

SORRY NOT SORRY: ONTARIO DECISION HIGHLIGHTS "AGGRAVATING FACTORS" IN SEXUAL HARASSMENT CASES

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Ontario's Superior Court of Justice has upheld the termination of a 30-year employee with a clean disciplinary record following a single incident of sexual harassment. The Court's decision in *Render v ThyssenKrupp Elevator (Canada) Limited*^[1] highlights the significance of "aggravating factors" in cases where just cause for termination is alleged. Such aggravating factors can include an employee's lack of remorse and failure to understand the seriousness of his or her misconduct following an incident of sexual harassment.

Background

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

Following the incident, Mr. Render demonstrated a lack of remorse and understanding of the implications of his actions. His apology to the complainant was seen to be insincere. He also made joking comments about the incident to his male colleagues. For example, he told colleagues that "for 10 bucks" they could shake the hand that had touched the complainant's buttocks. Mr. Render ultimately filed his own counter-complaint against the complainant regarding an incident where she had allegedly punched his shoulder.

Following a workplace investigation, ThyssenKrupp decided to terminate Mr. Render's employment for just cause based solely on the incident in which he touched the complainant's buttocks. Mr. Render then sued ThyssenKrupp for wrongful dismissal.

Intervener Status

In a pre-trial motion, the Court granted intervener status to the complainant, allowing her counsel to make opening and closing statements and participate in cross-examinations.^[2] While intervener status is rarely

granted in private actions such as wrongful dismissal cases, the Court found that the complainant had a significant interest in the proceedings and that her moral and physical integrity would likely be affected by the outcome of the trial.

In particular, the Court's decision to grant intervener status was influenced by the pre-trial conduct of Mr. Render's counsel, which reflected an intention to "attack [the complainant's] credibility by impugning her moral integrity". The Court also found there was a legitimate concern that the complainant could be subjected to similar conduct from other employees if her evidence was not accepted.

Termination for Just Cause Upheld

At trial, Mr. Render maintained that the touching was not sexual in nature and that termination for just cause was not a proportional response. The Court disagreed on both accounts.

In particular, the Court found that the incident amounted to very serious and unacceptable conduct, the purpose of which was to assert dominance over the complainant and to demean and embarrass her in front of her colleagues. In the Court's words, the act of slapping the complainant's buttocks "was an act that attacked her dignity and self-respect. This type of conduct is unacceptable in today's workplace."

In upholding the employer's decision to terminate Mr. Render's employment for just cause, the Court was significantly influenced by a number of aggravating factors, including Mr. Render's lack of understanding and remorse regarding the incident, the fact that the company's anti-harassment policy had been communicated to him just eight days prior to the incident, and Mr. Render's position of authority over the complainant as a supervisor. According to the Court, Mr. Render's lack of contrition and understanding of the seriousness of his actions was not reconcilable with sustaining his employment.

Conclusion

While each case always turns on its own facts, the Court's decision confirms that a single incident of sexual harassment can amount to just cause for termination of employment, even for a long-service employee with an otherwise unblemished disciplinary record. This is particularly so where there are "aggravating factors", such as a failure to offer a sincere apology. Had Mr. Render recognized his misconduct and offered a genuine apology to the complainant in this case, it is possible that the Court's decision could have gone the other way.

The Court's decision also underscores the importance of having a robust anti-harassment policy and conducting regular workplace harassment training. In this regard, the Courts have consistently held that the very existence of an anti-harassment policy constitutes a warning that transgression could lead to termination for just cause.

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[1] 2019 ONSC 7460.[ps2id id='1' target='']

[2] *Render v ThyssenKrupp Elevator*, 2018 ONSC 3182.[ps2id id='2' 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.

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