CITATION: Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900
TORONTO DIVISIONAL COURT FILE NO.: DC-23-00000490-00JR
DATE: 20240402

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Firestone RSJ, Charney and Leiper JJ.

BETWEEN:	
METROLINX	
Applicant	*Bonnie Roberts Jones* and *Rayaz M. Khan*, for the Applicant
– and –	
AMALGAMATED TRANSIT UNION, LOCAL 1587 and THE GRIEVANCE SETTLEMENT BOARD	*Karen Ensslen* and *Emily Home*, for the Respondent, Amalgamated Transit Union, Local 1587
Respondents	
	HEARD at Toronto: February 14, 2024

REASONS FOR DECISION

CHARNEY J.:

Overview

[1] In this application for judicial review, Metrolinx seeks an Order quashing the decision of Arbitrator of the Grievance Settlement Board (the "Board"), dated July 20, 2023 (the "Decision"). The Decision had the effect of granting the Union's grievances and reinstating five employees whom the Employer had dismissed. The Employer submits that the Decision is unreasonable.

[2] The Decision concerns the termination of the employment of five GO Transit bus drivers (the "Grievors") employed by Metrolinx (the "Applicant" or the "Employer") following an investigation into their behaviour which Metrolinx determined to constitute workplace

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harassment and misconduct. The Grievors are members of the Amalgamated Transit Union, Local 1587 bargaining unit (the “Respondent” or the “Union”).

[3] There is no dispute that the standard of review for a decision of the Board is reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[4] For the reasons that follow, I find that the Arbitrator’s decision was unreasonable. I would grant the application, quash the Decision and remit the matter back to a different Arbitrator for reconsideration in accordance with these Reasons.

Facts

[5] The parties prepared an agreed statement of facts for the purposes of this application for judicial review. The facts below are a summary of that agreed statement.

[6] Metrolinx is a regional transportation provider, operating GO Transit, the UP Express and PRESTO. GO Transit operates numerous train lines and bus routes.

[7] The Union is the bargaining agent for the bargaining unit which includes the Grievors. The Applicant and the Union are parties to a collective agreement.

[8] The Applicant has developed a framework of policies that are intended to address workplace harassment and discrimination, including mechanisms for the purposes of investigating complaints of harassment and discrimination, and training modules designed to eradicate harassment and discrimination. The Grievors have each participated in the referenced training modules and are, therefore, familiar with the applicable policies which prohibit harassment and discrimination.

[9] The Workplace Harassment and Discrimination Prevention Policy (the “Policy”) commits the Employer to take “every reasonable step to”, among other things, “…identify and eliminate workplace harassment and discrimination in a timely manner”. It “also covers harassment and discrimination which occurs outside the workplace but which is having a negative impact within the workplace” as well as “harassment and discrimination through social media where it is established that the impact of the harassment and/or discrimination is being manifested within the workplace”. And while recognizing that harassment may take many forms, it expressly includes “offensive behaviour arising from the use of electronic media, devices and systems”.

[10] In September 2019, the Grievors were engaged in online text communications via a platform called “WhatsApp” on their personal cellphones.

[11] In April 2020, while conducting an investigation into an unrelated matter, the Applicant’s HR department was informed by an employee that a WhatsApp conversation between the Grievors and others contained negative, derogatory and sexist comments about a female employee. These comments made references to a female co-worker, Ms. A, performing sexual favours for career advancement. Ms. A had received screen shots of these messages.

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Although Ms. A reported these allegations to her supervisor in 2019, she did not file a formal complaint at the time because she did not want the matter investigated.

[12] Once the HR department became aware of these allegations, they were reported to the Employer's Workplace Harassment and Discrimination Prevention Department for investigation.

[13] Metrolinx commenced an investigation, which was conducted by the Employee Labour Relations Manager, who conducted interviews with each of the five Grievors and other witnesses. During the course of the investigation, the investigator became aware of additional allegations of inappropriate comments allegedly made by other Metrolinx employees in a WhatsApp group chat.

