

Ontario worker gets second chance to change mind about retirement pg. 3
Appeal court found notice was contingent on circumstances



Bonus policies and wrongful dismissal damages p. 4
Recent cases clarify how employers can avoid bonus payments over the notice periods



Ask the Expert pg. 2
Harassment of supervisor by subordinate

with **Tim Mitchell**

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Persistent advances get worker fired for sexual harassment

Calgary city worker sent inappropriate texts and pictures after he knew supervisor wasn't interested; no remorse during investigation

BY JEFFREY R. SMITH

AN ALBERTA municipal worker's history of inappropriate texts to his supervisor and what he claimed was an accidental showing of a naked picture of himself to her on his phone amounted to a pattern of sexual harassment that provided just cause for dismissal, an arbitrator has ruled.

Norman Mossman began working for the City of Calgary in June 1988 as a seasonal labourer. He became a full-time employee 13 years later and joined the city's roads department as a driver/operator/labourer. His work included a variety of operations using different equipment depending on what needed to be done on city roads.

The road department consisted of a mostly male workforce, with less than four

WORKER on page 6 »



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No discrimination if worker doesn't give reason for accommodation

Ontario worker's injury-related shift change interfered with custody arrangement for daughter, but he didn't tell his employer until after change

BY JEFFREY R. SMITH

IT'S A STANDARD tenet of accommodation that it is a two-way street — both the employer and the employee must participate in the process. That's why the Ontario Human Rights Tribunal dismissed a worker's complaint that his family status wasn't accommodated by an injury-related shift change schedule — the worker didn't inform his employer of his family status obligations until after the change had been made.

Steve Linklater was a coil handler technician in Essar Steel Algoma's steel production facility in

Sault Ste. Marie, Ont. He worked 12-hour shifts on an eight-day rotation — two 12-hour days shifts from 5 a.m. to 5 p.m. followed by 24 hours off and then two 12-hour overnight shifts from 5 p.m. to 5 a.m.

Linklater was separated from his spouse and had joint custody of his young daughter. The custody schedule was arranged around his shift schedule with Essar Steel, so he could pick up his daughter

EMPLOYER on page 7 »

Ask an Expert

with **Tim Mitchell**

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Harassment of supervisor by subordinate

Question: If a subordinate employee harasses or bullies a supervisor, are there any ways the matter should be handled differently than the reverse situation?

Have a question for our experts? Email jeffrey.smith@habpress.ca.

Answer: Harassment and bullying are actionable forms of workplace misconduct. The essential employer duties for handling harassment and bullying are analogous regardless of who engages in the misconduct. However, employers should be aware of distinctions created by differing context of bullying or harassment by subordinates.

Wrongful conduct by a supervisor, including harassment or bullying, is exacerbated by their position of authority: see *Canada Safeway Ltd. v. U.F.C.W., Local 401*.

When a supervisor is harassed or bullied by an employee under her purview, the employer must assess the complaint in light of the broader context, including: previous or ongoing issues between the complainant and the alleged harasser; the possible job performance implications of a supervisor who is harassed by a subordinate; and the potential that the alleged harasser has harassed other peers or subordinates.

In Alberta, for example, harassment may be prohibited by the employer's policy, the Human Rights Act or the Occupational

Health and Safety Act. In particular, the Occupational Health and Safety Act outlines the relative duties of employers, supervisors and employees in the harassment context:

- Employers are obligated to ensure that none of the employer's workers are subjected to or participate in harassment.
- Supervisors are obligated to ensure that none of the workers under their supervision are subjected to or participate in harassment.
- Workers must refrain from causing or participating in harassment.

The individual who receives the report of harassment or bullying and the manager of the victim of the wrongful conduct are in positions of authority regarding the investigation and resolution. Employers must be aware of potential liability for inaction following reports of harassment and bullying.

Employers must implement internal policies, investigate harassment complaints and ensure that the complainant does not experience adverse impacts from reporting the incident. Adverse impacts — which may range

from additional harassment to wilful blindness or a poisoned work environment — are characterized as reprisal for enforcing a right. Reprisal is inconsistent with the purpose and protections of the Occupational Health and Safety Act: see *Ljuboja v. Aim Group Inc.*

The failure to investigate and address harassment concerns may be serious enough to justify damages for constructive dismissal or even Wallace damages for pain and suffering in egregious cases: see *Boucher v. Wal-Mart Canada Corp.*

When the accused harasser is a subordinate of the complainant, the employer must be alive to the potential relationship intricacies when conducting its investigation and resolving the issues.

