

The Definition Of Harassment For Federally-regulated Employers



Although courts have not yet addressed the nuances of this definition to settle the debate, I dare say there are excellent arguments challenging that initial interpretation. In my view, when applied to a set of facts, the criteria in the federal definition of harassment are virtually identical to those under Ontario and Québec legislation. I have reproduced the relevant definitions here:

Canada Labour Code, section 122(1):

“harassment and violence” means any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.

Québec – Act respecting labour standards, section 81.18:

For the purposes of this Act, “psychological harassment” means 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 environment for the employee. For greater certainty, psychological harassment includes such behaviour in the form of such verbal comments, actions or gestures of a sexual nature.

A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment.

Ontario – Occupational Health and Safety Act, section 1:

“workplace harassment” means,

- (a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
- (b) workplace sexual harassment.

Both provincial laws refer to “vexatious conduct,” whereas the *Canada Labour Code* refers to conduct that “cause[s] offense” or “humiliation.” In my view, the term “vexatious” is practically synonymous with those terms. *Merriam Webster* defines “offensive” as something “causing displeasure or resentment,” and “humiliating” as something “extremely destructive to one’s self-respect or dignity.” The term “vexatious” refers to “distressing” which means “a pain or suffering affecting the

body (...) or the mind." In French, these definitions all refer to the same meaning, which is to hurt someone's self-esteem and dignity.

One difference lies in the fact that Québec's definition also requires harm to dignity or physical integrity, whereas in the federal definition, the use of the word "or" makes physical or psychological injury optional (if the act is offensive or humiliating). But in practice, do we often see offensive and humiliating behaviours at the federal level that produce no harm to dignity? That will depend on how courts interpret it—but from a definitional standpoint, the terms offensive and humiliating imply an affront to dignity.

I do admit that there's a significant apparent difference between the federal and provincial definitions: the repetition criterion. Québec and Ontario definitions speak of repeated gestures or acts (in the plural), whereas the federal definition refers to "any action, conduct or comment" (in the singular), which may suggest a lower threshold for harassment under federal law in that a single occurrence could meet the threshold. However, when applying the criterion (causing offence or humiliation) in the federal definition, a single act will need to be sufficiently serious to meet this threshold; if not, several acts would need to be repeated if they are of a lesser severity. This results in the same outcome as the provincial laws which also allow for a single conduct sufficiently serious to constitute harassment—and the federal singular form does not exclude repeated conduct either.

Moreover, there is an objective assessment of behaviours in the *Canada Labour Code* definition. In French, this is reflected by "vraisemblablement," whereas in English the term used is "reasonably." In my opinion, these terms indicate that like the Ontario and Québec laws, a reasonable person placed in the same circumstances and with similar characteristics should also conclude that these behaviours are offensive or humiliating.

Returning to my earlier argument regarding repetition: would a reasonable person conclude that harassment occurred based on a single action, conduct, or comment that is not particularly serious? I do not believe so. Therefore, the outcome is, in my view, the same under all three definitions—that harassment always involves evaluating the gravity/repetition of the conduct.

The Québec law is certainly more explicit on these criteria, particularly in emphasizing that behaviours must be sufficiently serious. But in my opinion, these nuances are superficial and perhaps reflect the difficulty of describing workplace harassment in legal terms. I would add that the term "harassment" has a meaning that transcends the law, and that it is established both in common usage and case law that harassment implies a certain level of seriousness. In this context, although the legislator undoubtedly intended to foster cultural change in workplaces, I do not believe they intended to set an unexpectedly low threshold.

Until a court or tribunal clarifies the interpretation, some ambiguity will remain. What I've written above is my interpretation; legal decision-makers may interpret the federal definition differently. Meanwhile, those conducting investigations for federally-regulated employers should carefully examine the definition of harassment and explain in their investigation reports how that term was interpreted.

Finally, it's also prudent for investigators—especially those who are internal—to seek legal advice if they are uncertain about how to apply the definition. Likewise, employers should exercise great caution before dismissing allegations at the outset of a matter on the basis that they do not appear to meet the definition of workplace harassment. As we'll see in future posts, that could be a costly error in this federally-regulated process—a process now largely driven by the complainant.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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