EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

Ontario Court of Appeal Confirms Single Act of Sexual Harassment Constitutes Just Cause for Termination, but Not Wilful Misconduct under the Employment Standards Act, 2000

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In *Render v. ThyssenKrupp Elevator (Canada) Limited*, (2022 ONCA 310) ("*Render*"), the Court of Appeal confirmed that a single incident of workplace sexual harassment can constitute just cause for dismissal. However, the same conduct was found not to constitute wilful misconduct under the *Employment Standards Act, 2000* ("ESA"), meaning the employee was entitled to statutory termination pay. The decision therefore serves as an informative discussion of the difference between the two legal standards.

The case also demonstrates a continuing evolution in the judicial approach to workplace sexual harassment. In the past, incidents of workplace sexual harassment were viewed as existing on a spectrum that ranges from less serious on the lower end of the spectrum to very serious on the higher end of the spectrum. As indicated in *Render*, the more recent judicial trend is to view all such incidents, including isolated incidents, as serious.

By way of background, Mr. Render was an operations manager with 30 years of service and a flawless employment record with no incidents of discipline. The office of ten men and three women was described as a "friendly and joking environment," with the employees engaging in regular banter that included inappropriate jokes and comments.

Eight days after the introduction of a "zero tolerance" workplace harassment and discrimination policy, after an exchange of what appeared to have been typical banter between Mr. Render and a female co-worker, Mr. Render slapped the co-worker on the buttocks. After an investigation, Mr. Render was terminated for cause, so he received no severance, termination or vacation pay.

Mr. Render brought an action for wrongful dismissal. The trial judge found that Mr. Render's actions were an attack on the dignity and self-respect of his co-worker and therefore unacceptable in a modern workplace. The judge found that the incident caused a breakdown in the employment relationship that justified termination for cause. Mr. Render appealed the wrongful dismissal decision, also seeking termination and severance entitlements under the ESA, which were not specifically discussed at trial.

The Court of Appeal indicated that the appropriate consideration in cases dealing with termination for

cause for misconduct is proportionality, as noted by the Supreme Court of Canada in *McKinley v. BC Tel* (2001) ("*McKinley*"). Since termination for cause is without notice and without pay in lieu of notice, termination for cause is reserved for those instances in which the employee's misconduct is incompatible with the fundamental terms of the employment relationship such that the relationship cannot be sustained. The Court used the following steps to apply the *McKinley* standard:

1. Determining the nature and extent of the misconduct;

2. Considering the surrounding circumstances; and

3. Deciding whether dismissal is warranted (i.e., whether dismissal is a proportional response).

The Court of Appeal found that the trial judge had properly applied the above test and weighed and considered relevant factors. The trial judge's decision referred to the Employer's harassment and discrimination policy and noted that Mr. Render was a manager responsible for implementing the policy. The trial judge took into account the sexual nature of the impugned contact and Mr. Render's lack of appreciation of the seriousness of his conduct. Mitigating factors, including Mr. Render's long and unblemished employment history, were also considered by the trial judge. The Court of Appeal went on to conclude that there was no error in the trial judge's approach or analysis and that his finding of just cause termination was entitled to deference.

In considering the issue of entitlement to notice and severance under the ESA, the Court of Appeal noted that certain employees prescribed by regulation are disentitled to termination pay, including "an employee who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" (Ontario Regulation 288/01 – *Termination and Severance of Employment*).

While the employer argued that Mr. Render was not entitled to ESA entitlements because he was dismissed for cause and was therefore a prescribed employee disentitled to termination and severance pay, the Court of Appeal disagreed. The Court noted case law which held that the wilful misconduct threshold under the ESA is a higher test than for just cause at common law. The standard would not be met by careless, thoughtless, heedless, or inadvertent conduct. Rather, the employer would have to show that "the employee purposefully engaged in conduct that he or she knew to be serious misconduct."

The Court noted that while the trial judge found that the touching was not accidental, there was no finding that the conduct was preplanned. Instead, the trial judge's findings were consistent with the fact that Mr. Render's conduct was done in the heat of the moment. In the Court of Appeal's view, while Mr. Render's conduct warranted dismissal for cause, it was not the type of conduct in the circumstances that was intended to deprive him of his ESA benefits.

The Court therefore awarded him eight weeks of termination pay. However, there was no evidence

before the Court that the employer had a $2.5 million payroll, as required by s. 64(1)(b) of the ESA for the purposes of entitlement to severance pay, so the Court of Appeal did not award severance pay.

What Does This Decision Mean for Municipal Employers?

The case is a reminder of the difference between just cause at common law and wilful misconduct under the ESA, the latter being a higher threshold. As such, municipal employers contemplating termination for cause should seek legal advice to understand how the distinction may impact their situation.

This decision also shows the evolution of the judicial treatment of sexual harassment in the workplace. It is a clear statement that one single incident of sexual harassment can constitute just cause at common law. It also serves as a warning to employers about "overly familiar" workplaces with "inappropriate workplace atmosphere[s]" that are "allowed to get out of hand":

As this court said in *Bannister* almost 25 years ago, it is a workplace atmosphere that can no longer be tolerated. Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed.

To learn more about the Court of Appeal's decision, please see our Focus Alert.