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> *"I interpret the legislation to mean that an employer must protect a worker from a hazardous person in the workplace."*

Arbitrator: *OHSA* Violence Provisions Have Significantly Changed Workplace Law

A recent decision by Arbitrator Elaine Newman in *Kingston (City) and CUPE, Local 109* demonstrates the impact the Bill 168 amendments under the *Occupational Health and Safety Act ("OHSA")* can have on an arbitrator's assessment of the appropriateness of discipline.

A 28 year municipal employee who worked as a truck driver/labourer met with her Local Union President (also a City employee) to prepare for a return-to-work meeting with management following her lengthy absence due to disability. During her meeting with the Union President, the employee became angry and abusive and accused the Union of having failed to properly represent her and her husband (a former employee). She also uttered a comment to the effect the Union President would soon be dead just like another Union steward who had died recently.

The Union President immediately advised the City he would not be attending the return-to-work meeting and that another Union official would be representing the employee. He also stated the employee had threatened his life.

The City investigated and concluded the employee had uttered a death threat and so it terminated her employment. It noted she had a long history of acting with aggression and anger, which had resulted in previous discipline as well as efforts to help her receive support to alter her behaviour (she had completed an anger management course only days before the incident). The City also noted her lack of an apology or any expression of remorse.

The employee grieved her termination and sought reinstatement. At arbitration, the City stated Bill 168 had resulted in *"a new deal in Ontario, with very little tolerance for an unremorseful perpetrator of violent misconduct"* and argued termination was its only option. It also argued that since efforts over the years to alter the employee's behaviour, through discipline as well supportive measures, had been unsuccessful and further, due to her lack of remorse, termination was the only outcome consistent with the City's statutory obligation to provide a safe workplace.

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The arbitrator upheld the termination and dismissed the grievance. She agreed a death threat had been uttered and the employee had neither apologized nor expressed remorse. She noted the *OHSA* defines *"workplace violence"* as including *"a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker"*. As well, she stated the *OHSA* harassment and violence provisions required an employer to "*protect a worker from a hazardous person in the workplace"*. Additionally, she stated Bill 168 has had the following four significant impacts on workplaces:

1. it has clarified how arbitrators, judges and adjudicators (as well as the workplace parties themselves) must think about incidents of harassment and violence; under the amended *OHSA,* language that is unwelcome and vexatious now constitutes harassment; further, language that makes a *"direct reference to the end of a person's life or that suggests impending danger"* falls within the definition of *"violence",* regardless of whether there is evidence of an immediate ability on the part of the perpetrator to do physical harm or of actual fear on the part of the person to whom the threat was directed;

2. it has changed how employers and workers must react to allegations involving threats; an employer must not *"hide its head in the sand, or take a passive stand, hoping that things will sort themselves out"*; since a threat constitutes *"workplace violence*" under the *OHSA* , it must be reported, investigated and addressed; while the *OHSA* does not create a "*zero tolerance*" regime requiring automatic termination in all cases, it does require employers to address workplace violence in a serious and thorough manner;

3. it has affected how arbitrators assess the reasonableness of discipline imposed in cases involving workplace harassment or violence; while the factors to be considered when assessing discipline are well-established (they include: who was threatened or attacked? was it a momentary flare up or a premeditated act? was a weapon involved? was there provocation? etc.), the fact the *OHSA* now defines threats as *"workplace violence"* means the seriousness of the incident is a factor to which arbitrators must give greater weight than previously;

4. it now requires arbitrators to consider *"workplace safety*" as an additional factor; instead of simply asking whether the employment relationship can be repaired if the employee is reinstated, arbitrators must now consider whether an employee seeking reinstatement reasonably can be relied upon to act in a manner that is safe to others - the employment relationship cannot be repaired if it is likely the employee will *"render the employer incapable of fulfilling its obligation to provide a safe workplace under the OHSA"*.

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Arbitrator Newman took a pointed and strong approach to the issue of workplace violence and the impact the Bill 168 amendments have had on how that issue must be addressed by the workplace parties. Her decision supports the notion the amended *OHSA* imposes a heightened obligation upon the workplace parties to address workplace harassment and violence in a serious manner. Although each case ultimately will turn on its own particular facts (i.e., termination will not always be the appropriate response), this decision underscores the appropriateness of employers dealing decisively with incidents of workplace harassment and violence.

If you would like more information, or if you require assistance in preparing or completing your Customer Service Standard policies and procedures, please contact one of our Human Resources lawyers.

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