Personal Harassment:
The Evolving Arbitral Caselaw

by Victoria Réaume,[1] Jo-Anne Pickel,[2] and Janina Fogels[3]

1. INTRODUCTION

The issue of harassment has garnered increasing public and media attention over the past several years. Whether it is bullying in schools, so-called "cyber-bullying" over the internet, sexual harassment, or high profile incidents of women harassed and killed in the workplace, it seems clear that the issue of harassment is increasingly being reported on and studied.[4]

This paper addresses one particular form of harassment: personal harassment in the workplace. In particular, it tracks the development of personal harassment as a distinct and arbitrable wrong in unionized workplaces across Canada over the past few years. Prior to the mid-1990s, personal harassment claims were rarely arbitrated. In the cases where the issue of harassment was raised, it was typically in the context of a union grievance alleging

---

1 Victoria Réaume is a partner with Cavalluzzo Hayes Shilton McIntyre & Cornish LLP.

2 Jo-Anne Pickel is an Associate in the Research Group at Cavalluzzo Hayes Shilton McIntyre & Cornish LLP.

3 Janina Fogels is an Associate in the Research Group at Cavalluzzo Hayes Shilton McIntyre & Cornish LLP.

4 See for e.g. "Schools Tackle Cyber-Bullying" CBC News Online (February 20, 2006; the following websites: www.bullying.org, www.cyberbullying.ca; "Female Firefighters Harassed, Report Says" Globe & Mail (September 23, 2006), S3; "Police Plan to Charge Doctor in Nurse's Death November 15, 2005) A16; Andre Picard, "Remedy is needed for Violence Against Nurses" Globe & Mail (March 30, 2006) A17; and Grace Mancuso, "MPP: Get Tough on Threats at Work" Windsor Star (November 17, 2005).

that the discipline imposed on the union member "perpetrator" for unacceptable workplace conduct was inappropriate or overly harsh.[5]

As of the mid-1990s, some arbitrators in British Columbia relied on expansive harassment clauses contained in many collective agreements in that province and on tort law principles to grant damages for mental suffering in cases of personal harassment or conduct resembling harassment.[6] However, arbitrators in other jurisdictions have been much less willing to assume broad jurisdiction over personal harassment grievances in the absence of a "hook" that could be found the collective agreement before them.[7] Following the fundamental shift in arbitrators' jurisdiction marked by cases such as *Weber v. Ontario*[8] and *Parry Sound(District) Social Services Administration Board v. O.P.S.E.U.,*[9] arbitrators across the country increasingly have accepted that personal harassment is an issue that

---

5 See e.g., *Newfoundland and Labrador Hydro and I.B.E.W., Local 1615* (1996), 42 C.L.A.S. 493 (Thistle, Alcock and Oake); *Vancouver-Richmond Association for Mentally-Handicapped People and B.C.G.E.U.* (1995), 39 C.L.A.S. 231 (Jackson); *University of Victoria and C.U.P.E.,* [1995] B.C.C.A.A.A. No. 520 (Chertkow); *ITT Canon Canada, Division of ITT Industries of Canada Ltd. and C.A.W., Loc. 1090* (1990), 15 L.A.C. (4th) 369 (Brown); *Re Canada Post Corp. And Canadian Union of Postal Workers (Gibson)* (1987), 27 L.A.C. (3d) 27 (Swan).

6 See e.g., *CVC Services and I.W.A. -Canada, Local I-71* (1997), 65 L.A.C. (4th) 54 (Lanyon); *Pacific Press and C.E.P., Local 115-M*(1998), 73 L.A.C. (4th) 35 (Bruce); and *Tyee Village Hotel and H.R.C.E.B.U.* (1999), 81 L.A.C. (4th) 365 (Albertini).

7 See for e.g.: *Seneca College of Applied Arts and Technology and OPSEU* (1978), 17 L.A.C. (2d) 113 (H.D. Brown) (grievance inarbitrable because no specific clause "within four corners of agreement": *ibid*. at 116); *Northwest Territories and Union of Northern Workers* (1997), 48 C.L.A.S. 396 (Chertkow) (grievance inarbitrable because personal harassment not on grounds covered by discrimination clause). See also cases cited at note 24 *infra*.

8 *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; 125 D.L.R. (4th) 583.

9 *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324*, [2003] 2 S.C.R. 157; 230 D.L.R. (4th) 257.

is central to the collective agreements over which they have jurisdiction, and they are fashioning remedies to address these claims. However, arbitrators are still tentative with respect to damage awards in this area, and the issue is one that will require greater attention as this jurisprudence develops. This is especially so in light of the lively debate over an arbitrators' jurisdiction to award punitive damages in cases involving human rights, defamation or other tort-based claims.[10] As discussed below, in Ontario, the case of *Toronto Transit Commission v. Amalgamated Transit Union (Stina) ("TTC"),* decided by respected arbitrator Owen Shime, may prove to be a turning point when it comes to the arbitration of personal harassment claims.[11]

This article explores the evolution of arbitral responses to personal harassment grievances, from a reliance on express provisions in the collective agreement, to the imposition of implied obligations arising, in part, from human rights and/or employment-related legislation such as provincial occupational health and safety statutes. Throughout this article, we draw attention to important issues that will require greater attention as the arbitral analysis of personal harassment continues to develop.

---

[10] See *Seneca College and O.P.S.E.U. (Olivo) (Re)* (2001), 102 L.A.C. (4th) 298 (Picher); application for judicial review granted *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology* (2004), 73 O.R. (3d) 185 (Div. Ct.); reversed on appeal (2006) , 80 O.R. (3d) 1 (C.A.); leave to appeal filed with Supreme Court of Canada.

[11] *Toronto Transit Commission v. Amalgamated Transit Union (Stina Grievance)* (2004), 132 L.A.C. (4th) 225 (Shime).

