Workplace Violence – Requirements and recent developments

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Ontario's *Occupational Health and Safety Act* (OHSA) was amended in June 2010, by Bill 168, to include new requirements for employers to address and prevent workplace violence. As a result, dealing with violence in the workplace has become a priority for employers. Although there are few decided OHSA prosecution cases to date dealing with the requirements relating to workplace violence, we are beginning to see some cases work their way through the system. Recent incidents of workplace violence have resulted in significant fines against employers who have failed to meet their statutory obligations. Those decisions assist in clarifying the statutory requirements and the extent of an employer's obligations in respect of workplace violence.

Ontario is by no means alone in its efforts to explicitly address workplace violence through its occupational health legislation. Many other jurisdictions in Canada have also adopted specific workplace violence prevention regulations. In jurisdictions where workplace violence has not been expressly addressed (i.e., New Brunswick and the Yukon), there are, nevertheless, general duty provisions in the legislation which would require employers to take steps to protect employees against workplace violence. Although Quebec's legislation does not specifically address violence in the workplace, provisions in Quebec's labour standards legislation dealing with "psychological harassment" would appear broad enough to cover workplace violence.

Significant fines for contraventions of workplace violence requirements

The general offence provisions set out in Part IX of the OHSA apply to contraventions of the workplace violence requirements. Individuals found guilty of contravening these requirements are subject to a fine of up to $25,000 or to imprisonment for a term of not more than twelve months, or to both, while corporations may be fined up to $500,000 (s. 66). The actual amount of the fine that may be imposed will depend upon the circumstances of each case.

Where workplace violence actually occurs, the fines imposed to date have been quite significant. For example, Kinark Child and Family Services, an agency providing mental health services to children, was fined $125,000 under the OHSA (August 2016). This followed an incident in which two staff members were attacked by a resident youth at a detention centre. The workers suffered both physical and psychological injuries. The employer pleaded guilty to failing to provide information, instruction and supervision to protect a worker from workplace violence or the risk of violence from a resident. In addition to the fine of $125,000, the employer was also required to pay a 25% victim surcharge.

Similarly, the Centre for Addiction and Mental Health (CAMH) was fined $80,000 following an

incident in which two of its workers were attacked and injured by a patient at one of its facilities (July 2016). The patient had a history of violence and was not taking the necessary medication. CAMH pleaded guilty to “failing to develop, establish and put into effect measures and procedures including safe work practices” to protect workers on the night shift from workplace violence. CAMH was also subject to the 25% victim surcharge.

Charges against employer dismissed

The recent decision in *Ontario (Ministry of Labour) v. Royal Ottawa Health Care Group* (July, 2016) is of particular interest for employers. One of the few trial decisions dealing with OHSA charges relating specifically to workplace violence, the decision shows that an incident of workplace violence is not, in and of itself, sufficient to establish that an employer failed to comply with its obligations under the OHSA. The Royal Ottawa Health Care Group was charged with “failing as an employer to develop and maintain the measures and procedures for summoning immediate assistance when workplace violence occurs”, as required under section 32.0.2 (2b) of the OHSA.

This charge, as well as charges under each of sections 25(2)(a) and (h) of the OHSA (duties to provide information, instruction and supervision and to take reasonable precautions to protect worker safety), were laid as a result of a violent incident at the Royal Ottawa Mental Health Centre. A patient in a recovery program had attacked a number of workers. During the attack, calls for assistance were made following the employer’s “Code White” program. A Code White could be triggered by a worker dialing a three digit number on various phones in the workplace. Once triggered, a Code White would lead to an announcement being made which would prompt other staff to respond and assist.

The Crown argued that the Code White program was ineffective stating that there were delays in both summoning assistance and in assistance being provided. Since the program was ineffective, the Crown asserted that the employer failed in its OHSA obligation to have measures and procedures in place for summoning immediate help. Their position was that the occurrence of the violent incident itself showed that the employer contravened the OHSA. The employer argued that its obligation was limited to having a policy and program in place that included procedures for summoning immediate help. Its position was that it did not have to establish the effectiveness of the program, or even that the program was implemented.

The Court carefully considered detailed accounts from witnesses and found that the nurses on duty that night had the ability to immediately call for assistance through the Code White procedure. The Court concluded that there was a program in place in the workplace for summoning assistance immediately, and that it functioned properly. Based on that finding, the Court proceeded to dismiss all three charges.

It is interesting to note that the Court did consider the effectiveness of the employer’s workplace violence program, particularly the measures and procedures for summoning immediate help. This

means that an employer will not satisfy its obligation simply by having a “token” workplace violence program in place that is ultimately insufficient. An employer must ensure that its program meets the purposes, requirements and intent of the OHSA. However, the fact that the Court rejected the notion that the violent incident itself established that the employer failed in its obligations is, nevertheless, significant and provides greater clarity on this issue for employers and other workplace parties. The Court expressly stated that, while this was an unfortunate incident, “not every accident or workplace injury implies fault.”

In our view

Dealing with violence in the workplace will continue to be an important priority for employers. The significant fines that may be imposed for contraventions of the OHSA workplace violence requirements drive home the importance of compliance. Employers should ensure that they properly assess the risk of violence in their workplace, and reassess that risk when work conditions change. Employers should also ensure that their workplace violence policies and programs are carefully crafted to ensure they meet the requirements of the OHSA. In the event that an incident of violence occurs in the workplace, those assessments, policies and programs will be key factors in determining compliance with the OHSA.

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