Legal Corner

By Erin R. Kuzz

Can an arbitrator order you to fire a supervisor? Just maybe …

An Ontario arbitrator has ruled that she has the power to order a unionized employer to fire a supervisor.

The case involved a supervisor who had allegedly harassed and ultimately assaulted a unionized employee. The union argued that the supervisor's conduct had created an unsafe workplace. As part of the remedy in the case, the union asked the arbitrator to have the supervisor removed from the workplace, and award the employee money to compensate him for the supervisor's behaviour. In response, the employer argued that the arbitrator did not have the power to do what the union wanted, even if everything the union said about the workplace (and the supervisor) was true.

Accordingly, before the arbitrator began hearing evidence about what had actually occurred, the company asked the arbitrator to rule on whether she had the power to do what the union was asking her to do—order the supervisor be fired and award the employee monetary damages. The company argued that the arbitrator did not have this power, either under the collective agreement or the Labour Relations Act. As such, the employer argued, the whole grievance should be dismissed.

In response, the union argued that if it was able to prove the allegations made against the supervisor, the arbitrator was required to design a complete and substantive remedy to address what was going on in the workplace. That remedy, the union argued, could include direct action against the supervisor.

The decision

There is a long line of cases discussing which kinds of disputes between an employer and employee must be decided by a court, and which kinds must be decided by an arbitrator (in the construction industry, in the majority of circumstances arbitrations are heard and decided by the Ontario Labour Relations Board). After reviewing these cases, the arbitrator ultimately found in favour of the union. In her decision, the arbitrator held that:

1. An "appropriate remedy" could include monetary damages; and

2. In circumstances where less drastic means could not provide an appropriate and effective remedy, an arbitrator could create an order that included discipline or discharge of a supervisor.

Needless to say, this decision is of significant concern for employers. As we have already seen in cases of health and safety and harassment, employers are being held increasingly accountable for the actions of their employees. Now, arbitrators are saying that their power to deal with a "bullying" supervisor does not end with punishment of the employer, but extends to punishment of the supervisor himself. Of course, in circumstances where the "bullying" supervisor is also a valuable resource to the company, punishing the supervisor also punishes the company.

It is also significant that years ago, most arbitrators would not decide cases about human rights or accommodation, or about matters such as workplace harassment. However, today, the courts tend to not want to decide work-related matters, but instead to send them back to arbitration. As such, we have seen and will continue to see unions attempting use the arbitration process to address more and more matters that are, at best, loosely related to the workplace.

For employers, this means at least two things. Employers must:

1. Be particularly alert to every grievance that is filed against them; and

2. Ensure that every grievance is responded to in a way that best meets the interests and objectives of the employer. This involves consideration of the broader, legal, policy and financial consequences to the employer of responding to the grievance in one manner or another.

Failure to give prompt and adequate attention to any particular grievance, however unusual or unrealistic it may appear to be, while it may not be immediately apparent, can have wide-reaching and undesirable results for the employer in the long run.

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