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Court of Appeal: One Incident of Sexual Harassment May Warrant Summary Termination

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Dismissal for just cause has been described as the "capital punishment" of employment law. Indeed, courts are generally reluctant to uphold a dismissal for just cause absent a finding of very serious misconduct, especially in cases involving long service employees with clean disciplinary records. However, as a recent decision from the Court of Appeal for Ontario in *Render v ThyssenKrupp Elevator (Canada) Limited*[i] confirmed, a single incident of workplace sexual harassment may constitute serious misconduct such that dismissal for just cause is warranted.

Background

Mark Render was the operations manager of ThyssenKrupp Elevator (Canada) Limited ("**TKE**")'s Mississauga office until his dismissal in March 2014. He had worked at TKE, including the predecessor company, for 30 years.

On March 6, 2014, Mr. Render was dismissed for cause for an incident that occurred on February 28, 2014, involving Mr. Render and a female co-worker, Linda Vieira. Ms. Vieira, an accounts manager in the same office, alleged that Mr. Render put his face for two or three seconds in close proximity to Ms. Vieira's breasts, slapped her buttocks, and said "good game" after his hand came into contact with her buttocks.

Following the incident, Mr. Render apologized to Ms. Vieira, but she considered the apology insincere. Mr. Render subsequently made numerous comments to his co-workers, such as "for 10 bucks," they could shake his hand that had touched Ms. Vieira's buttocks.

TKE investigated the incident and characterized Mr. Render's conduct as a sexual harassment. Following the investigation, TKE dismissed Mr. Render with cause, he sued TKE for wrongful dismissal.

Superior Court of Justice Decision

Mr. Render's position at trial was twofold: (1) TKE did not have cause in dismissing him because the slap was not sexual in nature; and (2) his dismissal was not a proportionate response to the incident.

The trial judge disagreed with both positions. With respect to the first position, the trial judge wrote:

Whether the act was a sexual harassment, sexual assault or simply a common assault, the purpose seems to be the same: to assert dominance over Ms. Vieira and to demean and embarrass her in front of her colleagues. [ii]

According to the trial judge, the act of slapping "was an act that attacked Ms. Vieira Vieira's dignity and self-respect" and that this "type of conduct is unacceptable in today's workplace."[iii]

The trial judge also rejected Mr. Render's second argument —holding that TKE's dismissal of his employment was proportionate in the circumstances. The trial judge reaffirmed the long standing principle that (a) the onus of proof is on the employer to establish that there was no other reasonable alternative to the termination of employment for cause and (b) the burden of proof is high, especially in cases involving long-service employees. In this case, in concluding that TKE's response was proportionate, the trial judge relied on the following aggravating factors in finding that TKE's disciplinary response was proportionate:

1. Render, as a supervisor and senior to Ms. Vieira, was in a position of authority over Ms. Vieira. As a supervisor, he was responsible for ensuring a safe wok environment, including for knowing and implementing TKE's anti-discrimination and anti-harassment policies.
2. TKE communicated a zero tolerance policy for harassment and discrimination to its employees eight days before the incident. The policy expressly provided that (i) sexual harassment can arise from a single incident; and (ii) sexual harassment includes (a) public humiliation and (b) unwelcome sexual touching.
3. Render showed a lack of remorse after the incident. In particular, he did not appreciate the seriousness of his act, as evidenced by his testimony that a slap on a subordinate female worker's buttocks was akin to a punch in his shoulder.

The trial judge considered two mitigating factors—namely that Mr. Render was a long service employee with a clean disciplinary record and that there was a joking culture in the office. The trial judge accepted Mr. Render's employment history as a mitigating factor, but was not prepared to consider the joking culture as a mitigating factor:

Although Ms. Vieira may have participated in the jokes, this does not mean she consented to being touched on a sexual part of her body. Also, she did not consent to being demeaned in front of her co-workers. Even in a joking environment there is a line that cannot be crossed, and that line includes physical touching without consent of a sexual and private part of someone's body. There is no place for any conduct which could result in a person feeling demeaned or disrespected.[iv]

In conclusion, despite Mr. Render's long-standing employment, coupled with a clean employment history, the trial judge was satisfied that Mr. Render's slapping of Ms. Vieira's buttocks and his lack of remorse following the incident justified TKE's dismissal of his employment for cause.

