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Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

"It is in my opinion now appropriate to regard any use of demeaning racial or ethnic slurs by one employee to another as very serious misconduct falling within the category of workplace offences that prima facie justifies terminating the employment relationship."

Racist Remarks Found to be *Prima Facie* Cause for Termination

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There are certain workplace offences decision-makers view as being so serious they undermine the trust an employer has in its employee to the point the employment relationship cannot continue. Misconduct that falls into this category has historically included: theft, sexual assault, assaulting a supervisor and deliberating sabotaging the employer's equipment.

In the recent arbitration decision, *Levi Strauss & Co v. Workers United Canada Council,*[1] Arbitrator Gordon Luborsky added to the list: "use of demeaning racial or ethnic slurs by one employee to another", describing such behaviour as "very serious misconduct falling within the category of workplace offences that *prima facie* justifies terminating the employment relationship".

Which is not to say a decision-maker will not consider mitigating factors such as the circumstances in which the misconduct arose. However, there is now an arbitral basis to classify racist behaviour as *prima facie* cause for termination or other significant discipline.

What happened?

The grievor, a White man, worked in the company's distribution centre. The work area consisted of several conveyor belts which moved product from various sorting stations. As part of the company's safety mechanisms, the work area had pull cords which, when pulled, stopped the conveyor belt system.

One day, another employee, a Black man, pulled a pull cord for a non-safety related reason. The grievor took exception to this and approached that employee. A heated exchange followed, during which the grievor uttered you "Black Bastard" and mouthed the n-word to him. The two employees then left the shop floor briefly to speak to a manager. When the grievor returned to the floor, he announced he had gotten rid of the other employee. He used a racist epithet as part of his announcement.

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When the company was made aware of these racist remarks, it conducted an investigation and the grievor was terminated for violating the company's Workplace Violence and Harassment Policy. At the time of his termination, the grievor was 53 years old and had 23 years of service with a clean disciplinary record.

Grievance dismissed

At arbitration, the grievor admitted to the heated exchange and that he had used profanities. However, he denied having made racist comments or used racist epithets. Arbitrator Luborsky did not believe the grievor in light of the testimony of witnesses, and surveillance footage.

The question left unanswered was whether the conduct was just cause for termination?

After a thorough review of the evolution of the law on harassment and discrimination in the workplace, Arbitrator Luborsky held that racist remarks, whether directed at a specific individual or made generally, could no longer be classified or excused as "shoptalk", and had risen to the level of *prima facie* grounds for termination:

> Thus in the prevailing environment, given the progress towards the societal goal of eliminating all forms of harassment in the workplace, consistent but not limited by the recent amendments of the [Occupational Health and Safety Act], **it is in my opinion now appropriate to regard any use of demeaning racial or ethnic slurs by one employee to another as very serious misconduct falling within the category of workplace offences that prima facie justifies terminating the employment relationship**, amongst the appropriate disciplinary measures as part of the "corrective action" (in the words of sec. 32.0.7 (b) of the OHSA) that the employer is obliged to consider in response to workplace harassment, because of the hurtful nature of such conduct that undermines the smooth running of a diversified workforce.
>
> **[emphasis added]**

Mitigating factors could include:

- Did the act arise in the context of a momentary flare up?
- Did the grievor have a clean record?
- Did the grievor make a timely apology?
- Did the grievor show genuine remorse?

However, in this case, the grievor failed to make an apology and never showed any remorse for his action. As such, the termination was upheld.

Lessons for employers

Racism has no place in Canadian workplaces and now there is an arbitral basis to treat this type of misconduct as *prima facie* cause for termination, or other significant discipline.

This does not mean a zero tolerance policy, calling for automatic dismissal, will be blindly followed by a decision-maker. As a matter of substantive and procedural fairness, a decision-maker should always consider whether there are mitigating circumstances sufficient to impact the result.

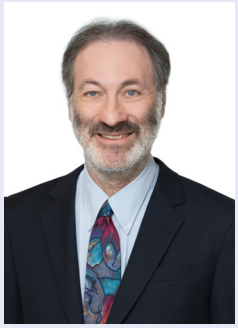
For assistance addressing misconduct in the workplace, contact your Sherrard Kuzz LLP lawyer, or if you are not yet a Sherrard Kuzz LLP client, any member of our team.

[1] *2020 CanLII 44271 (ON LA).*

DID YOU KNOW?

By **December 31, 2020**, every organization in Ontario with at least 20 employees must file a report confirming compliance with the requirements of the **Accessibility for Ontarians with Disabilities Act**. By **January 1, 2021**, designated public sector organizations and organizations with 50 or more employees must ensure their website and all content published on their website after January 1, 2021, meets the World Wide Web Consortium Web Content Accessibility Guidelines (WCAG) 2.0, at Level AA (with certain exceptions). **To learn more, or for assistance, contact Leah Simon at lsimon@sherrardkuzz.com.**

Absence of Duty to Mitigate Does Not Mean Mitigation Earnings Don't Count



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In certain situations, a fixed term employment agreement ("FTEA") can be a useful vehicle for an employer. However, if an employer wishes to terminate employment early, the employer may find itself responsible for full payment to the end of the term, unless the contract includes a valid early termination clause.

