

### **Ontario Court of Appeal Takes a Strong Stance on Workplace Harassment**

In *Hucsko v. A.O. Smith Enterprises Limited*, 2021 ONCA 728, the Ontario Court of Appeal upheld the for cause termination of an employee who had sexually harassed a co-worker. Prior to terminating the employee, the employer issued a final warning and advised the employee that he must complete sensitivity training and apologize to the complainant. The employee refused to apologize and denied any wrongdoing.

In response, the employee was terminated for cause. The Court of Appeal found that the employee's conduct of engaging in sexual harassment and in refusing to comply with the reasonable corrective action imposed by the employer resulted in a breakdown of the employment relationship and warranted termination for cause.

#### **Background and Decision Below**

The Plaintiff, John Hucsko, was terminated for cause by A.O. Smith Enterprises Ltd. ("A.O. Smith" or the "Company") following an internal investigation into a complaint of sexual harassment made against him to the HR Manager.

The investigators (the HR Manager and the Director of Finance/Administration) concluded that the Plaintiff had made four (4) inappropriate comments to the complainant, and that two of the comments were made after the Plaintiff's manager had advised him that his initial comments were inappropriate.

Following the investigation, the Plaintiff was issued a letter which set out the investigation findings and corrective action that would be required, namely:

1. That the letter constituted a final warning and that any further inappropriate comments would lead to his immediate termination;
2. That he would be required to complete sensitivity training; and
3. That he would be required to provide a direct apology to the complainant.

The Plaintiff responded to the letter through counsel and advised that he would not apologize to the complainant because he denied any wrongdoing. He also advised that he was agreeable to completing the sensitivity training but was adamant that the training was unnecessary.

In response to the Plaintiff's refusal to comply with the required corrective action, the Company terminated his employment for cause due to an irreparable breakdown in the employment relationship. The Company cited the fact that the Plaintiff made inappropriate and unwelcome comments to the complainant, the fact that he showed no remorse for his actions, and his willful insubordination in refusing to comply with the Company's decision on corrective action as the reasons for termination.

The Plaintiff then brought an action for wrongful dismissal against the Company. The trial judge found that the Plaintiff's conduct did not amount to cause for termination and awarded him a reasonable notice period of 20 months.

## **The Court of Appeal's Decision**

The Ontario Court of Appeal set aside the judgment of the trial judge, finding that the Plaintiff's conduct clearly amounted to cause for termination.

In coming to this conclusion, the Court of Appeal found that the trial judge had incorrectly applied the test for determining whether an employee's conduct gives rise to just cause for dismissal, which requires a determination of whether the employee engaged in misconduct that was incompatible with the fundamental terms of the employment relationship. This analysis requires the following steps:

1. Determining the nature and extent of the misconduct;
2. Considering the surrounding circumstances; and
3. Deciding whether dismissal is warranted and proportional.

At the first step, the Court of Appeal found that the comments made by the Plaintiff amounted to sexual harassment which created a poisoned work environment, and that the Plaintiff knew these comments were unwelcome. He had been advised as such by both the complainant and his manager.

At the second step, the Court of Appeal noted that the Plaintiff was a senior employee who had been with the Company for 20 years. He had recently received training on the Company's Workplace Harassment Policy, and was trusted to comply with this policy by his co-workers. Also relevant was the fact that the Company clearly followed the procedure set out in this policy both in investigating the complaint and issuing corrective action.

At the third step, the Court of Appeal found that the Plaintiff's misconduct resulted in a breakdown of the employment relationship and that termination for cause was a proportional response for the following reasons:

1. The Plaintiff confirmed that he understood sexual harassment was a "fireable offence";
2. The Company's initial action of offering the Plaintiff an opportunity to redeem himself and save his job by completing sensitivity training and apologizing to the complainant was a fair and proportionate response;
3. The Plaintiff's response of stating that the sensitivity training was unnecessary (despite the fact that he agreed to complete it) indicated a complete failure to acknowledge the seriousness of his conduct;
4. The Plaintiff refused to apologize to the complainant and denied any wrongdoing, which was a reasonable and essential requirement of the corrective action issued by the Company.

Accordingly, the Court of Appeal found that the termination of the Plaintiff's employment for cause was a wholly warranted response.

## **Practical Implications**

This decision confirms that the surrounding circumstances are highly relevant to the analysis of whether an employer has cause for termination. A refusal by an employee to acknowledge any wrongdoing, including

the refusal to apologize, can be an aggravating factor which may contribute to a finding that the employment relationship has been irreparably damaged where there is evidence of workplace harassment. This is particularly so where the employer's response to evidence of workplace harassment is reasonable and proportional.

\*\*\*\*\*

For further information, please contact a member of our growing team: [Leslie Dizgun](#), [Allyson Fischer](#), [Mitchell Smith](#), [Paul Schwartzman](#), [Justin Anisman](#), [William McLennan](#), [Alyssa Jagt](#), and [Oscar Moody](#).

This publication is intended only to provide general information. It should not be relied on as legal advice.