COURT OF APPEAL: SINGLE INCIDENT OF SEXUAL HARASSMENT IS CAUSE FOR TERMINATION

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Ontario's Court of Appeal has upheld the termination of a 30-year employee (with a clean disciplinary record) for cause following a single incident of sexual harassment.

***Render v Thyssenkrupp* ("*Render*"): Background**[1]

Mr. Render was the Operations Manager of ThyssenKrupp's Mississauga office, a small workplace of 10 men and three women. In March 2014, he was dismissed for cause following an incident involving a female co-worker. While Mr. Render and the complainant gave differing accounts of the incident, the trial judge found that Mr. Render put his face in close proximity to the complainant's breasts for two or three seconds, and then slapped the complainant on the buttocks and said "good game" (as if they were football players on the field or in the locker room).

Following the incident, Mr. Render demonstrated a lack of remorse and understanding of the seriousness of his actions. His apology to the complainant was considered insincere. He also made joking comments about the incident to his male colleagues, including by stating that "for 10 bucks" they could shake the hand that had touched the complainant's buttocks.

Following a workplace investigation, ThyssenKrupp terminated Mr. Render's employment for cause.

Trial Judge's Decision

The trial judge upheld the termination of Mr. Render's employment for cause, finding that the slap constituted "serious and unacceptable conduct" and was "an act that attacked the complainant's dignity and self-respect". The trial judge also considered a number of aggravating factors, including that, as a supervisor, Mr. Render was in a position of authority over the complainant; that Mr. Render had been trained on the company's Anti-Harassment Policy just eight days before the incident; and that Mr. Render did not appreciate the seriousness of his actions.

Court of Appeal's Decision

Mr. Render appealed the trail judge's factual findings and legal analysis, alleging that the slap was accidental, that his remorse was genuine, and that the trial judge erred in law when he found that ThyssenKrupp had cause for termination.

In rejecting each of Mr. Render's arguments, the Court found that the trial judge considered all of the evidence and that his factual findings were owed deference. The Court also found that the trial judge engaged in the proper legal analysis, which had recently been confirmed in *Hucsko v A.O. Smith Enterprises Limited* ("***Hucsko***").[2]

In *Hucsko*, the Court endorsed the three-step test established nearly 20 years ago in *Dowling v Ontario (Workplace Safety & Insurance Board)* ("***Dowling***")[3] for determining whether an employee's misconduct is incompatible with the fundamental terms of the employment relationship. The test consists of: (1) determining the nature and extent of the misconduct; (2) considering the surrounding circumstances; and (3) deciding whether dismissal is warranted (i.e., whether dismissal is a proportional response).

Although the trial judge in *Render* did not specifically refer to *Dowling*, the Court found that he properly applied the test in finding that ThyssenKrupp had cause to terminate Mr. Render's employment, despite his "long and unblemished history with the company". The Court also noted that ThyssenKrupp had considered the availability of other disciplinary measures, but justifiably decided that they could not be implemented because "to retain [Mr. Render] would send a message to other female employees that the impugned conduct was being condoned":

> "Given the seriousness of the conduct, involving non-consensual touching of a private part of the body, [ThyssenKrupp] determined that it could not condone it or be seen to condone it."

No "Wilful Misconduct"

Even though the Court upheld Mr. Render's dismissal for cause, it found that he was nevertheless entitled to statutory pay in lieu of notice of termination under Ontario's Employment Standards Act, 2000 (the "**ESA**").[4]

This is because Ontario Regulation 288/01 under the ESA states that an employer cannot terminate employment without statutory notice (or severance pay) unless the employee is "guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by the employer." This is a higher standard than the common law definition of cause.

Shockingly, the Court found that Mr. Render's conduct did not rise to the level "wilful misconduct" (despite the trial judge's finding that Mr. Render intentionally slapped the complainant to "assert dominance over her and demean and embarrass her in front of her colleagues"). According to the Court, because the slap occurred in the "heat of the moment" and was not preplanned, it did not amount to the type of conduct that should

deprive him of his minimum statutory entitlements.

Takeaways for Employers

The Court's decision reaffirms the seriousness of sexual harassment in the workplace, as well as the importance of aggravating factors in determining whether a single incident of sexual harassment will justify cause for termination. By upholding termination for cause of a long-serving employee with a clean disciplinary record, the Court has sent a strong message that this type of misconduct should not be tolerated in today's workplace.

Unfortunately, however, the Court's decision also raises serious questions about the kind of conduct necessary in order to establish "wilful misconduct" within the meaning of Ontario Regulation 288/01 under the ESA.

[1] 2022 ONCA 310.
[2] 2021 ONCA 728.
[3] (2004), 2004 CanLII 43692 (ON CA).
[4] If Mr. Render had established proper evidence that ThyssenKrupp had a payroll of $2.5 million, he likely would have also received statutory severance pay under the ESA.

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A Cautionary Note