

**HARASSMENT AND BULLYING IN THE**  
**WORKPLACE:**  
**THE ASSOCIATION'S ROLES AND**  
**RESPONSIBILITIES**

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## 1. **Introduction**

For the past few decades, human rights legislation in Ontario and in other jurisdictions have provided workers with some protection from being harassed in the workplace based on prohibited grounds of discrimination. When such conduct has contravened legislation, it has been addressed in several forums, including human rights tribunals and boards, through civil proceedings, and in labour arbitrations. More recently, behaviour that can be considered bullying or harassment but that has no roots in an enumerated ground is being addressed in the workplace and through the same legal mechanisms. Police associations have an important role to play in both preventing harassment, and in ensuring effective processes and remedies for the parties when it occurs, and in representing members for whom disciplinary action has been taken for allegations of harassment and bullying. However, as a profession regulated under its own legislation the police regime presents some unique challenges for dealing with harassment in the workplace.

## 2. **What is harassment and bullying?**

Harassment is defined in section 10 of the Ontario *Human Rights Code*<sup>1</sup> as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”. Section 5(2) of the *Human Rights Code* states:

Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

Sexual harassment is specifically addressed in section 7(2) of the *Human Rights Code*, which states as follows:

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

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<sup>1</sup> *Human Rights Code*, R.S.O. 1990, Ch. H-19 [*Human Rights Code*].

The Supreme Court has defined sexual harassment in the workplace as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims...”<sup>2</sup>

In the police regime in Ontario, the Police Services Code of Conduct, outlined in Ontario Regulation 123/98 of the *Police Services Act*<sup>3</sup>, is also relevant. Section 2(1) of Regulation 123/98 refers to discreditable conduct, and states the following:

- 2.(1) Any chief of police or other police officer commits misconduct if he or she engages in,
- (a) Discreditable Conduct, in that he or she,
    - i. Fails to treat or protect a person equally without discrimination with respect to police services because of that person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap,
    - ii. Uses profane, abusive or insulting language that relates to a person's race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap,
    - iii. Is guilty of oppressive or tyrannical conduct towards an inferior in rank,
    - iv. Uses profane, abusive or insulting language to any other member of a police force,
    - v. Uses profane, abusive or insulting language or is otherwise uncivil to a member of the public...

The Ontario Civilian Commission on Police Services (OCCPS) has upheld findings of guilt for discreditable conduct for behaviour that constitutes harassment.<sup>4</sup>

Some collective agreements or policies governing the workplace contain definitions of harassment. Collective agreements containing anti-harassment provisions most often root such provisions on the grounds enumerated in the *Human Rights Code*.<sup>5</sup> However, some parties have turned their minds to bullying that is not based on a human rights violation, and have provisions in their agreements that state that no intimidation, interference, etc. may take place against employees or members.

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<sup>2</sup> *Janzen v. Platy Enterprises Ltd.*, [1989], 59 D.L.R. (4th) 352 at 375 [*Janzen v. Platy*].

<sup>3</sup> *Police Services Act*, R.S.O. 1990, c. P.15.

<sup>4</sup> See, for example, *Lewin and Toronto Police Service* (OCCPS) July 23, 2001.

<sup>5</sup> See, for example: Brantford Police Services Board and the Brantford Police Association [*Collective Agreement*], [March 7, 2003], Article 2.01; Chatham-Kent Police Services Board and Chatham-Kent Police Association [*Collective Agreement*], [October 28, 2003], Article 5.1; Cornwall Community Police Services Board and Cornwall Police Association [*Collective Agreement*], [August 25, 2003], Article 5.04, Essex Police Services Board and Essex Police Association [*Collective Agreement*], [January 1, 2002], Article 5.1.

One arbitrator has defined harassment as a course of conduct that is vexatious or distressing to the victim, and that has no legitimate work-related purpose. This definition did not relate to a violation of the *Human Rights Code*.<sup>6</sup> Others have held that if an employee has a right to be protected from a physical assault, she or he has an equivalent right to be protected from verbal injury, regardless of whether the course of verbal conduct is a prohibited ground of discrimination under the *Human Rights Code*.<sup>7</sup>

Words or conduct that has been held to constitute harassment include the following:

