



Human Rights Commission

Sexual Harassment Legal Position

Proof of sexual harassment frequently becomes complicated when the issue of consent and the issue of what ought “reasonably to have been known” by the respondent come into play. Understanding the legal burdens of proof and when it shifts from the complainant to the respondent are vital to provide a correct legal analysis.

STAGE ONE: Establishing Protection under the Act

To trigger protection from sexual harassment under s.3(o)(i) of the Nova Scotia *Human Rights Act*,¹ a *prima facie* case is made out when the complainant establishes three things² on a balance of probabilities:

1. Did sexualized behaviour occur?
2. If yes:
 - a. was the behaviour vexatious?
 - i. subjective test³ (was the employee, in fact, annoyed?)
3. If yes:
 - a. was the behaviour unwelcome?
 - i. objective test⁴ (should the employer have known better?)
-or-
ii. subjective test (did the employer know better?)

¹ Nova Scotia *Human Rights Act*, R.S., c. 214 [the “Act”].

² Prongs two and three of the test, “vexatious and unwelcome behaviour” (and its subjective and objective elements of proof), were discussed in *Miller v. Sam's Pizza* (1995), 23 C.R.R.R. D/433 (NSBOI) and approved by Nova Scotia Court of Appeal in *Nova Scotia Construction Safety v. Nova Scotia Human Rights Commission*, 2006 NSCA 63 (CanLII).

³ The vexatious test is subjective and asks: was the conduct vexatious to the complainant? If not, there would be no damages. Therefore, the first and second prong, practically speaking, must both be shown by the complainant.

⁴ The unwelcome test, is (typically) objective and asks: would a reasonable person in the same situation consider the conduct unwelcome?

In a situation where a supervisor (i.e., a person with greater power over the complainant) is engaging in the sexualized conduct or allowing it, the complainant's test is less onerous. The vexatious and unwelcome parts of the test are, in effect, presumed. A reasonable person should know sexualized behaviour in the workforce is vexatious and unwanted:

...[T]he purpose of this branch [prohibiting vexatious and unwelcome sexual conduct] of the anti-sexual harassment law is to protect employees against having to endure a sexualized work environment as a term or condition of their employment....

I conclude that any reasonable person would be aware by 1995 that a significant number of individuals in our society find sexualization of the workplace professional, unacceptable and unwelcome....⁵

STAGE TWO: Justifying the Conduct

Consent

Consent to the conduct is a common justification or defence of sexual harassment. If the conduct is consented to, then it is not considered sexual harassment. The defence of "consent" acts to refute the complainant's proof of "unwanted" or "vexatious" behaviour. Technically, if the complainant has shown the conduct to be unwanted (on a balance of probabilities), then the legal burden shifts to the respondent to dislodge this proof. The respondent must then prove this consent defence on a balance of probabilities.

When a manager in a workplace engages in sexual conduct or allows it in others, s/he cannot rely only on complainant silence or even participation to prove consent. The power imbalance and fear of reprisal can be compelling reasons to remain silent or for a complainant to try to "fit in" by participating. To be successful with this defence, the manager would have to show that these power dynamics were not operative. Success with this defence is, of course, challenging because supervisors structurally have power over their employees.

⁵ *Nova Scotia Construction Safety v. Nova Scotia Human Rights Commission*, 2006 NSCA 63 (CanLII) paras 106 113.

Sexual Harassment Background Legal Research

(a) Relevant Legislative Provisions

The Act defines sexual harassment as:

- s. 3(o)(i) **vexatious sexual conduct** or a course of comment that is known or ought reasonably to be known as **unwelcome**,
- (ii) a sexual solicitation or advance made to an individual by another individual where the other individual is in a position to **confer a benefit on**, or deny a benefit to, the individual to whom the solicitation or advance is made, where the individual who makes the solicitation or advance knows or ought reasonably to know that it is unwelcome, or
- (iii) a reprisal or threat of reprisal against an individual for rejecting a sexual solicitation or advance. 1991, c. 12, s. 1; 2007, c. 41, s. 1.

The Nova Scotia Court of Appeal in *Nova Scotia Construction Safety Association v. Nova Scotia Human Rights Commission*, 2006 NSCA 63 (CanLII) provides a thorough review of the law as it applies to sexual harassment, including defining the key elements of the definition: “sexualized behaviour,” “vexatious,” and “unwelcome”.

