WORKPLACE VIOLENCE & HARASSMENT UNDER BILL 168: A 5-YEAR REVIEW

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I. INTRODUCTION

It has now been just over five years since Bill 168, now known as Part III.0.1 of the *Occupational Health and Safety Act (Ontario)* ("*OHSA*" or the "Act"), amended the *OHSA* on June 15, 2010. As Ontario employers are now generally aware, the amendments required employers to establish workplace violence and harassment policies, develop programs to implement those policies and provide employees with information regarding these policies and programs.

The purpose of this paper is to review the arbitral, common law and tribunal jurisprudence that has since emerged interpreting the amendments to the *OHSA*. The paper begins with a summary of *Kingston (City) v. Canadian Union of Public Employees, Local 109* (Hudson Grievance)[1] which is now widely regarded as the leading arbitral decision considering the Bill 168 amendments. This is followed by a review of the recent Ontario Labour Relations Board ("OLRB" or the "Board") decision in *Hydro One Inc. v. CUSW*[2]. Two civil court decisions, *Shakur v. Mitchell Plastics*[3] and *Phanlouvong v. Northfield Metal Products (1994) Ltd.*[4] are then considered. This is followed by a detailed summary of OLRB decisions involving applications under Section 50 of the *OHSA* alleging reprisal conduct on the part of employers.

The paper includes a note on Bill 132 which is the Ontario government's proposed new legislation dealing with amendments to various statutes with respect to sexual violence, sexual harassment, domestic violence and other related matters.

[1] [2011] O.L.A.A. No. 393
[2] 2014 CarswellOnt 10678 (Ont. L.R.B.); 2015 CarswellOnt 3431 (Ont. L.R.B.).
[3] 2012 ONSC 1008
[4] 2014 ONSC 6585.

The concluding section of the paper sets out lessons and takeaways for employers that can be drawn from the case law.

II. REVIEW OF CASE LAW IN THE UNIONIZED WORKPLACE

(i) *Kingston (City) v. Canadian Union of Public Employees, Local 109* (Hudson Grievance)

In *Kingston (City) v. Canadian Union of Public Employees ("CUPE"), Local 109 (Hudson Grievance)*, the arbitrator considered what impact the amendments to the *OHSA* introduced by Bill 168 have on the manner in which discipline relating to workplace threats is treated. The arbitrator concluded that verbal threats constitute violence, not merely harassment. In light of Bill 168, arbitrators must attribute more weight to the seriousness of an incident in determining the reasonability of a particular penalty in cases where employees have made threats of violence. Furthermore, the employer's obligation to provide a safe workplace environment must also be considered in assessing whether dismissals should be upheld.

The circumstances giving rise to this case involved the dismissal of Donna Hudson (the "grievor"), a 47 year-old employee of the City of Kingston with 28 years of service. The grievor was discharged for uttering a death threat against John Hale, a colleague who happened to be president of CUPE Local 109 (the "Union"). The grievor admitted to having an anger management problem and had received discipline for incidents relating to her explosive temper in the past.

In September 2009, the grievor participated in training programs related to workplace violence and safety. In July 2010, as part of a settlement involving her previous grievances, the grievor attended anger management counselling. She reported that the counselling had been very helpful. Two days following the completion of her counselling, the grievor confronted Hale during a meeting and made a death threat against him.

The grievor accused Hale of trying to damage her career, and accused a former steward, a friend of Hale's who was recently deceased, of the same behaviour. Hale

told the grievor not to talk about his friend because he was dead, to which the grievor replied “yes, and you will be too.” Hale reported the incident, and an investigation ensued. The grievor denied that she had threatened Hale’s life. Hale expressed that he was nervous about the threat, and feared what would happen to him and his family if the grievor were dismissed. He eventually reported the threat to the police at the insistence of his wife. After investigating the incident, reviewing her file, and noting that the grievor had just completed anger management counselling and yet continued to behave inappropriately, the employer made the decision to discharge her for cause.

The Union filed a grievance on her behalf, and submitted that Bill 168 did not create a zero-tolerance policy for workplace violence or harassment. The Union claimed that discipline must be proportionate and progressive and, given the grievor’s length of service, discharge was inappropriate in this case. However, the employer maintained that the seriousness of the incident irreparably damaged the employment relationship. Of further import, the grievor had received training regarding workplace violence and had undergone anger management counselling to no avail. The employer submitted that dismissal was therefore the appropriate response in the circumstances.

The arbitrator concluded that discharge was warranted. First, the arbitrator made a factual determination that the grievor had made a death threat, for which she remained unapologetic and did not accept responsibility. Second, the arbitrator considered the purpose of Bill 168 and its effect on the employer’s obligation to prevent workplace violence, including threats of violence.

The arbitrator identified four principal ways in which Bill 168 had affected the assessment of the reasonability of employee discharges similar to the one in the instant case. First, it clarified that arbitrators must take threats in the workplace more seriously. The arbitrator noted that a death threat constituted real violence, not just harassment, and she underscored the gravity of such threats.

Second, Bill 168 changed the way that employers and workers alike must react to threats in the workplace. The employee has an obligation to report such incidents, and the employer must take direct action to address allegations of threats. The

arbitrator was careful to point out, however, that the employer cannot engage in an automatic response to such violence. The employer's response must still be reasonable, informed, and proportionate.

Third, Bill 168 impacted how an arbitrator must assess the reasonableness of the penalty for making threats in the workplace. The arbitrator concluded that the usual factors articulated in *Dominion Glass Co. and United Glass & Ceramic Workers, Local 203*[5] (i.e. who was threatened or attacked?; was this a momentary flare-up or a premeditated act?; how serious was the threat or attack?; was there a weapon involved?; was there provocation?; what is the grievor's length of service?; what are the economic consequences of a discharge on the grievor?; is there genuine remorse?; has a sincere apology been made?; and has the grievor accepted responsibility for his or her actions?) are still relevant. However, more weight must be given to the seriousness of the incident in light of this new legislation.

Fourth, Bill 168 added workplace safety as an additional factor that must be considered in assessing the reasonability and proportionality of the employer's disciplinary response. The critical question is: "to what extent is it predictable that the misconduct will be repeated"? The purpose of this inquiry is to gauge whether the employee could conduct herself in the workplace in a manner that is safe for others moving forward.

