

Race-Based Harassment & Unconscious Biases

BCPSEA Symposium

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Bullying & Harassment

- Any inappropriate conduct or comment that a person knew or reasonably ought to have known would be humiliating or intimidating.
- Excludes reasonable actions taken by a supervisor relating to managing the workforce.
- May be written, verbal, physical, online, a gesture or display, or any combination of these.

Discriminatory Harassment

- Behaviour directed towards another person that is abusive and demeaning, includes a reference to a protected ground, and leads to adverse consequences for the person harassed.
- **Race, colour, ancestry, place of origin, Indigenous identity**, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, age, political belief, and unrelated criminal convictions.

Discriminatory Harassment

- Not every negative comment that is connected to a protected ground will be discriminatory harassment. Usually, repeated conduct or a pattern of behaviour is required.
- Will consider factors such as the relationship between the parties and their previous interactions, the egregiousness of the behaviour, the context of the interactions, the impact the behaviour had on the target, and whether an apology was offered.

Employer Policies / Collective Agreements

- May also contain definitions of bullying, harassment, discrimination, and other types of inappropriate conduct.
- Must develop and follow procedures for dealing with complaints of workplace bullying and harassment, including discriminatory harassment, including how and when investigations will be conducted.
- Ignoring complaints is not an option.

Concurrent Legal Proceedings

- Grievance arbitrations (union employees), wrongful dismissal cases (excluded employees), and human rights complaints can resolve human rights issues.
- Complainants will typically commence concurrent proceedings to meet limitation periods.
- Employment standards complaints, workers' compensation claims, and employment insurance claims cannot resolve human rights issues.

Grievance or Human Rights Complaint?

- Want to avoid duplication of effort, tying up resources, and possibility of conflicting results.
- Often a strategic preference.
- Which forum will cover all the issues in dispute, has more expertise on the issues in dispute, and will provide a more timely resolution.
- Possible for both proceedings to go ahead if there is not total overlap in the issues or prejudice would result.

Remedies for Harassment

- Financial compensation for loss of dignity and/or mental distress, lost wages/benefits, and expenses.
- Giving what the complainant was denied (e.g. getting their job back).
- A declaration.
- Steps to prevent future harassment/discrimination.
- Ability to review discipline separates the BC Human Rights Tribunal and labour arbitrators.

Labour Case Law

- Vancouver Drydock Company Ltd. v Marine Workers & Boilermakers Industrial Union, Local 1, 2021
- Grievor received a 9 day suspension for making a racist comment: “so you are going to move in with Harinder’s mom”.
- Arbitrator reduced the discipline to a 1 day suspension.

Labour Case Law

- Coca Cola Canada Bottling Inc. v Teamsters, Local Union 213, 2021
- Grievor was terminated for failing to acknowledge the significance of hanging a noose in the workplace and wearing a Confederate flag on his face at work.
- Arbitrator reinstated the Grievor and substituted a 5 day suspension.

Human Rights Case Law

- Gardner and Jurao v. Geldenhuys, 2014
- Negative comments that engaged race and place of origin, such as “what is wrong with you Filipinos” and “Filipinos are gossipers”.
- Criticised Ms. Jurao for not wearing a proper uniform but did not criticize non-Filipino staff for the same thing.
- Ms. Gardner awarded \$1,500 and Ms. Jurao awarded \$2,000 for injury to dignity.

Human Rights Case Law

- PN v. FR and MR, 2015
- Physical, emotional, and sexual exploitation of a young single mother from the Philippines who moved to Canada with her employer and lived with them as a nanny and servant.
- Notable discussion of intersectionality: race, colour, place of origin, ancestry, sex, family status, and age.
- Awarded lost wages and \$50,000 for injury to dignity.

Human Rights Case Law

- Francis v. BC Ministry of Justice, 2021
- Awarded \$974,167 – including a record-shattering \$176,000 for injury to dignity.
- Racial stereotyping, different treatment, and racial slurs directed daily at a Black Corrections Officer over an 18 month period created a poisoned work environment.

Observations

- Less serious human rights violations can be handled by labour arbitrators and the Human Rights Tribunal.
- Very serious human rights violations or cases which require a deeper human rights analysis should be heard by the Human Rights Tribunal.
- Desired remedy can influence choice of forum.
- Stereotypes and prejudices can find their way into schools – they can bleed into any workplace.

Unconscious Biases & Discrimination

- Unconscious biases and stereotypes may lead to decisions that amount to discrimination:
 - They have a protected ground;
 - They experienced an adverse impact in their employment; and
 - The protected ground was a factor in the adverse impact.
- Difficult to prove in a legal proceeding but affects workplace culture and how employees view DEI.

unfamiliar



Reflection

- What stereotypes or unconscious biases do I hold, even if they seem harmless?
- Who do I see as the *other*?
- How do my biases serve me? How do they disadvantage me?
- When do my biases kick in? Moments of high stress or ambiguity?

Examples of Workplace Biases

- Confirmation Bias
- Similarity Bias
- Attribution Bias

→ All three can stand in the way of effective labour relations.

Managing Unconscious Biases

- Would I handle this situation in the same way if this person looked like me or didn't look like me?
- Would I be making a different decision if this person was more/less like me or more/less familiar to me?
- Who is in my circle of trust? Are they all or mostly people who are like me (same race, sexual orientation, gender identity, etc.)?
- What kind of content am I paying attention to on social media?

Action is the only remedy to
indifference:
the most insidious danger of all.
– *Elie Wiesel*

Questions?