Case In Point

Ontario Divisional Court Finds Arbitrator's Decision to Reinstate Terminated Grievors Was "Fatally Flawed"

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On April 2, 2024, the Ontario Divisional Court released its decision in Metrolinx v. Amalgamated Transit Union, Local 1587, which was a judicial review of an arbitration decision rendered by the Grievance Settlement Board (GSB). The Court found that the decision of the arbitrator, in which he reinstated five grievors whose employment had been terminated for workplace harassment as a result of inappropriate comments they made on WhatsApp, was unreasonable.

The Arbitrator's Decision

The arbitration before the GSB involved a consideration of the appropriateness of the termination of the employment of five grievors following an investigation into their conduct; specifically, their conversation in a WhatsApp group chat, which was determined by the employer to constitute workplace harassment and misconduct.

While conducting an unrelated investigation, the employer's human resources department had become aware of the WhatsApp conversation, which included offensive, sexist and derogatory comments about current and former employees, primarily women. One of the women referenced in the WhatsApp conversation, Ms. A, received screenshots of these messages, in which the grievors made lewd suggestions about how she obtained a promotion in exchange for sexual favours. Although she reported the messages to her supervisor, Ms. A indicated that she did not want to file a formal complaint because she did not want the matter investigated. The employer did commence an investigation. When questioned as part of the investigation, Ms. A repeatedly stated that she did not wish to participate in the investigation or have the matter go further. As a result of the investigation, the employment of the grievors was terminated. The matter proceeded to an arbitration hearing.

In his decision, the arbitrator held that the employer did not have just cause to terminate the employment of the grievors and ordered their reinstatement with back pay. The arbitrator relied on the following findings, among others, in reaching this conclusion:

- The grievors had intended the WhatsApp messages to be private and the employer did not have "licence to intrude on their private electronic conversations without express contractual, statutory or judicial authority to do so."
- A fair and impartial investigation could not be conducted because Ms. A refused to file a complaint or co-operate in the investigation, and the employer could not be both "complainant" and "investigator," which the arbitrator found to be a conflict of interest.
- Ms. A's refusal to participate demonstrated that she did not believe that she was the victim of sexual harassment and/or experiencing a hostile or poisoned work environment.
- There was no evidence which established a negative impact of the vexatious words being manifested in the workplace.

Judicial Review at Divisional Court

In applying the reasonableness standard of review, the Divisional Court held that the arbitrator's decision was not reasonable and granted the employer's application for judicial review. It quashed the arbitrator's decision, finding it fatally flawed, and remitted the matter back to a different arbitrator for reconsideration in light of the Court's reasons.

In reaching this conclusion, the Divisional Court found that the arbitrator failed to recognize that employers remain obligated to investigate workplace harassment even where victims are reluctant to report the harassment or participate in the resulting investigation. Specifically, the Court stated that it was wrong at law for the arbitrator to conclude that the matter should have ended when neither Ms. A nor any other active employee filed a complaint of sexual harassment. The Court referenced the definitions of harassment and workplace sexual harassment in the Ontario *Human Rights Code* and *Occupational Health and Safety Act* (*OHSA*), as well as the employer's duties with respect to harassment arising from the *OHSA*. It held that an employer has a statutory obligation under the *OHSA* to investigate incidents of possible sexual harassment regardless of whether a complaint has been lodged and emphasized that this obligation protects not only the potential victim, but all employees, who are entitled to a workplace free of demeaning and offensive comments.

Notably, the Divisional Court echoed the Supreme Court of Canada in finding that it is an error to rely on what is presumed to be the expected conduct or reaction of a victim of sexual assault, including a victim's reluctance to report or complain about sexual assault, in making determinations about what may have happened in the workplace. Simply put, the Court held that a victim's reluctance to report or complain is not a basis for drawing an adverse inference, importing the Supreme Court's words in the context of sexual assault to the within context of workplace sexual harassment.

Importantly, the Divisional Court held that a victim's reluctance to report or complain about sexual harassment may be the result of any of a myriad of factors, including embarrassment, fear of reprisal, the prospect of further humiliation or the hope that the harassment will stop if ignored. The Court held that it was unreasonable for the arbitrator to fail to consider any of the other reasons why Ms. A may not have filed a complaint or participated in the resulting investigation.

In response to the arbitrator's emphasis on the grievors' right to privacy with respect to their private WhatsApp conversation, the Divisional Court found that the contents of the conversation became a workplace issue because they came to the attention of Ms. A in the workplace. The Court found that this outcome was "hardly surprising" given the nature of social media and the unknown number of employees participating in the conversation, all of whom were free to, and did, forward the messages to other employees.

Key Takeaways

The Divisional Court's decision is important for a number of reasons, including the following:

1. The Court acknowledged the outdated myths and stereotypes surrounding how a victim of sexual harassment in the workplace "should" or may react to such incidents, and what employers may conclude as a result of an atypical reaction, noting that such myths and stereotypes permeated the arbitration decision.
2. The Court recognized there are a number of reasons why a victim of workplace sexual harassment may not file a complaint or participate in an investigation, including (but not limited to) fear of reprisal, further harassment or the hope that the behaviour will stop if ignored.
3. The Court held that the employer is statutorily obligated to investigate potential incidents of such harassment of which it becomes aware, and that the reaction of an alleged victim of workplace sexual harassment is not relevant to this mandate.
4. A "private" conversation in a social media chat group can and does become a disciplinable workplace issue if the contents of the conversation have an impact in the workplace. Employees should be aware that such messages can and do get forwarded, "screenshotted" and shared with others.

The employer in this case was represented by Hicks Morley's Bonnie Roberts Jones and Rayaz Khan.