2. "PERSONAL" VS. "WORKPLACE" HARASSMENT

This paper uses the term "personal harassment" rather than "workplace harassment" in order to differentiate between broader forms of personal harassment and harassment occurring in the workplace which violates human rights legislation (often referred to as "workplace harassment"). While arbitral analysis of the issue of personal harassment and damages for such harassment is borrowed from the framework used to analyse workplace harassment claims under human rights legislation, it is framed differently: in terms of implied obligations rooted in the collective agreement and external statutes, and from tort-like notions of pain, suffering and harm to reputation. In addition, personal harassment differs from workplace harassment in that it is not limited to harassment based on the grounds listed in the provisions of human rights legislation which prohibit harassment in the workplace.[12]

3. PERSONAL HARASSMENT LITIGATION BASED ON TERMS OF COLLECTIVE AGREEMENT

While many collective agreements across the country have long recognized and prohibited harassment on the basis of the prohibited grounds listed in human rights legislation, few include protection for broader forms of personal harassment. Early litigation of personal harassment grievances arose in the mid-1990s in British Columbia where many collective agreements have specifically addressed and prohibited "personal harassment" or have

[12] See for e.g. Ontario's *Human Rights Code*, R.S.O. 1990, c. H-19, ss. 5(2) and 7(2).

included expansive definitions of harassment that are not limited to the grounds protected under the province's human rights legislation.

One of the most commonly-quoted definitions of personal harassment was first articulated in the *Burnaby Villa Hotel*[13] case decided just over a decade ago:

> [O]bjectionable conduct or comment directed towards a specific person(s), which serves no legitimate work purpose, and has the effect of creating an intimidating, humiliating, hostile or offensive work environment.[14]

The arbitrator in the case noted that this definition was "generally accepted in collective bargaining relationships in British Columbia".[15] The *Burnaby Villa Hotel* case is an interesting source for this useful definition as it involved an informal dispute resolution mechanism wherein the arbitrator acted as an investigator to address the workplace dispute in an informal "grass roots"[16] fashion. The case arose following a complicated series of events in which an employee of a bar was disciplined for directing abusive and derogatory commentary towards a co-worker. In front of other employees as well as customers, the perpetrator raised his voice, used the term "fucking cunt" numerous times, and called the complainant and other co-workers other inappropriate names. The

---

13 *Burnaby Villa Hotel v. H.R.C.E.B.U., Local 40*, [1994] B.C.C.A.A.A. No. 147 (McEwen) at paras. 11-12.

14 *Ibid*. at para. 11.

15 *Ibid.*

16 *Ibid*. at para. 1.

perpetrator's behaviour continued to the point where the complainant feared him and began to eat her lunch in the women's change room in order to avoid him. At the completion of his investigation, the arbitrator recommended that the perpetrator's discipline be upheld: he had been issued a written reprimand, ordered to cease using abusive language with co-workers and customers, and provided educational material on harassment issues. The arbitrator also recommended, *inter alia*, that the employer implement workplace harassment training and that it commit to taking harassment complaints seriously, including ensuring that investigations into harassment complaints were conducted as quickly as possible.

The arbitrator made a point of specifying that behaviour which could constitute personal harassment included: "threats, bullying, coercion; actual or threatened physical assault; taunting, ostracizing, or other verbal assault; and, malicious gestures or actions that create(s) a poisoned work environment".[17] Over the past decade, the accepted definition of harassment has expanded in scope. Arbitrators have recognised that even a single act having a harmful effect can constitute harassment.[18] Even harmful gossip has been characterized as a violation of a workplace harassment policy.[19]

---

17 *Ibid.* at para. 12.

18 *TTC*, s*upra* note 11 at 241; *Prestressed Systems Inc. and L.I.U.N.A., Loc. 625* (2005) 143 L.A.C. (4th) 340 (Snow).

19 *Canadian Union of Public Employees*, *Local 1252 v. Atlantic Health Science Corp. (Hobbs grievance),* [2004] N.B.L.A.A. No. 29 (Bladon).

Arbitrators from British Columbia have freely assumed jurisdiction over harassment grievances in other cases because the definitions of harassment included in many collective agreements in the province are broad and unrestricted to grounds of gender, race, or other commonly accepted grounds of discrimination. For example, in *Tyee Village,*[20] the collective agreement specified that "harassment" meant "any unwelcome physical contact, comments, gestures, body language, posting or distribution of material, or other behaviour which has the purpose or effect of interfering with an employee's work performance or creating a hostile or offensive work environment."[21] Sexual harassment was addressed in a separate clause. The union filed a grievance alleging that the employer had engaged in harassing behaviour towards the grievor. It sought a cease and desist order, compensation for lost wages during the grievor's stress leave, and damages for mental distress. Arbitrator Albertini concluded that the general manager's actions in repeatedly raising his voice, yelling and swearing at the grievor amounted to harassment. As for the remedy, the arbitrator ordered the manager to cease his harassing behaviour, awarded compensation for the grievor's monetary losses and, as discussed further below, awarded damages in tort for mental distress suffered by the grievor.

In another British Columbia case, *Bear Creek Lodge,*[22] the treatment of the grievor, a receptionist/secretary, by her managers included disrespectful and humiliating remarks. The mistreatment continued for over year after the grievor notified her managers of her

---

[20] *Tyee Village Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Loc. 40 (Prudhomme) (Re)* (1999), 81 L.A.C. (4th) 365 (Albertini).

[21] *Ibid.* at 366.

[22] *Bear Creek Lodge and H.E.U. (Scott)* (2002), 106 L.A.C. (4th) 254 (McEwen).

work-related injury. The arbitrator concluded that the managers' behaviour was prohibited by a collective agreement clause which provided that:

> [t]he Union and the Employer recognize the right of employees to work in an environment free from harassment, including sexual harassment, and the Employer shall take such actions as are necessary with respect to any person employed by the Employer engaging in sexual or other harassment in the workplace.[23]

In the result, the arbitrator ordered that the employer remedy the violation of the collective agreement by compensating the grievor for lost wages. As discussed below, he also awarded tort damages equalling a further six months' pay.

In addition to these cases where arbitrators assumed jurisdiction over personal harassment grievances on the basis of specific clauses dealing with the issue, arbitrators have also assumed jurisdiction over the interpretation of employers' harassment policies, but only if these policies are specifically incorporated into the collective agreement.[24] In some cases, arbitrators have been prepared to shoe-horn their jurisdiction over personal harassment

---

23 *Ibid*. at 255.

24 See for e.g. *Eurocan Pulp& Paper Co. and C.E.P., Local 298 (Klie)* (2000), 93 L.A.C. (4th) 95 (Hope); *C.E.P., Local 2000 v. Surrey Now – South Fraser Publishing Ltd.,* [2002] B.C.C.A.A.A. No. 393 (Dorsey). Meanwhile, arbitrators have declined jurisdiction over such policies if they are not specifically incorporated in, or ancillary to, the collective agreement: see e.g. *St. Paul's Hospital and B.C.N.U. (McHaffie)* (1998) 72 L.A.C. (4th) 129 (Bluman); *Brewers' Distributor Ltd. and Brewery, Winery and Distillery Workers, Local 300* (2004), 76 C.L.A.S. 241 (Moore); *Petro-Canada Lubricants Centre and C.E.P., Loc. 593 (Burpee)* (2000), 89 L.A.C. (4th) 378 (Kirkwood).

claims into existing collective agreement clauses, often without any detailed analysis of their reasons for doing so.[25]

In most of the cases discussed above arbitrators have sought to base their jurisdiction over personal harassment claims on the express terms of the collective agreement, or a policy that has been incorporated into the agreement. As discussed below, the decisive expansion of arbitral jurisdiction due to Supreme Court of Canada cases such as *Weber* and *Parry Sound* has led to a greater willingness on the part of arbitrators to assume jurisdiction over personal harassment claims even when these claims do not clearly arise from an express provision in a collective agreement.

4. ARBITRATORS' EXPANDED JURISDICTION

(a) *Weber* and Its Successors

[25] *St. Paul's Hospital, ibid*. (arbitrator found possible connection to clause dealing with need for a "safe and healthful workplace": *ibid* at 132, 139); *Teamsters Canada, Local 419 v. Tenaquip Ltd. (Vandervende Grievance)* (2002), 112 L.A.C. (4th) 60 (Newman) (arbitrator assumes jurisdiction based on management's duty to provide safe work environment); Re. *Berryland Foods (Division of Jim Patterson Enterprises Ltd.) and U.F.C.W., Local 430P* (1987), 29 L.A.C. (3d) 311 (Hope) (assault by supervisor during grievance meeting arbitrable under clause providing that grievance procedure will take place "quietly, amicably, and speedily": *ibid*. at 322) However, in at least one case decided prior to the *TTC* case discussed below, an arbitrator provided clear reasons for assuming jurisdiction on the basis of the collective agreement's management rights provision. He reasoned that the harassment of employees did not further the employer's legitimate business interests and therefore could not reasonably have been contemplated by the parties as being inarbitrable under the managements rights clause: *Toronto (City) and C.U.P.E., Local 79 (Stockley grievance)*, [1999] O.L.A.A. No. 446 (Starkman).

In the era prior to the Supreme Court of Canada's decision in *Weber v. Ontario*, a labour arbitrator's jurisdiction was widely viewed as strictly limited to the bargained terms expressly set out in the applicable collective agreement. However, *Weber* and cases that have followed in its wake have broadened the jurisdiction of arbitrators.[26] Arbitral jurisdiction now extends to the adjudication of a broad spectrum of statutory and the common law claims that may be found to arise inferentially from a collective agreement.

In *Weber*, the Supreme Court of Canada held that labour relations statutes confer exclusive jurisdiction on labour arbitrators to deal with disputes if the "essential character" of those disputes "arises from the interpretation, application, administration or violation of the collective agreement."[27] This jurisdiction extends to tort claims as well as to claims based on the *Canadian Charter of Rights and Freedoms*. In *Parry Sound*, the Court once again recognized an expanded jurisdiction for labour arbitrators by holding that the substantive rights and obligations contained in human rights codes and other employment-related legislation are implicitly incorporated into every collective agreement. As the Court concluded, these statutes establish a "floor beneath which an employer and union cannot contract".[28] The Court rejected the argument that human rights legislation can only be applied where jurisdiction exists by virtue of an alleged violation of the express terms of the

---

[26] *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 267; *Parry Sound, supra* note 9. See also A. K. Lokan, "From *Weber* to *Parry Sound*: The Expanded Scope of Arbitration" (2004), 11 C.L.E.L.J. 1 and S. E. Luciw, "*Parry Sound* and Its Successors in the Supreme Court of Canada: Implications for the Scope of Arbitral Authority" (2004), 11 C.L.E.L.J. 365. For a review of more recent developments on the issue, see J. Pickel, "*Garon* and *Bisaillon*: More Complications in Determining Arbitral Jurisdiction" (2006), C.L.E.L.J. [forthcoming].

[27] *Weber, supra* note 8 at para. 52.

[28] *Parry Sound, supra*, note 9 at para. 28.

collective agreement. Instead, regardless of what is (or is not) expressly included in the four corners of the collective agreement, an arbitrator now has the *responsibility* to apply human rights and employment-related statutes to workplace disputes.[29]

(b) Arbitral Application of Tort Law

The post-*Weber* arbitrator, therefore, takes tort law under her wing.[30] As a consequence, arbitrators have shown a greater willingness to assume jurisdiction to hear tort claims that seek to remedy the mental distress which often accompanies personal harassment. This greater willingness to remedy the psychological harm inflicted on employees accords with developments in employment law in the non-unionized context which require that employers take greater care to protect employees' psychological welfare. That employment is an essential element of a person's identity, self-worth, and emotional well-being is a recurring theme in employment law decisions involving personal harassment and abuse of authority.[31]

---

[29] *Ibid*. at para. 1.The Court based its decision on section 48(12)(j) of the *Ontario Labour Relations Act* , 1995, S.O. 1995, c. 1, Sch. A which provides that an arbitrator has the power "to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement". However, the decision has been interpreted more broadly to extend to arbitrators other than those governed by the Ontario legislation.

[30] As discussed below, courts increasingly have refused jurisdiction over tort claims in circumstances where the parties are governed by a collective agreement: see for e.g. *Dwyer v. Canada Post Corp.,* [1997] O.J. No. 1575 (C.A.)*; Giorno v. Pappas* (1999),170 D.L.R. (4th) 160 (Ont. C.A.); *Marinaki v. Canada*, [2001] F.C.J. 1920; *A(K) v. Ottawa* (2006), 80 O.R. (3d) 161 (C.A.).

