

## ONE INCIDENT OF SEXUAL HARASSMENT JUSTIFIED TERMINATION FOR CAUSE

By Barry W. Kwasniewski\*

### A. INTRODUCTION

On November 27, 2019, the Ontario Superior Court of Justice (the “Court”) released its decision in *Render v ThyssenKrupp Elevator (Canada) Ltd* (“*ThyssenKrupp*”),<sup>1</sup> holding that the employer, ThyssenKrupp Elevator (“TKE”) had just cause to terminate its employee, Mark Render (“Render”), over an incident of workplace sexual harassment. In finding the dismissal of Render without notice or pay in lieu of notice was justified, the Court applied a contextual analysis, which is “an assessment of the context of the alleged misconduct to determine whether the misconduct violates an essential condition of the employment contract, breaches the faith inherent in the work relationship or is fundamentally inconsistent with the employee’s obligations to his employer.”<sup>2</sup> This *Bulletin* summarizes the Court’s decision, which is relevant to charities and not-for-profits as employers.

### B. FACTUAL BACKGROUND

The plaintiff, Render, worked for the defendant, TKE (and its predecessor), for 30 years when a co-worker, Linda Vieira (“Vieira”) brought allegations against Render for slapping her buttocks (the “Incident”). Render had no history of any disciplinary or performance issues prior to the Incident, and he was a valuable member of TKE before being terminated. Render was working as the operations manager of TKE’s Mississauga office, which was a small office with 13 people working in it, with 10 of them being

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<sup>1</sup> 2019 ONSC 7460 (CanLII), <<http://canlii.ca/t/j48pk>> [“*ThyssenKrupp*”].

<sup>2</sup> *Ibid* at para 6.

males and three females. At the time of Render's termination, four individuals, not including Vieira, directly reported to Render, and another 40 technicians and mechanics indirectly reported to him, given that Render was responsible for the service operations of the company and had been involved in hiring and training TKE employees. While Vieira directly reported to the office manager, she was required to work with Render when the office manager was away, as Render was left in charge.

The Mississauga office was described as being very social, with regular joking and bantering, and even sometimes inappropriate jokes and conduct. The male workers would even occasionally tap each other on their buttocks and say "good game", but this activity did not include the women employees. Shortly before the Incident, TKE had introduced an Anti-Harassment and Anti-Discrimination Policy ("Policy") that included a new "zero tolerance" policy for discrimination and harassment matters. The Policy also stated that sexual advances and touching would be considered to be sexual harassment, and any employee engaging in conduct that ran contrary to the Policy would be subject to appropriate discipline, including termination from employment. This Policy was introduced at a presentation that was attended by both Render and Vieira. Further, TKE also had a Progressive Discipline Process Policy, based on which employees could be subjected to progressive discipline that ranged from "coaching, a verbal warning, a written warning, final warning, suspension and, finally, termination"<sup>3</sup> for violation of any company policy. Additionally, behavior or concern of serious nature could even lead to progressive discipline being accelerated to match the violation.

Render and Vieira had a friendly relationship that included joking with each other, but did not involve any inappropriate touching before the Incident. The two parties presented conflicting evidence regarding the Incident in question, which occurred in front of other co-workers. The Court found that at the time of the Incident, Vieira had made a verbal or non-verbal joke about Render's height, which he found to be disrespectful, as he did not appreciate comments about his height. According to Render, following Vieira's comment on his short height, he agreed that he was short and crouched down while he was standing about 12 inches away from her. He then took off his boots and went on his knees in front of her to show how short he was with his boots off. Render testified that while he was crouching down, his face was fairly close to her breasts for two to three seconds, but everyone, including Vieira, was laughing as he went down on his knees. Contrary to this, Vieira stated that after what was a non-verbal joke on Render's height,

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<sup>3</sup> *Ibid* at para 26.

he crouched down and moved his face to her breast level to only be an inch away from her breasts, and then started moving his head back and forth, making motorboat sounds (“motorboating”). Further, Vieira stated that while doing so, he moved further towards her and backed her against the wall.

The plaintiff’s evidence was that as Render was getting up, he lost balance and since Vieira had turned, his hand partly came into contact with her hip and buttock. Render had only meant to tap her slightly, but he did say “good game” following this. In contrast, the defendant’s evidence, including Vieira’s, was that Render had slapped Vieira on her buttocks, clearly upsetting her since she had not given Render permission to touch her in such a manner (something Render accepted). There was further evidence of two emails sent by Vieira to her husband where she had described the Incident to him, which aligned with Vieira’s description of the events, except for the fact that there was no reference to Render’s conduct involving “motorboating”. Initially, Vieira was ok with just getting an apology from Render, and while he apologized, it seemed insincere to her. Then, after believing that Render was mocking her amongst some other co-workers, Vieira decided to report the matter to HR. Vieira also spoke to the Canadian president of TKE, Gary Medeiros (“Medeiros”) about the Incident, and an investigation was carried out by the HR manager who thought the Incident was sexual harassment. In response, Render made a complaint to HR against Vieira having punched him in the arm in the past and for making anti-Semitic comments. Following this, Render was terminated effective immediately for cause, which Medeiros testified was solely based on “the incident in which Mr. Render touched Ms. Vieira’s buttocks.”<sup>4</sup>

