
**Blame the Lawyer?
Drawing Best Practices for In-House Counsel from the Jurisprudence**

By: Jeremy Schwartz and Amanda Boyce

In-house counsel is often the unsung hero of a legal saga, having guided their internal client adeptly before litigation ensued. In our experience, it is only rarely that an organization would undertake a *post-mortem* to determine what lessons may be learned from litigation or a near miss, much less to analyze in-house counsel's role in a situation. In its decision in [*MacLeod v Lambton \(County\)*](#), the Human Rights Tribunal of Ontario (Tribunal) provides a rare opportunity to conduct such a *post-mortem*.

The Facts

The County hired Mr. MacLeod as its Emergency Medical Services ("EMS") Manager in 2005. He had bipolar disorder, but didn't disclose his condition when he was hired. His symptoms were under control for the first few years, but flared up significantly during two periods when his doctor changed his medication regimen.

During these periods, Mr. MacLeod swore at staff and was otherwise verbally abusive, engaged in inappropriate email exchanges with a female subordinate, berated a supervisor to a subordinate, and encouraged threats of reprisal against staff who complained about him. He also used his managerial authority to purchase extravagant, unnecessary equipment for his department, and offered positions to his friends without conducting formal interviews, in violation of the County's policies.

Mr. MacLeod did not advise the County of his condition until the summer of 2008, when several staff members complained about his behaviour while he was off on a medical leave of absence. In response, the County temporarily reassigned him from his position as EMS Manager to work on special projects in another building, without loss of salary. The County also launched an investigation into his behaviour, but was unable to complete the investigation until he returned from his medical leave.

In 2011, Mr. MacLeod returned to work in his new temporary role on special projects while the County continued its investigation. Unfortunately, he berated and attempted to intimidate his supervisor, who was responsible for the investigation. Subsequently, the supervisor concluded his investigation and determined that Mr. MacLeod could never be returned to the EMS Manager position, but could continue with a permanent, modified role in special projects.

The Decision

In a rare finding, the Tribunal concluded expressly that the County's in-house counsel had failed to clearly communicate to the supervisor the extent to which Mr. MacLeod's workplace conduct may have been related to his bipolar disorder, and the potential for medical intervention to

control his behaviour in the future. The Tribunal noted several times in its decision that the County's in-house counsel and HR department should have taken steps to convey this information because it would have been relevant to the supervisor's decision. As such, the Tribunal ruled that the County had failed in both its procedural and substantive duties to accommodate when it permanently refused to return Mr. MacLeod to his EMS Manager position in 2011.

Ultimately, the Tribunal found that the County acted appropriately when it temporarily reassigned Mr. MacLeod pending investigation. However, the Tribunal found that the County's decision to permanently reassign Mr. MacLeod was not correct, and was tainted by the supervisor's lack of knowledge concerning bipolar disorder and accommodation of mental disabilities.

The Tribunal concluded as follows in regard to this lapse:

[218] I therefore find that the respondent failed to meet its procedural obligation to accommodate the applicant's disability. By the end of the hearing, it was still unexplained why the respondent's counsel and/or its HR department had failed to provide relevant information about the applicant's disability to Mr. Taylor. I will assume that this failure was inadvertent rather than intentional.

The Tribunal ordered the County to reinstate Mr. MacLeod to his managerial position, to pay him three years of lost income, \$25,000 in general damages, and to send its in-house counsel and various other human resources professionals for training on how to accommodate disabled workers under the *Human Rights Code*.

We are holding a half-day program, [Employment Law for In-House Counsel](#), on September 23 (you may also register for our [live webinar](#)). In this new, much requested program, we focus on guiding In-House Counsel to address common issues in the human resources portfolio, including practical and compliance matters, legal triage, and professional/ethical considerations. The program has been pre-approved for 1 hour and 40 minutes of LSUC CPD. We hope you will join us or forward this to someone who would find it educational.

The Takeaway

The decision does not detail what steps the County's in-house counsel and HR department might have taken to prevent this outcome.

Ultimately, the Tribunal's decision to call out in-house counsel in this way provides an opportunity to draw a few lessons on in-house counsel's role and best practices (this is by no means an exhaustive list):

1. **Protecting Privilege:** Something likely went wrong in the governance of the solicitor-client relationship. In his testimony, the supervisor repeatedly stated that neither HR **nor in-house counsel** provided him with the information he required on Mr. MacLeod's disability or accommodation obligations generally. Although it is not fleshed out in the decision, it appears that in-house counsel also played a direct role in decision making, rather than advising managers who then made the decisions.

In-house counsel must be very careful to ensure the privilege so necessary to their client's best interests is not inadvertently waived. And, of course, if the intention is to waive privilege, care must also be taken to ensure that sufficient consideration is given to the possibility that the waiver may later be deemed to reach beyond the intended scope.

2. **Proactive Measures:** In-house counsel is uniquely positioned at the intersection of compliance and operations. This provides the opportunity not only to provide advice and guidance once litigation commences, but also to recognize opportunities for due diligence and to set the agenda for review and improvement. Too often, general counsel is either not given the mandate to take proactive steps in the HR portfolio, or simply has too much responsibility day-to-day to take on a proactive role in HR matters.

HR compliance and policy should be included in any governance checklist, and in-house counsel and HR should touch base on a regular schedule – not just when there is a fire to put out.

3. **Damage Control:** Sometimes it can't be helped, an HR fire starts and in-house counsel only becomes involved after the fact. Under virtually no circumstances should an organization be left to rely on the actions of in-house counsel as a defence. Had in-house counsel in *MacLeod* been trained and provided that training to the supervisor, it still would not have exculpated the County if the supervisor failed to properly apply that knowledge. So there was no legitimate reason to waive privilege on that point.

Many organizations have emergency response plans that are activated when certain situations arise. It may be useful, particularly in larger organizations, to put in place an HR response plan or policy guide that delineates the levels of authority and scope of responsibility for each internal actor, including the process for consulting in-house counsel and maintaining legal privilege.

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