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Duty to Investigate Alleged Harassment Not Up for Debate ~

Court of Appeal for Ontario Agrees ~ Arbitrator's Reinstatement of Employees Terminated for Workplace Harassment Unreasonable

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In July 2023, an arbitrator made waves when he reinstated five employees Metrolinx dismissed for engaging in workplace harassment. In the arbitrator's (now overturned) view, Metrolinx did not have authority to investigate the alleged workplace harassment because: (a) it occurred on personal devices and personal time; and (b) the subject of the harassment declined to file a formal complaint.

The courts disagreed.

In April 2024, on judicial review, the Ontario Superior Court of Justice (Divisional Court) held the arbitrator's decision was unreasonable and quashed it.[1] The union appealed to the Court of Appeal for Ontario which agreed with the Divisional Court.[2] Key to the Court of Appeal's decision was its determination that an employer has not only the right but a *duty* to investigate harassment even in the absence of a formal complaint.

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. Ms. A received screenshots of these messages and alerted her manager but declined to file a formal complaint or disclose the identity of the person who sent her the screenshots. Despite there being no formal complaint, Metrolinx investigated and determined the five employees engaged in sexual harassment. It dismissed the employees for cause. The union grieved.

The arbitrator allowed the grievances and ordered reinstatement of all grievors, without loss of seniority, and with back pay. The arbitrator found the messages were "beyond the Employer's authority" because

[1] See our April 18, 2024 briefing note *Court Quashes Arbitrator's Reinstatement of Five Employees Terminated for Workplace Harassment*
[2] *Metrolinx v Amalgamated Transit Union, Local 1587*, 2025 ONCA 415 [*Metrolinx Court of Appeal*].

they occurred outside the workplace on the grievors' own time, on personal cell phones, and through an online medium they believed to be private.[3]

The arbitrator also found Metrolinx's policy prevented it from investigating an incident of harassment if there was no actual complaint. The policy stated that the investigative process "is initiated by a complainant in writing" and that "[a]n employee must file his or her complaint promptly and without delay." The arbitrator found the policy did not expressly or inferentially recognize that Metrolinx could be a "complainant."

Divisional Court

On judicial review, the Divisional Court concluded the arbitrator's decision was unreasonable for the following reasons:[4]

- Even if the subject of workplace harassment is reluctant to report or participate in an investigation, an employer must investigate under the *Occupational Health and Safety Act* ("OHSA").
- An employer's internal policy cannot limit its legal obligation to respond to workplace harassment under the OHSA.
- Even if electronic communication takes place on a personal phone, on personal time, and on a private platform, it can become a workplace issue if it makes its way into the workplace.

The union appealed.

Court of Appeal

On an appeal of a judicial review, the Court of Appeal does not owe deference to the Divisional Court. The Court of Appeal's role is to "step into the shoes of the [Divisional Court] and review the Arbitrator's award again."[5] In this case, the Court of Appeal agreed with the Divisional Court, quashed the arbitration award, and reaffirmed the principles set out in the Divisional Court's decision.

The Court of Appeal noted an employer has a statutory duty under the OHSA to investigate "both 'incidents and complaints' of workplace harassment"[6] and this duty arises when an employer learns of an incident, even without a formal complaint:

> *The reluctance of a victim of sexual harassment [to make a complaint]… does not relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention.*[7]

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[3] *Amalgamated Transit Union – Local 1587 (Juteram et al) v The Crown in Right of Ontario (Metrolinx),* 2023 CanLII 72192 (ON GSB) .
[4] *Metrolinx v Amalgamated Transit Union, Local 1587,* 2024 ONSC 1900 (Div Ct).
[5] *Metrolinx Court of Appeal, supra* note 2 at para 7.
[6] *Ibid* at para 35, emphasis in original.
[7] *Metrolinx Court of Appeal, supra* note 2 at para 39.

The arbitrator therefore erred by concluding that because Ms. A failed to pursue a complaint, there was no harassment. Such reasoning relied on rejected myths and stereotypes about sexual harassment:

> *The Arbitrator erred by concluding that Ms. A's reluctance to pursue a complaint meant there was no harassment; this line of reasoning relies on rejected myths and stereotypes about how an employee in Ms. A's situation would respond.*[8]

It was also an error for the arbitrator to find that because the grievors communicated on personal devices outside of work, this meant their communication did not fall within the purview of an investigation into workplace misconduct:

> *Whatever the Grievors' intent, some of the offensive comments came to Ms. A.'s attention in the workplace. ... The employees who participated in the chat were free to, and did, forward the message to other employees. Regardless of where the impugned conduct originated, it made its way into the workplace and became a workplace issue. The Arbitrator's reasoning that the impact of their communications was not "manifest within the workplace" is not consistent with the facts as found and does not withstand scrutiny.*[9]

Lessons for employers

The OHSA requires an employer to have a workplace violence and harassment policy that provides employees with an avenue to make a complaint. Even if no formal complaint is made, or the subject of harassment declines to participate, once an employer becomes aware of harassment, it has a duty to investigate; this includes investigating off-duty conduct that has made its way into the workplace. That the offending communication was made privately, or an employer's internal policy requires a formal written complaint to trigger an investigation, does not absolve an employer of its duty to meet its obligations under the OHSA; an internal policy must align with statutory duties.

For more information or for assistance or advice regarding any workplace matter, contact your Sherrard Kuzz LLP lawyer at info@sherrardkuzz.com.

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[8] *Ibid* at para 38.
[9] *Metrolinx Court of Appeal, supra* note 2 at para 40, citations omitted.