For more information see:

- *Canada Safeway Ltd. v. U.F.C.W., Local 401*, [2008] A.G.A.A. No. 38 (Alta. Arb.).
- *Ljuboja v. Aim Group Inc.*, 2013 CanLII 76529 (Ont. Lab. Rel. Bd.).
- *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 (Ont. C.A.).

Security cameras in the workplace

Question: Does an employer have to officially notify employees about security cameras in the office if they're obvious and in common areas? What about if cameras are added to specific areas where there are only a few people?

Answer: Employers do not have a unilateral right to conduct surveillance, and the installation of security cameras is not a simple matter of informing employees of the change. The law of privacy continues to emerge, with varying schemes across the Canadian provinces. The overarching approach to privacy rights is one of proportionality. The employer has the onus of demonstrating that the business interest outweighs the employee's privacy interest, as an arbitrator found in *Canada Safeway Ltd. v. U.F.C.W., Local 401*.

Federally regulated private sector employers, such as banks and airlines, are governed by the Personal Information Protection and Electronic Documents Act (PIPEDA). Alberta's provincially regulated private sector employers, which make up the majority and include construction and real estate, are regulated by the Personal Information Protection Act (PIPA). Both statutes provide limits on the collection, use, and retention of personal information, including exemptions. Government institutions have separate legislative schemes.

Courts, privacy commissions, and arbitrators have considered similar analyses regarding employer surveillance. Specifically,

the surveillance must be conducted reasonably, and for a reasonable business purpose. The privacy rights of the employee must be balanced with the business interests of the employer, provided that such interests are real and meaningful. Because most, if not all, businesses have concerns about security and safety in the workplace, an employer must provide objective evidence of specific circumstances justifying surveillance: *Calgary Herald v. GCIU Local 34-M and Re: Woodstock (City) and Woodstock Professional Firefighters' Association (Video Surveillance)*.

Therefore, the permissibility of surveillance installation is not resolved by informing employees of the cameras. The analysis will consider the business purpose, including the applicability of safety and security concerns, the probability that surveillance will assist with the concerns, and the number of and characteristics of the cameras.

Absent a situation where the employer is conducting a serious investigation, as contemplated in PIPA, it is difficult to justify covert surveillance as a reasonable business objective.

Even an investigation may not be sufficient grounds for intrusion on an employ-

ee's privacy rights. For example, in *Colwell v. Cornerstone Properties Inc.*, the installation of a covert security camera in the office of a trusted manager, followed by an implausible explanation, was not a reasonable act of employer surveillance. Specifically, the surveillance irreparably damaged the trust between employee and employer and was not the least intrusive method of accomplishing the employer's desired investigative objective, which was cleaning staff. Not only had the employer improperly intruded on the privacy of a trusted employee, but the intrusion and associated conduct were so egregious that they resulted in the constructive dismissal of the employee. Not only had the employer infringed the privacy rights of its employees, it was also liable for wrongful dismissal damages.

It's recommended that all private sector employers review the Privacy Commissioner of Alberta's "Guidelines for Overt Video Surveillance in the Private Sector."

Looking ahead, the trend in privacy law is toward protection of personal privacy. Therefore, employers should exercise cau-

TREND on page 7 »

Ontario worker gets second chance to change mind about retirement

Trial court found employer didn't have to allow rescission of retirement notice; Appeal court found notice was contingent on circumstances

BY JEFFREY R. SMITH

THE ONTARIO Court of Appeal has overturned a lower court's finding that an insurance company employee was bound to her retirement notice and couldn't change her mind after circumstances at work changed. As a result, the employer's insistence on holding the employee to her notice has cost it wrongful dismissal damages worth one year of the employee's salary and benefits.

Elisabeth English, 67, was a senior customer relationship manager for group savings and retirement at an Ontario branch of Standard Life, an insurance company based in Montreal, starting in March 2006. Nine years later, in 2015, Standard Life was acquired by another insurance company, Manulife Financial Corporation.

Soon after the merge, Manulife informed its employees that its customer information would be converted to a new computer system beginning in January 2016 and progressing over time until completed.

Since English was 64 years old at the time, she didn't think it would be worth it to try to learn an entirely new computer system when she was getting close to retirement — she planned to retire at the end of 2017 — and she wasn't sure she would be able to learn the new system. She told her supervisor on Sept. 22, 2016 that she was planning on retiring early before the new computer system was implemented. When her supervisor asked her if she was sure, she replied, "not totally."

However, English followed through, giving her supervisor a typed letter stating she was giving formal notice of her retirement effective Dec. 31. She noted that she would be open to working in a part-time position two or three days per week if it was possible but understood if it wasn't an option.

When she handed her supervisor the letter, he told her that if she changed her mind, she could rescind the notice of retirement. However, soon after, she agreed that he could announce her impending retirement at a staff meeting.

