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Court Quashes Arbitrator's Reinstatement of Five Employees Terminated for Workplace Harassment

April 2024

The bar to overturn a labour arbitrator's decision is high. But, in *Metrolinx v Amalgamated Transit Union, Local 1587*,[1] the Ontario Superior Court of Justice (Divisional Court) did just that. The decision is significant because the arbitrator decided the employer had no authority to investigate alleged workplace harassment when the harassment occurred on personal devices and on personal time, and the alleged subject of the harassment declined to file a formal complaint. The Divisional Court rejected this analysis and affirmed an employer's right, and obligation, to act even in these circumstances.

What happened?

Five Go Transit bus drivers, employed by Metrolinx, participated in a WhatsApp group chat on their personal cellphones in which they shared explicit, derogatory, and sexist messages about female coworkers, including Ms. A. Ultimately, Ms. A received screen shots of these messages and alerted her manager but did not file a formal complaint because she did not want the matter investigated. She also refused to disclose the identity of the person who sent her the screen shots.

Despite there being no formal complaint, once Metrolinx became aware of the incident it commenced an investigation and determined the five employees had engaged in sexual harassment. The employees were dismissed for cause, grieved, and the arbitrator allowed the grievance and reinstated the employees without loss of seniority, and with back pay.

The arbitrator decided that while the grievors' WhatsApp messages were "shameful and reflected poorly on their character," the messages were "beyond the Employer's authority" because they occurred outside the workplace on the grievors' own time and on their personal cell phones through an online medium they believed to be private.[2] Further, the arbitrator decided Metrolinx's policy prevented Metrolinx from investigating an incident of harassment if there was no complaint regarding the incident.

What did the arbitrator get wrong?

The court identified several errors in the arbitrator's decision, including that he:

1. Failed to recognize that even if the subject of workplace harassment is reluctant to report the harassment, or participate in a workplace investigation, an employer remains obligated to investigate.

[1] 2024 ONSC 1900,
[2] *Amalgamated Transit Union - Local 1587 (Juteram et al) v The Crown in Right of Ontario (Metrolinx)*, 2023 CanLII 72192 (ON GSB) .

2. Did not consider that the employer's duty to investigate is not just a duty owed to a complainant, but a duty owed to all employees in the workplace. Every employee has the right to work in an environment that is free from demeaning and offensive comments.
3. Erred in concluding Ms. A's reluctance to pursue a complaint meant there was no harassment, where there could have been other reasons why she chose not to file a complaint.
4. Erred in concluding that because the terminated employees' electronic communications took place on personal phones, on personal time and on a private platform, the messages could not constitute *workplace* sexual harassment, and were therefore not a workplace issue.

Lessons for employers

The court quashed the arbitrator's decision and remitted the matter back to a different arbitrator for reconsideration. In doing so, the court offered the following lessons for employers:

First, the *Occupational Health and Safety Act* ("OHSA") imposes specific duties on an employer to protect its workers from workplace harassment. As part of that duty, an employer must ensure an investigation, appropriate in the circumstances, is conducted into all incidents and complaints of workplace harassment. There is no requirement that a formal complaint be made. An employer must act once the harassment is known to it.

Second, it is an error to rely on what is *presumed* to be the expected conduct or reaction of a subject of sexual harassment. The court explained:

> A victim's reluctance to report or complain about sexual harassment may be caused by many factors: embarrassment, fear of reprisal, the prospect of further humiliation, or just the hope that, if ignored, the demeaning comments or behaviours will stop.

Third, reluctance to make a formal complaint or participate in the investigation process, does not *necessarily* mean the alleged act(s) of harassment did not occur.

Fourth, the arbitrator was too focused on the grievors' right to privacy. Even if the grievors' comments were made on their personal phones, in a personal group chat, at least some of those comments made their way into the workplace. The court noted, "Wherever it originated, the impugned conduct made its way into the workplace and, to that extent at least, became a workplace issue."

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