Case In Point

Expanded OLRB Power to Consider Bill 168 Workplace Harassment Reprisal Complaints

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Based on two decisions rendered late last month, the Ontario Labour Relations Board ("OLRB" or "Board") has expanded the scope of the Board's authority to consider complaints arising from the Bill 168 workplace harassment amendments to the *Occupational Health and Safety Act* ("OHSA" or "Act"). This moves away from the Board's decision in Confortia v. Investia Financial Services Inc.

The 2011 *Investia* decision involved a reprisal complaint brought by a worker whose employment was terminated shortly after he asked the employer to investigate his harassment complaint. The Board commented that its statutory authority was very limited with respect to the new workplace harassment additions to the OHSA. The Board reasoned that because an employer's obligations were limited to creating a workplace harassment policy and program and providing certain training to workers, but did not extend to an obligation to ensure a harassment-free workplace, the reprisal provision had no application. Essentially, a reprisal complaint needed to relate to negative consequences for a worker acting in accordance with the Act or seeking enforcement of the Act. Being fired for making a harassment complaint did not fit within those categories. Despite this reasoning, the Board expressly refrained from deciding whether the Board has jurisdiction over reprisal complaints for workplace harassment and dismissed the complaint on a different basis. A number of Board decisions applied the reasoning from *Investia* and the common wisdom had become that harassment complaint-related reprisal applications could be disposed of on a preliminary basis.

In Ljuboja v Aim Group Inc., the Board again considered a reprisal complaint brought under section 50 of the OHSA by an applicant when his employment was terminated shortly after he complained of workplace harassment. The responding parties strenuously argued, on the basis of prior jurisprudence including *Investia*, that the Board had no jurisdiction to hear a complaint that a worker was terminated for filing a harassment complaint with the employer.

Vice-Chair Nyman found that *Investia* did not conclusively determine the scope of the Board's authority to deal with workplace harassment complaints and disagreed with that decision's reasoning that the absence of a general statutory obligation to prevent workplace harassment deprives the Board of jurisdiction over reprisal complaints related to filing workplace harassment complaints.

While the obligations on employers with respect to workplace harassment are entirely procedural,

Vice-Chair Nyman reasoned that it would undermine the obligations to have an internal process for addressing complaints of workplace harassment if an employer is free to terminate a worker because they brought forward a complaint in accordance with that process. Such an interpretation of the OHSA would be “untenable,” would strip the employer’s obligations of any meaning and the health and safety purpose intended by the Legislature would be “eviscerated,” according to Vice-Chair Nyman. Instead, the obligations to develop and maintain a program to implement a workplace harassment policy must mean that there is an active obligation on an employer to enable workers to make complaints about incidents of workplace harassment and that terminating an employee for doing so could qualify as an unlawful reprisal.

However, Vice-Chair Nyman was careful to point out that this interpretation does not mean that an employer’s workplace harassment obligations are unlimited. He accepted that there is no obligation on employers to provide a harassment-free workplace or to provide any specific type of investigation or outcome of a complaint. Necessarily, the obligations enforceable at the Board would be procedural in nature, and would not delve into the substance of the alleged harassment in question.

In a second decision, *Abick v Ministry of Government Services (Ontario Government)*, OLRB Vice-Chair Rowan distinguished *Investia* and dismissed an employer’s argument that the applicant failed to make out a *prima facie* case regarding a complaint that his employer violated the OHSA when it failed to include mandated harassment policies and failed to properly investigate a workplace harassment complaint. Allowing the case to proceed, she took note of the novel issues involved as well as the fact *Investia* dealt with a reprisal complaint, whereas here the issue was the sufficiency of an employer’s harassment policy.

If these interpretations are upheld and adopted moving forward, the Board’s jurisdiction (and by extension the Ministry of Labour’s enforcement powers) relating to workplace harassment policies and programs are actually broader than initially believed. Employers will want to adjust their litigation strategies and expectations of obtaining early dismissal of reprisal complaints accordingly.