Ontario’s Divisional Court Overturns Arbitrator’s Unreasonable Decision In Workplace Sexual Harassment Case

A concerning arbitration decision has been quashed on judicial review.

Five Metrolinx employees had their employment terminated in 2021. The circumstances of their terminations were troubling, and frankly a bit complicated. The employees received regular workplace harassment training and were subject to the employer’s “zero tolerance” policies for harassment, including sexual harassment and other forms of discrimination. Yet, during an investigation into a separate matter, it was found that they had been exchanging derogatory and sexist comments about their co-workers in a WhatsApp group text. One such individual, referred to as Ms. A, received screen shots of some such comments including that she exchanged sexual favours with her superiors for career advancement. Ms. A was disturbed by receiving the messages, and while she did report them to her supervisor, she specifically did not want to make a formal complaint or have the matter investigated.

Of course, Metrolinx conducted an internal investigation regardless, which uncovered the extent and severity of the messages. Significantly, it was unclear exactly who was participating in the conversation and to what extent the offensive messages were being shared and circulated. But there was no dispute that the messages were being sent at least by the five Grievors. Metrolinx determined that they had engaged in workplace harassment and workplace sexual harassment, and terminated their employment on a just cause basis.

The Union representing the terminated workers, the Amalgamated Transit Union, grieved the terminations and the matter came to hearing before the Grievance Settlement Board. That Arbitrator allowed the grievances, rescinded the terminations, and reinstated the employees with back pay. The parts of the decision that on their face seemed baffling and clearly unreasonable included: that the employer could not “intrude on their private electronic conversations without express contractual, statutory or judicial authority to do so”; that the communications could not constitute harassment since they were not accessible to the public generally; that the employer could not investigate the potential harassment without the cooperation of Ms. A; and that Ms. A did not believe that she was “the victim of sexual harassment and/or … experiencing a hostile or poisoned work environment” as demonstrated by her refusal to file a complaint. Basically, even though the conduct *would have* constituted sexual harassment, in these particular circumstances

the matter could not have even been investigated, let alone resulted in discipline for the Grievors.

Metrolinx sought judicial review of the Arbitrator's decision, and the Divisional Court stepped in to overturn the Arbitrator's findings. The question for the Court on a judicial review of an arbitrator's decision is not whether the arbitrator's decision was correct, but whether it was reasonable. This is a high standard of review as labour arbitrators are generally afforded significant deference given their specialized experience in labour relations. In this case, however, the Court did not mince words, summarizing fairly:

[46] In the present case, the Arbitrator's reasons, read as a whole, fail to recognize that while some victims of workplace harassment are reluctant to report harassment or participate in the resulting investigation, their employer remains obligated to investigate such behaviour and to protect the workplace from a hostile or demeaning work environment.

[47] The Arbitrator's conclusion that "When Ms. A declined to file a complaint of sexual harassment … and no other active employee would, that also should have been the end of the matter", is wrong in law, and indicative of his approach to the issue before him. It is not an isolated misstep, but permeates his reasoning throughout.

The Court observed that "harassment" is a defined term in both the *Human Rights Code* and the *Occupational Health and Safety Act* in Ontario as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome". Workplace sexual harassment is further defined in the *OHSA* as:

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome

The Court determined that the offensive messages fell under paragraph a of that definition. Then, the Court undertook an analysis of the positive duties imposed upon employers by the *OHSA*. Section 32.0.7 of the *OHSA* in particular requires that employers conduct investigations "into incidents and complaints of workplace harassment" that are appropriate in the circumstances. Where the Arbitrator initially ruled that the employer had no business investigating the alleged harassment because Ms. A would not make a complaint, the Court made it clear that assessment was dead wrong, or in legal terms "unreasonable" for the purposes of the judicial review application.

The Court observed that the *OHSA* imposes a duty on the employer to investigate both "incidents" and "complaints" of workplace harassment. The Ontario Labour Relations Board itself has ruled that the separate terms for "incidents" and "complaints" means that the *OHSA* requires an investigation of an "incident" even if it is not the subject matter of a "complaint". To be clear, the Court agreed with Metrolinx that "an employer has an obligation to take steps to deal with harassment of employees once harassment is known to the employer".

In a very important part of its analysis, the Court reminded us all that the Supreme Court of Canada has been cautioning judges for over thirty years against relying on

presumptions of expected conduct or reaction of a victim of sexual assault (which extends to targets of sexual harassment). There may be any number of reasons why a person would be hesitant to report or complain about sexual misconduct, but that hesitation cannot be used to discredit the individual. The Court said clearly that "a victim's reluctance to report or complain cannot, however, relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention."

Finally, the Court also determined that the Arbitrator was too focused on the Grievors' right to privacy. Whatever their intent, and wherever the messages originated, they made their way into the workplace and became a workplace issue that needed to be addressed by the employer.

The Court's reasoning will hopefully be instructive to other adjudicators, employers, and unions. When an employer becomes aware of a potential incident of harassment, it must be investigated. Where the alleged target of harassment does not want to complain or cooperate in an investigation, that does not relieve the employer of its duty to investigate, and it does not influence the outcome of the investigation.

The "Lawyers for Employers" at CCPartners have extensive experience with advising employers on how to properly **handle incidents of workplace harassment**, as well as a number of experienced **workplace investigators** who understand how to properly handle investigations into sensitive allegations of workplace misconduct.

To read the full court decision summarize in this blog, see **Metrolinx v. Amalgamated Transit Union, Local 1587**.

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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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