[14] The investigator relied upon screenshots of messages that were sent in the WhatsApp group chat and were provided by one of the Grievors on June 19-20, 2020 at a time when he had access to both WhatsApp group chats. During the investigation, he accessed the group chat in front of the investigator, confirming its existence and his participation in it. He agreed to send screenshots of the group's discussions to the investigator.

[15] One of the witnesses interviewed was Ms. A, a bus driver and temporary acting supervisor in September 2019. As part of her acting supervising duties, she was required to shadow various supervisors in bus operations.

[16] During a night shift in September 2019, Ms. A shadowed a male supervisor out of the Hamilton GO station. Near the end of that shift, Ms. A and the male supervisor returned together to the Streetsville Garage at approximately 4:00 a.m. Ms. A saw approximately three or four drivers at the Streetsville Garage when she returned with the male supervisor. She could not recall who was present, with the exception of one of the Grievors. Ms. A told the investigator that she heard someone say something to the effect of "they look cozy together," in reference to her and the male supervisor returning to the Streetsville Garage at the end of the night shift.

[17] Some time after this incident, someone sent screenshots of WhatsApp group messages to Ms. A's personal cellphone. Despite repeated requests by Metrolinx, Ms. A refused to disclose who sent her the screenshots. Ms. A recalls the WhatsApp messages had an identifier on them indicating that the original messages had been sent by another one of the Grievors.

[18] When Ms. A was asked during the interview on April 23, 2020 what the messages said exactly, Ms. A said she could not remember all the messages she had received, but she recalled that one message said something to the effect of "[Ms. A] went down on her knees to get the acting supervisor job."

[19] Ms. A deleted the messages from her cellphone shortly after receiving them as she did not think it was appropriate to have them on her personal cellphone.

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[20] The messages upset Ms. A at the time she reviewed them. She recalled getting emotional at work when she first saw the messages.

[21] Ms. A said that she did not want to file a formal complaint, as she did not want the other drivers to know she complained. Ms. A also stated in July 2020 that she did not want to "take this further".

[22] The investigator sent Ms. A emails on June 18, 2020 and July 2, 2020 requesting, among other things, that Ms. A provide a copy of the messages she had reviewed, or information about the person who had provided them to her. Ms. A advised on July 2, 2020 and July 6, 2020 that she did not want to participate in the investigation any further, explaining that the investigation was "really stressing me out and distracting me to do my job knowing I didn't bring up the complaint nor do I want to do anything about it".

[23] The following are examples of the comments made by the Grievors in their WhatsApp chat group. The names are anonymized:

a. "maybe Ms. B tried to suck her cock too!" allegedly a reference to a former Metrolinx Sr. Manager;

b. "I heard C walked in on D sucking Mr. E's dick" referring to rumors involving current employees (all of whom were Union executives);

c. "U suck ur way to the top like Ms. B… but then ran into another woman who wasn't into her [with laughing emoji]";

d. "a guy said…he is a backstabbing dick [with 3 laughing emojis]" in response to a posted photo of a former Metrolinx Senior Management Official;

e. "Ms. G don't know anything except being on her knees" in reference to a female driver

f. "10-4" in response to "G. don't know anything except being on her knees";

g. "Anything is possible when you suck cock" while discussing a female employee's salary;

h. "but they both sleep around" referring to two female drivers; and

i. Engaging in discussions with other group members about a rumour that the ATU Union President walked in on the ATU Financial Treasurer, giving the ATU Vice President a blow job.

[24] The investigation was completed on December 19, 2020. Ms. A was the only person referenced in the chats who was interviewed. After completing her investigation, the investigator produced an investigation report on March 10, 2021.

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[25] On April 27, 2021, after reviewing the Investigation Report, management determined that the employment of the Grievors should be terminated.

[26] Metrolinx advised each of the Grievors that the investigation had revealed, *inter alia*, that they had engaged in sexual harassment contrary to the Policy. On April 30, 2021 and May 3, 2021, the employment of the Grievors was terminated for cause.

[27] The Respondent filed grievances on behalf of all five of the Grievors, and the grievances were referred to the Board.

[28] On July 20, 2023, the Arbitrator of the Board (the "Arbitrator") issued the Decision, finding that the Grievors had been terminated without just cause and that such termination was therefore in violation of the collective agreement. The Arbitrator ordered that the Grievors be reinstated without loss of seniority and be compensated for all monetary shortfalls arising from the termination of their employment.

[29] The issue on the application for judicial review is whether the Board's Decision to find that the Applicant terminated the Grievors without cause and to order the reinstatement of the Grievors was unreasonable.

Decision of the Arbitrator

[30] While the Arbitrator found, at para. 13, that the Greivors' text messages were "shameful and reflected poorly on their character", he noted that:

> [T]hey occurred outside the workplace on the Greivors' own time, using their personal cellphones through an on-line medium they reasonably believed and intended to be private to the Greivors and its other participants not available to the public generally, in circumstances beyond the Employer's authority.

[31] The Arbitrator found that, in these circumstances, the Employer did not have "licence to intrude on their private electronic conversations without express contractual, statutory or judicial authority to do so". Because their electronic communication was "inaccessible to the public generally" it could not constitute workplace sexual harassment even if the same language would qualify as a form of sexual harassment "if made at work during working hours or in a public forum having a demonstrated hostile impact on employees in the workplace."

[32] The Arbitrator acknowledged, at para. 68, the Employer's statutory duty under the *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 and the *Ontario Human Rights Code,* R.S.O. 1990, c. H.19:

> to protect a worker from discrimination and harassment, particularly sexual harassment, which the Employer submitted can be devastating to the morale of employees if not addressed firmly. It is simply unacceptable to permit any form of sexual harassment affecting the modern workplace,

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> which all employees have the right to expect. Women have for too long suffered the indignity of misogynistic men questioning and/or mocking their capabilities and competence because of their sex, often in the vilest of terms, creating a hostile work environment that employers have an obligation to extinguish in promoting employment equality and respect, according to the Employer.

[33] Notwithstanding this statutory duty, the Arbitrator concluded, at paras. 16, 150, that the Employer could not conduct a fair and impartial investigation because "the impacted employee refused to file a complaint or cooperate with the investigation", and the Employer could not act as both the complainant and the investigator:

> thus creating an obvious conflict of interest between the representation of the purported Complainant (i.e. the Employer) and the designated "fair and impartial" investigator (i.e. also the Employer), who were one and the same person in this case.

[34] After reviewing the conduct of the investigation, the Arbitrator found, at paras. 40, 128:

> It is clear from the Agreed Facts and supporting documents, that the source of Ms. A's stress was the investigation itself. Nothing in the Agreed Facts indicates Ms. A's stress had anything to do with the isolated screenshots received on September 23, 2019, nor did she tell anyone that the screenshots had caused her to feel she was working in a negative or hostile environment (which, as discussed later, is a central element in the offence of sexual harassment).

[35] The Arbitrator was critical of the employer for pursuing the investigation "regardless of the absence of a Complainant", at para. 41.

[36] The Arbitrator noted, at para. 46, that it was unfair that one of the Grievors was later disciplined for failing to cooperate in the investigation, but "Ms. A did not receive discipline for her refusal to participate in the investigation…":

> This was notwithstanding Ms. A's obligations as an employee governed by the WHD Prevention Policy to "report immediately, all complaints or incidents of workplace harassment and/or discrimination experienced" and to "cooperate fully in the investigation of complaints or incidents of workplace discrimination or incidents of workplace discrimination and/or harassment."

[37] The Arbitrator also concluded, at para. 121, that "there was no evidence before the Investigator establishing a negative impact of the vexatious words 'being manifested in the workplace'."

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[38] The Arbitrator found at para. 126, that Ms. A's refusal to file a complaint after she saw the text message demonstrated that she did not believe that she was "the victim of sexual harassment and/or … experiencing a hostile or poisoned work environment".

[39] Finally, the Arbitrator concluded that if Ms. A was not prepared to file a complaint, the Employer could not substitute itself as the complainant under the Policy. The Arbitrator stated, at para. 150:

> When Ms. A declined to file a complaint of sexual harassment arising out of the September 2019 screenshots and no other active employee would, that also should have been the end of the matter.

