

# Zero Tolerance — Can It Work in a Unionized Environment?

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A YOUNG WOMAN who works underground in a potash mine has just finished her shift. As she exits the “cage” at ground level and walks toward the change room, a 52-year-old male co-worker runs up behind her and grabs her crotch. The female worker is mortified. “It was just a joke,” says the man in his defence. There is no history of acrimony or harassment between the two. However, the employer has a “zero tolerance” policy toward sexual harassment and, after a brief investigation, the man — with 25 years seniority — is fired. The union, obliged by tradition and by law<sup>1</sup> to defend the grievor’s interests, responds by grieving the member’s dismissal and taking it to arbitration.

The arbitrator’s decision is not an easy one. If he upholds the dismissal, he is sacrificing the time-honoured principle, embedded in Canadian industrial relations, of progressive discipline. Under this principle, a worker cannot be fired for a single incident unless

- a. it is a “culminating incident” following several reprimands for similar offences, or
- b. the incident itself constitutes “gross misconduct,” an incident so injurious to the employer’s interests that dismissal is the only option.

<sup>1</sup>Unions are obliged by law to represent their members in a way that is not arbitrary, discriminatory, or in bad faith. Theoretically unions can refuse to grieve or arbitrate dismissals but labour relations boards put them to such a rigorous test that most unions arbitrate all dismissals. See Michael MacNeil, Michael Lynk, and Peter Engelmann, *Trade Union Law in Canada* (Aurora 2003), 7:10-7:40.

Another time-honoured arbitral tradition, moreover, is that a long, unblemished employment record is a major mitigating factor against peremptory dismissal.<sup>2</sup>

If the arbitrator decides in the union's favour, the perpetrator returns to his job in the mine. Even if the arbitrator substitutes a suspension, the long wait for arbitration usually means the grievor returns to work immediately with some back pay. This often looks like a vindication of the grievor, nay a triumph, effectively undermining management's decision and making light of the seriousness of the incident. And, more to the point, where is the victim and her complaint in all of this and what damage is done to the employer's policy against sexual harassment?

This paper is about zero tolerance of sexual harassment in the workplace and how employers and unions wrestle over this problem — with each other, and within themselves. The paper examines eight cases in the arbitral jurisprudence in which workers were fired for sexually harassing female co-workers. In each case, the union took the dismissal to arbitration to get it overturned. In most of the cases, the arbitrator awarded the men their jobs back. These reinstatements proved to be a rejection of zero tolerance policies. Zero tolerance policies are a relatively new phenomenon in the workplace. Historically, the benchmark for workplace policies on discipline has been “progressive discipline,” a term used by human resource professionals to “grade” or rank employees' breaches of workplace discipline. Clearly, most employers have rules for employees' behaviour. Employers customarily insist on rules to govern safety in the workplace, to limit breaks and “downtime,” or to discourage fighting in the workplace<sup>3</sup> (among other things).

It became clear that employers could not very well mete out severe punishment — such as dismissal — for either small infractions, or for first-time offences — especially in a unionized environment. In a non-unionized or a unionized environment, dismissal — for any infraction — would have a potentially destabilizing effect on a workplace. It would be reminiscent of the time when workers were routinely fired for not reaching a production quota, or even for being late to work. For example, a century ago Frederick Taylor regularly fired factory workers who could not keep the pace that he prescribed in his infamous time/motion studies.<sup>4</sup> Taylor had zero tolerance for workers who did not meet his production demands. However, things changed. After World War I, a surge in unionization<sup>5</sup> caused managers to re-think the draconian forms of discipline which had previously been acceptable.

<sup>2</sup>Donald Brown and David Beatty, *Canadian Labour Arbitration*, 3rd ed., No. 41 (Aurora 2003), 7:4314.

<sup>3</sup>Anthony Giles and Akivah Starkman, “The Collective Agreement,” in Morley Gunderson, Allen Ponak, and Daphne G. Taras, eds., *Union-Management Relations in Canada* (Toronto 2005).

<sup>4</sup>Eric Breitbart, *Clockwork* (San Francisco, CA. California Newsreel, 1982). Documentary film.

<sup>5</sup>In 1913 before troops went off to World War I, union membership in Canada stood at 176,000. In 1918, it was 249,000. In 1919, that figure swelled to 378,000. See John Godard, *Industrial Relations, the Economy, and Society*, 2nd ed. (Toronto 2000), 83.

Step-by-step or progressive discipline was considered by some to be a more positive way to impose discipline. An example of progressive discipline is that for a first offence perhaps the offending employee may receive a verbal warning and told not to do it again; for a second offence he or she may receive a formal penalty of a note placed in their employee file. For a third offence — depending on the severity of the transgression — the employee may be suspended or even dismissed.

However, as we will see, by the 1990s, some transgressions became totally unacceptable either because of changes in the law or due to a shift in the political or social climate in the workplace. This was indeed the case with sexual harassment. It was prohibited under human rights law in every province and in the federal jurisdiction.<sup>6</sup> In addition, because of an increasing (and unprecedented) number of women entering the workforce<sup>7</sup> and staying there, sexual harassment was decreasingly tolerated. With the legal prohibition against sexual harassment, employers no longer had an excuse to condone, tolerate, or ignore it. Underscoring the law was the standard “no discrimination” clause written into almost every collective agreement in the country. Just as it sounds, the clause prohibits discrimination on the basis of gender and race, among other things. The human rights law in tandem with the “no discrimination” clause made it possible to put a box around sexual harassment and to distinguish it from the “garden variety” of discipline issues such as lateness or absenteeism. If sexual harassment was seen as a serious offence (because of the legal implications for the employer), then perhaps disciplinary measures against it ought to be “fast-tracked.”

Since other misdemeanours — such as lateness, absenteeism, insubordination, or “slacking off”<sup>8</sup> — were not directly addressed in collective agreement preambles (the way the “no discrimination” clause was), the other misdemeanours were typically subject to progressive discipline. Lateness and absenteeism were often considered merely technical challenges to discipline. Yet sexual harassment, it could be argued, deserved to be stopped or at least acted upon right away.

Sexual harassment, as a problem, became management’s jack-in-the-box. As soon as it popped up, because of the potential of legal problems that could ensue, management tended to respond immediately and seriously. One rather impulsive way to tackle the problem was to eliminate it. To do so, management had to institute a policy of zero tolerance. Zero tolerance meant immediate discipline for a first offence. The discipline could range from a written warning to dismissal. For instance, in the IMC Potash case examined later in this paper, the company’s anti-sexual

<sup>6</sup>Arjun P. Aggarwal, *Sexual Harassment in the Workplace*, 2nd ed. (Markham 1997).

<sup>7</sup>See [http://www.swc-cfc.gc.ca/pubs/b5\\_factsheets/b5\\_factsheets\\_3\\_e.pdf](http://www.swc-cfc.gc.ca/pubs/b5_factsheets/b5_factsheets_3_e.pdf) (retrieved 9 January 2005).

<sup>8</sup>This used to be called “soldiering” in Frederick Taylor’s time.

harassment policy spelled out that zero tolerance could mean anything up to and including termination.<sup>9</sup>

This paper examines how zero tolerance policies work in practice in the unionized environment. In the selected arbitration cases studied, unions do battle with employers when union members are disciplined for sexually harassing co-workers, who are often also union members.

