Workplace Harassment: What The OLRB Can And Cannot Do



The 2010 amendments to the Ontario *Occupational Health and Safety Act* ("OHSA"), known as Bill 168, imposed obligations on employers in respect of workplace violence and workplace harassment in the form of bullying. However the Ontario Labour Relations Board ("OLRB") has consistently held that it does not have any general authority to deal with the enforcement of complaints arising out of the policies and programs created by an employer in meeting its substantive obligations to address workplace violence and harassment.

While health and safety inspectors may issue compliance orders that become the subject of an appeal to the OLRB under section 61 of the OHSA, they do not have any role to play to resolve or mediate specific allegations of harassment in the workplace. That is the role of the employer. To the extent an employee is dissatisfied with the employer's handling of a particular matter, she must seek her remedy either before the Human Rights Tribunal (if a prohibited ground of discrimination is involved) or before the courts (for example, a claim of constructive dismissal).

In a series of early cases following the enactment of Bill 168, the OLRB was also reluctant to find that it had jurisdiction to deal with a section 50 reprisal complaint under the OHSA arising out of an employee's attempt to enforce her rights to a workplace free from harassment. That began to change with the OLRB's decision in*Ljuboja v. The Aim Group Inc.*, 2013 CanLII 76529. On June 29, 2015, the OLRB issued its most recent decision dealing with this subject, *Saumur v. Commissionaires Ottawa*, 2015 CanLII 38123, making it clear that it will assume jurisdiction to address reprisal complaints.

The Decision

Saumur had protested about her supervisor's conduct toward her in a complaint to human resources. Although she apparently did not use the "H" word in the written complaint given to the employer, it was clear that in reading the complaint the employer had no difficulty appreciating the significance of Saumur's issues. However in the course of writing her complaint, Saumur also alleged that everyone knew that her supervisor and "Jane Doe" were having an affair, resulting in favouritism to Jane Doe.

In investigating the complaint, the company fixated on Saumur's allegation of an

affair, and not the alleged harassment. When Saumur resiled from her statement about the affair, the employer considered the investigation closed. Two months later, Saumur was fired as not being a "good fit". Following her dismissal, Saumur filed a section 50 reprisal complaint under the OHSA, alleging that the dismissal was as a result of having sought the enforcement of the OHSA. The Commissionaires argued, among other things, that the OLRB was without jurisdiction to hear the complaint.

In finding it had jurisdiction to deal with the complaint, the OLRB approved the reasoning in the *Aim Group* decision. It went on to adopt the words of the tribunal in *Aim Group*, as follows:

To this end, even when the Board determines that it will inquire into any given application, the focus of the Board's inquiry will almost never be upon the underlying allegations of harassment. Those allegations are, at the very best, peripheral to the issues that the Board must address, which are exclusively whether a workplace harassment complaint was made, whether the worker suffered some detrimental impact and whether there is a causal connection between the two. This latter issue will, in most cases, be focused on the employer's explanation and rationale for its actions. In the usual case, the only inquiry that the Board will make into the underlying allegations of harassment is whether the employer terminated, or otherwise penalized, the worker for having filed the harassment complaint.

In a reprisal complaint, the onus of proof is on the employer to demonstrate that it did not discharge, discipline or otherwise unfairly treat the employee because she sought enforcement of the OHSA. In this case, the Commissionaires failed to discharge that onus. The OLRB found that the Commissionaires failed to present any meaningful evidence of a basis for its "proffered explanation and rationale for the decision to terminate Saumur's employment". The result was Saumur's reinstatement with full back-pay (a little more than one year's compensation).

What this means for Employers

The Saumur decision makes it clear that an employer must be cognizant of the possible connection between a decision to dismiss or discipline an employee who has previously made a complaint of workplace harassment or otherwise challenged the employer's alleged failure to meet its Bill 168 obligations under the OHSA. The onus will be on the employer to demonstrate that the employee's previous exercise of rights was in no way linked to the decision. A failure to satisfy that onus can have costly consequences for the employer.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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