



Court of Appeal upholds dismissal of executive director of “workplace infected by sexual harassment”

February 1, 2002

Ontario’s highest court has once again signaled that it takes a very dim view of supervisory personnel who fail to rein in their sexual urges on the job. As we reported in the case of *Bannister v. General Motors of Canada* (see [“Court of Appeal sends strong message on sexual harassment by supervisory personnel, twice”](#) on our Publications page), supervisors and managers will be held to a higher standard than ordinary employees in weighing allegations of sexual harassment.

The case, *Simpson v. Consumers’ Association of Canada* (Dec. 21, 2001), concerned the termination, after four years of service, of the employer’s executive director, following a number of alleged sexual incidents and instances of abuse directed at female staff. The employee, David Simpson, was successful at trial, winning 12 months’ damages in lieu of notice and a further six months’ notice for bad faith dismissal.

In discharging Simpson in January of 1993, the employer had relied upon six alleged incidents:

- An incident in 1989 in which Simpson allegedly propositioned his considerably younger executive assistant, saying he “could make things happen” for her at work if she agreed to have a “personal relationship” with him. Although Simpson denied the allegation, the woman’s testimony was not challenged on cross-examination. The trial judge found that Simpson had been “testing the waters” with the woman, and that his advances had been rejected.
- An incident in 1990 in which the employer’s legal counsel alleged she had been lured by Simpson into accompanying him to a strip club, where he regaled her with an account of his wife’s experience with lesbianism. Simpson testified that he was on friendly terms with the woman, that they often had frank discussions about sex, and that they went to the strip club at her suggestion. The trial judge found in Simpson’s favour.
- An affair in the spring and summer of 1991 between Simpson and his secretary. Simpson acknowledged that the souring of their affair had had an impact on their working relationship.
- A gathering of several employees in July 1991 at Simpson’s cottage, in which he and his assistant went skinny-dipping.
- An incident in June 1992 following a meeting of the employer’s board, in which Simpson and several employees had drinks and went into a hot tub in a hotel suite. Simpson was naked, and his secretary bare breasted. Afterwards, he was observed at the bar, wrapped in a towel, by three volunteer members of the employer’s staff.



- An incident in October 1992, during an annual general meeting, in which Simpson squeezed the buttocks of the employer's bookkeeper as she bent over to take off her shoes. Simpson testified that the incident resulted from a misunderstanding and that he had apologized immediately.

TRIAL JUDGE: CONSENSUAL CONDUCT, OUTSIDE THE WORKPLACE

In finding that Simpson had been wrongfully dismissed, the trial judge noted that the alleged incidents had occurred during a time when the employer had no sexual harassment policy, and "just prior to the heightened consciousness concerning the issue of sexual harassment". He found that all of the incidents occurred outside the workplace, and that, with the exception of the squeezing of the bookkeeper's buttocks, they all constituted consensual conduct among friends. He faulted the employer for failing to investigate the alleged incidents, thereby missing the chance to avoid "highly protracted, and unfortunately very expensive litigation".

APPEAL COURT: WORKPLACE "SEXUAL CULTURE" DUE TO SIMPSON

The Court of Appeal held that Simpson's termination was justified and reversed the lower court's award of damages. It noted that, while the trial judge had found Simpson to be a credible witness, he had failed to consider whether Simpson's admitted conduct could be viewed as acceptable for the executive director in charge of all staff in an organization. The Court pointed to a number of factual and legal errors in the lower court judgment:

- In finding that the conduct occurred outside the workplace, the trial judge had failed to consider the true circumstances of the incidents. Three incidents had clearly occurred at business meetings or retreats held in hotels. Though not in the physical confines of the office, they had occurred in the context of a work environment.
- The trial judge's finding that the conduct was largely consensual was subjected to stern criticism by the Court of Appeal. Alluding to the ruling in *Bannister*, the Court noted that the power imbalance between Simpson and female staff made it extremely difficult to ascertain whether the consent was genuine.
- It was an error to suggest that because there was no sexual harassment policy in effect at the time, Simpson should not be held accountable. There was no evidence of any sexually charged atmosphere having existed in the workplace before Simpson's arrival. Rather, the evidence suggested that any such sexual culture had been introduced by Simpson himself. As executive director, the Court pointed out, Simpson himself could have implemented a harassment policy, and should not be allowed to benefit from its absence.

In concluding that the employer had cause for dismissal, the Court stated that Simpson's actions had amounted to a pattern of sexually harassing conduct:

"Taken together, the six impugned incidents and the fallout from them, instead of creating an atmosphere of high morale and professionalism among the staff, created a workplace which ...



was, as the trial judge characterized it “abuzz with unrestrained gossip” and which reflected “a mood of near hysteria”. [...Because Simpson] was the executive director of the Association and the supervisor to whom the employees reported, his obligation to the Association was to ensure that sexual harassment did not occur, and to set the standard of a workplace which protected both the employees and his employer from complaints of offensive conduct.”

In Our View

Managerial and supervisory personnel bear a special responsibility to avoid indulging in sexually questionable conduct on the job, due to their position of authority over other employees. The Court’s decision makes it clear that claims that the impugned conduct was consensual are likely to be subjected to strict scrutiny if the employee has authority over others.

Further, even if it is established that there was a consensual element to the conduct, a supervisor’s sexual behaviour can have a negative impact on others not directly involved. In this connection, the Court referred to evidence that two female employees had been terminated, one in circumstances which suggested that she had been let go due to Simpson’s favouritism towards the woman with whom he would become sexually involved, and another because she had taken exception to Simpson’s conduct towards other female staff. This, as well as the fact that two other women with whom he been involved or had propositioned had resigned soon after, was among the factors relied on by the Court in finding that the employer had cause for dismissal.

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