And what about unions? Since unions by their very nature are adversarial organizations designed to act as a check or balance against management's excesses (including over-zealous discipline), sexual harassment in the workplace is usually seen as management's problem — not the union's. Most unions have internal policies condemning sexual harassment between members, especially when it occurs at union meetings and conventions. Unions, including the Canadian Autoworkers [CAW], the Canadian Union of Public Employees [CUPE], the Canadian Union of Postal Workers [CUPW], the United Steelworkers of America [USWA], and the Communications, Energy and Paperworkers Union [CEP], have strict rules against sexual and personal harassment at their own conferences or on their own turf. The Canadian Labour Congress [CLC] also prohibits it at meetings. While union members can be castigated and indeed expelled from union meetings for saying or doing harassing things, that discipline is enforced by fellow members. There is little risk to the person's livelihood. A problem arises in the unionized workplace when management disciplines a union member who is harassing a co-worker, often a fellow union member. Of course when a worker is disciplined, it can compromise wage/salary remuneration, even the right to employment, so the stakes are raised.

Unions allow that sexual harassment should fall under the “no discrimination” clause in their collective agreement,<sup>10</sup> but it is still a thorny issue. It is thorny because both the accused perpetrator and the victim are typically union members. It is thorny also because management tends to use the victim — and the issue of sexual harassment — to club the union. This is what happened in the IMC case below. So how do unions deal with member-on-member harassment in the unionized workplace? Can unions defend the perpetrators and speak for the victims at the same time?

Perhaps it is easier to see the problem of sexual harassment and unions in the following way: the “first shoe” drops as management typically scurries to discipline — even dismiss — the person who they think is guilty of sexual harassment on their premises. The “second shoe” drops as the union — which sees its interest in preserving its integrity and defying management's control — becomes eroded when management, perhaps unfairly, disciplines a union member. However, for the

<sup>9</sup>IMC's sexual harassment policy was a four-page grey-covered booklet given to all employees — including those in the US and Canada — in the early 1990s.

<sup>10</sup>The clause really exists to stop a supervisor from harassing a union member. A union can file a grievance under this clause if one of its members is being harassed by a member of management.

union, when a member is disciplined for sexual harassment, it is a more difficult situation than when a member is disciplined for the “garden variety” of offences. Clearly, in both cases the union’s first obligation is to defend its members. But the union also is obliged to assist a member who suffers discrimination at work. And since a Supreme Court of Canada ruling in 1989,<sup>11</sup> sexual harassment has been classified as a form of sex discrimination.<sup>12</sup> So in this paper, both “shoes” will be examined: the issue of management’s use of zero tolerance as a form of discipline in cases of sexual harassment as well as the union’s response and fulfillment of its legal and ethical dilemmas.

### *A Brief History of the Struggle Against Workplace Sexual Harassment*

Though women worked in “men’s jobs” during both wars and have flooded into the labour market since 1970, it is only relatively recently that women have taken “non-traditional” jobs<sup>13</sup> and worked beside men in those jobs. These are jobs in skilled trades and in mines, mills, and various resource industries. In factories women, once relegated to assembly and packing, now join men in machine shops and other facets of production.

In the past 25 years, there has been increasing attention to sexual harassment in the workplace.<sup>14</sup> Sexual harassment can be a complex and serious problem. Observers have divided it into two types: sexual intimidation or coercion and sexual disapprobation. The first, sometimes called *quid pro quo* sexual harassment, offers to improve a woman’s pay, working conditions, or promotion opportunities if she accedes to the sexual advances of a superior, or punish her if she does not. The second type of sexual harassment is annoyance or intimidation, and though it usually does not directly affect the woman’s job prospects, it makes the workplace environment unsafe, often terrifying, sometimes toxic, and can actually be worse than *quid pro quo* offences. It ranges from verbal innuendos and what may seem like harmless gestures such as touching or hugging to molestation and actual rape. But the

<sup>11</sup>See *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352.

<sup>12</sup>For example, the Canadian Human Rights Act says, “sexual harassment shall ... be deemed to be harassment on a prohibited ground of discrimination.” See Section 14 (2).

<sup>13</sup>Irene Padavic and Barbara Reskin, *Women and Men at Work*, 2nd ed. (Thousand Oaks, CA 2002), 64-66; Kay Deaux and Joseph C. Ullman, *Women of Steel: Female Blue-Collar Workers in the Basic Steel Industry* (New York 1983); Aggarwal, *Sexual Harassment in the Workplace*, 308.

<sup>14</sup>Aggarwal, *Sexual Harassment in the Workplace*, 2-5; Pradeep Kumar and Lynn Acri, “Unions’ Collective Bargaining Agenda on Women’s Issues: The Ontario Experience,” *Relations Industrielles*, 47 (Autumn 1992), 623-653; Diane Crocker and Valery Kalembara, “The Incidence and Impact of Women’s Experiences of Sexual Harassment in Canadian Workplaces,” *The Canadian Review of Sociology and Anthropology*, 36 (November 1999), 541-559.

psychological torture of a poisoned work environment can be more injurious than any physical assault.

Gerri Sanson, a Toronto lawyer, claims that the types of jobs women have affect the way they are harassed.<sup>15</sup> If women are working in “traditional” jobs, such as clerical or call centre work, service, sales, or reception, some men tend to look upon the women as potential dates or sweethearts. Men comment on their appearance and attractiveness (or lack of it) and even sometimes try to befriend, hug, or paw them. However, things take on a more sinister aspect in non-traditional workplaces, such as mines, trades, or production lines.<sup>16</sup> Women there are sometimes considered a threat to men’s long-term job security. Men feel the jobs should be reserved for themselves or other men. The argument goes that men are breadwinners and these jobs are more highly skilled and have better pay and benefits than what working women typically receive.<sup>17</sup> As a result, harassers try to drive women out of the workplace. There are two key ways this is done. First, the harasser may make repeated, mean, or hurtful jokes or taunts, or circulate stories about a woman co-worker’s promiscuity or sexual habits.<sup>18</sup> Second, the harasser may leave a nasty talisman — such as a pornographic picture or a sexual object — at the women’s work station.<sup>19</sup>

Once virtually ignored by employers, by the 1980s sexual harassment had become a recognized workplace problem and legislators explicitly added it to human rights legislation or courts effectively “read it in.” In several Acts, notably the On-

<sup>15</sup>Margot Gibb-Clark, “Managing Harassment Tragedy Sparks Quest for Answers,” *Globe and Mail*, 31 March 1998, B13.

<sup>16</sup>Gibb-Clark, “Management Harassment Tragedy,” B13; Kristen R. Yount, “Ladies, Flirts, and Tomboys: Strategies for Managing Sexual Harassment in an Underground Coal Mine,” *Journal of Contemporary Ethnography*, 19 (January 1991), 396-422.

<sup>17</sup>For example, the female-to-male earnings ratio usually quoted is based on Statistics Canada’s Survey of Consumer Finances [SCF]. In 1997, the latest year for which data are available, the SCF showed that women working full-year full-time earned only 72.5 cents for every dollar earned by men. The survey definition of “full-year full-time” is problematic since men tend to work more hours than women, but the SCF provides the longest time series available and is thus able to show changes over time in women’s relative earning power, as displayed in the following table. See <http://www.statcan.ca/english/ads/11-010-XPB/pdf/feb00.pdf>.

<sup>18</sup>In an infamous case at the Dairy Producers’ Cooperative in Saskatoon, at least one of the two lone women working in the plant with 180 men was the subject of rumours. The most insidious rumours were the claims by male co-workers that they had had sex with the woman when her husband, who also worked at the plant, was on a different shift.

<sup>19</sup>This was done to a black woman who worked at Colgate-Palmolive in Toronto. She actually received a large penis sculpted from soap from co-workers. At the Dairy Producers’ Cooperative in Saskatoon, two women who worked in the ice cream department were greeted with signs hung in the factory ridiculing their undergarments or their menstrual periods. See also Yount, “Ladies, Flirts, and Tomboys,” 400.

tario Human Rights Code and the Canadian Human Rights Act, sexual harassment itself is explicitly defined and prohibited. In some provinces, notably Nova Scotia and Alberta,<sup>20</sup> the courts have held that prohibition of sexual harassment is included within the prohibition of sex discrimination. These alterations to human rights legislation were sea changes in the Canadian social and legal realms. After all, human rights legislation which guarantees equal pay for equal work<sup>21</sup> is barely 30 years old.<sup>22</sup> It is barely twenty years since sexual harassment has been named as a form of discrimination.

Over these years, employers have tried to grapple with the issue of sexual harassment. The position of the perpetrator is often an important consideration in how employers tackle the problem. There is supervisor-on-worker harassment and worker-on-worker harassment. In supervisor-on-worker harassment, even if the employer considers it loathsome, the complaint by a subordinate always has an element of subversion of managerial authority. Management is challenged to discipline one of “their own” on the word of an underling. Thus the woman complainant frequently faces a wall of denial from the employer. Management often turns a deaf ear to the complaint and counts on the victim either quitting her job or requesting a transfer.<sup>23</sup>

Worker-on-worker harassment is somewhat less complicated for companies to deal with for two reasons. First, it does not make the employer choose between a subordinate and a superior. True, under Canadian human rights law, regardless of whether or not the sexual harassment was perpetrated by a supervisor or a coworker, management can be held responsible.<sup>24</sup> Cases of worker-on-worker harassment, however, can sometimes work to management’s advantage allowing it to

<sup>20</sup>Under the Alberta Human Rights, Citizenship and Multiculturalism Act sexual harassment is included within the prohibition of sex discrimination. See <http://www.albertahumanrights.ab.ca/faqs/protection.asp>. With the Nova Scotia Human Rights Act, there is the interpretation that “sex” discrimination includes sexual harassment. See <http://www.gov.ns.ca/legi/legc/statutes/humanrt.htm>.

<sup>21</sup>Clearly, equal pay for equal work is a giant step behind the concept of equal pay for work of equal value. The former has been part of human rights legislation since 1976-1977. And still, in most jurisdictions (except the federal one) there is very little to guarantee equal pay for work of equal value.

<sup>22</sup>See <http://laws.justice.gc.ca/en/h-6/30599.html>. Section 11(1) of the Canadian Human Rights Act says: “It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value.” (from 1976-1977)

<sup>23</sup>Constance Backhouse and Leah Cohen, *The Secret Oppression: Sexual Harassment of Working Women* (Toronto 1978); Aggarwal, *Sexual Harassment: A Guide for Understanding and Prevention* (Markham 1992), 11.

<sup>24</sup>Aggarwal, *Sexual Harassment in the Workplace*, 216.

discipline or even terminate an irksome or problematic employee<sup>25</sup> and to spread mischief and dissension within the union.

For unions, member-on-member harassment presents a classic dilemma. In the fordist model of business unionism, unions are not proactive and find it most comfortable to react only when management acts, to grieve and arbitrate only when management explicitly breaks the collective agreement.<sup>26</sup> In cases of member-on-member sexual harassment, the union finds it most easy to defend the member faced with discipline or discharge. It is in the quasi-legal arena of arbitration that unions shine because so much of the work of unions is circumscribed by the law and they have become so used to it. But the union may overlook or even abandon the member who was victimized because that person is not facing discipline by management. Sometimes the union may also vilify the victim as the one who set the discipline in motion and occasionally subject her to brutal cross-examination if she takes the witness stand at arbitration.<sup>27</sup>

Management has many reasons for wanting to combat workplace sexual harassment. It can cause instability in the workforce and damage the employer's reputation. Sexual harassment is grounds for a highly embarrassing complaint to the human rights commission. Few companies can afford — either financially or in terms of their reputation — to have a case go before a human rights tribunal. Victims sometimes quit their jobs, often suddenly, and turnover can be a serious problem for an employer. Even the rumour that an employer runs a “rough” workplace could discourage some people (especially women) from working there. Hence, the understandable recourse to a zero tolerance policy.

### *Zero Tolerance*

The notion of zero tolerance is not restricted to the workplace. It became prevalent in schools across North America as a way of combating bullying and violence, especially in the US, where students occasionally carried weapons in their backpacks.<sup>28</sup> In 1999, the Toronto District School Board initiated a zero tolerance policy,<sup>29</sup> in which carrying a weapon or a violent incident at school could result in a student's expulsion.

<sup>25</sup>This was the case at IMC. The industrial relations manager stated flat out that the assailant should have been fired long ago (for a series of minor infractions), but the company had been much too “benevolent” to do so.

<sup>26</sup>Larry Haiven, “Hegemony and the Workplace: The Role of Arbitration,” in Larry Haiven, Stephen McBride, and John Shields, eds., *Regulating Labour, The State, Neo-Conservatism and Industrial Relations* (Toronto 1990), 79-117.

<sup>27</sup>Later in the paper, two cases (IMC and NAPE) explore the issue of the union being forced to help a member they do not wish to help.

<sup>28</sup>William Ayers, Bernardine Dohrn, and Rick Ayers, *Zero Tolerance* (New York 2001).

<sup>29</sup>Policy of the Toronto District School Board, Number C.06: Safe Schools, 3.



At around the same time, workplace managers began adopting zero tolerance toward sexual and personal harassment. A major contributor to this trend was the famous Robichaud case.<sup>30</sup> In 1980, Bonnie Robichaud, a cleaner on a Canadian forces' base in North Bay, Ontario, complained to the Canadian Human Rights Commission of sexual harassment by her supervisor. The initial tribunal decided sexual harassment had not taken place because the relationship with the supervisor began as consensual — even though it became otherwise over time.<sup>31</sup> The tribunal also accepted the employer's argument that the employer was not responsible because it did not know of the incidents. A review tribunal reversed that decision, stating that the victim's clear withdrawal of consent had to be taken seriously. Perhaps more importantly, the appeal body also rejected the employer's plea of ignorance and found the employer "strictly liable" for the actions of the supervisor. The Federal Court of Appeal, in a split decision, overruled the appeal tribunal.

Arriving at the Supreme Court of Canada, the case made history when the top court decided, among other things, that the employer has "vicarious liability" in sexual harassment cases. Whether or not the employing company was aware of the harassment, it was responsible for what occurred at the workplace.<sup>32</sup>

As can be imagined, this decision had an ominous effect on Canadian employers. No longer could they argue ignorance. If they did not know about sexual harassment, the Supreme Court said, they should have known. Similar case law was being decided in the US and in some cases employers were losing expensive lawsuits.

To defend themselves in advance, many employers responded by promulgating blanket prohibitions on sexual harassment and insisting that any instance would result in dismissal of the perpetrator. Presumably, employers thought that such harsh measures would illustrate the seriousness of both the offence and the employers' desire to prevent it. As we shall see, this response was neither adequate nor well thought out.

### *The Arbitration Cases*

Many of the issues surrounding sexual harassment, zero tolerance, and women in non-traditional jobs came together in a particularly striking way in several emblematic<sup>33</sup> labour arbitration cases. The methodology used in this paper is a content analysis, case by case, of nine full arbitration cases. This exploration is at different levels of intensity to combine quantitative scope and qualitative depth. First we

<sup>30</sup>Canada (Treasury Board) v. Robichaud (1987), 8 C.H.R.R. D/4326.

<sup>31</sup>Aggarwal, *Sexual Harassment in the Workplace*, 190-201.

<sup>32</sup>Aggarwal, *Sexual Harassment in the Workplace*, 189-193.

<sup>33</sup>It should be noted that only a small percentage of labour arbitration cases are "reported," i.e., appear in the legal compendia available to the wider community of industrial relations practitioners and scholars. The editors of *Labour Arbitration Cases* choose only those cases that appear to offer new issues, incidents, and insights in arbitral jurisprudence.

look briefly at three cases. The three cases set important patterns for the way in which sexual harassment cases are presented and dealt with at arbitration. In two of the three cases, the arbitrator awarded the perpetrator his job back after brief suspensions from work. But in the third case, at BCTV, the arbitrator did *not* agree that the women had been sexually harassed. Furthermore, to promote workplace harmony, the arbitrator allowed the accused man to quietly leave the employer with a significant severance package in hand. In a way, the first three cases set the outside parameters for arbitrators' decisions about sexual harassment cases.

Because it becomes difficult to keep all nine cases and their details in mind, the three cases (above) set the stage for more detailed examination of four other cases. In three of the four cases, the male perpetrators refused to admit they had done anything wrong to female co-workers. This was clearly taken into consideration by the arbitrator when making a decision about whether or not to uphold the firing. With no admission of error or guilt, the arbitrator upheld their dismissals. Interestingly enough, the three men were immigrants to Canada — two were visible minorities — and the cultural differences in either how they perceived female co-workers or the very issue of sexual harassment was never mentioned in the arbitration cases. By taking the four cases as a group, one sees similarities in how the men reacted to the initial charge of sexual harassment and the unions' rather lacklustre efforts to defend them.

The case which I think deserves the most detailed analysis is that of IMC Potash. In this case the arbitrator addressed the issue of zero tolerance squarely because of one witness's evidence. Her evidence was that if this policy was upheld at the minesite and workers were fired on a first offence, then the female co-workers would rarely complain about sexual harassment because the result would be the man's dismissal. So, at IMC, there would be few or no complaints by female employees about sexual harassment. Women workers themselves who testified felt the all-or-nothing approach would add to long-term problems between the sexes. The IMC case is also useful to study because the arbitrator, perhaps for the first time, addresses what can be done to mend the disparate factions within the union — those who wanted the perpetrator returned to his job and those who wanted to attend to the needs of the victim.

One final case, which looks at sexual assault and the obligation of a union to represent all its members equally, will round out the paper. While nine cases do not pretend to deliver statistical proof, they do illustrate a definite trend and allow for "more detailed information about a case than is usually available about each instance in a statistical aggregate."<sup>34</sup> By examining these cases, we have an opportunity to address the questions "how" and "why," and to examine "exceptions to the rule" to heighten the explanatory character of the study.

<sup>34</sup>Martyn Hammersley, *The Dilemma of Qualitative Method* (London 1989), 93.

*Three Thumbnail Sketches*

In the following three cases to be dealt with briefly, women complained that a co-worker in a non-supervisory position and also a fellow union member had sexually harassed them. The cases proceeded to arbitration. In the BCTV case,<sup>35</sup> management had an explicit zero tolerance policy. In the other two cases, Western Grocers and West Coast Energy Management, the employers each dismissed a long-standing employee for a first offence of sexual harassment, amounting to an implicit zero tolerance policy.

In the BCTV case, three female reporters, under age 30, complained that a middle-aged cameraman had sexually harassed them. The cameraman, a married man with two children, had more than ten years of blemish-free service, and worked closely with each woman in turn. On an out-of-town assignment he took one woman to dinner and told her his marital and sexual troubles. Each complainant reported that he pressured her to have an affair with him. Once, while on the job, he allegedly deliberately swam naked in a female reporter's presence.

The arbitrator stated that in her view these actions did not constitute sexual harassment, because the cameraman stopped when any of the woman so requested. Also, the arbitrator felt that the sexual pressure the complainants spoke of amounted to little more than being asked for a date — albeit persistently. This case was somewhat of an anomaly in that the perpetrator denied he sexually harassed the women but said he did not want to go back to his job for personal reasons. Since he did not want his job back, given his length of service, the arbitrator awarded him six months' pay.

At Western Grocers in Saskatoon,<sup>36</sup> a female employee accused a male worker in his early thirties of calling her insulting names, ridiculing and embarrassing her in front of peers. At a routine work meeting he told her, "shut up bitch." The man, with no record of previous discipline, was fired. The employer, knowing it was remiss in not having a policy on sexual harassment, issued one as soon as the arbitration case ended. The perpetrator tried to rationalize his harassing behaviour. However, at the hearing he became apologetic and was given his job back after a three-month suspension from work.

The third case concerns a 44-year-old man with 24 years of service at West Coast Energy<sup>37</sup> who was fired by the employer for anonymously sending a female co-worker suggestive and sexually explicit emails. Though there was a policy on

<sup>35</sup>BCTV and CEP. Local 814M (April 2002) Canadian Labour Arbitration Summaries, 68/286.

<sup>36</sup>Re. Western Grocers, Division of Westfair Foods Ltd. & United Food and Commercial Workers Union, Local 1400, Indexed as Western Grocers and UFCW, Local 1400 (1993) 32 L.A.C. (4th) 63.

<sup>37</sup>Re. Westcoast Energy Inc. and Communications, Energy and Paperworkers Union, Local 686B, Indexed as: Western Grocers and C.E.P. Loc. 686B (Bourdon) (Re) 84 L.A.C. (4th) 185.

internet and email abuse, the grievor had ignored it. The arbitrator altered his firing to a suspension because the male worker apologized to the woman and to two fellow workers he had falsely blamed for sending the emails.

These three thumbnail sketches exhibit several important commonalities. First, a zero tolerance policy may be explicit or it may be *de facto*. Second, contrition is a major factor in prompting arbitral leniency. Finally, in none of the three cases were the victims either consulted or especially considered in the arbitration process. Even in the case of the BCTV cameraman, it was his wish to leave his job, rather than “face the music.”

#### *Four Cases in More Depth*

In the following four cases, the companies all had explicit zero tolerance policies and in one case (IKO), there had also been education and training about sexual harassment. The implications of these cases will be discussed after their fundamentals are presented.

