

Federal Court rules employer harassment can constitute workplace violence – will the CFIA obey?

Our union has scored an important victory over the issue of whether or not employer harassment, in this case by the Canadian Food Inspection Agency, constitutes 'workplace violence' under the *Canada Occupational Health and Safety Regulations* of the *Canada Labour Code*.

The Federal Court decision, handed down November 13, also clarified whether the employer can be viewed as a 'competent person' to investigate complaints of work place violence and, if not, at what stage of the complaint process such a competent person must be involved.

The Court was hearing an application for judicial review of a decision taken last January 27 by an Appeals Officer of the Occupational Health and Safety Tribunal of Canada. The Appeals Officer had rescinded a Direction issued by a Health and Safety Officer (HSO).

This case is particularly important as it is the first instance of the Tribunal interpreting the definition of 'work place violence' and the process to be followed under section 20.9 of the *Regulations*.

The facts of the matter were as follows:

- In late 2011, an Agriculture Union member employed by the Canadian Food Inspection Agency in Saskatchewan complained, both verbally and in writing, of employer harassment. The member alleged miscommunication, favouritism, humiliation, unfair treatment and a lack of respect by his supervisor.
- In January 2012, the CFIA Regional Director was asked by the employer to undertake a fact-finding review of the concerns raised by the member in his complaint.
- A month later, after conducting an internal investigation, the Regional Director concluded that while there were communication issues and unresolved tension between the member and his supervisor, there was no evidence of harassment, and therefore no further investigation was warranted.

The Honourable Mr. Justice Manson, hearing the case before the Federal Court, rejected the Occupational Health and Safety Tribunal's position that 'workplace violence' should be restricted to physical force that can cause harm, injury or illness. In the Court's ruling, he found that the harassment and psychological bullying inflicted on the member could reasonably be expected to cause harm or illness and could be said to be within the scope of the definition of 'workplace violence'.

As to whether an employer representative can be deemed to be a 'competent person' to carry out a complaint investigation, the Court held that the CFIA Regional Director in this case was *not* competent as the member did not agree that the management representative was an impartial party once the allegation of workplace violence was unresolved at the pre-screening stage.

Mr. Justice Manson held that a 'competent person' must meet three tests: be seen by the parties to be impartial; have knowledge, training and experience in issues relating to workplace violence; and, have knowledge of the relevant legislation.

The Court stated that pre-screening by the employer is limited to fact-finding in an attempt to resolve the dispute with the employee and facilitate mediation. If the allegation of workplace violence has not been resolved after such pre-screening, there is a mandatory duty for the employer to proceed to appoint a 'competent person' to investigate the complaint. In this case, as there had been *no* proper investigation by a 'competent person' within the meaning of the *Regulations*, the Tribunal Appeals Officer could not reasonably deal with the process.

Having accepted the PSAC's application for judicial review, Mr. Justice Manson referred the case back to the Tribunal Appeals Officer for re-determination in accordance with the Court's findings.

The fly in the ointment is that the CFIA has a track record of thumbing its nose at orders to clean up its act when it comes to violence in the workplace. Management no doubt has learned from experience that the Departments and Agencies responsible for enforcing legal or tribunal decisions are notoriously lax in their follow-through. In fact, the department responsible for administering the *Canada Labour Code*, Employment and Social Development Canada, is in violation of its enforcement policy clearly posted on its own Web site!

We will be pressing CFIA management to take Mr. Justice Manson's ruling to heart and carry out its full responsibilities in the face of this legal order.

(The Federal Court has yet to translate Mr. Justice Manson's English-language ruling. We will post his decision on our Web site once we receive copies in both official languages. In the meantime, the English-language version is available from the Agriculture Union National Office upon request.)

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