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Union Claims Employer Violated Collective Agreement by Conducting ‘Internal’ Harassment Investigation



A union recently accused its employer of violating the Collective Agreement. They claimed the employer was required to hire an ‘outside’ investigator to probe a sexual harassment allegation. The employer instead chose to have its own personnel supervisor conduct an ‘internal’ investigation. An arbitrator recently considered the following

- * Pierre was employed as the head custodian at a local high school and was 56 years old. He was born in France and immigrated to Canada 30 years ago. He was responsible for supervising the full-time and casual custodians. Pierre had a reputation of making offensive comments and gestures to the female employees. Pierre’s supervisor, Mike, had received several complaints from female employees and warned him repeatedly about his inappropriate behaviour. Pierre’s response would often be *“It was normal for French people to act like that.”* The principal also received complaints about Pierre’s unacceptable behaviour and had spoken to him about this on occasion. Pierre replied *“He was French and he liked women.”*
- * One day Elaine, a casual employee who had recently been hired, attended an employee orientation. She met Pierre, her supervisor, who took her hand and kissed her all the way up her arm. Elaine was a little shocked and pulled her arm away. Pierre said *“Don’t worry - I am French and that is what French people do.”* Mike, Pierre’s supervisor, told him to *‘cut that out.’* Elaine continued to have problems with Pierre. One day in the lunch room he asked her if she wanted to look at a *‘Victoria Secret’* magazine. Elaine got up and left the room.
- * A meeting was eventually held with Mike, Pierre and the shop steward. Mike explained the concept of sexual harassment to Pierre and that further *‘inappropriate comments and actions’* could result in him losing his job. Following the meeting, the shop steward also warned Pierre to watch his behaviour.
- * On Christmas Eve the custodians were taking a break and were offered Christmas *‘drinks’* which consisted of vodka (even though consumption of alcohol on school property was forbidden.) Elaine refused the vodka, left the lunch room and went into the kitchen for a soft drink. Pierre followed her, closed the door and told her he wanted to have sex with her. He asked if she would like a *‘quicke.’*
- * Elaine said she wasn’t interested and Pierre then began pushing his body up against hers. She told him if he didn’t stop her knee was coming up. Pierre immediately let go of her and Elaine left the kitchen. Immediately following the Christmas break, Elaine filed a complaint against Pierre. She reported the incident to Mike, Pierre’s supervisor, who advised the union. Human Resources contacted the Secretary Treasurer of the school division who instructed them to begin an internal investigation. Pierre was suspended with pay while the investigation was being conducted. The employer immediately reassigned Elaine to another school and began the investigation.
- * Several meetings were held with staff who were informed they were entitled to have a shop steward present. A few of the female custodians admitted they too had experienced problems with Pierre. They also told Mike about the teacher bringing a bottle of vodka into the lunchroom. (Elaine had not mentioned the drinking when she filed her complaint.) A meeting was also held with the male custodians who indicated they had not witnessed the *‘kitchen’* incident but saw Elaine drinking. Elaine later admitted she had a couple of drinks but only after the incident with Pierre had occurred.
- * A meeting was held with Mike, a human resources representative, a union representative and Pierre. Pierre denied Elaine’s allegations that he had sexually harassed her. He indicated that he was merely showing her where the kitchen was.
- * A few days later Pierre received a letter stating that *“In light of the issues of allowing custodians under his supervision to drink and the finding of sexual harassment (as well as the fact he had not been truthful)* the employer had no option but to terminate his employment. Pierre filed a grievance and an arbitration followed.

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- * During the arbitration hearing the union argued that in the past it had been the practice of the employer, when an allegation of sexual harassment had been made to hire an external investigator to investigate the complaint and provide a written report before any action was taken. They said the collective agreement did not allow for such internal investigations. The union also noted they were not made aware of any of the interviews except for that of Pierre and were therefore unable to provide a representative to advise the employees of their rights. In addition they argued the internal investigation's written report had not been submitted until almost 3 months after Pierre was terminated. *The union concluded that for all these reasons the internal investigation process was invalid and therefore all information gathered from it must be ignored.*
- * The arbitrator stated *"The process provided for in the collective agreement regarding the investigation of complaints was not as detailed as he had seen in some other agreements."* However, he said the agreement did say complaints involving personal or sexual harassment *'shall be referred to the Secretary Treasurer or designate.'* In this case the complaint was referred to the Secretary Treasurer who instructed the employer to investigate the matter.
- * The arbitrator added *"In my view, the instruction to gather information in these circumstances while it was fresh was a reasonable one. Only if the issue remained unresolved after the initial internal review, was there any requirement for the employer to bring in an external investigator."* The arbitrator stated the union's argument that the employer should have hired an external investigator was *'based more on past practice than the express language in the collective agreement.'*
- * The arbitrator stated *"Direction of the working force is vested exclusively in the employer subject to the provisions of the collective agreement."* This included the power to discipline or dismiss employees who failed to comply with those directions. However, he added the agreement also limited the employer by the requirement that they must have *'just and reasonable cause.'* He added *"Ultimately the discipline and dismissal of employees and the investigation of allegations of misconduct including personal and sexual harassment are a matter of management rights."*
- * The arbitrator concluded the restrictions on the employer's investigatory authority contained in the collective agreement were *'limited'* and *'unambiguous.'* He stated that these restrictions were *'silent'* on the questions of: *who may investigate; who may be interviewed in respect of such complaints to find the facts; at what point in time the union should be notified of a complaint; and whether a final report must be prepared or at what stage.* He added that provided the investigatory process followed is not arbitrary, discriminatory, carried out in bad faith or unreasonable *it cannot be challenged on a matter not expressly covered in the collective agreement.*
- * Regarding Elaine's complaint of sexual harassment the arbitrator concluded that given all of the evidence, Elaine's story regarding the *'kitchen'* incident was consistent with Pierre's general conduct towards women. His supervisor, the school principal and his shop steward had spoken to Pierre about his relationship with female custodians and warned him about his inappropriate conduct and the concept of sexual harassment. *The arbitrator did not believe Pierre's testimony and therefore upheld the employer's dismissal.*

** As this case points out, it is critical that the Employer watch the wording in Policy and Collective Agreements to ensure the Employer always has a choice to investigate harassment allegations *'internally'* as well as *'externally.'* **



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