COURT OF APPEAL FOR ONTARIO

CITATION: Metrolinx v. Amalgamated Transit Union, Local 1587, 2025 ONCA 415
DATE: 20250606
DOCKET: COA-24-CV-1201

Lauwers, Nordheimer and Wilson JJ.A.

BETWEEN

Metrolinx

Applicant (Respondent)

and

Amalgamated Transit Union, Local 1587

Respondent (Appellant)

Karen Ensslen and Emily Home, for the appellant

Bonnie Roberts Jones and Rayaz Khan, for the respondent

Heard: April 4, 2025

On appeal from the order of the Divisional Court (Regional Senior Justice Stephen E. Firestone and Justices Robert Charney and Janet Leiper), dated April 2, 2024, with reasons reported at 2024 ONSC 1900, allowing an application for judicial review and quashing the decision of Arbitrator Gordon F. Luborsky, dated July 20, 2023, with reasons reported at 2023 CanLII 72192 (Ont. G.S.B.)

Lauwers J.A.:

A. OVERVIEW

[1] The employer Metrolinx dismissed five employees who were members of Amalgamated Transit Union, Local 1587 for sexual harassment. The Union grieved

the dismissals. The Arbitrator allowed the grievances and ordered the reinstatement of the Grievors. Metrolinx applied for judicial review and, unusually, given the high deference typically accorded to labour arbitrators by courts, the Divisional Court concluded that the award was unreasonable. It granted Metrolinx's judicial review application, quashed the arbitration award, and remitted the matter back to the Grievance Settlement Board for reconsideration by a different arbitrator. A panel of this court granted the Union leave to appeal.

[2] For the reasons that follow, I would dismiss the Union's appeal.

B. STANDARD OF REVIEW

[3] This court's approach to an appeal from the Divisional Court on an administrative law matter is to step into the shoes of the lower court and focus on the decision of the tribunal under review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47; *Turkiewicz (Tomasz Turkiewicz Custom Masonry Homes) v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 49, leave to appeal to S.C.C. refused, [2023] S.C.C.A. No. 131.

[4] It is common ground that the standard of review for the arbitration award is reasonableness. The decision must be "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that

constrain the decision maker": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 563, at para. 85.

[5] It is sometimes said that this court must determine whether the Divisional Court identified and correctly applied the standard of review. However, regardless of the answer to that question, this court is still obliged to step into the shoes of the lower court, focus on the decision of the tribunal under review, and do its own analysis. This court does not owe deference to a judicial review decision of the Divisional Court, whose findings are not binding: *Ottawa Police Services v. Diafwila*, 2016 ONCA 627, 352 O.A.C. 310, at para. 51. That said, I find the Divisional Court's approach to be sound, and its decision to be clear and comprehensive. Its analysis is completely consistent with the principles of *Vavilov*. The appellant has identified no errors in law or principle, and no palpable and overriding errors of fact in the Divisional Court's reasons, as I will explain.

C. THE ISSUES

[6] The Union raises two issues:

1. Did the Divisional Court err in applying the reasonableness standard of review?
2. Was the arbitration award reasonable?

D. ANALYSIS

(1) Did the Divisional Court err in applying the reasonableness standard of review?

[7] Whether the Divisional Court erred in applying the reasonableness standard is not a live issue before this court, given that our task, as noted, is to step into the shoes of the court and review the Arbitrator's award again.

[8] I am obliged to recast some of the Union's complaints as arguments forewarning of errors this court might make if we were to take the Divisional Court's tack, but that analysis falls under the second issue, to which I now turn.

(2) Was the arbitration award reasonable?

[9] I set out the factual background and summarize the Arbitrator's award before turning to the sub-issues.

(a) Background

[10] Metrolinx is a government-owned, regional transportation provider and the operator of GO Transit. The Union is the bargaining agent for the bargaining unit that represents certain GO Transit employees.

[11] Metrolinx has a framework of policies to address workplace harassment and discrimination, including procedures for investigating complaints and training modules designed to eradicate such misconduct.

[12] The Workplace Harassment and Discrimination Prevention Policy (the "Policy") commits Metrolinx to take "every reasonable step to", among other things, "identify and eliminate workplace harassment and discrimination in a timely manner". It "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."