- Shouting or name-calling<sup>8</sup>;
- Staring excessively at co-workers<sup>9</sup>;
- Unwanted physical contact<sup>10</sup>;
- Peering into a washroom cubicle<sup>11</sup>;
- Commenting on a female employee's hygiene<sup>12</sup>;
- Requesting sexual favours or activity<sup>13</sup>;
- Displaying sexually explicit posters in the workplace<sup>14</sup>;
- Telling jokes that are racist<sup>15</sup>;
- Holding particular employees to a higher standard of behaviour or subjecting them to more criticism, supervision, etc.<sup>16</sup>

The term "bullying" is not defined in relevant legislation. Some arbitrators have indicated that bullying is an example of personal harassment<sup>17</sup> while others have used bullying to

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6 *Overwaitea Food Group and United Good & Commercial Workers' Union, Local 1518*, [1997] B.C.C.A.A.A. No. 721 (Korbin) [*Overwaitea*].

7 *Re Canada Post Corp. and Canadian Union of Postal Workers* (1987), 27 L.A.C. (3d) 27 (Swan) [*Canada Post*].

8 *Re Tyee Village Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Local 40* (1999), 81 L.A.C. (4th) 365 (Albertini) at 373 [*Tyee Village*].

9 *Re ITT Cannon Canada, Division of ITT Industries of Canada Ltd. and Canadian Automobile Workers, Local 1090* (1990), 15 L.A.C. (4th) 369 (H.D.Brown).

10 *Re Government of Province of Alberta and Alberta Union of Provincial Employees* (1988), 34 L.A.C. (3d) 204 (McFetridge). See also *Re Juan de Fuca Hospital Society (Mount Tolmie) and Hospital Employees Union, Local 180* (1990), 16 L.A.C. (4th) 184 (McPhillips) and *Re Lionel Ulrich Discreditable Conduct (Ingersoll Police Force)* (January 28, 1994).

11 *Re De Havilland Aircraft Co. of Canada, Division of Boeing Canada Ltd. and Canadian Automobile Workers, Local 112* (1989), 6 L.A.C. (4th) 269 (Gorsky) [*De Havilland*].

12 *Canada Post*, supra note 7.

13 *Newfoundland (Newfoundland Farm products Corp.) and Newfoundland Association of Public Employees* (1988), 35 L.A.C. (3d) 165 (Dicks).

14 *Re Goodyear Canada Inc. and United Steelworkers of America, Local 189* (2002), 107 L.A.C. (4th) 289 (Goodfellow) [*Goodyear*].

15 *Wei Fu v. Ontario Government Protective Service* (1985), 6 C.H.R.R. D/2797 (Ont. Bd. Inquiry).

16 *Toronto Transit Commission and Amalgamated Transit Union* (2004), 132 L.A.C. (4th) 225 (Shime) [*Toronto Transit Commission*].

17 See, for example, *Re St. Paul's Hospital and British Columbia Nurses' Union* (1998), 72 L.A.C. (4th) 129 (Bluman) (QL) at p. 6.

describe behaviour that is consistent with behaviour that could also be considered harassment.<sup>18</sup> Sometimes, bullying is said to have at its core the exercise of power and aggression. For the purposes of this paper, the terms will be used interchangeably.

While arbitrators have recognized that standards for what is appropriate may vary according to workplace, it has also been held that while context is important, it does not provide an excuse or defence for conduct or comments that are clearly unwelcome.

Intention is not a necessary element of harassment.<sup>19</sup> While generally, harassment refers to a pattern of inappropriate behaviour, it has been held that a single incident, if egregious enough, may also constitute harassment.<sup>20</sup> Furthermore, the fact that an individual has accepted a type of conduct that constitutes harassment for a period of time does not preclude him or her from successfully bringing a complaint.<sup>21</sup> Similarly, with respect to sexual harassment, one arbitrator has stated that just because an employee has engaged in a flirtation or sexual banter with one employee doesn't mean that she or he must accept the same conduct from others; the right to choose how to interact with other employees is not limited by such actions.<sup>22</sup>

OCCPS have held that regardless of whether offensive comments are directed towards the individual who hears them, they may be found to constitute harassment.<sup>23</sup> In one case, an officer made offensive comments about women passing by in the presence of a female officer. The panel members held, in upholding a finding of guilt of discreditable conduct made by a Hearing Officer:

What may have been tolerated as passable comments, barrack room or off the cuff humour, albeit in very poor taste, is no longer acceptable today. The comments in question were offensive. They were a clear violation of the Toronto Police Service Professional Conduct Rules and Workplace Harassment Policy.<sup>24</sup>

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18 For example, in *Re Universal Showcase Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 1072* (2005), 141 L.A.C. (4th) 437 (Surdykowski) [shouting at a member of management was found to constitute "bullying"] at par. 33.