New computer system cancelled

Less than three weeks after English gave her retirement notice, on Oct. 11, Manulife announced that it would not be going ahead with the conversion to the new computer system. The next day, English told her supervisor that she wanted to withdraw her notice of retirement because of the change in Manulife's plans. The supervisor acknowl-

edged her desire and relayed the information to Manulife's human resources department.

The human resources department didn't respond for nearly one month, but it eventually advised the supervisor that the company would not accept the rescission of English's retirement notice. The supervisor informed English of this on Nov. 25, to which English reminded him that he had told her she could rescind if she changed her mind. She also made clear that the new computer system was the only reason for her decision to retire, so there was no need for her to do so with the transition being suspended indefinitely.

The day after the company cancelled plans to implement the new computer system, the worker said she wanted to rescind her retirement notice.

English's supervisor responded with a Dec. 1 email saying that Manulife was "honouring" her retirement notice. Eleven days later, she was told not to come back to work. She then filed a complaint for wrongful dismissal demanding payment of 16 months' salary in lieu of notice.

The Ontario Superior Court of Justice found English's letter of retirement was a clear and unequivocal notice of her decision to retire — she typed it up herself and handed it to her supervisor, and there was no evidence there was any persuasion for her to make the decision. The court also found that while the supervisor had told her she could rescind her notice of retirement during the Sept. 22, 2016 meeting, there was no indication the offer to rescind was valid all the way up until her intended retirement date of Dec. 31. In addition, the supervisor accepted her notice by the end of that meeting, said the court.

The court also found that the supervisor did not formally accept her rescission a few weeks later and English didn't formally notify Manulife that she had changed her mind — which was important since the company had initiated plans to go into effect upon her retirement.

The court determined that English's no-

tice of retirement on Sept. 22, 2016 was a clear and unequivocal "offer by (English) to retire as an employee effective Dec. 31, 2016" and this offer was accepted by her supervisor. Once accepted, the offer became a binding contract between English and Manulife, the court said.

Employee could rescind notice

However, English appealed and the Ontario Court of Appeal saw things differently.

The Court of Appeal disagreed with the lower court's finding that the retirement notice was unequivocal — English made it clear that her decision was prompted by the circumstances around implementation of the new computer system. Her notice was equivocal — subject to different meanings — and she was entitled to withdraw it when the circumstances changed, said the appeal court.

The appeal court noted that English initially told her supervisor that she wasn't sure and the supervisor said she could change her mind — which she did as soon as she learned the circumstances around the new computer system had changed.

"When Manulife cancelled the computer conversion within three weeks of her Sept. 22, 2016 conversation with (her supervisor), the basis for (English's) resignation disappeared," the Court of Appeal said. "(Manulife) is bound by (the supervisor's) promise to (English) that she could change her mind. She did so within three weeks and her change of mind was not challenged."

The appeal court determined that English did not resign from her employment and she was wrongfully dismissed on Dec. 12, 2016, when she was told not to come back to work — nearly three weeks before her stated retirement date in her letter.

In the trial, the lower court determined that had English been wrongfully dismissed, she would be entitled to 12 months' salary in lieu of notice based on her decade of service with Manulife and Standard Life and managerial position at the time of her dismissal. The Court of Appeal agreed with this assessment and ordered Manulife to pay English 12 months' salary and benefits as damages for wrongful dismissal.

For more information see:

• *English v. Manulife Financial Corporation*, 2019 ONCA 612 (Ont. C.A.).

Bonus policies and wrongful dismissal damages

Recent cases clarify how employers can avoid bonus payments over the notice period

BY MATTHEW TOMM

BACKGROUND

COMPANIES generally don't want to pay their dismissed employees bonuses that accrue after the termination date. But drafting policies to achieve that is easier said than done. Matthew Tomm looks at a series of court decisions that examine circumstances when dismissed employees are and aren't entitled to bonus payments following termination.

Entitlement to bonus payments can be a bone of contention when employees are dismissed and their reasonable notice is being determined. The recent Ontario Court of Appeal decision *Dawe v. The Equitable Life Insurance Company of Canada* provides an important example of a policy that was effective in limiting the dismissed employee's entitlement to a bonus. Other recent jurisprudence gives further guidance as to what works and what doesn't, which employers can draw on to draft better policies.

The legal framework

It is common for companies to require their employees to be "actively employed" as of the payment date to be eligible for bonus payments. Employees who are dismissed without notice prior to the payment date are then denied bonuses that would have accrued over the notice period, being apparently ineligible under the straightforward terms of the plan. However, in *Paquette v. TeraGo Networks Inc.*, the Ontario Court of Appeal rejected that approach, finding that a requirement of "active employment" alone is not sufficient.