[13] In 2020, Metrolinx learned that the five Grievors were part of an online "WhatsApp" texting group on their personal cellphones, in which they made negative, derogatory, and sexist comments about other employees in some of their texts. This included allegations that one employee, referred to in these proceedings as "Ms. A", performed sexual favours for career advancement. Although Ms. A received a copy of screenshots of the texts in 2019 and reported them to one of her supervisors, she did not ultimately file a formal complaint.

[14] A few months later, after a member of Metrolinx's human resources team became aware of the messages, Metrolinx launched an investigation. The investigator interviewed Ms. A, who confirmed that she had received screenshots of the texts but refused to disclose who sent them to her. She did not want the matter investigated or pursued. In a later interview, one of the Grievors,

Mr. Juteram, shared screenshots of some of the WhatsApp group chat with the investigator.

[15] After receiving the investigation report,[1] Metrolinx terminated the Grievors for cause on the basis that they had engaged in sexual harassment.

[16] The Union filed grievances on the Grievors' behalf. The Grievance Settlement Board referred the grievances to the Arbitrator, who granted the grievances and ordered reinstatement of the Grievors.

(b) The Arbitrator's award

[17] Since this court is obliged to review the Arbitrator's award *de novo*, I set out some of the details in his lengthy reasons. The Arbitrator posited, at paras. 85-89, four questions that the grievances raised around which he structured his award:

- Does Metrolinx have authority over the Grievors' conduct while they are off duty?
- Does the evidence establish that "the impact of the harassment and/or discrimination is being manifested within the workplace", as required under the Policy?
- Does Metrolinx's failure to follow some of the procedures mandated by the Policy in handling the allegations "undercut its ability to rely on the Policy"?

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[1] See Investigation Report (File: WHD-24-20), MPMR, Vol. 2, Tab E-24.

- Was the penalty of termination appropriate?

[18] The Arbitrator noted that while employees can be disciplined for their off-duty conduct, an employer must establish that the misconduct has seriously prejudiced or injured its reputation or legitimate business interests, with the level of discipline proportionate to the harm: para. 90, citing Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration,* 5th ed. (Toronto, Ont.: Thomson Reuters, 2019), at § 7:15; *Toronto District School Board v. C.U.P.E., Local 4400* (2009), 181 L.A.C. (4th) 49 (Ont.), at para. 59; and *Millhaven Fibres Ltd. v. O.C.A.W., Local 9-670* (1967), 18 L.A.C. 324 (Ont.). The Arbitrator stated: "[I]n order to sustain legitimate discipline the communication must have been publicly disseminated or available and shown to have a real, as opposed to hypothetical or presumed, negative impact in the workplace and/or on the specific target or targets of the inappropriate language": at para. 94, citing e.g., *United Steelworks of America, Local 9548 v. Tenaris Algoma Tubes Inc.* (2014), 244 L.A.C. (4th) 63 (Ont.), at para. 47. The burden is on the employer.

[19] The Arbitrator did not err in his articulation of the governing principles. What is in issue is his application of those principles to the facts at hand. As I will explain, the Arbitrator fell into errors that impacted his disposition of each of the sub-issues.

(i) Does Metrolinx have authority over the Grievors' conduct while they are off duty?

[20] The Arbitrator explained that, in applying the Policy,[2] a finding of sexual harassment for off-duty misconduct in the form of words transmitted through social media requires: (i) a course of vexatious comment against a worker where the words were known or ought reasonably to have been known to be unwelcome; and (ii) a negative impact manifested within the workplace: paras. 101(c), 120, and

[2] As noted above, the Policy states that it "covers 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." It also defines "workplace harassment" and "workplace sexual harassment":

> For the purposes of this policy, "workplace harassment" means engaging in a course of vexatious comment or conduct against an employee in a workplace that is known or ought reasonably to be known to be unwelcome, including sexual harassment.
>
> "Workplace sexual harassment" means (i) 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 conduct is known or ought reasonably to be known to be unwelcome, or (ii) 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.

123; see also *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*"), s. 1(1);[3] Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 ("*OHRC*"), s. 10(1)[4].

[21] In applying these principles, the Arbitrator pointed out that the Grievors communicated using their personal cellphones while off duty through a social media platform inaccessible outside of their chat group. He considered that these features brought the Grievors outside of Metrolinx's authority to discipline them for off-duty conduct: at paras. 115-116.

