What's New in HR Law

Arbitrator Makes Significant Findings Regarding Alleged Harassment and Resulting Investigation in Unionized Workplace

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BOTTOM LINE

An Ontario arbitrator held that management is not held to a "standard of perfection" in carrying out managerial and supervisory duties. Accordingly, not every wrong or mistake by a manager will necessarily constitute harassment. Further, in investigating allegations of harassment, employers are not required to conduct a perfect investigation, but rather to conduct the investigation in good faith.

Facts: Registered nurse alleges harassment by manager; Employer conducts internal investigation

A registered nurse in a Hospital (the "Grievor") filed a complaint alleging several incidents of harassment by her manager. The Hospital investigated the complaint. The investigation was led by a program director to whom the Grievor's manager, among other managerial personnel, reported. Following its investigation, the Hospital found the Grievor's complaint to be unsubstantiated. The Ontario Nurses Association (the "Association") subsequently filed a

grievance alleging that the Hospital violated the parties' collective agreement and the Ontario *Human Rights Code* by failing to provide the Grievor with a harassment-free work environment.

At the hearing, the Association argued that the alleged incidents of harassment amounted to "differential and unfair treatment" of the Grievor by her manager, and referred to the *Occupational Health and Safety Act*, which addresses workplace harassment. The Association also asserted for the first time that the Hospital had conducted a biased investigation.

The Determination

The Arbitrator made significant findings in respect of the following two issues before him:

1. Whether the Grievor was harassed by her manager.

2. Whether the Hospital had conducted a proper investigation into the Grievor's allegations.

Issue #1: Management not held to "standard of perfection"

In finding that the Grievor's manager had not harassed the Grievor, the Arbitrator made several important findings regarding the meaning of harassment. In particular, the Arbitrator concluded that management is not to be held to a "standard of perfection" in carrying out managerial and supervisory duties.

The Arbitrator expressly recognized that supervision is a "human business" into which human foibles come into play. Managers have the right to be wrong, to make mistakes, to occasionally overreact and underreact, without having to worry that each and every unsatisfactory exchange, at least when viewed from the perspective of the employee, will constitute "harassment". This is why a "*course* of conduct" or a "pattern" of vexatious behaviour is often looked for when determining whether harassment has occurred.

The Arbitrator further concluded that while acting in "good faith" may not be a complete answer to every harassment allegation, some human leeway must be afforded lest every workplace incident be treated as constituting harassment.

Issue #2: Employers' duty is to conduct investigation in good faith

The Arbitrator also concluded that the Hospital had conducted an adequate investigation into the Grievor's allegations. In so finding, the Arbitrator found that, in the absence of more onerous language in the collective agreement, the Hospital's duty was to conduct a good faith investigation into the Grievor's complaint. The Hospital had complied with that duty.

The Arbitrator also rejected a number of alleged flaws in the structure and conduct of the investigation that the Association submitted revealed "bias" or, perhaps, no real investigation at all. In particular, the Hospital's oversight in requiring the Grievor's manager to provide a written, as opposed to verbal, response to the Grievor's complaint in accordance with its policy did not call into question the honesty or integrity of the investigation. Further, the fact that the investigation was led by a program director to whom the Grievor's manager reported did not mean that the investigator was incapable of neutrality.

In addition, the Arbitrator concluded that not every case requires an expert or professional investigator. Accordingly, the fact that the program director's prior investigative experience was with respect to disciplinary matters, as opposed to harassment complaints, did not mean that she was unqualified to conduct the investigation. On the contrary, as a senior and experienced hospital administrator, and a former nurse, who had conducted upwards of 30 discipline investigations, the program director was "more than capable of conducting the investigation".

Finally, the Arbitrator addressed an allegation that the Grievor had been asked specific questions, rather than open-ended ones, about her complaint, while the opposite was true of the Grievor's manager. The Arbitrator found that this was true but not a flaw. The Grievor had filed a highly detailed complaint, and all that was needed in respect of that complaint was to fill in some factual blanks.

Conclusion

This decision is an important affirmation that imperfect conduct on behalf of managers and supervisors vis-à-vis their subordinates in unionized workplaces, while not ideal, does not necessarily constitute harassment. Further, an imperfect investigation into allegations of harassment is not necessarily problematic, as long as the investigation is conducted in good faith.

Forum: Grievance arbitration.

Date: August 3, 2017.

Citation: *Ontario Nurses Association v. Humber River Regional Hospital re Grievance of Maria (Rina) Cherubino* (August 3, 2017), Toronto (Arbitrator Russell Goodfellow) (Unreported).

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