[31] *Wallace v. United Grain Growers Ltd.* (1997) 152 D.L.R. (4th) 1 typically marks the beginning of this movement in employment law. See also *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 215 D.L.R. (4th) 31 at paras. 41-48 (Ont. C.A.) for a review of damages awarded for mental distress arising from the tort of intentional infliction of mental suffering in the employment law context. *Sulz v. Canada (Attorney General)*

Following *Weber*, a growing body of arbitral jurisprudence, especially in British Columbia, has found employers responsible in tort for the intentional infliction of mental distress in harassment cases where the following conditions are made out: (1) the employer has dealt with an employee in an extreme, outrageous or flagrant manner; (2) the behaviour was calculated to produce harm or the harm is reasonably foreseeable; and (3) the behaviour results in a visible and provable illness.

For example, in *CVC Services,*[32] a cook providing catering services to logging and mining camps was told she was not permitted to return to camp as the manager accused her of promiscuity. The union alleged she was dismissed without cause, and sought damages for lost wages and for intentional infliction of mental suffering. On the basis of *Weber*, arbitrator Lanyon concluded that he had jurisdiction over the dispute. He found that the union had made out all of the elements of the tort and awarded damages equalling an additional year's wages to compensate for the intentional infliction of mental suffering.

Another British Columbia arbitrator, in *Pacific Press*,[33] similarly found that the elements of the tort were met in the case before him and awarded a grievor $8,000 for mental suffering.

(2006), 263 D.L.R. (4th) 58 (B.C.S.C.) is another significant tort decision involving harassment in the employment context. The British Columbia Supreme Court found that an RCMP officer's supervisor had breached his duty of care to the officer. As well, the Court concluded that the province was vicariously liable for the supervisor's conduct because it did not take adequate steps to prevent it and failed to provide a harassment-free workplace.

32 *CVC Services and I.W.A.-Canada, Local I-71* (1997), 65 L.A.C. (4th) 54 (Lanyon).

33 *Pacific Press and C.E.P., Local 115-M* (1998), 73 L.A.C. (4th) 35 (Bruce).

The employer in that case had failed to provide its insurance company with a doctor's report after the grievor was injured in two motor vehicle accidents, causing chronic pain and depression. The employer inappropriately contacted the grievor repeatedly, urging her to return to work and threatening to withhold pay for missed shifts. The union alleged that the employer had improperly denied her disability benefits and successfully sought damages in tort for emotional and financial stress.

In *Tyee Village Hotel,*[34] a case discussed above, arbitrator Albertini rejected the employer's argument that the challenged conduct had to be intentional in order to prove the tort of infliction of mental distress. He awarded $400 for mental distress on the basis that the grievor's mental suffering was a *foreseeable* result of the employer's actions.[35] Similarly, arbitrator McEwan in *Bear Creek Lodge* concluded that a managers' persistent harassment created a "unconscionably hostile workplace environment for the grievor" and therefore that the tort of intentional infliction of emotional suffering had been made out. In the result, the arbitrator ordered that the employer compensate the grievor for lost wages as well as a further six months' pay in tort damages.

As these cases demonstrate, after *Weber*, it is increasingly clear that arbitrators have a broad jurisdiction over personal harassment claims that involve allegedly tortious conduct, at least when their "essential character"[36] can be argued to fall within the scope of the

---

[34] *Tyee Village, supra*, note 20.

[35] *Ibid*. at 374.

[36] *Weber, supra* note 8 at para. 52.

collective agreement. As a corollary, courts appear increasingly unwilling to assume jurisdiction over harassment-related tort claims in cases where the parties are governed by a collective agreement. This appears to be the case especially in Ontario. For example, in *A.(K.) v. Ottawa (City)*,[37] the Ontario Court of Appeal concluded that a unionized employee's tort claim against a co-worker and her employer for sexual harassment and sexual assault fell within the exclusive jurisdiction of an arbitrator under the employee's collective agreement. Applying *Weber*, the Court found that the "essential character"[38] of the dispute was a workplace dispute as to whether the "employer failed to provide a safe working environment for its employees"[39] and that this "[brought] the dispute squarely within the jurisdiction of the arbitrator under the collective agreement."[40] Meanwhile, courts in some other provinces, to date, been slightly more willing to accept jurisdiction over tort claims in harassment arising in the unionized context if there is no clear connection between the tort and the collective agreement.[41]

---

37 *Supra* note 8.

38 *Ibid*. at para. 14

39 *Ibid.*

40 *Ibid*. The Court commented that the naming of the co-worker as a co-defendant in the case did not alter the conclusion based on Weber that the dispute was arbitrable as it arose from the collective agreement: para. 23. See also cases cited in note 30, *supra*, in which Ontario courts have refused to take jurisdiction over other tort claims arising from within the unionized context.

41 See for e.g. *Ferreira v. Richmond (City)*, [2004] B.C.J. No. 2520 (Sup. Ct.) in which the British Columbia Supreme Court refused to strike a harassment-related tort claim on the basis that the tortious conduct complained of would not fall within the jurisdiction of the labour arbitrator because it fell "outside the scope of employment relations": *ibid*, para. 35.However, the British Columbia Court of Appeal has granted leave to appeal in the case. In granting leave to appeal, Smith J.A. stated he was satisfied that "the proposed appeal raise[d] important issues concerning the proper boundary between the jurisdiction of arbitrators under the labour relations legislative scheme and the jurisdiction of the courts": [2005] B.C.J. No. 223 (C.A.). See also: *Oliver v. Severance*, [2005] P.E.I.J. No. 16 (Sup. Ct. T.D.) in which the PEI Supreme Court refused to strike a harassment related

As described in this section, in the wake of *Weber* and its successor cases, there has been a steady shift in jurisdiction over harassment claims from courts to arbitrators. This may mean that complainants increasingly will not have recourse to the courts for harassment-related claims; however it has also meant that personal harassment is increasingly emerging as a distinct and arbitrable wrong in the unionized context.

