

'Barnyard' atmosphere factor in ruling in sexual harassment case: adjudicator

BY THE CANADIAN PRESS

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MONCTON, N.B. – The “barnyard-like” atmosphere of sexual banter and gestures around the office helped convince a New Brunswick adjudicator to reverse the firing of a probation officer for sexual harassment.

Adjudicator Robert Breen says in his decision, dated July 28, that Kevin Kelly’s firing was too severe a penalty and is instead calling for a five-month suspension without pay and his reinstatement in a different office.

“A mitigating consideration here is .. the cited ‘office culture’ of the Moncton probation office,” he wrote.

"This, I observe, can be described, at times, as 'barnyard' like."

Kelly had been accused of grabbing female coworkers' buttocks and legs at staff parties in 2014, making inappropriate sexual comments and leaving his office door open while visible in his boxer shorts.

His union, local CUPE 1418, filed a grievance arguing his firing was too severe a penalty, in part because Kelly wasn't given early enough warnings about his behaviour and because of a general lack of training of the staff in the office.

The decision says the union argued that evidence showed nobody in the office had ever been disciplined for sexual joking, "raising ... the question of 'what is permissible' and 'what is accepted.'"

The adjudicator said in his written decision the series of incidents testified to by co-workers fell within the definition of sexual harassment in the workplace and had created a "poisoned work environment."

Breen also noted that Kelly had been shown the government's harassment policy.

But he said in some cases the employer had taken a long time to act on the allegations and in some instances Kelly wasn't shown sufficient details of what he was accused of doing.

Breen's decision says testimony by co-workers indicated that Kelly had discussed his penis size and, in a separate incident, had asked a female co-worker if she had a condom and then added that if she did he would like to have sex with her immediately.

There was testimony in the hearing that Kelly was seen "humping" door frames of female co-workers.

However, Breen noted that Kelly testified other male employees made similar humping motions in the office.

He also wrote that earlier intervention might have been wise in incidents that supervisors were aware of.

"I suggest ... that it might well have been appropriate early on to call in Kelly, an employee with a clear record and very favourable assessments, and to address allegations directly with him, before proceeding to direct an external 'tell all' investigation," he wrote.

The adjudicator also said he was troubled that an office supervisor hadn't testified, noting "many of Kelly's office behaviours ... would have been in his sight, including the so-called 'humping,' the ongoing sexual joking."

He also said the supervisor "apparently participated in disputed behaviour at times."

The adjudicator found the employer didn't offer training or education that might counter the kinds of behaviour that Kelly was disciplined for.

Erin Kuzz, a Toronto-based lawyer specialized in advising employers on employment law, said in an interview that the case is an illustration of the importance of both having a harassment policy and ensuring people are using it.

"I would describe it as a great reminder for employers of not only having to make sure you have a (sexual harassment) policy, but that you educate employees about the policy and you uniformly enforce it," she said.

"You can't permit a workplace culture to develop and try to reverse it in one step."

Breen acknowledged that Kelly's behaviour had damaged the office environment, and he recommended he not be returned to the Moncton location but be given a job in another office.

Kuzz said the fact that the probation officer won't be back in the same office is "a saving grace."

"Thankfully the adjudicator also says that he won't put him back in his department where the people who were the victims of his conduct will have to continue to interact with him," she said.

The union declined to comment.

A spokesman for the province's Department of Public Safety and Justice said in an email the department is reviewing the decision and its legal options "and will not comment further at this time."

— By Michael Tutton in Halifax

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