HUNTER-LIBERATORE-LAW

"Harassment" in Labour Relations Management

A certain amount of offence, annoyance and discomfort can be expected anywhere that human beings interact. The workplace is no different. Not all conduct that an employee perceives as harassing meets the legal definition of harassment that employers have an obligation to prevent. The cases discussed below demonstrate that a finding of workplace harassment requires objective evidence of conduct that is abusive, attacking and represents a marked departure from reasonable conduct.

In *Toronto (City) v Canadian Union of Public Employees* (Sheri Price, January 12, 2023), an employee filed a grievance against their Employer for harassment based on multiple trivial incidents. The Grievor alleged that their supervisor had on multiple occasions expressed annoyance or frustration with the Grievor, and in another incident, the same supervisor had neglected to take the Grievor's complaints of an unpleasant scent in the workplace seriously.

The Grievor further described how they were once almost accidentally struck by an elastic band by a co-worker and expressed how an argument between two coworkers frightened them. There were various other minor complaints about the Grievor's co-workers in which it was alleged that they were rude, disagreed with the Grievor, avoided the Grievor's workspace, and interrupted the Grievor.

In addressing, and rejecting each of the allegations, the arbitrator described how the Grievor misinterpreted the legal definition of harassment:

> Harassment has an inherently subjective component because it is defined, in part, by the impact it has on the person being harassed, i.e. its vexatiousness to that person. At the same time, a finding that someone has been harassed requires an objective analysis. An arbitrator cannot base a finding of harassment solely on an employee's perception that s/he has been harassed… An employee may feel offended, annoyed or even intimidated by particular conduct, but if the conduct itself is objectively reasonable, s/he will be unable to establish that the conduct constituted harassment … Consistent with this, it is well established that the legitimate exercise of managerial authority – to manage an employee's work performance or to impose discipline for just cause, for example – does not constitute harassment, even though it may be bothersome or upsetting for the employee… In order to constitute harassment, the conduct in question must represent a departure from reasonable conduct and is generally abusive or attacking in nature (at para 25)

In assessing the grievor's complaints, the arbitrator found no evidence that the use of scent by one or more coworkers was aimed at the grievor or constituted vexatious

conduct towards her. She further found that if the grievor was accidentally struck by an elastic band, there was no basis to reasonably conclude that incident constituted a course of vexatious conduct towards the grievor. Nor could the arbitrator conclude that a comment that the grievor had been rude rose to the level of harassment.

In *Ontario (Workplace Safety and Insurance Board) and CUPE, Local 1750* (Ontario Grievance Settlement Board, May 6, 2014) an employee filed a Grievance alleging harassment on the basis that they were "badgered, belittled, scolded like a child and treated aggressively by their manager". The arbitrator found that the conduct at issue was insignificant, and emphasized that a finding of harassment would require that the conduct be more than trivial, making these relevant comments:

> Treating any course of conduct or comment that causes foreseeable annoyance, frustration or worry, no matter how minor, as grounds for complaint would encourage unwarranted grievances, because friction and conflict are inevitable byproducts of human interaction. Only significant misconduct that leads to serious harm should be viewed as harassment within the meaning of the collective agreement.
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> In this respect, I concur with the sentiments expressed in British Columbia v. B.C.G.E.U. (1995), 49 L.A.C. (4th) 193 (B.C. Arb.) (Laing), where the arbitrator wrote:
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> > For example, every act by which a person causes some form of anxiety to another could be labelled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly, we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless or insensitive. The question then is when are we guilty of harassment?
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> > I do not think every act of workplace foolishness was intended to be captured by the word harassment. This is a serious word, to be used seriously and applied vigorously when the occasion warrants its use. It should not be trivialized, cheapened or devalued by using it as a loose label to cover petty acts of foolish words, where the harm, by any objective standard, is fleeting) ...
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> There is additional reason for caution when determining whether a manager has engaged in harassment in the course of supervising an employee. It would not be unusual for an under-performing employee to be worried by a manager's efforts to correct the problem. Labelling all such efforts as harassment would make no sense, because doing so would completely undermine managerial authority.

> In PIPSC and Unifor, Local 3011 (Menard), Re... the arbitrator concluded "the legitimate use of managerial authority" does not amount to harassment. Mr. Starkman cited with approval two earlier decisions asserting even an "unpolished" or "less than optimal" managerial style, exercised in good faith, did not constitute harassment....
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> In the case at hand, there is no evidence indicating Ms. Kofsky was not acting in good faith. There is nothing to suggest she was motivated by personal animosity or any other illegitimate factor. (paras 35-39)

In *Cara Operations Ltd. v. Teamsters, Chemical, Energy & Allied Workers, Local 647* (Luborsky, May 25, 2005) an employee filed a grievance for harassment on the basis that their new supervisor frequently used vulgar and profane language when instructing them, as well as acting as if they were on a “power trip” when directing the Grievor’s activities. In this regard the Grievor stated that they were not allowed to leave work early as they had been with a previous supervisor.

Furthermore, the supervisor allegedly continued to contact the Grievor when they were on their break without offering overtime pay. The Grievor described an incident in which their supervisor interrupted them and angrily slapped a desk in frustration. In addition, the Grievor stated that they felt the supervisor began to ignore them following a meeting in which the Grievor made a formal complaint against the supervisor.

In rejecting the grievance, the arbitrator explained that the test for workplace harassment will not be met simply because an employee had an adverse reaction from their supervisor’s managerial style:

> ....Consequently, even if the Grievor believed she was a victim of such harassment, and suffered real medical consequences as a result, her perceptions and their result are not enough, in themselves, to support a finding of harassment ... (at para 20)
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> Sharma's failure to extend to the Grievor the same indulgences, courtesies and respect granted her by the other supervisors (such as permission to leave early for working during breaks, not calling the Grievor while she was on break, perceived indifference to the Grievor's opinions, raising her voice and using profanity in her speech, etc.), seem more in the nature of Sharma's personality traits that were subjectively unsettling to the Grievor rather than, from an objective viewpoint, "mental maltreatment and the improper use of power" that would be seen as "a departure from reasonable conduct" (at para 22)

The arbitrator went on to explain that it would not constitute harassment for an employee to disagree with or come into conflict with their supervisor, as this was to be expected in certain working environments:

> My impressions of the Grievor and of Sharma from the evidence before me are that these are two competent, longstanding and valued employees who are each hardworking and dedicated, but each has different perspectives, mannerisms and approaches that unfortunately clashed in the workplace. ...
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> ...one must be careful not to construct too narrow a definition of "departure from reasonable conduct" lest every perceived slight or subjective inference of abuse might result in paralyzing consequences to the workplace. There is a wide range of personalities that we experience in our interaction with others; not all of which may be pleasing to our individual sensitivities, but which we must live with nevertheless, within legal bounds, developing a certain "thickness of skin" to the challenge another's disagreeable mannerisms might present. Whether dealing with a family member, backyard neighbour, co-worker or supervisor, the question of whether the other person's behaviour amounts to a "depature from reasonable conduct" is an objective inquiry that given the expected variability in human capabilities and personalities, must be afforded a relatively wide margin of interpretation. Not every supervisor is a "good" one, but not all "bad" supervisors are abusive, without suggesting that Sharma fell within one or the other category. (at paras 23-24)

In *Toronto (City) and CUPE, Local 79 (Connell), Re* (Marilyn A. Nairn, August 1, 2012) an employee filed a grievance against their Employer for harassment based on 21 minor incidents. These included, but were not limited to being questioned for their frequent bathroom breaks, a sarcastic comment directed at them, being excluded from e-mail chains, being prevented from attending a staff meeting, and being unable to consume the communal pizza because their supervisor neglected to provide a lactose intolerant option:

In addressing, and rejecting each of the allegations, the arbitrator described how the Grievor misinterpreted the legal definition of harassment:

> ... Even assuming that Mr. McBoyle asked the grievor about coverage, and regardless of whether the breaks were authorized or not, there is no evidence from which to conclude that Mr. McBoyle's inquiry occurred on any kind of inappropriate basis. It is a customer service department. The employer has a right to ensure that necessary work is being performed. It would be entirely reasonable for the supervisor to inquire of the employee responsible for the work whether that work was accounted for. (at para 41)

> .... She later stated that it made her feel "like a second-class citizen". However the grievor was excluded on the basis that she was not part of the technical staff. There was no evidence that she was excluded from meetings where other clerical staff were present. As she otherwise worked at the counter in the receptionist capacity, it made sense for her to be the person to cover the counter while meetings of technical staff took place. (at para 64)
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> ...I find that the evidence does not support a conclusion that the grievor was inappropriately excluded from participating in pizza meals. Even assuming that the employer bears some responsibility for ensuring that dietary needs are met in these circumstances, this evidence represents a mutual failure of communication....The evidence does not support a finding that the employer, specifically Mr. McBoyle, harassed the grievor or discriminated against her on the basis of any prohibited ground. (at para 72)
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> ...Although I recognize that the grievor sincerely believed that she was the subject of discrimination and harassment, I have found that those allegations have not been made out. I sincerely wish for the grievor that she find in this review, however difficult, an opportunity to move forward in her employment. (at para 176)

Key Takeaways:

Arbitrators recognize that a supervising employee cannot effectively manage their subordinates without the freedom to discipline, reprimand, and instruct them. In this regard, the legitimate use of managerial authority will not be considered harassment under the Ontario *Human Rights Code* definition or the *Occupational Health and Safety Act*. Arbitrators will consider harassment allegations within the context of practical workplace dynamics and the personality conflicts that are inherent in any social environment.

Nevertheless, it would be prudent for employers to respond to an employee's complaints in good faith, no matter how frivolous they appear. An objective demonstration of their honest intentions will be persuasive to an arbitrator when considering a harassment claim.