



NEWSLETTER – SEPTEMBER 2007

WORKPLACE HARASSMENT

This newsletter focuses on the decision of the Ontario Superior Court of Justice in *Menagh v. Hamilton (City)*, 2005 CanLII 36268. That decision was recently affirmed by the Ontario Court of Appeal in 2007 ONCA 244 (CanLII).

Background Facts

At the time his employment was terminated, the plaintiff, Robert Menagh, had worked for the City of Hamilton for 13 years. He occupied the position of Director of Labour Relations, Employee Wellness and Health and Safety. He had a number of people reporting to him and, in turn, reported to the General Manager of Human Resources. Mr. Menagh was Chief Negotiator for the City and, needless to say, had a media profile.

Mr. Menagh – who had been a member of the Ontario Bar since 1984 and was a labour and employment lawyer by training – was responsible for ensuring that the City's comprehensive harassment policies were published to employees and incorporated into all newly-negotiated collective agreements. He supervised the City's Harassment Complaint Officers and occasionally participated in harassment investigations. Until the events leading to

his dismissal, Mr. Menagh was considered to be a valued employee and had never been disciplined for any kind of misconduct.

Mr. Menagh was dismissed from employment for engaging in a course of sexual harassment in violation of the City's policies. His conduct was alleged to be, among other things, an abuse of his authority, in conflict with his duties to the City, and insubordinate.

The circumstances underlying Mr. Menagh's dismissal were as follows. Shortly after the Easter weekend in 2001, Ms. W, the Mayor's Chief of Staff and a co-worker of the plaintiff, attempted to convey to him that the three-year romantic relationship between them was over. Ms. W understood that she and the plaintiff would remain friends. He does not appear to have had the same understanding.

In the ensuing months, Mr. Menagh repeatedly proposed marriage to Ms. W. He asked her to attend romantic getaways with him, sent flowers and other mementos to her office and home, parked close to her car at work, made a point of staring into her office window while she was working, and repeatedly attended at her home. Many of the plaintiff's messages to Ms. W were

written. Some were transmitted using the City's e-mail system.

In spite of numerous clear and direct communications from Ms. W to Mr. Menagh that she was no longer interested in him, he persisted in his conduct.

The plaintiff contacted Ms. W's parents to solicit their support for a rekindling of the romance. He was rebuffed but persisted. He discussed his feelings for Ms. W with her administrative assistant, and also with his superior, the General Manager of Human Resources. He also arranged various meetings with the Mayor to discuss his feelings.

In November 2001, Mr. Menagh learned that Ms. W and Mr. C, the Regional Chairman of Hamilton-Wentworth, were in a romantic relationship and living together. He also learned that Mr. C's ex-wife, Ms. B, was angry about this turn of events. Seeking to exact revenge on Ms. W and Mr. C, the plaintiff sought out Ms. B, and conveyed to her a great deal of private and potentially embarrassing information about Ms. W.

In a discussion with the General Manager of Human Resources, Mr. Menagh, angry and crying, stated, "I feel like killing them [Ms. W and Mr. C] both and then myself." He suggested to the Mayor that it would be best if Ms. W's employment were terminated. When in the company of his friends, Mr. Menagh accused Ms. W of having serious psychotic problems.

By late December 2001, the plaintiff knew where Ms. W and Mr. C were living. One day, when Mr. C was walking home, he became aware of a vehicle a couple of car lengths behind him. As Mr. C tried to cross the street, he heard tires squeal and saw the vehicle coming towards him at a high speed. He jumped out of the way. The

vehicle backed up, and the door opened. Mr. Menagh was the driver. He yelled obscenities at Mr. C.

As a result of that encounter and earlier events, Mr. Menagh was criminally charged with dangerous driving, uttering death threats, and harassment. He was arrested but later released on bail. When the City learned of the criminal charges, it placed the plaintiff on paid leave, and hired a neutral third party to conduct an investigation into possible breaches of the City's harassment policies.

An initial report of the harassment investigator was delivered to the Acting City Manager. He was the only City official who reviewed the report. The Acting City Manager learned that Mr. Menagh had attempted to have Ms. W fired, and converted the plaintiff's suspension with pay to one without pay.

In September 2002, Mr. Menagh agreed to enter into a peace bond in exchange for withdrawal and dismissal of the criminal charges against him. He admitted certain facts, and signed an apology that was entered in court. (Incidentally, at the wrongful dismissal trial, the plaintiff's sincerity in the criminal proceedings was thrown into question. In his testimony at the subsequent trial, he challenged the facts he had previously admitted and said he did not mean his apology.)

