

Bullying and harassment: in Canada, it's no longer just a 'schoolyard' issue

Bullying on the playground is a well-recognised issue and one that regularly receives significant media attention. Recently, discussion of bullying has moved from the sandbox to the workplace.

Alarming, some studies show that as many as 40 per cent of Canadian workers experience bullying on a weekly basis. Statistics of this sort have caused employers and legislators alike to take note of the issue and have spurred a call to action to address a problem that has not only significant, but also far-reaching implications.

Workplace bullying and harassment defined

Workplace bullying and harassment is typically viewed as a form of aggression wherein the perpetrator tries to injure or isolate a fellow co-worker or group of co-workers. Bullying and harassment can take a multitude of forms, either subtle or overt, and may manifest itself as verbal, psychological or even physical abuse. Whatever form it may take, the perpetrated actions are typically designed to intimidate, insult, degrade or embarrass the targeted individual or group and, more often than not, present as a pattern of repeated behaviour rather than as a single isolated event.

The implications of workplace bullying and harassment

At the individual level, an employee who is the target of workplace bullying or harassment may experience a variety of psychological effects ranging from anger and self-doubt to loss of confidence, as well as physical effects which may include the onset of stress-related disorders, loss of sleep, loss of appetite, inability to concentrate and a reduction in productivity – both at home and at work.

The implications of workplace bullying and harassment on the organisational level can be equally devastating. From an employer's perspective, the presence of such influences in the workplace can result in decreased

employee morale, which in turn may breed increased levels of absenteeism, higher turnover rates, losses in overall productivity and ultimately damage to the company's brand. Another ancillary impact is, of course, the legal cost associated with defending the various claims and actions that may arise out of these workplace incidents.

The precursor to violence

In addition to the practical implications outlined above, where bullying and harassment is allowed to fester there is an increased risk of physical aggression and violence. Unfortunately, in Canada, we have seen glaring examples of this intrinsic link between bullying and workplace violence. These include multiple murders committed by a former employee of OC Transpo who had been the target of repeated incidents of workplace bullying and the murder of a Windsor nurse after she ended a romantic relationship with a physician at the hospital where she worked.

As a result of the increased awareness of and sensitivity to these issues, Canadian employers are increasingly being called upon to take a proactive stance against humiliating, intimidating and/or demeaning conduct in the workplace. In many jurisdictions, legislators have responded to this growing public pressure by enacting statutes that address the issues of workplace violence and harassment head on.

Human rights legislation

While most human rights legislation in Canada predates much of the recent focus on workplace harassment and bullying, it provides an important protection for employees in respect of certain types of violence, harassment and bullying.

Specifically, Canadian human rights legislation affords workers the right to be free from discrimination and harassment on the basis of any protected ground, for example, inter alia, sex, sexual orientation, gender

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identity, race, colour, ethnic origin, marital status, family status and disability.

In keeping with this legislated protection, Canadian employers are under a corresponding positive obligation to take active steps toward the prevention and elimination of contravening conduct in the workplace. Where such behaviour occurs and is not appropriately dealt with by an employer, an employee may file a complaint with the appropriate human rights tribunal or adjudicative body, claiming damages flowing from the infringement of his or her human rights.

This type of human rights regime is common across all Canadian jurisdictions and affords important workplace protections against violence, bullying and harassment that is discriminatory in nature, but only where there is a nexus to a protected ground. The effect is that human rights legislation, while serving an essential function, provides no protection or recourse to employees who experience violent, intimidating or demeaning conduct that is not discriminatory in its origin.

Recognising the gap left by human rights legislation, a number of Canadian jurisdictions have enacted legislation that deals specifically with workplace violence and harassment of a non-discriminatory nature.

Legislation addressing workplace violence

Alberta, British Columbia, Manitoba, Newfoundland & Labrador, Nova Scotia, Ontario, Saskatchewan and the federal government (federal legislation governs the employee relations issues of federal undertakings such as organisations operating in the banking sector, postal service or transportation industry) have all included as part of their occupational health and safety statutes provisions in respect of workplace violence.

Although there are distinctions that can be drawn as between jurisdictions, most of the applicable legislation recognises 'workplace violence' as an act that either causes, or is likely to cause, physical injury. The various pieces of legislation not only prohibit *acts of violence*; most also include *threatening acts of violence* in their definition of prohibited behaviour.

The obligations placed on employers in respect of workplace violence do not end there. Provisions relating to workplace violence commonly require employers to take a number of proactive measures, including:

- enacting policies and procedures to minimise the risk of violent occurrences;
- conducting regular workplace risk assessments, taking into account the organisation's previous experiences, the prior experiences of similarly situated organisations and the organisation's location and circumstances, which may predispose workers to heightened risk of violence;
- establishing reporting, complaint and investigation procedures, which will be utilised if or when incidences of violence occur; and
- providing employees with training to ensure they are aware of the mechanisms that have been put in place to protect worker safety.

Tackling workplace harassment

While a significant majority of Canadian jurisdictions have enacted legislation to deal with workplace violence and the risk of physical harm, fewer have taken steps to address the associated issue of workplace harassment and bullying, which more traditionally manifest as psychological or emotional abuse. To date, only the legislatures of Manitoba, Ontario, Saskatchewan and Québec have taken the initiative to squarely address the issue of non-Code related harassment in the workplace.

In particular, legislation enacted in these jurisdictions generally requires employers to implement harassment prevention policies aimed at curtailing the occurrence of personal harassment and put in place procedures for the filing and investigation of internal complaints. While the legislation enacted in Manitoba, Ontario and Saskatchewan follows this general model, the provisions of Québec's 'An Act Respecting Labour Standards' concerning psychological harassment go a step further and require employers to not only take all reasonable steps to prevent psychological harassment, but also to put a stop to it once made aware of its occurrence. In Québec, therefore, the positive obligation imposed on employers is twofold and involves both *prevention* and *intervention*.

In addition to legislation currently in place, in January 2013, the Mental Health Commission of Canada, the Bureau de Normalisation du Québec and the Canadian Standards Association jointly released the 'National Standard of Canada for Psychological Health and Safety in the Workplace'. This new standard is not a statutory or regulatory enactment but, rather,

has been designed as an entirely voluntary tool intended to promote the psychological safety and wellbeing of Canadian workers. The new standard goes beyond existing legislation and provides employers with recommendations and guidelines for the implementation of a systematic approach to the issue of psychological safety by addressing such topics as:

- identification of workplace hazards;
- assessing and controlling permanent risk factors;
- promotion of a culture of respect for psychological health and safety in the workplace; and
- development of organisational excellence and long-term sustainability.

These varied approaches toward addressing violence and harassment in the workplace are relatively new and, perhaps not surprisingly, have been met with mixed reviews. While some suggest that legislation and national standards of this sort place further onerous obligations on already overburdened employers, others have suggested that the legislative response does not go far enough in addressing issues of violence and bullying in Canadian workplaces.

Critics have focused their comments on the fact that most workplace violence and harassment legislation merely requires employers to put mechanisms in place to minimise the risk of such occurrences and does not contemplate the provision of compensation or damages to workers who have been subject to harassment or bullying while at work.

More particularly, unlike the human rights system discussed above, which provides a complaint-driven access to justice model, legislation dealing with personal violence and/or harassment (with the exception of the psychological harassment regime established in Québec) has not established a similar procedure for registering individual complaints with a government agency. As a result, in Canada, much of the litigation around the issue of non-discriminatory workplace bullying and harassment has arisen in the context of broader civil claims for wrongful or constructive dismissal.

Civil claims and remedies

The Canadian courts have recognized that where an employee has been exposed to harassment and bullying in the workplace, particularly where it is persistent and carried

out over a lengthy period of time, such conduct may found a successful constructive dismissal claim. Similarly, where an employer is aware that such events have transpired and fails to take reasonable or adequate steps to curb the pattern of behaviour, this may likewise provide the basis for an award of increased damages and/or a finding of vicarious liability for the organisation's offending employees' actions.

The case of *Piresferreria v Bell Mobility Inc* highlights the manner in which incidents of harassment and bullying may factor into employment-related civil litigation. In this case the plaintiff was subject to repeated abuse by her supervisor wherein he frequently yelled, swore at and berated her in front of colleagues. Events came to a head when, after failing to set up a meeting with a client, the plaintiff's supervisor forcibly pushed her aside, causing her to lose her balance and fall against a filing cabinet. Rather than acknowledge the impropriety of his actions, the supervisor instead presented the plaintiff with a performance improvement plan, following which the plaintiff was diagnosed with post-traumatic stress disorder and never returned to work.

On appeal, the Ontario Court of Appeal found that the plaintiff had been constructively dismissed, her continued employment rendered impossible as a result of the abuse she had suffered at the hands of her supervisor, and awarded her 12 months' pay for the duration of the reasonable notice period. In addition, the Court awarded CAD45,000 for mental suffering as a result of the manner of her dismissal and, further, found the employer vicariously liable for the supervisor's battery and assault, which landed the company with an additional bill of CAD15,000. While awards of this amount may seem minimal in some jurisdictions, they represent a not insignificant sum in the landscape of Canadian court awards.

In this case, the plaintiff had additionally argued that her employer owed a common law duty of care to protect her from incidents that had the potential to cause mental suffering. However, and very helpfully for employers, the Court of Appeal rejected the plaintiff's argument in this regard and refused to find the employer liable in negligence on the basis that recognising such a duty would expand the scope of liability for employers too substantially. While the Court of Appeal's decision on this point (and the Supreme Court of Canada's subsequent

dismissal of the plaintiff's leave to appeal) was a welcome outcome for Canadian employers, the *Presferreira* case nevertheless serves as an illustrative example of the significant costs and liability risks associated with bullying and harassment in the workplace.

Concluding thoughts

The law surrounding the issue of bullying and harassment in the Canadian workplace is

still very much in its evolutionary stages and we are likely to see continued development in this area as employers and legislators alike face ongoing public scrutiny and pressure to devise practical and effective solutions. What is abundantly clear, however, is that there are profound implications for employers, employees and society as a whole if workplace issues of this sort go unaddressed and are left to smoulder.