



What's New in HR Law

Being Bad on Purpose: Court of Appeal for Ontario Upholds Just Cause Termination for Single Incident of Workplace Sexual Harassment

May 16, 2022 | By [Charles Muriithi](#)

Bottom Line

The Court of Appeal's recent decision in [Render v. ThyssenKrupp Elevator \(Canada\) Limited, 2022 ONCA 310](#), affirms that even a single incident of workplace sexual harassment may amount to just cause for termination. However, Ontario's highest court has also signaled that, depending on the particular circumstances, employers may still owe termination pay under the *Employment Standards Act, 2000* ("ESA") to employees who have committed such misconduct.

Facts

A 30-year senior employee (the "Employee") was dismissed from employment after he slapped the buttocks of a female colleague ("V") while in the presence of other employees. V filed a formal HR complaint against the Employee, following which the Employer conducted an internal investigation into the circumstances surrounding the complaint. After determining, based on the investigative findings, that the Employee's misconduct was sufficiently serious, the Employer immediately dismissed the Employee without providing any vacation pay, pay in lieu of notice, or severance pay.

This article is for the purposes of only general information and does not constitute legal advice or opinion.

Not long before the slapping incident, the Employer had introduced a new “zero tolerance” anti-harassment and anti-discrimination policy. Under the policy, employees engaging in workplace harassment or discrimination would be subject to discipline, up to and including termination of employment.

The Lower Court’s Decision

The issue at trial ([2019 ONSC 7460](#)) was whether the Employer had just cause to dismiss the Employee. Absent just cause for dismissal, the Employee would have been entitled to common law reasonable notice of termination, or pay in lieu thereof.

The evidence at trial established that the Employee and V were friendly towards one another at work and would frequently engage in joking and bantering while at work. Moreover, the office environment was described as one where sexist and offensive jokes were made and where male colleagues would sometimes tap one another on the buttocks and say “good game.” Prior to the slapping incident, however, neither the Employee nor V had touched each other on the buttocks.

After reviewing the facts, the Superior Court concluded that the employment relationship could no longer be maintained and that the Employer had just cause for the Employee’s dismissal. The trial judge found that the Employee’s conduct towards V was non-accidental, akin to serious and unacceptable conduct, and an attack on V’s dignity and self-respect. The trial judge also admonished the Employee’s misconduct, stating that it had no place in the modern workplace and that the Employee ought to have been aware that his conduct was unacceptable. Other relevant factors included the Employee’s position of authority over V, the Employer’s anti-harassment and anti-discrimination policy (on which the Employee had been trained merely a week before the incident and which the Employee, as a manager, was responsible for implementing), and the Employee’s lack of remorse following the incident.

The Court of Appeal’s Decision

The Employee appealed the lower court’s decision, with partial success.

The Court of Appeal agreed with the trial judge that the Employer had just cause for dismissal at common law, as non-consensual touching of a colleague’s private body parts is considered serious misconduct.

However, the Court found that the Employee was nevertheless entitled to statutory notice of termination (or pay in lieu thereof). The Termination and Severance of Employment regulation under the *ESA* ([O. Reg. 288/01](#)) removes entitlements to statutory notice of termination (or pay in lieu) and severance pay where an employee is guilty of wilful misconduct, disobedience or wilful neglect of duty that is not trivial and has not been condoned by their employer. This standard is higher and much narrower than just cause for dismissal at common law, and requires evidence that an employee deliberately engaged in wrongdoing. Finding that the Employee’s conduct was not preplanned but, rather, done in the heat of the moment in reaction to a slight, the Court concluded that the Employee had not engaged in wilful misconduct. Accordingly, the Employee was awarded eight weeks of termination pay, although he was not awarded severance pay as there was no evidence that the Employer’s payroll was \$2.5 million or more.

Check the Box

This decision serves as a timely reminder to employers to review their employment policies — particularly those with respect to workplace harassment, workplace sexual harassment, and professional conduct — and update and provide any required training to ensure employee compliance. As employees return to on-site work, it is important for employers to clearly communicate expectations around workplace behaviour and to promote a positive work environment for all employees.

The decision also provides much-needed clarification with respect to employers' obligations, if any, where employment is terminated for just cause at common law as compared to "wilful misconduct" under the *ESA*. Prudent employers should consult with legal counsel before proceeding with for cause terminations in order to assess the potential risks and liabilities that may result.

Need More Information?

For more information or assistance with workplace management, termination-related issues, and HR policies, contact [Charles Muriithi](#) at 647.598.0517, or your regular lawyer at the firm.



Toronto
Bay Adelaide Centre
333 Bay Street
Suite 2500, PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West
Suite 1201, Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca