

**Locker-room behaviour in the workplace can no longer be tolerated –  
so decides the Court of Appeal for Ontario in  
*Render v ThyssenKrupp Elevators***

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The days of locker-room banter in the workplace are over. In *Render v Thyssenkrupp Elevator*, Mark Render learned this lesson when the Court of Appeal for Ontario upheld his termination for cause<sup>1</sup> after he slapped a colleague’s buttocks and later joked about it. The decision offers important reminders about what is an acceptable workplace environment, the difference between common law “just cause” and statutory “wilful misconduct,” and the risks of litigation misconduct.

**What happened?**

In 2014, ThyssenKrupp Elevator (Canada) Limited, terminated Render’s employment for “just cause” when he slapped Linda Vieira’s buttocks in front of four colleagues and later joked about it. Render sued for wrongful dismissal.

The trial court upheld Render’s termination for cause, which meant he was not awarded common law termination payments. The trial judge found ThyssenKrupp had a very social but inappropriate workplace dynamic<sup>2</sup> rampant with suggestive banter among colleagues, including Vieira. Render had apologized for his behaviour, but the court found he did not appear to appreciate the seriousness of his actions.

Significantly, despite being successful on the issue of just cause and awarded costs, the trial court reduced the cost award by half because ThyssenKrupp and Vieira had engaged in serious litigation misconduct. Specifically, Vieira had conducted an interview with the press and exchanged text messages with several witnesses who had not yet given their evidence, despite being subject to a witness exclusion order; and ThyssenKrupp had retained a media consultant who, before the trial began, sent 40 media outlets a sensationalized statement including unproven

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<sup>1</sup> [2022 ONCA 310](#) (CanLII) [*Render*].

<sup>2</sup> [2019 ONSC 7460](#) (CanLII).

allegations and some of Vieira's anticipated evidence. The court found this may have been intended to put additional pressure on Render or influence the court.

### **Employee's arguments on appeal**

On appeal, Render made three primary arguments:

1. Rather than fire Render for just cause, ThyssenKrupp should have considered the office environment as a mitigating factor and lessened the punishment to something less severe than termination.
2. Even if there was "just cause" to terminate his employment, Render should still be entitled to statutory termination payments under the *ESA* because the threshold to disentitle an employee from statutory payments is "wilful misconduct", a higher standard than "just cause" which can include careless, thoughtless, or inadvertent conduct.
3. Vieira's and ThyssenKrupp's litigation misconduct warranted an award of punitive damages against ThyssenKrupp or, in the alternative, further reduced costs awarded to ThyssenKrupp.

### **The appeal decision**

The appeal court dismissed argument 1, allowed argument 2 and allowed argument 3 in part.

#### *Office environment not a mitigating factor*

Relying on a 1988 decision of the Court of Appeal for Ontario, *Bannister v General Motors of Canada*, in which a similar incident of locker-room behaviour occurred,<sup>3</sup> the court reiterated that this type of workplace atmosphere "can no longer be tolerated":

I would add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand... Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way... Every workplace should be based on mutual respect among co-workers [which will] naturally generate the boundaries of behaviour that should not be crossed.<sup>4</sup>

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<sup>3</sup> (1998), 40 OR, (3d) 577 (CA).

<sup>4</sup> *Render*, *supra* note 1 at para 70.

The court also held the employer did not have a standalone duty to consider alternatives to termination if termination was ultimately proportionate to the misconduct.

*Wilful misconduct is a higher standard than just cause*

The appeal court awarded Render his *ESA* termination payments because his actions, while not accidental, occurred in the heat of the moment and were not preplanned. Quoting from earlier caselaw, the court stated:

... to be disentitled from the *ESA* entitlements under the “wilful misconduct” standard ... the employee must do something deliberately, knowing they are doing something wrong... The test is higher than the test for “just cause” [which can include careless, thoughtless, or inadvertent conduct]... cases of wilful misconduct will almost inevitably meet the standard test for just cause but the reverse is not the case.”<sup>5</sup>

*Litigation misconduct*

While ThyssenKrupp won the just cause argument at trial, its litigation misconduct proved costly. The trial court reduced ThyssenKrupp’s cost award in half, and the appeal court further reduced it to zero, finding ThyssenKrupp’s litigation conduct “particularly egregious” and the type of conduct that “cannot be tolerated or condoned”.<sup>6</sup>

### **Lessons learned**

The trial and appeal courts’ decisions in *Render* reiterate three important lessons for employers:

1. An overly casual workplace atmosphere will rarely be an excuse for inappropriate behaviour among colleagues. Employers are responsible to take reasonable steps to ensure a safe and respectful workplace.
2. An employee terminated for just cause may still be entitled to receive statutory termination payments. To be disentitled from statutory entitlements under the “wilful misconduct” standard an employee must do something deliberately, knowing they are doing something wrong. An employer seeking to terminate employment for “just cause” should consult with experienced employment counsel to assess whether statutory payments still apply.

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<sup>5</sup> *Render*, *supra* note 1 at para 79.

<sup>6</sup> *Ibid* at para 90.

3. As the old saying goes, *it's not whether you win or lose, it's how you play the game*. Even if a party 'wins' at trial, if it engages in litigation misconduct that compromises the integrity of the judicial system and/or the fairness of a proceeding, the court has discretion to make a zero-cost award or even to order costs against the 'winning' party.

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