##### *Canadian Airlines and IAM*<sup>38</sup>

In 1999, a female “cabin service groomer” employed by Canadian Airlines was cleaning an airplane. She asked the lead hand, Mr J, to help her put Kleenex in the stocker. After helping her, she claimed, he touched her breast and kissed her. She told him to stop immediately. But he told her that she had excited him and that he had a “hard on.” He made her grab his penis. She screamed and ran downstairs. She also complained that the lead hands routinely told the female cleaners that if they did not do what the lead hands wanted, they would get the women fired.<sup>39</sup>

The collective agreement called for any complaints of sexual or personal harassment to be processed in accordance with the Workplace Harassment Policy and Procedure which had been jointly prepared by union and management. The union and the employer each had an investigator who checked into the woman’s complaints and the grievor was fired. Ultimately both investigators became witnesses for the employer at the arbitration. The following information was disclosed in the arbitration case. According to the investigators’ testimony, the workplace was a highly sexualized environment; more than 90 per cent of the talk at work was of a sexual nature. Other personnel had also complained about the grievor’s language and behaviour. But the grievor admitted nothing. He denied that anyone had ever been offended by his behaviour or that he had done what the complainant had alleged. In addition he told the tribunal that he had never been warned or disciplined

<sup>38</sup>Canadian Airlines International Ltd. and Association of Machinists and Aerospace Workers, District 140, Indexed as Canadian Airlines International Ltd. and I.A.M. District 140 (Re) 92 L.A.C. (4th) 153, October 2000.

<sup>39</sup>A lead hand is a co-worker who has some supervisory responsibilities but does not have the right to promote or discipline. A lead hand is also a union member and a member of the bargaining unit.

about his language or anything else. The grievor insisted that the complainant had made up the story because she was angry about a work reassignment. The arbitrator said “the grievor’s inability to be honest and contrite” contributed to the arbitrator’s upholding the discipline — the firing — that was imposed.

*CN Rail and CBRT & GW*<sup>40</sup>

At a CN Rail scheduling centre one long-term employee was fired for massaging (against their will) and overtly harassing two young female employees new to the workplace. However, at least two co-workers and two supervisors were not disciplined for making harassing comments, including one about one woman’s breasts and legs and how sexy she was. One woman was upset enough to transfer to a lower-paying clerical job rather than continue to work with the harassers. Yet CN had a written policy and procedure to deal with sexual harassment. The question arises as to whether or not someone should know or should have reasonably known he was harassing someone. But the Ontario Human Rights Act states that, “Harassment means comments or actions that are unwelcome to you or should be known to be unwelcome.”<sup>41</sup>

The fact that the two women in the CN case did not demand the harasser to stop, or “raise any immediate hue and cry” when they were first physically assaulted, did not mean the male worker could take it as consent. It was clear in the arbitrator’s view that

it [was] neither implausible nor unlikely that the first reaction of some women to overt sexual harassment might be silence ... [it] can be the natural consequence of a woman’s fear of embarrassment at the thought of publicizing an unpleasant and humiliating experience.<sup>42</sup>

The workplace became polarized. Many of the employees felt the women were lying or publicizing a very minor act, especially after the harasser, Eddie Morgan, vigorously denied all the allegations and demanded his “day in court.”<sup>43</sup> At the arbitration hearing, his denials continued. But two harassment investigators, one from the employer and one from the union, corroborated the women’s evidence. With no apology or contrition in sight, the arbitrator upheld Morgan’s dismissal.

<sup>40</sup>Canadian National Railway Co. and Canadian Brotherhood of Railway, Transport and General Workers, Indexed as Canadian National Railway Co. and CBRT & GW (Re)7-1 L.A.C. (4th) 183 September 1988, 189.

<sup>41</sup>Ontario Human Rights Commission “Guide to the Human Rights Code” (Toronto 1999), 14, <http://www.ohrc.on.ca/english/publications/hr-code-guide.pdf>.

<sup>42</sup>Canadian National Railway Co. & CBRT, 199.

<sup>43</sup>This was described in “Workplace Justice,” *Toronto Star*, 17 April 1988, which laid out what had happened from Morgan’s point of view.

*IKO and USWA*<sup>44</sup>

The third case involved the firing, for sexual harassment, of Guy Lacelle, a millwright who had worked for 26 years at IKO, a roofing company in Hawkesbury, Ontario. Though not part of the bargaining unit, the victim was one of only two women employed in the lab in the production area of the plant. The woman complained to a supervisor after Lacelle had stood too close and pressed his body into hers. He commented on her “nice set of bears” (the woman had worn a sweatshirt decorated with cartoon bears). At first no discipline was taken against Lacelle. But as a result of the original complaint, managers at the plant, which had an explicit sexual harassment policy, decided that their employees had not been adequately trained and that at least some employees did not understand the policy. The employer hired an outside lawyer to give all staff a workshop on what harassment was, how it should be responded to, and issue a warning that “disciplinary sanctions imposed on the offender will be applied with an understanding of the seriousness of the misconduct and may include summary dismissal ...”

Though the grievor had attended the training, several months later he pulled the same woman’s sweatshirt, he claimed, so he could read the words on it. Very upset, she told her supervisor it was her concern that if other men in the plant knew they could get away with this kind of behaviour, they would. As a result of these incidents, Lacelle was suspended pending an investigation. He was very remorseful and wrote a letter of apology — which his daughter typed — to the woman. He was afraid to give it to her, thinking she would reject it out of hand.

Management fired Lacelle, claiming that, despite the training programme and their circulation of the policy and warnings, he had deliberately harassed the co-worker. At the arbitration hearing, the arbitrator felt dismissal was unfair because it amounted to a zero tolerance approach. The arbitrator suggested that the employer was taking an extreme position — that sexual harassment was “such degrading and demeaning conduct” that a perpetrator could not be rehabilitated. The arbitrator disagreed. He felt that the grievor — a middle-aged man, with decades of blemish-free service — may not have understood the gravity of the issue. The arbitrator determined that the employer’s zero tolerance policy actually left some leeway for progressive discipline “up to and including discharge ... [as] not all acts of sexual harassment will require the automatic termination of the offending employee ... there must be an assessment of the nature of the acts, and other salient factors to determine the appropriate punishment.” Accordingly, the arbitrator gave Lacelle his job back, albeit with nearly a year’s suspension without pay.<sup>45</sup>

<sup>44</sup>IKO Industries Ltd. and United Steelworkers of America, Local 8580, Indexed as Re IKO Industries Ltd. and U.S.W.A., Local 8580, 2002 C.L.A.S.J. Lexis 117, paragraph 47 quoted.

<sup>45</sup>IKO Industries Ltd. and United Steelworkers of America, Local 8580, Indexed as Re IKO Industries Ltd. and U.S.W.A., Local 8580, 2002 C.L.A.S.J. Lexis 117, paragraph 47 quoted.

*Trillium Health Centre and CUPE*<sup>46</sup>

Another interesting case arose at the Trillium Health Centre in London, Ontario. A long-term employee, a middle-aged man who worked in the hospital's kitchen, harassed a young female dietary aide new to the hospital. In a walk-in fridge, and then in a service elevator, he had kissed her and rubbed her crotch. The employer had an explicit zero tolerance policy and fired the man. The grievor denied all wrongdoing at the hearing and refused to apologize. As a result the arbitrator upheld the discharge.

*Discussion*

Before we move on to the in-depth case, let us summarize these four, which we have explored with medium intensity. At each of the arbitration hearings, a central issue was the zero tolerance policy of the employers. Trillium Health Centre and IKO had explicit zero tolerance policies; CN and Canadian Airlines had only *de facto* policies. Yet the arbitrators did not make much of a distinction between these two types. Arbitral jurisprudence holds that management has a "reserved right" to discipline employees for misconduct<sup>47</sup> and the mere fact that management has not announced in advance that dismissal is the penalty does not *in itself* render summary dismissal unacceptable. Moreover, employers with explicit and those with *de facto* zero tolerance policies both at least have a clear anti-sexual harassment policy, which many employers across Canada still do not have.<sup>48</sup> Arbitrators are loath to uphold discipline for flouting a rule that never existed. Even where a rule exists, arbitrators insist that the employees must be made aware of it before they can be disciplined. In the CN case, for example, it was revealed that virtually none of the employees were aware of the existence of the employer's anti-harassment policy.

But even the existence of anti-harassment policy which the employer has communicated to employees may not be good enough. The mere existence of a known rule may be quite sterile if education is absent. In the case of sexual harassment, education on the issue is essential to breathe life into the policy by defining the offence, explaining why it is unacceptable, and exploring ways in which it can be avoided. Three of the four workplaces above had no education program at all. At IKO, senior management was surprised when, after a first incident, the perpetrator did not seem to be aware or understand the policy. So the employer hired a lawyer to give workshops about sexual harassment. Even after the perpetrator was given a chance to redeem himself after taking the course, he continued to harass the same

<sup>46</sup>Re. Trillium Health Centre and Canadian Union of Public Employees, Local 4191, Indexed as Trillium Health Centre and C.U.P.E., Loc. 4191 (Borgona) (Re) 102 L.A.C. (4th) 48 2001.

<sup>47</sup>Brown and Beatty, *Canadian Labour Arbitration*, 7:4428, 7:3540.

<sup>48</sup>Aggarwal, *Sexual Harassment in the Workplace*, discusses the problems companies face if they have no policy against sexual harassment.

woman. And even so, the arbitrator believed that the education was not sufficient for this particular employee or other older employees who were more set in their ways. At CN, the problem with the policy was that it was rigid and formalistic. Few employees knew of it and no supervisor acted upon it. In practice, the policy was nearly invisible, so that the women felt the only action available to them to avoid the harassment was by either taking stress leave or quitting the job. Neither woman spoke against the harassment until the arbitration hearing.

However, as alluded to in the first three cases, a key factor in an arbitrator's decision appears to be the question of contrition. The four cases were resolved in one of two ways. Those perpetrators exhibiting contrition were reinstated (albeit with an unpaid suspension<sup>49</sup>); those denying the offence or refusing to apologize were not. In the CN Rail and Canadian Airlines cases, the perpetrators denied ever engaging in sexual harassment and accused the victims of vindictiveness. Indeed, both went on the offensive. In the CN case, grievor Eddie Morgan complained to the Canadian Human Rights Commission that in fact he was the real victim — of racial discrimination because he was black.<sup>50</sup> Grievor Mr J in the Canadian Airlines case also denied any wrongdoing, accusing the complainant of spite for his changing her work schedule. That grievor also made a formal complaint to the Canadian Human Rights Commission that he was dismissed because of his race.<sup>51</sup> In both labour arbitration cases the arbitrator felt the "race card" was a red herring. The victim was also South Asian, and there was no mention of racial tensions in the workplace. So it seemed the question of power — as he was a lead hand and had some ability to discipline workers under him — played a role in this case.

This paper now turns to explore these issues in more depth in an especially interesting and instructive arbitration case between IMC and the Communications, Energy and Paperworkers Union [CEP].<sup>52</sup> Unlike the seven previous cases, in this case the arbitrator overtly took the victim's needs into consideration and also attempted to ensure that the union took some responsibility (along with the employer) for an anti-sexual harassment education program.

<sup>49</sup>In the case at IKO, the employee got an eleven-month suspension. After apologizing at Western Grocers, the employee received a three-month suspension. At Westcoast Energy, the employee received a six-month suspension.

<sup>50</sup>According to "Workplace Justice" (*Toronto Star*, 17 April 1988), Morgan believed his superiors had discriminated against him in the approval and denial of sick benefits. It is not clear if this was true.

<sup>51</sup>Both Mr J and the complainant were South Asian. In fact the Human Rights Commission turned down the complaint.

<sup>52</sup>International Minerals and Chemical Corporation (Canada) Ltd. and Communications, Energy and Paperworkers Union, Local 892 and B. Decision of August 1992. Unreported case.



*IMC Arbitration Case*

IMC operates a potash mine in Esterhazy, Saskatchewan. Esterhazy, a town of 3,000 people, is a typical prairie town with railway tracks that divide the north end posher homes from the south end trailer park. It is a two-and-a-half-hour drive east of Regina and 60 kilometres from the Manitoba border. The major employer in the town and the surrounding area is IMC Potash, part of IMC Global based in Lake Forest, Illinois.

In the mid-1990s, out of a workforce of more than 800 only 43 were women.<sup>53</sup> Up to the mid-1980s, the women all worked in the office. Then, due to a job creation program offered by the Canada Employment Centre based in Yorkton, Saskatchewan, the nearest major town, a group of women were hired in non-traditional jobs at the mine. The federal government paid for part of the women's wages. However, working underground was hard on women, according to one woman who worked in the mine for more than fifteen years.<sup>54</sup> The sexism was palpable, especially for those working in non-traditional jobs: "One day my direct supervisor and I were standing by a unit and he told me to shut off something. I didn't know where the take up was. Al stood up and said he'd show me; so I followed him. My supervisor made a comment, 'Well if it's got tits and an ass he'll follow her anywhere'."<sup>55</sup>

In February 1992, 24-year-old underground miner PB was riding the "cage" — or mine elevator — up to the surface at the end of her shift. As she alighted from the cage and walked toward the "dry" (the change room), a male co-worker, B aged 52, ran up behind her and "put his hand up between her legs and touched her genital area in a very deliberate fashion."<sup>56</sup> This was witnessed by a handful of employees, who saw him grab her crotch and heard her response.<sup>57</sup> She was terrified and ran into the change room. Shaken and upset, PB managed to work the remaining days of her shift.<sup>58</sup> On her doctor's advice she took two weeks' sick leave and saw a counsellor. However, given that the closest counsellor was in Regina, her appointments were infrequent. PB felt vulnerable and distressed. She told her supervisor about what had happened. He, in turn, contacted the mine's industrial relations manager who, citing the mine's zero tolerance policy against sexual harassment, suspended the offender. A few days later, B was fired.

Essentially zero tolerance means summary discipline, and in this case termination, even for a first offence. The US parent corporation, IMC Global, had introduced the policy in the 1980s after management was caught unawares at the firm's benton-

<sup>53</sup>From an interview with a local union official.

