WhatsApp Got To Do With It

A recent Ontario Superior Court case highlights the balance between employee privacy and an employer's duty to investigate workplace harassment. The case involved WhatsApp messages containing derogatory remarks about a female employee. While an arbitrator initially ruled the terminations unjust due to privacy concerns, the court overturned this decision, reinforcing that employers must investigate harassment even without a formal complaint. The ruling underscores that employers have a legal obligation under the *Occupational Health and Safety Act* to address workplace harassment, including incidents occurring on personal devices outside working hours if they affect the workplace.

A common concern for employers when conducting a workplace investigation into alleged misconduct is how to balance obtaining evidence of the alleged misconduct vs respecting the privacy of the employees. With today's technology, workplace harassment can frequently occur on the private devices of an employee. The question is, can the employer collect and use the evidence from an employee's personal electronic device?

As was discussed in Part 1 of our *Labour + Employment: Trends Shaping Your Workplace in 2025* sessions, in the 2024 case of *Metrolinx v Amalgamated Transit Union, Local 1587,* the Ontario Superior Court of Justice considered this issue in the context of a judicial review of an arbitration award.

In this case, Metrolinx (the "Employer") became aware of a WhatsApp conversation between five male employees (the "Employees") that contained negative, derogatory and sexist comments about a female employee, including comments about her exchanging sexual favours for career advancement. The female employee was sent a screenshot of the conversation and reported it to her supervisor. While she was upset about the messages, the female employee ultimately decided not to submit a formal complaint.

Upon becoming aware of the WhatsApp conversation, the Employer commenced an investigation and became aware of additional allegations of inappropriate comments made in the WhatsApp group chat. One of the Employees provided screenshots of the WhatsApp conversation to the investigator.

The Employer relied on the WhatsApp screenshots as evidence that the Employees engaged in sexual harassment and all five Employees were terminated for cause. The Amalgamated Transit Union, Local 1587 (the "Union") grieved the termination on behalf of the Employees.

The arbitrator found that the Employees had been terminated without just cause which was in violation of the collective agreement. The arbitrator ordered reinstatement. The arbitrator stated the following in his decision:

- The Employer violated the grievor's reasonable expectation of privacy as the offensive messages were sent from their personal devices. The WhatsApp messages occurred outside the workplace on the Employees' own time using their personal cellphones through a medium they reasonably believed and intended to be private. In such circumstances, the Employer did not have the "licence to intrude on their private electronic conversations without express contractual, statutory or judicial authority to do so".
- Despite an Employer's statutory duty outlined in the Ontario *Occupational Health and Safety Act* (the "OHSA") to protect a worker from discrimination and harassment, should not have conducted an investigation where there was no formal complaint. The Employer's policy required investigations to be initiated by a complaint. The Employer should not have acted as both the complainant and the investigator.

Upon judicial review, the Ontario Superior Court overturned the arbitrator's decision, finding it fatally flawed. The Court held that:

1. "A victim's reluctances to report or complain…cannot relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention."
2. The Employer had an obligation to investigate pursuant to the OHSA which requires employers to conduct investigations into both incidents and complaints of workplace harassment and cannot be overridden by an employer's policy.
3. An employer has a duty to investigate sexual harassment in the workplace, including harassment that takes place online or outside of normal working hours.
4. The arbitrator was too focused on the Employees' privacy rights. Regardless of the Employees' intent, some of the WhatsApp messages came to the attention of the female employee in the workplace. The messages made their way into the workplace, thus becoming a workplace issue.

Key Takeaways

Under the Alberta OHSA, employers are required to establish procedures for investigating complaints and incidents of violence or harassment. This obligation extends beyond formal complaints, meaning employers must investigate whenever there is a reasonable basis to suspect harassment is occurring. Additionally, the duty to investigate may include obtaining and considering private messages, even those sent outside of working hours, if there is a sufficient connection to the workplace.

Link to decision: *Metrolinx v Amalgamated Transit Union, Local 1587, 2024 ONSC 1900*

Author: Tracy Zimmer

Field Law