Court of Appeal Decision

Mr. Render appealed the trial decision on the basis that the trial judge:

1. erred in finding that slapping Ms. Vieira's buttocks was not accidental; and
2. misapprehended the evidence by finding that he was not remorseful when he had apologized to Ms. Vieira.

Mr. Render further argued that if the appeal is not granted, he should nonetheless be granted his entitlements under the *Employment Standards Act, 2000* [the ***"ESA"***], which provides a higher threshold for an employer to establish disentitlement to statutory termination amounts compared to the threshold for just cause at common law. Notably, under *ESA* regulations, an employee may only be disentitled to notice of termination or termination pay for misconduct if, among other reasons, the employee "has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer."[v] The common law provides for a broader range of employee conduct that can give rise to a just cause dismissal. The issue of whether Mr. Render's conduct met the *ESA* threshold was not addressed by the trial judge.

The Court of Appeal dismissed the appeal in part, upholding the termination on the basis that the single incident amounted to just cause dismissal under the common law, stating:

I would also add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate

workplace atmosphere that was allowed to get out of hand. As this court said in *Bannister* almost 25 years ago, it is a workplace atmosphere that can no longer be tolerated. Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed.[vi]

However, the Court of Appeal held that the incident did not meet the *ESA* threshold necessary to deny Mr. Render his statutory termination entitlements, relying on a line of case law interpreting the *ESA* and its regulations to require more than what is required for just cause for dismissal at common law. The Court of Appeal held that while Mr. Render's touching was not accidental, it was done in the "heat of the moment" and in reaction to a slight against him. Accordingly, Mr. Render was owed his minimum *ESA* entitlements to eight weeks of termination pay.[vii]

In making this finding, the Court of Appeal reaffirmed that the test "for cause" under the *ESA* such that an employee may be dismissed without termination entitlements requires that an employer demonstrate wilful misconduct on part of the employee. To constitute wilful misconduct, the employee must do something deliberately, knowing they are doing something wrong. The *ESA* test is higher than the test for just cause at common law. The Court of Appeal's decision confirms that in circumstances where an employee's misconduct is serious but not "wilful," an employer may have just cause to dismiss an employee at common law, while still being required to provide the employee with their minimum entitlements under the *ESA*.

Takeaway

The Court of Appeal's decision in *Render* is an important reminder to both employers and employees: a single incident of sexual harassment may lead to justifiable termination of employment for cause. However, the decision also highlights that employer must carefully examine the circumstances of sexual harassment and other incidents of misconduct to determine whether the conduct can be said to be "wilful" and, accordingly, whether it gives rise to just cause for purposes of both the common law and the *ESA*.

Render is also an important reminder to employers that they must not only investigate complaints, but also implement robust anti-harassment workplace policies and conduct training. In *Render*, the fact that TKE had communicated its policy of zero tolerance for harassment and discrimination to its employees, including Render, played a significant role in the court's decision to uphold the termination for cause.

WeirFoulds has developed a flexible and targeted **Employer Compliance Audit Program** to assist employers with their efforts to achieve and maintain compliance with their obligations under the applicable employment laws and regulations including obligations under occupational health and safety legislation. For more information about the Employer Compliance Audit Program, please contact Daniel Wong, Partner and Chair of WeirFoulds' Employment Law Group.

[i] 2022 ONCA 310 [**Appeal Decision**].

[ii] 2019 ONSC 7460 [**Trial Decision**] at para. 93.

[iii] Trial Decision at para. 94.

[iv] Trial Decision at para. 106.

[v] *Termination and Severance of Employment*, O Reg 288/01, s. 2(1).

[vi] Appeal Decision at para. 70.

[vii] Appeal Decision at para. 81. However, at para. 82, the Court of Appeal held that since there was no evidence in the trial record that TKE had a $2.5 payroll, it was not in a position to award statutory severance pay as requested by Mr. Render.

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