5. PERSONAL HARASSMENT IN THE *TTC* CASE

Arbitrator Shime's *Toronto Transit Commission*[42] decision marks a significant step in this expanding pocket of law for many reasons. First, the decision reaffirms an arbitrator's power to award tort-like damages for personal harassment. Second, it clearly and unequivocally recognizes an arbitrator's jurisdiction over the issue of personal harassment even in the absence of a clause specifically addressing the issue in the collective agreement – both through the management rights clause and by implying a term that precludes supervisors from acting in an abusive or harassing manner. Finally, the decision bases the arbitrator's jurisdiction over personal harassment claims on an employers' obligations under the *Occupational Health and Safety Act* ("*OHSA*")[43] to take all reasonable precautions to protect workers.

---

tort claim filed by a unionised employee on the basis that the matter "did not present itself as a subject for determination under the collective agreement: *ibid*. at para. 27.

42 *Supra* note 11.

43 R.S.O. 1990, c. O.1.

(a) Facts

The grievor in the case, Vito Stina, performed mechanical service work and backup inspections on TTC buses. His supervisor, Frank Zuccaro, humiliated, frightened, and isolated him over a number of years. Stina successfully established that he was treated differently from other employees. For instance, Zuccaro publicly ordered him back to work when others were not so ordered. Zuccaro restricted Stina's telephone use but not that of others, and placed demands on Stina with respect to his work performance that were not demanded of others. In addition, the evidence revealed that Stina had been inadequately trained and repeatedly denied the opportunity to receive training for his position. Moreover, Zuccaro attempted to discipline Stina when it was not warranted, and unjustifiably complained about his work. Stina was also subjected to Zuccaro's yelling and threatening behaviour. No concrete actions were taken when Stina reported the problem to the shop steward and the Superintendent's office. When he attempted to deal with the matter through the TTC's Human Rights department, he was "stonewalled"[44] and told that there were insufficient grounds for his complaint. Stina eventually went on sick leave due to the anxiety and depression he suffered and he also had to undergo psychiatric treatment.

The TTC raised a preliminary objection to the arbitrator's jurisdiction in the matter, arguing that the collective agreement did not contemplate the pursuit of tort claims through the grievance arbitration process. In addition, the employer argued that Zuccaro was legitimately managing and directing an unproductive, oversensitive employee. Meanwhile,

---

[44] *TTC, supra* note 11 at 257.

the union argued that the employer failed to ensure a safe working environment as required under the *OHSA*. The union sought substantial damages for mental distress, arguing that the grievor's anxiety and depression were foreseeable effects of his supervisor's harassment. Finally, the union also sought a remedial order protecting the grievor from further harassment in the future.

(b) Arbitral Jurisdiction Over Personal Harassment

Although the collective agreement was silent on the issue of personal harassment, arbitrator Shime found that there were several alternate bases on which he could assume jurisdiction over the dispute.

First, citing the Supreme Court of Canada's decision in *New Brunswick v. O'Leary*[45] as support, arbitrator Shime determined that the collective agreement contained an implied term mandating that the work of a supervisor be exercised in a "non-abusive and non-harassing manner".[46] Arbitrator Shime concluded that it was implicit in the collective agreement that management "must not abuse its authority and act in a manner that constitutes abuse or harassment of employees."[47]

---

45 [1995] 2 S.C.R. 967.

46 *TTC, supra* note 11 at 237 In *O'Leary,* the Supreme Court of Canada implied a term relating to employee conduct into the collective agreement and thereby found that the essential character of a claim of employee negligence arose inferentially from the collective agreement.

47 *Ibid*.

Next, the arbitrator chose between two different and conflicting lines of jurisprudence and sided with the Ontario Court of Appeal in *Municipality of Metropolitan Toronto v. C.U.P.E., Local 43*[48] in which Tarnopolsky J.A., writing for the Court, concluded that there was an implied obligation of "reasonable contract administration"[49] in the exercise of management rights under a collective agreement. Accordingly, Arbitrator Shime declared that "a supervisor who abuses his/her authority by abusing and harassing an employee is not administering the management rights clause in a reasonable manner and is in violation of the collective agreement."[50] He added, almost in passing, but importantly, that management's abuse and harassment of employees would also constitute bad faith and therefore breach the management rights clause on this basis as well.[51]

Third, arbitrator Shime noted that the collective agreement provided for a Joint Health and Safety Committee, as required under the *OHSA*, to monitor and ensure the safety of employees. Arbitrator Shime held that the existence of this provision "implie[d] the management rights clause be exercised with a view to the safety of employees."[52] He determined that "safety" included not only physical safety but psychological safety as well. He also found that the Joint Health and Safety Committee clause on its own indicated the

---

48 (1990), 69 D.L.R. (4th) 268 (Ont. C.A.).

49 *Ibid*. at 287.

50 *TTC, supra* note 11 at 240.

51 *TTC, supra* note 11 at 240.

52 *Ibid*. at 237.

parties' concern for the safety of employees and, "[a]ccordingly, a supervisor who acts in a manner that jeopardizes the psychological safety of the employee is acting contrary to the collective agreement."[53]

Finally, Arbitrator Shime found that the interdependent relationship between the *OHSA* and the collective agreement provided him with jurisdiction over the matter. He ruled that it was an implied term in the collective agreement that management exercise its authority so as to comply with the *OHSA*, particularly a provision of the Act which requires a supervisor to take "every precaution reasonable... for the protection of a worker."[54]

(c) Remedies Awarded

Arbitrator Shime ordered significant remedies in this case, including reinstatement of sick leave credits, plus the difference between the amount Stina received in sick pay and his regular salary during the relevant time period, with interest. Zuccaro and the TTC were found to be jointly and severally liable to Stina for $25,000 in general damages. Further, the TTC was ordered to ensure that Stina had a harassment-free workplace and, more specifically, that Zuccaro was to have no communication whatsoever with Stina. Arbitrator Shime ordered that Stina be able to move freely among the employer's various workplaces.

---

[53] *Ibid*. The notion that workplace "safety" encompasses more than just safe equipment and processes has also appeared in employment law cases: for example, the Alberta Provincial Court ruled that the duty to maintain a safe work environment included a duty to prevent bullying and harassment, that being conduct that may produce psychological damage and create a hostile work environment: *Haggarty v. McCullogh* (2002), A.J. No. 7 (Alta. Prov. Ct.).

