Arbitrator upholds discharge for sexual harassment

The grievor was discharged for sexual harassment. The conduct giving rise to the discharge occurred over a period of several months and consisted of comments of a sexual nature and inappropriate touching directed at three young female employees. Upon learning of the incidents, the employer conducted an investigation and ultimately decided discharge was appropriate. The union grieved the discharge and sought reinstatement and full redress.

The arbitrator dismissed the grievance noting the grossly indecent nature of the grievor's behaviour, his indifference to the effect of his conduct on his victims, and the fact that none of the complainants would feel comfortable working with the grievor.

***Arnprior Aerospace Inc. and International Association of Machinists and Aerospace Workers, Local Lodge No. 1542,* 2011 CLB 14801 (Weatherill)**

FACTS

The grievor was employed as an Aerospace Technician with over 23 year's seniority and a clean disciplinary record at the time of his discharge. The conduct giving rise to his discharge occurred over a number of months and involved three young female workers, none of whom had more than a year's seniority and one of whom was still a probationary employee. The first complainant stated that on one occasion the grievor came up close behind her and flicked her pony tail. The complainant told the grievor not to touch her and the grievor laughed. On another occasion, while the complainant was talking with a co-worker, the grievor approached her from behind and put his face over her shoulder close to hers. The complainant informed the grievor that his conduct was unwanted, and he laughed in response. The matter was brought to the attention of a supervisor who warned the grievor "Don't touch her, don't talk to her, or this will be a different conversation" [Pg. 3, 2nd para], to which the greivor replied "ok".

The grievor ceased to harass the first complainant and turned his attention to the two other complainants. In the case of the second complainant, his conduct consisted of comments of a "particularly vulgar sexual nature" and included references to the complainant's mother and the desirability of another young female employee, as well as his own sexual prowess. The third complainant was the probationary employee. His conduct towards this complainant consisted of daily comments to her about her body, her mother, and suggestions that he might have sex with the complainant and her mother at the same time. On a number of occasions the grievor would tap or brush this complainant's shoulders. The complainant did not bring the matter to the attention of management, as she was on probation and felt that she had to tolerate it. Another

employee however took action and spoke to a union steward, who raised the matter with the company.

The company investigated the matter with full union participation. When interviewing the grievor, he did not deny the allegations, although there were some incidents that he claimed he could not remember. Given the serious nature of the grievor's harassment of the young women, the company's obligation to protect employees from such behaviour, and the reluctance of the young woman (two of whom were still employed by the company at the time of the arbitration) to work in the same workplace as the grievor, the company discharged the grievor.

DECISION/REASONS

The issue before the arbitrator was whether discharge was too severe a penalty in the circumstances. At arbitration it was revealed that subsequent to the termination, the grievor attended three counselling sessions at the union's suggestion. The counsellor reported that the grievor had accepted responsibility for his behaviour and was committed to behaving respectfully toward women in the workplace. In his evidence, the grievor expressed regret for his actions and stated that he was deeply ashamed. In the arbitrator's view, his regret seemed sincere and indicated that he was unlikely to repeat his misconduct. The grievor's age and seniority, and the difficulty of finding other employment, were acknowledged by the arbitrator to also be factors supporting reinstatement. However, these factors did not outweigh the arguments supporting discharge.

The arbitrator noted the grossly indecent nature of the grievor's behaviour and the fact that it was repeated and ongoing. At the time of the harassment, the grievor appeared to be completely indifferent to its effect on his victims. The behaviour "left real scars" on the victims and created a toxic work environment. Even after the supervisor had told the grievor to stop in the case of the first complainant, the grievor continued his harassment of the other complainants. Furthermore, none of the complainants would feel comfortable working with the grievor in the future. In light of these factors, and in recognition of the employer's need to send a strong message that workplace harassment will not be tolerated, the arbitrator held that reinstatement would not be appropriate. The grievance was dismissed and the discharge was upheld.