Position of the Parties

[40] In the present case, the Applicant submits that the Arbitrator made several unreasonable findings:

a. that the impugned conduct took place outside of the workplace and had no impact on the workplace, and that the conduct was "off-duty" conduct that did not engage the legitimate interests of the Employer;

b. that the Employer overreached in forcing the disclosure of these communications in these circumstances;

c. that the investigation was fatally flawed because (a) the Employer was both complainant and investigator; and (b) the Employer was not a person and could therefore not be a complainant, allegedly contrary to the terms of the Policy;

d. that the Grievors had a reasonable expectation that their WhatsApp messages would remain private;

e. because the Applicant referenced its "zero tolerance" policies regarding workplace harassment, the Applicant failed to give due consideration to the appropriate discipline in the circumstances, and instead automatically chose termination once a finding of misconduct had been made; and

f. the Arbitrator failed to consider the relevant legislative requirements that governed the Applicant's obligation to investigate suspected sexual harassment on the part of the Grievors.

[41] The Applicant submits that in making these findings, the Arbitrator relied on myths and stereotypes about how women who are the target of sexual harassment in the workplace should respond to the harassment. This reliance is demonstrated by the following findings:

a. that Ms. A was not upset about the degrading messages that the Grievors shared about her and that she was only upset at the prospect of an investigation being conducted; and

b. that Ms. A could not have been harassed, because she was not willing to file a complaint under the Policy and fully participate in any investigation, and relatedly, that it was appropriate to justify the Grievors' lack of cooperation with the investigation by reference to Ms. A's refusal to cooperate with the investigation.

[42] In addition, the Applicant argues that the Arbitrator relied on the following "facts" that were not supported by any evidence:

a. that the WhatsApp messages were "encrypted", without hearing any expert evidence on the issue of encryption;

b. concluding that the Grievors had a reasonable expectation of privacy when sending the messages to a chat group including multiple employees, who were free to (and did) forward the messages on to anyone;

c. that the Grievors had a reasonable expectation of privacy based on the WhatsApp group chat allegedly having a limited number of identifiable participating members, while ignoring evidence about the open nature of the group, and the fact that other employees of the Applicant had access to and/or became aware of the offensive messages exchanged in the group chat;

d. that the WhatsApp messages were authored only during off-duty hours; and

e. that the first Grievor did not volunteer to show his WhatsApp messages to the investigator, and as such, they cannot be relied upon.

[43] The Union takes the position that the decision of the Arbitrator was an "unremarkable application of the collective agreement protection against discipline without just cause". The Arbitrator's decision is reasonable and entitled to deference.

Analysis

[44] Where the standard of review is reasonableness, the Court's role is not to review the evidence before the Arbitrator and substitute the decision it would have made in his place. Its task is to consider whether the Arbitrator's decision was "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, at para. 85.

[45] In *Vavilov*, the Supreme Court of Canada summarized the standard of reasonableness, at para. 100:

> The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or

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> peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[46] In the present case, the Arbitrator's reasons, read as a whole, fail to recognize that while some victims of workplace harassment are reluctant to report harassment or participate in the resulting investigation, their employer remains obligated to investigate such behaviour and to protect the workplace from a hostile or demeaning work environment.

[47] The Arbitrator's conclusion that "When Ms. A declined to file a complaint of sexual harassment … and no other active employee would, that also should have been the end of the matter", is wrong in law, and indicative of his approach to the issue before him. It is not an isolated misstep, but permeates his reasoning throughout.

[48] Section 10(1) of the *Human Rights Code* defines "harassment" as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

[49] The Code provides the following protection from harassment to employees:

> **Harassment in employment**
>
> 5(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.
>
> **Harassment because of sex in workplaces**
>
> 7(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.

[50] Similar protections are found in the *Occupational Health and Safety Act* which defines "workplace harassment" as including "workplace sexual harassment" and defines "workplace sexual harassment" as follows:

> "workplace sexual harassment" means,
>
> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or

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conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome

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[51] The alleged sexual harassment in this case would fall into category (a) of the definition of "workplace sexual harassment". It was a "course of vexatious comment" that the Grievors ought reasonably to have known would be unwelcome. When it became known to Ms. A, it created a demeaning and offensive work environment that no employee should be compelled to endure.

