

RECORD HIGH DAMAGES FOR WORKPLACE SEXUAL MISCONDUCT IN LANDMARK HUMAN RIGHTS DECISION

Posted on June 8, 2015

Categories: [Insights](#), [Publications](#)

A recent decision of the Human Rights Tribunal of Ontario has sent a strong message that there is no place for sexual misconduct in the workplace. In *O.P.T. v. Presteve Foods Ltd.*,^[1] the Tribunal awarded record high damages to two sisters who had been subjected to unwanted sexual solicitations and advances, including sexual assaults, by their employer.

Background

The facts of this case are egregious. The sisters, O.P.T. and M.P.T., had come to Canada from Mexico under the Government of Canada's Temporary Foreign Worker Program in order to work for Presteve Foods Ltd. ("Presteve"), which operates a fish processing plant in Wheatley, Ontario. The sisters brought an application to the Tribunal containing numerous and serious allegations of misconduct by Presteve's owner, including but not limited to:

- slapping M.P.T.'s buttock;
- touching and squeezing the sisters' breasts over their clothing on several occasions;
- sexually propositioning the sisters on several occasions, and touching them on their thighs while doing so;
- inviting and taking O.P.T. out to dinner on several occasions when she did not want to go;
- telling O.P.T. that he loved her;
- forcibly hugging and kissing O.P.T. on several occasions;
- forcing O.P.T. to perform fellatio on multiple occasions; and
- forcing O.P.T. to engage in sexual intercourse on multiple occasions.

The sisters testified that they did not want to do these things, but felt forced to do so due to repeated threats that the owner would send them back to Mexico if they refused.

"Unprecedented" Sexual Misconduct

The Tribunal found that the evidence given by the sisters was credible. According to the Tribunal, the owner

violated the Ontario *Human Rights Code* ("Code")^[2] by engaging in a persistent and ongoing pattern of sexual harassment in the workplace. He was a person in a position to confer, grant or deny a benefit or advancement to the sisters, and he wielded this authority by threatening to send them back to Mexico if they refused his unwanted solicitations and advances. The Tribunal also found that the owner's sexual misconduct in the workplace created a sexually poisoned work environment.

Therefore, the Tribunal ordered Presteve and the owner, jointly and severally, to pay \$150,000 to O.P.T and \$50,000 to M.P.T. as compensation for injury to dignity, feelings and self-respect. The Tribunal also ordered Presteve to provide any workers hired under the Temporary Foreign Worker Program with human rights information and training in their native language for a period of three years.

In arriving at these record high amounts, the Tribunal noted that the owner's sexual misconduct was unprecedented in terms of previous Code decisions. It also noted that the sisters were particularly vulnerable because the Temporary Foreign Worker Program operates on the basis of closed work permits, which only entitle workers to work for one designated employer.

Lessons for Employers

There is no maximum damages award for injury to dignity, feelings and self-respect.^[3] In the past, awards often ranged from \$500 to \$15,000, with an unofficial high range between \$25,000 and \$40,000 for the most offensive misconduct.^[4] However, this case demonstrates that significantly higher awards are possible for egregious violations of the Code.

From an employer's perspective, there are three main takeaways from this decision:

1. Even though this case concerned the conduct of the employer's owner, employers can also be found liable for sexual misconduct committed by their officers, officials and employees if the impugned misconduct occurs in the course of employment. As noted by the Tribunal, the term "in the course of employment" does not require that the misconduct fall within "the four squares of a job description", but means only that the misconduct is in some way related or associated with the employment.
2. Employers should implement harassment (including sexual harassment) and workplace violence policies, and ensure that all employees, including upper management, receive training on such policies. It is imperative that employers diligently enforce their harassment and workplace violence policies, and send a clear message to employees that sexual misconduct in any form will not be tolerated.
3. The Tribunal is prepared to order large awards against employers where human rights violations occur inside (and sometimes outside) of their workplace. Therefore, employers should also ensure that they create, foster, and maintain a workplace that is free of unlawful discrimination and harassment.

In addition to damages under the Code, employers should be aware that they could also face consequences under applicable occupational health and safety legislation. In this regard, employers in Ontario should take note that harassment and workplace violence policies are specifically required under the Occupational Health and Safety Act.⁵

by Paul Boshyk and Stefanie Di Francesco

¹ 2015 HRTO 675.[ps2id id='1' target='']

² RSO 1990, c H.19.[ps2id id='2' target='']

³ *Vetricek v. 642518 Canada*, 2010 HRTO 1436.

⁴ Prior to the Tribunal's decision in this case, the highest amount ever awarded in Canada for injury to dignity, feelings and self-respect was \$75,000 in *Kelly v. University of British Columbia* (No. 4), 2013 BCHRT 302.[ps2id id='4' target='']

⁵ RSO 1990, c O.1.[ps2id id='5' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2015