<sup>54</sup>From an interview with a female underground miner.

<sup>55</sup>From an interview with a female underground miner.

<sup>56</sup>IMC Canada Ltd and Energy Chemical Workers Union, Local 892 and B, unreported, 3.

<sup>57</sup>IMC Canada Ltd and Energy Chemical Workers Union, Local 892 and B, unreported, 3.

<sup>58</sup>At IMC, employees worked shifts that were so many days on (e.g., four days at ten hours a day) and then three or four days off.

ite<sup>59</sup> processing plant in Colony, Wyoming. According to a former senior manager at IMC's corporate head office, the case dated back to the 1970s:

There were allegations that male employees were harassing females. The typical comment was that females were occupying male jobs when they were supposed to be home having children. The women complained. Nothing was done. So they filed a complaint and we launched a full scale investigation. We took action against several supervisors and the plant manager; they were terminated.<sup>60</sup>

In this case, the men involved were all part of management and IMC ended up paying costly damages of “at least six figures” to the Wyoming complainants.<sup>61</sup> To avoid future court battles — either through the US government's Equal Employment Opportunity Commission [EEOC]<sup>62</sup> or a civil suit — IMC Global's head office decided to enforce a zero tolerance policy in all their North American operations.

IMC adopted the policy at Esterhazy as well. When company managers investigated the assault on PB and then fired B, no one realized it would end up being a test of their zero tolerance policy. Like some other US companies which operate in Canada, IMC did not count on one major difference between their US and Canadian operations — the existence of union strength and a system of arbitral jurisprudence that holds progressive discipline as a prime virtue. At the Esterhazy mine, the company's only foothold in Canada at the time, workers belonged to Local 892 of the Communication, Energy and Paperworkers Union of Canada. CEP threw down the gauntlet right from the start. Though B was not a union activist, the union refused to accept his summary dismissal. Co-workers thought he was a practical joker, but not a sexual harasser. But the company was adamant. A senior manager at Esterhazy claimed that B was always causing trouble: “He had a discipline record a mile long for not following rules, insubordination, attendance problems, and absenteeism.... He worked here for 25 years because we were a benevolent company.”<sup>63</sup>

The manager wanted to fire B in light of his previous record, advocating dismissal for “gross misconduct”: behaviour that shocks, is outrageous, or endangers others' lives. Typically that means theft, embezzlement, or serious violence, or actions that seriously damage the employer's property or reputation.<sup>64</sup> However, to dismiss an employee for gross misconduct is very different from subjecting an employee to progressive discipline. Progressive discipline is a form of punishment in which the penalty becomes more severe each time an employee repeats a similar

<sup>59</sup>Bentonite is a moisture-absorbent clay used — among other things — to make lipstick.

<sup>60</sup>From a telephone interview with a senior manager at the US parent company.

<sup>61</sup>From an interview with a senior manager at IMC, Esterhazy.

<sup>62</sup>To give some idea of the dimensions of the problem, the EEOC reported over 16,000 complaints and collected \$55 million (US) from employers for “sexual harassment violations.” See Padavic and Reskin, *Women and Men at Work*, 49.

<sup>63</sup>Interview with a senior manager at Esterhazy.

<sup>64</sup>Brown and Beatty, *Canadian Labour Arbitration*, 7:3310, 7:3330, 7:3430.

type of offence. Progressive discipline usually starts with an oral warning and progresses to written warnings, suspension, and culminates in dismissal if the pattern of wrongdoing persists. In the B case, while the company insisted the grievor's offence constituted gross misconduct, the union disagreed, arguing that progressive discipline was in order.

The union had dealt with other member-on-member sexual harassment cases before. But in the past these had been handled by sitting down with the people involved, with the union and management. Usually management suspended the harasser for a few days and when the perpetrator returned he was put on a different shift and a different job from the person harassed. The union developed a mutual agreement on this with the employer. One Local 892 union official said, "the incidents that happened were very quiet and only involved the two individuals, one from the union executive and one from the company. Very few knew about it."<sup>65</sup> All that changed when corporate policy directed management to employ a zero tolerance policy, which left no room for negotiation. He explained, "We went in with B and tried to make a deal. But the company wanted to terminate him immediately.... Firing's not fair. Even for killing you only get seven years. Firing is a lifetime sentence.... We wanted to save the guy's job yet give him a lengthy suspension. We don't condone his actions."<sup>66</sup> The local union official claimed that it was the union's responsibility to fight for a member's job even though the cost of going to arbitration would be nearly \$30,000 and union members found B's behaviour reprehensible.<sup>67</sup>

The decision about whether or not to take the matter to arbitration came before the union's monthly membership meeting. The union leadership claimed it did not wish to take sides, supporting neither the perpetrator B nor the victim PB. But in practice, it could never work out so neatly; indeed, it became quite ugly. Fighting to win back B's job really meant taking on the employer. More importantly, it meant taking on its chief witness, PB. Anyone who opposed taking the case to arbitration was judged to support PB and was suspected of being pro-management.<sup>68</sup>

It took six months for the case to get to arbitration. During that time, the lines were drawn between those union members who supported bringing B back to work and the few who did not. After all, he was a family man with a wife and three children, it was said; he needed his job. In the context of an arbitration case the union was on one side and the company — and PB — were on the other.

Arbitration is inescapably adversarial.<sup>69</sup> The employer disciplines, suspends, or fires a worker and the union takes the dismissal through all the steps of the griev-

<sup>65</sup>Interview with Local 892 union official.

<sup>66</sup>Interview with Local 892 union official.

<sup>67</sup>Interview with Local 892 union official.

<sup>68</sup>Interview with Local 892 union official. It happened that PB's father was also in management at IMC, so it was easy to believe that her case was supported by management.

<sup>69</sup>Haiven, "Hegemony and the Workplace: The Role of Arbitration."

ance procedure, spelled out in the collective agreement. Inevitably, each side, in a display of legalistic one-upmanship, tends to overstate its case and submits each other's witnesses to withering cross-examination. When union members find themselves on opposite sides of the battle, hard feelings are cultivated and grudges nursed.

The arbitration hearing took place in Regina, six months after the incident. IMC's policy of zero tolerance was what was really on trial, not B. A "win" for the union — getting B his job back — was most certainly a "defeat" for the employer. For the employer the key issue was whether its policy on zero tolerance could be implemented in a unionized environment.

What exactly was that policy? At the time, IMC Fertilizer's "Policy on Sexual Harassment" was a two-page cardboard folder, printed in the US. It stated, "Harassment on the basis of sex is against the law. It is also a violation of IMC Fertilizer, Inc. policy which can lead to severe disciplinary action." The sober grey type goes on to define sexual harassment as "any unwelcome ... sexual advances or requests for sexual favors, or verbal or physical conduct of a sexual nature." The policy stipulates that no one must benefit from submitting to this conduct or be penalized for refusing to participate in it. Finally, the policy warned:

It is the intent of IMC Fertilizer, Inc. management to provide *every* employee with a work environment which is free of sexual harassment. And *each* employee has the responsibility and obligation to conduct himself or herself accordingly. No employee can escape this obligation, and any employee who refuses to accept this responsibility will be subject to disciplinary action up to and including termination of employment. [emphasis in original]

This is not technically a zero tolerance clause as the last sentence leaves some room for discretion. But management at IMC Esterhazy interpreted it as a policy of zero tolerance, an "all or nothing" approach. The classic argument against such an approach is familiar to students of discipline and criminology. If an employer uses firing — which one classic arbitrator labelled industrial capital punishment for a worker — as a weapon or a deterrent for *any* infraction of a sexual nature, from foul language to groping to rape, then there is no point for an employee to monitor or regulate his or her own behaviour.