TeraGo's bonus program provided that an employee who was "actively employed by TeraGo on the date of the bonus payout" was eligible for a payment, but not otherwise. But the Court of Appeal concluded that the dismissed employee's claim was not for bonus pursuant to the terms of the plan but was rather for damages for the loss of opportunity to earn bonus, which would have been earned if the employer had given reasonable notice of termination.

The court in *Paquette* held that, first, it must determine whether the bonus plan was an integral part of the employee's compensation package, which would entail a right to common law damages for its loss. At common law, an employee is entitled to damages that place him in the position he would have been in but for the without-notice dismissal, which generally means compensation for whatever would have been paid until the end of the reasonable notice period. Second, if the right to common law damages applies, the court must decide

whether the terms of the bonus policy restrict or abrogate that right. That is, does the language clearly remove the right to damages over the notice period for the loss of opportunity to earn bonus?

TeraGo's simple requirement of "active employment" did not pass muster. It allowed the employee to argue that, but for the wrongful dismissal, he would have been actively employed as of the payment date and consequently he should get the payment.

A requirement of 'active employment' alone is not sufficient if the bonus payout occurs during the reasonable notice period.

Paquette ushered in an era of uncertainty around what language would be effective to restrict entitlement to bonuses that accrue after termination.

A recent employer success

Dawe v. Equitable Life Insurance Company reviewed eligibility under short-term and long-term incentive plans. Both plans provided that:

- "An Eligible Participant must be employed by the Corporation on the date an award is paid in order to receive an award."
- An Eligible Participant terminated without cause will be entitled to receive only pro-rated awards "to the last day of active employment, regardless of whether notice of termination is given or not given and regardless of whether the termination is lawful or unlawful..." (The prorated awards were defined as the "Terminal Awards" and in this case amounted to considerably less than what would have been earned over the notice period.)
- "Awards earned and awards actually paid shall not be considered in determining any entitlement to termination, severance or common law notice or payments in lieu of notice."

The lower court followed the *Paquette* analysis and concluded that the plans were unclear and did not successfully displace the employee's right to common law damages for breach of contract. The judge pointed out that, in some key clauses, there was no specific reference to common law entitlement or the statutory notice period. "Simply put," the judge wrote, "the wording is unclear and confusing."

However, the employer's argument fared better on appeal. The Court of Appeal reviewed the same clauses and was satisfied they were sufficient to oust the right to common law damages. The court held that the motions judge erred in reading the clauses in isolation from one another. Reading the plans as a whole, there was no ambiguity. They went beyond stipulating that "active employment" was a precondition for receiving a bonus. They "anticipated the very event that occurred" — the employee's dismissal without cause — and thereby restricted the employee's common law rights on termination.

Further guidance from the jurisprudence

The jurisprudence following *Paquette* has evolved and now paints an increasingly clear picture of what language will suffice to dis-entitle employees to bonus pay after termination, and what will not. Many employers will recognize the following examples (for better or for worse) in their own policies.

Notable cases where the language was enforced are:

- *Carroll v. ATCO Electric Ltd.*: This case addressed a stock options plan and a Share Appreciation Rights plan. Both plans provided that any options/rights that have not vested as of "the date on which the participant actually ceases to be an officer or employee of the Corporation ..." (without regard to any statutory or common law notice periods which may otherwise be required for the termination of employment) shall immediately terminate... The court found that the parties had contracted to extinguish any right of recovery where the employee does not work during some or all of the notice period.



CREDIT: JUMMIE/ISTOCK

• *Kieran v. Ingram Micro Inc.*: This case involved a stock options plan, which stated that shares would be repurchased by the company at the lower of their market value or the original purchase price, if the participant's employment "is terminated for any reason other than death, disability ... or retirement ... prior to the time when all Shares have become Unrestricted Shares..." The plan further provided that that the termination of employment for any reason "shall occur on the date Participant ceases to perform services for [the Company] or any Affiliate without regard to whether Participant continues thereafter to receive any compensatory payments therefrom or is paid salary thereby in lieu of notice of termination." These terms were upheld, having specifically addressed entitlement in the event of termination without just cause or notice.

Some notable cases where the employer was unsuccessful are:

• *Carroll v. ATCO Electric Ltd* (cited above): An executive bonus plan stated that, if a participant's "employment is terminated for any reason, whether with or without cause, prior to the bonus payout, the participant will not be entitled to any bonus payment..." Crucially, the plan did not stipulate whether the termination of employment takes effect on the date notice of termination is given, the actual last day of employment, or the date on which the notice period concludes. The court found the plan did not specifically eliminate entitlement over the notice period and awarded

damages for the bonus.