In our view

As this decision illustrates, employers have an obligation to ensure that the workplace is free of harassment. When determining the appropriate discipline in sexual harassment cases, employers should consider the nature and gravity of the actions constituting the harassment, the effect of the harassment on the victims, the remorse and contrition of the employee, and the likelihood that the behaviour will be repeated. This decision confirms that in the proper circumstances employers are entitled to send a strong message that workplace harassment will not be tolerated.

Divisional Court overturns Arbitrator's reinstatement after termination for sexual harassment

The grievor was discharged for sexual harassment in the workplace. The conduct giving rise to the termination occurred over the course of almost five years culminating in an incident constituting sexual assault in which the grievor attempted to kiss and grab a female worker. The union filed a grievance claiming that termination was too severe and that the grievor should be reinstated. Although the arbitrator accepted the evidence of the sexual harassment, he nevertheless reinstated the grievor on the basis of the employee's clean disciplinary record, and evidence that the complainant did not want the employee discharged.

Upon judicial review, the Divisional Court overturned the decision of the arbitrator to reinstate the grievor and upheld the employer's original termination. Given the ongoing nature of the grievor's misconduct, the lack of remorse or contrition, and in light of the employer's obligation to provide a workplace free from harassment, the Divisional Court determined that reinstatement could not be justified and was not reasonable.

***Professional Institute of the Public Service of Canada and Communications, Energy and Paperworkers' Union of Canada, Local 3011*, 2013 ONSC 2725 (CanLII)**

***Professional Institute of the Public Service of Canada and Communications, Energy and Paperworkers' Union of Canada, Local 3011*, (2012) 228 L.A.C. (4th) 180 (Weatherill)**

FACTS

The grievor was employed in 2006 as a mail room clerk in an office building in Ottawa. The building manager contracted out cleaning services to a company that allocated five cleaning staff to the building. The grievor was familiar to the cleaning staff as he would often join them on breaks and lunches. The grievor was also known by the cleaning staff to frequently engage in inappropriate behaviour. This included suggestive comments and gestures, blowing kisses, and even occasionally grabbing the cleaners in inappropriate ways. In 2012, a female cleaner (the "complainant") complained that the grievor entered an elevator with her and attempted to kiss her. After she pushed him away, he grabbed her buttocks. The complainant reported the incident immediately and stated that this type of conduct had been ongoing for four or five years and that she wanted it to stop. The employer placed the grievor on administrative leave and proceeded to investigate the complaint. In the interview with the grievor, the grievor did not deny the incident but claimed that the complainant consented to his conduct in the elevator and had in fact

consented to similar conduct in the past. After concluding their investigation, the employer terminated the grievor's employment.

The union grieved the discharge and sought reinstatement on the basis that termination was too severe. At arbitration, the arbitrator accepted the evidence of the sexual harassment but nevertheless reinstated the grievor. In the arbitrator's view, reinstatement was appropriate based on the grievor's clean disciplinary record, and evidence that the grievor had stopped sexually harassing another worker when she "showed him her fist" and made it clear that he had gone too far. The arbitrator also based his decision on the fact that the complainant herself did not want the grievor discharged but only wanted the harassment to stop.

DECISION/REASONS

Upon application for judicial review of the arbitrator's decision, the employer submitted that the arbitrator's decision to reinstate the grievor could not be justified based on the following facts:

- The grievor's misconduct was ongoing and had persisted for most of the period of his employment;
- The grievor refused to accept that "no means no";
- The gravity of the incident in the elevator which constituted sexual assault;
- The lack of evidence of remorse, acknowledgement or contrition; and
- The arbitrator's reliance on inappropriate factors, such as the complainant's desire that the grievor not be discharged.

The Divisional Court accepted these submissions. The evidence established that when asked by the complainant and others to stop his inappropriate behaviour, the grievor would simply ignore them. This was evident in the incident in the elevator in which, after being pushed away by the complainant, which was a clear indication that the behaviour was unwanted, he proceed to grab her buttocks. This clearly showed that the grievor could not accept that "no means no".