19 *Overwaitea*, supra note 6.

20 See *Re Religious Hospitallers of St. Joseph of Hotel Dieu of Kingston and O.P.S.E.U., Loc. 465* (1995), 50 L.A.C. (4th) 225 (Simmons), and *Overwaitea*, *Ibid.*

21 *Canada Post*, supra note 7.

22 *Ibid.*

23 *Lewin*, supra note 4 at p. 6.

24 *Ibid* at p. 6.

### **3. The Association's roles and responsibilities with respect to workplace harassment: Preventing harassment**

The Police Association of Ontario has published a directive entitled "Equal Opportunity, Discrimination and Workplace Harassment" as part of its Police Standards Manual (2000).<sup>25</sup> This directive adopts the *Human Rights Code* definition of harassment and makes suggestions for police services on responding to and preventing harassment.<sup>26</sup> It further states at section 6 that all Chiefs of Police "should ensure no sexist, racist or other offensive or derogatory material is displayed in the workplace".<sup>27</sup>

While the primary obligation to prevent harassment may lie with police services boards, there are several ways police associations can and should participate in ensuring that a workplace remains free of harassment and based on respect for others. The following steps may assist in insulating associations from claims that they have not met their duty of fair representation of members .

First, all association representatives must be made aware of what harassment is and how it can be prevented or dealt with in the workplace. This includes understanding the grounds enumerated in the *Human Rights Code*, any provision of the collective agreement, and any policies or directives that apply to the workplace.

Second, associations should try to collaborate with management in order to agree upon processes and solutions for harassment and bullying. Associations should negotiate relevant provisions into their collective agreements in order to ensure their role in resolving such issues.

Another option is to create a workplace policy or protocol on harassment and bullying. Any policy should outline the following:

- What constitutes harassment
- Who the policy applies to (e.g. members of management and employees)

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<sup>25</sup> *Police Standards Manual*, AI-003.

<sup>26</sup> *Ibid*, at section 5.

<sup>27</sup> *Ibid*.

- Who harassment can occur between (e.g. between management and an employee, between employees themselves, between an employee and a third party, and so on)
- Where harassment can occur (e.g. both in or outside of the workplace)
- The process for those who have been harassed and who wish to pursue a remedy

Some associations have worked with employers to set up joint human rights committees to try to investigate and find a resolution to complaints of harassment.

Third, the Association can assist in preventing harassment by urging its members to refrain from conduct that constitutes harassment. Members should be told what their obligations are both to other Association members and to the Board. All members should also be advised of any harassment policies in place between the parties, and must also be informed that bullying or harassing others will not be tolerated. Several methods of disseminating information in regards to acceptable workplace conduct may be used to accomplish this. This may include the distribution of written information to individual Association members, holding mandatory education sessions at the commencement of employment and/or at regular intervals during employment, posting information bulletins in the workplace, etc.

#### **4. The Association's roles and responsibilities with respect to workplace harassment: When harassment is alleged**

##### **A. Processing a harassment complainant**

Harassment and bullying complaints can play out in various forums, depending on the nature of the harassment, the identity of the complainant, the identity of the respondent and employer Directives.

##### *i. Investigations*

As discussed above, in some cases associations and employers have agreed upon a process for dealing with a harassment complaint outside of the grievance procedure. For example, the Peel Police Services Board and the Peel Regional Police Association have agreed on a process whereby a complaint is referred to a harassment investigator, who then makes a non-binding recommendation to the Board. Should no resolution be achieved by the parties through these means, the matter may then be forwarded to an arbitrator.<sup>28</sup> It should be noted, however, that the Board retains the right under this procedure to discipline an Association member. Several other workplaces have developed similar procedures.

ii. *Grievance Proceedings*

In other labour forums, where harassment has been committed against a union member by a member of management, the grievance procedure has been successfully utilized. In the words of one arbitrator:

[I]f an employee responds inappropriately to a properly given directive, the Employer has the legitimate authority to discipline that employee. The only defence to an employee of a management person's inappropriate conduct is to grieve as [the grievor] has done in this case.<sup>29</sup>

However, there is an arbitral decision that questions whether harassment of a police officer by a member of management is grievable in the Ontario policing arena, depending on the language in the collective agreement. In *Durham Regional Police Services Board and Durham Regional Police Assn.*<sup>30</sup>, Arbitrator Jackson considered this issue. He held that both the *Police Services Act* and the collective agreement between the parties allowed for any dispute arising out of the collective agreement to be dealt with by an arbitrator.<sup>31</sup> In this case, the collective agreement contained no clause that required management to act fairly. Moreover, it was held that the allegations that the grievor made either were not matters falling under the collective agreement, or had a

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28 See the Uniform Collective Agreement between Regional Municipality of Peel Police Services Board and Peel Regional Police Association, [*Collective Agreement*], [January 1, 2004], Article 4.03. [This process is to be used for alleged harassment based on sex or race only].

29 *Tyee Village*, supra note 8.

30 (2000), 95 L.A.C. (4th) 323 (Jackson) (*Durham*).

31 *Durham*, supra at p. 6. See sections 123 and 124 of the *Police Services Act*.

very tenuous link to the agreement.<sup>32</sup> Arbitrator Jackson concluded that this matter was not arbitrable because the grievance was “much more of the police world than of the police labour-relations world”.<sup>33</sup>

It is our opinion that the *Durham* decision is inconsistent with the Supreme Court’s decision in *Weber v. Ontario Hydro*<sup>34</sup>. In *Weber*, the Court held that any dispute that, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement, must be decided by an arbitrator.<sup>35</sup> This applies to disputes that arise out of the collective agreement either expressly or inferentially.<sup>36</sup> *Weber* is constantly followed in arbitral decisions.

The *Durham* decision denies an association’s ability to protect its members from harassment by management and should not be followed. Again, bargaining provisions regarding harassment into the collective agreement or management rights clauses requiring management to act fairly may prevent a similar result. However, Associations should file a grievance for anything that arises out of the labour relations context, even if the collective agreement does not contain an explicit provision on the matter.

Where a collective agreement contains a “Management Rights” clause requiring management to act fairly, associations may attempt to pursue a grievance for a failure to provide a harassment-free workplace, thereby failing to exercise those rights fairly, reasonably or in good faith. Some arbitrators have held that collective agreements have an implied term that requires members of management to operate in a non-abusive or non-harassing way.<sup>37</sup> Arbitrators have also found that they have jurisdiction to hear grievances on harassment regardless of whether the parties have agreed on a collective agreement provision, policy, or directive on harassment, or whether such harassment is based on a *Human Rights Code* violation.<sup>38</sup>

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<sup>32</sup> *Durham*, supra at p. 9.

<sup>33</sup> *Durham*, supra at p. 11.

<sup>34</sup> [1995] 2 S.C.R. 929 at par.

<sup>35</sup> *Weber*, supra at par. 52.

<sup>36</sup> *Weber*, supra at par. 54.

<sup>37</sup> *Toronto Transit Commission*, supra note 16 at 237.

<sup>38</sup> *Canada Post*, supra note 7. See also *Toronto Transit Commission and Amalgamated Transit Union*, *Ibid* at 237-241

The *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (*OHS*A) has also been found to provide an avenue for pursuing a grievance against a member of management. The *OHS*A governs health and safety in Ontario workplaces and includes the police forces. Section 25(2) of the *Act* states as follows:

Without limiting the strict duty imposed by subsection (1), an employer shall,

- (a) provide information, instruction and supervision to a worker to protect the health or safety of the worker;
- (c) when appointing a supervisor, appoint a competent person;
- (e) afford assistance and co-operation to a committee and a health and safety representative in the carrying out by the committee and the health and safety representative of any of their functions;
- (h) take every precaution reasonable in the circumstances for the protection of a worker;

Section 27(2)(c) states that a supervisor shall take every precaution reasonable in the circumstances in order to protect a worker. Similarly, a provision in the collective agreement that deals with the obligation to ensure the health and safety of workers may be used to pursue a claim.

Regardless of whether an agreement between the parties contains a health and safety clause, it has been held that when a member of management is exercising authority under the collective agreement, it must be done so in a matter that is consistent with the *OHS*A.<sup>39</sup>

### *iii. Discipline proceedings*

Following investigation, respondents may be subject to discipline. In the case of civilian members, discipline will be imposed by management and subject to challenge by the Association through the grievance process, typically on a “just cause” standard.

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<sup>39</sup> *Toronto Transit Commission*, *supra* at 238.

