ADVANCED PLANNING REQUIRED BY MUNICIPALITIES TO RESPOND TO NEW CHANGES TO OMERS

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As previously reported in the OMHRA Winter Echo Newsletter 2019 issue and in a Hicks Morley FTR Now, changes to the Ontario Municipal Employees Retirement System (OMERS) will be made, effective January 1, 2021 to: (i) eliminate the 35-year cap on credited service; and (ii) expand the normal retirement age 60 opportunity to paramedic employee groups. For municipalities that are OMERS participating employers, these changes raise the planning considerations discussed below.

Elimination of 35-year Service Limit

Historically, some OMERS participating employers had experienced situations where employees would elect to retire at the point that they hit the 35-year cap on OMERS credited service (having largely maximized the value of their OMERS pension benefits). With the upcoming elimination of that cap, there will be a greater opportunity for OMERS pension benefits to further increase in value, and this may mean that some employees continue to work when they would have otherwise have elected to retire.

The elimination of the 35-year cap on credited service will only apply to those OMERS members who have less than 35 years of credited service prior to January 1, 2021. For those OMERS members who continue to work and have not hit the 35-year cap on credited service before January 1, 2021, contributions will continue to be required and credited service will accrue up to the end of November in the calendar year in which the employee attains the age of 71.

The effect of this change will likely mean increased payroll costs, in part due to the continuation of OMERS contributions for members who continue in employment beyond 35 years of service, and also because a greater number of these members, who are likely at the top of their pay-scales, might choose to work longer. In addition to the potential financial impact of this change, the impact on organizational planning and management, particularly to the extent that it may slow renewal of workforces, should also be considered.

NRA 60 – Paramedics

Under OMERS, the normal retirement age for most employees is age 65 (NRA 65). However, a lower normal retirement age of 60 (NRA 60) is available for certain emergency sector employees, specifically police and fire employees. To compensate for the fact NRA 60 members can commence their pensions five years earlier than NRA 65 members, required employee and employer contributions for NRA 60 members are higher than for NRA 65 members. The recently approved changes to OMERS will expand the groups eligible for NRA 60 treatment to include paramedics effective January 1, 2021.

This change does not mean that NRA 60 is automatically extended to paramedic employees. Rather, an employer must decide (unilaterally or, more likely, through negotiation) to apply NRA 60 to paramedic employees, which decision will only be implemented by the OMERS Administration Corporation if a by-law is filed with it that confirms the NRA 60 treatment. The effective date of the election cannot be earlier than January 1st of the year in which the by-law is filed.

The employer must also define the scope of the class of employees to whom the NRA 60 conversion will apply. A class will typically be based on an attribute of the employment relationship (for example, full-time status) or can be time-specific (i.e., based on hiring date). NRA 60 treatment will apply to all employees within the identified class, meaning all prior NRA 65 service must be converted and employees in the class cannot opt-out.

On conversion, paramedics who are already participating in OMERS as NRA 65 members will have their NRA 65 credited service reduced to account for the entitlement to retire with an unreduced pension five years earlier than before. To account for this service adjustment, each affected member will be provided the option to purchase additional credited service at their own cost. Either the employer or union representing employees can make a request to the OMERS Administration Corporation for an estimate of the credited service adjustments that will be made on conversion from NRA 65 to NRA 60, and the costs for purchasing lost service.

It is expected that paramedic employee groups will begin to seek NRA 60 status during current and future rounds of collective bargaining. For municipal employers, there are a number of considerations that should be assessed before agreeing to NRA 60 status. In addition to the impact that higher contribution rates will have on payroll costs, the potential for paramedic employees to retire and leave the workforce sooner could have additional impacts on: (i) the management of absenteeism rates and sick leave expenses; (ii) salary and benefits costs, including any retiree benefits; (iii) the ability to recruit/replace retiring workers; and (iv) recruitment and training expenses.

It is also notable that the OMERS Administration Corporation has estimated that as many as 40% of paramedic members will not benefit from a NRA 60 conversion and a further 40% may or may not benefit. Significantly, if a member elects to purchase the service adjustment, the member will not receive a refund at a later date if he or she does not ultimately benefit from the conversion. While employees are responsible for the cost of purchasing any additional credited service that they might wish to purchase, employers should anticipate that union proposals will be made to assist employees with those costs.

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We continue to work with OMERS participating employers who will be affected by the elimination of the 35-year cap and/or the expansion of NRA 60 to paramedics. Jordan Fremont, Natasha Monkman and Sukhvinder Dulay specialize in pension and benefits matters facing municipalities. If you have questions on one or both of these changes, do not hesitate to contact Jordan at 416-864-7228, Natasha at 416-864-7302 or Sukhvinder at 416-864-7327. They may also be reached by email at: jordan-fremont@hicksmorley.com, natasha-monkman@hicksmorley.com and sukhvinder-dulay@hicksmorley.com.