[22] The Arbitrator explained that WhatsApp is an encrypted means of communication, and the Grievors reasonably believed and intended their comments to be private amongst themselves. They did not share them with anyone

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[3] Section 1(1) of the *OHSA* defines "workplace harassment" and "workplace sexual harassment":

> "workplace harassment" means,
>
> > (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
> >
> > (b) workplace sexual harassment; ("harcèlement au travail")
>
> "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 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; ("harcèlement sexuel au travail")

Both definitions were recently amended in October 2024 to explicitly state within their definition: "including virtually through the use of information and communications technology…."

[4] Section 10(1) of the *OHRC* defines "harassment":

> "harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; ("harcèlement")

else. Metrolinx only obtained copies of the messages when its investigator told Mr. Juteram that his obligation to cooperate under the Policy required him to disclose the screenshots, with the clear implication he would be disciplined if he did not. If the Grievors had made their comments at a backyard barbecue amongst themselves, there would be little doubt that the conversations would be private and not subject to discipline by Metrolinx: at paras. 110-114. The Arbitrator also considered the investigator's insistence that Mr. Juteram disclose information from his personal cellphone constituted a violation of the limitations on Metrolinx's entitlement under the collective agreement: at para. 109.[5]

(ii) Does the evidence establish that "the impact of the harassment and/or discrimination is being manifested within the workplace", as required under the Policy?

[23] The Arbitrator determined that, even if the Grievors' private communications through WhatsApp fell within Metrolinx's authority to discipline them for their off-duty misconduct, Metrolinx's finding of sexual harassment would also not stand because the impact of the communications was not manifest within the workplace: at para. 130.

[24] The Arbitrator relied on two facts in reaching these conclusions. First, the investigator did not specifically find that the impugned comments had a negative

[5] The Arbitrator found this was contrary to article 6.1 of the collective agreement which requires that rules must be applied reasonably by Metrolinx. This rule is addressed in detail below.

impact within the workplace, consistent with Metrolinx's own express definition of workplace sexual harassment: at paras. 120-121 and 130. Second, with the exception of Ms. A, there is nothing to suggest that any of the other employees mentioned in the messages had known about the offensive chats, and had any reaction to them during the investigation. And, as for Ms. A, the only source of stress was the investigation itself: at paras. 122 and 128.

(iii) Does Metrolinx's failure to follow some of the procedures mandated by the Policy in handling the allegations "undercut its ability to rely on the Policy"?

[25] The Arbitrator took the position that even if Metrolinx did have authority to discipline the Grievors, and even if the communications were manifested in the workplace, Metrolinx failed to follow its own substantive and procedural safeguards, vitiating its actions in enforcing the Policy: at paras. 131 and 153.

[26] The Arbitrator identified several procedural shortcomings. Under article 6.1 of the collective agreement, Metrolinx may "make and apply reasonable rules and regulations to be observed by employees" (emphasis added). Metrolinx promulgated the Policy, which promises a "fair and impartial investigation" and sets out a comprehensive process for receiving and handling complaints of workplace discrimination and harassment: at paras. 134, 139.

[27] Metrolinx's investigator unilaterally altered a number of clear procedures mandated by the Policy, including (i) ignoring mandatory time limits and

unreasonably applying discretionary timelines throughout the process: at paras. 136 and 144; (ii) substituting “Metrolinx” as the “complainant” when Ms. A refused to file a complaint: at paras. 147-150; and (iii) engaging in a “fishing expedition” through her insistence that one of the Grievors disclose the communications from his cellphone and then using them to build a case against the other Grievors: at paras. 151-152. Moreover, the Grievor who provided the screenshots to the investigator was disciplined in part for failing to cooperate in the investigation by not supplying the complete record of the WhatsApp conversation, even though Ms. A was never disciplined notwithstanding all employees’ obligations under the Policy to immediately report all complaints of harassment and cooperate fully in investigations: at paras. 46 and 136-138.

(iv) Was the penalty of termination appropriate?

[28] The Arbitrator held that Metrolinx’s application of its “zero tolerance” stance for sexual harassment through its automatic termination of the Grievors is unenforceable: at para. 159. He reached this conclusion on the basis that the Policy proclaims a “ZERO tolerance stance on harassment and discrimination” and states that, in line with that stance, “violations of the [Policy] will result in substantive sanctions up to and including termination” (emphasis deleted.): at para. 156.

