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Discrimination and Harassment Case Highlights the Difficulties in Choosing the Appropriate Forum

By: Linda McKay-Panos

Case Commented On: *LL v Canadian Natural Resources Ltd*, 2018 ABQB 879

LL sued her former employer Canadian Natural Resources Ltd (CNRL) for damages for its failure to protect her (as her employer) from ongoing sexual harassment and abuse. LL also claimed damages for constructive dismissal. CNRL applied to have the actions summarily dismissed or for an order to have portions of LL's claims struck (at paras 1-3).

CNRL employed LL for approximately four years (2010 to 2014) as a Testing Technician. LL alleged that beginning on her first day of work (on Shift A), she experienced verbal, emotional and sexual harassment, discrimination and abuse from her male colleagues and the male team lead (at para 4). The types of harassment and abuse included (at para 5):

- Inappropriate and discriminatory comments against Aboriginal people;
- Inappropriate and discriminatory comments against women;
- Inappropriate sexual comments;
- Inappropriate and unwanted sexual contact;
- Breaches of her privacy when her supervisor illegally obtained her home address and visited her home uninvited;
- Her supervisor stalking her by telephone and in person;
- Unlawful coercion of the Respondent into a sexual relationship with her supervisor under threat of being fired; and
- Belittling and demeaning treatment of the Respondent in the presence of other team members.

The harassment caused LL to suffer from stress, anxiety attacks and depression and it affected her work (at para 6). She consulted with her family doctor and members of CNRL's medical centre. She also notified other team members and supervisors about the harassment (at para 6). CNRL claims that it investigated the complaints and took disciplinary action (at para 6).

About six months after she started working for CRNL, she discussed the harassment with the human resources department of CNRL and they reassigned her to a different shift (Shift B) from June 2011 to August 2013 (at para 7).

LL reported that her work environment improved, as did her health and work performance. However, she was returned to Shift A in August 2013, where she alleged to have experienced increased abuse and retaliation for having reported her colleagues to human resources. She began

to suffer anxiety attacks at work and experienced depression (at para 9). LL took medical leave beginning in February 2014 (at para 9).

LL's psychiatrist wrote a letter in support of LL being reassigned to Shift B. As part of LL's return to work plan in October 2014, her insurer also requested that she be reassigned to Shift B. LL worked from October 2014 to November 2014 and then resigned (para 10).

LL filed a complaint to the Alberta Human Rights Commission in August 2014. This was settled for $9,000 in December 2015 (at para 11). CNRL argued that the settlement of this complaint and the release signed by LL created a bar to LL's action (at para 24). LL argued that the human rights complaint was much narrower that the one in this case and there was a limitation period set out under the *Alberta Human Rights Act*, RSA 2000 c A-25.5 (*AHRA*), which restricted the claim [note the limitation period for a claim under the *AHRA* is 1 year from the last incident].

CNRL argued that LL's injuries (emotional, mental and physical) were "Workplace Injuries" under the *Workers Compensation Act*, RSA 2000, c W-15 (*WCA*), and therefore her current claims for damages were under the exclusive jurisdiction of the Workers Compensation Board (WCB) (at para 11). Master Smart noted that s 26(1) of the *WCA* provides that no compensation be paid unless an accident is reported by a worker within 24 months of the accident or the date on which the worker became aware of the accident. In some cases, the WCB may pay compensation if there are reasonable and justifiable grounds for the accident not being reported in the prescribed time, or the claim is a just one that should be allowed despite the failure to report within the prescribed time (at para 21).

Master Smart noted that CNRL was making a claim that the WCB should consider the nature and extent of the human rights settlement with CNRL and how it might affect compensation under the WCA (at para 25).

Master Smart declined to grant summary determination of the claim for constructive dismissal, noting that the affidavits filed in relation to this claim contained conflicting versions of the facts and neither affidavit had been subject to cross-examination. It would be impossible to resolve the conflicting perspectives in order to make a fair and just summary determination (at para 26).

Master Smart did, however, strike portions of the Statement of Claim as they related to injury caused by harassment and negligence in the CNRL workplace (at para 27). However, he noted the facts related to LL's entire period of employment, including the facts that related to the Human Rights Settlement, should remain in the Statement of Claim as they might also be relevant to the reasonableness of the Respondent's belief that she had been constructively dismissed (at para 27).

Commentary

This case draws attention to an ongoing challenge for victims of discrimination and harassment in the workplace. They may have a number of potential avenues for redress of their claim, depending on what outcome they are seeking to achieve.

The first possibility is to launch a suit for damages in tort or contract. While one cannot sue directly for discrimination and harassment as these are not recognized torts in the common law (*Seneca College v Bhadauria*, [1981] 2 SCR 181), some of the actions related to discrimination can be the subject of tort or contract actions. In tort, for example, one could sue for damages for the intentional infliction of emotional suffering.

Constructive dismissal (a contract action) arises when the employer does not directly dismiss the employee, yet, in the case of a toxic work environment (e.g., a reasonable person would not be expected to work under conditions where they are unprotected from harassment), the employee can legally regard the conduct of the employer as a termination, claiming damages for that breach. Note that the law expects the worker to mitigate his or her damages by seeking other employment.

A second set of possible actions involves determining the legislation applicable to the particular employment relationship. In some circumstances, the worker can make a claim under the *Workers Compensation Act* for damages incurred from harassment and discrimination, if they meet the criteria under the Act. However, the claim under workers compensation law would preclude a claim for damages related to the same injuries under the civil system.

Other possibly applicable legislation includes occupational health and safety laws. In some jurisdictions, both physical and psychological harassment and/or discrimination are not permitted in the workplace. Violators can be subjected to administrative penalties.

A third possible avenue, especially if the complainant seeks reinstatement as a remedy, is to complain to the Human Rights Commission, where reinstatement is at least theoretically possible as a remedy. Complainants can also receive modest amounts for hurt feelings. Under human rights legislation, employers can be ordered to enact and enforce harassment policies and they can be ordered to have anti-harassment seminars provided for their employees. This avenue is considered to be less expensive than launching a civil suit, although money awards tend to be more modest.

If the employee belongs to a union, he or she might seek to have his or her human rights issue dealt with through labour arbitration, as these fora have shared jurisdiction over human rights matters.

It is not straightforward to decide where to go for a remedy for a complaint of discrimination and/or harassment. There are strategic considerations, which include whether an individual seeks remedies that only human rights commissions can give or whether they want to receive damages that are calculated based on the legal precedents involving constructive dismissal. Perhaps they also want the workplace to be safer for all employees.

These potential fora for harassment and discrimination in employment are not mutually exclusive. One could complain to the Occupational Health and Safety Board at the same time as launching a human rights complaint.

Nevertheless, there is a general legal principle that double recovery is not allowed. This means that the complainant is allowed to be returned to the position he or she would have been in if the illegal conduct had not occurred. Complainants or plaintiffs are not, however, entitled to receive double amounts based on the same facts.

Ideally, a lawyer could address all of the possibilities with the client before any action is taken.

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