• *Grainger v. Pentagon Farm Centre Ltd.*: The relevant bonus clause entitled employees to an "annual performance bonus" of "2 per cent on increased growth over the first five millions [sic] dollars in total sales." The company argued that the reference to "annual performance" should be interpreted to entail that an employee must successfully work an entire year before becoming entitled to the bonus. The court disagreed and awarded damages, despite the fact that the employee did not work through the entire plan year.

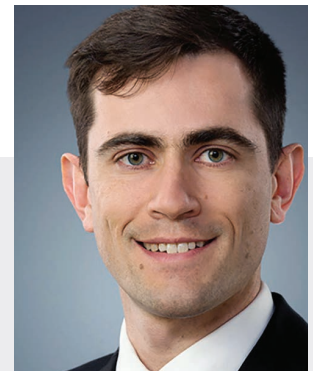
• *Lin v. Ontario Teachers' Pension Plan*: A short-term incentive plan stated: "In the case where ... the Participant's employment is terminated by [the company] prior to the payout of a bonus ... no bonus shall be earned by or payable to the Participant." The wording did not unambiguously alter or remove the respondent's common law right to damages. It did not specifically address entitlement to payments that would have been earned over the notice period.

Company bonus policies have received some rough treatment from courts in recent

years. However, employers can learn from the defeats and successes of others. The uncertainty engendered by *Paquette* is slowly diminishing as new cases fill out the legal landscape, permitting employers to review their policies with the benefit of these precedents.

For more information see:

- *Dawe v. The Equitable Life Insurance Company of Canada*, 2019 ONCA 512 (Ont. C.A.).
- *Paquette v. TeraGo Networks Inc*, 2016 ONCA 618 (Ont. C.A.).
- *Carroll v. ATCO Electric Ltd*, 2017 ABQB 267 (Alta. Q.B.).
- *Kieran v. Ingram Micro Inc.*, 2004 CanLII 4852 (Ont. C.A.).
- *Grainger v. Pentagon Farm Centre Ltd.*, 2019 ABQB 445 (Alta. Q.B.).
- *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619 (Ont. C.A.).



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Worker twice offered to send supervisor copy of offending photo

« from **PERSISTENT** on page 1

per cent women, and only one out of about 25 foremen was female. In the winter and spring seasons of 2017/2018, Mossman worked in roads maintenance and often reported directly to the female foreman, referred to as AB.

Mossman was friendly with AB at work, but he wasn't friends with her outside of work. The environment in the roads department involved joking and sometimes sexual banter. Since it was male-dominated, AB went along with the jokes and tolerated inappropriate comments to fit in and be "one of the guys." She was also concerned that if she complained about sexualized jokes and comments to management, she would be labelled a "rat" by other city employees.

Over a period of three years reporting to AB as his district foreman, Mossman became interested in her romantically, as he knew she was separated from her husband — another city employee. He regularly exchanged work-related texts with AB on their work cellphones, but when he started adding romantic comments and innuendos, it made AB uncomfortable. However, due to her concerns about the fallout from complaining or making things awkward with him, she either ignored the comments or laughed them off.

In May 2017, Mossman texted AB to thank her for a service award and asked her out on a date. AB waited until the next day to respond, at which point she said she was doing well but didn't respond to his date suggestion.

Increasingly inappropriate conduct

Over time, Mossman's texts continued to get more sexually charged. AB continued to ignore them, but she sometimes briefly participated in brief sexual banter initiated by Mossman. In January 2018, Mossman had been off work with an injury to his leg. He sent AB a text with a photograph of an individual pointing to his ankle resting on a desk, but next to the ankle was what appeared to be a swollen penis. Mossman texted that it was proof he wasn't faking his injury and "the swelling has gone down a lot." AB knew the photograph was a meme taken from the internet and not a picture of Mossman and she thought it was funny.

Three months later, in April 2018, Mossman sent AB a text with a picture of a flesh-toned object with a face on it. AB initially thought it was his thumb, but then realized it was probably his penis, which made her "horrified and disgusted." When Mossman followed up by asking if she liked his happy face, she didn't respond.

On April 25, 2018, Mossman informed AB that there was some damage to his city truck. He showed her some pictures of the truck on his cellphone and, while she was look-

ing at them, swiped to a picture of his erect penis. He laughed and said "oops," adding that he shouldn't have shown her that one. AB was "deeply offended and shocked," but a little later Mossman twice offered to send her a copy of the picture. The next morning he texted her again saying "can I send you 1 more pic," to which she didn't respond.

AB didn't think Mossman had accidentally shown her the picture of his penis — a belief that was solidified when he offered to send it to her. She reported the incident to upper management, who launched an investigation into the matter.

Mossman was interviewed and said it had been a mistake — he accidentally swiped too far to the picture of his penis and AB wasn't supposed to have seen it. However, he acknowledged that in his later texts he was offering to send AB the picture.

The city suspended Mossman without pay on April 25, 2018 pending the completion of the investigation. He was told the investigation was confidential and he must not discuss anything related to the allegations with any city employee. However, five days into his suspension, Mossman contacted a roads maintenance foreman with whom he was friends — and who reported to AB — and told him he was shocked and felt AB had betrayed their friendship with her complaint to management. He also said his friend shouldn't trust AB.

Management later interviewed AB about the incident, and she said the picture shocked and upset her. She also mentioned the other text message with inappropriate comments and innuendo that Mossman had been sending her for some time.

Showing photo unintentional: worker

At a second interview, Mossman reiterated that it had been a mistake showing AB the picture. He said he was aware of the city's respectful workplace policy — which set out examples of discriminatory and harassing behaviours including "unwelcome remarks, jokes, taunts, suggestions or speculations about a person's body, attire, sex life, etc., and displays of pornographic or other sexual materials in the form of pictures" — but he insisted he and AB were friends and he didn't feel remorseful. He mentioned that now he understood how it had affected her and wished he could apologize.

Management went back to AB, who confirmed they were not friends outside of work and, while she had found the knee injury picture from January 2018 funny, she knew it was a joke from the internet and not actually a picture of Mossman.

The city determined Mossman had violated the respectful workplace policy — which stipulated inappropriate behaviour that is objectionable and unwelcome to an indi-

vidual would be subjected to discipline up to termination of employment — and code of conduct and failed to appreciate the inappropriateness of his behaviour. It terminated his employment effective May 8, 2018.

The union grieved the dismissal in June 2018 and Mossman prepared a letter of apology to AB on the suggestion of the city's director of transportation.

The arbitrator found that Mossman's "lengthy series of flirtatious comments" toward AB were initially from his romantic interest, but once she "pointedly ignored his request for a date," he should have known his overtures were unwelcome. However, he continued to send her texts with sexual innuendos — often during work hours to AB's work cellphone — which constituted sexual harassment and a violation of the city's respectful workplace policy, said the arbitrator.

The arbitrator also found that, though AB initially thought the "happy-face" picture was of a thumb, she later realized it was a penis. Sending pornographic pictures during work hours on a city cellphone was also disciplinable conduct. Combined with his showing AB another picture of his penis while showing her his truck pictures and then offering to send it to her, it was "unwelcome and offensive conduct" that also constituted sexual harassment and violated the respectful workplace policy — a policy that described harassing behaviours, so Mossman was aware of what was inappropriate.

The arbitrator noted that AB was in a vulnerable position as a woman in a male-dominated workplace and was worried she would face repercussions if she complained of sexual harassment. Mossman proved these concerns to be true when he contacted a co-worker who reported to AB and warned him not to trust her. This was an attempt to undermine AB's authority at work and also undermined Mossman's own acceptance of responsibility — not to mention contrary to the instructions he had been given to not discuss matters related to the allegations during the investigation, said the arbitrator.

Since Mossman had 30 years of discipline-free service with the city, a lesser amount of discipline might have been appropriate if his showing of the photograph to AB in April 2018 was truly accidental, said the arbitrator. However, it was clearly intentional, since he aggravated the situation by offering to send her the picture later. Combined with Mossman's history of inappropriate texting of the previous couple of years and his attempt to undermine her during the city's investigation, his misconduct was deserving of termination, said the arbitrator in dismissing the grievance and upholding the dismissal. See *Calgary (City) and CUPE, Local 37 (Mossman)*, Re (May 30, 2019), J.T. Casey – Arb. (Alta. Arb.).

Employer acted on the information it had from the employee

« from **NO DISCRIMINATION** on page 1

the morning after his second night shift and keep her for the next two nights that he was off before dropping her off either at school in the morning of the third day or at her mother's house in the evening.

On Jan. 4, 2016, the tip of one of Linklater's fingers on his right hand was crushed between two steel plates. The doctor who treated him wrote a note that indicated Linklater would be unable to use his right hand for work because of the injury — meaning Linklater wouldn't be able to perform the tasks of his coil handler position. An assessment was scheduled for three weeks later.

Despite his injury, Linklater came to work on his next four scheduled shifts. Because he was unable to do his regular job duties, he was assigned to help another worker with tasks that were within his restrictions. However, it became evident that the modified work Linklater was doing wasn't of value and the company determined he would be of better use performing office work.

The superintendent in charge of the facility and Linklater's supervisor decided to assign Linklater to speak to all employees about the company's job safety practice manual. They set him up in the lunchroom where he could speak to employees as they came in, let them review the manual and then have them sign off that they had seen it. In order to ensure he saw employees on both the day and night shifts, Linklater would have to work in the lunchroom on eight-hour shifts from 7 a.m. to 3 p.m. Monday to Friday.

