HUNTER-LIBERATORE-LAW

Handling Hate Speech: *Laurentian University v Laurentian University Faculty Association*

We all have responsibility over our own actions at work. To some extent, employers may have responsibility over their employees' actions. But to what extent are employers responsible for the actions of strangers?

Where the strangers' actions are impacting your workplace, the answer to this question gets a bit murky.

In a recent arbitral decision, *Laurentian University v Laurentian University Faculty Association*, 2023 CanLII 21642 (ON LA), a professor filed a grievance against the University for failing to properly respond to an antisemitic incident. The professor, Dr. Roth, spoke out against the actions of the University in regards to a financial matter. In response, Dr. Roth received an anonymous email filled with antisemitic vitriol.

Understandably disturbed, Dr. Roth forwarded the email to the Dean, who then forwarded it to the University's Equity, Diversity and Human Rights Office ("EDHRO"). The EDHRO replied to Dr. Roth with the following statement:

> "I am sorry that you have received this inappropriate correspondence and please do let me know if we can be of any further assistance."

The university's IT department blocked any further emails from the sender.

Dr. Roth felt that the EDHRO's response was flippant, dismissive, and insufficient given the gravity of his experience. The use of the term "inappropriate correspondence" to describe a hate-filled message was taken as being grossly insufficient and insensitive.

Dr. Roth filed a grievance alleging that in responding so flippantly to a racist, antisemitic incident, the University violated its duty to provide an environment free from discrimination and harassment under the collective agreement.

The arbitrator determined that the University's response to Dr. Roth did not violate the terms of the collective agreement. When considering the adequacy of an employer's response to a hateful incident, adjudicators use the *Marineland* test. That test asks six questions:

I. Did the employer meet its obligation to provide a healthy work environment?
II. Did management communicate its actions to the applicant?
III. Was the issue dealt with seriously?
IV. Was the respondent prompt in dealing with the harassment complaint?
V. Was there an awareness by the employer that the conduct in question is prohibited?
VI. Did the employer demonstrate that there is a complaint mechanism in place?

Overall, the arbitrator found that Laurentian University responded adequately to the incident. The arbitrator chose to not to look at the EDHRO's response independently, but to assess it in concert with the responses from other University actors. Both the Dean and the IT department provided swift, empathetic responses to Dr. Roth.

While the arbitrator found that the EDHRO used "the mildest possible language to describe what was a hateful, antisemitic attack on the grievor", she did not find that the EDHRO's language amounted to a violation of the collective agreement. The University satisfied the basic requirements of the *Marineland* test:

> [30] …Dr. Roth's right to a healthy working environment free from discrimination was breached by the email he received on his university email. However, **the University had no role in sending this email and its actions in response were not in breach of their obligations**. The policies they had in place recognized the right of the University community to a healthy workplace free from discrimination, and provided complaint mechanisms for those who felt that their rights had been violated. When they were advised by Dr. Roth of the hateful

> antisemitic email which he had received they recognized that it was a serious breach of his rights and took immediate steps to prevent further breaches. They communicated the steps taken to Dr. Roth. He was also asked to notify them if he required further assistance.

This case provides a couple of key takeaways for employers.

The first is that in a large organization, it is critical that all departments work together to form a cohesive system for responding to discriminatory and offensive behaviour. The EDHRO's response hit on some of the minimum requirements of the *Marineland* test by acknowledging the discrimination, apologizing, and offering further assistance.

That said, the response was not deeply empathetic, and did not offer any specific trauma supports. In contrast, the Dean's response was both sensitive and appropriate. The IT department also responded swiftly and appropriately by acting quickly in blocking the sender. A shortfall in sensitivity from one department of the University was not fatal to the University's overall position as the system as a whole continued to function properly. Since the EDHRO's response was merely insensitive and not blatantly dismissive, the University was able to rely on other parts of its system to protect it from liability.

The second major takeaway from this case is that while employers cannot always prevent discrimination and harassment in the workplace, they can control how they respond to it. Prior to the digitization of the workplace, employers could protect their employees by simply removing hateful and disruptive individuals from the employer's premises. In modern times, employees are often accessible through their employer's email network. They can be contacted by anyone, anywhere, at any time. Short of filtering an employee's emails, there is simply no way to stop these communications from reaching vulnerable employees.

An employer cannot control what employees receive, but they can control their response.

The *Marineland* test, summarized above, can act as a basic checklist for employers when responding to instances of discrimination and harassment.

That said, *Marineland* is really just a jumping-off point. The EDHRO's response to Dr. Roth may have satisfied the basics of the *Marineland* test, but had the Dean not been sensitive and appropriate in his response, it is hard to say how this case would have been decided. In such cases, there is room for the human element, and for empathy and sensitivity to guide employers' responses.

Employers are not responsible for the words of anonymous strangers. They are, however, responsible for responding appropriately and sympathetically to those words, and providing, as much as possible, a safe working environment.