The Divisional Court discussed the seriousness of sexual harassment and sexual assault in the workplace and quoted the following passage from *Re Trillium Health Centre and C.U.P.E., Local 4191 (2001)*:

> Sexual harassment or assault is intolerable. It is one of the most frightening and damaging things that one person can do to another. The effects of sexual harassment or sexual assault on the victim can be extreme and long-lasting, and incidents of this misconduct can disrupt the workplace. I am satisfied that sexual harassment falls within the same category of serious misconduct as theft, and that discharge is *prima facie* the appropriate penalty even in the case of a first offence. This does not mean that discharge will necessarily be appropriate in every case,

> but the onus is on the Union and the grievor to demonstrate that it is appropriate to mitigate the penalty in a particular case.

The Divisional Court went on to note that a lesser penalty than discharge may be appropriate in sexual harassment or assault cases where the conduct falls on the less serious end of the continuum and the employee demonstrates remorse. In this case however, the conduct was persistent and widespread – the complainant was not the only worker that had been subject to the grievor's conduct. In addition, there was no evidence that the grievor had any remorse for his behaviour. The grievor did not testify before the arbitrator, and there was nothing to suggest that he had learned from this experience or that he had taken steps to ensure that it did not happen again. Instead, the grievor insisted that the complainant had consented to his behaviour and in fact enjoyed it. In the Court's view, there was nothing to suggest that if the grievor was reinstated, he would not continue to pose a threat to the complainant and other employees.

In terms of the weight that the arbitrator gave to the facts that another cleaner was able to get the grievor to stop harassing her when she threatened him with violence, and that the complainant did not herself want the grievor discharged, the Court stated that these were "irrelevant" and represented "a dangerous step backwards in the law surrounding the treatment of sexual misconduct in the workplace." The Divisional Court made it clear that it is not the responsibility of employees to protect themselves from being sexually harassed or assaulted by being strong or threatening violence. Instead, it is the responsibility of employers to ensure that employees are not subject to sexual harassment or assault. This responsibility is underscored by the Bill 168 amendments to the *Occupational Health and Safety Act* (the "OHSA") which address violence and harassment in the workplace.

The Divisional Court concluded its reasons by noting that based on the various concerns with the arbitrator's decision, reinstatement was not justified and in fact fell outside of the range of possible acceptable outcomes. The employer's application for judicial review was allowed and the grievor's termination was upheld.

In our view

This decision underscores the importance of the responsibility of employers to ensure that the workplace is free from harassment and violence. In this case, the employer appropriately investigated the complaint and considered the relevant factors in determining the appropriate discipline. As the Divisional Court noted, without evidence to the contrary, the employer could not be satisfied that the sexual harassment would cease if the grievor was reinstated. As such, the penalty of reinstatement could put the employer offside of its obligations under the OHSA.

Arbitrator awards compensation in lieu of reinstatement – subtle but insidious harassment renders employment relationship no longer viable

The grievor, a registered nurse, was suspended and ultimately dismissed for harassing and bullying Registered Practical Nurses (RPNs) working in the Dialysis Unit (Unit) of the Health Centre. The grievor was alleged to have intimidated and bullied the RPNs through a series of subtle but extremely insidious actions. These included repeated incidents of staring at RPNs, rolling her eyes, and generally conveying an attitude to the RPNs that they were not welcome in the Unit and could not expect support from the grievor.

The union grieved the suspension and the discharge on the basis that the employer did not have just cause for imposing either discipline. The union requested that the arbitrator exercise his discretion to reinstate the grievor. The employer argued that the suspension and discharge were justified on the basis of the grievor's conduct and the damage that it did to the operation of the Unit. It submitted that if the arbitrator held that discharge was not the appropriate penalty, the grievor should be awarded compensation in lieu of reinstatement, as the grievor's conduct had deteriorated the employment relationship to the point that it was no longer viable.

Although the arbitrator agreed that discharge was too severe a penalty for the grievor's misconduct, he accepted the employer's position that the grievor's conduct rendered the employment relationship no longer viable. He refused to reinstate the grievor and awarded compensation in lieu of reinstatement.

***Peterborough Regional Health Centre and Ontario Nurses' Association*, (2012), 219 L.A.C. (4th) 285 (Starkman); 2012 CANLII 52238 (ON LA)**

FACTS

The grievor, a Registered Nurse (RN) worked in the Dialysis Unit (Unit) of the Health Centre providing dialysis treatments to patients. Until the fall of 2010 the Unit was staffed by RNs. In 2010 the Health Centre had to reduce costs and decided to replace twenty percent of the RNs with Registered Practical Nurses (RPNs). RPNs generally earn less money and have a narrower scope of practice than RNs. Evidence at the hearing indicated that there was a general anxiety in bringing RPNs into the Unit, as the introduction of RPNs meant that several RNs were displaced.
In November of 2010 two RPNs resigned from the Unit on the basis that they were being intimidated and bullied. The grievor's name was mentioned as one of the people who had bullied and intimidated the RPNs. The employer placed the grievor on a paid leave

of absence and commenced a series of interviews with RNs and RPNs working in the Unit. As a result of the investigation, the employer concluded that there was a systematic and persistent culture of intimidation and bullying of RPNs, and that the grievor was part of this bullying and intimidation. The employer proceeded to discharge the grievor for harassment, bullying, and unprofessional conduct.

The union grieved both the suspension and the discharge. It argued that the grievor had been a scapegoat for the employer's failure to properly integrate RPNs into the Unit. In the union's view, the incidents referred to, even if they occurred, should not have attracted discipline, and did not amount to just cause for discharge.

The employer submitted that the grievor engaged in a course of behaviour that amounted to harassment of her co-workers in the Unit. The conduct was a pattern of intimidation and harassment which was intended to force the RPNs from the Unit. In the employer's submissions, the conduct warranted discipline. In light of the fact that the grievor had not acknowledged any wrongdoing, the employer submitted that discharge was appropriate and that no alternate penalty should be substituted. The employer also argued that should the arbitrator find that discharge was too severe, compensation in lieu of reinstatement should be awarded as the grievor's conduct had deteriorated the employment relationship to the point that it could not be salvaged.

DECISION/REASONS

After reviewing the evidence, the arbitrator concluded that the grievor had in fact engaged in intimidating and bullying conduct during the period in question. The conduct consisted of an attitude conveyed to RPNs that they were not wanted in the Unit and could not expect support from the RNs. The evidence established that the grievor would be dismissive of RPNs and ignore their requests for assistance. The grievor was also found to have intimidated RPNs by staring at them and rolling her eyes when they would speak. An RPN testified that the grievor had intentionally bumped into her as she was delivering a report.

Given the nature of the grievor's conduct, the arbitrator found that the employer had just cause to suspend the grievor with pay while it conducted the investigation. The arbitrator dismissed the union's grievance with respect to the suspension.

The arbitrator went on to comment that bullying and harassment can consist of a single incident or a series of repeated incidents. Single discreet incidents were seen to be more easily dealt with in the arbitral context as opposed to allegations of subtle behaviours over a period of time. The former allows the arbitrator the opportunity to evaluate each incident, and to apply the principle of progressive discipline in determining the appropriate penalty. A series of subtle behaviours does not afford the same opportunity. The arbitrator found that the grievor's conduct, although subtle, was extremely insidious, and therefore attracted discipline. Nevertheless, in the arbitrator's view, discharge was too severe. Although the grievor was aware of the employer's policies with respect to

intimidation and harassment, there was no evidence that the grievor conspired with others to intimidate the RPNs. Furthermore, in the arbitrator's view, the problems the Unit faced with integrating RPNs into the Unit could not all be ascribed to the grievor. Other RNs were involved in the bullying and intimidation, and the lack of guidelines and managerial supervision may have added to the problems in the Unit.

The arbitrator cited the following passage from the decision from *Hendrickson Spring (Stratford Operations) and United Steelworkers of America, Local 8773 (Ewaniuk Grievance*), [2009] OLAA No 34 in which it was held that the conduct of the employee did not lend itself to reinstatement:

> In summary, there is concrete evidence of many factors or circumstances that arbitrators have considered relevant in this context – lack of trust between the grievor and the company, refusal of the grievor to accept responsibility for his wrongdoing, his continued animosity towards management and his demeanor and attitude at the hearing...All these factors in my view point toward the conclusion that to reinstate the grievor would simply be an invitation to start the whole process again of discipline, grievances and arbitration...