[52] Sections 32.0.1 to 32.0.6 of the *Occupational Health and Safety Act* set out the employer's obligations to establish, post and implement policies with respect to workplace harassment. Section 32.0.7 imposes specific duties on the employer to protect a worker from workplace harassment. It states:

> **Duties re harassment**
>
> **32.0.7** (1) To protect a worker from workplace harassment, an employer shall ensure that,
>
> (a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;
>
> (b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation;
>
> …

[53] Significantly, s. 32.0.7(1)(a) imposes a duty on the employer to investigate both "incidents and complaints of workplace harassment". The Ontario Labour Relations Board has confirmed that the terms "incidents" and "complaints" means that the Act contemplates an investigation of an incident even if it is not the subject matter of a complaint: *E.S. Fox Limited v. A Director under the Occupational Health and Safety Act,* 2020 CanLII 75931; [2020] O.L.R.B. Rep.579, at para. 75:

> Having regard to the use of the terms "incidents" and "complaints", and relying on the plain and ordinary meanings of those terms, the Act contemplates investigations where there is an incident of workplace harassment. In other words, an incident of workplace harassment is, in and

> of itself, grounds for an investigation being carried. That incident can be, but does have to be, the subject of a complaint.

[54] I agree with and adopt this conclusion, which is consistent with both the plain and ordinary meaning of those terms and s. 64(1) of the *Legislation Act*, *2006*, S.O. 2006, c. 21, Sched. F, which provides that "An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects."

[55] An employer has an obligation to take steps to deal with harassment of employees once the harassment is known to the employer: *United Food and Commercial Workers Union, Local 175 v. Copper River Inn and Conference Centre,* 2021 ONSC 5058 (Div.Ct.), at paras. 33, 35. While the Policy states that "the investigative process is initiated by a complaint", the policy cannot limit the Employer's legal obligation under the *Occupational Health and Safety Act.*

[56] Moreover, the Supreme Court of Canada has, for more than 30 years, been warning judges that it is an error to rely on what is presumed to be the expected conduct or reaction of a victim of sexual assault. In particular, a victim's reluctance to report or complain about a sexual assault cannot be used to draw an adverse inference about her credibility: *R. v. W. (R.),* [1992] 2 S.C.R. 122, at p. 136; *R. v. D.D.*, 2000 SCC 43, at paras. 63, 65; *R. v. A.R.J.D.*, 2018 SCC 6, at para. 2.

[57] The conduct in this case was not a sexual assault, although courts have recognized that. "harassment with a physical component constitutes a form of sexual assault and is among the most serious form of workplace misconduct": *Calgary (City) v. Canadian Union of Public Employees Local 37,* 2019 ABCA 388, 439 D.L.R. (4th) 405, at para. 31, and cases cited therein.

[58] In *Calgary (City)*, the Alberta Court of Appeal held, at para. 42, that while the Supreme Court's statements about reliance on these types of presumptions and stereotypes were made in the context of criminal proceedings, "the caution about these types of errors should apply equally to arbitrators adjudicating sexual assault grievances" In my view, there is no reason to limit this caution to "sexual assault grievances", the caution about these types of presumptions and stereotypes applies to all sexual harassment grievances.

[59] A victim's reluctance to report or complain about sexual harassment may be caused by many factors: embarrassment, fear of reprisal, the prospect of further humiliation, or just the hope that, if ignored, the demeaning comments or behaviours will stop. This is true whether or not the conduct rises to the level of assault.

[60] A victim's reluctance to report or complain cannot, however, relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention.

[61] The Arbitrator in this case concluded that Ms. A's reluctance to pursue a complaint meant that there was no harassment. He did not consider any of the other reasons why an employee in her situation might not complain. That line of reasoning relied on the myths,

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stereotypes and presumptions rejected by the Supreme Court of Canada and was unreasonable.

