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Hot topics and recent developments in labour and employment law

Managing Harassment Investigations under the OHSA: Requirements and Pitfalls

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Presented by: Adrian Miedema, Partner

OHSA Part III.0.1: Violence and Harassment

- Basic obligations:
  - Harassment policy + program
  - Violence policy + program
  - Post
  - Review at least annually
  - Provide “information and instruction”

Harassment Program

- **Developed and maintained in consultation with joint health and safety committee**
- Must contain:
  - Reporting (to employer, and to person other than employer or supervisor)
  - Investigation process
  - Confidentiality
  - Communicating results

Other Obligations - Harassment

- **Investigation** “appropriate in circumstances”
- Complainant and respondent are **informed** of results and any corrective action
- Program **reviewed** “as often as necessary, but at least annually”
- Employer provides “**information and instruction**”

MOL Code of Practice - Harassment

- MOL “Code of practice to address workplace harassment”
- Compliance with Code of practice is compliance with OHSA obligations regarding harassment
- But: not required to comply with Code of practice

Code of Practice

- Investigation:
  - Completed within 90 days unless extenuating circumstances (e.g. 5 or more witnesses, key witnesses unavailable due to illness)
  - Investigator is objective
  - Thoroughly interview complainant and respondent
  - Respondent must be given opportunity to respond to specific allegations
  - Separately interview relevant witnesses
  - Collect and review relevant documents
  - Take appropriate notes and statements
  - Prepare a written report: investigation steps, allegations, response, evidence

Caselaw: Appropriate Investigation

- *OPSEU v. Ontario* (2019, Grievance Settlement Board)
  - Employer found to have **not** conducted “appropriate” investigation, even though complainant had been terminated for other reasons
  - Investigation may be “less extensive” where complainant not returning to workplace
  - But some investigation still required

Caselaw: Appropriate Investigation

- *Horner v. 897469 Ontario Inc.* (2018, Ontario Superior Court)
  - Court finds plaintiff was harassed in workplace
  - Employer, rather than investigating, terminated the plaintiff
  - Judge finds employer's conduct malicious, oppressive and high-handed
  - $10,000.00 in punitive damages

Caselaw: Appropriate Investigation

- *Toronto District School Board v CUPE, Local 4400* (2018, Arbitrator)
  - OHSA does not dictate that an investigation has to be comprised of certain components; or that certain "rules" for the investigation have to be adhered to."
  - Here: person experienced in workplace and labour relations matters was retained to conduct the investigation
  - Interviewed all the relevant witnesses
  - Gave complainant the opportunity to make further submissions/comments with respect to his draft report
  - Arguably most importantly, investigator's analysis in reaching both the conclusion that the complainant was not harassed, and that the decision to discipline him was not a reprisal by employer was generally sound

Caselaw: Third-Party Investigation

- *St. Joseph's Healthcare Hamilton v. Stoimenov and ONA* (2019, OLRB)
  - MOL inspector ordered hospital to engage third party investigator
  - Hospital already conducted internal investigation
  - Hospital explained in detail:
    - why it chose the particular internal investigator
    - why investigation parameters were narrower than complaints,
    - why it takes the view that that these decisions were “appropriate in the circumstances”
  - OLRB: words “appropriate in the circumstances” must have some meaning
  - Hospital has made out strong *prima facie* case for appropriate investigation
  - MOL inspectors’ order for third-party investigator suspended on appeal

Impartial Investigator

- MOL policy: “impartial person investigation” may be required if:

•“The alleged harasser is the employer and a person internal to the workplace conducting the investigation would be unduly influenced by the alleged harasser’s high-ranking position.

•The employer and/or organization has not effectively dealt with or addressed workplace harassment complaints in the past (e.g. multiple complaints about the same person or behaviour).

•The employer can’t ensure that the investigation will be conducted objectively by someone internally.”

Privilege in Investigations

- Privilege if investigation required by statute?

Thank you

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A Caselaw Update on Sexual Harassment

Presented by:
Cristina Wendel, Partner

Calgary (City) v Canadian Union of Public Employees Local 37, 2019 ABCA 388 (CanLII)

- Provides some guidelines regarding how employers ought to respond to complaints of sexual harassment in the workplace.
- Reviews when sexual harassment will constitute grounds for discharge (or termination for just cause).
- Expresses caution about reliance on older legal precedents, noting that modern views of sexual harassment are changing.
- Reviews employers' obligations regarding sexual harassment under occupational health and safety legislation.

Calgary (City) v CUPE - Facts

- The City had investigated a complaint of sexual assault against the Grievor.
- The City found that the allegation was substantiated and that the conduct was a very serious breach of the City's Respectful Workplace Policy.
- As a result, the City terminated the Grievor, noting that the Grievor had initially denied any physical contact but later admitted to touching of an innocent nature.
- The Union grieved the termination.
- The arbitrator overturned the City's decision to terminate the Grievor, substituting a lengthy suspension for the discharge.
- On judicial review, the court upheld the arbitration award.
- The matter then went to the Court of Appeal.

Calgary v CUPE - Arbitration Decision

- The arbitrator applied the well-known, 3 part test from *WM Scott & Co. v CFAW, Local P-162 ("William Scott")* for assessing termination grievances:
  1. Has the employee given reasonable and just cause for some forms of discipline by the employer?
  2. If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances?
  3. If discharge was excessive, what alternative measure should be substituted as just and equitable?
- On the first part of the test, the arbitrator found the complainant to be credible and determined that the Grievor had in fact committed the misconduct alleged. The arbitrator also found that the conduct justified a disciplinary response as it violated the City's Respectful Workplace Policy.

Calgary v CUPE - Arbitration Decision

- The arbitrator then considered the second element of the test, analyzing the seriousness of the misconduct and surrounding circumstances to determine whether termination was excessive.
- The arbitrator concluded that the misconduct was at the lower end of the sexual harassment spectrum:
  - it was a single incident;
  - the complainant did not appear to be significantly traumatized;
  - it appeared to be just an impulsive, ill thought out, isolated incident; and
  - there was no evidence of persistent conduct that would create a hostile or unsafe environment.

Calgary v CUPE - Arbitration Decision

- The arbitrator considered certain mitigating factors, including:
  - the Grievor's long service and clean disciplinary record;
  - the economic hardship on the Grievor and his family; and
  - the City's departure from progressive discipline. The City's reasons for doing so was because the Grievor had failed to acknowledge any inappropriate behaviour or apologize for his conduct.
- The Arbitrator agreed it was troubling that the Grievor had not admitted to the misconduct. However, she concluded that the risks of returning the Grievor to workplace were minimal.
- The arbitrator directed the City to reinstate the Grievor without a loss of seniority following a lengthy suspension of 9 months without pay.

Calgary v CUPE - Judicial Review

- The City applied for judicial review.
- On judicial review, the judge found that the arbitrator's decision making process was justified, transparent and intelligible and the outcome fell within the range of possible, acceptable outcomes based on the facts in the law.
- As such, the reviewing judge upheld the arbitrator's decision.
- The City appealed to the Court of Appeal.

Calgary v CUPE - Court of Appeal

- The Court of Appeal disagreed with the reviewing judge.
- The Court determined that the arbitrator's reasoning under the second element of the William Scott Test was unreasonable.
- The arbitrator's characterization of the conduct as "lower end sexual harassment" was in error.
- The Court considered the conduct (grabbing and squeezing a co-worker's breast without consent) to be sexual assault which by its very definition was serious misconduct.
- The Court found that the arbitrator focused on the circumstances of the Grievor and irrelevant considerations such as that the complainant did not appear to be traumatized.
- In doing so, the arbitrator did not properly analyze the factors before her.

Calgary v CUPE - Court of Appeal

- The Court began the analysis by reviewing definitions of sexual harassment.
- Sexual harassment was defined by the Supreme Court of Canada as:

  Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

- The Court also reviewed a updated definition developed by a current academic authority:

  [T]he harassing comments or conduct is unwanted, often coercive, humiliating or offensive, sexual or gender-based behavior, whether physical or verbal, directed by one or more person (the perpetrator(s)) towards a targeted person(s), that is in violation of the targeted person(s)' human rights, occupational health and safety protections, common law entitlements and/or other applicable statutory rights.

Calgary v CUPE - Court of Appeal

- The Court stated that sexual assault is sexual harassment in its most serious form.
- The Court noted that the arbitrator did not call the misconduct sexual assault, instead referring to it in different ways that suggested an attempt to minimize the type of misconduct.
- Having already determined that a sexual assault had occurred, it was unreasonable for the arbitrator to analyze the misconduct in this way.

Calgary v CUPE - Court of Appeal

- The Court also found that the arbitrator misapplied previous arbitral awards that sought to categorize sexual harassment.
- The arbitrator's categorization of the conduct let her astray. This caused her to focus on factors that were not current with present day analysis of sexual assault, and were inconsistent with the social context and evolving attitudes of what was acceptable in the workplace.
- One of these factors was the complainant's response to the sexual assault.
- The Court noted that both the Court of Appeal and the Supreme Court of Canada have previously held that it is an error to rely on what is presumed to be expected conduct of a victim of sexual assault.
- While the presence of significant harm or distress to the complainant may be an aggravating factor, the absence of distress should not be a mitigating factor.