[54] *OHSA, supra* note 43, s. 27(2)(c); *TTC, ibid*. at 238.

If he were to bid or be transferred to a position in an area where Zuccaro was present, the TTC was directed to move Zuccaro to another area. In effect, Stina was to have "workplace immunity"[55] from Zuccaro. Finally, the TTC was ordered to institute an anti-abuse and anti-harassment training for all its managers and to provide the union and Stina with proof that the training program had been implemented.

Whether arbitrator Shime's conclusions are considered individually or as a whole, there is no doubt that the management rights clause and the concept of implied terms collective agreement terms underwent significant renovations with this case. Other arbitrators have followed suit but, to date, in a much more cautious way. In the next section, we discuss the treatment of harassment issues in the arbitral caselaw after the *TTC* case.[56]

6. Arbitral Caselaw Subsequent to *TTC* Case

Arbitrator Shime's *TTC* decision has been cited with approval, often in combination with *Weber* and *Parry Sound*, by arbitrators in subsequent cases as support for implying terms into collective agreements and for assuming jurisdiction over the application of

---

55 *TTC, supra* note 11 at 258.

56 The *TTC* decision has been cited by a handful of cases other than those discussed below, including: *Prestressed Systems Inc. and LIUNA, Loc. 625 (Venosa), supra* note *18*; *Ontario Lottery and Gaming Corp. (c.o.b. Slots at Windsor Raceway) v. Ontario Public Service Employees Union, Local 111 (Discrimination Grievance)*, [2005] O.L.A.A. No. 370 (Knopf); and *Canadian National Railway Co. v. International Brotherhood of Electrical Workers System Council No. 11 (Ducharme Grievance)*, [2005] C.L.A.D. No. 187 (Frumkin). However, none of the above cases discuss or rely on the *TTC* case in the ultimate decision.

employment-related statutes.[57] As discussed, to date arbitrators have been divided over whether to follow arbitrator Shime's willingness both to recognize the significant negative effects that personal harassment can have on employees and to remedy these effects through the granting of substantial human rights or tort-like damages.

Nunavut v. PSAC,[58] is one of the few personal harassment cases decided after the *TTC* decision. While Arbitrator Knopf did not specifically reference the *TTC* decision since the case arose under a specific collective agreement clause dealing with personal harassment. However, her analysis resembles that of arbitrator Shime's in that she clearly recognized the harms caused by the employer's harassing conduct and awarded significant monetary damages as a remedy these harms. The grievor, Ms Kellett, was Nurse in Charge in a community health centre in Nunavut. Approximately two years after her acceptance of this position, members of the community filed a petition with the Ministry of Health asking that she be removed from her position because she was allegedly rude to patients and disclosed personal medical information to the public. The employer conducted a full investigation which concluded that there had been no misconduct, and that the complaint was unsubstantiated. Following this, the employer made no announcement to the

---

[57] For e.g. in *Canadian National Railway v. United Transportation Union (Croteau)*([2005), 136 L.A.C. (4th) 270, arbitrator Picher cited various passages from the TTC decision with approval to support his determination that he had jurisdiction over a grievance that alleged breaches of three different employment-related statutes. In *Canadian Union of Public Employees, Local 133 v. Niagara Falls (City) (Iaonnoni Grievance),* [2005] O.L.A.A. No. 228, arbitrator MacDowell cited the *Canadian National Railway* and TTC cases to support his conclusion that he had jurisdiction to hear a grievance which alleged a breach of a privacy statute as well as an express or implied collective agreement obligation to maintain the confidentiality of confidential employment information.

[58] *Nunavut v. Pub lic Service Alliance of Canada (Grievance of Kellett)*, [2006] C.L.A.D. No. 190 (Knopf).

community, despite the nurse's repeated demands of her Regional and Executive Directors that they communicate with the community and exonerate her publicly.

Shortly thereafter, the employer began a second investigation without a clear mandate to the investigator other than to "look for issues"[59] concerning the grievor's performance. Ms Kellett was asked intrusive and humiliating questions about her health and was subjected to the "humiliation of having to trying to defend herself against amorphous and indefinable attacks."[60] The investigator went into the community to ask whether Ms Kellett was "acting strange"[61] which, as the arbitrator noted, could only lead to the impression that there was cause for concern.

Ms Kellett complained that the employer had failed to protect her from community abuse and harassment and in addition that she had been humiliated, unsupported by her employer, and made to feel like a scapegoat because of the employer's actions, and failure to act. The collective agreement in question contained an explicit commitment by the employer to promote a work environment free from personal harassment, with a clause that required the employer to ensure that policies were in place to properly investigate and intervene in harassment situations. The arbitrator concluded that "a finding of harassment could only be made if there is objective evidence to support that claim."[62] While the

---

[59] *Ibid.* at para. 23.

[60] *Ibid.* at para. 37.

[61] *Ibid.*

[62] *Ibid.* at para. 33.

arbitrator found that the employer had acted appropriately in its initial investigation, she concluded that the second "investigation" was carried out inappropriately and without a reasonable basis. The employer's actions in conducting the second investigation were found to be demeaning, humiliating and embarrassing and, as such, constituted personal harassment. The arbitrator found that the employer's behaviour demonstrated a lack of support for a vulnerable employee; it developed no plan to lessen the likelihood of further abusive behaviour from the community; and furthermore, it fanned the flames of suspicion, giving credence to unfounded rumours. The arbitrator concluded that Ms Kellett's resulting emotional distress and humiliation were "completely foreseeable consequences"[63] and, accordingly, she awarded the grievor general damages for emotional suffering in the amount of $12 500 plus compensation for counselling costs. In sum, according to the arbitrator, the employer "could have, and should have"[64] done more to fulfill its obligations to this nurse under the collective agreement.

By contrast, in *Cara Operations*[65], another post-*TTC* decision dealing with personal harassment, the arbitrator adopted a far stricter approach to the issue than that taken by arbitrators Shime or Knopf. The grievor, Anna Palmieri, alleged that she had been harassed by her shift supervisor, Sue Sharma. Sharma's conduct was, according to the grievor, that of a person on a "power trip".[66] The supervisor used vulgarity and profanity on

---

63 *Ibid*. at para. 35.

