Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
Emond Harnden LLP

Ontario court rules against employer who conducted flawed investigation of sexual harassment claim

Employers are rightly concerned about maintaining a vigilant attitude towards workplace harassment. Accordingly, it is important not to minimize complaints of alleged sexual or racial harassment. However, a recent decision of the Ontario Superior Court is a reminder that not all incidents of harassment merit dismissal, and that all complaints of harassment must be adequately investigated before being acted upon.

C.R. v. Schneider National Carriers Inc. (January 10, 2006) involved the termination of an employee with three years of service who had progressed from the position of a truck driver to that of a driver training engineer. This responsibility entailed taking trainee drivers on the road for one to two weeks at a time, during which she would teach them how to complete paperwork to cross the border, map reading, driving regulations and the employer's procedures and business methods.

C.R.'s troubles started when two of her trainees approached management with allegations of misconduct. The two complained that C.R. had spoken suggestively to them about being involved in sadism and masochism, had exhibited herself in various stages of nudity, swore excessively, and had thrown things around the cab of the truck when she was frustrated or angry. The trainees described the events to management in each other's presence.

Management then invited C.R. to a meeting without telling her why the meeting was being held. Nor was she told the names of the complainants. She was confronted by a senior officer in the employer's U.S. headquarters with only general questions and was invited to respond. For example, she was asked if she threw things around the truck in anger, whether her conversations focused on sadism, masochism and domineering behaviour and whether she displayed herself in various stages of nudity. Finally she was asked whether she had invited trainees into a submissive relationship.

C.R. denied having done anything wrong. A few minutes later, management read a brief statement to her informing her that her employment was terminated because she had created a hostile work environment. The employer later claimed that C.R. was a threat to the safety of other employees who would be on the road with her for periods of time and be vulnerable to her behaviour.

COURT: CONDUCT "DISTASTEFUL" BUT ONLY LESSER SANCTIONS WARRANTED

At trial, C.R. testified that, until the termination meeting, she had received only positive feedback about her numerous training sessions. She denied the allegations of inappropriate behaviour, while admitting that she had discussed sado-masochism in response to one of the trainee's complaints of a physically and mentally abusive husband. She also admitted that, because of her obesity, she was unable to sleep with clothes on but insisted that she always slept under bed covers.

Only one of the trainees testified at trial, and the court found that, while C.R.'s behaviour as described by the trainee was distasteful, at no time had the trainee alleged that C.R. had actually touched her or invited her to participate in a sexual relationship of any kind. This was the only evidence against C.R. and the court held that it was insufficient to warrant dismissal.

Although sexual harassment in any form is objectionable, the court stated, the cases have established that there are two categories of sexual harassment: serious and mild. Only serious cases in which the conduct interferes with the proper operations of an employer's business justify summary dismissal. This was not such a case:

> "It is difficult to conclude on the basis of the evidence adduced during this trial that the defendant's business operations were affected by the plaintiff's conduct or that the degree of misconduct amounted to a gross repudiation of the employer/employee relationship … . The defendant may have been justified in distancing itself from the plaintiff's behaviour but lesser sanctions could have been employed to conform her behaviour to company expectations."

TAINTED INVESTIGATION

The court also criticized the investigation of the complaints by the employer, noting the following aspects:

- the complainant trainees had compared notes before making their complaints to management;
- when the trainees did approach management, they were permitted to voice their complaints in each other's presence;
- when they were asked to put their complaints in writing, the trainees were not cautioned not to speak to each other about their respective complaints and were not urged to express only their own individual experiences;
- management did not question the complainants about the positive assessments that they had filed about C.R.;
- C.R. had been summoned to a meeting without being informed why the meeting was being held;
- at the meeting, C.R. was not informed of the specifics of the complaints but was merely asked to respond to general questions;
- only a general synopsis was recorded of the meeting and, accordingly, no complete record existed of what was actually said;
- despite the fact that only general questions had been put to C.R., her lack of specific answers was held against her;
- C.R. was not given the complainants' names, nor was she given specific dates on which she was alleged to have misbehaved.

This, in the court's view, was not a careful or thorough investigation. C.R. had not been given sufficient particulars to enable her to respond appropriately to the allegations and the employer, accordingly, was not in a position to properly assess the gravity of her conduct.

The court stressed that it had arrived at this conclusion despite having found that both people who had conducted the investigation were honest and reliable and worked for a reputable company. It attributed the missteps to inexperience and lack of training. While acknowledging that management should not be required to meet the standards or practices of criminal investigators, the court noted that such investigations must demonstrate that the "basic fundamentals of fair play" had been observed. In this case, they had not.

Accordingly, the court ruled in favour of C.R., awarding her three months of notice in view of her age, length of service and position with the employer.

In Our View

This case is a reminder that, when dealing with the sensitive issue of alleged sexual harassment, "zero tolerance" is no substitute for a balanced policy and careful investigation and assessment. In this regard, see also "Workplace Harassment: A legal minefield for employers" on our Publications page.

For further information, please contact Colleen Dunlop at (613) 940-2734.

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