Calgary v CUPE - Court of Appeal

- The Court also noted some caution in relying on arbitral precedents.
- While following arbitral precedents may fortify the reasonableness of an arbitrator's award, social context informs the application of arbitral precedents.
- Arbitrators must consider whether time and changing social values result in certain precedents being based on faulty assumptions about acceptable sexual conduct in the workplace.
- Here, the arbitrator relied on precedents that were contrary with modern society's view of acceptable conduct in the workplace.

Calgary v CUPE - Court of Appeal

- The Court also considered the implications of the legislative changes to Alberta's health and safety legislation in 2017.
- These changes introduced new provisions directed at sexual harassment and violence in the workplace, which reflects the changing culture and social expectations in the workplace.
- While the employer's duty to provide a safe workplace stems from both the common law and legislation, the duty under Alberta's current *Occupational Health and Safety Act* is more robust than the common law duty.
- Arbitral jurisprudence extends this duty to require that the employer terminate an accused employee from the workplace if necessary in order to satisfy the employer's obligations to protect its employees from sexual harassment in the workplace.

Calgary v CUPE - Court of Appeal

- In this case, the Court found that the arbitrator focused on the interests of the complainant and Grievor without adequately considering the interests of all employees.
- The fact that there was no pattern of misconduct or that this was an isolated incident did not lead to the conclusion that future co-workers could be confident or assured of a workplace free of such incidents in the future.
- This was particularly so because the Grievor was found to be dishonest and did not take responsibility for his actions.
- There had been a breakdown in trust with the Grievor which had a significant impact on the penalty. Where an employee cannot be trusted, the employment relationship is beyond repair. Employers cannot be expected to return an employee to the workplace in those circumstances.

Calgary v CUPE - Court of Appeal

- The Court acknowledged that the standard of review required that deference was owed to the arbitrator.
- However, the Court's obligation to consider whether the decision making process was justified, transparent, and intelligible was only one part of the review test.
- The Court was also obliged to consider whether the result falls within the range of acceptable outcomes which are defensible in respect of the facts and law. Just because an outcome is possible, does not make it acceptable or defensible.
- In the Court's view, on the facts before it, the decision to overturn the termination and substitute a suspension failed on the second part of this test.
- The Court allowed the appeal, quashed the award and remitted the matter for rehearing before a different arbitrator.

Calgary v CUPE - Takeaways

- The Court of Appeal's message is clear that employers and arbitrators should not down play the seriousness of sexual assault and must analyze it with the understanding that it is sexual harassment in its most serious form.
- While this case arises in the arbitral context, the Court's reasoning is equally applicable in the non-union context when assessing the merits of a termination for just cause.

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Cristina advises and represents employers in all aspects of occupational health and safety matters, including day-to-day compliance, incident response, investigations and defending employers charged with occupational health and safety offences. She also represents federally and provincially regulated, unionized and non-unionized employers in a variety of employment and labour law matters such as wrongful dismissal claims, employment standards disputes, human rights issues, labour arbitrations and labour relations board proceedings.

Cristina is a regular presenter at seminars and courses, including Dentons' Breakfast for the Mind series, on a variety of current occupational health and safety, employment and labour topics. She is also a member of Dentons' National Diversity and Inclusion Committee.

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Creating Enforceable Contracts

Consideration in the Employment Context

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Overview

- What is Consideration?

- Employment Agreements
  - Continued Employment
  - Common Problems
  - Fresh Consideration

What is Consideration?

- Essential element of a contract
  - Offer
  - Acceptance
  - Consideration
- Something of value transferred
  - Money, Services, Goods

No Consideration = No Contract

- No consideration then it is a mere promise
  - Promises are not enforceable in court
  - Language of the Contract doesn't matter
- Courts do not typically assess value

Consideration in Employment Agreements

- If done properly this is not an issue
  - Employee provides services
  - Employer agrees to pay
- Agreements are Enforceable

Consideration in Employment Agreements

- BUT … continued employment is not consideration

  - Employer's cannot introduce new employment terms during employment
  - Applies to the 10 year employee and the 3 day employee

Common Consideration Problems

- Employment contracts not signed before the employee starts
- New terms added mid-employment
- Transactional employment agreements

Fresh Consideration

- Options for Fresh Consideration
  - Signing bonus
  - Promotion
  - Non-routine pay raise
  - Increased vacation or other benefits
  - Additional paid time off

Sufficiency of Fresh Consideration

- Again, courts don't typically look at the amount
- However, recognized power imbalance between employers and employees
- Don't want a reason for it to be unenforceable
- Need an incentive for the employee to sign

Sufficiency of Consideration

- Employment Standards Minimums are unlikely to be Consideration
  - These are guarantees to the employee
  - More of a concern in the release context
  - If just given ESA minimums for release it is unlikely to be enforceable

Thank you

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