



What's New in HR Law

Human Rights Violation Found to Arise from an Employee's Forced Complicity in a Sexual Relationship

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Bottom Line

In cases involving sexual activity between two co-workers, it can be difficult to determine whether a participant is truly consenting or merely acquiescing to the relationship. As the #MeToo movement has revealed, the line between consent and acquiescence becomes even more blurred when there is a significant power imbalance between the participants to a sexual encounter.

The Human Rights Tribunal of Ontario (“HRTO”) grappled with this timely issue in [NK v Botuik](#). Along with setting the HRTO’s second-highest damage award, the decision is noteworthy in its description of how workplace sexual harassment can develop and how victims may cope with abusive work-related experiences.

This update is for general discussion purposes and does not constitute legal advice or an opinion.

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Factual Background

The applicant was employed by a group home provider as a part-time direct care worker. In this role, she was responsible for the care of residents with significant disabilities, many of whom were non-verbal.

Initially, the applicant worked out of the employer's Brealey Residence group home. The respondent was employed as the on-site residence supervisor at the Brealey Residence. Most critically, the respondent exercised complete control over shift assignments, which were scheduled at his discretion instead of according to any objective system.

Over the course of her employment, the applicant was subjected to sexual harassment by the respondent. The alleged misconduct by the respondent included:

- Frequently calling the applicant's personal cell phone, mostly for reasons unrelated to work;
- While alone in a company vehicle with the applicant, commenting about oral sex performed by women with tongue piercings;
- Instructing the applicant to give him a massage in a locked office;
- Kissing and fondling the applicant after having cornered her in areas of the workplace, despite the applicant's protests and occasionally in the presence of the group home's residents; and
- Forcing the applicant to engage in sexual activity with him in the workplace.

Throughout his inappropriate treatment of the applicant, the respondent would remind the applicant of the power that he exercised over her employment. The respondent would also "dangle" shifts in front of the applicant, with the insinuation that he would assign her to more shifts if she acquiesced to his sexualized behaviour. These comments had a significant impact on the applicant, who, as both a single mother and a probationary employee, intensely feared losing her income and a chance at full-time employment. Consequently, out of a desire to keep her job, the applicant gradually stopped resisting the respondent's sexual advances.

Notably, the applicant was a survivor of sexual assault as a child and had been in abusive domestic relationships later in her life. This history contributed to how the applicant reacted to the respondent's sexualized behaviour: she felt as though she had to go along with the respondent's actions and do what he wanted.

At the end of her probationary period, the applicant transferred to another group home run by the employer. Despite the transfer, the respondent would not leave the applicant alone and, every few weeks, would attend at the group home to observe or speak to the applicant.

Later, after learning that the applicant had begun dating another individual, the respondent threatened to end the applicant's employment and then sexually assaulted her. The next day, the respondent reported the applicant to the police for criminal assault. This led to the applicant's arrest and, in turn, the cancellation of the applicant's work shifts due to the allegations against her.

The applicant complained to her employer about the respondent's sexual misconduct. Following a lengthy workplace investigation by an external investigator, the employer dismissed both the applicant and the supervisor for having engaged in inappropriate activity in the workplace.

The HRTO Decision

The applicant filed a human rights complaint against the employer and the respondent in his personal capacity. Following a negotiated resolution between the applicant and her employer, the HRTO proceeded to adjudicate only the allegations raised against the respondent. The respondent, however, did not participate in the proceeding.

The HRTO found clear evidence that the respondent subjected the applicant to persistent and severe sexual harassment both in and pertaining to the workplace. Using his position of authority, the respondent engaged in a series of escalating actions that were designed to cultivate a sexual relationship with the applicant. The HRTO held that the respondent knew, or ought to have known, that his actions were unwelcome — especially given that each of his advances were met with the applicant's reticent body language and voiced objections.

Moreover, the HRTO held that the respondent had engaged in sexual solicitation contrary to the *Human Rights Code*. At the time of his sexual advances, the respondent was in a position to confer or grant benefits to the applicant. In fact, the respondent actually did confer such benefits to the applicant by often scheduling her to work more than 40 hours per week, even though she was a part-time employee, and providing her with advanced training opportunities. When these benefits were granted, the respondent made clear to the applicant that he could reduce her hours if she displeased him, irrespective of her actual job performance.

Although the applicant had eventually acquiesced to her relationship with the respondent, the HRTO found that the relationship was forced. Because the applicant had been mentally beaten into a state of fearful compliance, her participation in the relationship and compliance with the respondent's demands could not have been based on true consent.

The HRTO awarded \$170,000.00 in general damages against the respondent to compensate for the injury to the applicant's dignity. This high damages award was warranted due to, *inter alia*, the extremely serious nature of the respondent's misconduct, the applicant's particular vulnerability due to her life circumstances, and the traumatic effect that the respondent's actions had on the applicant.

Check the Box

The HRTO's decision clarifies that legal consent does not extend to situations where an individual complies with sexual acts out of a fear of reprisal. Employers should keep this important consideration in mind when conducting investigations into alleged workplace harassment. Especially where the parties to a complaint share a direct reporting relationship, investigators may need to assess the extent to which a harasser has generated complicity to manufacture sexual consent.

Need more information?

For assistance navigating the workplace investigation process, or for representation in related litigation, contact [Cassandra Ma](#) at 416-408-5508, or your regular lawyer at the firm.



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