During the criminal proceedings, the City's harassment investigation was underway. The harassment investigator met with Mr. Menagh to get his side of the story.

In October 2002, the harassment investigator delivered a final report to the Acting City Manager. It was on the basis of that report that the plaintiff's employment was terminated.

Decision of Ontario Superior Court of Justice

Mr. Justice Scime of the Superior Court of Justice concluded that the City's decision to terminate Mr. Menagh's employment was "entirely appropriate". The plaintiff was aware of the City's harassment policies, and knew he was required to abide by them.

In Mr. Justice Scime's view, the City had established "misconduct by Menagh consisting of harassment, harassment in the workplace and sexual harassment in the workplace in violation of the City's harassment Policies". The trial judge continued, "Superimposed on this misconduct was Menagh's misconduct involving conflicts of interest, abuse of authority in his capacity as Director of Labour Relations and insubordination."

Mr. Justice Scime went on to assess the "context of Menagh's misconduct". Among other things, the trial judge noted:

- (a) The City is not an ordinary employer. As a municipality, "it is accountable to the people of Hamilton".
- (b) Mr. Menagh was a member of management. He had "a responsibility to protect employees from harassment in any form and to promote a workplace free from harassment".
- (c) The plaintiff was a "senior labour lawyer" and "Director of Labour Relations [who] was totally familiar with the [harassment] Policies". He had "a higher duty than other employees to comply with the Policies and to set an example for all employees".
- (d) The plaintiff's "misconduct consisted of numerous repeated acts against

the same employee, amounting to a pattern of harassment and sexual harassment in and out of the workplace".

- (e) In court, Mr. Menagh "stood firmly unrepentant and unapologetic". He "denied any misconduct on his part and challenged that characterization of his actions".

Decision of Ontario Court of Appeal

On appeal, the Court of Appeal, in a unanimous judgment, affirmed the trial judgment. It stated:

"The evidence is overwhelming that the appellant [Mr. Menagh] did engage in both personal and sexual harassment of [Ms. W]. He persisted in trying to be in a romantic relationship with [Ms. W] after she repeatedly told him that she was no longer interested. In order to achieve this end, the appellant communicated with [Ms. W's] colleagues, superiors (he tried to have her employment terminated) and family members, as well as with [Ms. W] directly. He also harassed her by going to her home, watching her in her office and parking beside her car."

The Court of Appeal went on to say:

"[T]he character of the appellant's employment is a key factor. The appellant was responsible for labour relations for the City of Hamilton. As such, he was in a senior position that required him to be familiar with all workplace policies (including policies relating to harassment). His misconduct is therefore more serious in light of his particular

employment responsibilities ... [T]he cumulative effect of the appellant's misconduct was not reconcilable with sustaining his employment relationship with the City."

Workplace Harassment Will Not Be Tolerated

It is clear from *Menagh v. Hamilton (City)* that harassment, be it sexual or otherwise, will not be tolerated in the workplace.

Mr. Justice Scime's concluding comments in the trial judgment are instructive:

"In our modern society, sexual harassment in the workplace, which attacks the dignity and self respect of the targeted employee, cannot be tolerated. Victim employees should not be required to defend their dignity and self respect or to resist or turn away from unwelcome conduct, approaches or comments of a sexual nature by another employee."

There is no reason to limit Mr. Justice Scime's comments to sexual harassment. They have equal application to other forms of harassment.

In modern Canadian society, employees have the right to work in an environment of mutual respect where individuals are equal in dignity and rights. While the facts in *Menagh v. Hamilton (City)* may seem unusual or even extreme, an employer's obligation to provide a safe and harassment-free workplace may be put to the test on more mundane facts.

If you have questions regarding the issues raised in this newsletter and how they may affect you or your company, please do not hesitate to contact any lawyer at our firm.

Lawyer contact information can be obtained by contacting us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

ROPER GREYELL MORNING EDUCATION SERIES – UPCOMING WORKSHOPS

We are very pleased to be able to offer the following Roper Greyell Morning Education Series workshops:

- “Workers’ Compensation and Occupational Health and Safety”
September 28, 2007 – 7:30 to 9:00 a.m. at the offices of Roper Greyell LLP
- “Important Issues in Employment Contracts”
November 9 and 23, 2007 – 7:30 to 9:00 a.m. at the offices of Roper Greyell LLP

Please note that space for the above workshops is limited.

Remaining places can be reserved on a “first come, first served” basis by telephoning Gillian Clee at (604) 806-3871 or e-mailing her at gcleee@ropergreyell.com.

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *