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Feature

The Times are Definitely Changing

Is the legal standard for "just cause" catching up to an evolving social context?

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As many employers know, the threshold to terminate an employee for "just cause" is very high. This is because terminating for just cause allows the employer to end the employment relationship without reasonable notice or pay in lieu thereof – it is the capital punishment of discipline.

Termination of an employee for just cause is even more difficult where it concerns an employee with an otherwise pristine disciplinary record. So how egregious must that employee's (mis)conduct be to meet this threshold? Has this threshold changed, as society's values have changed over time?

In the Board of Reference (the "Board") Decision in ***Edwards v Pembina Hills School Division*** issued on October 19, 2023, the school division terminated the teacher's employment for just cause due to an isolated incident of the teacher "coerc[ing] the [minor student]…by placing her hands on him", "moving his body and straddling him," and proceeding to "bounce and grind on his lap" (the "Incident"). The school division further noted the student had special education needs and an Individual Program Plan, authored by that same teacher, that required keeping physical distance from the student to avoid causing him to feel threatened. The teacher appealed the school division's decision to terminate her employment to a Board of Reference in accordance with the *Education Act*, arguing that such termination was unreasonable and that a lesser form of discipline should have been imposed. The teacher otherwise had a clean disciplinary record.

There was no question that the teacher's actions constituted misconduct. However, to establish "just cause," the misconduct must be sufficiently serious. On this point, the teacher cited the 1986 decision of ***Hogan v Commiss-ioner of the Northwest Territories***, 1986 CanLII 6578 [*Hogan*], where a Board of Reference found that a teacher twisting the arm of a student, patting a student on the bum for the purpose of "teasing her" rather than for "sexual gratification", and singling her out for "special attention", did not constitute just cause.

The teacher's argument was that the Incident was not so serious as to justify dismissal without notice as her physical touching of the student, like in *Hogan*, was not motivated by sexual intent.

The Board invited the parties to make submissions on ***City of Calgary v CUPE Local 37***, 2019 ABCA 388 [*Calgary*], in which the Court of Appeal overturned a judicial review decision upholding an arbitral award that substituted a lengthy suspension for termination as discipline for squeezing a colleague's breast without consent. The Court of Appeal adopted an updated definition of sexual harassment, which incorporated gender-based harassment and acknowledged the evolving legal landscape. Regarding the importance of social context, the Court stated:

Social context informs the application of arbitral precedent. Arbitrators must consider whether time and changing social values reveal precedents to be based on faulty assumptions about acceptable sexual conduct in the workplace.

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Accordingly, reliance on precedent that is incongruent with modern society's views of acceptable conduct in the workplace would render a decision unreasonable. The Court further held that harassment with a physical component constitutes a form of sexual assault and is among the most serious forms of workplace misconduct.

In the wake of the Court of Appeal's decision, the Board refused to rely on Hogan as suggested by the teacher. Notably, the Board stated that *Hogan* inappropriately focused on whether the complainant felt the conduct was "serious" rather than considering the context in which the misconduct occurred. Instead, the Board concluded that the Incident was properly characterized as sexual assault, or at minimum, a "very serious sexual harassment" and would therefore attract the most significant form of discipline: termination. Termination is especially proportional in this context as teachers are subject to a high standard of conduct, given their position of trust and authority over vulnerable children. Ultimately, the Board was satisfied that just cause existed for the teacher's termination.

With societal expectations regarding appropriate workplace behaviour clearly shifting, employers have sometimes been faced with a double standard. Namely, employers carry OH&S statutory obligations to prevent and address workplace misconduct of this nature. Further, this type of misconduct is now widely considered intolerable by today's society. Despite this, the burden on an employer to establish just cause seemingly remains high. In result, employers have been left holding the bag, paying out severance to offending employees. While this recent case law has not lowered the standard for just cause per se, it is good news for employers that arguably signals the times may in fact be changing.

Where an employer becomes aware that an employee has engaged in misconduct and/or is considering the termination of an employee for just cause, they are highly encouraged to seek legal advice to assess whether the employee's misconduct warrants summary dismissal in the context of the modern workplace.

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