Although the bulk of recent case law seems to have left employers with few ways around this liability, a decision released earlier this year in the Court of Appeal for Saskatchewan offers new hope for employers.

Fixed term employment agreements – past case law

A FTEA can be a perilous endeavour for an employer, due in part to a 2016 decision from the Court of Appeal for Ontario, *Howard v. Benson Group Inc.*[1] There the court held that an employee under an FTEA had no "duty to mitigate" if the agreement was terminated early, without cause.

The duty to mitigate is a legal obligation of long standing, which obliges a wrongfully dismissed employee to make reasonable attempts to search for alternative employment in an effort to reduce the employee's loss.

The duty to mitigate is a legal obligation of long standing, which obliges a wrongfully dismissed employee to make reasonable attempts to search for alternative employment in an effort to reduce the employee's loss. If an employee secures alternative employment during the reasonable notice period, the employee is obliged to credit earnings from that employment against the employee's claim. If the employee fails to make reasonable attempts, the employee runs the risk of having their claim reduced by a court.

This issue was revisited in 2017 in another Ontario decision, *Mohamed v. Information Systems Architects Inc.*[2] *("Mohamed").* Mr. Mohamed was dismissed before the expiry of his FTEA. During a pre-hearing cross-examination, he refused to disclose whether he had found another job. When the matter came before a judge on summary judgment, the employer asked the judge to infer from Mohamed's refusal that he had fully replaced the earnings he would have received through his FTEA. The judge declined to rule on the employer's request, on the basis Mohamed had no legal duty to mitigate, a decision upheld by the Court of Appeal.

From these two decisions, many concluded (perhaps in error) that in the case of a FTEA terminated before its expiry, the employer is not entitled to any credit even if an employee successfully finds alternative employment during the remainder of the fixed term.

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Saskatchewan appeal court delves deeper

While not *disagreeing* with the decisions of the Ontario court (that there is no duty to mitigate), the Court of Appeal for Saskatchewan recently held that if an employee nevertheless *does* secure alternative employment during the remainder of the fixed term, the employer is entitled to a credit equal to the employee's earnings *(Crook v. Duxbury).*[3] The court separated the question of whether the employee had a duty to look for other employment, from the consequences of the employee actually finding such employment.

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The court's reasoning was based on fundamental contract law principles that a party seeking compensation for breach of contract should not be entitled to an amount greater than the party's actual loss.

In *Mohamed*, the employer had taken an "all-or-nothing" approach by asking the court to infer that Mohamed had not lost any earnings. The Saskatchewan Court of Appeal stated that the decision in Mohamed should not be interpreted to mean the employee would not have been held accountable had there been actual evidence of earnings. In *Crook v. Duxbury*, the employee had earned $52,000 which he was obliged to credit against his claim.

Lessons learned for employers

A FTEA, while it may appear enticing to an employer, is often fraught with danger. This is why we rarely, if ever, recommend them to our clients. That said, in the rare case when a FTEA is preferred, the most effective method to avoid liability for early termination is to include a valid early termination clause.

The decision of the Saskatchewan Court of Appeal may serve to help employers even further, but that remains to be seen.

Until there is clarity in the law, it is at least arguable that an employer that finds itself defending a claim based on early termination of an FTEA, without a valid early termination clause, may still be able to reduce the value of the claim if the employee *has* found other employment before the end of the term of the FTEA.

We will continue to monitor the evolution of this important decision and keep our readers posted.

For more information and/or assistance, contact a member of the Sherrard Kuzz team.

[1] *2016 ONCA 256*
[2] *2018 ONCA 428*
[3] *2020 SKCA 43*

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Out with the Old, In with the New:

Lessons Learned from 2020 and What to Expect in 2021

The COVID-19 pandemic brought unexpected change and upheaval to workplaces across the country and around the world. Join us as we discuss the most significant changes from 2020, including those likely to continue to impact employers, and pressing issues that may come down the pipe in 2021. Topics include:

1. Termination and Closure

- Does a requirement to permanently work-from-home or return to the office constitute a constructive dismissal?
- Can an Ontario employer terminate an employee on Infectious Disease Emergency Leave?
- What is a "mass termination" and how does it impact an employer's obligation to its employees?
- Recent case law on the enforceability of employment agreements.

2. A Return to "Normal"

- Managing a request for accommodation related to mental health and COVID-19 fears.
- Can an employer require an employee to be vaccinated from COVID-19?
- For how long can an employer remain on Infectious Disease Emergency Leave either due to the employee's own health status or need to provide "care and support" to a family member?

DATE: **Wednesday, December 2, 2020; 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Friday November 27, 2020.**

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