

Single Incident of Workplace Sexual Harassment Can be Just Cause for Dismissal

Stefanie Di Francesco

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The threshold for establishing just cause for dismissal is high. Courts consider a dismissal for just cause to be tantamount to “capital punishment” in employment law. Accordingly, the courts generally have been hesitant to uphold dismissals for just cause where an employee has long service and an otherwise clean disciplinary record.

In a recent decision, however, the Ontario Superior Court of Justice found that a single incident of workplace sexual harassment is such serious employee misconduct that it can warrant just cause for dismissal – particularly if there are aggravating factors. In *Render v. ThyssenKrupp Elevator (Canada) Limited*, the Court upheld the termination of a 30-year employee with a clean disciplinary record following a single incident of sexual harassment.

The Facts

The accused was the operations manager of the company’s Mississauga branch. The complainant was an account manager at the same branch. The branch was a small office. Of the 13 people working there, ten were male and three were female. Everyone socialized at work and there was regular joking and bantering in the office.

While the operations manager and the complainant gave differing accounts of the incident, the Court found that after the complainant made a joke about the operations manager being short, he crouched down, put his face in close proximity to her breasts for two or three seconds, and then slapped her on the buttocks and said: “good game” (as if they were football players).

The incident was witnessed by several male co-workers. It was clear to all the witnesses that the complainant was upset by the incident. She told the operations manager that the slap was “not OK” and “I can’t believe you did that.” In response, the operations manager asked her if she was “serious” and said: “you have punched me in the arm in the past.” The complainant said it was different because “you hit me on a private sexual part of my body.”

The operations manager apologized to the complainant, but his apology was seen to be insincere. He made joking comments about the incident to his male co-workers. For example, he told them that “for 10 bucks”

they could shake the hand that had touched the complainant's buttocks.

The Findings

The Court confirmed that whether an employer is justified in dismissing an employee for just cause requires an assessment of the context of the alleged misconduct. Underlying the contextual analysis is the principle of proportionality. The Court confirmed that an effective balance must be struck between the severity of an employee's misconduct and the sanction imposed.

The Court found the act of slapping the complainant on the buttocks in the presence of male co-workers to be very serious workplace misconduct. The Court concluded that the act undoubtedly "attacked her dignity and self-respect" an "this type of conduct is unacceptable in today's workplace."

In assessing whether just cause was an appropriate and proportional disciplinary response, the Court found the following to be aggravating factors:

- The operations manager was in a position of authority over the complainant and was a supervisor in the office. As a supervisor he was responsible for knowing and administering the company policies including the Anti-Discrimination and Anti-Harassment Policy. He was responsible for ensuring a safe work environment.
- The "zero tolerance" policy had been communicated to the operations manager eight days before the incident. The policy and training on the policy were clear that sexual harassment could arise from a single incident, involve public humiliation, and include unwelcome touching. The policy also provided that any employee found to have engaged in this type of conduct would be subject to discipline up to and including termination of employment.
- The operations manager's reaction to the incident showed a lack of remorse and appreciation of the seriousness of his act. He maintained that a slap on a subordinate female worker's buttocks was the same as a punch to his shoulder, and that he had done nothing wrong.

Notably, the Court was not prepared to consider the office culture to be a mitigating factor. Although there was a joking culture in the office and the complainant had participated in the jokes, the Court found that those facts did not mean that the complainant consented to being touched on a sexual part of her body and being demeaned in front of her co-workers. The Court found that: "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."

As the only mitigating factor being the operations manager's long service with no disciplinary record, the Court found that just cause was an appropriate disciplinary response when balancing the aggravating and

mitigating factors and considering the severity of the single incident.

Employer Take-Aways

This case affirms that a contextualized approach remains essential to determine just cause for dismissal, but also sends a clear message that one serious incident of workplace sexual harassment can justify the dismissal of an employee for just cause – even a long-service employee with a clean disciplinary record.

To proactively prevent incidents such as these, it is important to implement a workplace harassment policy, to train employees on that policy, and to ensure that employees are made aware of its importance.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.