Helpful Legal Information for MAHCP Members

Making the Case for Employee Harassment

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What can we do in Manitoba if we are subject to harassment in the workplace? If it is in the form of physical or sexual harassment, employers and police are usually proactive in helping an employee deal with it. At least more so than in years past. But what if it abuse is more subtle and comes in the form of psychological harassment? What if the harasser is a superior directing you in the workplace? In those circumstances it may be more difficult to protect yourself.

One avenue that employees may look to in dealing with verbal or psychological harassment is to try to deal with the matter in court. There is a view among some in the legal community that harassment should be a tort for which a person can sue the harasser. That is not necessarily the case. There is no clearly recognized tort of harassment in Canada. There is a similar legal action called the intentional infliction of mental distress that may be a valid basis on which to launch a lawsuit.

Definition of Tort: A negligent or intentional civil wrong not arising out of a contract or statute. A tort is an act that injures someone in some way, and for which the injured person may sue the wrongdoer for damages. Legally, torts are called civil wrongs, as opposed to criminal ones. (Some acts like battery, however, may be both torts and crimes; the wrongdoer may face both civil and criminal penalties.)

However, pursuing a claim for the intentional infliction of mental distress through the court is difficult and expensive. One of the aspects of this type of lawsuit that makes it particularly difficult is that evidence must be provided that the victim of the harassment has been severely traumatized. Medical evidence must show that the victim suffers severe physical or psychological impairment because of the actions of the harasser. Essentially, in order to be successful in winning this suit, you have to prove that the harasser has won. That their actions have so impacted the victim psychologically or physically that they are severely damaged. Another problem that arises in the pursuit of this claim against a harasser is where do you go to sue the harasser? Do you have to go to court or can the union help deal with the matter at arbitration?

The Supreme Court of Canada in 1995 in the case of Weber v. Ontario Hydro essentially gave arbitration boards the power to impose common law remedies between employees and employers governed by a collective bargaining agreement. Before this case, if an employee had an issue that was not directly covered by the terms of an agreement they had to seek a remedy by suing in court. If an employee suffered a tort like the intentional infliction of mental suffering, they would take the perpetrator to court.

The Weber case changed all that. Since the Weber case there have been many decisions out of the Courts rejecting lawsuits filed by employees or former employees against their employers. The courts are finding they simply don't have the jurisdiction to deal with issues between employer and employee.

The court in Weber asked itself the following question: *"When may parties who have agreed to settle their differences by arbitration under a collective agreement sue in tort?"*

In answering this question the Supreme Court looked at the labour relations rules that essentially committed employers and unions to dealing with their employment issues exclusively through the arbitral process. They looked at the Labour Relations Act in Ontario that stated an arbitrator shall settle "all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement". The Supreme Court had to decide whether this provision gave the arbitral process the jurisdiction to deal, not only with the application and interpretation of the collective agreement but also the ability to hear evidence and make decisions about Charter claims and tort cases.

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There was some doubt raised that arbitrator's had the necessary expertise to deal with these sometimes very complex legal issues. The Supreme Court determined that this shortfall could be overcome by the fact that arbitrators decisions are subject to judicial review. Errors made by an arbitrator could be corrected by the courts.

The court concluded "that mandatory arbitration clauses such as s. 45(1) of the Ontario Labour Relations Act generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement."

This "essential character" test is now applied to any dispute between employee and employer in a collective agreement context. If employee psychological harassment occurs in the workplace, the essential character of that dispute arises out of the collective agreement and is to be dealt with according to the terms of the collective agreement.

The fact that issues of psychological harassment are to be dealt with by arbitrators does not make them any easier to prosecute. There is still no tort of "harassment" and the intentional infliction of mental distress remains a very difficult action to successfully bring forward.

Some employers have been proactive in drafting respectful workplace policies in recent years. This may become a viable means of addressing harassment complaints in the future. Their usefulness at this time is somewhat limited because it is the employer that retains the right and

continued on page 11