

**Human Resources Professionals Association  
Northwestern Ontario**

**BILL 168 - ONE YEAR OUT:  
WHAT HAVE WE LEARNED?**

**May 13, 2011**

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# **PART ONE**

## **BILL 168 - OVERVIEW**

## **BILL 168**

**Subsection 1 (1) of the *Occupational Health and Safety Act* is amended by adding the following definitions:**

“workplace harassment” means 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.

## **BILL 168 (cont'd)**

### **Policies, violence and harassment**

**32.0.1** (1) An employer shall,

- (a) prepare a policy with respect to workplace violence;
- (b) prepare a policy with respect to workplace harassment; and
- (c) review the policies as often as is necessary, but at least annually.



## **BILL 168 (cont'd)**

### **Program, violence**

**32.0.2** (1) An employer shall develop and maintain a program to implement the policy with respect to workplace violence required under clause 32.0.1 (1) (a).

### **Contents**

- (2) Without limiting the generality of subsection (1), the program shall,
- (a) include measures and procedures to control the risks identified in the assessment required under subsection 32.0.3 (1) as likely to expose a worker to physical injury;
  - (b) include measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
  - (c) include measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;
  - (d) set out how the employer will investigate and deal with incidents or complaints of workplace violence; and
  - (e) include any prescribed elements.

## **BILL 168 (cont'd)**

### **Assessment of risks of violence**

**32.0.3** (1) An employer shall assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.

### **Considerations**

- (2) The assessment shall take into account,
- (a) circumstances that would be common to similar workplaces;
  - (b) circumstances specific to the workplace; and
  - (c) any other prescribed elements ...

### **Reassessment**

(4) An employer shall reassess the risks of workplace violence as often as is necessary to ensure that the related policy under clause 32.0.1 (1) (a) and the related program under subsection 32.0.2 (1) continue to protect workers from workplace violence.

Slide 6 of 34

## **BILL 168 (cont'd)**

### Domestic violence

32.0.4 If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker.

### Duties re violence

32.0.5 (1) For greater certainty, the employer duties set out in section 25, the supervisor duties set out in section 27, and the worker duties set out in section 28 apply, as appropriate, with respect to workplace violence.

## ***OCCUPATIONAL HEALTH & SAFETY ACT***

### **Duties of supervisor**

27. **(1)** A supervisor shall ensure that a worker ...

### **Additional duties of supervisor**

(2) Without limiting the duty imposed by subsection (1), a supervisor shall ...

(c) take every precaution reasonable in the circumstances for the protection of a worker. R.S.O. 1990, c. O.1, s. 27.

# ***OCCUPATIONAL HEALTH & SAFETY ACT*** **(cont'd)**

## **Duties of workers**

28. (1) A worker shall ...

(d) report to his or her employer or supervisor any contravention of this *Act* or the regulations or the existence of any hazard of which he or she knows.

## **BILL 168 (cont'd)**

### **Information**

- (2) An employer shall provide a worker with,
- (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence; and
  - (b) any other prescribed information or instruction.

### **Provision of information**

- (3) An employer's duty to provide information to a worker under clause 25 (2) (a) and a supervisor's duty to advise a worker under clause 27 (2) (a) include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if,
- (a) the worker can be expected to encounter that person in the course of his or her work; and
  - (b) the risk of workplace violence is likely to expose the worker to physical injury.

## **BILL 168 (cont'd)**

### **Limit on disclosure**

(4) No employer or supervisor shall disclose more personal information in the circumstances described in subsection (3) than is reasonably necessary to protect the worker from physical injury.

### **Program, harassment**

**32.0.6** (1) An employer shall develop and maintain a program to implement the policy with respect to workplace harassment required under clause 32.0.1 (1) (b).

## **BILL 168 (cont'd)**

### **Contents**

- (2) Without limiting the generality of subsection (1), the program shall,
- (a) include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;
  - (b) set out how the employer will investigate and deal with incidents and complaints of workplace harassment; and
  - (c) include any prescribed elements.

### **Information and instruction, harassment**

**32.0.7** An employer shall provide a worker with,

- (a) information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment; and
- (b) any other prescribed information.



***OCCUPATIONAL  
HEALTH & SAFETY ACT  
(cont'd)***

**Refusal to work**

**43.(3)** A worker may refuse to work or do particular work where he or she has reason to believe that ...

(b.1) workplace violence is likely to endanger himself or herself  
...

## ***OCCUPATIONAL HEALTH & SAFETY ACT*** **(cont'd)**

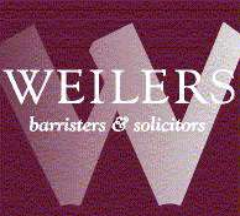
### **Refusal to work following investigation**

**(6)** Where, following the investigation or any steps taken to deal with the circumstances that caused the worker to refuse to work or do particular work, the worker has reasonable grounds to believe that ...

## ***OCCUPATIONAL HEALTH & SAFETY ACT*** **(cont'd)**

(b.1) workplace violence continues to be likely to endanger himself or herself; or ...

the worker may refuse to work or do the particular work and the employer or the worker or a person on behalf of the employer or worker shall cause an inspector to be notified thereof. R.S.O. 1990, c. O.1, s. 43 (6).



# PART TWO

## RECENT CASELAW

## **USW vs Madill Equipment – B.C. Arbitration, 2008**

- Long history of abusive behaviour by Grievor toward co-workers and supervisors
- USW grieved 3-day and 7-day suspensions, and dismissal
- Employer had encouraged Grievor to attend anger management counselling
- Employer hired External Investigator under harassment policy; harassment found

### **HELD:**

- Discharge upheld; Grievance denied
- Harassment should be used sparingly as a ground for discharge

### **THE LESSON**

- The harassment process can be used to support and validate the disciplinary process, and discipline outcomes

## **DC vs HTS Engineering Ltd. (2009 Ont. Sup. Ct.)**

- Grievor complained that she was repeatedly subjected to verbal sexual abuse by her Supervisor

### **HELD:**

- All evidence points to fact that the conduct was consensual, welcomed, and often “initiated” by Grievor
- But - other conduct (excessive criticism, swearing), etc. – made continued employment “intolerable” – therefore constructive dismissal found

### **THE LESSON:**

- Onus on Supervisor to establish that conduct was “welcome”
- Finding of harassment is contextual: not an “absolute liability” offence

## **Alberta Union of Provincial Employees vs Alberta (Alberta Grievance and Court of Queen's Bench, 2008, 2009)**

- Employee posted “thinly veiled” derogatory descriptions and criticism of co-workers and supervisors on several online blogs



### **HELD AT ARBITRATION:**

- Discipline upheld, due to harmful nature of comments, belligerent attitude and lack of remorse

### **HELD AT COURT OF QUEEN'S BENCH:**

- Quashes on judicial review, because Employer failed to provide for right to notice of disciplinary meetings and Union representation of Employee's choosing

### **THE LESSON:**

- In zeal to deal with harassment, do not forget basic Collective Agreement requirements!

## **CUPE Local 86 vs Houston (District) – B.C. Arbitration, 2008**

- Municipal employee belittled, demeaned and berated by Manager on several occasions; Union alleged workplace harassment
- Employer did not participate in hearing as Manager had left

**HELD:** was harassment by Manager; also was “disrespect” by General Manager, though short of “harassment”

- Was “poisoned work environment”
- Declined damages; ordered less punitive remedy (imposition of joint harassment policy; resurrection of Labour/Management Meetings; “trouble-shooter” role be established)

### **THE LESSON:**

- Fact that antagonist has left organization is not complete defence
- Arbitrators will look for meaningful systemic solutions

## **OPSEU vs St. Joseph's Hospital Laboratory (Ont. Arb., 2005)**

- Social worker complained of harassment by Supervisor
- Employer appointed Internal Investigator, found “no harassment”
- Union grieved, seeking, *inter alia*, discipline of Supervisor
- Employer brought preliminary objection, stating issue moot

### **HELD:**

- Sustained Employer's preliminary objection. Employee had done all the Board could have done, therefore, issue “moot”; exercise jurisdiction not to hold hearing

### **THE LESSON:**

- In very narrow circumstances, Board can decline to hear case if doing so would serve no useful purpose

## **AY vs Toronto Police Services Board (Ont. H.R. Tribunal, 2009)**

- Complainant a man of Afghani descent was accused of being a terrorist by a co-worker – a “bad joke”

### **HELD:**

- Police Board discriminated by failing to provide a workplace free of discrimination and harassment

### **THE LESSON:**

- Employer has duty to investigate allegations of discrimination and harassment even if they are stale or seem unsubstantiated
- Employer is responsible to control taunting and gossip when it involves prohibited grounds of discrimination

## UFC vs Canada Safeway (Alberta Grievance and Court, 2010)

- Safeway employee pushed by a Supervisor

### HELD:

- It was abusive, an assault, but spur of the moment, no physical harm, and partly defensive
- Supervisor should have been moved to another store, or suspended with pay during investigation, to meet Employer's obligation to maintain safe workplace
- Therefore awarded Grievor \$1,000 in “general damages” for failure to ensure her health and safety

### THE LESSON:

- Upholds concept of compensation for “intrinsic value of an Employee's right” (eg. cases prohibiting Employee from wearing Union pins – freedom of expression)

## **UFCW and Canada Safeway (Alberta Grievance, 2009)**

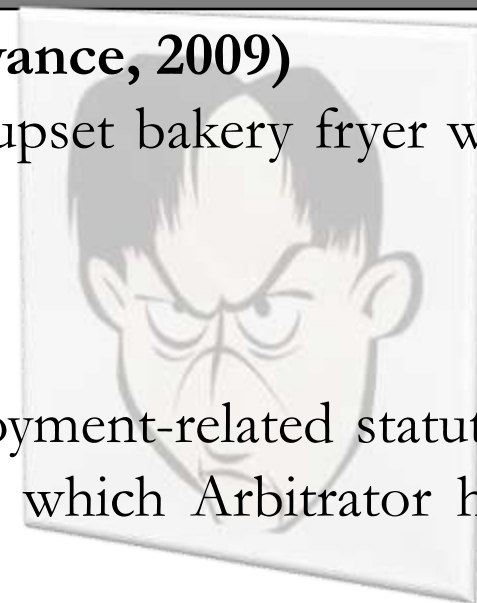
- Manager shoved an Employee at Safeway (upset bakery fryer was not properly cleaned)
- Investigation took 4 months to complete

### **HELD:**

- Substantive rights and obligations of employment-related statutes are implicit in Collective Agreements, over which Arbitrator has jurisdiction
- Employer failed to provide safe workplace under OHSA
- Monetary award appropriate as deterrence
- 5 factors re monetary award: (1) severity (2) number of incidents (3) duration of events (4) effect on victim (5) effectiveness of Employer's responses
- Therefore awarded Grievor \$2,500 in damages

### **THE LESSON:**

- Single, isolated incident can give rise to damages award



## ATU vs TTC (Ont. Arb., 2004)

- Grievor continuously harassed by his Supervisor, who had a relentless obsession with Grievor's productivity
- Grievor ultimately suffered depression and anxiety

### HELD:

- Ordered TTC to pay \$25,000 in general damages to compensate for mental distress and lost wages
- Collective Agreement has implied term in Management Rights clause requiring Supervisors to ensure employee's physical and psychological safety
- Management Rights to be read subject to s. 27(2)(c) of OHSA ("take every reasonable precaution ... for safety of worker")
- Also required that Managers receive anti-harassment training

## Canadian H.R. Commission vs Chief and Onion Lake First Nation (HRT, 2009)

- Severe and prolonged incidents of sexual harassment; Complainant suffered “acute situational anxiety” and ultimately post-traumatic stress disorder
- Complainant sought special compensation under CHRC

### HELD:

- Awarded \$14,813.94 for lost wages, \$18,000 for special compensation, and \$16,000 for pain and suffering

### THE LESSON:

- CHRC will award substantial damages in extreme cases of sexual harassment
- Employer must deal effectively and promptly with any sexual harassment complaint that it is aware of, whether or not Employee elects to utilize Employer’s internal grievance procedure

## **SH vs Maplewood Painting (Ont. H.R. Tribunal, 2009)**

- Complainant was repeatedly sexually harassed by her Employer, also subject to insults about her ethnic background
- Respondent charged with sexual assault; plead to lesser offence of criminal harassment; restraining order imposed

### **HELD :**

- Complainant was harassed in employment on grounds of sex, ancestry, race and family status
- Ordered compensation for first 6 months after she quit, for injury to dignity, feelings and self-respect
- Stressed “intersectional nature” of complaint, as a “... framework for assessing the impact of the discrimination on complainant’s dignity, feelings and self-respect”
- Ordered 6 months’ wages and \$40,000

### **THE LESSON:**

- OHRC will take “big picture” view – will arbitrators follow suit???

Slide 27 of 34

## Piresferreira vs Ayotte (Ont. C.A., 2010)

- Piresferreira suffered emotional distress due to critical, demanding, loud and aggressive boss, who had problems with her performance
- Supervisor ultimately disciplined; Piresferreira went on stress leave and never returned. Diagnosed with PTSD and a major depressive condition
- Trial Judge ordered \$500,000 in damages for, *inter alia*, negligent and intentional infliction of emotional distress

### APPELLATE COURT:

- Tort of negligent infliction of mental suffering does not exist in employment context; tort of intentional infliction of mental suffering does, but not made out here. Damages reduced to \$148,000, for battery, constructive dismissal and mental distress caused by manner of dismissal

### NOTE:

- At least one case in B.C. has recognized tort of negligent infliction of mental suffering in employment law context – Sulz vs Canada – ordering damages of \$950,000
- Also , in an arbitration decision (PSAC vs Toronto Airports), Owen Shime ordered \$500,000 damages for breach of a C/A, characterized as a “contract designed to secure a psychological benefit – i.e. the mental security of being gainfully employed”. At Divisional Court (2011), award upheld, but not on basis of “foreseeability”; on basis of manner of dismissal (bad faith)

Slide 28 of 34

**PART THREE**  
**NOBODY KNOWS**  
**THE TROUBLES I'VE SEEN**

## In the context of Performance Management:

- Scenario – poorly performing Employee subject to performance management
    - Over a series of several months – numerous meetings with HR Manager; gradually more detailed performance plans
- Right before termination – “harassment” complaint made under Policy
- Performance management suspended
  - CEO undertook investigation
  - Conclusion – no harassment
  - Turned back to HR Manager – performance management completed; Employee terminated

**In the context of a Harassment Investigation:**

- Employee has food allergies and food sensitivities
- Employee attends out of town retreats and workshops at small venues – food needs not met; Employee does not handle the situation well (very critical of hotel staff; very public displays of frustration, complaints to Health & Safety Committee)
- Management meets with her:
  - Management focus – “entitlement mentality”; unprofessional behaviour
  - Employee focus – failure to meet dietary restrictions

**Conclusion:**

- No harassment because conduct not “vexatious” (maliciously; to cause trouble or annoyance) – mental element
- BUT – policy states – if no harassment found, but there are systemic problems in the workplace that created the problems, can impose certain solutions ...

Good Approach.

**In the context of Collective Bargaining:**

“The Employer and the Union agree to abide by the Workplace Harassment Policy and the Workplace Violence Policy issued by the Employer in 2010, as amended from time to time and agree to work collaboratively to promote and ensure the effective implementation of the related programs.”

### In the context of Client Service:

- Mentally challenged client of social services agency enters agency offices, yells and swears at agency staff
- Agency issues Trespass Notice – may not enter any of our premises in Thunder Bay or region (to protect staff); all services provided over the phone
- Client files H.R. Complaint – discrimination in the provision of services, on the basis of disability
- Clash of duties to client and duties to Employees

[Postscript – email this week – “I will withdraw complaint if you will withdraw Trespass Notice; my medication was ‘off’”]

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