[62] While the Arbitrator referenced the *Human Rights Code* and the *Occupational Health and Safety Act*, he failed to properly apply those provisions to the facts of this case. In particular, his decision did not meaningfully address the employer's obligation to investigate under s. 32.0.7(1)(a) of the *Occupational Health and Safety Act*, and this rendered his decision unreasonable: *Copper River,* at para. 39.

[63] In the present case, the agreed statement of facts stated that: "The messages upset Ms. A at the time she reviewed them. She recalled getting emotional at work when she first saw the messages."

[64] That fact was a sufficient basis to establish the employer's obligation to investigate the incident, whether or not Ms. A filed a complaint. As the Court of Appeal of Alberta stated in *Calgary (City)*, at para. 43:

> [T]he presence of significant harm or distress to the complainant may be an aggravating factor. However, the converse line of reasoning, that the absence of distress on behalf of the complainant is a mitigating factor, is impermissible.

[65] The Employer's duty to investigate "incidents" as well as "complaints", means that there was no conflict of interest in having the Employer investigate the incident in the absence of a complaint. The Employer did not become the complainant when it conducted the investigation, because no complainant was necessary.

[66] The Arbitrator's conclusion that an Employer cannot investigate an incident if the victim is unwilling or afraid to complain is inconsistent with the employer's obligations under the *Occupational Health and Safety Act*, and inconsistent with the reality of the workplace environment where employees may refuse to bring forward complaints against other employees for fear of reprisal or other consequences.

[67] Moreover, the Employer's duty to investigate is not just a duty owed to the complainant, but a duty owed to all employees in the workplace. All employees – not just the direct victim of the comments – have a right to work in an environment that is free from demeaning and offensive comments.

[68] I also agree with the Applicant that the Arbitrator was too focused on the Grievors' right to privacy. The fact is, whatever the Grievors' intent, at least some of their comments came to the attention of Ms. A in the workplace. Given the nature of social media, and the fact that the number of employees who had access to the chat was not known, this was hardly surprising. The employees who participated in the chat were free to, and did, forward the message to other employees. Wherever it originated, the impugned conduct made its way into the workplace and, to that extent at least, became a workplace issue.

Remedy

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[69] The Applicant seeks an order that the Decision is unreasonable and that it be quashed, and the grievances be dismissed.

[70] The Respondent argues that the application should be dismissed, or, in the alternative, if the Court finds the Decision unreasonable, the matter should be remitted to the Board for reconsideration in accordance with the Court's guidance.

[71] I agree with the Respondent that this is not an appropriate case in which to simply dismiss the grievances. While the Arbitrator's decision was fatally flawed for the reasons set out above, there were numerous other issues addressed by the Arbitrator, including the appropriateness of the termination penalties imposed by the employer. These issues should be reassessed in light of this Court's reasons.

[72] This Court has confirmed that "not every case of sexual harassment or assault demands a discharge. There are cases where it is appropriate to substitute a lesser penalty, particularly where the conduct falls on the less serious end of the continuum and the grievor has demonstrated remorse for his behaviour.": *Professional Institute of the Public Service of Canada v. Communications, Energy and Paperworkers' Union of Canada, Local 3011*, 2013 ONSC 2725, at para. 21.

[73] See also: *Ontario Power Generation v. The Society of United Professionals*, 2020 ONSC 7824, at para. 38:

> If we were to accept OPG's arguments on this application, all findings of sexual harassment, regardless of the nature of the conduct, would warrant termination. This cannot be the case. Ultimately, it is up to the arbitrator to consider the specific conduct in each case and decide whether termination or a lesser penalty is appropriate in the circumstances.

[74] Accordingly, I conclude that the appropriate remedy in this case is to grant the application, quash the Decision and remit the matter back to a different Arbitrator for reconsideration in accordance with these reasons.

[75] Costs to be paid by the Respondent, Amalgamated Transit Union, Local 1587, in the agreed amount of $7,500 all inclusive.

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Charney, J.

I agree ___________________________________

Firestone RSJ

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I agree __________________________________

Leiper J.

Released: April 2, 2024

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REASONS FOR DECISION

Justice R.E. Charney

Released: April 2, 2024

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