After considering all of the factors in light of the evidence, the arbitrator decided that the grievor's discharge should be upheld. The determinative factor was that the safety of the workplace would be at risk if the grievor were reinstated. There was no evidence before the arbitrator that anything had changed in the grievor's attitude or conduct. Significantly, the grievor had not taken steps to control her anger, had not accepted responsibility, and had not shown any remorse for her behaviour. The grievance was therefore dismissed.

[5] [1975] 11 L.A.C. (2d) 84

(ii) *Hydro One Inc. v. CUSW*

Hydro One Inc. v. CUSW involved a grievance referred to the OLRB under section 133 of the *Labour Relations Act, 1995*.[6] The grievance concerned whether the unpaid suspension and ultimate discharge of the grievor, Wendi Allan, were justified.

The grievor alleged that she had experienced discriminatory treatment throughout her employment and had been forced to work in a poisoned work environment for many years. The Board dealt with the referral as a grievance of the grievor's discharge, and rejected the notion that allegations about discrimination and a poisoned work environment were independent issues. Rather, it treated these allegations as going to the issue of mitigation and remedy only.

The grievor worked as an electrical journeyperson for Hydro One Inc. ("Hydro One"). At the date of her discharge, she had been working in this position for approximately five months at the Manby Transfer Station ("Manby") in Toronto. The Board accepted that while she was an apprentice, the grievor was "subjected to inappropriate and offensive conduct … which may well have amounted to gender harassment." The grievor also gave evidence about other incidents of inappropriate conduct and "sexist talk among the crews," but the Board noted that these allegations were vague and that the grievor never filed a formal complaint.

The grievor also testified about unpleasant sexist behaviour on the part of Carl DeKoning. The grievor worked with Mr. DeKoning when she was an apprentice, and testified that, back then, he "talked down" to her and demonstrated certain attitudes about women generally. On a later occasion while working at Richview Transfer Station ("Richview"), the grievor observed Mr. DeKoning performing a task that she felt endangered another worker and she responded by calling Mr. DeKoning "a f[*]cking idiot". She received a written disciplinary warning for insubordination, but also received an assurance from her then supervisor that she would not be re-assigned to Richview

[6] S.O. 1995, c.1, as amended ("*OLRA*").

(where Mr. DeKoning remained) and that Mr. DeKoning would not be assigned to Baywood Panel Shop (where the grievor was then assigned).

In 2011, the grievor was transferred to Manby. Shortly before this transfer, she had been accused of threatening a co-worker, resulting in a police investigation but no charges. There was no evidence that Hydro One was aware of this accusation or that it was a factor in the grievor's transfer.

On August 30, 2011, she was paired to work with Crystal McFadyen. Mr. DeKoning was also working at Manby that day and, upon seeing him, the grievor asked her supervisor why "that f[*]cking [*]sshole" was there. The grievor also told Ms. McFadyen that Mr. DeKoning was following her, and she was visibly shaken and crying at one point. At some point during the morning, Ms. McFadyen offered to accompany the grievor to the washroom. The grievor declined, telling Ms. McFadyen "Don't worry about me. I carry weapons." Ms. McFadyen was surprised and concerned, and reported the incident to the Electrical Foreman In Training, Mike Turner. Ms. McFadyen asked Mr. Turner not to disclose the comment to the foreman, Andrew Banks, until she had an opportunity to go back to the grievor to clarify what she meant.

The grievor later told Ms. McFadyen she meant the tools she carries, such as an electrician's knife and spud wrench. Later in the day, Ms. McFadyen noticed the grievor was having trouble using a pair of pliers. As a joke, the grievor told Ms. McFadyen, "I guess I'll have to sharpen my weapons." In the afternoon, upon encountering some wasps, the grievor told Ms. McFadyen "it would feel really good to kill something today" and jumped at the task of applying insecticide. Ms. McFadyen insisted this comment was not conveyed in a joking manner.

Late in the afternoon, the grievor met with her union representative, David McParland, Mr. Turner and Mr. Banks on an unrelated matter. During the meeting, the grievor raised the issue of Mr. DeKoning and again asked why "that f[*]cking idiot" was on the worksite and complained he was following her. She then said she had a knife. After a pause, she explained she had a knife because she was an electrician. Mr. Banks then said, "Well, we all have knives." At the end of the meeting, the grievor

asked if she could go home, and was permitted to leave. The next day, Mr. Banks and Mr. Turner conducted an investigation into the allegation that Mr. DeKoning was following the grievor. On September 1, 2011, the grievor was suspended without pay pending an investigation into the allegedly violent comments she made to Mr. McFadyen, and later to Mr. Banks and Mr. Turner.

Hydro One hired an external investigator to investigate the comments allegedly made on August 30, 2011, and the grievor's workplace behaviour generally. The grievor was interviewed on September 23, 2011. The investigator concluded that the grievor had violated the company's Code of Conduct by engaging in harassing behaviour and by making violent comments. The grievor responded to the investigator's report by letter on November 1, 2011. On November 11, 2011, Hydro One discharged the grievor for cause.

The Board held that the discharge was not discriminatory, but that it was excessive in all of the circumstances. The Board considered the decisions in *Kingston* and *Toronto Transit Commission and ATU, Local 113 (Merolle), Re*,[7] noting that these decisions were "[m]ore to the point" as they were decided following the Bill 168 amendments to the *OHSA*.

In considering the Bill 168 amendments, the Board held that they "make clear that, if there ever was any doubt, workplace violence, including threats of physical force, is a very serious matter indeed." However, the Board rejected the assertion that every act of workplace violence should result in dismissal of the worker in question. Citing *National Steel Car Ltd.*[8], a case decided after *Kingston*, the Board held that the *OHSA* does not prescribe any particular penalty for workplace violence, and that arbitrators are not precluded from assessing the degree of seriousness of the particular instance of workplace violence.

[7] [2013] O.L.A.A. No. 505 (Ont. Arb.).
[8] [2011] O.L.A.A. No. 574

The Board held that the grievor's comment that she "had a knife" was made in the context of her complaint about the presence of Mr. DeKoning at Manby and was capable of being interpreted as a threat, and that this constituted workplace violence under the definition in the *OHSA*. The Board held that while the grievor's comments were unacceptable and inexcusable, they were at the less serious end of the spectrum of workplace violence and did not warrant automatic dismissal. Among other things, the Board noted that the comments did not amount to a death threat and that it was not an imminent threat, as the grievor was permitted to return to work the next day.