(b) Common Law

STAGE ONE: Proving Sexual Harassment ***Sexualized Behaviour***

Saunders, J. A. writes:

[106] The Board then went on to refer to an extensive list of unacceptable behaviours compiled by Agarwal and Gupta which may constitute sexual harassment. She [the Board Chair] emphasized the authors’ view that such unacceptable behaviours do not necessarily have to be specifically directed at the victim to constitute sexual harassment. Impugned behaviours were said to include rough and vulgar humour; jokes causing awkwardness or embarrassment; comments about a person’s looks; lewd gestures; and the display of sexually explicit pictures. I concur with the Board’s observation that the common element among all these diverse examples of unacceptable behaviours qualifying as sexual harassment is that **they all involve the sexualization of the**

workplace. Recognizing, as I do, that s. 3(o)(i) of the Act contemplates the “sexual annoyance” category of unacceptable behaviours, I accept that the purpose of this branch of the anti-sexual harassment law is to **protect employees against having to endure a sexualized work environment as a term or condition of their employment** [emphasis added]

[109] After instructing herself that in order to qualify as a sexual course of comment, there must be some degree of repetition in order to constitute sexual harassment, the Board was satisfied that:

. . . taken together, Mr. Collins’ verbal comments accompanying his gesture with respect to his crotch, Mr. Collins’ verbal analogies between chicken breasts and women’s breasts at the barbecue, the “take it like a man aspect” of the “up against the wall” episode at the barbecue, the reference to Ms. Bunston “getting laid,” and Mr. Collins’ ongoing pattern of sexual joking constitute a repetitive pattern of sexual comment that satisfies the requirements of this aspect of section 3(o)(i) of the Act.

Vexatious

Saunders, J. A. continues:

[110] The Board then turned its attention to the requirement that the impugned behaviour be “**vexatious**.” She adopted the reasoning of the Board in *Miller v. Sam’s Pizza House* (1995), 23 C.H.R.R. D/433 (NSBOI) where vexatious sexual conduct was held to be “annoying” or “distressing”. The Board also properly instructed herself that whether conduct is “vexatious” depends in part on the subjective response of the complainant. The Board in *Miller v. Sam’s Pizza*, supra wisely observed that simply because all people might not perceive the same conduct to be vexatious does not detract from the fact that the conduct may be discriminatory to other people. [emphasis added]

[111] Here, the Board carefully reviewed the evidence with respect to the allegations of sexual harassment and noted the varying reactions of the several witnesses to Mr. Collins’ conduct. For every situation the Board found that there was at least one witness who felt uncomfortable witnessing such behaviour. The Board concluded that this satisfied the test for vexatiousness with respect to each allegation. The Board also flatly rejected the

suggestion that certain witnesses were lying when they testified that they had found Mr. Collins' conduct to be vexatious or that their evidence was coloured by the conflict or allegiances among staff within the Association. On the contrary the Board found:

. . . that these witnesses did not complain about genuine subjective experiences of vexatiousness because they were subjectively afraid for their jobs at the NSCSA if they objected to the sexualized behaviours of Mr. Collin[s], who was effectively the CEO of the NSCSA, as well as the most powerful individual within the organization.

Unwelcome

Finally, Saunders J. A. defines unwelcomeness:

[112] Lastly, on this issue, the Board considered the nature of the ***unwelcomeness*** requirement imposed by the words "is known or ought reasonably to be known" in s. 3(o)(i) of the Act. Contrary to the appellants' submission, to succeed with her complaint, Ms. Davison did not have to establish that the appellants knowingly engaged in unwelcome sexual conduct or a course of comment. With respect, that is not an accurate characterization of the test. The question is not whether the alleged perpetrator of discrimination actually knew that his or her conduct was unwelcome. The established jurisprudence clearly shows that there is an objective element to the inquiry. Properly framed the question that ought to be asked by the tribunal is how a "reasonable person," rather than the actual respondent, placed in such an environment under similar circumstances, would have reacted? See for example Wigg v. Harrison, supra; Miller v. Sam's Pizza, supra; Robichaud v. Canada (Treasury Board), supra and Agarwal and Gupta (3rd edition), supra, especially at pp. 131-2. [emphasis added]

Manager Power Inequality - "Conferring a Benefit"

Saunders J. A. also makes a clear statement that managers are presumed to know that a sexualized workplace is unwelcome as of 1995:

[113] ...I conclude that any reasonable person would be aware by 1995 that a significant number of individuals in our society find sexualization of the workplace unprofessional, unacceptable and unwelcome. A reasonable person would also be aware by 1995 that inequalities of power in the workplace, and the strong negative reactions that many managers display toward allegations that their behaviour constitutes sexual harassment, may cause some

employees to remain silent and not express the fact that they find sexualized behaviour unwelcome when the sexualized behaviour in question is that of a manager, such as Mr. Collins, who has significant power with respect to their employment [quoting the Board Chair:].

. . . I find that a reasonable senior manager in Mr. Collins' position would: a) appreciate that a significant number of employees in Canada find any sexualized behaviour in the workplace to be unwelcome and unprofessional; b) that it was highly likely some employees at the NSCSA would fall into this category; c) that such employees would find sexualized behaviours on the part of Mr Collins to be offensive and unwelcome, even when Mr. Collins himself considered them to be humorous; and d) that employees who did find such sexualized behaviours unwelcome would be unlikely to complain about them because of the power that Mr. Collins had over their jobs....

STAGE TWO: Common Law Defence of Consent

Consent to the conduct is a common justification or defence of sexual harassment. If the conduct is consented to, then it is not considered sexual harassment. The defence of "consent" can act to refute the complainant's proof of "unwanted" or "vexatious" behaviour. Technically, if the complainant has shown the conduct to be unwanted (on a balance of probabilities), then the legal burden shifts to the respondent to dislodge this proof. The respondent must then prove this consent defence on a balance of probabilities.

Participation

Participation in the conduct, however, is not necessarily consent to the conduct. Several cases highlight the importance of considering the power differences in determining whether the complainant's conduct should be viewed as consent. As well, section 3 (o)(ii) and (iii) (noted above), which defines sexual harassment, encompasses this power analysis.

The power differences when managers sexualize the workplace is also explored in a British Columbian tribunal decision. In *Dupuis v. British Columbia (Ministry of Forests)* (1993), 20 C.H.R.R. D/87 (B.C.C.H.R), the adjudicator found the professor had sexually harassed the new student in the way he inappropriately used his authority to orchestrate a sexual relationship with her. The Board in *Dupuis* helpfully refined the distinction between participation and consent:

...because of the ***imbalance of power*** that often exists between

managers and their employees, managers must be very careful to ensure that they are not taking advantage of their position of authority to import sexual requirements into the job. In my view, the ***burden rests with the manager*** to be certain that any sexual conduct is welcomed by the employee and continues to be welcome....(p. 14) [emphasis added]

Applying these principles to the evidence in this case, there are two issues that I must consider in determining whether the sexual conduct was unwelcome to Dupuis. First, I must assess whether, considering all the circumstances, Dupuis' actions were consistent with her allegation that the conduct was unwelcome. Second, I must determine whether there is evidence that the alleged harasser knew or ought to have known that the conduct was unwelcome... (p. 17, para. 48 and 49)

On its face, this evidence [from the respondent] is inconsistent with Dupuis' position that she did not welcome the sexual conduct. Certainly she had many opportunities to prevent the conduct from progressing which she did not take.

However, there is evidence that Dupuis did not welcome the sexual conduct. Though she did not resist his initial advances, she did tell Seip [the respondent] that she did not want to have sex. She also objected when he put his arm around her in front of co-workers. Garnier [a witness] observed that something was wrong between Dupuis and Seip on the ferry. I also find her behaviour at the Queen Charlotte Islands to be consistent with her position. Although she did have sexual intercourse on some occasions, she made it clear to Seip that she did not want the others to know. She also became more assertive about her feelings. Further, she was apparently in emotional turmoil much of the time....(p. 18, para. 53 and 54)

Dupuis was in a relatively weak and vulnerable position in her dealings with Seip. Seip was not only her supervisor, he was also responsible for research for the Ministry in her area of interest. He had influence in funding decisions of the Ministry that could affect her thesis. He was affiliated with UBC....(p. 19, para. 61)

I am satisfied that there were circumstances from which Seip should have inferred that Dupuis did not welcome sexual intercourse with him. Seip was in a position of authority over her. He rented a single room for the two of them without ensuring that she was comfortable

with those arrangements - a decision that he should have known was grossly inappropriate. Having made that decision, he should have proceeded with extreme caution. He did not. (p. 20, para. 62)

The complainant in *Swan v. Canada (Armed Forces)*, (1994), 25 C.H.R.R. D/312 (Can.Trib.); *Swan v. Canada (Human Rights Tribunal)* (1995), 25 C.H.R.R. D/333 (F.C.T.D.) was also found to have participated in the conduct but was nonetheless subjected to unwelcome racial harassment. Swan alleged that throughout his military career he was subjected to racial slurs, jokes and comments. He was not specific as to times, places and individuals. He contended that the Forces condoned that conduct.

At the tribunal hearing, Swan was asked about his reactions to the alleged discriminatory comments. He said that his reactions to the comments depended on the context, specifically, whether they were "joking around" between his friends or whether they were intended to demean him as a native person.

The tribunal noted that the complainant, in his testimony, painted a very bleak picture of his time in the Forces and gave evidence that he had few friends and no close working relationships with his co-workers. The tribunal said that other witnesses did not paint the same picture and indicated that there was a significant amount of back-and-forth ribbing/joking and comments made by them and by the complainant.

The tribunal accepted the complainant's general allegations were true on a balance of probabilities. The discriminatory comments or terms used in relation to Swan included "wagon burner," "chief" and other blatantly racial slurs. Many of these comments had been made in the mess hall. Swan's fellow employees testified that the comments had been made "in passing" and were not "directed at an individual." They also said that the racist comments were made in a "spirit of fun" and a "joking manner."

Intention of Respondent

The tribunal found that the context or intention of the perpetrator was not the issue. The issue, it said, was the perception of the individual who was being victimized:

Lack of objection and even participation in the activity do not imply consent or cloak otherwise objectionable behaviour with propriety.
(p. 7)

The tribunal determined that Swan had been discriminated against and harassed on the basis of his race and that the Forces had failed to provide him with a

harassment free workplace by failing to respond in an appropriate fashion to Swan's complaints of harassment. This finding was undisturbed by the Federal Court upon review, although it was referred back to the tribunal to recalculate wage losses.