64 *Ibid.* at para. 43.

65 *Cara Operations Ltd. v. Teamsters Chemical, Energy and Allied Workers Union, Local 647 (Palmieri Grievance)*, [2005] O.L.A.A. No. 302 (Luborsky).

66 *Ibid*. at 268.

a regular basis. While Sharma allowed other employees to leave early without loss of pay when they skipped lunch or breaks, she refused to let the grievor do so and insisted she take her breaks at the scheduled time. During the grievor's breaks, Sharma would interrupt Palmieri by calling on a two-way radio or cell phone. Sharma also let other people know that she wanted "to get rid of" Palmieri.[67] She also ignored the grievor, attempted to add duties to her job description, and even warned Palmieri that she was the vindictive type and not to get on her bad side. On one occasion Sharma interrupted the grievor, slapped her desk and yelled at her in front of others. The grievor reported that this behavior was negatively affecting her family life and her health. Eventually, after one altercation involving a misunderstanding about a time card, the grievor took time away from work because she was experiencing a variety of complications including sleep disturbance, stress and anxiety, and depression.

The union grieved that Palmieri was harassed by her shift supervisor and that this violated the collective agreement, the employer's policy prohibiting harassment, and the *OHSA*. The employer initially objected to the arbitrator's jurisdiction but eventually agreed that the arbitrator had authority to hear the grievance as a complaint under s.50 of the *OHSA*. Section 50 prohibits reprisals against employees who seek to enforce rights under the Act and permits alleged reprisals to be settled through arbitration. The employer argued that no workplace harassment had been made out. According to the employer, the personality clash was unfortunate but no wrongdoing had been demonstrated for which damages could be awarded.

---

[67] *Ibid*. at 268-69.

In his analysis, arbitrator Luborksy referred to the *TTC* and *Canadian National Railway* decisions as standing for the proposition that abusive conduct "violated the implied obligation for management to ensure safe working conditions pursuant to health and safety legislation."[68] The arbitrator cited the *TTC* decision as indicating that an objective standard is to be applied to determine whether workplace abuse and/or harassment has occurred. Despite accepting Palmieri's evidence and an independent investigator's factual findings, the arbitrator held that the evidence did not substantiate harassment in violation of the employer's policy, the collective agreement or any specific statutory prohibition. The arbitrator found that "even if the Grievor believed she was a victim of such harassment, and suffered real medical consequences as a result, her perceptions and their result are not enough, in themselves, to support a finding of harassment."[69]

In discussing the clash between the grievor and her supervisor, the arbitrator noted that the grievor (as a Lead Hand) and her supervisor were close in rank and that, for this reason, their different views about the management of the department might lead to "honest differences of opinion".[70] He dismissed the grievance stating:

> [E]ven if that [the Supervisor's behaviour] was the substantial cause of the Grievor's illness, one must be careful not to construct too narrow a definition

---

68 *Ibid.* at 274.

69 *Ibid*. at 275.

70 *Ibid.*

> of "departure from reasonable conduct" lest every perceived slight or subjective inference of abuse might result in paralyzing consequences to the workplace. There is a wide range of personalities that we experience in our interaction with others; not all of which may be pleasing to our individual sensitivities, but which we must live with nevertheless, within legal bounds, developing a certain "thickness of skin" to the challenge another's disagreeable mannerisms might present. Whether dealing with a family member, backyard neighbour, co-worker or supervisor, the question of whether the other person's behaviour amounts to a "departure from reasonable conduct" is an objective inquiry that given the expected variability in human capabilities and personalities, must be afforded a relatively wide margin of interpretation.[71]

As such, the *Cara Operations* case provides a contrasting approach to the one taken by arbitrator Shime in the *TTC* case. While arbitrator Shime took a more expansive approach to the role of arbitrators in remedying personal harassment, arbitrator Luborsky's decision arguably treads a more traditional and restrictive path. Whereas the *TTC* decision can be seen as breaking new ground in redressing personal harassment claims and compensating employees who are the victims of bad bosses, *Cara Operations* raises the spectre of

---

[71] *Ibid*.

bursting floodgates to re-legitimize the view that workers must develop a thicker skin and suffer bad bosses as we all must suffer bad neighbours.[72]

Notwithstanding arbitrator Luborsky's cautions, a review of the caselaw suggests that the floodgate theory is one which has never had much credibility when it comes to harassment. While the distinction between what is harmful bullying and what is lawful management action can be contentious, a review of the arbitral jurisprudence demonstrates that cases advanced by *complainants* (as opposed to grievors seeking to mitigate disciplinary penalties) through the grievance mechanism are few and far between, whether the harassment claimed is personal harassment or harassment in violation of human rights legislation. In any event, in future, arbitrators will have to determine whether to adopt the more restrictive traditional approach exemplified by the arbitrator Luborsky's decision or the more expansive approach taken by arbitrators Shime and Knopf in their recent personal harassment decisions.

7. Strengthening Legislative Standards

Just as the arbitral caselaw on personal harassment is evolving, the issue of harassment has also attracted greater attention in the legislative sphere as proposals have also been introduced to amend statutory regimes to better address the issue of harassment. Prohibitions on harassment and sexual harassment have long been included in human

---

[72] For another case taking the same restrictive approach see *Yukon v. PSAC (Hardie Grievance),* [2002] C.L.A.C. No. 422 (Taylor).

rights statutes in most Canadian jurisdictions, however until recently only one province, Saskatchewan,[73] provided protections against harassment in its occupational health and safety legislation. Quebec recently became the second province to strengthen prohibitions against harassment and other provinces may follow suit in the future. Private member's bills were introduced at the federal level and in Ontario and Manitoba in the past few years proposing to amend labour or occupational health and safety legislation in those jurisdictions to provide greater protection against personal harassment in the workplace. Although none of the three bills were brought forward by the governments in those jurisdictions, they may provide a sign of legislative developments to come.