If a harassment complaint is made against a police officer, then Part V of the *Police Services Act* and Regulation 123/98 come into play. This is the only means to discipline a police officer.

Section 126 of the *Police Services Act* restricts the jurisdiction of arbitrators as well as what can be dealt with in collective agreements. It states:

Agreements and awards made under this Part do not affect the working conditions of the members of the police force in so far as those working conditions are determined by sections 42 to 49, subsection 50 (3), Part V (except as provided in subsection 64 (17)) and Part VII of this Act and by the regulations.

Part V of the *Police Services Act* deals with complaints made about police officers, the hearing procedure in regards to complaints and sets out the disciplinary procedure for officers.

While the discipline of a police officer may not be grieved, an Association may still play a role in representing the officer throughout the disciplinary procedure.

*iv. The Human Rights Commission:*

Complaints of harassment on prohibited grounds may be processed through the Commission. The Commission may refuse to deal with a complaint if it is determined that the complaint is better dealt with under other legislation. The Commission will endeavour to effect a settlement and if necessary conduct an investigation. If still unresolved, the Commission itself determines whether a complaint will be forwarded to adjudication at the Human Rights Tribunal.

**5. Who does the Association represent?**

A unique feature of harassment complaints is that the Association may be called upon to represent either or both of the complainant and respondent. The nature and degree of assistance will vary in each case, depending upon the type of proceeding invoked, the needs of the member and the degree to which the employer is supporting the member. In most cases, members will require emotional support, representation through the grievance process and/or legal representation.

The Association has a particularly challenging role to play when faced with a situation where both the complainant and respondent are Association members. In such scenarios, the Association must strive to strike an appropriate balance between a) providing support for complainants who have been subject to harassment; and b) representing members who face disciplinary action. This can be enhanced by adopting the following process:

1. advise both members that the Association will be providing appropriate representation to the complainant and respondent. Make clear that the Association is committed to due process for all its members;
2. appoint separate staff/Executive to represent each member exclusively;
3. adequately investigate the matter in order to determine whether the Association should or must take a position on the allegations (e.g. to file a grievance alleging harassment by the respondent member);
4. advise both members in the event the Association elects to take a position in support of one of the members, and assure both that the Association will continue to provide support within that framework; and
5. in appropriate cases, provide separate legal counsel to the member whose position the Association will not advance, in order to provide advice and representation in a grievance, disciplinary or other proceeding;

A. Representing the complainant

The Association should provide an avenue of redress for those who have been subject to harassment or bullying in the workplace. A complainant should be able to step forward and know that his or her complaint will be taken seriously and treated in a confidential manner. Appointing a member of the Association staff or Executive to deal with harassment claims may assist in assuring confidentiality insofar as possible, and in ensuring that complaints are dealt with adequately and appropriately.

Once an individual has come forward with a complaint, the Association should inform that member of his or her options in pursuing a remedy for the harassment. Considerations in this regard include the anticipated time required to resolve the complaint, cost, control and carriage rights, the willingness of the complainant to participate in the proceeding and available remedies.

Once the choice is made, the role of the Association depends in part on the procedure. During an investigation, the Association may play a neutral role, providing support and advice to all involved, including witness members.

Where a grievance is filed, the Association's role is to "prosecute" the complaint and advocate on behalf of the complainant, often providing legal counsel. Here, the Association will have carriage rights of the grievance, allowing it to have final say as to how the matter goes forward and whether a settlement can be achieved.

Where there is a discipline hearing under the *Police Services Act*, many associations will provide legal counsel and other support to complainants who may be called to give evidence.

Where a complaint is filed under the *Human Rights Code*, the Association will have no official standing, but may elect to provide financial or other support.

B. Representing the respondent

The Association has an obligation to represent members who have been accused of harassing or bullying an individual, and may be or have been disciplined as a result.

In almost any case, it is most useful for the Association to assist the respondent in understanding the perspective of the complainant, even where the allegations are denied. Many individuals accused of harassment are genuinely surprised that their actions were considered objectionable. Promoting understanding and empathy can go a long way to resolving complaints.

Where there is a grievance alleging harassment by a fellow member – and management’s failure to adequately respond to it – the representation required will depend upon the circumstances. For example, if the employer takes the position that no harassment occurred, the respondent member’s interests may be adequately canvassed by the employer. However, where the employer does not deny the harassment, the respondent may have an independent interest in defending him or herself and may seek limited standing to intervene in the arbitration for that purpose only. The Association may consider providing legal counsel for such a respondent.

