Workplace Harassment: The Employer's Responsibility In The Modern World

In the recent decision *Metrolinx v Amalgamated Transit Union, Local 1587 ("Metrolinx")*, the Ontario Court of Appeal addressed workplace harassment in the digital age. In doing so, the court clarified the scope of the employer's statutory duty to investigate workplace harassment imposed by the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "*OHSA*"). While the courts rarely overturn awards granted by labour arbitrators, the court found the Arbitrator's award to be unreasonable after being subjected to judicial review.

Background: Quashing the *Unreasonable* Arbitration Award

In April 2021, five Metrolinx employees were terminated for sexual harassment after the company became aware of screenshots from the employees' private WhatsApp group chat. The screenshots were sent to a female Metrolinx employee who was targeted in the screenshot by comments suggesting she had performed sexual favours for her professional development.

Upon learning about the comments made in the group chat, Metrolinx conducted an investigation despite the targeted employee indicating that she did not want an investigation to proceed. The investigation revealed multiple instances in which the five employees would make inappropriate remarks about their other colleagues, often suggesting that they were also performing sexual acts to advance their careers. Metrolinx terminated these employees. The employees' Union then filed grievances on their behalf.

After appearing before the Grievance Settlement Board for arbitration, the Grievors were awarded reinstatement at Metrolinx. The Arbitrator claimed that employers do not have jurisdiction over employees when they are off-duty and that the messages did not affect the workplace environment in a way that constitutes harassment. The Arbitrator further reasoned that Metrolinx's Workplace Harassment and Discrimination Prevention Policy (the "Policy") did not grant them the authority to conduct its investigation without adhering to the rules listed in the Policy. As a result of Metrolinx's failure to act according to the Policy, the Arbitrator found that Metrolinx's ability to terminate the employees was undercut.

On judicial review, the Divisional Court used the principles set out in *Vavilov* to declare the Arbitrator's award unreasonable. The Divisional Court emphasized the statutory duty of the employer under the *OHSA* – quashing the Arbitrator's award for

inaccurately weighing the Policy over the *OHSA*.

Is the Workplace Harassment Prevention Policy Determinative?

The Court of Appeal affirmed the Divisional Court's reasoning. Where the arbitration decision emphasizes the internal logic and language of the Policy as being fundamental to deciding whether the grievances should be allowed, the court proceeds in a different direction by stressing the statutory duty imposed by the *OHSA*.

The decisions made by the Arbitrator and the court illustrate two different lines of reasoning regarding the employer's duty. On the one hand, the Arbitrator's decision suggests that the employer fulfills their duty under the *OHSA* by putting procedures in place that respond to workplace harassment. The Arbitrator further suggests that the employer is then bound by such procedures. On the other hand, the court does not read the *OHSA* as requiring an employer to be governed by their procedures. Instead, the court finds the employer to be subject to the requirements set out by the statute itself. Specifically, section 32.0.7 of the *OHSA* requires an employer to investigate both incidents and complaints of sexual harassment.

To illustrate the paramountcy of the statute, the court ignores Metrolinx's failure to comply with the procedural requirements set out by the Policy. This includes their failure to meet the Policy's investigation timeline requirements and the requirement that the investigation be initiated by a complaint. In this scenario, the court permitted Metrolinx's noncompliant investigation into the Grievors' WhatsApp group chat because of the finding that such an investigation satisfies the employer's statutory duty under the *OHSA*.

Significance

This decision offers key insight into how the *OHSA* modifies the responsibilities of the employer, demonstrating that a workplace's policy falls under the umbrella of the *OHSA*. This decision clarifies that an employer's duty to prevent and respond to workplace harassment is one that is statutorily imposed and not one that can be bypassed through the language of a workplace harassment policy.

By adopting this position, the court clarifies the boundaries of what constitutes "workplace" harassment – deciding that encrypted private messages are not sufficiently private to negate professional sanctions for harassment. The fact that the terminations were considered reasonable, despite the harassment not being reported or known by their target victims, displays the court's insistence to respond to sexual harassment as well as the myths and stereotypes that surround it. This includes commitments to ensuring that the workplace is free from offensive behaviour and curbing outdated perspectives on how victims should react to sexual harassment.

After affirming the Divisional Court's reasoning, the Court of Appeal has sent this matter back to the Grievance Settlement Board to be redecided. It now remains to be seen whether the Grievors' termination will be deemed proportionate to the harassment.

It appears that the Courts are sending a message to arbitrators that, in Ontario, alleged compliance with company policies is not sufficient.

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