The Board ultimately concluded that the grievor's conduct warranted serious discipline, but that discharge was excessive. The parties initially tried to resolve the issue of remedy on their own. When they were unable to come to an agreement, they returned to the Board for a decision on that issue. The Board ultimately ordered Hydro One to reinstate the grievor without back pay, but also without a loss of seniority. The Board further ordered that her discharge be removed from her disciplinary record and a 30-day suspension be entered in its place.

III. REVIEW OF CASE LAW IN THE NON-UNIONIZED WORKPLACE

(i) *Shakur v. Mitchell Plastics*

In *Shakur v. Mitchell Plastics*, the Ontario Superior Court held that an employer did not have cause to terminate an employee who assaulted a colleague with an open hand strike to the face. The employee and the colleague often engaged in verbal jousting, but there was no evidence that this behaviour had ever escalated to physical contact in the past, nor was there evidence that the employee had any history of violence. Following the incident, Shakur was dismissed for cause without notice or pay in lieu of notice. At the time of his dismissal he was 35 years old, had been employed by the defendant as a machine operator for approximately six years, and was earning approximately $33,000 per year.

Shakur sued Mitchell Plastics for wrongful dismissal. At trial, the issue was whether his misconduct had justified dismissal without notice. The Court held there was

no just cause. In essence, the Court adopted the "contextual approach" articulated by the Supreme Court of Canada in *McKinley v BC Tel*[9] and considered the fact that Shakur was a six-year employee without a disciplinary record. It noted that there was an element of provocation on the part of his colleague. Nevertheless, the Court's decision was somewhat surprising having regard to the changing landscape with respect to workplace violence and the impact of Bill 168.

(ii) *Phanlouvong v. Northfield Metal Products (1994) Ltd.*

In *Phanlouvong v. Northfield Metal Products (1994) Ltd.*, Mr. Phanlouvong, a 41-year-old employee with a clean disciplinary record and 16 years' seniority, was discharged for cause after assaulting a co-worker. The employee worked as a labourer on the shop floor of a manufacturing facility. He had a poor relationship with one of his co-workers, Mr. Bailey. Mr. Phanlouvong claimed that Mr. Bailey had previously made racist comments to him, although he never filed a complaint about this behaviour.

The day before the assault, Mr. Bailey had criticized Mr. Phanlouvong's manner of work. The next day, Mr. Bailey elbowed Mr. Phanlouvong as he walked by (causing no injury). Mr. Phanlouvong immediately punched Mr. Bailey in the face, breaking his safety glasses and causing a bloody nose and possible concussion.

Mr. Bailey received first aid and reported to a number of people, including the human resources manager and plant manager, that Mr. Phanlouvong had punched him in the face. Mr. Bailey was send to the hospital in a taxi. Mr. Phanlouvong was not questioned and was sent home for the day. The plant manager instructed the human resources manager to investigate the incident further, and stated that if Mr. Phanlouvong had struck Mr. Bailey, he should be fired for cause. The evidence was that the human resources manager spoke privately to another manager about whether there was any other option available short of termination, but was told if Mr. Bailey's story was correct, there was no choice but to dismiss him. Following a summary investigation, the employer dismissed Mr. Phanlouvong for cause.

[9] 2001 2 SCR 161

Mr. Phanlouvong commenced an action for wrongful dismissal. The Court held that although the misconduct was serious and warranted discipline, having regard to the previously clean disciplinary record, the employer ought to have considered steps short of summary termination. The Court ultimately awarded the dismissed employee fifteen (15) months' pay in lieu of reasonable notice (less mitigation earnings).

The Court based its decision primarily on a finding that the employer rushed to judgment by determining that Mr. Phanlouvong must be dismissed. The employer failed to consider, or even consult, Mr. Phanlouvong's unblemished work history. Citing *Shakur*, the Court held that the employer failed to consider whether its legitimate interest in demonstrating that workplace violence would not be tolerated could be adequately served by imposing progressive discipline. The Court held that a breach of the *OHSA* does not override the need to adopt a contextual and proportional approach in assessing whether an employer has established just cause for dismissal.

IV. REPRISAL CASE LAW UNDER SECTION 50 OF THE *OHSA*

The OLRB has authority to deal with complaints of reprisal or retaliation under Section 50 of the *OHSA*. The relevant provisions of Section 50 of the *OHSA* provide as follows:

> **No discipline, dismissal, etc., by employer**
> 50. (1) No employer or person acting on behalf of an employer shall,
>
> (a) dismiss or threaten to dismiss a worker;
> (b) discipline or suspend or threaten to discipline or suspend a worker;
> (c) impose any penalty upon a worker; or
> (d) intimidate or coerce a worker,
>
> because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the Coroners Act. R.S.O. 1990, c. O.1, s. 50 (1).
>
> …

> **Inquiry by Board**
> (3) The Board may inquire into any complaint filed under subsection (2) or referral made under subsection (2.1) and section 96 of the Labour Relations Act, 1995, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act. 1998, c. 8, s. 56 (1); 2011, c. 11, s. 13 (2).
>
> …
>
> **Onus of proof**
> (5) On an inquiry by the Board into a complaint filed under subsection (2) or a referral made under subsection (2.1), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer. R.S.O. 1990, c. O.1, s. 50 (5); 1998, c. 8, s. 56 (2); 2011, c. 11, s. 13 (5).

In its April 8, 2011 decision in *Barton v. Commissionaires (Great Lakes)*[10], the Board set out the requirements necessary to establish a violation of Section 50:

> 20. The combined effect of these provisions is that, for the Board to find that there was a reprisal in this matter, it must be satisfied that Mr. Barton was engaged in the exercise of his statutory rights, and that the exercise of those rights was a motivating factor, no matter how small, for Commissionaires' decision to terminate Mr. Barton's employment. Even if the employer has what would otherwise be legitimate reasons for termination, if one factor in the decision is the applicant having exercised his rights under the *OHSA*, the termination will be found to be a violation of section 50 of the *OHSA* (see for example, *MLG Enterprises Limited*, [1994] OLRB Rep. Nov. 1550). [emphasis added]
>
> …
>
> 22. In order to engage the reverse onus of s. 50, the application must fall within the parameters of the Act. At a minimum two conditions must be met: first some adverse impact (dismissal, discipline). Second that the reprisal was the result of seeking to enforce rights under the Act (see *E.C. King Contracting (a division of Miller Paving Ltd.*), 2010 CanLII 8391 (ON LRB), 2010 CanLII 8391 (ON L.R.B.).

