Cassels

Ontario Court of Appeal Weighs in on the Meaning of “Wilful Misconduct”

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In April of 2022, the Court of Appeal released its decision in *Render* v. *ThyssenKrupp Elevator (Canada) Limited* 2022 ONCA 310. This decision provides employers with some guidance on how and when to distinguish between just cause for termination under the common law and wilful misconduct under the *Employment Standards Act, 2000* (the ESA), a distinction that was critical to the decision of the Court of Appeal in *Waksdale* v. *Swegon North America*. (See our article on this decision here.)

The plaintiff in this case, Mr. Render, was a former employee of ThyssenKrupp Elevator (Canada) Limited (ThyssenKrupp) who had been terminated for just cause in 2014. At the time of his termination, Mr. Render had been employed by the company for over 30 years and held a managerial position. His job required him to directly manage four employees and indirectly manage up to 40 others. The incident that resulted in the termination of Mr. Render’s employment was an interaction with a woman who reported to him, Linda Veira, which took place in the presence of several other male coworkers. Ms. Veira alleged that Mr. Render had placed his face near her breasts for a short period of time (two or three seconds) and had then slapped her on her bottom, after which he said, “Good game.” The evidence at trial indicated that male coworkers in the workplace would frequently slap each other on the bottom and say, “Good game!” The evidence at trial also established that joking and teasing was a regular feature of the ThyssenKrupp workplace and that Ms. Veira had often engaged in teasing her coworkers, including Mr. Render.

Ms. Veira’s evidence was that although the initial interaction was in jest, the atmosphere in the room changed once Mr. Render made contact with her bottom. She alleged that she immediately told Mr. Render she was not comfortable with the physical contact. Mr. Render responded by reminding her that she had punched him in the shoulder recently. Mr. Render said he apologized; Ms. Veira denied this.

The trial judge found that immediately after the incident, Mr. Render retreated to his office and discussed the interaction with two of the male coworkers who had been present. In that meeting, Mr. Render was asked how it felt to make contact with Ms. Veira’s bottom. In response, he offered the other employees the opportunity to shake his hand “for 10 bucks.” Shortly thereafter, Mr. Render encountered Ms. Veira in the hallway and he offered an apology, noting that the contact was intended to be a joke and confirming that he was not trying to sleep with her. Ms. Veira testified that she believed the apology was insincere. Mr. Render’s manager gave evidence that Mr. Render had also advised him that the contact with Ms. Veira was intended to be a joke and that he would apologize.

Ms. Veira ultimately made a formal complaint to her manager and to ThyssenKrupp's Human Resources department regarding the incident and the company conducted an investigation. When Mr. Render was informed of the investigation, he made a counter-complaint against Ms. Veira alleging that she had assaulted him when she punched him in the shoulder and also alleging that she and others had made anti-Semitic comments in the workplace. In response to the allegations by Ms. Veira, Mr. Render told the investigator that the slap on Ms. Veira's bottom had been accidental, which the trial judge found was contrary to his prior statements that the physical contact was intentional and supposed to be joke.

The employer's investigation concluded that Mr. Render had intentionally made physical contact with Ms. Veira and that the contact was contrary to ThyssenKrupp's policies on harassment and discrimination. Notably, Mr. Render had received training on ThyssenKrupp's policies and appropriate workplace behaviour just one week prior to the incident in question. ThyssenKrupp's position at the time was that "the slap" constituted just cause for Mr. Render's termination. It did not rely on the comments made by Mr. Render to his coworkers after the incident (wherein he offered them the opportunity to shake his hand for $10), the potentially retaliatory complaint regarding assault on the basis of her shoulder punch, or the lack of consistency between Mr. Render's statement to investigators and his comments to coworkers regarding the nature of the physical contact (i.e., that the contact was accidental as opposed to intentional and supposedly humorous).

Mr. Render brought a claim against ThyssenKrupp and alleged that his termination was wrongful because the contact with Ms. Veira had been accidental and, further, that ThyssenKrupp's response had been disproportionate. Mr. Render argued that ThyssenKrupp had failed to meet its duty to evaluate whether a lesser penalty would have been sufficient to address his alleged misconduct.

The trial judge concluded that Mr. Render's conduct was intentional and constituted sexual harassment at law. The trial judge also noted that Mr. Render had not expressed a sufficient understanding of the harmful nature of his conduct and lacked contrition. In light of Mr. Render's managerial position, this made his continued employment untenable even though ThyssenKrupp could not satisfy the Court that it had given meaningful consideration to any alternatives to termination. The trial judge found that summary dismissal was a proportionate response to the incident and that Mr. Render was not entitled to any damages arising from the termination of his employment by ThyssenKrupp. Mr. Render appealed.

Mr. Render asserted in his appeal that the trial judge had made certain factual errors. The Court of Appeal dismissed these arguments, noting that trial judges are generally entitled to deference in their assessment of evidence and witness credibility. Mr. Render then argued that the trial judge had erred in failing to consider whether he was entitled to notice of termination and severance under the ESA even if ThyssenKrupp had shown that there was just cause at common law for the termination of his employment. On this point, Mr. Render was successful.

