CANADIAN OCCUPATIONAL SAFETY The Safety Standard

Bill 168 provides ‘ammunition’ for employers in cases of workplace threats

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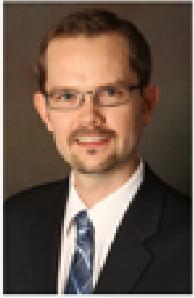
June 27, 2012



Nearly two years have passed since Bill 168, the Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009, came into force effectively extending the reach of the Act beyond traditional workplace safety to include protection against violence and harassment in the workplace. Now, every provincially regulated Ontario employer is required to take proactive steps to prevent and address workplace violence including the development of a workplace violence and harassment policy and implementation program.

On the one hand, Bill 168 has increased the burden placed upon the shoulders of employers. On the other hand, it has also put employers in a stronger position to take action against employees who commit acts of workplace harassment and violence. Nowhere has this been more evident than in grievance arbitration dealing with threats of violence.

Impact of Bill 168 on grievance arbitration

One of the first arbitration decisions to consider the impact of Bill 168 is the recent decision in *City of Kingston and C.U.P.E. Local 109 (Hudson Grievance)*. This case dealt with the termination of an employee with 28 years' seniority, for having uttered a death threat against her co-worker (who also happened to be the local union president).

In upholding the grievor's termination, the arbitrator identified four ways in which Bill 168 has impacted upon the process for determining the appropriate penalty for a threat in the workplace:

1. Bill 168 has made it clear a threat of violence in the workplace is not just words or gestures; it is itself violence. Regardless whether there is any evidence of an immediate ability to do physical harm, or even intent to do harm, the mere utterance of the threat is violence.

2. Bill 168 requires every employer to react to an allegation of a threat in the workplace. No longer may an employer disregard, minimize or turn a blind eye to a report of workplace violence. The allegation must be investigated and appropriately dealt with.

3. While arbitrators traditionally look at a number of factors in determining whether the discipline imposed was appropriate, in light of Bill 168, arbitrators may now place greater emphasis on the seriousness of the incident above all other factors.

4. Bill 168 requires the formal recognition of one more factor to the list of those typically considered by arbitrators: workplace safety. While workplace safety traditionally formed part of the analysis whether the employment relationship could be salvaged, it now takes on a separate and distinct role.

In a subsequent decision in *National Steel Car (Faiazza Grievance)*, the grievor, a crane operator, got into

a heated confrontation with a lead hand accusing him of being a "rat." When the lead hand responded by challenging the grievor to "take it outside" and "do this like a man," the grievor threatened to "get" or "bring" his "ammo." The lead hand, who knew the grievor owned firearms, complained to his employer and later laid criminal charges against the grievor.

When asked for his version of the events, the grievor claimed he was misheard and he had, in fact, said next time he would "use his intuition." The grievor was terminated and a grievance was filed by the union.

In considering the impact of Bill 168, the arbitrator noted the bill obligates employers to investigate all claims of workplace violence and does not permit employers to pick and choose. In this case, because the employer only investigated and disciplined the grievor, and disregarded the lead hand's misconduct, the adequacy of its investigation was called into question.

Regarding the appropriate penalty for a workplace threat, the arbitrator cautioned the impact of Bill 168 does not mean every threat should result in termination of the offender. In his view, the traditional analysis for deciding appropriate discipline need not be revisited in response to Bill 168. That said, the arbitrator noted the grievor in this case was a first offender and the incident was a momentary flare-up that was unlikely to be repeated. In the result, he reinstated the grievor on condition any further incident of workplace violence within the following two years would result in his termination.

Lessons learned for employers

Changes to the Occupational Health and Safety Act brought about by Bill 168 are now front and centre in many grievance arbitrations, particularly where threats of violence are involved. While arbitrators are not unanimous about the full impact of these amendments, they are clear about one thing — a threat of violence in the workplace cannot be discounted or tolerated.

As a result, while the law continues to evolve in the wake of Bill 168, employers can take comfort in knowing, despite its burdens, Bill 168 can and often does work for an employer to help ensure dangerous employees no longer pose a threat to workplace safety.

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