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Verbal threat considered workplace violence

Ruling around Bill 168 sheds some light on appropriate response of employer

It has been more than one year since the Ontario government made changes to the Occupational Health and Safety Act under Bill 168.

Since then, there has been little, if any, case law to assist employers and employees with the interpretation and application of the new workplace violence and harassment provisions.

However, in August, a Bill 168 arbitration decision was made in the matter of *Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance)* which provided well-needed insight into how the Bill 168 amendments are to function in the workplace and how they may be used to terminate an employee.

Donna Hudson began working for the City of Kingston in Ontario in 1983. Throughout her employment, Hudson received multiple non-disciplinary and disciplinary warnings from her employer for various reasons, including arguing with and shouting at her supervisor, angrily confronting a co-worker and swearing at co-workers.

In September 2009, the employer conducted Bill 168 training for employees. Hudson attended one of the training sessions, during which she was informed of the concepts of harassment, verbal and physical violence and the need to be mindful of how a worker's words and actions affect other people in the workplace.

On July 28, 2010, two days after successfully completing a required anger management counselling course, Hudson made a verbal threat to her union representative, John Hale, at the workplace. The threat was made after Hale requested Hudson not talk about a friend of Hale's who was dead, to which Hudson responded: "Yes, and you will be too."

In accordance with Bill 168, Hale reported the threat to the employer. In response, the employer conducted a work-

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place investigation, interviewing Hale and Hudson. During her interview, Hudson denied threatening Hale prior to any of the investigators informing her there was even such an allegation. Additionally, Hudson did not apologize for the threat.

Following the conclusion of the workplace investigation, the employer determined that given Hudson's record of issues at the workplace, her having taken part in Bill 168 training and having completed anger management counselling just two days before she made the threat, the appropriate disciplinary response was to terminate her employment.

Hudson grieved her termination before an arbitration board.

After concluding Hudson did make the alleged threat towards Hale, arbitrator Elaine Newman discussed the four ways Bill 168 has impacted the process used to determine the appropriate penalty for acts of workplace violence.

Newman stated: "First, the Bill 168 amendments… make it clear that language that is vexatious and unwelcome is harassment and very serious in its own right. But language that is made in direct reference (sic) the end of a person's life or that suggests impending danger, falls into a category of its own. This is not just language, it is violence.

"Second, the Bill 168 amendments have changed the manner in which the employer and a worker must react to an allegation of a threat… The utterance of a threat is workplace violence and must be reported, investigated and addressed."

Third, the Bill 168 amendments impact the manner in which an arbitrator might assess the reasonableness of termination as an appropriate form of discipline when a threat is found to have been made, she said.

As the union argued, the usual factors still apply to the analysis: Who was threatened or attacked? Was this a momentary flare-up or a premeditated act? How serious was the threat or attack? Was there a weapon involved? Was there provocation? What is the grievor's length of service? What are the economic consequences of a discharge on the grievor? Is there genuine remorse? Has a sincere apology been made? Has the grievor accepted responsibility for her actions?

"Fourth, and finally, I interpret the Bill 168 amendments to cause on (sic) additional factor to be added to the list of those usually considered when assessing the reasonability and proportionality of the discipline. That factor is workplace safety," said Newman.

After applying the above listed factors, the arbitrator found the employer was justified in terminating Hudson's employment and stated: "Having reviewed the evidence at length…it is with regret that I must conclude that the termination, in this case, is an appropriate and proportionate

disciplinary response.

"This would not have been my conclusion if the grievor's actions or evidence had reflected an acceptance of responsibility for her misconduct, any appreciation of how serious her misconduct was or what she herself is going to have to do in order to gain control over her angry impulses."

The initial response to Bill 168 by both employees and employers was one of confusion around issues such as how the amendments would be correctly applied and enforced, how an employer would ensure it has appropriately satisfied all of the new requirements and what types of discipline would be considered a reasonable response to a breach of the Bill 168 requirements.

Though the above decision is context-specific, it has defined what an appropriate response may be from an employer in regards to an act of workplace violence and has also shed light on what is expected of both employees and employers when an act of workplace violence has occurred.

However, employers should take note of the arbitrator's concluding remarks regarding the possibility of an alternative finding if the employee had accepted responsibility, appreciated the seriousness of her misconduct or had known what she would do to gain control over her angry impulses.

On this basis, it appears termination may not be an appropriate response to a verbal threat in the above context if any of the above factors apply to the situation at hand, as it is assumed the above considerations are mitigating factors that may reduce the likelihood of future violence in the workplace by the same employee.

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