Harassment in the Workplace: Does the Victim’s Perception Matter? | The HR Space

Labour, Employment and Human Rights Bulletin

July 6, 2016

Over the last few years, decision-makers across the country have regularly been called on to interpret the meaning of “harassment”. Certain principles have emerged from the main cases. Decision-makers usually look at the situation objectively. In other words, they don’t typically put much emphasis on subjective elements, such as the perception of the victim.

However, an arbitrator in Quebec recently did just that. In Bombardier inc. et Association internationale des machinistes et des travailleurs et travailleuses de l’aérospatiale, section locale 712 (PDF - available in French only), the arbitrator reinstated an employee who had been fired for sexually harassing a female co-worker. Why? Because the victim was not truly offended by the sexual content of the messages the harasser posted on social media.

The Facts

In this case, two employees developed a friendship both in the workplace and online through Facebook. The two employees were L, a 34 year old man and H, a 19 year old woman. Over time, it appeared that L was not only attracted to H, but was also falling in love with her. These feelings were not reciprocated.

The content of their Facebook conversations clearly indicated that the relationship between the two co-workers appeared flirtatious at first. However, over time L’s comments towards H became increasingly sexual. This made H feel uncomfortable. H told L that his sexual comments were unwelcome and troubling to her.

The events culminated when L brought H flowers to work. He also grabbed her without her consent so that she could “smell his perfume”.

H filed a harassment complaint against L. She requested that she no longer work with him and asked that he cease communicating with her.

Following the employer’s investigation, L’s employment was terminated for sexual harassment.

The Decision

The arbitrator recognized that L’s behaviour towards H constituted sexual harassment. He also noted that the employer had a duty to protect the safety of its employees in the workplace. However, the arbitrator reinstated L and replaced the termination with a one year suspension.

In reaching this conclusion, the arbitrator took into account a number of mitigating factors. One such factor was the victim’s wishes and perception:

• when filing her complaint, H did not wish for L to be terminated; and
• H was not truly offended by the sexual content of the messages because she recognized that it was “the way guys write”.

In sum, the arbitrator concluded that although L’s behaviour was highly reprehensible and constituted harassment, it did not warrant termination.

Conclusion

This decision suggests that the perception of the victim of harassment may be an element to be considered when determining the appropriateness of the sanction imposed on the harasser. This analysis appears to go against the main cases involving harassment in the workplace. Time will tell if this angle of analysis will be followed by other arbitrators. In the meantime, employers in all provinces should be aware that the perception of the victim may be viewed as a mitigating factor in disciplinary cases involving harassment in the workplace.