[10] 2011 CanLII 18985 (ON LRB)

(i) *Conforti v. Investia Financial Services Inc.*[11]

One of the first significant decisions of the Board dealing with the nexus between the Bill 168 amendments to the *OHSA* and Section 50 was *Conforti v. Investia Financial Services Inc.* ("*Investia*"), a September 23, 2011 decision of Vice Chair Brian McLean. In *Investia*, the essential facts were not in dispute. The applicant, Shlomo Conforti, was engaged as an independent contractor by Investia Financial Services Inc. The dispute in this matter began when Investia employees sent emails to Conforti reminding him about various corporate compliance requirements. Conforti regarded the emails as amounting to harassment. He sent responding emails that were abrasive. He also complained to management regarding the emails he was receiving. His emails reflected an unprofessional, belligerent and derogatory tone. The employer warned him that further communications of that sort would result in his immediate dismissal. Conforti persisted in sending emails of a similar nature to Investia higher-ups. The Company fired him.

Conforti brought an application under Section 50 of the *OHSA* before the OLRB. The Board invited submissions from Conforti as to whether his application actually made out a violation of Section 50 on the alleged facts and whether the application was something that the Board "should inquire into." On the basis of written submissions received from Conforti, the Board came to the conclusion that his application had "no prospect of success as pleaded even if the Board has jurisdiction to inquire into it." As such, the Board declined to inquire into the application and it was dismissed.

In coming to that conclusion, the Board assessed whether employer reprisals in connection with harassment complaints under the Bill 168 provisions of the *OHSA* constituted a violation of the statute. Vice Chair McLean began by noting the following:

> 10. … The Board cannot take jurisdiction over something unless the *OHSA* or another piece of legislation says it can. Section 50 of the *OHSA* tells the Board when it can take jurisdiction over health and safety reprisal complaints. There are three bases upon which the Board can take jurisdiction under section 50 of the

[11] [2011] O.L.R.B. Rep. 549

> *OHSA*: - when a worker has "acted in compliance with the Act"; when a worker has "given evidence"; or when a worker "has sought the enforcement" of the Act or the regulations. In my view, the latter basis is the only one that applies in the "typical" harassment complaint situation as in this case.

The Vice Chair then turned to deal with the new workplace harassment provisions of the *OHSA*. He reviewed the statutory requirements for employers to create a policy with respect to workplace harassment; to develop and maintain a program to implement the policy; and to provide a worker with appropriate information and instruction on the contents of the policy and program with respect to workplace harassment. Having reviewed the new amendments to the legislation, the Vice Chair came to the following conclusions:

> 13. Therefore, it appears the *OHSA* only requires an employer to put a workplace harassment policy and program in place and to provide a worker with information and instruction as appropriate. The *OHSA* does not provide any further requirements and, in particular, does not provide that the duties under ss. 25, 27, and 28 apply with respect to workplace harassment. Further, the *OHSA* provides no specific rights to a worker with respect to workplace harassment.
>
> 14. To look at it another way, the *OHSA* specifically gives the Board the power to enquire into the situation where an employee is fired for complaining about a missing guard on a machine but does not specifically give the Board the power to enquire into the situation where an employee is fired for complaining about harassment. In the case of an employee who claims that the workplace is unsafe because a machine is lacking a guard, the employee is, when complaining, seeking to force the employer to comply with the statutory obligation to ensure protective devices as prescribed in the Act are provided (section 25(1)(a)) or take every precaution reasonable in the circumstances for the protection of a worker (section 25(2)(h)).
>
> 15. In the case of an employee who complains that he has been harassed, there is no provision in the *OHSA* that says an employer has an obligation to keep the workplace harassment free. The only obligation set out in the Act is that an employer have a policy for dealing with harassment complaints. The legislature could very easily have said an employer has an obligation to provide a harassment free workplace but it did not.

In concluding his analysis of the significance of the Bill 168 amendments, the Vice Chair stated:

> 17. What it appears the Board does not have the authority to do is to adjudicate upon the practical application of a policy that otherwise complies with the Act. If an individual complains under an employer's workplace harassment policy and doesn't like the way the employer handled the investigation (i.e. it didn't interview anyone), and then that person complains to the employer about its poor investigation and is fired, the Board appears not to have the authority under section 50 to deal with that situation. The discharge is not a reprisal as defined under section 50, because the Act does not dictate how an employer will actually investigate a harassment complaint and protect a worker who complains about that practical task not being performed properly. The Act just does not give us the authority to deal with this situation.
>
> 18. The issue comes back to the rules of delegated statutory power. The Board only has the ability to adjudicate on matters that the Legislature, through the Act, tells us we have the authority to adjudicate upon and all powers which are practically necessary for the accomplishment of the statutory objective. Our authority to deal with reprisal complaints is set out in section 50 of the Act. With respect to the new harassment provisions, the Board's authority appears very limited. The Legislature could have very clearly opened up the Board's authority beyond what is there, but it chose not to. The Board has no power to decide otherwise. Individuals who find themselves in situations that the Board cannot remedy will usually have other options, via a grievance or a court action. But if for some reason they don't, the Board does not have the authority to create some free-standing jurisdiction in order to help them.

Ultimately, as noted above, Vice Chair McLean declined to inquire into Conforti's application and dismissed it. Given that context, his commentary and assessment regarding the significance of the new Bill 168 provisions of the *OHSA* amounted to *obiter dicta* or commentary "in passing" rather than actual reasoning that informed his decision in the matter.

(ii) *Ljuboja v Aim Group Inc.*[12]

Vice Chair McLean's interpretation of the amendments to the *OHSA* in *Investia* came under close scrutiny in the Board's subsequent decision in *The Aim Group Inc. and General Motors of Canada Limited*, a November 22, 2013 decision of Vice Chair Nyman ("*Aim Group*"). In that case, the applicant, Peter Ljuboja, alleged that the responding parties, The Aim Group Inc. ("Aim") and General Motors of Canada Limited ("GM"), violated sub-section 50(1) of the *OHSA* when his employment was terminated in or about December 2012.

By way of response, Aim and GM denied any violations of the Act or that Ljuboja's dismissal was in any way connected to the exercise of rights under the legislation. In any event, both Aim and GM asserted that Ljuboja's application should be dismissed by the Board without a hearing because it failed to plead a *prima facie* case. In the alternative, they asserted that the Board lacked jurisdiction to adjudicate the application.

Ljuboja was employed by Aim and placed in a managerial position at a GM plant under a contract between Aim and GM. The essence of Ljuboja's allegations was that in a meeting between him and his two supervisors, one of the supervisors told him to "shut the fuck up"; "if you don't like your fucking job then get the fuck out of here"; and "manage your fucking business." Ljuboja alleged that, due to his supervisor's comments, he feared for his safety and for the safety of the work environment.

According to his complaint, the next day, Ljuboja was summoned into a meeting with the two supervisors who accused him of having an attitude problem and "causing the fight." Ljuboja reported the incident to GM's human resources manager who assured him that reporting the incident would not result in any retaliatory action. Ljuboja then filed a formal written complaint with GM's human resources department. A few days later, the supervisor in question apologized to Ljuboja who was then assured that the matter was concluded.

[12] 2013 CanLII 76529 (ON LRB)

However, shortly thereafter, Ljuboja's employment was terminated. Not surprisingly, Ljuboja brought an application to the Board alleging that he had been dismissed as a result of having made a complaint regarding his supervisor's conduct.

The Board invited the parties to make written submissions with respect to the preliminary issues raised by Aim and GM. Aim and GM both submitted that, having regard to the existing case law (including the Board's then recent decision in *Investia*), the Board had no jurisdiction under the Act "to hear a complaint that a worker was terminated for filing a harassment complaint with their employer." Accordingly, Aim and GM submitted that Ljuboja's allegations did not make out a case for relief under the Act.

In its analysis, the Board focussed on the specific wording of Section 50. In particular, its focus was on whether Ljuboja was complying with the Act, seeking to enforce the Act or giving evidence in a proceeding under the Act and whether, as a result, he was penalized or retaliated against by his employer or person acting on behalf of his employer.

Ljuboja argued that his complaint raised allegations of workplace violence. The Board found that that was not the case. Workplace violence is defined in section 1 of the Act: "In order to meet that definition there must be actual physical force, an attempt to exercise physical force or a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force." The Board held that nothing alleged by Ljuboja met that definition. There was no allegation of any physical force or attempted physical force. The allegations were not objectively capable of being regarded as a threat to use physical force. The statements in question were unwelcome, rude, belittling and unprofessional but did not amount to any reasonably perceived threat of physical force.

In the Board's view, the resolution of the preliminary matter before it turned specifically on "whether an employer has any obligation under the Act to allow a worker to report incidents of workplace harassment. Put in slightly different terms, the issue for the Board is whether a worker who is making a complaint of workplace harassment to

his or her employer is seeking enforcement of the Act or acting in compliance with the Act."

The Board then turned to Vice Chair McLean's interpretation of the Bill 168 amendments as set out in his decision in *Investia*. It noted that the Act does not provide workers with a right to a "harassment free workplace." In particular, with the passage of Part III.0.1 of the Act, substantial obligations were imposed on employers with respect to the prevention of workplace violence but not with respect to workplace harassment. For example, with respect to workplace violence, employers must:

- implement measures and procedures to control the risk of workplace violence and summon immediate assistance if workplace violence is even likely to occur (subsection 32.0.2(ii)(a) and (b));
- conduct a workplace violence risk assessment and subsequent reassessments (subsection 32.0.3);
- take steps with respect to preventing domestic violence in the workplace (subsection 32.0.4); and,
- expressly clarify that the employer duties in section 25 (including subsection 25(2)(h)), the supervisor duties in section 27 and the worker duties in section 28 all apply as appropriate with respect to workplace violence (subsection 32.0.5).

As the Board noted, none of these obligations appear in Part III.0.1, or anywhere else in the Act, with respect to workplace harassment. Thus, in the Board's words, the Legislature's omission of these obligations with respect to workplace harassment and inclusion with respect to workplace violence "must have been deliberate." By way of comparison to what employers must implement with respect to workplace violence, an employer's workplace harassment-related obligations included the following:

- prepare a policy about workplace harassment (section 32.0.1(b));
- review the policy annually (section 32.0.1(3));
- post a written copy of the policy in the workplace (section 32.0.1(2));

- develop and maintain a program to implement the policy (section 32.0.6(1)) that must:
  - ensure that the program includes measures and procedures for reporting incidents of workplace harassment to the employer or supervisor (section 32.0.6(2)(a));
  - ensure that the program sets out how the employer will investigate and deal with incidents and complaints of workplace harassment (section 32.0.6(2)(b)); and
- provide workers with information on the contents of the policy and the program (section 32.0.7(a) and (b)).

In summary:

> Reading these provisions as a whole, the obligation on employers with respect to workplace harassment is entirely procedural. There is an obligation on an employer to develop and implement an internal process for reporting, investigating and dealing with workplace harassment issues. There is, however, no obligation on an employer to provide any substantive result and thus no ability for a worker to insist on any particular outcome. Moreover, employers are provided with significant leeway in determining the process that they will adopt by which workers may make complaints and those complaints will be investigated and dealt with. There are in fact no specific procedural criteria set out in the Act that must be adopted by employers other than including measures and procedures for reporting incidents of harassment to the employer or supervisor and requiring the employer to set out how it will investigate and deal with incidents and complaints of workplace harassment. While the Legislature has authorized the prescription of other elements by regulation, no such regulation has yet come into being.

Referring to Vice Chair McLean's reasoning in the *Investia* decision, the Board agreed that if an employer refused to implement a workplace harassment policy, and a worker filed a complaint in that regard, subsection 50(1) of the Act would prohibit the employer from penalizing or retaliating against the employee for bringing such a complaint. In that scenario, the worker would have been seeking the enforcement of the Act by requiring the employer to comply with statutory requirements. Similarly, if the employer failed to post its policy or if the policy did not set out a complaint mechanism

or procedure for how it would investigate and deal with a potential complaint of workplace harassment, subsection 50(1) would likely prohibit the employer from retaliating against the employee in the event of a complaint of non-compliance with the statute.

The Board also noted that in the event that an employee were to file an application complaining about the method by which a complaint was investigated by the employer, or if the employee were to contest a determination made by the employer in connection with the outcome of a complaint, such an application would likely be unsuccessful before the Board. That is, the Act "places no obligation on employers with respect to substantive outcomes, nor does it prescribe any explicit method by which complaints will be investigated or determined other than requiring employers to 'set out how' a complaint will be investigated and dealt with."

