Harassment complaint can't face reprisal: Ontario Labour Board

Board rejects earlier decision that health and safety legislation doesn't protect employees from reprisals for harassment complaints

| BY ANDREW EBEJER |

WHEN BILL 168 came into force in 2010, Ontario employers were required under the Occupational Health and Safety Act (OHSA) to devise, post, and implement a workplace harassment policy and workplace violence policy.

While Bill 168 specified an employer had a duty to take every reasonable precaution to protect its workers from workplace violence, the extent of an employer's obligations with respect to workplace harassment remained murky. A recent Ontario Labour Relations Board decision — *Ljuboja v. Aim Group Inc. and General Motors of Canada Ltd.* — has clarified this lingering ambiguity.

Peter Ljuboja was employed by Aim Group, a staffing agency based in London, Ont., and placed in a managerial position at a General Motors plant. One evening, as a consequence of being understaffed, Ljuboja reassigned a relief worker to the assembly line — leaving no one available to stand in when other workers took a washroom break. Jamie Rice, one of Ljuboja's supervisors, chided Ljuboja about this reassignment during an end-of-shift meeting. While Rice was alleged to have "screamed" and sworn at Ljuboja, there was no allegation he threatened or attempted to exercise physical force. During a meeting the following day, Rice accused Ljuboja of having an attitude problem and inciting a fight.

The employee reported the incident of his supervisor screaming and swearing at him. He was terminated shortly thereafter.

Ljuboja reported the incident to GM's HR department and his employment was terminated shortly thereafter.

Ljuboja argued his dismissal violated s. 50(1) of the OHSA, which prohibits a reprisal by an employer against a worker for exercising or enforcing a right under the act. Aim Group and GM relied on earlier labour board decisions to argue that

Continued on page 8

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Policy must have mechanism for complaints

Continued from page 3

making a complaint of workplace harassment was not a right under the OHSA and, therefore, Ljuboja was not afforded protection from reprisals on this basis. In particular, the board's 2011 decision in *Conforti v. Investia Financial Services Inc.* held that the extent of an employer's obligations under the OHSA with respect to workplace harassment were to create an anti-harassment policy, develop and implement the policy, and provide workers with information about it. However, this precedent was rejected and the matter was allowed to proceed to a board consultation.

Earlier board decision 'flawed'

In *Conforti*, the board said (the case was decided on other grounds) it did not have the jurisdiction to adjudicate an allegation of reprisal for making a workplace harassment complaint. Two years later, in *Ljuboja,* the board changed course, finding that its earlier position was unfair and "flawed."

Vice-chair Nyman, writing for the board, held that two of the legislative mandates of Bill 168 — implementation of a workplace harassment policy containing a complaint mechanism, and investigation of harassment complaints as they arise — would be "completely undermined" if an employer was permitted to discipline, terminate or otherwise retaliate against a worker for making a harassment complaint. Should that be the state of the law, the board noted, "only the most intrepid or foolish worker would ever complain."

If an employer was permitted to discipline, terminate or otherwise retaliate against a worker for making a harassment complaint, Bill 168 would be 'copmleteley undermined.'

When a worker makes a workplace harassment complaint to an employer, the worker is seeking the enforcement of a right under the OHSA "because the worker is seeking to have the employer comply with its obligation to enable the worker to make a complaint," said the board. As such, the worker will be brought within the ambit of protection afforded by the anti-reprisal provisions contained in s. 50 of the act.

Employer still not required to provide a harassment-free workplace

Significantly, the reasoning in *Conforti* was upheld in other respects. The board reaffirmed the OHSA does not create substantive obligations with respect to workplace harassment. An employer is not required to provide a harassment-free workplace, nor to provide a specific type of investigation to a harassment complaint. As well, a worker cannot insist on any particular resolution to her complaint.

The board also acknowledged an employer cannot reasonably be expected to guarantee every aspect of its operation will "run in a manner that avoids offending every individual's subjective sensibilities."

The phrase "workplace harassment" could capture a broad range of conduct, and the board recognized it may be functionally impossible to absolutely prohibit every behaviour which could possibly fall within that definition.

Tips for employers

The board's decision in *Ljuboja* clarified two aspects of Bill 168 with respect to workplace harassment — workplace harassment policies must contain a mechanism by which a worker may bring a complaint; and an employer will not be permitted to take reprisals against a worker who brings a complaint.

Yet, an employer is still provided significant leeway to determine the complaint process it will adopt and the process by which those complaints will be investigated and resolved. Neither the OHSA nor *Ljuboja* specifies any procedural criteria. An employer must, however, take some active steps to implement and carry out its policy — simply posting it will not be sufficient.

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