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Workplace Harassment in 2016: The Year in Review

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Introduction

The law continued to evolve in 2016 with respect to identifying, thwarting, and remedying workplace harassment. Trends over the last year include increased damage awards resulting from civil courts' inherently broad jurisdiction, stricter duties for employers in protecting employees from bullying in the workplace, and decisions which show that mental injuries resulting from harassment can occur regardless of whether the conduct at issue is an isolated incident or a prolonged pattern of vexatious behaviour. With increased responsibility and more severe sanctions, the stakes are even higher for employers to properly delineate what is appropriate management of the workplace and what constitutes harassing behaviour. This paper reviews the latest legislative reform as well as decisions across the various forums in Ontario that are tasked with adjudicating claims of workplace harassment and the resulting mental injuries.

WSIB: Update on Claims for Mental Stress due to Harassment

Overview of Regime

The Workplace Safety & Insurance Board ("WSIB") scheme in Ontario protects employers from civil liability if they are covered by the no fault insurance scheme which compensates workers for illness or injury arising from employment. In recent years there has been action around claims for mental injuries resulting from workplace harassment. In such cases, an employee can claim benefits for health care costs, loss of earnings, and permanent impairment. The claim must fall under the general entitlement provision, however, and compensation for mental stress is limited to events causing "traumatic mental stress."[1] In the decisions this has required an Axis 1 DSM-IV diagnosis, most commonly of Post Traumatic Stress Disorder ("PTSD").

Section 13 of the Ontario Workplace Safety and Insurance Act, 1997 ("WSIA") sets out entitlement and exceptions to benefits for mental stress injuries:[2]

> Insured injuries
>
> 13. (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan. 1997, c. 16, Sched. A, s. 13 (1).
>
> Exception, employment outside Ontario
>
> (4) Except as provided in subsections (5) and 14 (3), a worker is not entitled to benefits under the insurance plan for mental stress. 1997, c. 16, Sched. A, s. 13 (4); 2016, c. 4, s. 1.
>
> Same
>
> (5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the

[1] *Workplace Safety and Insurance Act,* 1997 S.O. 1997, c. 16, Sch. A, s.13(5) ("*WSIA*").
[2] *Ibid* s.13

> worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment. 1997, c. 16, Sched. A, s. 13 (5).

Decisions have drawn a distinction between injuries caused by harassment of a sexual, violent, and "acute" nature, as compared to those which result from "continuous" psychological bullying. Traditionally, workers' compensation adjudicators have viewed this latter type of behaviour as "the usual stresses and strains of the workplace",[3] however recent cases indicate the tide is turning.

Since 2014, the Workplace Safety and Insurance Appeals Tribunal ("WSIAT") has ruled that the bar to claims for "continuous" mental stress were unconstitutional,[4] as the limitations in s.13(4) and (5) of the *WSIA* infringe on a worker's equality rights under s.15(1) of the *Charter of Rights and Freedoms* without proper justification. As a result of this unconstitutionality, where the worker's appeal would have succeeded but for s. 13(4) and (5), the WSIAT has found the worker entitled to benefits for mental stress. Note, however, that the Charter challenges have been restricted to the "acute" mental stress branch of s. 13(5), meaning that the constitutionality of the prohibition on mental stress caused by an employer's actions *per se* has yet to be tested.[5]

[3] See e.g. *D.W. v. New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2005 NBCA 70, where confrontational workplace politics caused an employee to develop "major and resistant depression". The workers' compensation board, reviewing court, and New Brunswick Court of Appeal all agreed that an "acute reaction to a traumatic event" had not occurred within the meaning of the legislation. Rather, the employee's condition was related to the "usual stresses and strains of the workplace" and was therefore not compensable.
[4] Decision No. 2157/09, 2014 ONWSIAT 938 and Decision No. 1945/10, 2015 ONWSIAT 223.
[5] Decision No. 2157/09, 2014 ONWSIAT 938.

