Ontario Court Decides “Private Group Chats” Can Become A Disciplinable Workplace Issue



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*Metrolinx*v. *Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900 (Ont. Div. Ct.) involved the Ontario Divisional Court’s judicial review of an arbitration award.

Facts

In or around April 2020, while the Human Resources department at Metrolinx (the “Employer”) was conducting an investigation into a separate and unrelated matter, an employee informed the Employer about a WhatsApp conversation between the five grievors approximately eight months earlier, a conversation which “contained negative, derogatory and sexist comments about a female employee”.

The comments were made about Ms. A. and included comments about her exchanging sexual favours for career advancement. Ms. A received screenshots of the messages and had made a report to her supervisor in 2019. She said that she was upset by the messages when she reviewed them; however, she did not file a formal complaint at the time because she did not want the matter to be investigated.

When the Employer became aware of the messages in 2020, it commenced an investigation. In the course of its investigation, the Employer became aware of additional inappropriate and sexual comments made on the WhatsApp group chat.

In July 2020, Ms. A said she did not want to participate any further in the investigation as it was causing her stress and distracting her from her job. She stated, “I didn’t bring up the complaint nor do I want to do anything about it.” After concluding the investigation, the Employer determined that the grievors had engaged in sexual harassment contrary to workplace policy and should be discharged from employment.

Procedural History

The Amalgamated Transit Union, Local 1587 filed a grievance on behalf of all five grievors.

On July 2023, Arbitrator Gordon Luborsky held that the grievors had been discharged

without just and reasonable cause and ordered them reinstated to employment without loss of compensation or seniority.

Judicial Review

The Divisional Court held the arbitration award was "fatally flawed", quashed the decision and remitted the matter to a different arbitrator for reconsideration.

In its reasons for decision, the Court held:

- The arbitrator had failed to recognize that employers have an obligation to investigate workplace harassment even where victims do not wish to report the harassment or participate in the ensuing investigation. The Court stated it was wrong at law for the arbitrator to conclude that the matter should have ended when neither Ms. A nor any other active employee filed a complaint of sexual harassment. The Court noted that the employer has a statutory obligation under occupational health and safety legislation to investigate incidents of possible sexual harassment regardless of whether a complaint has been filed. This protects not only the potential victim but other employees as well.
- The Court echoed the Supreme Court of Canada and said it is an error to rely on what is "presumed to be the expected conduct or reaction of a victim of sexual assault". The Court added, "[A] victim's reluctance to report or complain about a sexual assault cannot be used to draw an adverse inference about her credibility."
- A victim's reluctance to report sexual harassment may be due to a number of factors, including embarrassment, fear of reprisal, the prospect of further humiliation, or a hope that ignoring the behaviour will cause it to stop.
- The Court also held that the arbitrator focused too heavily on the employee right to privacy. Irrespective of the intent to have the message remain "private", the fact is that it came to the attention of Ms. A and was further forwarded to other employees. It made its way into the workplace and became a workplace issue.

Takeaways

- The Ontario Divisional Court has recognized the Employer's statutory obligation to investigate potential incidents of harassment, regardless of the victim's willingness to file a formal complaint or participate in the investigation process.
- There are a number of reasons why a victim of sexual harassment in the workplace might not file a complaint or participate in an investigation. It is not appropriate, however, to draw conclusions based on a victim's unusual reaction to a situation.
- A private conversation between employees on personal devices can become a workplace issue if the conversation has an impact on the workplace. Employees should be aware that such messages may be shared with others.

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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