Ontario worker's complaint falls short of harassment threshold

'To constitute harassment, you need something more than just incivility'

By Jeffrey R. Smith

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"In the modern workplace, a lot of employees are losing the distinction between incivility and harassment – to constitute harassment, you need something more than just incivility or inappropriateness. Not everything is harassment."

So says Rishi Bandhu, a labour and employment lawyer at Bandhu Professional Law in Oakville, Ont., after an Ontario arbitrator dismissed a worker's claim of harassment stemming from several workplace incidents.

"Is the behavior something that is likely to cause or will reasonably cause some significant mental distress? Is it disrespectful? Is it abusive?" says Bandhu. "One-off incidents of conflict are not going to get to that level."

Co-workers horsing around

The worker was a support assistant in the urban forestry department of the City of Toronto's Parks, Forestry, and Recreation division.

In January 2017, the worker complained to her supervisor and the department manager that employees were being arbitrarily selected to receive training on service requests and work orders without consideration of seniority or city policy. According to the worker, they didn't provide any explanation, although the training in question was aimed at new employees and the collective agreement did not require the city to offer training in order of seniority.

Following the worker's complaint, her supervisor encouraged her to take a more active role in training new employees, but the worker declined for reasons such as it was "too late" or she had her own work to do.

In March 2017, two co-workers were flinging elastic bands at each other and one came close to the worker's face without hitting her. The worker told them to stop and reported it to the supervisor, who said that she and the manager would deal with it. The elastic throwing stopped after that.

After the incident, the worker said that the co-workers called her a "bitch," although she later said that the word was "commonly used" in the workplace." She added that she didn't know if it was a "younger language or a code or something" and it was common behaviour for them to "call me things like that."

In the summer of 2017, the worker noticed a strong scent of perfume. Since the city had guidelines prohibiting strong scents, the worker discussed it with the supervisor. However, the supervisor said she didn't smell it, so the worker emailed the manager and the supervisor. They put up posters directing employees to refrain from using scented products and the worker didn't detect any more strong scents.

In September, two co-workers got into a loud argument while the worker was on the telephone with a client. The worker reported it to her supervisor, who sent one of the employees home. However, the co-worker who was sent home asked who reported it and the supervisor told them, saying that she was being truthful.

The worker wanted to have the matter reported as workplace violence, but the supervisor disagreed that it qualified. A week later, a staff meeting addressed the topics of civility and better communication, although the worker claimed that co-workers laughed at her and called her a "bitch" afterwards. She didn't bring the issue to management.

Government initiatives and the #MeToo movement have put more pressure on employers to address bullying and workplace harassment.

Disagreement with co-worker

In November, the worker received a call from an angry homeowner. The caller had previously spoken to a co-worker, so the worker followed policy and asked the co-worker if she could transfer the caller to her. The co-worker didn't want it, so the worker took the call. According to the worker, another co-worker called her a "bitch" and told the other co-worker that she would back her up if she wanted to make a complaint about the worker.
The worker was unable to find the supervisor, so she emailed asking to clarify the procedure for repeat calls. She didn't mention that another co-worker had called her a name. A few days later, the supervisor called her to her office and said that the co-worker who had refused the call had complained that she had been rude and scared her. The worker said that the team wasn't working together and she would file a complaint if there were more "snide remarks," but she still didn't mention the insult.

The supervisor sent emails to all employees about the proper procedure for repeat calls asking everyone to review the anti-harassment and discrimination policy. The supervisor also filled out an assessment for a harassment complaint, but the worker refused to sign a complaint against another union member.

The worker alleged other incidents were harassment involving what co-workers were saying about her, but she didn't report any to management.

The union, on behalf of the worker, filed a grievance alleging that the city failed to provide the worker with a workplace free from harassment or to prevent co-workers from harassing the worker, and that management didn't respond appropriately to her harassment complaints.

Nearly two-thirds of Canadians experienced at least one behaviour of harassment and violence at work in the past two years, according to a 2022 survey.

Definition of harassment

The arbitrator noted that the Ontario Occupational Health and Safety Act (OHSA) defines "workplace harassment" as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome. This definition was adopted into the city's Human Rights and Anti-Harassment/Discrimination Policy.

The arbitrator also noted that harassment can be subjective, but it also has to be reasonably objective – an employee's perception that they have been harassed can't be the sole basis for a finding of harassment.

The arbitrator found no evidence of harassment related to the training selection, as it was targeted at new employees and the supervisor tried to give the worker opportunities to participate, which the worker declined. This was not improper or vexatious conduct towards the worker.

The arbitrator noted that the evidence indicated that the worker didn't report anyone to management for calling her names. An employer is liable for harassment when it fails to take appropriate steps to address a complaint, but it can't be responsible if it is not aware of the alleged harassment, said the arbitrator.

"The employer is not going to be liable for harassment unless those issues are specifically brought to their attention and they're given an opportunity to address it," says Bandhu. "That just didn't happen here."
An HR lawyer looks at four pitfalls to avoid for employers dealing with or trying to prevent sexual harassment in the workplace.

Management acted swiftly

The arbitrator also found that scent in the workplace and the elastic band incident were not harassment. The evidence indicated that management resolved both issues by meeting and communicating with staff.

"It appears that the worker made a complaint of mistreatment or incivility and the employer addressed it, spoke to people, distributed the policy, made reminders, and dealt with it swiftly, which is exactly what you want to do," says Bandhu.

As for the repeat call incident, the arbitrator found that the supervisor's handling of the matter was appropriate, the worker didn't report the "bitch" comment, and she refused to sign the harassment complaint form.

As for other incidents, the arbitrator found that they may have been unpleasant and offended the worker, they didn't constitute a departure from unreasonable conduct that was vexatious. The arbitrator determined that the worker was unable to prove prima facie workplace harassment and dismissed the grievance.

Canadian HR Reporter discusses eight ways to prevent and mitigate workplace harassment and bullying.

Objective perspective

A key reason why the worker couldn't prove harassment was that the arbitrator determined that an objective person would not view the incidents as workplace harassment, says Bandhu, adding that could be an instance of an employee who has unreasonable expectations.

"There's obviously an element of subjectivity to it but, more importantly, on an objective standard, it has to be apparent to a third party that it is harassment," he says. "It has to be clearly obvious to a third party that that the conduct is abusive, inappropriate, and well over the line of something that's just uncivil, inappropriate, or unprofessional."

The decision implies that workplaces are an extension of society and it's not always perfect getting along with people, says Bandhu, but employers can mitigate the risk of harassment by ensuring that they have policies in place and address issues immediately so they don't fester.

"There are going to be disagreements and there's going to be conflict, at the end of the day, but some of that conflict is something that we simply have to deal with as it arises," he says. "We've got to have some thick skin in dealing with it because not everything is going to rise to the level of conduct that is actionable."
See *Toronto (City) and CUPE, Local 79 (Stockley), Re*, 2023 CanLII 999.

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