"Acute" vs "Continuous" Mental Stress

A number of recent decisions demonstrate how workers' compensation adjudicators have dealt with the legislative distinction between "acute" and "continuous" mental stress. For example, in Decision No. 2157/09,[6] a hospital nurse was subject to harassing behaviour by a doctor over a period of 12 years. The harassment included yelling at her, making demeaning comments towards her, and interfering with her ability to do her job. Eventually the nurse stopped working and was diagnosed with an adjustment disorder, anxiety, and depression, all of which were attributed to workplace stress. Though initially denied benefits on account of not having suffered "acute" mental stress, the nurse successfully challenged the decision which led the *WSIAT* to rule that the legislative distinction violated her constitutional rights.

In 2016, Decision No. 1572/12[7] ruled on the entitlement of a deaf kitchen worker who had been chronically bullied throughout his 30 years on the job. The cruel behaviour inflicted on the worker included locking him in the walk-in freezer, throwing food at him to get his attention, giving him "wedgies", pulling his pants down, making threatening physical gestures towards him, and on one occasion a co-worker hit him. Eventually the worker was diagnosed with PTSD, at which point he stopped working.

While the employer claimed that these actions were done in jest, the WSIAT found that regardless of the intention, the behaviour experienced by the worker was still traumatic. Because of this, even though the harassment took place over a long period of time and was likely still cumulative, it nonetheless met the requirements of s. 13(5) as being an "acute reaction to sudden, unexpected traumatic events". Notably, the Panel also commented that even if they had not been

[6] *Ibid*
[7] Decision No. 1572/12, 2016 ONWSIAT 987.

able to justify the prolonged harassment under the confines of s. 13(5), because the worker also suffered mental stress due to "physical assaults" (i.e. being locked in the freezer, having food thrown at him, wedgies, being hit), he would still be entitled to benefits on this basis.

A recent case from Nova Scotia[8] similarly demonstrates the flexibility adjudicators are starting to show in navigating the distinction between "continuous" and "acute" mental stress. In decision WCAT # 2012-111-AD,[9] released in August 2016, a gay firefighter was awarded entitlement for mental stress after being subjected to homophobic harassment over a period of many years. The harassment consisted of homosexual pornography being distributed anonymously around the fire hall, insulting and humiliating comments as well as threats of physical violence being made against the worker, and the sabotage of his breathing apparatus so that outside air, gases, and smoke could enter his facemask in the event of a fire, something that could have endangered his life.

After being subject to years of this behaviour the worker was diagnosed with "situational adjustment disorder with depressed and anxious mood" and was deemed incapable of returning to work. Although the Worker's Compensation Board ruled that the harassment was cumulative and therefore "continuous", which disentitled him to benefits, the Appeal Tribunal disagreed as it found that the acts inflicted would reasonably cause the worker to perceive a threat of death or serious injury. As a result, the definition of a "traumatic event" was made out which entitled the worker to coverage and benefits.

[8] The worker's compensation scheme in Nova Scotia similarly limits claims for mental stress where the stress is cumulative, and not the result of a single, discrete traumatic event.
[9] 2012-111-AD (Re), 2016 CanLII 59328 (NS WCAT)

Legislative Reform

While appeals tribunals seem sympathetic to victims of "continuous" workplace harassment, they do not have the power to strike down legislation. In Ontario, without a change in the legislation from the government, the WSIB must continue to apply s. 13(4) and (5) of the *WSIA* as written.[10] As a result, unless a worker has the means to appeal their disentitlement to the WSIAT, and in many cases launch a *Charter* challenge, he or she will not receive benefits for mental stress. This situation led to a complaint in 2016 to the Ombudsman of Ontario with respect to the government's failure to remedy the WSIAT's finding that its own legislation was unconstitutional,[11] as well as concerns that Ontario seems to be out of step with other provinces that allow coverage for injury resulting from "continuous" mental stress.[12]

In 2016, the Ontario government changed the law with respect WSIB claims for PTSD for first responders with Bill 163, "Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder)". Bill 163 amended the *WSIA* to create a rebuttable presumption in favour of granting benefits to first responders diagnosed with PTSD,[13] given that they are twice as likely as the general population to suffer from PTSD due to the nature of their jobs.[14] Notably, however, if a first responder's PTSD is a result of performance management-related actions taken by the employer, he or she will still be disentitled to coverage.[15]

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[10] See Decision No. 665/10, 2016 ONWSIAT 997 and Decision No. 1945/10, 2015 ONWSIAT 223.
[11] "Ombudsman Asked to Probe WSIB Treatment of Mentally Ill", The Toronto Star (November 14, 2016), online: https://www.thestar.com/news/gta/2016/11/14/ombudsman-asked-to-probe-wsib-treatment-of-mentally-ill.html
[12] Aside from Alberta and British Columbia, jurisdictions such as Saskatchewan, Québec, Yukon, Northwest Territories, and Nunavut do not exclude claims for chronic onset psychological injury.
[13] *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A, (WSIA) s.14
[14] Ministry of Labour, "Ontario Passes Legislation to Support First Responders with PTSD" (April 5, 2016).
[15] WSIB Operational Policy Manual: Posttraumatic Stress Disorder in First Responders and Other Designated Workers, 2016

Update on Damages for Workplace Harassment: A Tale of Two Forums

Human Rights Tribunals

Despite a number of record-setting decisions, it appears that damage awards by human rights tribunals for workplace harassment have remained relatively restrained.

Recall that the British Columbia Supreme Court made news in 2015 for overturning an award of $75,000.[16] In 2016, however, the BC Court of Appeal allowed the applicant's appeal and restored the original damages award.[17] While the judicial review judge had found the $75,000 award patently unreasonable since it was twice the amount given in other cases of similar discrimination, the Court of Appeal disagreed,[18] noting that ranges from previous cases should play a "more diminished role" when determining an award for injuries to dignity under the *Human Rights Code* (an echo of concerns raised in 2012's *Pinto Report*[19]). This new high watermark for B.C. comes after the Ontario Human Rights Tribunal set its own new record in 2015 when it awarded $150,000 to a victim of egregious sexual harassment in *O.P.T. v. Presteve Foods Ltd*.[20]

While certainly high, the above awards do not appear to have become trend-setting as of yet, however, as recent damage awards for workplace harassment at the HRTO have still remained in the range of $20,000.

[16] *University of British Columbia v. Kelly*, 2015 BCSC 1731.
[17] *University of British Columbia v. Kelly*, 2016 BCCA 271.
[18] *Ibid* at para 60.
[19] Andrew Pinto, "Report of the Ontario Human Rights Review 2012" (November 2012), online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/human_rights/#_Toc436831399.
[20] 2015 HRTO 675.

For example, *Perry v. The Centre for Advanced Medicine*[21] involved ongoing sexual harassment of the applicant by her boss, a naturopathic doctor. The harassment included unwanted hugging, a kiss on the neck, frequent massaging and touching of the applicant's neck and shoulders, as well as rubbing his body up against her when she walked by. The applicant also frequently received sexually charged, though not explicit, text messages from her boss which included "wink" and "tongue sticking out" emojis. After repeatedly refusing his advances, the applicant was terminated. Relying heavily on the text message exchanges, the HRTO did not hesitate to find that the applicant had been a victim of workplace sexual harassment. In terms of damages, the HRTO the awarded the applicant $15,000.00 for injury to dignity and $10,000.00 as compensation for reprisal.

The award in *Perry*, which involved unwanted sexual solicitation over a period of time, can be contrasted with the result in *Granes v. 2389193 Ontario Inc.*,[22] where the applicant was awarded $20,000.00 in human rights damages after enduring one night of sexual harassment by the co-owner of the restaurant where she worked. In *Granes*, the HRTO found that the personal respondent had "touched the applicant's breast, put his arm around her, touched her stomach, rubbed her thigh, attempted to kiss her and used physical force against her."[23]

Civil Court Claims for Harassment

In contrast to human rights tribunals, civil courts have shown a willingness to compensate victims of workplace harassment with significant damages awards. Given the significant flexibility with which employees can plead their cases, this is perhaps not surprising. As a result

[21] *Perry v. The Centre for Advanced Medicine*, 2017 HRTO 191.
[22] *Granes v. 2389193 Ontario Inc.*, 2016 HRTO 821.
[23] *Ibid* at para 58

of amendments to the *Code* in 2007 that allowed plaintiffs to add a human rights claim onto an existing cause of action, employees can now simultaneously seek remedies for workplace harassment under the *Human Rights Code*, breach of contract (i.e. constructive dismissal), or tort (i.e. intentional infliction of mental suffering), while also seeking punitive and/or aggravated damages from the same underlying facts.

For example, in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*,[24] the Ontario Court of Appeal actually increased the damages awarded to a deaf employee who had been the victim of egregious workplace harassment. The plaintiff was a part-time clerical employee with fifteen years of service who suddenly became completely deaf one year before her termination. Once she became deaf the employer's attitude towards her changed, and a campaign was commenced designed to make her working environment so intolerable that she would quit. The court accepted that the employer was deliberate in its harassment and mistreatment of the employee. For example, the employer would give the plaintiff instructions in a manner that prevented her from lip reading then call her "stupid" for not understanding, she was criticized and called "too cheap" when doctors were unable to identify the exact reason for her hearing loss, and it suggested to her that she should "just quit" and go on disability.

Despite the severity of this misconduct, the lower court made relatively modest awards of $20,000 for violations under the *Human Rights Code*, $18,984 for intentional infliction of mental suffering, and $15,000 in punitive damages. On appeal, however, the Court of Appeal increased these amounts to $40,000, $35,294, and $55,000 respectively, in addition to awarding a new amount of $70,000 for aggravated damages. With regards to the employer's concern about

[24] 2016 ONCA 520.

"double-punishment" and/or "double-recovery", the Court of Appeal held that while such outcomes should be "avoided", they can nonetheless be justified in certain circumstances:[25]

> "It is true that the same conduct that underlies the awards under both punitive damages and damages for conduct in dismissal. However, such will invariably be the situation. What justifies punitive damages ultimately is the conclusion, in exceptional cases, that compensatory damages are simply insufficient to respond to the conduct being addressed.
>
> I agree with the motion judge that this is such a case. In my view, Applied Consumer's conduct in relation to Ms. Strudwick, who the evidence demonstrates was a highly regarded, long-term, faithful employee who became profoundly disabled late in life, can only be described as a marked departure from any conceivable standard of decent behaviour. Such conduct deserves punishment on its own." [Emphasis added]

In total, the Court of Appeal increased the employee's damages award from $113,782.79 to $246,049.92 (inclusive of pay in lieu of reasonable notice).

A similar result occurred in *Doyle v. Zochem Inc.*, where an employee received $60,000 in *Keays*/"moral" damages in addition to $25,000 under the *Human Rights Code* as a result of being terminated five day after making a sexual harassment complaint against the manager of her male-dominated workplace. Among other misconduct, the employer wanted to replace the employee with a male so as to avoid any "gender issues" in the future, went to great lengths to protect the respondent harasser, conducted a meaningless and biased one-day investigation led by an executive who lacked proper training, and concocted unfounded allegations of after-acquired cause. On appeal the employer attacked the apparent overlap in damage awards, to which the Court of Appeal stated that:

> "While there is an overlap of conduct, the conduct relating to the award of moral damages and that relating to *Code* damages for sexual harassment is not identical. […]
>
> What this jurisprudence does illustrate is that when damages vindicate the same interests in law, the courts take care to avoid double-recovery. Moral damages are awarded as a result of the manner of dismissal, where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith, that caused mental distress. … In contrast, *Code* damages are remedial, not punitive in nature, and compensate for the intrinsic value of the infringement of rights under the *Code*.

[25] *Ibid*. at paras 113-114.

> Where, as here, the awards in question vindicate different interests in law, there will be no overlap in the damages awarded although the same conduct is considered." [Emphasis added]

Given the more modest damage awards and constraints on claims at the *HRTO*, as well as the fact that an employer cannot be ordered to pay a successful employee's legal costs, query whether civil courts will become the new forum of choice for cases involving workplace harassment.

Update on Constructive Dismissal: Harassment or "Ordinary" Stress?

The recent case of *Persaud v. Telus Corporation*[26] addressed the reoccurring question of whether the conduct an employee complains of constitutes harassment or is the result of the "ordinary stress" of a given job.

In *Persaud*, the plaintiff was unsuccessful in her claim for constructive dismissal, a she failed to make out either a change in circumstances or a poisoned work environment. The plaintiff worked a high stress job as a software developer at Telus. She resigned and made a claim for constructive dismissal, claiming that the employer had unduly increased her workload and caused her to work in a poisoned work environment. Her evidence with respect to the poisoned work environment consisted of two incidents where superiors raised their voice at her and the general high stress nature of the position.

The court found that the ordinary stress of the position could not be a basis for constructive dismissal and noted that this is especially true in competitive, high-pressure industries, such as IT. The employee's complaints of a poisoned work environment were similarly not made out as there was no pattern of wrongful behaviour, nor any single egregious

[26] *Persaud v. Telus Corporation*, 2016 ONSC 1577

incident.[27] In coming to this conclusion, the court confirmed that "[a] workplace becomes poisoned only where serious wrongful behaviour is demonstrated", [28] and that it is the employee who bears the onus of establishing a poisoned work environment on an objective basis, without regard for his or her "subjective feelings or genuinely-held beliefs". [29]

Update on Legislative Reform in Ontario

On September 8, 2016, "An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters",[30] commonly known as Bill 132, came into force. The new amendments significantly bolster an employer's obligations under the *Occupational Health and Safety Act*[31] with respect to preventing and investigating claims of workplace harassment. Bill 132's changes include:

- Creating a new definition specifically for "workplace sexual harassment;"[32]
- Requiring employers to develop and maintain a program to implement the workplace harassment policy;
- New procedures for reporting workplace harassment when the employer or a supervisor is the alleged harasser;
- New directions with respect to how sensitive information, such as identifying information of the individuals involved in harassment investigations, will be handled so that it is not disclosed unless necessary; and

[27] *Ibid* at para. 47.
[28] *Ibid* at para 48
[29] *Ibid*.
[30] Online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=3535&detailPage=bills_detail_the_bill
[31] RSO 1990, c O.1.
[32] *Ibid*, s.1(1).

- New provisions on how the results of an investigation will be shared with the complainant and alleged harasser.

In addition, a general duty was created requiring employers to protect workers from workplace harassment by:

- Conducting investigations into incidents and complaints of workplace harassment;
- Informing the complainant and alleged harasser of the results of an investigation and any corrective action taken; and
- Reviewing the workplace harassment program as often as necessary but at least annually.

To enforce this duty, Bill 132 grants Ministry of Labour inspectors the power to compel an investigation by an impartial third party into allegations of workplace harassment at the employer's expense.

Though not yet passed, Bill 26, "An Act to amend the *Employment Standards Act, 2000* in respect of leave and accommodation for victims of domestic or sexual violence and to amend the *Occupational Health and Safety Ac*t in respect of information and instruction concerning domestic and sexual violence",[33] would also impose new duties on employers. Specifically, Bill 26 would:

- Require employers to train managers and supervisors about domestic and sexual violence in the workplace;

[33] Online: http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4174

- Create new forms of employee leave under the *Employment Standards Act*, 2000 for employees that suffer domestic or sexual violence personally, or where it is suffered by their children; and
- Require employers to accommodate employees who have experienced domestic or sexual violence by allowing them to change work hours or location.

As with Bill 132, the legislative changes proposed by Bill 26 reiterate that workplace harassment remains a serious issue, and that employers are the entities with primary responsibility for preventing and rectifying it.

Update on the Duty to Protect from "External" Harassment

While much of this paper has focused on workplace harassment as between employees, the arbitral decision of *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)*[34] spoke to the importance of protecting employees from outside harassment. Specifically, the Union challenged the employer's use of Twitter to solicit customer complaints, and in so doing, "to publish personal information about Local 113 members, to receive and make complaints about Local 113 members, and to solicit public comment with respect to Local 113 members."[35]

The TTC established the Twitter handle @TTChelps in order to communicate with TTC users and as a means of addressing complaints. The tweets received by @TTChelps were often abusive, profane, and derogatory towards TTC workers, and frequently contained identifying information about the particular individual. For example, tweets directed at @TTChelps refer to

[34] *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Use of Social Media Grievance)* [2016] O.L.A.A. No. 267
[35] *Ibid* at para 1

TTC employees as: "bitchy bus drivers", "racist asshole bus drivers", "shitty drivers", "cunts", "douchebags", "fucking dicks", "doublefucks", "rudest people on the planet", "grumpy bastard", "rude selfish beastly male TTC subway operator", "another fucking faggot in a not in service bus", "brown son of a gun of a driver", "bald white piece of shit fuck", "racist fuck that needs to get laid", "overweighted ginger with a grouchy attitude", and "bald dude w/ 2 earrings taking tickets at temporary Union entrance is an absolute prick".[36]

The Union argued that by maintaining the account the TTC contributed to a hostile work environment by creating a forum for abuse of employees. The Union also argued that in its responses to customer complaints from @TTChelps, the TTC did not defend employees from such abuse. A further problem was with respect to the publicity of the tweets, as Twitter only allows a tweet to be deleted by its author, even when directed to or containing information about another. Therefore abusive tweets about TTC employees, tweeted at @TTChelps, remained on the TTC twitter page for public view.

Arbitrator Howe found that, even on social media, employers have a legal obligation to prevent harassment of employees. Applying this principle to the facts at hand, he held that in their responses to the tweets the TTC failed to protect its employees. The TTC was also criticized for accepting the truth of the customer complaints without any investigation, and for empathizing with the customer and not the employee. @TTChelp often responded to customer complaints with platitudes such as "sorry to hear that", "that's not good", and "that was not nice at all."[37]

[36] *Ibid* at para 29.
[37] *Ibid* at para 17.

While the Union requested that the TTC shut down @TTChelps, this action was not granted. Instead, Arbitrator Howe ordered the Parties to create a Twitter policy to ensure the TTC would be taking all reasonable measures to protect its employees from harassment, and provided the following as instructional guidance:[38]

> "@TTChelps should not only indicate that the TTC does not condone abusive, profane, derogatory or offensive comments, but should go on to request the tweeters to immediately delete the offensive tweets and to advise them that if they do not do so they will be blocked. If that response does not result in an offensive tweet being deleted forthwith, @TTChelps should proceed to block the tweeter."

He further indicated that harassing tweets should be deleted with the assistance of Twitter, and that if Twitter is unresponsive, use of the @TTChelps account should be reconsidered.

Conclusion

As our society becomes more diverse and more digitized we will continue to see new developments in the law of workplace harassment. As adjudicators and legislators deliver these changes, it is crucial for employers and their counsel to remain up to date on the ever-evolving requirements for preventing harassment and responding to claims from those who have been injured by it.

[38] *Ibid* at para 133.