Get With the Times! The Alberta Court of Appeal Weighs in on Sexual Harassment in the Workplace

Workwise Newsletter

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The recent case of ***Calgary (City) v Canadian Union of Public Employees Local 37*, 2019 ABCA 388** from the Alberta Court of Appeal marks an important decision on sexual misconduct in the workplace.

The City of Calgary (the "City") terminated the grievor after investigating a complaint that the grievor had grabbed and squeezed the complainant's breast without her consent. The City determined that the allegation was substantiated and the grievor's conduct constituted a serious breach of its Respectful Workplace Policy and therefore terminated the grievor. The union grieved the termination, which proceeded to arbitration.

The arbitrator applied the test for assessing termination grievances, which entails asking:

1. If there is reasonable and just cause to impose some form of discipline;
2. If so, was the employer's decision to dismiss the employee an excessive response in all the circumstances of the case; and finally
3. If the discharge is excessive, what alternative measure should be substituted as just and equitable.

The arbitrator determined that while the grievor had committed the misconduct and it justified a disciplinary response, the conduct was at the lower end of sexual harassment spectrum. This was based on the findings that the misconduct was a single incident, the complainant did not appear to be traumatized in any significant way, and there was no evidence of conduct that would create a hostile or unsafe work environment. This along with mitigating circumstances prompted the arbitrator to conclude that the misconduct justified a lesser penalty of a nine month suspension without pay and reinstatement of the grievor's employment with no loss of seniority.

The City applied for judicial review of the arbitrator's decision to the Alberta Court of Queen's Bench; the reviewing judge upheld the arbitrator's decision. The City then appealed to the Alberta Court of Appeal. The majority of Court of Appeal allowed the appeal and sent the matter to be re-heard before a new arbitrator.

Ultimately, the Court determined that, having found the assault occurred as alleged it was unreasonable for the arbitrator to conclude that the decision to dismiss the grievor was excessive given the circumstances of the case.

In coming to this conclusion, the majority engaged in an extensive discussion regarding sexual harassment in the workplace. The majority held that sexual harassment with a physical element is a form of sexual assault and constitutes "sexual harassment in its most serious form". The majority of the court of Appeal concluded that this was most certainly the case with the misconduct at hand. The arbitrator's failure to find that the grievor's conduct

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constituted sexual assault and therefore the most serious sexual harassment, as well as the use of minimizing language (e.g. "personal assault" or "incident") represented errors that undermined the decision.

Further and notably, the majority held that in the context of workplace sexual assault, arbitrators should apply the principles and cautions from recent criminal law cases[1] on avoiding assumptions regarding how victims will react to trauma. In fact, the majority determined that while the impact on the victim can be considered as an aggravating factor when considering discipline, it is an error to consider the absence of impact or distress on the complainant as a mitigating factor (as was done by the arbitrator).

The majority further commented that "…social context is intimately connected to what is relevant in assessing a grievance for sexual harassment and also the labour relations between employers and unions". Significantly, the majority held that arbitrators need to consider changes in social norms and be cautious about applying older case law on the degree of discipline that is appropriate for sexual misconduct. Older cases can be out of step with modern society's view of acceptable conduct in the workplace and therefore should not be relied upon to determine an appropriate disciplinary response.

Finally, the majority placed a significant emphasis on the employer's obligation to maintain a safe work environment for all employees. This obligation has been at the forefront of employer's minds with the recent amendments to Occupational Health and Safety legislation but is also an obligation that persists under the common law.

While this case comes out of the unionized context, it contains commentary also applicable to non-unionized employment environments as the majority of the Court of Appeal signals a shift in the context in which workplace harassment and assault should be adjudicated and discipline imposed. What is particularly noteworthy is that current societal views must form part of the analysis and because of this, it is inappropriate to use older case law to decide on a disciplinary response. Further, one must be careful in how the presence or absence of victim impact is incorporated into the determination of the appropriate disciplinary response. While impact can be an aggravating factor, employers and adjudicators may not use the absence of impact as a mitigating factor. Further, the decision makes an important statement that current principles on understanding of trauma from criminal cases should be applied when considering cases of sexual assault and harassment in the workplace. Finally, this case highlights the importance of maintaining a safe work environment for all employees and the fundamental breach of trust that can result from just one instance of sexual harassment or assault.

This is an important decision from the Court of Appeal on sexual harassment and sexual assault in the workplace, particularly given the current social climate where safe, harassment-free workplaces are of utmost concern to employers. Field Law's **Labour and Employment lawyers** can assist you and your organization when it comes to handling complaints of sexual harassment or other types of complaints or employee concerns. You may also wish to consult cases we previously reported on in Workwise in regards to the #metoo movement.

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[1] *R v. ARD,* 2017 ABCA 237 at para 8 and 23; *R v. DD,* 2000 SCC 43 at para 63