Hucsko v. A.O. Smith Enterprises Limited (2021) Ontario Court of Appeal – Adamant refusal to apologize for sexual harassment can be cause for termination

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Background

The employer, A.O. Smith, terminated John Hucsko, a senior employee with 20 years' service, with cause following an investigation into complaints of sexual harassment by a female employee. The investigation found four incidents where Hucsko made inappropriate comments which amounted to sexual harassment.

In response to the investigation, the employer offered corrective action in the form of a final warning, mandatory refresher training, and a formal apology to the complainant. Hucsko was willing to comply with the training requirement but was 'adamant' that training was unnecessary because he denied any wrongdoing. He also refused to apologize. The employer ultimately terminated Hucsko for just cause. While the trial judge found the employer lacked just cause, the Ontario Court of Appeal allowed the appeal and upheld the termination.

Test to determine if there is just cause for termination

The Court of Appeal applied the test set out in *Dowling v. Ontario (Workplace Safety and Insurance Board)* 2004 246 DLR (4th) 65:

1. Nature and extent of the misconduct.

2. Consider the employee within the employment relationship, including age, employment history, seniority, role and responsibilities, type of business, relevant policies and practices, and the employee's position within the organization.

3. Assess whether the misconduct is reconcilable with sustaining the employment relationship and whether the misconduct is sufficiently serious that it would give rise to a breakdown in the employment relationship.

Nature and extent of misconduct – definition of sexual harassment

The employer's investigation substantiated the complainant's allegations of four incidents in which Hucsko made inappropriate comments to her, even after he was told by her that they were

inappropriate and unwelcome, and after he was warned by his superior to cease. The four incidents (detailed in the decision) all involved comments of sexual innuendo, which Hucsko either denied or attempted to explain away as a misunderstanding by the complainant.

The Court of Appeal relied on the definition of sexual harassment set out by the Supreme Court of Canada in *Janzen v. Platy Enterprises Ltd* [1989] 1 S.C.R. 1252 (p. 1284):

> "Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is…and has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being."

The Court notes that sexual harassment "is not confined to actions but includes comment with a sexual innuendo." The Court quotes from a leading text on sexual harassment (A. Aggarawal and M. Gupta, *Sexual Harassment in the Workplace*, 2000) at p. 119:

> "Sexual harassment is a form of discrimination based on sex. It occurs when a person is disadvantaged in the workplace as a result of differential treatment in the workplace. It is an unwarranted intrusion upon the sexual dignity of the person. It consists of acts that are unwarranted, unsolicited and unwelcome. It can be overt or subtle. Even if the nature of the harassment is not physical, it can still be considered sexual harassment if it creates a poisoned environment, even if there is no economic consequence such as loss of one's job, loss of seniority, or economic consequences of a similar nature. It is also clear that even if it might be considered that what has occurred is sexual banter, common to the workplace, if a person finds it objectionable and makes it known in clear and precise terms that such actions are not acceptable to the person, then that is the standard of behaviour that is established *vis-à-vis* that person."

Applying these principles and definitions, the Court found there was no doubt that the comments made by Hucsko constituted sexual harassment (p. 10-11):

First, they were each based on gender and bore an unmistakable sexual connotation. They were comments that would only have been made by him to a woman, not a man.

Second, the comments were demeaning and undermined the dignity of their recipient. They implied provocative behaviour by the recipient or that she welcomed sexual suggestions made by him.

Third, the comments were unwelcomed, and he knew that. He was told that by the complainant and his superior following initial comments.

Fourth, they created a poisoned atmosphere for the complainant in her workplace. They were of a sexual nature, and they might reasonably be expected to cause discomfort and humiliation and create a hostile and offensive work environment.

Surrounding Circumstances

The Court considered the fact that Hucsko was a 20-year employee, in a senior position in which he would have been trusted to abide by the Workplace Harassment and Discrimination Policy. The Court also noted that he had recently received training under the policy, and the policy clearly set an expectation that he would treat employees with dignity and respect. The complainant was in a subordinate position who had to work closely with him.

The company's policy clearly defines harassment and sexual harassment and sets out corrective action that may be taken when an employee has engaged in harassment or sexual harassment, including termination.

Whether Dismissal is warranted

The Court notes that the employer did not initially terminate Hucsko because of the sexual harassment found by the internal investigation. They gave him the opportunity of corrective action – to agree to mandatory training and to issue an apology to the complainant. The Court found this was a fair and proportionate response by the employer. Hucsko initially agreed to the training but was adamant that training was unnecessary because he denied any wrongdoing, and he refused to issue an apology. As a result of this response, the employer concluded there was a 'complete breakdown in the employment relationship' and they had no confidence that Hucsko would not engage in the same type of behaviour in the future. He was therefore terminated with cause. The Court found his response demonstrated a complete failure to acknowledge the nature and the seriousness of his conduct, and the effect it had on the complainant and the atmosphere in the workplace.

While the trial judge found a lack of cause, the Court of Appeal found that, faced with Hucsko's lack of contrition, lack of understanding of the seriousness of his conduct, and his refusal to comply with reasonable corrective actions including an apology, the employer's decision to terminate his employment was a proportional and warranted response. It also found the decision met all components of the three-part test set out in *Dowling*.

Takeaways for employers and workplace investigators

The decision of the Court of Appeal provides a clear and concise overview of the definition of sexual harassment in the workplace and its application in the case of harassment in the form of inappropriate comments. It also sets out and applies the proper test (from *Dowling*) to determine if there is just cause for discipline, including termination, in response. The Court's finding of sexual harassment based on inappropriate comments is instructive for employers and investigators.

There are important takeaways from this case that reinforce the serious nature of sexual harassment in the workplace, and the appropriate factors to be considered in responding to sexual harassment. In this case, the respondent's seniority and senior position did not mitigate his wrongdoing –rather it set the bar higher for the behaviour that was expected of him. The Court's findings on the employer's response to the respondent's failure to admit wrongdoing and accept the corrective actions offered to him is also instructive for employers as they seek to determine

appropriate responses to workplace sexual harassment, and deal with employees (particularly senior employees) who refuse to accept responsibility for their actions.

The decision of the Ontario Court of Appeal was issued on October 15, 2021 (**www.ontariocourts.ca/decisions/2021/2021ONCA0728.htm)**

If you would like assistance in reviewing your organization's policy on harassment/discrimination, and your processes for response, please contact: Hulton Workplace Resolutions:

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