

HILL ADVISORY NEWS

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EMPLOYER

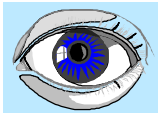
Should a Sexual Harassment Complaint be Filed with Employer or Human Rights Commission ?



In the last few years - if a case of harassment was filed with Human Rights - they would usually refer the case back to the employer to handle via the employer's Harassment Policy or through the Collective Agreements. There was no legal obligation for this to occur, but by general practice it did. However, things appear to be changing in the workplace today and there seem to be many harassment cases that Human Rights Commissions have not referred back to the employer. Instead, Human Rights have taken on the investigation role for the Complainant. A Saskatchewan Court of Appeal has recently considered this issue

- * Brenda and Susan worked for a large manufacturing plant in a city in Saskatchewan. They filed a complaint with the provincial Human Rights Commission, alleging that their supervisor had sexually harassed them. Although both employees were covered by a collective agreement, they decided not to proceed with the grievance arbitration procedure under that agreement.
- * The Human Rights Commission appointed a Board of Inquiry to hear the case. The employer objected and applied to the provincial Court of Queen's Bench to block the Board from hearing the complaint.
- * The employer argued that discrimination in the workplace should be determined under the provisions covering discrimination in the collective agreement. The employer also noted the provincial Trade Union Act required that all differences relating to a collective agreement should be referred to arbitration and therefore the Human Rights Board had no jurisdiction to hear the case.
- * The Court of Queen's Bench agreed with the employer on the basis there was nothing in the Human Rights Code that gave Human Rights Boards of Inquiry an overriding jurisdiction in cases involving discrimination provisions in collective agreements.
- * *Therefore, the Court of Queen's Bench ruled that arbitration was the appropriate course of action and an order was issued prohibiting the Human Rights Board of Inquiry from hearing the complaint.*
- * *The Human Rights Commission appealed the decision*
- * The Court of Appeal judge stated just because a collective agreement included a clause, such as the provision not to discriminate based on sex, which complied with the Human Rights Code it did not transform the complaint from a human rights violation to a breach of the collective agreement.
- * The judge ruled such issues as the right to be free from discrimination was a fundamental human right and was not a right arising out of a collective agreement. He stated "The right which was allegedly violated in this case is a fundamental human right which the employees and the union need not bargain." The judge continued to say "It is a fundamental right which forms part of every employee's contract of employment and is enforceable under the Human Rights Code. It is a right which would not have existed in the absence of the Code."
- * The judge stated if the complaint pertained to a breach of a contractual nature, such as seniority or benefits, an Arbitration Board may have jurisdiction under the Trade Union Act. However on matters where the complaint related to discriminatory conduct, which is prohibited by legislation such as the Human Rights Code, then Boards of Inquiry were the appropriate bodies to hear the complaint. While Arbitration Boards may have to consider and apply Human Rights legislation in the interpretation of collective agreements, complaints of discrimination should be determined by Boards of Inquiry that have human rights expertise.
- * *The Court of Appeal therefore ruled in favour of the Human Rights Commission and sent the complaint back to the Board of Inquiry appointed by the Human Rights Commission.*

*** It should be noted however - unlike Saskatchewan - labour relations legislation in B.C., Ontario and Nova Scotia provides Arbitration Boards with the jurisdiction to apply Human Rights legislation. In these provinces, the issues raised in this case are still wide open With these changes occurring in the workplace - what impact will this have on employers, unions and employees across Canada??*



WITNESSES

Determining Credibility in a Harassment Investigation

EVIDENCE



An investigator is often faced with making a determination based on the credibility of the parties involved. This normally occurs when: there are no witnesses to the actual incidents; witnesses cannot provide all the required information needed; or witness testimony - to some extent - is unreliable. Consider the following ...

- * Rosa worked in a meat processing plant. One day she told her supervisor her back hurt and asked if she could be moved to another position in the production line. Her supervisor told her she must first report to the health centre and see the nurse - which Rosa did. Val (the nurse) informed Rosa that company policy required that Rosa must have her family doctor complete a fitness evaluation form before she could be reassigned any new work duties.
- * Rosa returned the next day with the form but was told by the nurse it was incomplete and she could not yet return to work. Rosa became upset and at that time informed Val her supervisor had grabbed her buttocks the previous day and said "Show me what you can do baby!" Val asked her why she had not mentioned this yesterday and Rosa said she had. The nurse denied this and said "That's not true. This is the first I've heard of it." Val then asked Rosa if there were any witnesses and if she had reported the incident to management or the police. Rosa said "No."
- * The nurse subsequently reported the incident to Human Resources and a company investigation was held. It was concluded "There was insufficient evidence to support the allegation and disciplinary action was unwarranted." The next day Rosa filed a grievance stating that her supervisor had sexually harassed her.
- * At the hearing, upon reviewing the evidence, the arbitrator outlined the main issues which she considered determined the credibility of a witness
 - * *demeanour of the witnesses as they testify*
 - * *any apparent contradictions in evidence*
 - * *existence of any corroborating evidence*
 - * *reasonableness of each version of the facts in light of all of the surrounding circumstances*
- * The arbitrator felt that Rosa failed to meet all of these requirements *Firstly, Rosa had appeared very agitated in her demeanour when being questioned. She was not very articulate and had to be coaxed at times to provide details. Secondly, regarding contradictions of evidence Rosa had previously stated her supervisor had agreed she could move to another position on the production line. However on cross examination, Rosa admitted her supervisor did not assign her to another position. She also admitted that she may have neglected to mention the alleged grabbing incident to the health nurse until returning the next day with her form.*
- * *Rosa could also not provide any witnesses to the alleged incident. Lastly, the arbitrator believed that no accusation of grabbing was made by Rosa on her initial visit to the nurse and only when she failed to provide the completed medical form, did Rosa claim that she been sexually harassed. (There were also some inconsistencies in the supervisor's testimony who denied the allegations. However, the arbitrator felt that since they did not relate to matters that were material they could be fairly attributable to imperfect recollection.)*
- * *Finally, the arbitrator determined the health nurse was a credible witness and felt had she been informed of the grabbing incident when it originally occurred, she would have acted upon it immediately. The arbitrator therefore decided that Rosa did not prove, on a balance of probabilities, that sexual harassment took place and the grievance was dismissed.*
- * The arbitrator concluded *"It is always helpful to have evidence of witnesses who have nothing to gain or lose, in addition to the evidence of the protagonists, who clearly do have something to gain or lose."*

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Thanks



Don't forget to send us your e-mail address to ensure quick delivery of our "Electronic" newsletter. Contact Donna (the Editor) at:

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- * *Special thanks go out to Joe Maciag at SaskWater for giving Cam Hill the opportunity to work with their internal committee on the development of a Harassment Policy and Dispute Resolution Policy in September.*
- * *We always enjoy our return visits to the City of Saskatoon. It was a pleasure dealing with Betty Ann Whittaker who was responsible for arranging the Harassment Awareness and Prevention training sessions in November.*
- * *Also thanks to all the participants who helped to make our public Harassment Investigation workshop (Level II) held last October in Halifax such a success.. We had a great time and met some nice folks!*
- * *We also wish to extend our appreciation to Sandy Stevenson at Suncor Inc. You did a great job of coordinating the training sessions in November - and again in December.*

Even though Cam Hill & Associates are constantly on the move - you can always get in touch with us!!

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