Grievances and Complaints Involving Human Rights

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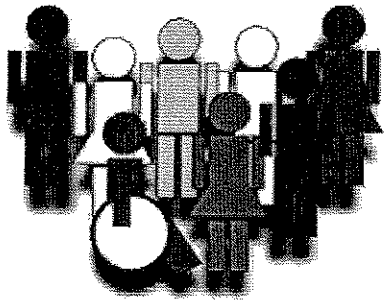

The PSAC's human rights policy statement and Constitution clearly outlines that we do not condone discrimination and that we will be vigilant in challenging discrimination in our workplaces.

Human rights are protected in law – through human rights legislation, labour legislation and health and safety legislation to some extent. Human rights laws are quasi-constitutional which means that other laws or agreements that violate human rights laws are invalid.

Collective agreements also protect and promote human rights.

There may also be workplace policies specifically related to human rights issues such as discrimination, harassment or duty to accommodate that deal with the implementation of human rights protections.

More generally, workplace rules, policies, contract language or practices may not appear discriminatory - but may still have a discriminatory impact on an individual or group of individuals. The Supreme Court, in its 1999 Meiorin decision, has set out the requirements for employers and service providers to build conceptions of equality into workplace standards. This places a two prong on the employer:

1) A positive obligation on employers to design workplace standards and requirements so that they do not discriminate (i.e., the employer must take proactive action to ensure these standards and requirements are not discriminatory).

2) A reactive obligation to address specific discriminatory impact on individuals on a case-by-case basis.

Should a negotiated arrangement or a collective agreement provision have a discriminatory impact, unions have a joint responsibility with the employer to proactively eliminate that discrimination.

However, even if the Union was not involved in negotiating or implementing a discriminatory provision, it must cooperate with the efforts of the employer to accommodate the worker.

There is case law that now sets out that unions need to be vigilant and ensure they provide thorough representation in human rights cases.

If a discriminatory act or practice occurs in the workplace, the grievance route is the route of preference for dealing with these human rights violations. The Union is entitled to and has a duty to ensure that discrimination is addressed.

Stewards and Locals should not wait for human rights complaints and grievances to be filed before eradicating discrimination in their workplaces. Many pro-active measures such as human rights training, work culture surveys, employment equity programs, anti-harassment training and measures to create inclusive workplaces can go a long way in ensuring that discriminatory practices do not occur. Unfortunately workplace discrimination may occur even when the union is vigilant in ensuring that pro-active measures have been implemented.

WHAT IS A HUMAN RIGHTS VIOLATION?

In simple terms, a discriminatory act or practice;

- results in a **denial of rights**, e.g., a denial of employment, promotion, etc;
- which occurs either in **employment** or in the provision of goods, services, facilities or accommodation;
- is based on or motivated by a **prohibited ground** for discrimination.

The manner in which discrimination occurs in the workplace may be subtle.

Stewards should remember that harassment based on a prohibited ground is a form of discrimination as is the refusal to accommodate a worker either related to their disability, family status, religion, ethnicity, etc.

PROHIBITED GROUNDS

Prohibited grounds of discrimination are found in human rights legislation. Anti-discrimination provisions in collective agreements also list prohibited grounds.

The grounds currently listed in the Canadian Human Rights Act include:

- race;
- national or ethnic origin;
- colour;
- religion;
- age;
- sex (including pregnancy and childbirth);
- sexual orientation;
- marital status;
- family status;
- disability (including mental conditions, alcohol or drug dependency), and;
- a pardon for criminal conviction.

It is important to check the specific grounds in the relevant human rights legislation since they vary from jurisdiction to jurisdiction.

The PSAC has supported the inclusion of "Gender Identity" and "Gender Expression" in human rights legislation.

GRIEVANCES

Most if not all PSAC collective agreements contain an anti-discrimination article. Here are a few examples of these:

Table 1 (PA Group)

*"**19.01** There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national or ethnic origin, religious affiliation, sex, sexual orientation, family status, mental or physical disability, membership or activity in the Alliance, marital status or a conviction for which a pardon has been granted."*

The Canadian Museum of Civilization

*"**14.01** The Corporation and the Alliance agree that there shall be no discrimination or harassment exercised in the workplace with respect to an employee by reason of age, marital status, family status, race, creed, colour, national or ethnic origin, political or religious affiliation, sex, sexual orientation, mental or physical disability, membership or activity in the Union or conviction for which a pardon has been granted."*

HUMAN RIGHTS COMPLAINT

In most jurisdictions, if a member believes he/she has been discriminated against based on one or more of the prohibited grounds, a complaint can be filed with the applicable human rights commission.

It is important to note that **at the federal level**, Bill C-4 which received Royal Assent in late 2013 will have significant impact on grievances. Once the representation related provisions are enacted, employees covered by the Public Service Labour Relations Act (PSLRA) will no longer have the right to file a human rights complaint with the Canadian Human Rights Commission. The only formal individual recourse route PSLRA units will have in cases of discrimination will be the grievance route. The time limit to file such a human rights grievance under the PSLRA will be extended to one year. In addition, an employee covered by the PSLRA will be able to file a human rights grievance directly (without requiring the approval of the union or union representation).

For other jurisdictions where it is possible to file a human rights complaint, it may still be useful to do this while filing a human rights grievance in order to protect the timelines under human rights legislation (which may vary across jurisdictions). In most cases, the human rights will place the complaint in abeyance until the human rights grievance has been dealt with. It is also important to note that human rights agencies are very reluctant to deal with a human rights complaint if the issue has already been dealt with through the grievance process. Therefore, it is important to emphasize that the grievance process should be exhausted fully and that in very few circumstances will the human rights agency deal with a human rights complaint that has already been dealt with through the grievance process. Although arbitrators have the authority to interpret human rights legislation, a human rights complaint provides protection in the event of an error in the grievance process.

HUMAN RIGHTS COMMISSIONS

Yukon Human Rights Commission
http://www.yhrc.yk.ca/

Northwest Territories Human Rights Commission
http://www.nwthumanrights.ca

Nunavut Human Rights Tribunal
http://www.nhrt.ca/splash.html

British Columbia Human Rights Tribunal
http://www.bchrt.bc.ca/

Alberta Human Rights and Citizenship Commission
http://www.albertahumanrights.ab.ca/

Saskatchewan Human Rights Commission
http://saskatchewanhumanrights.ca

Manitoba Human Rights Commission
http://www.manitobahumanrights.ca/

Ontario Human Rights Commission / Commission des droits de la personne de l'Ontario
http://www.ohrc.on.ca/

Québec. La Commission des droits de la personne et des droits de la jeunesse
English http://www.cdpdj.qc.ca/en

New Brunswick Human Rights Commission
http://www.gnb.ca/hrc-cdp/index-e.asp

Nova Scotia Human Rights Commission
http://humanrights.gov.ns.ca/

Prince Edward Island Human Rights Commission
http://www.gov.pe.ca/humanrights/

Newfoundland Human Rights Commission
http://www.justice.gov.nl.ca/hrc/

Canadian Human Rights Commission
http://www.chrc-ccdp.ca/

EMPLOYER POLICY

Employers may have human rights related policies that set out the principles and processes which must be undertaken by the employer in order to meets its human rights obligations. Employers are required, since the Bonnie Robichaud Supreme Court Decision, to have a process to address harassment. Many employers have duty to accommodate policies. These policies usually outline a complaint process for employees who feel the policy has not been respected.

It should be noted that cases of personal harassment which are not linked to a ground of discrimination cannot be adjudicated through the grievance process (unless the collective agreement contains an article on personal harassment) nor can they be the basis of a human rights complaint. Cases of personal harassment can be dealt with via the employer's policy.

HEALTH AND SAFETY

Federal Public Sector Employers are legally required under *Canada Labour Code (CLC) Part II* and *Part XX-Violence Prevention in the Work Place* of the *Canada Occupational Health and Safety Regulations (COHSR)* to provide employees with a safe and healthy work environment free of all types of violence including harassment and bullying.
While there are many definitions of harassment, traditionally, harassment has been defined as:

"Any improper conduct by an individual that is directed at and offensive to another person or persons in the work place and which the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, or any act of intimidation or threat. It includes harassment within the meaning of the Canadian Human Rights Act (CHRA). "

Part XX requires Employers to develop and post a Work Place Violence Prevention Policy which sets out specific obligations of the employer which include providing a safe, healthy and violence-free work place, establishing emergency notification procedures to respond to work place violence as well as assisting employees who have been exposed to work place violence.

It is important to note that the remedies for human rights related violations under the grievance process is different from the health and safety process since the purpose of each process is very different. Therefore, it is important to determine which route is the most appropriate under the circumstances. Both can be utilized at the same time.

When using health and safety recourse, it is important that the complaint explicitly state this.

DEALING WITH A GRIEVANCE INVOLVING HUMAN RIGHTS

The person experiencing the discrimination may not articulate her or his experience as discrimination but as an unfair practice or experience. Stewards should assess whether the situation is related to a discriminatory practice.

In addition, persons who belong to groups protected by human rights legislation may have had to deal with prior situations of exclusion or discrimination in other aspects of their lives. A person experiencing

discrimination in the workplace may require support from others, including union representatives, due to the emotional, physical and psychological impact of the discrimination. Stewards should be familiar with support mechanisms available to the person experience discrimination (i.e. EAP, counselling, advocacy groups, PSAC equity committees etc.)

GATHERING EVIDENCE

The key issue in analyzing a human rights complaint or grievance is the question of **evidence**. It is important to have evidence to establish that the employer's action, policy or practice is discriminatory and linked to a prohibited ground of discrimination. Stewards play an important role in gathering the evidence.

Here are additional tips on gathering human rights related evidence:

- Information or evidence will be required from the person experiencing the discrimination.
- Information or evidence may also be required from witnesses and experts (i.e. medical experts, experts on organizational health or safety).
- Each case will be unique and different evidence may be required but in essence, the evidence should show that: a) the person(s) who is experiencing the discrimination falls within the prohibited grounds; b) the discriminatory practice is linked to the prohibited ground (i.e. a racialized person is denied an employment opportunity due to her or his race) and c) the impact of the discriminatory practice (i.e. person had to take leave of absence due to the discriminatory practice).
- Victims of discrimination or harassment may be isolated in the workplace. This may make it more difficult to find witnesses. Remind witnesses that you are not asking them to decide if harassment/discrimination has taken place. You simply want them to share what they have seen or heard.

- Look for patterns and for differential treatment (a comparison with how others are being treated) and document this evidence.
- It is not necessary to prove intent. In human rights investigations, intent does not affect whether or not an action is deemed discriminatory.
- Ensure members keep track of any leave taken or other benefits used as a direct result of the harassment/discrimination.
- Advise the member to alert their health care professional that they are being harassed.
- Determine if medical evidence is necessary and if so, how to best gather it.

OTHER USEFUL NOTES:

- Retaliation against members who file human rights complaints or grievances is a violation of their rights. The sad reality is that members who file human rights related complaints or grievances are often belittled or ostracized. Stewards should be vigilant about challenging and recording these incidents on the case file and forward these details up the line. This could support the union's demand for punitive damages.

- It is a discriminatory practise to refuse to renew a temporary worker or to terminate their contract sooner because they have requested accommodation, are pregnant, have complained about racism, etc.

- In cases of harassment involving allegations against other members, stewards are to guide their interventions according to the PSAC Policy on Union Representative: Workplace Harassment

PSAC RESOURCES:

The PSAC has several publications and documents which may assist you in representing human rights related complaints:

- PSAC Policy on Union Representation: Workplace Harassment
- Duty to Accommodate a PSAC Guide for Local Representatives
- Accommodating Mental Health Disabilities in the Workplace: A Tool for Union Representatives