## C. ANALYSIS

The Court found that Render was rightfully terminated with cause by conducting the contextual analysis set out in *McKinley v BC Tel* (“*McKinley*”)<sup>5</sup>, which “requires an examination of the particular facts and circumstances and considers the nature and seriousness of the employee’s conduct to determine whether it is sufficiently egregious so as to violate or undermine the employment relationship.”<sup>6</sup> In reviewing the factual background, the Court assessed the aggravating and mitigating factors, given the circumstances.

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<sup>4</sup> *Ibid* at para 74.

<sup>5</sup> 2001 SCC 38, [2001] 2 SCR 161 [“*McKinley*”].

<sup>6</sup> *ThyssenKrupp*, *supra* note 1 at para 12.

First, the Court found that “the incident was more than Mr. Render recognize[d] it to be, and something less than Ms. Vieira assert[ed] it to be.”<sup>7</sup> The Court did not accept that there was any motorboating involved in Render’s conduct because of the lack of reference to motorboating in the emails sent by Vieira to her husband. Further, according to the Court, motorboating would have left “a significant impression on the persons who were in the office”, such as being noticed by others present or causing them to discontinue any ongoing conversations, which was not found to be the case. Notwithstanding this, the Court concluded that Render was invading Vieira’s personal space by being in close proximity to her breasts and acting inappropriately. Further, the Court did not accept Render’s evidence of the contact of his hand with Vieira’s buttocks being accidental because of several reasons, such as it ran contrary to common sense based on the evidence, Render saying “good game” like the male employees would jokingly do after slapping each other on buttocks, not classifying the Incident as an accident until several days later, and asking Vieira if she was serious when she looked upset immediately following the slap.

The Court found that the mere act of slapping was unacceptable conduct. “Whether the act was a sexual harassment, sexual assault or simply a common assault, the purpose seem[ed] to be the same: to assert dominance over Ms. Vieira and to demean and embarrass her in front of her colleagues.”<sup>8</sup> In addition, other factors that the Court found to be aggravating included Render’s position of authority as a supervisor; his lack of remorse for his actions and not taking responsibility for the same, but instead making a formal complaint against Vieira; as well as a lack of understanding that his conduct was a form of sexual assault or harassment. The company’s Policy clearly stated that “sexual harassment can arise from a single incident and may include public humiliation. Sexual harassment is defined to include any unwelcome sexual touching. The Policy [also] provides that any employee found to have engaged in this type of conduct will be subject to discipline up to and including termination of employment.”<sup>9</sup> This was something that Render should have been familiar with, given his position and having attended a presentation on it.

Despite Render’s record of not having had any performance or disciplinary issues in the past 30 years of employment being a mitigating factor, it was insufficient for the Court to find that his dismissal was unjust. The Court also did not find having a joking office culture and Vieira’s participation in jokes to be

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<sup>7</sup> *Ibid* at para 78.

<sup>8</sup> *Ibid* at para 93.

<sup>9</sup> *Ibid* at para 97.

mitigating factors because she never consented to being touched on any sexual or private part of her body, and also never consented to being demeaned or disrespected in front of other co-workers.

Next, the Court applied the principle of proportionality that was part of the *McKinley* contextual analysis. This required the Court to “strike a balance between the severity of an employee’s misconduct and the sanction imposed.”<sup>10</sup> Since termination of an employee is considered to be “the ‘capital punishment’ of employment law,”<sup>11</sup> the onus rested on TKE to prove on a balance of probabilities that no other reasonable alternative, other than Render’s termination for cause, was available. This burden was also particularly high given Render’s long serving history of employment. On this, the Court concluded that given the circumstances and after balancing the aggravating and mitigating factors, TKE had satisfied this onus and Render’s termination was justified.

## D. CONCLUSION

This case serves as an important reminder for employers, including charities and not-for-profits, that a single act of sexual assault or harassment may be sufficient grounds to justifiably terminate an employee. Further, an employee’s long history of service and lack of any disciplinary or performance issues in the past may be insufficient to show that termination was without cause. Having policies in place that clearly define the acceptable conduct and disciplinary action that may be taken for violating those policies is also very helpful in such cases, which are fact-specific.

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<sup>10</sup> *Ibid* at para 107.

<sup>11</sup> *Ibid* at para 108.