That being said, Ljuboja argued that if the Act requires an employer to create and implement a policy that sets out a process by which employers investigate and deal with harassment complaints, it would follow that an employer could not penalize or retaliate against an employee for having made such a complaint "without completely undermining the creation and implementation of the policy." As such, Ljuboja argued that the Board's interpretation of the scope of its authority in *Investia* "went too far and was flawed."

In dealing with that submission, the Board had this to say:

> 48. In paragraphs 14 and 15 of *Investia*, *supra*, the Board reasons that because the Act does not obligate employers to provide a harassment free workplace the Board has no jurisdiction or ability to inquire into an allegation that a worker was terminated because he or she made a harassment complaint to their employer. With the greatest respect, I accept the applicant's argument that this analysis is flawed because it fails to consider the distinction between, on the one hand, complaining that the employer has failed to provide a harassment free workplace and insisting on that substantive outcome and, on the other hand, complaining that the employer has failed to comply with its obligation to provide a policy through which workers may make complaints about workplace harassment. While employers are not obligated to provide the former, employers are obligated to provide the

latter. It appears from the reasons in *Investia*, *supra*, that this argument was not made to the Board in that case and therefore was not considered as part of the Board's reasons.

49. Accepting, as I do, that the Act requires employers to have an internal process for addressing instances and complaints of workplace harassment, it would entirely undermine that process if an employer is free to terminate a worker because he or she brought forward a complaint of workplace harassment in compliance with that process. An interpretation of the Act that finds employers are obligated to create and maintain a policy by which workers may bring forward complaints of harassment but are nevertheless free to terminate, or otherwise penalize or retaliate against, any worker for having actually made a complaint under that policy is, in my view, untenable. To interpret the Act in this manner would be to strip the employer's obligation to have a program to implement their workplace harassment policy through which workers may make a complaint of any meaning. Surely the Legislature did not intend in subsection 32.06(2) to spell out the obligation on employers to include measures and procedures for workers to report incidents of harassment *at their own peril*? Surely the Legislature did not envision that, in requiring employers to describe how they will "deal with" complaints of workplace harassment in subsection 32.02(2)(b), employers would be free to terminate the complainant merely because he or she had the temerity to complain about a course of unwelcome and vexatious comment or conduct?

50. An interpretation that allows employers to penalize or retaliate against workers who make a workplace harassment complaint would entirely undermine the procedural mechanism that the Act creates through which harassment issues can be brought forward in the workplace. If workers can be terminated for making a complaint that the employer's legislatively imposed policy enables them to do, then only the most intrepid or foolish worker would ever complain. In practical terms, there would be no measure or procedure for making a complaint of harassment. Moreover, the occupational health and safety value, whatever it may be (and I have speculated above as to some of the possible values of requiring such a process), that caused the Legislature to impose this obligation on employers would be eviscerated.

51. The corollary to this is that a worker who makes a workplace harassment complaint to his or her employer is seeking the enforcement of the Act because the worker is seeking to have the employer comply with its obligation to enable the worker to make the complaint. Alternatively the worker is acting in compliance with the Act by accessing the statutorily prescribed mechanism by which they are able to bring forward complaints of workplace harassment to their employer. Either way, the worker is seeking enforcement of the Act or acting in compliance with the Act,

> thereby bringing them within the ambit of the protection of subsection 50(1) of the Act.

The Board then went on to articulate its assessment of what the Act requires employers to do in connection with workplace harassment:

> 53. What the Act obligates employers to do is to develop and maintain a *program to implement the policy* with respect to workplace harassment (subsection 32.0.6). It is that program that must include the measures and procedures for workers to report incidents of harassment (subsection 32.0.6(a)). The question this raises is what does it mean to "develop and maintain a program to implement the policy"? First, it must mean more than simply developing and updating the policy. The Legislature could have said that but did not. Instead, it obligates employers to develop and maintain a *program* to *implement* the policy. The program must therefore be something more than just the policy and thus must be something more than merely creating and posting the policy; in my opinion it must include some active steps in carrying out the policy or giving effect to it.
>
> 54. Second, the concept of developing and maintaining a program to implement a policy appears elsewhere in the Act. Subsection 25(2) of the Act, which imposes a number of duties on employers, includes subsections 25(2)(j) and (k). Those provisions read:
>
> > Without limiting the strict duty imposed by subsection (1), an employer shall,
> >
> > …
> >
> > (j) prepare and review at least annually a written occupational health and safety policy and develop and maintain a program to implement that policy;
> >
> > (k) post at a conspicuous location in the workplace a copy of the occupational health and safety policy;
> >
> > …
>
> 55. The concept of developing and maintaining a program to implement the written occupational health and safety policy means more in this context than simply creating and posting the policy because those obligations are imposed elsewhere in these provisions. Rather, the meaning of "develop and maintain a program to implement the policy" in this context must be to ensure that the policy is carried out and complied with.

> 56. Finally, in addition to developing and maintaining a program to implement the harassment policy, an employer must also develop and maintain a program to implement the workplace violence policy (subsection 32.0.2(1)). Pursuant to subsection 32.0.2(2), that program must include the following:
>
> (a) measures and procedures to control the risks identified in the assessment required under subsection 32.0.3 (1) as likely to expose a worker to physical injury;
>
> (b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
>
> (c) include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;
>
> (d) set out how the employer will investigate and deal with incidents or complaints of workplace violence; and
>
> (e) include any prescribed elements.
>
> …
>
> 58. The same words, "develop and maintain a program to implement the policy" were chosen by the Legislature with respect to the harassment policy. Developing and maintaining a program to implement the policy must be more than merely recording the elements of the policy in writing. It must mean there is an obligation to actively carry out that policy. If this is correct, there is an obligation on an employer to enable workers to make complaints about incidents of workplace harassment. Terminating a worker because they made such a complaint would therefore be terminating the worker because they sought enforcement of the Act or were acting in compliance with the Act; namely, seeking to have their employer comply with its obligation to enable the worker to make the workplace harassment complaint or accessing the statutory mechanism by which they are able to make a complaint.

In the result, the Board concluded that it would not dismiss Ljuboja's application for failing to plead a *prima facie* case or on the basis that the Board has no jurisdiction to inquire into the complaint. Before doing so, the Board restated the scope of the remedies available to a worker in connection with workplace harassment under the Act:

> 63. In this respect, the Board considers it important to reiterate that remedies for complaints about workplace harassment and the harm caused by that harassment will have to be found elsewhere, such as at common law or, if the harassment is based upon a protected ground of discrimination, at the Human Rights Tribunal of Ontario. While the Act obligates employers to have a policy that enables workers to bring complaints forward, and the Board has the authority under section 50 to protect individuals who invoke that procedural right, the Board does not have any general authority to remedy the underlying workplace harassment that gave rise to the complaint in the first place.

(iii) *Saumur v. Commissionaires Ottawa*[13]

The significance and impact of the Board's reasoning in *Aim Group* is apparent in the Board's June 29, 2015 decision in *Saumur v. Commissionaires Ottawa*. The facts in this case were, in many respects, similar to those in *Aim Group*. The applicant, Constance Saumur, complained that her employer, Commissionaires Ottawa, violated subsection 50(1) of the Act when it dismissed her from her employment. Not surprisingly, the employer took the position that it had not breached the Act and that Saumur had not engaged in an exercise of her rights under the statute. Moreover, the employer took the position that there was no nexus between the workplace complaint that she had made and her subsequent dismissal.

Commissionaires Ottawa provides a range of security services at various facilities in Ottawa. It employed Saumur as a security guard from October 6, 2011 until it terminated her employment on June 20, 2014. Saumur's complaint was that starting in or about February 2014, she began experiencing continuous workplace harassment at the hands of her supervisor ("Hoffman"). She complained to the Company's Employee and Labour Relations Manager ("Britton") by phone. She then produced a written complaint in which she alleged that she was "really stressed out"; that she was repeatedly told that if she did not like the workplace she could transfer out or quit; she thought she was going to have a stroke; and that it was up to another female guard

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"Jane Doe" to decide first whether or not she wished to work at a location and on a shift that Saumur sought.

Saumur stated in her complaint that it was common knowledge that her supervisor and Jane Doe were having an affair. In her testimony before the Board, Saumur's evidence was that she had daily interactions with Hoffman in which he asked if she wished to be transferred or if she would like to quit, and he also said that he could get her fired.

In dealing with Saumur's complaint, Britton recorded three areas of concern:

(i) that Saumur took exception with how shifts were assigned to persons at the workplace;

(ii) that Hoffman treated Saumur inappropriately when talking to her because, she claims, in most encounters he would ask what her plans were on leaving the section or resigning her job;

(iii) that Hoffman was seeing Jane Doe in a sexual context and that that was influencing assignments at the section.

Britton set out these issues in an email to a fellow manager. The two managers then engaged an internal investigator ("Wisker") to investigate the third issue; that is, Saumur's allegation that Hoffman was having an affair with Jane Doe and that that relationship was influencing assignments at the section. Wisker recorded his understanding that the first two issues had been dealt with "at the management level." He proceeded to interview Saumur and Jane Doe but did not meet with Hoffman. He accepted a report from another manager that Hoffman "had quite clearly responded in the negative concerning the possibility of he and Jane Doe having any kind of personal relationship." Thus, the allegation of the affair between Jane Doe and Hoffman became the focus of the complaint. Wisker pressed Saumur on her allegations in that regard. He concluded that, in his meetings with Saumur, she had effectively retracted her allegations regarding the affair and committed to not making that sort of allegation again again.

Having regard to those facts, the Board found that Wisker's investigation "bore no relationship to the complaint that Hoffman was subjecting Saumur to workplace harassment." In her testimony, Saumur maintained that Jane Doe had herself told her about her sexual relationship with Hoffman. Saumur had communicated this to Wisker. However, because she had learned that her co-workers would not back her allegations regarding the alleged affair, Saumur was unable to establish the truth of her specific allegation that "everyone knew" that the affair was going on.

Ultimately, there was no evidence that the particulars of Saumur's allegations were ever put before Hoffman. Britton nevertheless testified that he and management had accepted Hoffman's response to Saumur's complaint; there was "no evidence" and, based on the information provided, Hoffman's version was more believable. Saumur's evidence was that no one had said anything to her about her harassment complaint.

Rather than communicate the results of its investigation to Saumur or to Hoffman, the employer disciplined Saumur with a formal warning on April 16, 2014. She was then subject to further discipline in May on the basis that she had been observed using her mobile phone while on duty on four occasions over three days. That discipline was issued in the form of a "CEO Reprimand."

Saumur's evidence was that Hoffman continued to harass her and follow her around notwithstanding her complaint. She also testified that she confronted Hoffman regarding his behaviour and called Britton to tell him that Hoffman was regularly checking up on her. She claimed that Britton responded that there was nothing wrong with Hoffman's conduct and that he ultimately "hung up on her." One week later, on June 20, 2014, her employment was terminated.

In its analysis, the Board was referred by both the applicant and the employer to the decision in *Aim Group*. Vice Chair Rogers noted that in his view,

> …it is critically important to recognize that *Aim Group* varied the lens through which the Board examines cases of this sort with the result that the responding party's assertions regarding the Board's unwillingness to accept the viability of the Act as affording certain protections in the context of workplace harassment are no longer

> valid. This is made evident by the following passages in the decision, all of which I adopt: ...

The Board concluded that the upshot of the circumstances before it was that the evidence and submissions of Commissionaires Ottawa did not discharge its onus under subsection 50(5) of the Act. That is,

> [t]he Commissionaires did not establish with clear and compelling evidence that there were continuing performance issues, that those were the only bases for its decision to terminate Saumur's employment as one who was not "a good fit", and that, in the words in Barton v. Commissionaires (Great Lakes), the applicant's harassment complaint was not "a motivating factor, no matter how small, for Commissionaires' decision"

Accordingly, the Board granted Saumur's application. As to remedy, the Board noted that Saumur sought reinstatement with compensation for lost wages. The employer objected to the remedy of reinstatement, referring to the passage of time and its contention that the employment relationship had been "irreparably damaged." The Board noted that there was no evidence to support the proposition of irreparable harm and stated that "the passage of time is not an answer to an employee's *prima facie* entitlement to reinstatement in circumstances such as are present here."

In the result, Commissionaires Ottawa was ordered to reinstate Saumur to her employment by no later than July 13, 2015 and to compensate her for "lost wages and benefits accruing over the period from June 20, 2014 with credit to [Commissionaires] for all payments made to the applicant and the applicant's employment or other mitigation earnings in the interim."

V. BILL 132: AN ACT TO AMEND VARIOUS STATUTES WITH RESPECT TO SEXUAL VIOLENCE, SEXUAL HARASSMENT, DOMESTIC VIOLENCE AND RELATED MATTERS

The amendments brought about by Bill 168 to the *OHSA* have not in any way diminished widespread concerns regarding the threat posed by workplace violence and harassment.

