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# **The Employment Law Roundup: The Impact of Bill 168**

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*The Impact of Bill 168 by Christine Thomlinson*

*Kingston (City) v. Canadian Union of Public Employees, Local 109  
2011 CanLII #50313 (Decision of Arbitrator Newman)*

Donna Hudson had worked for the Parks and Recreation Department of the City of Kingston (the “City”) for 28 years, most recently as a driver labourer, when she was fired for uttering a death threat to a co-worker.

Ms. Hudson had struggled with anger management issues throughout her employment with the City, having what she herself described as “a short fuse, and a bad temper”. Several days following her completion of an anger management counselling program which she was required to attend because of a work-related incident, she was scheduled for a meeting to discuss possible accommodation of a work-related shoulder injury from which she suffered. Before this meeting began, she was alleged to have had the following exchange with the union Local President who was attending the meeting with her:

*Ms. Hudson:* “You have been screwing me for years. So were Gord and Allen.”

*Mr. Hale:* “I appreciate your keeping my friend’s name out of this, he is dead, and not even cold.”

*Ms. Hudson:* “Yes, and you will be too.”

Mr. Hale was visibly shaken and reported the exchange, saying that he would not continue to deal with Ms. Hudson. The City commenced an investigation into the incident, during which Ms. Hudson denied having made the comment. Ultimately, the City made the decision to terminate Ms. Hudson based on the outcome of the investigation and a consideration of other factors. The union grieved the termination.

There were no witnesses to the exchange. Arbitrator Newman heard from both Ms. Hudson and Mr. Hale and concluded that the “only plausible inference...was that [Ms. Hudson] was making direct reference to the end of Hale’s life.” She similarly found that Ms. Hudson made no apology, failed to acknowledge her behaviour, failed to recognize the seriousness of the misconduct, and expressed no remorse.

Reviewing the purpose behind the amendments to the Ontario *Occupational Health and Safety Act* set out in Bill 168, Arbitrator Newman noted the theory that workplace violence is usually foreshadowed (“It is, in many cases, predictable.”). She also noted the distinction in the legislation between workplace violence and harassment:

*The amendments make it clear that language that is vexatious and unwelcome is harassment, and very serious in its own right. But language that is made in direct reference to the end of a person’s life or that suggests impending danger, falls into a category of its own. This is not just language, it is violence.*

Arbitrator Newman also noted that Bill 168 has changed the manner in which an employer and a worker must react to an allegation of a threat:

*The utterance of a threat in the workplace requires that the workplace parties stop cold. They must report. They must investigate. They must assess the existence of real danger. They must act.*

Cautioning however against over-reaction, Arbitrator Newman espoused the “full and fair approach” to conducting investigations, and ensuring that approaches to responding are “informed, reasonable and proportionate.” As she stated:

*The seriousness of the allegation does not minimize the requirement for thorough and appropriate investigation and decision-making.*

Arbitrator Newman also noted that termination of an employee found to have committed an act of workplace violence should not be “automatic”, holding that discipline must be determined on the facts of each case, and must be reasonable and proportionate.

After an extensive review of the fact in this case, the City was found to have acted with appropriate care and attention, and to have made the appropriate decision regarding Ms. Hudson, taking into account her history of discipline, the seriousness of the misconduct and the likelihood of improvement of her behaviour. In this regard, and notwithstanding Ms. Hudson’s 28 years of seniority, the fact that Ms. Hudson did not apologize, show any remorse or take any meaningful steps to address her anger management issues were highly influential in Arbitrator Newman’s dismissal of her grievance.

***What does this mean for employers?***

1. It is a post-Bill 168 world. Employers are required to treat violence, and threats of violence, seriously.
2. How an employee responds to allegations of violence may impact on the ultimate legal disposition of the matter. Here, the fact that the employee showed no remorse played a role in the Arbitrator determining there was just cause for her termination.
3. A solid investigation is helpful in protecting the employer’s legal position, namely that it had just cause to terminate Ms. Hudson’s employment.