No (Reinstatement) Means No (Reinstatement) – **Court Reverses Arbitrator's "Dangerous Step Backwards" and Upholds Termination of Sexual Harasser**

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It has been three years since Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009*, took effect, extending the reach of the *Act* into the realm of workplace violence and harassment.

Since its enactment, Bill 168 has increasingly been relied upon by employers, courts and arbitrators in support of a "zero tolerance" approach to violence and harassment in the workplace. Which is not to say courts and arbitrators will now *always* give deference to an employer's discipline of a workplace harasser. However, it is becoming increasingly clear that Bill 168 has empowered adjudicators to take a harder line when it comes to ensuring a workplace free from violence and harassment.

A Recent Decision in the Sexual Harassment Context

In *Professional Institute of the Public Service of Canada v. CEP, Local 3011*, Mr. Haniff, a unionized mail room clerk with six years of service and no prior discipline, was dismissed for cause after a woman employed as a cleaner in the same building complained about a disturbing incident that had taken place in the elevator. According to the complainant, as she was getting into the elevator, Mr. Haniff raced to get on with her and then tried to kiss her, but she pushed him away. Then, as she exited the elevator, Mr. Haniff is alleged to have grabbed her buttocks.

In the course of its investigation, the employer learned this was not the first incident of sexual harassment allegedly involving Mr. Haniff. Throughout the previous five years, Mr. Haniff had engaged in a course of inappropriate conduct including: frequently speaking and gesturing in sexually suggestive ways, performing his "sexy dance" during breaks and, if he encountered the complainant or another cleaner alone, blowing her a kiss or occasionally grabbing her buttocks.

Mr. Haniff did not deny the incident on the elevator, nor his previous inappropriate behaviour. Instead, he alleged the women had consented to and enjoyed his advances. The employer - not satisfied with his explanations - terminated Mr. Haniff's employment for cause. Mr. Haniff's union grieved the termination.

Arbitrator's Reinstatement of Mr. Haniff

At arbitration, Arbitrator Weatherill found that, while the offence was serious and not denied, Mr. Haniff's discharge "went beyond the range of reasonable disciplinary responses to the situation". He reinstated Mr. Haniff and, in *lieu* of termination, substituted an unpaid suspension of roughly six months.

According to Arbitrator Weatherill, two factors supported an order of reinstatement:

- Another cleaner testified that, when harassed by Mr. Haniff one too many times, she showed him her fist and made it clear he had gone too far. This had dissuaded him from bothering her again; and

- The complainant, who was described as a "strong woman [who] knows how to stand up for herself", did not want Mr. Haniff to be discharged.

Divisional Court's Reversal of the Arbitrator's Award

At a judicial review hearing before the Divisional Court for Ontario, the employer argued the substitution of a suspension in *lieu* of termination could not be justified for several reasons. The most significant reason being that reinstatement could potentially put the employer in breach of its obligations under Bill 168 to provide a workplace free from violence and harassment. The additional, factual, reasons included:

1. Mr. Haniff's record of past misconduct persisted for most of his employment.
2. Mr. Haniff refused to accept that "no means no".
3. Mr. Haniff's actions were grave and constituted sexual assault.
4. Mr. Haniff showed no remorse, acknowledgment of wrongdoing or contrition.
5. The Arbitrator relied on inappropriate factors (noted in the bullets above) in determining that Mr. Haniff should be reinstated.

A unanimous Divisional Court agreed with the employer, reversing the Arbitrator's decision and upholding the termination. Rejecting both bases on which Arbitrator Weatherill had ordered reinstatement, the Divisional Court held:

1. It is "not the responsibility of employees to protect themselves from being sexually harassed or assaulted by being strong or threatening violence". Whether an individual is "strong and able to stand up for him/herself" is therefore "irrelevant and represent[s] a dangerous step backwards in the law surrounding the treatment of sexual misconduct in the workplace".

2. In determining the suitable penalty, it is not appropriate to consider the wishes of the assaulted individual. Whether that individual can cope with the offending employee's return to the workplace says nothing about the risk he/she poses to other workers who may be exposed to his/her misconduct in the future.

What the Decision Means for Employers

In a legal atmosphere where employers can bear responsibility for the actions of their employees, an arbitrator's decision that an admitted harasser should be returned to the workplace is, frankly, a chilling one. The Divisional Court's decision is therefore a welcomed message that employers will increasingly have the court's support when taking steps necessary to ensure the protection of their workers from violence and harassment in the workplace.

To learn more and/or for assistance reviewing, preparing and implementing a violence and harassment policy tailored to your organization, please contact a member of Sherrard Kuzz LLP.

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