The Court of Appeal agreed with the trial judge that Mr. Render's conduct had constituted just cause for

termination at common law. However, it found that the conduct did not fall within the definition of "wilful misconduct" under the ESA and, as such, Mr. Render could not be deprived of his statutory entitlements on termination. Regulation 288/01 of the ESA states that an employee "who has been guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer" is not entitled to notice of termination or severance pay. At paragraph 79 of the decision, Justice Feldman (writing for the Court) considered this exemption and noted as follows:

The law on the interpretation of the prohibition sections has been consistently stated to require more than what is required for just cause for dismissal at common law. In Plester v. Polyone Canada Inc.*, 2011 ONSC 6068, 2012 C.L.L.C. 210-022, aff'd 2013 ONCA 47, 2013 C.L.L.C. 210-015 (the reasons on appeal found it unnecessary to address this point), Wein J. explained that in order to be disentitled from the ESA entitlements under the "wilful misconduct" standard in the Regulation, the employee must do something deliberately, knowing they are doing something wrong. In the case before Wein J., the conduct was not preplanned and not "wilful" in the sense required under the test, which she described as follows at paras. 55-57:*

The test is higher than the test for "just cause".

"In addition to providing that the misconduct is serious, the employer must demonstrate, and this is the aspect of the standard which distinguishes it from 'just cause', that the conduct complained of is 'wilful'. Careless, thoughtless, heedless, or inadvertent conduct, no matter how serious, does not meet the standard. Rather, the employer must show that the misconduct was intentional or deliberate. The employer must show that the employee purposefully engaged in conduct that he or she knew to be serious misconduct. It is, to put it colloquially, being bad on purpose".

Both counsel seemed to be slightly bemused by the recent authorities that distinguish between the definition of just cause and wilful misconduct. In my view, however, the distinction is quite obvious: Just cause involves a more objective test, albeit one that takes into account a contextual analysis and therefore has subjective elements. Wilful misconduct involves an assessment of subjective intent, almost akin to a special intent in criminal law. It will be found in a narrower cadre of cases: cases of wilful misconduct will almost inevitably meet the test for just cause but the reverse is not the case.

The conduct of Mr. Plester was serious, and his failure to report deliberate. However, it did not rise to the very high test set for disentitlement to the statutory notice benefit. It was not preplanned and not wilful in the sense required under this test. There was an element of spontaneity in the act itself and at most a "deer in the headlights" freezing of intellect in the delay in reporting. On these facts willful misconduct should not be found. [Emphasis added.]

Justice Feldman found that because Mr. Render's physical contact with Ms. Veira had occurred in the "heat of the moment" and was not preplanned, it could not constitute wilful misconduct within the meaning of the ESA and, as such, Mr. Render was entitled to receive eight weeks of pay in lieu of notice of termination. The Court of Appeal did not have evidence before it regarding ThyssenKrupp's annual payroll so it declined to assess Mr. Render's potential entitlement to severance pay, which is only available to employees who are employed by a company with an annual payroll in excess of $2.5 million.

The Court of Appeal did not appear to consider whether Mr. Render's conduct after "the slap," i.e., the statements to male coworkers about touching Ms. Veira, the inconsistent statements to the investigator, and the potentially vexatious assault complaint against Ms. Veira could or should be taken into account when considering whether or not the employer had established "wilful misconduct," nor did it consider whether or not his refusal to admit that "the slap" was serious could also be viewed as misconduct or insubordination in and of itself. It is interesting to consider whether such subsequent conduct could also have been viewed to be "in the heat of the moment" or unplanned given that it occurred over a longer period of time and took place after Mr. Render was aware that Ms. Veira viewed the physical contact as unwelcome and upsetting.

The decision of the Court of Appeal in this case certainly illustrates the intricacies of litigating just cause allegations given the differences between the statutory and common law entitlements. There are a few notable points for Ontario employers to consider. First, both the trial judge and the Court of Appeal declined to give any weight to Mr. Render's argument that the "joking atmosphere" of the workplace should be taken into account when assessing the seriousness of his misconduct. Both found that even if an employee consents to or participates in office humour, they cannot be deemed to have consented to being touched, demeaned, or humiliated.

Second, the Court of Appeal confirmed that although it is best practice for the employer to consider whether an alternative to dismissal should be used to respond to misconduct, employers do not have a "standalone duty" to consider alternative measures, meaning that dismissed employees cannot avoid a finding of just cause just by pointing to a gap in the employer's analysis of potential disciplinary outcomes.

Finally, the trial judge and the Court of Appeal both noted the importance of establishing a professional tone in the workplace and the potentially serious consequences for those who engage in workplace harassment or sexual harassment. "I would also add that this was a most unfortunate situation that arose out of an overly familiar and, as a result, inappropriate workplace atmosphere that was allowed to get out of hand. As this court said in *Bannister* almost 25 years ago, it is a workplace atmosphere that can no longer be tolerated. Although some may perceive it to be benign and all in good fun, those on the receiving end of personal "jokes" do not view it that way. And when things go too far, as they did in this case, the legal consequences can be severe. Every workplace should be based on mutual respect among co-workers. An atmosphere of mutual respect will naturally generate the boundaries of behaviour that should not be crossed." (para 70)

The decision in ThyssenKrupp clearly shows the importance of establishing and enforcing standards of behaviour in the workplace. Employers would be well-advised to review their harassment and sexual harassment policies to ensure that they are compliant with provincial requirements and that employees in their workplaces understand the expectations regarding professionalism and respect at work.

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