Worker objected to change but didn't specify why

The shift change reduced Linklater's hours to 40 every week from 48 every eight days and he lost a shift premium for working two night shifts every week. Linklater objected to the change and said it would also disrupt or impact the time he could spend with his children — though he didn't mention custody access was based on his 12-hour shift schedule.

Linklater met with the superintendent and said he wanted to stay on 12-hour shifts for "family reasons, money." The superintendent said Essar Steel wouldn't pay two people to do one job, so Linklater couldn't remain as a coil handler technician if he could not perform the duties of the position. In addition, it was standard procedure at the facility to move injured workers to eight-hour shifts when they were unable to do their regular job.

Linklater remained unhappy about the arrangement, but he began working the eight-hour shift on Jan. 13. He unsuccessfully asked again to be moved back to 12-hour shifts, though during the first week there was no conflict with the custody

order. Finally, he took his concerns to his union, which sent an email on Jan. 22 outlining Linklater's "court ordered access to a child which he is now not able to follow because of a schedule change" and requested a return to the 12-hour shift schedule.

The first conflict with the custody order happened on Jan. 25 — a day on which the worker would have been off on the old 12-hour shift schedule and dropped his daughter off at school at 8:45 a.m. Because his eight-hour shift started at 7 a.m., Linklater had to arrange for his ex-wife to pick their daughter up the previous evening, costing him a night and a morning with her.

Linklater met with the superintendent and his supervisor on Jan. 27 to discuss options. They asked Linklater to come up with a different solution, but he insisted that going back to the 12-hour shifts was the only thing that would work with his custody order. Management agreed to return him to 12-hour shifts once he had medical clearance to do at least one of the five jobs on the 12-hour shift rotation. Linklater received that clearance soon after and returned to the 12-hour shift on Feb. 4.

However, Linklater filed a human rights complaint alleging that, for the period before his return to the 12-hour shift, Essar Steel discriminated against him based on his disability because he earned less in the accommodated position — with fewer hours and no shift premium for two night shifts each week — and based on his family status when it failed to accommodate his child custody obligations by changing his work schedule.

The tribunal found that when Linklater was initially taken off the 12-hour shift, his restrictions prevented him from performing any of the jobs available on that shift. Without work for him on the shift, it was reasonable for Essar Steel to move him to the eight-hour shift where there was work he could do. Linklater's restrictions didn't say he couldn't work 12-hour shifts, but he wasn't entitled to stay on that shift if he couldn't do the work, the tribunal said.

The tribunal also found that Linklater

didn't inform Essar Steel of his court-ordered custody arrangement when discussing accommodation options. The company was unaware of it until the union's Jan. 22, 2016 letter. Before then, Linklater had expressed displeasure with the shift move but not the reason why. In addition, at the time of the union's letter, Linklater had yet to lose any time with his child and the letter didn't indicate a specific conflict was coming up on Jan. 25.

Once Essar Steel became aware of the conflict, it took measures to rectify the situation, agreeing to move Linklater back to 12-hour shifts as soon as he provided medical clearance. When he did, the move was made immediately. As a result, Essar Steel met its duty to accommodate once it was aware of the need for accommodation and would likely have taken steps to address the Jan. 25 conflict had it known earlier, the tribunal said.

"[Essar Steel] took appropriate actions based on the information it had, and when advised that there were issues which required accommodation, it took further steps to address [Linklater's] concern, which resulted in [Linklater] returning to his preferred shift," said the tribunal, adding that it was up to the company to determine the method of accommodation, not Linklater, who wanted only to return to 12-hour shifts and refused to consider other options.

The tribunal also found that because Linklater couldn't do the jobs on the 12-hour shift, the loss of the night-shift premium and the difference in hours — totalling about \$250 during the three weeks Linklater was on the eight-hour shifts — wasn't discrimination. Linklater was paid for the work he performed and wasn't entitled to be paid as if he could perform the jobs on the 12-hour shift.

The tribunal determined that Essar Steel did not discriminate against Linklater's family status or disability and dismissed his complaint.

For more information see:

- *Linklater v. Essar Steel Algoma Inc.*, 2019 HRTO 273 (Ont. Human Rights Trib.).

Trend toward protection of personal privacy

« from **ASK AN EXPERT** on page 2

tion in all matters involving personal information and particularly workplace video surveillance. In addition to the privacy issues, employers must be aware that video surveillance may erode the employment relationship due to distrust.

For more information see:

- *Canada Safeway Ltd. v. U.F.C.W., Local 401*, [2005] A.G.A.A. No. 109 (Alta. Arb.).