[29] On the evidence in this case, Metrolinx applied its “zero tolerance” stance in the sense of imposing the penalty of automatic dismissal for any form of

discrimination and harassment. There was no evidence Metrolinx gave any regard to the nature and extent of the alleged malfeasance, the considerable passage of time from the date of the alleged misconduct, or the seniority and clean disciplinary record of the Grievors.

[30] The Arbitrator found that Metrolinx failed to consider the range of potential sanctions: at para. 155-156. A proper consideration of all of the circumstances and mitigating factors would not have justified discharge for any of the Grievors, but rather a much lesser penalty, assuming proof of off-duty misconduct: at para. 158.

[31] While acknowledging the seriousness of sexual harassment and recognizing the text messages were “shameful and reflected poorly on [the Grievors’] character”, the Arbitrator concluded that the Grievors had been terminated without just cause in violation of their collective agreement. He ordered they be reinstated to their former positions with no loss of seniority and with compensation to make them whole for all monetary shortfalls and benefits of their employment to the date of reinstatement, plus any associated and/or non-economic damages arising out of the discharge that were reasonably foreseeable: at paras. 13 and 17.

[32] To summarize, thus far I have noted that Metrolinx does have authority over the Grievors’ conduct while they are off duty, subject to the legal norms found in the cases. In my view, the Arbitrator made errors in principle and palpable and

overriding errors in his assessment of whether the evidence established that "the impact of the harassment and/or discrimination is being manifested within the workplace", as required under the Policy, and whether the investigator had the authority to request disclosure of the Whatsapp messages. He made similar errors in concluding that Metrolinx's failure to follow some of the procedures mandated by the Policy in handling the allegations "undercut its ability to rely on the Policy".

(c) Discussion

[33] In brief, I would adopt the Divisional Court's approach. Contrary to the Union's submissions, the Divisional Court approached the arbitration award "as an organic whole", not as "a line-by-line treasure hunt for error": *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191, at para. 71, citing *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 54. This court must do the same.

[34] There were several legal errors that "permeate[d]" the analysis and rendered the award unreasonable: Divisional Court reasons, at paras. 46-7 and 68. The Arbitrator erred in law in concluding: "When Ms. A declined to file a complaint of sexual harassment … and no other active employee would, that [] should have been the end of the matter": Arbitrator's reasons, at para. 150. This error has two sources.

[35] First, the Arbitrator's failure to meaningfully address Metrolinx's statutory obligations rendered his decision unreasonable: Divisional Court reasons, at paras. 53-54 and 62. The conduct of the employees in this case appeared to meet the definition of "workplace sexual harassment" in s. 1(1) of the *OHSA*. An employer has a duty, under s. 32.0.7 of the *OHSA*, to investigate both "incidents and complaints" of workplace harassment.[6] This means an investigation is required into 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 (Ont. L.R.B.), at para. 75. Such an interpretation of the legislation is consistent with s. 64(1) of the *Legislation Act*, *2006*, S.O. 2006, c. 21, Sched. F, which requires an act be interpreted remedially and given such fair, large, and liberal interpretation as best ensures the attainment of its objects.

[36] Metrolinx was statutorily obligated to investigate the incident even in the absence of a complaint. An employer's duty to investigate is not just a duty owed to the victim, but to all employees, who have a right to work in an environment free from demeaning and offensive comments: Divisional Court reasons, at para. 67.

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[6] Section 32.0.7(1) of the *OHSA* provides, in part:

> 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;

There was a sufficient basis to trigger Metrolinx's obligation to investigate the incident, irrespective of whether Ms. A filed a complaint.

[37] Consequently, although the Policy states that "the investigative process is initiated by a complaint", the Policy cannot limit Metrolinx's obligations under the *OHSA*: at paras. 55 and 66. Whatever the wording of the Policy, Metrolinx did not become the complainant when it conducted the investigation because no complainant was necessary: at para. 65. Contrary to the Arbitrator's view, Metrolinx was not in a conflict of interest in carrying out the investigations: Arbitrator's reasons, at paras. 16 and 150.

[38] Second, the Arbitrator's focus on the absence of an official complaint by Ms. A. is based on a failure to recognize that there are many reasons why a victim of harassment might choose not to pursue an official complaint, none of which erase the harassing behaviour or the employer's obligation to investigate it in order to protect the workplace from a hostile or demeaning environment: Divisional Court reasons, at paras. 47 and 59-60. The Arbitrator erred by concluding that Ms. A's reluctance to pursue a complaint meant there was no harassment; this line of reasoning relies on rejected myths and stereotypes about how an employee in Ms. A's situation would respond.

