

An Apology Goes a Long Way: Court of Appeal Upholds Termination for Sexual Harassment and Refusal to Apologize to Complainant



What Happened?

The employer terminated a senior male employee with 20 years' service for just cause following an investigation into a complaint made by a female co-worker, regarding four inappropriate comments that constituted sexual harassment.^[1]

Following the investigation, the employer imposed corrective action in the form of a final warning and remedial action, including participation in sensitivity training and a requirement that the employee apologize to the complainant. While agreeing to participate in training, the employee refused to apologize to the complainant, in part, because he was adamant that he had done nothing wrong.

The employer found that the employee's refusal to apologize demonstrated his lack of remorse for his serious misconduct, irreparably damaging the employment relationship and amounting to cause for termination.

At trial, the trial judge held that the employee was wrongfully dismissed and awarded 20 months' notice. The trial judge held, in part, that it was "unclear" whether the employer had found the comments as having amounted to sexual harassment, thereby making the employee's failure to apologize for his conduct insufficient cause for termination in the circumstances. The employer appealed, arguing that the trial judge's conclusion regarding the outcome of the investigation was incorrect, as was his application of the test for just cause.

What Did the Court of Appeal Decide?

The Court of Appeal overturned the lower court's decision, ultimately upholding the termination for cause.

1. The Employee's Inappropriate, Demeaning Comments Justified Corrective Action

The Court of Appeal found that the trial judge erred in his conclusion that it

was “unclear” whether the employer made a finding that the inappropriate comments amounted to sexual harassment, citing to both the language of the investigation summary and the employee’s own testimony. As a result of his failure to properly characterize the misconduct, the trial judge inappropriately focused solely on the employee’s refusal to apologize in deciding whether cause had been met.

The Court held that the employee’s comments – which included asking the complainant to sit on a male colleague’s lap in front of coworkers, and making sexually suggestive comments while thrusting his hips – had clearly amounted to sexual harassment for the following reasons:

- The comments met the definition of sexual harassment under the employer’s harassment policy, as they were “unsolicited and unwelcome”, “of a sexual nature”, and they “might reasonably be expected to cause discomfort and humiliation and create a hostile and offensive work environment”;^[1]
- The comments were demeaning, undermined the dignity of the complainant, and based on gender and sexual connotation in such a way that they “would have only been made to a woman, not to a man;”^[2] and
- The employee’s awareness that these comments were unwelcome – both by hearing from the complainant herself and from a supervisor – contributed to creating a poisoned work environment for the complainant.

Even with this finding, the Court acknowledged that the employer’s decision to issue corrective action rather than terminate for cause was a proportionate response.

2. Refusal to Apologize Resulted in Irreparable Breakdown in the Employment Relationship, Termination Warranted

The Court of Appeal found that, despite corrective action being warranted for the findings of sexual harassment, the employee’s adamant refusal to apologize for his misconduct left the employer with no choice but to find a complete breakdown in the employment relationship.

In the circumstances, the Court found that the employee’s refusal to apologize demonstrated either an unwillingness to (a) take the employer’s policies seriously, or (b) accept the scope of corrective and remedial action imposed on him. Regardless of the road taken, the Court found that the result was the same: the employee’s sexual misconduct and refusal to apologize irreparably damaged the employment relationship, and amounted to just cause for termination.

Takeaway for Employers

This decision provides helpful guidance to employers investigating or terminating for sexual harassment, particularly by highlighting the importance of remedial actions, such as sensitivity training and apologies, when it comes to defending the discipline imposed, up to and including termination. In this case, a simple apology from the employee and acknowledgement of wrongdoing made the difference between keeping and losing his employment.

This decision is also a reminder that employers have a duty to provide a workplace free from discrimination and harassment. In this case, a fulsome policy with a clear definition of harassment assisted the employer in justifying

the decision to terminate.

If you have any questions about workplace violence and harassment policies and investigations, please contact the author or your regular Fasken lawyer.

[1] *Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728

[2] *Ibid* at paras. 46, 50

[3] *Ibid* at para. 47

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