NEW INSIGHTS INTO THE ACCOMMODATION OF WORK-RELATED VERSUS NON-WORK-RELATED ILLNESSES

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In a recent decision, the Ontario Divisional Court affirmed that differential treatment between employees with work-related injuries and employees with non-work-related injuries is not discriminatory under the Ontario *Human Rights Code* (the "*Code*"). This decision will be helpful for municipalities when considering accommodation efforts for employees with work-related or non-work-related injuries.

Carter v FCA Canada Inc and Human Rights Tribunal of Ontario

The Applicant went off work as a result of a non-work-related injury. He attempted to return to work in May of 2013, but he did not provide adequate medical documentation until August 2013. At that time, the Employer was unable to accommodate him in a permanent position and decided not to consider any temporary jobs that he may have been able to do.

The Applicant brought an application before the Human Rights Tribunal of Ontario (the "Tribunal") alleging that he had been discriminated against on the basis of his disability from May 2013 through May 2014. The Tribunal concluded that the respondent had discriminated against the applicant by not considering whether he was capable of doing temporary and non-standard jobs from the period of August 2013 to May 2014, but found that the Employer had satisfied its obligations to accommodate from May 2013 to August 2013.

The Applicant sought judicial review of the Tribunal's decision on the basis of three arguments: (1) the Tribunal gave primacy to the *Workplace Safety and Insurance Act* over the *Code*; (2) the Tribunal unreasonably gave primacy to the seniority provisions in the collective agreement in conducting its undue hardship analysis and (3) the remedy was unreasonable, because the Tribunal made no damage award for lost wages despite the Employer's breach of its procedural duty to accommodate.

Primacy of the WSIA over the Code

The Applicant argued that the Employer gave preferential treatment to employees with work-related injuries who were receiving Workplace Safety and Insurance Board benefits over those with non-work-related injuries. The Applicant claimed that this was as a result of the Employer's participation in the "NEER" program, an experience rating system that provides incentives to employers who successfully accommodate, at full pay, workers who have suffered a work-related injury. The Applicant believed that the NEER incentive program led the Employer to preferentially accommodate those with work-related restrictions over other disabled workers, such as himself.

The Court upheld the Tribunal's finding that preferential treatment of workers due to the NEER program was not discrimination on the basis of disability under the *Code*. Specifically, the Court agreed with the Tribunal as the distinction arose from the statutory scheme. Therefore, while the Applicant had established that the Employer was treating workers with active WSIB claims differently than other employees with medical restrictions, he had not established that this was discriminatory under the *Code*.

Primacy of the Seniority Provisions in the Collective Agreement

The Applicant also argued that the Employer had misinterpreted the undue hardship analysis. He noted that the language of the *Code* provided that the only proper considerations with respect to undue hardship were costs, outside sources of funding and health reasons. The Applicant argued that the Employer had erred in relying on the collective agreement provisions relating to seniority in attempting to accommodate the Applicant. These provisions provided that seniority would have an impact on an employee's bumping rights upon their return to work and allowed for a disabled employee to displace a more junior employee.

The Tribunal disagreed. It noted that the duty to accommodate does not give employees in a non-unionized workplace the right to displace another employee, and unionized employees have no greater rights to displace employees in other positions (absent collective agreement language to the contrary).

The Court affirmed that the duty to accommodate does not include an obligation on an employer to displace another employee out of their job. As such, the Court found that seniority rights remain a relevant consideration when determining whether there are available positions to accommodate employees.

Remedy

The Court also agreed with the Tribunal's rationale with regard to remedy. The Tribunal had explained that there was no basis to quantify and issue a monetary award for lost income, as there was not clear data on job availability.

Significance for Municipal Employers

This decision is helpful for municipal employers, as it provides a reminder on what the duty to accommodate entails. The key principles can be summarized as follows:

1. The preferential treatment or accommodation of employees with work-related injuries over those with non-work-related injuries is not discriminatory when motivated by the WSIB's experience and merit rating program.

2. The seniority provisions of a collective agreement may be a relevant consideration for employers in their undue hardship analysis.

3. The duty to accommodate does not include an obligation to bump or displace another employee from their job. An employer's job search can be limited to vacant jobs for which the employee is reasonably qualified (or for which only reasonable training is required) and to jobs that meet the employee's medical restrictions and limitations.

Amanda Cohen and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Amanda at 416-864-7316 or Jessica at 416-864-7529. They may also be reached by email at: amanda-cohen@hicksmorley.com and jessica-toldo@hicksmorley.com.