



HUMAN RIGHTS COMMISSION

Newfoundland and Labrador

Harassment in the Workplace



What is the Human Rights Commission?



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- At-arms-length government agency
- Department of Justice & Public Safety
- Staff:
 - Commissioners
 - Investigative Staff
 - Administrative Staff
 - Executive Director
 - Lawyers

Role of the Commission

- Administer the *Human Rights Act, 2010*
- Investigate & resolve complaints
- Educate & inform
- Advise government, private business, individuals, schools and other groups

Human Rights Act, 2010



- Human Rights legislation is quasi-constitutional – it takes precedence over other legislation if there is a conflict (s.5 of the *Act*)
- Applies to the provincial government, all of its departments and agencies (school boards, hospitals, etc.) and to private business, landlords, non-profit organizations
- Does not apply to federally regulated businesses like banks, airlines, etc.

Discrimination

Definition

- A distinction, whether intentional or not, which is related to personal characteristics
- Imposes burdens, disadvantages or limits access to opportunities

Types of Discrimination

Direct Discrimination:

- plainly obvious

Systemic Discrimination:

- stereotypical assumptions based on a person's presumed traits
- harder to prove, much more subtle
- look at statistics, policies and procedures, organizational culture

Types of Discrimination

Adverse Effect Discrimination:

- Employer adopts for genuine business purposes a rule, which on its face is neutral, but has a discriminatory effect

Harassment:

- An individual is given the opportunity, but once in the job, they are subjected to negative treatment because of their race, disability etc.

Where is Discrimination Prohibited?



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- Goods, services, accommodation and facilities
- Commercial and residential housing
- Employment
- Publications
- Contracts

Prohibited Grounds



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- Must reasonably believe that discrimination or harassment is based on one or more of the prohibited grounds (immutable personal characteristics)
- Low threshold at intake, but must be able to prove link later on in process

What are the prohibited grounds?



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- Political opinion
- Race, colour, nationality and ethnic origin
- Social origin
- Religion and religious creed
- Age (no longer required to be 19 yrs)
- Disability
- Disfigurement
- Sexual Orientation, Gender identity, and Gender expression
- Sex (including pregnancy)
- Marital and family status
- Source of income (ONLY recipients of some form of income support through AES)
- Criminal conviction where the offence(s) is unrelated to the employment (section 14 ONLY)

Sexual Harassment

- Harassment is defined as *“a course of vexatious comments or conduct that is **known or ought reasonably to be known** to be unwelcome”*
- 2 part test:
 - 1) did harasser know how their behaviour would be received;
 - 2) How would someone else feel about the behaviour?
- Usually more than one event must take place or one very big event

Forms of Sexual Harassment

- Sexual solicitation and advances
- Poisoned environment (pornographic images in the workplace)
- Gender based harassment is “any behaviour that polices and reinforces traditional heterosexual gender norms”
- Violence

Examples of Sexual Harassment



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- Explicit sexual discussions
- Unnecessary touching/commenting on physical traits
- Demeaning or inappropriate terms
- Leering or inappropriate staring
- Showing or sending pornography, sexual pictures or cartoons, sexually explicit graffiti, or other sexual images (including online)
- Sexual jokes in person or by email
- Spreading sexual rumours (including online)
- Making an employee dress in a sexualized or gender-specific way

What is NOT Sexual Harassment?



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- Occasional compliment or remark
- Personality differences
- Jokes where both parties find the conduct acceptable (CAUTION: context is important)
- Normal exercise of supervisory responsibilities, including discipline or counseling

Preventing Sexual Harassment - Employer

- Owner or manager can be liable if knowingly permitted or failed to take reasonable steps to prevent the harassment
- Have appropriate policies/procedures in place
- Publicize them (posted/orientation/on-going training)
- Respond to complaints quickly/seriously
- Are resources available to respond to complaint?
- Healthy work environment for complainant
- How was the complainant told about the action taken?

Why have a policy?



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- Outlines parties rights, roles and responsibilities
- Limits harm and reduces liability
- Promotes equity and diversity goals
- Makes good business sense

Elements of a good policy

- Vision statement
- Legal rights and obligations of parties
- Reference to HRA and any other legislation
- Legal definitions of relevant terms/concepts
- Examples of unacceptable behaviour
- Who does policy apply to?
- How will internal complaints be handled?
- Available remedies
- Statement reinforcing right to file elsewhere

What should you do if you're harassed?



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- If safe, tell the person to stop
- Report it to your manager/authority
- Document
- Internal resolution policies, where possible
- Other options: union; HRC; labour standards; OH&S; RNC

Legal Burden of Proof

- Complainant has the onus of proving allegations
- Proven on a “**balance of probabilities**” – evidence that comments or conduct more likely than not took place
- Credibility of witnesses important
- Similar fact evidence may be introduced

Accommodation

- Employers and service providers have a duty to accommodate to the point of undue hardship
- All parties, including unions, have a duty to participate
- Dignity, individualization, inclusion
- Employer responsibilities:
 - Have policy in place
 - Take request seriously
 - Expert evidence, if necessary

What is undue hardship?

- Case by case analysis, but may include consideration of:
 - Financial Cost
 - Collective Agreement
 - Morale of other employees
 - Interchangeability of work force and facilities
 - Size of organization
 - Safety

Complaint Process

- One year limitation period
- Reasonable grounds to file a complaint
- Investigator will draft your complaint
- Legal document will be served on Respondent (the person or organization against whom the complaint is being filed)
- Early resolution (VRP)
- Independent, thorough, and unbiased investigation
- Cross-disclosure of information and documents
- Interviews/work site visits

Complaint Process

- Investigation Report
- Reviewed by Commissioners
- Mediation (CDM), Board of Inquiry or Dismissal
- Remedies – includes reinstatement, apology, damages etc.
- Appeal to Court
- New procedural powers in *Act* (Sections 31 to 33)

Contact Us



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