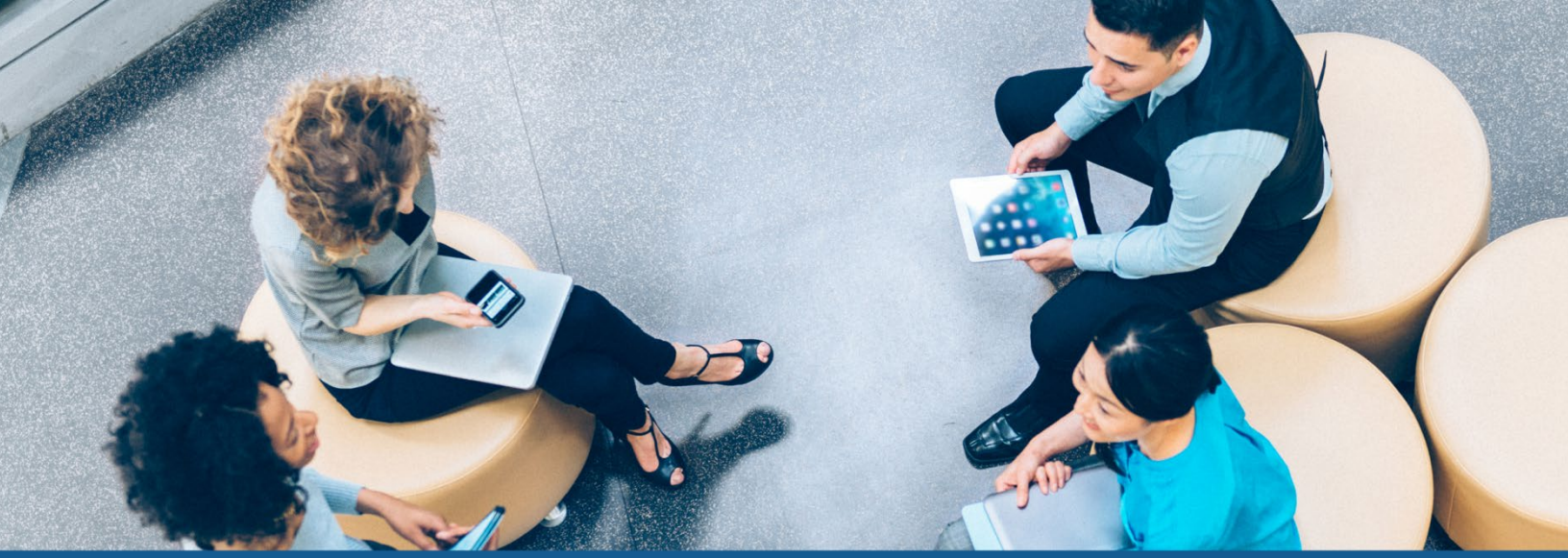

What's New in HR Law

Dated references, building boats, and never saying sorry: *Hucsko v. A.O. Smith Enterprises*

June 18, 2020

The Ontario Superior Court of Justice recently released its decision in *Hucsko v. A.O. Smith Enterprises*, 2020 ONSC 1346, a case that touches on various important employment law topics, including: harassment investigations, just cause terminations, forced apologies, and the duty to mitigate.

Factual Background

The Plaintiff, Mr. Hucsko, was 60 years old when his employment was terminated for just cause. At the time of his dismissal, he had worked for A.O. Smith Enterprises and its predecessor for approximately 20 years.

In 2017, Mr. Hucsko was the subject of a workplace harassment complaint. The complaint, which was made by a female colleague, detailed four separate incidents in which Mr. Hucsko made inappropriate comments and/or gestures to the complainant. The employer launched an investigation into the alleged harassment and interviewed the complainant, Mr. Hucsko, and several witnesses.

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When confronted with the allegations, Mr. Hucsko claimed that his comments were misinterpreted. For instance, one of the four allegations was that Mr. Hucsko stated the complainant was "getting pumped from under the skirt". The complainant understood this to be a reference to a sexual act. However, Mr. Hucsko claimed that he had actually said the complainant would have "so much sunshine pumped up her skirt…" which, according to him, was a reference to a movie from the 1970's. Although not referenced in the decision, it appears the line comes from the 1977 film titled "Oh, God!" starring John Denver. Ultimately, the employer determined that while not all of the allegations could be substantiated, Mr. Hucsko had made some inappropriate comments.

In the wake of the investigation Mr. Hucsko was advised that he would be required to participate in training, as well as apologize to the complainant. After seeking legal advice, Mr. Hucsko agreed to undergo training but refused to apologize to the complainant. The employer subsequently suspended, then terminated Mr. Hucsko for just cause, claiming an "irreparable breakdown of the employment relationship". Mr. Hucsko sued for wrongful dismissal.

The Court's Decision

The Court found that although much of the trial dealt with whether Mr. Hucsko's conduct amounted to sexual harassment, the actual reason Mr. Hucsko was dismissed was not his inappropriate conduct but, rather, his refusal to apologize to the complainant. Further, the Court found that Mr. Hucsko's decision to contact counsel factored into the employer's decision to terminate his employment. This led the Court to conclude that the employer did not have just cause to terminate the employment relationship.

Notice Period

After considering the relevant factors, including Mr. Huckso's advanced age and lengthy period of service, the Court found he was entitled to 20 months of notice.

The Court found that Mr. Hucsko made no attempt to mitigate his damages by seeking alternate employment. Instead, he opted to take a course on how to build a sailboat. Despite this finding, the Court also found that the employer failed to prove that Mr. Hucsko could have found comparable alternate employment if he had looked. Further, the Court highlighted that the employer made no attempt to assist Mr. Hucsko by providing him with outplacement counselling, a reference letter, or any other support to find a new job. As such, although Mr. Hucsko made no effort to mitigate his damages, the Court declined to reduce his 20 month notice period on this basis.

Check the Box

This case provides a number of important reminders for employers, including:

- **Use policies and training to set expectations.** Employees may have radically different opinions on what is appropriate in the workplace, or even about the meaning of certain

phrases (or movie quotes). Workplace policies and training can be important tools to align everyone's expectations around appropriate conduct.

- **Disciplinary measures should be justified and effective.** Forcing an employee to apologize is generally not an advisable disciplinary measure. Not only do forced apologies raise the issue of compelled admissions, practically speaking, an insincere apology can do more harm than good. Further, disciplining (or firing) an employee for seeking legal advice is never a good idea.
- **Be sure before issuing a summary dismissal.** Just cause is a high threshold. Employers should be confident they have evidence to support their position prior to issuing the notice of termination. While not awarded in this case, asserting cause without a justifiable basis to do so has the potential to expose an employer to exemplary damages.
- **There may be value in helping a former employee on their way.** It is often in an employer's best interest to assist a former employee with their job search in order to mitigate damages. At the very least, employers should be prepared to demonstrate what jobs may have been available to an employee if the employer intends to advance a failure to mitigate argument.

Need more information?

If you have any questions about this update, or need legal advice on litigation involving employment, labour, or human rights issues, please contact Darren Avery at 519-435-6008, or your regular lawyer at the firm.

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