[39] The Supreme Court's warnings about relying on presumptions and stereotypes about the expected conduct of victims of sexual assault extends

equally to arbitrators adjudicating sexual harassment grievances: see *Calgary (City) v. Canadian Union of Public Employees Local 37,* 2019 ABCA 388, 439 D.L.R. (4th) 405, at para. 42; *R. v. W.(R.),* [1992] 2 S.C.R. 122, at paras. 30-31. Here, the Arbitrator's reliance on myths, stereotypes and presumptions was unreasonable. He erred in concluding that Ms. A's reluctance to pursue a complaint meant that the impugned comments did not have a negative impact on her or within the workplace, and there was therefore no harassment. The reluctance of a victim of sexual harassment may be caused by many factors, but that reluctance does not relieve an employer of its statutory duty to conduct an investigation if an incident of sexual harassment comes to its attention: at paras. 56-59.

[40] Whatever the Grievors' intent, some of the offensive comments came to Ms. A.'s attention in the workplace. The agreed statement of facts stated: "The messages upset [Ms. A] at the time she reviewed them. She recalls getting emotional at work when she first saw the messages": at para. 63. This is hardly surprising given the nature of social media and the fact that the number of employees with access to the chat was not known. The employees who participated in the chat were free to, and did, forward the message to other employees. Regardless of where the impugned conduct originated, it made its way into the workplace and became a workplace issue: para. 68. The Arbitrator's reasoning that the impact of their communications was not "manifest within the

workplace" is not consistent with the facts as found and does not withstand scrutiny.

[41] The Union challenges the Divisional Court's determination that the Arbitrator erred in concluding that Metrolinx could not undertake an investigation after Ms. A declined to participate. The Union argues that this ground of the Arbitrator's analysis was expressly written in the alternative, after he concluded that the Grievors' conduct fell outside Metrolinx's authority to discipline them for off-duty conduct, so that it therefore cannot serve as a basis to intervene. Both of these grounds fail for the reasons explained earlier.

[42] It is also important to note that the first issue analyzed by the Arbitrator – whether the communications fall under Metrolinx's authority because they were made off duty – is related to and not separable from the second issue – whether Metrolinx has authority over the Grievors' off-duty conduct. Plainly, off-duty conduct can give rise to discipline if it manifests in the workplace as it did in this case.

[43] Lastly, the Arbitrator erred in principle in finding, at para. 109 of his reasons:

> The Employer's action, by its Investigator, to insist that Mr. Juteram disclose information from his personal cellphone (and, through that doorway, then intrude upon the private cellphone conversations of the other Grievors without their consent), in my opinion constituted a violation of the negotiated limitation on the Employer's entitlement under article 6.1 of the collective agreement.

[44] While the investigator got the texts from Mr. Juteram's private cellphone, this was a part of the investigation. The investigator was made aware of the concerning message regarding Ms. A, which warranted an investigation. Mr. Juteram made reference to the WhatsApp chat on his phone while speaking to the investigator in order to clear himself of responsibility for the offensive comments made about Ms. A, and it became clear to the investigator that Mr. Juteram still had access to the conversation. To continue the investigation, the investigator wanted to see the chat because the comments in issue could not be dealt with in isolation. The texts fell within the purview of an investigation into workplace misconduct.

[45] In summary, and as noted, a victim's reluctance to complain about sexual harassment does not relieve an employer of its statutory duty to investigate if an incident comes to its attention. The Arbitrator reasoned that because the Grievors communicated on personal cellphones outside of work and their comments did not appear to have a negative impact on the workplace, Metrolinx was under no obligation to conduct an investigation and was in fact barred from doing so. These were errors in light of the statutory framework governing workplaces.

E. DISPOSITION

[46] I would dismiss the appeal and confirm the order of the Divisional Court remitting the matter to the Grievance Settlement Board to appoint another arbitrator to determine the matter in accordance with these reasons.

[47] As agreed, the Union shall pay Metrolinx costs in the amount of $20,000, all-inclusive.

Released: June 6, 2025 “P.D.L.”

“P. Lauwers J.A.”
“I agree. I.V.B. Nordheimer J.A.”
“I agree. D.A. Wilson J.A.”