The facts in the present case gave rise to the same concerns. The grievor's behaviour was inappropriate and the workplace in the present circumstances required a high level of team work. The grievor's actions were seen to be a direct challenge to management's authority to staff the Unit as it saw fit. The grievor's behaviour destabilized the Unit and led to the resignation of at least two RPNs. There was no suggestion by the grievor that she understood the seriousness of her conduct. In light of this, the arbitrator concluded that there was no reasonable expectation that a viable employment relationship could be re-established between the employer and the grievor. The arbitrator held that it was in the best interest of the workplace that the grievor not be reinstated and that the grievor be paid damages in lieu of reinstatement.

In our view

This case reinforces the employer's obligation to take allegations of harassment and bullying in the workplace seriously. Suspension with pay while the employer investigates the alleged misconduct will often be appropriate. Although discipline must be reasonable in terms of the particular misconduct, where the employer can establish that the employment relationship is severely deteriorated as a result of the misconduct, compensation in lieu of reinstatement, although extraordinary, may be ordered.

Arbitrator orders lengthy suspension for senior employee due to harassment

The grievor was suspended and ultimately discharged for workplace harassment and threatening violence towards his supervisor. The incidents giving rise to the discharge occurred in a series of meetings between the grievor and his supervisor. In these meetings, the grievor was alleged to have raised his voice, adopt a threatening demeanor, and to have falsely accused his supervisor of being motivated by racism. Following an investigation of the incidents, the grievor was discharged for his conduct. The union grieved the discharge arguing that termination was too severe a penalty.

The arbitrator reinstated the grievor without compensation and without loss of seniority, effectively imposing a fourteen month unpaid suspension. In the arbitrator's view, although the conduct was disciplinable, discharge was too severe. The arbitrator held that the employer was under a duty to impose progressive discipline in order to warn the grievor that his misconduct was unacceptable and to provide the grievor with the opportunity to correct his behaviour. The arbitrator also imposed a last chance agreement which provided that if the employer within two years of the date of the decision has just cause to discipline the grievor for any issues concerning workplace harassment, intimidation or violence the employer is entitled to impose the penalty it considers appropriate. Any subsequent grievance can only challenge whether there is cause for discipline and if cause is established no arbitrator or arbitration board can vary the penalty imposed.

***Carleton University and Canadian Union of Public Employees*, (2012) CLB 22914 (Starkman)**

FACTS

The grievor was employed as a Circulation Co-ordinator in the Library of Carleton University. At the time of his discharge, he had twenty-seven years of service. In 2010, because of a reorganization, the grievor was declared redundant and move to a different position (although his salary was red-circled) and placed on day shifts working from 9:30 a.m. until 5:00 p.m. His duties included supervising students who were returning books to the stacks, managing holds and recalls of books, and working at the circulation desk.

Although there were a number of incidents relating to the grievor's performance and conduct over the years, the conduct giving rise to discharge occurred in November and

December of 2010 in a series of interactions between the grievor and his supervisor to discuss his performance.

In these interactions, the grievor raised his voice to his supervisor and alleged that his supervisor's actions were racially motivated. Witnesses at the hearing testified that during one such incident the grievor used inappropriate and offensive language and made intimidating physical gestures towards his supervisor. The grievor was alleged to have told his supervisor, "I am not your dog to keep barking at", and "Go get another person from Africa."

As a result of this conduct, the grievor was discharged for harassment and violence at the workplace. The union grieved the discipline arguing that the conduct, if it occurred at all, did not attract the severe penalty of discharge.

DECISION/REASONS

The arbitrator found that the grievor did in fact falsely accuse his supervisor of "trying to get him because he was black". This accusation, along with his raised voice and intimidating physical actions were seen to be an effort to intimidate his supervisor to prevent her from talking about his workplace performance. The arbitrator stated that the grievor's behaviour, in particular the making of comments implying that the supervisor's actions were motivated by racism, was abusive and intended to intimidate, annoy, and harass his supervisor. The arbitrator also found that the grievor's testimony was not credible and was intended to obfuscate the facts. Furthermore, the grievor refused to acknowledge any wrongdoing, or to accept responsibility for his actions and apologize. In light of this, the arbitrator was of the view that the grievor was not prepared to cooperate with his supervisors, as, in the grievor's view, "they were out to get him". In the arbitrator's view, the conduct of the grievor did warrant discipline.

In considering whether discharge was appropriate, the arbitrator noted that the jurisprudence imposes on employers a duty to warn employees that their conduct is inappropriate. By imposing progressively severe discipline, employees are afforded the opportunity to improve their behaviour. Only if it becomes apparent that improvement is not forthcoming will discharge be considered appropriate. The arbitrator recognized that the actions of the grievor may have been the culmination of months or even years of frustration. Nevertheless, by themselves they did not amount to sufficient and just cause to support a discharge.

The arbitrator stated that had the grievor acknowledged some wrongdoing, apologized for his actions and committed to being part of the solution, the arbitrator would have imposed a more lenient penalty. Conversely, if the employer had disciplined the grievor for prior incidents of harassment and intimidation, thereby clearly warning the grievor that his behaviour was unacceptable and a continuance of the behaviour would result in discharge, the arbitrator would have no difficulty upholding the later decision to discharge the employee.

Given the facts, the arbitrator exercised his discretion to impose an alternate penalty. He reinstated the grievor without compensation and without loss of seniority, effectively imposing a fourteen month unpaid suspension but also imposed a number of serious conditions to the reinstatement. If within two years of the date of the decision, the employer has just cause to discipline the grievor for any further harassment, intimidation or violence, the employer is entitled to impose the penalty it considers appropriate. Any subsequent grievance can only challenge whether there was cause for discipline. If cause is established, no arbitrator or arbitration board can vary the penalty imposed by the employer.

The result in this decision differs from that of *Peterborough Regional Health Centre and Ontario Nurses' Association*, **(2012), 219 L.A.C. (4th) 285 (Starkman); 2012 CANLII 52238 (ON LA).** In that case, the arbitrator ruled that discharge was too severe a response to the employee's misconduct, but nevertheless refused to reinstate the employee due to the irreparable damage to the employment relationship. Compensation in lieu of reinstatement was ordered. The different result may be attributed to the fact that in the present case, the arbitrator found that the employment relationship could potentially be salvaged if the grievor corrected his behaviour. The strict conditions of the reinstatement imposed by the arbitrator were intended to ensure that the employer had immediate recourse should the grievor not rectify his conduct. In *Peterborough Regional Health Centre and Ontario Nurses Association* the grievor's misconduct had more serious consequences, namely the resignation of two co-workers. The nature of the workplace in *Peterborough Regional Health Centre and Ontario Nurses Association* also required a higher degree of employee interaction and teamwork. In that case, the employee's misconduct, and the effects of that conduct, made successful re-integration into the workplace unlikely.

In our view

The difficulty of imposing discipline in cases of harassment and bullying arises from the fact that this conduct often involves threats and menacing behaviour. Victims of this conduct are often understandably reluctant to come forward and register a formal complaint out of fear of the employee's response and possible retaliation. The requirement to identify themselves and give evidence in a formal hearing also adds to the intimidation and reluctance to come forward. This is a fundamental challenge for employers as they balance their statutory obligations pursuant to the *Occupational Health and Safety Act* and arbitrators' expectations with respect to the principle of progressive discipline which can conflict with the employer's duty to provide a safe workplace.

This decision underscores the importance of progressive discipline when addressing misconduct of employees. An employer is under a duty to warn employees that their conduct is inappropriate. By imposing increasingly severe penalties, employees will be given sufficient warning that the particular behaviour is unacceptable, and the opportunity to improve their behaviour. As was noted in the decision, if it becomes

apparent to the employer that improvement is not forthcoming, discharge will be considered appropriate. By imposing progressive discipline, an employer's actions will be more likely to be viewed as reasonable and appropriate and therefore may withstand grievances.