In light of widely publicized recent events, Canadians have become engaged in a discussion about sexual harassment and violence against women. With the release of "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment" in March 2015, the provincial government of Ontario has made a commitment to "strengthen[ing] our laws to help ensure that workplaces are free from sexual violence and harassment."[14] As part of the Action Plan, the government introduced Bill 132 to make changes to different pieces of provincial legislation. Of particular interest, Schedule 4 of Bill 132 proposes amendments to the *OHSA* that build on the amendments made by Bill 168. Although Bill 132 just had its first reading on October 27, 2015, employers should take note of the implications of these amendments on their internal policies and the resultant obligations of employers to address sexual violence and harassment in the workplace.

(i) Proposed Amendments to the *OHSA*

The following amendments of Bill 132 highlight its potentially significant implications for employers:

- The definition of "workplace harassment" in s. 1 of the *OHSA* is expanded to specifically include "workplace sexual harassment," which is defined as:

    (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

    (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

[14] "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment" (March 2015) p. 2, available online at: https://dr6j45jk9xcmk.cloudfront.net/documents/4593/actionplan-itsneverokay.pdf .

- The following subsections of s. 32.0.6 would expand the scope of the employer's workplace harassment policy:

> …
>
> (b) include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;
>
> (c) set out how incidents or complaints of workplace harassment will be investigated and dealt with;
>
> (d) set out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law;
>
> (e) set out how a worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation; and
>
> (f) include any prescribed elements.

- The new s. 32.07 creates a duty of the employer to conduct an investigation:

> *Duties re harassment*
>
> 32.0.7 (1) To protect a worker from workplace harassment, an employer shall ensure that,
>
> (a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;
>
> (b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;

(c) the program developed under section 32.0.6 is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment required under clause 32.0.1 (1) (b); and

(d) such other duties as may be prescribed are carried out.

Results of investigation not a report

(2) The results of an investigation under clause (1) (a), and any report created in the course of or for the purposes of the investigation, are not a report respecting occupational health and safety for the purposes of subsection 25 (2).

Information and instruction, harassment

32.0.8 An employer shall provide a worker with,

(a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and

(b) any other prescribed information.

- The addition of s. 55.3 allows an inspector to order an employer to do a third-party investigation, at the employer's expense:

55.3 (1) An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

Report

(2) A report described in subsection (1) is not a report respecting occupational health and safety for the purposes of subsection 25 (2).

(ii) <u>The *OHSA* vs. *Human Rights Code*</u>

Section 5(2) of the *Human Rights Code* gives employees the right to be free from harassment on the basis of *Code* grounds. Under that legislation, at s. 10(1), "harassment" is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome." "Sexual harassment" in the workplace is specifically prohibited at s. 7(2). In order to prove harassment under

the *Human Rights Code*, an employee must prove that there was a course of comment or conduct that was vexatious and was known (or should have been known) to be unwelcome. Employers are obligated to keep the workplace free of harassment and discrimination based on the *Code* grounds. Failure to take proper steps to address and prevent harassment, or situations in which workplace harassment occurs, could render employers liable under the *Code*.

The definition of "workplace sexual harassment" in Bill 132 is similar to the definition in the *Human Rights Code*, but is broader in that it is not limited to harassment based on *Code* grounds. Further, whereas the existence of workplace policies is a factor that the Human Rights Tribunal considers, Bill 168 made such policies mandatory. Bill 132 expands the content of such policies, and creates a statutory duty that does not exist in the *Human Rights Code*: that employers must investigate all "incidents and complaints" of workplace sexual harassment. Building on Bill 168, Bill 132 makes it clear that harassment (including sexual harassment) and workplace violence are workplace safety issues, not simply human rights issues.

(iii) Implications for Employers

The proposed amendments to the *OHSA* bring the issues of sexual violence and harassment to the forefront of public consciousness, while arguably bringing about some concrete changes that were expected (but not realized) following the amendments of Bill 168. Bill 132 puts the onus on employers not only to have harassment policies, but to adhere to such policies and review them annually. It imposes a statutory duty to investigate complaints. As a result, it will become increasingly important for employers to learn when investigations are required, i.e. what process follows "incidents and complaints" and what falls into "workplace sexual harassment"? Further, training of internal investigators will become important, as will understanding the circumstances in which an inspector may order an employer to institute a third-party investigation.

VI. LESSONS FOR EMPLOYERS

Having regard to the review of the case law set out above, the following lessons or takeaways are worth noting for employers in managing a post-Bill 168 workplace:

- Bill 168 did not create a zero tolerance policy for workplace violence or harassment.
- There is no "automatic response" to incidents of violence or harassment.
- In the unionized environment, the employer's response must still be reasonable, informed and proportionate.
- In the non-unionized workplace, the "contextual approach" articulated by the Supreme Court of Canada in *McKinley v. B.C. Tel* still applies; all of the relevant circumstances including the accused employee's service, disciplinary record and overall context must be considered.
- Verbal threats constitute violence, not merely harassment.
- Employers and workers alike must react to threats in the workplace.
- Employers must take direct action to address allegations of threats, violence or harassment.
- The employer has a duty to investigate allegations of threats, violence or harassment.
- Not every incident or allegation warrants a full-fledged investigation or an independent third party investigation.
- Trite to say, but each incident must be considered in its own context and circumstances; there is no "one size fits all" approach.
- Failure to conduct a proper investigation into allegations of violence or harassment may lead to significant liability (*Saumur v. Commissionaires Ottawa*).
- Training of employees with respect to workplace violence and harassment is key.
- Level of training provided to an employee accused of violence or harassment is an important element in determining the appropriate sanction for misconduct.

- The employer's obligation to "develop and maintain a program to implement the policy" means more than merely recording the elements of the policy in writing.

- There is an obligation to take active steps in carrying out the policy or giving effect to it.

- Any attempt to retaliate or reprise against an employee for making a harassment complaint may result in a successful application for reinstatement before the OLRB.

- Even if the employer has what would otherwise be legitimate reasons for discipline or discharge, if one factor in the decision is the applicant having exercised his or her rights under the *OHSA*, the discipline or discharge will be found to constitute a violation of Section 50 of the *OHSA*.

- Employers will need to plan and prepare for implementation of Bill 132.

- Among other things, Bill 132 confirms an obligation to investigate incidents of workplace violence and harassment and to report on the results of the investigation.

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