Off-Duty Sexual Harassment May Still Trigger A Duty To Investigate



In a significant decision for employers, the Ontario Court of Appeal in *Metrolinx v. Amalgamated Transit Union, Local 1587*, upheld the Divisional Court's ruling that quashed an arbitrator's decision reinstating five employees dismissed for off-duty sexual harassment. The case offers critical guidance on the scope of an employer's duty to investigate harassment and the application of workplace harassment policies.

Background

The employer terminated five employees after discovering they had exchanged derogatory and sexist messages about colleagues in a private WhatsApp group. Although the messages were sent off-duty using personal devices, one of the targeted employees received screenshots and became visibly upset at work. Despite her reluctance to file a formal complaint or otherwise participate, the employer initiated an investigation and ultimately dismissed the employees for cause.

An arbitrator reinstated the employees, finding that the employer lacked authority over their off-duty conduct, failed to follow its own procedures, and imposed disproportionate discipline. The Divisional Court overturned this decision, and the Court of Appeal affirmed that ruling.

Key Takeaways for Employers

The Court of Appeal's decision provides a number of important takeaways for employers:

1. Off-Duty Conduct Can Be Disciplinary

The Court confirmed that employers may discipline employees for off-duty conduct if it has a real and demonstrable impact on the workplace. The private nature of the WhatsApp group did not shield the employees from accountability once the messages entered the workplace and affected an employee.

2. Statutory Duty to Investigate Exists Even if No Complaint Is Filed

A central issue was whether the employer had an obligation to investigate without a formal complaint. The Court held that under Ontario's *Occupational Health and Safety Act*, employers have a statutory obligation to investigate both "incidents and complaints" of workplace harassment, including workplace sexual harassment. This duty

exists even if the employee who would have been the complainant declines to participate or file a complaint.

3. Policies Cannot Undermine Statutory Obligations

The arbitrator erred in treating the employer's internal policy as limiting its ability to investigate without a complainant. The Court emphasized that internal policies must align with statutory duties and cannot be interpreted to restrict them.

4. Privacy Expectations Are Not Absolute

While the messages were exchanged privately, the Court found that once they impacted the workplace, they became subject to investigation. Employers may request access to relevant communications during a legitimate workplace investigation, especially when misconduct is alleged.

Concluding Thoughts

This decision reinforces that employers must take proactive steps to address workplace harassment, including off-duty conduct that infiltrates the workplace. Employers should ensure that harassment policies are consistent with statutory obligations and that investigations are conducted fairly, even in the absence of a formal complaint.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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