- *Calgary Herald v. GCIU Local 34-M*, [2004] A.G.A.A. No. 23 (Alta Arb.).
- *Woodstock (City) and Woodstock Professional Firefighters' Assn. (Video Surveillance)*, 122 C.L.A.S. 307 (Ont. Arb.).
- *Colwell v. Cornerstone Properties Inc.*, 2008 CanLII 66139 (Ont. S.C.J.).

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YOU MAKE THE CALL

How would you handle this case? Read the facts and see if the judge agrees



A tippie during relief work powers down worker's employment

THIS INSTALMENT of You Make the Call features an electrical utility worker who brought some booze on a trip across the border to provide assistance to an area that lost power from a storm.

The 54-year-old worker was a front-line manager for Hydro One, an electricity transmission and distribution utility serving Ontario, in Beachville, Ont. He first joined Hydro One in July 1986 and became a front-line manager on a temporary basis in 2016 with the position becoming permanent in 2017. He had no discipline on his record and was regularly trained on Hydro One's code of conduct — which specifically prohibited “drinking intoxicants or using illegal drugs in the workplace” or bringing them “to any Hydro One workplace” — and safety rules.

On March 3, 2018, the worker was asked to travel to Baltimore, Md. with other Hydro One employees to help with restoring power to the area after a major storm. The worker agreed and planned to meet with other Hydro One employees in St. Catherines,

Ont. that evening for an overnight drive to Baltimore. As he prepared to leave, the worker decided to take a partially full bottle of whiskey with him.

After the rendezvous in St. Catherines, the worker was responsible for leading a group of six or seven trucks to the storm area. The convoy drove overnight and arrived at the staging area at the Baltimore airport at about 6 p.m. on March 4.

The worker parked his truck with other Hydro One vehicles and joined a group of 27 Hydro One employees. After talking with them for a few minutes, he remembered the bottle of whiskey, so he returned to his truck, fetched the bottle from his bag and brought it back to the group. He took a gulp and asked if anyone wanted the rest. None of the other workers took him up on the offer.

A Hydro One customer operations manager was in the group and told the worker that his behaviour was inappropriate and he should put the bottle back in the truck. The worker went back to the truck, took one more

swig and put the bottle back in his bag. He then sat in his truck to make a phone call and the operations manager came to the truck window, introduced himself as a manager and said he didn't appreciate the worker taking another drink when he told him not to.

Later that evening, the worker attended an orientation in the staging area before going to his hotel. The next morning, when he arrived at the staging area, he was told they had to send him home. The worker asked if it was about the incident in the parking lot the previous evening and was told that it was. The worker then made the 12-hour drive back to Beachville in his Hydro One vehicle.

The worker met with management on March 13 for a fact-finding interview, at which he acknowledged his misconduct and said it was a “stupid lapse in judgment” after a long day on the road. Two weeks later, Hydro One terminated his employment for “failure to meet his duties as a leader, breach of trust, violation of the Hydro One code of conduct, and the Hydro One safety rules.”

YOU MAKE THE CALL

Was the worker wrongfully dismissed?

OR

Was there just cause for dismissal?



IF YOU SAID the worker was wrongfully dismissed, you're right. The arbitrator found that the worker's misconduct was serious, as he knew the code of conduct and safety rules and also held a leadership role. By committing a serious health and safety violation in front of Hydro One employees, the worker “failed to live up to Hydro One's reasonable leadership expectations,” said the arbitrator.

The arbitrator also pointed out that the worker was representing Hydro One “as an ambassador” in his role to help with storm relief efforts in Baltimore. Though there was no evidence of any adverse reaction from the Baltimore electric utility, the worker's mis-

conduct had the potential to cause Hydro One embarrassment, the arbitrator added.

However, the arbitrator found the worker's 32 years of service without discipline was a significant factor in the worker's favour, as was the fact that he acknowledged his misconduct in the meeting with management and expressed remorse. This acknowledgement lent credence to the idea that this was an isolated incident in a long career and it was likely the worker wouldn't repeat the misconduct.

The arbitrator set the termination aside and ordered it replaced with an unpaid suspension from the date of his discharge to the

date of the arbitration decision — a period of three months — with no loss of seniority.

“I. Accept that the (worker) understands and accepts that his behaviour was completely unacceptable, and he will never conduct himself in a similar manner in the future,” the arbitrator said. “In these circumstances, there is a very good prospect that the (worker) can learn from his mistake and continue to be a good and valuable employee.”

For more information see:

• *Hydro One Networks Inc. and Society of United Professionals, Re*, 294 L.A.C. (4th) 195 (Ont. Arb.).

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