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Managing Workplace Violence and Harassment: An Employer's Responsibility under Bill 168

By Karin Pagé

Bill 168 resulted in significant amendments to the *Occupational Health and Safety Act* (OHSA) which became effective June 15, 2010. The changes to the OHSA require employers to take proactive steps to protect workers from workplace violence and harassment, including domestic violence that may occur in the workplace.

The Act broadly defines workplace harassment as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome". As described on the Ministry of Labour website, workplace harassment may include bullying, intimidating or offensive jokes or innuendos, displaying or circulating offensive pictures or materials, or making offensive or intimidating phone calls. Employers should consider and take appropriate action in all incidents of workplace harassment, including conduct that might occur via social media such as Facebook, blogs or YouTube.

Another important change to the OHSA is that threats must be considered workplace violence, requiring action. Workplace violence is defined as follows:

a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;

b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to a worker; or

c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

The amendments require employers to be proactive in preventing and managing any and all incidents of workplace violence or harassment. At a minimum, an employer is required to do the following:

1. Prepare written policies with respect to workplace violence and workplace harassment, and to review the policies at least annually;

2. Develop and maintain programs to implement such policies, which must include measures for reporting incidents, measures to control risks of workplace violence, and setting out how the employer will deal with incidents and complaints.

3. Assess the risks of workplace violence (based both on circumstances that may be common to similar workplaces, and those that are unique to its workplace) and to report the results of such assessment to its workers, or to the health and safety committee/representative if there is one.

4. If the employer is aware (or ought to be aware) that domestic violence that is likely to expose a worker to physical injury may occur in the workplace, to take every reasonable precaution to protect the worker.

5. If there is a risk of workplace violence from a person with a history of violent behaviour, to provide information, including personal information to the extent that it is reasonably necessary, to the worker if that worker can be expected to encounter that person in the course of his or her work, and the worker may be exposed to physical injury as a result of a risk of workplace violence.

These measures and particularly those directed at risks arising from domestic violence or from persons with a history of violent behaviour, place a considerable onus on employers. However, a failure to comply with these requirements may result in investigation and possible sanction by the Ministry of Labour, which might include a fine of up to $500,000 against corporations, or $25,000 and/or incarceration of supervisors, officers and directors.

A natural corollary of Bill 168 will be a more timely and aggressive handling of disciplinary matters by employers against employees that engage in either workplace violence or harassment. It remains uncertain, however, to what extent courts and arbitration boards will consider Bill 168 and its impact on employers, when they consider the reasonableness of an employer's handling of disciplinary actions. The reasonableness of any disciplinary action taken by employers on account of workplace violence or harassment should consider an employer's heightened obligations to investigate and manage such incidents.

This was certainly the approach taken by Arbitrator Elaine Newman in the matter of *City of Kingston v. C.U.P.E., Loc. 109*, 2011 CanLII 50313 (ONLA), who acknowledged the employer's obligations under the OHSA. In this dispute, the arbitrator upheld the dismissal of a 28-year employee that followed repeated violent outbursts by the grievor, and culminated in an incident in which the worker made a death threat to a co-worker. While the arbitrator noted that the traditional factors by which the reasonableness of an employer's decision to terminate an employee remain valid, namely the grievor's length of service, the seriousness of the incident, whether there was any provocation, the person who was threatened, and whether the incident was premeditated, she found that greater weight must now be placed on the seriousness of the incident. In addition, the arbitrator gave several other examples of how Bill 168 affected her inquiry:

1. Threats are considered incidents of workplace violence;

2. Workplace threats require action. Employees must report threats and upon receiving a report, employers must conduct a full and fair investigation;

3. Arbitrators may give more weight to the seriousness of the incident; and finally,

4. Finally, she posed the key question ‘Can this employee be relied upon to conduct him/herself in a way that is safe for others?’

Bill 168 and the resulting amendments to the OHSA will undoubtedly influence employers and in turn, the courts and arbitration boards, in assessing what amount of discipline is appropriate for incidents of workplace violence or harassment. In practice, however, employers will face serious challenges in assessing the risk of harm to workers, and where there has been workplace violence or harassment, in determining what level of discipline is justified.