Where the employer has disciplined a civilian member and a grievance alleging no “just cause” is filed, the Association will process and represent the member in the grievance process in the usual way. The Association must of course ensure that the employer can prove the allegations against the member before imposing discipline, and ensure that the response is appropriate.

Should the employer seek to impose discipline upon a police officer, it is common practice among Associations to provide legal counsel or other representation for *Police Services Act* trials.

## **6. Remedies and Consequences**

Arbitrators have considered and applied a wide range of options with respect to remedies for bullying and harassment, subject to any limits to such remedies in the collective agreement. Generally it has been held that remedies are to be compensatory in nature rather than punitive.<sup>40</sup>

### **A. Harassment committed by an Association member**

Where the harasser is a civilian member of the bargaining unit, a range of discipline may be imposed on that member ranging from a warning to a discharge. The only question is whether such discipline is warranted in the circumstances, and the

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<sup>40</sup> See, for example, *C.U.P.E. and O.P.E.I.U., Local 491* (1982), 4 L.A.C. (3d) 385 (Swinton) [C.U.P.E.]

association should ensure that no more discipline is imposed than necessary in the circumstances.

For police officers, the penalty for being convicted of discreditable conduct due to harassment ranges, often depending on the position that the officer holds. In one case, where a Detective Sergeant and commanding officer made unwelcome sexual comments, advances, and, in some instances physical touching, toward five female civilian members, the penalty was a reduction in rank.<sup>41</sup> In another case, a hearing officer imposed a penalty of the forfeiture of fifteen days off for making offensive comments about women.<sup>42</sup> OCCPS took into account the fact that the officer was a supervisor, and the remarks were made during the course of training another officer.<sup>43</sup>

With respect to remedies, where an employer is found to have failed to adequately respond to an allegation of harassment by an employee, damages may also be awarded to the complainant in addition to any discipline against the bargaining unit member.<sup>44</sup> This applies to cases where the employer fails to protect an employee from the harassing conduct of a third party (e.g. a customer) as well.

## B. Harassment by management

The *Police Services Act* provides the avenue of redress for complaints about the conduct of a Chief or Deputy Chief of police in section 65, while section 66 addresses complaints about the Commissioner or Deputy Commissioner. The Association does not play a role in the investigation or resolution of such matters.

If an individual was harassed by a member of management, and that matter is arbitrable, damages may be awarded to compensate the victim for humiliation, loss of dignity or distress. Damages for the tort of intentional infliction of emotional suffering or mental harm may be awarded if the following three elements are met: 1) extreme and

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<sup>41</sup> *Brayshaw and Ontario Provincial Police (OCCPS)* September 3, 1992.

<sup>42</sup> *Lewin*, supra note 4.

<sup>43</sup> *Ibid* at p. 6.

<sup>44</sup> See Brown & Beatty, *Canadian Labour Arbitration* (3rd ed.) Aurora ON: Canada Law Book, 1988 at 7:3432.

outrageous conduct; 2) the harm is clearly foreseeable; and 3) there is actual harm with proven illness resulting.<sup>45</sup> General damages may also be awarded.<sup>46</sup> Arbitrators have awarded as much as \$25,000 for damages in harassment cases.<sup>47</sup>

When the bullying or harassing behaviour has resulted in the victim taking sick leave, some arbitrators will order the employer to pay any difference between the sick pay received and the member's regular salary. An arbitrator may also order that any sick leave credits used during that time be restored.<sup>48</sup>

Other remedies that are routinely given by arbitrators include:

- a cease and desist order;
- a declaration that the behaviour constituted harassment and violated the collective agreement, the *Human Rights Code* and/or the *Occupational Health and Safety Act*;
- a no-contact order between the harasser and the victim;
- the institution of an anti-harassment policy or training program where none exists.

## 7. **Conclusion**

Harassment complaints pose among the most difficult issues Association must face in the representation of their members. The problems of defining harassment, putting in place effective preventive measures and representing those at both ends of the dispute create unique challenges. While the best representational practices will be responsive to the circumstances of the case, even-handedness, openness and principled support will always be the cornerstones.

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<sup>45</sup> *Tyee Village*, supra note 8 at 373.

<sup>46</sup> *Toronto Transit Commission*, supra note 16 at 256.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at 257.