In 2002, Quebec amended its employment standards legislation, the *Labour Standards Act*,[74] to prohibit "psychological harassment" in the workplace. Psychological harassment is defined broadly as:

> any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work

---

[73] Since 1993, *Saskatchewan's Occupational Health and Safety Act*, S.S. 1993, c. O-1.1, s. 3(c) has required employers to "ensure, insofar as is reasonably practicable, the the employer's workers are not exposed to harassment at the place of employment." The Regulations to the Act impose on employer's the duty to put in place harassment prevention policy: *The Occupational Health and Safety Regulations*, 1996, R.R.S. 2000, c. O-1.1, Reg. 1, s. 36.

[74] R.S.Q. N-1.1, ss.81.18 - 81.20; 123.6 - 123.16.The amendments came into force June 1, 2004: *An Act to amend the Act respecting labour standards and other legislative provisions*, S.Q. 2002, c. 80 s. 47, s. 88.

> environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.[75]

The new provisions recognize that every employee has a right to a workplace that is free from psychological harassment and requires employers to "take reasonable action to prevent psychological harassment, and whenever they become aware of such behaviour, to put a stop to it."[76] If they fail to do so, employers face liability, inter alia, for lost wages, punitive damages, compensation for loss of employment, and the cost of psychological support.[77] The statute provides that the new provisions on psychological harassment are presumed to be an integral part of collective agreements across the province and that employees covered by collective agreements must enforce the provisions through the recourses provided for in these agreements.[78]

After the enactment of the Quebec legislation, a Bloc Quebecois MP introduced a private members bill in the House of Commons that would have put in place the same standards at the federal level.[79] The bill died before going to debate, but personal harassment

---

75 *Supra* note 74, s.81.18.

76 *Labour Standards Act, supra* note 74 s. 81.19.

77 *Ibid.*, s. 123.15.

78 *Ibid.*, s.81.20.

79 Bill C-451, *An Act to prevent psychological harassment in the workplace and to amend the Canada Labour Code*, 3d Sess, 37th Parl., Canada, 2003 (first reading September 24, 2003).

continued to garner attention at the federal level as the issue is one being considered in the current comprehensive review of Part III of the *Canada Labour Code*.[80]

Following a number of high profile workplace harassment incidents in Ontario, which culminated in violence and even death in some cases,[81] two private members bills were introduced which would have included express protections from harassment in the provinces occupational health and safety legislation.[82] The bill would have imposed a duty on employers to ensure that every worker is protected from workplace-related harassment by including guidelines in health and safety policies and providing regular harassment prevention training for workers and managers. Workers would also have had the right to refuse to work if harassed.

In March 2006, a private members bill, the *Workplace Safety and Health Amendment Act (Harassment in the Workplace)*,[83] was introduced which would have imposed on employers

---

80 Canada, *Interim Report of the Federal Labour Standards Review* (Gatineau: HRSDC, October 2005), available online at: http://www.fls-ntf.gc.ca/doc/int_rpt-e.pdf.

81 The Bill was initially introduced by NDP Marilyn Churley and then later re-introduced by NDP MP Andrea Horwath. The Bill was introduced following the killing of Windsor nurse Lori Dupont by a doctor at a Windsor hospital in 2005: Grace Mancuso, "MPP: Get Tough on Threats at Work" Windsor Star (November 17, 2005). A similar bill was introduced in 2006 by Liberal MPP to mark the 10 year anniversary of the death of woman killed by her boss at a Sears department store in 1996: see "Private member's bill to remember Theresa Vince" ctv.ca (June 22, 2006) and .

82 Bill 45, *Occupational Health and Safety Amendment Act (Harassment)*, 2d Sess., 38th Leg., Ontario, 2005 (first reading December 6, 2005); Bill 35, *Occupational Health and Safety Amendment Act* (Harassment), 2005, 2d Sess., 38th Legis., Ontario (Second Reading discharged and Bill withdrawn by Order of the House dated November 30, 2005) .

83 Bill 210, *Workplace Safety and Health Amendment Act (Harassment in the Workplace)*, 4th Sess., 38th Leg., Manitoba, 2006 (first reading March 8, 2006)

a new statutory duty to ensure that every worker be protected from workplace-related harassment. The definition of harassment in the bill was very similar to the one found in the Quebec legislation, but the bill included an additional category of behaviour that would constitute harassment:

> the improper use of the power or authority inherent in a person's position to endanger a worker's job, undermine the worker's job performance, threaten the economic livelihood of the worker or negatively interfere in any other way with the worker's career.[84]

Significantly, the proposed new definition of "workplace-related harassment" would have included harassment of a worker by his or her employer or supervisor or by another worker, whether or not the harassment occurred at the workplace.[85]

While the three bills discussed above died on the order paper, they may foreshadow greater legislative willingness to follow Saskatchewan and Quebec's lead in enhancing legislative safeguards against harassment in the future. Any such legislative developments would not only provide greater protection for employees, but would also have a significant impact on the jurisdiction of arbitrators over harassment claims since, as employment-

---

84 *Ibid.*, s. 2.

85 *Ibid.*

related statutes, they likely would be found to be implicitly incorporated into collective agreements in the jurisdictions where they were enacted.[86]

8. CONCLUSION

As suggested at the beginning of this article, the issue of harassment is one that has steadily gained public attention over the past several years as it becomes clear that harassment can have significant psychological and physical effects on those who are harassed. The developments in arbitral caselaw and the legislative proposals detailed in this article suggest an increasing recognition that harassment in the workplace carries with it significant financial, social and moral costs – costs that are considerable for all parties concerned. While there is no doubt that traditional restrictive approaches which minimize the harms caused by harassment may remain firmly entrenched in some cases, we have suggested that arbitrator Shime's *TTC* decision may represent a turning point in the caselaw on personal harassment. Not only does the decision provide a clear and unequivocal analysis of arbitrators' jurisdiction to hear personal harassment claims, but it may also signal a greater willingness on the part of arbitrators to recognize the harms caused by personal harassment and to compensate these harms using a range of remedies from workplace-immunity orders to tort-like damages. Certainly, such a decision would have been difficult to imagine a decade ago, and can only be understood against the legal trajectory traced in this article as well as the increased public awareness of the psychological and physical harms caused by harassment in all its various forms.

---

[86] *Parry Sound, supra* note 9.