At the arbitration hearing, the employer argued for discharge on two grounds. First, the nature of the incident itself was so extreme that it justified dismissal. Second, B had a record of inadequate work performance and had also recently withheld information about an automobile accident in which he had been involved at the work site. Yet even the most ill-informed management knows that previous misconduct unrelated to the final incident cannot be used to support an argument of "culminating incident" in dismissal.<sup>70</sup>

<sup>70</sup>Brown and Beatty, *Canadian Labour Arbitration*, 7:4310.

PB testified for management. She said that after the incident co-workers had made fun of her and referred derisively to what had happened. She felt humiliated and did not believe the hasty personal apology written and handed to her by B was good enough. She felt she had been cheapened in front of all the other workers. Yet even PB did not want the perpetrator dismissed. One senior manager at Esterhazy knew that the victim did not want the perpetrator fired. She was afraid other men would refuse to work with her. The manager explained his interpretation of her motivation, “Workers did turn on PB and in turn she turned on herself.”<sup>71</sup> Dismissal of the perpetrator only made the situation worse for her. A local union official understood PB’s dilemma: “It made her look like a company agent.” Yet, according to him, management isolated her; “She felt all alone and by herself. The company didn’t talk to her at the coffee breaks.”<sup>72</sup>

Isolation of the victim by fellow employees is often a problem in cases of member-on-member harassment. In practice the union distanced itself from PB and offered her virtually no support. Under normal conditions, at this stage, a woman complainant might decide to quit her job. In this case PB decided to stay on because of the way in which the arbitrator fashioned his decision, which offered her both support and a sense of justice.

To back its case for summary dismissal, the employer called MM, sexual harassment officer at a western Canadian university, as an expert witness. MM claimed that B’s apology three days later was all but worthless. She said an apology should contain three parts: it should admit what was done, recognize the complainant’s feelings, and promise that the behaviour would not occur again. In her view none of this was done. According to the arbitrator, MM

warned against a reinstatement of the harasser for fear that it would give the wrong signal entirely to the other workers, men and women alike. It was her view that in cases of serious sexual harassment, there should be a policy of “zero tolerance”; in other words, dismissal would be the appropriate remedy.... she stated that if the grievor in this case was reinstated, “it may be seen as his win; it may depend on how it is handled.”<sup>73</sup>

What was the reaction of the dozen women who worked underground with PB? Their dilemma was very keen. On the one hand, they condemned the assault, sympathized with PB, and deplored the reaction of many of the men. One of the handful of women who worked underground with PB said,

I think it was devastating for [PB]. She was subject to ridicule, embarrassment, guilt, negative star status. At work, it created tension. They nicknamed B “Boxcar Billy” when he said something about her wool [pubic hair]. They [co-workers] were tense or nervous. They joked in bad taste. They were on the crew all sitting with her together. They knew it was a ter-

<sup>71</sup>Interview with member of senior management at IMC, Esterhazy.

<sup>72</sup>Interview with Local 892 union official.

<sup>73</sup>IMC Canada Ltd and Energy Chemical Workers Union, Local 892 and B, unreported, 5.

rible thing and a big ruckus and they knew there were judgements about whether a woman should even be there — working.<sup>74</sup>

Women were nevertheless apprehensive about the dismissal. Indeed, one female underground miner, a co-worker of both PB and B, testified on behalf of the union against the discipline. And she turned out to be their most important witness. The arbitrator commented that her evidence was very useful because she described the atmosphere for women working in the mine. She said that sexual discrimination, as opposed to sexual harassment, takes place every day at work: “it is a daily recognition that as a female you are a less valued employee than a male.” Yet she felt the employer’s punishment of B was too severe.

The key point that the female co-worker drove home was that the penalty was too harsh. If upheld, other women workers would be reluctant to report ongoing incidents. She explained that they lived in a small town which would make it impossible for anyone to face a male perpetrator’s wife in the supermarket after her husband had been fired because of one person’s complaint. She also supported the idea of an education programme for all workers at the plant.

The company’s lawyer argued that reinstatement would punish PB, since she would be forced to work with her harasser again, as if the assault had never happened. The union argued against discharge and for a suspension, claiming it was an isolated incident and that it was motivated not by “sexual gratification” but unfolded as an act of “juvenile horseplay.”

In Canadian labour relations law the only thing an arbitrator has legal jurisdiction to decide is whether a punishable incident took place and whether the punishment fit the crime. The arbitrator can alter the penalty if he or she feels it is too harsh. But she or he cannot do management’s work for it. The arbitrator is not supposed to intervene positively. In this case, however, the arbitrator went considerably beyond his legal jurisdiction.<sup>75</sup> He ordered that:

- \* B be suspended from work without wages and benefits for one year
- \* B provide a complete and unequivocal apology to PB
- \* B or the union pay \$2,000 to PB to obtain counselling and any travel or other expenses connected to it
- \* the union initiate an education workshop at the worksite to deal with sexual harassment, and that the workshop highlight the effects of sexual harassment on the victim and the consequences on the harasser, attendance at this workshop to be mandatory for B

<sup>74</sup>From an interview with a female union member at Esterhazy.

<sup>75</sup>Had either party challenged the parts of the arbitrator’s decision that went beyond this jurisdiction, it is likely that the challenge could have been successful. The fact that neither party did so attests to the appropriateness of the arbitrator’s interventions.

- \* that upon reinstatement, B must be assigned to work in a mineshaft where PB was not working, and that every attempt must be made by management to accommodate her
- \* finally, that the arbitrator's decision be posted or made available to the union members of Local 89

The union had won B's job back. According to a senior member of management at the mine, the employer did not like the arbitrator's report but was prepared to accept it: "We sent a strong message. This company is a safe place for women to work. The Dairy Co-op case was very much in my mind."<sup>76</sup>

A former senior manager at the company's US headquarters disagreed. He thought the arbitrator's decision was all wrong.

I think [B] should have been fired. His prior [work] record shouldn't enter into it. It's physical assault. Why she didn't file a complaint with the police department is beyond me. I have no tolerance for that sort of thing. I wouldn't want someone doing it to my spouse or daughter. This arbitration decision should alienate every female who works there. Where do you draw the line? What type of conduct would be so outrageous that it would merit firing?<sup>77</sup>

But how do you solve this kind of problem? Esterhazy is a small community; if a woman reports a man for sexual harassment and he is fired, the whole community knows, and worse his firing is held against the female co-worker who "ratted" on him. How can this type of infraction be handled? With so much at stake, perhaps a nuanced approach is necessary.

In their evidence, one female miner and the sexual harassment officer (MM) said education is part of the answer. But one question that no one wanted to tackle was why did it happen in the first place? Why did B grab PB's crotch? Was it an irrational act? Was it a joke? Was it a way to drive women out of a workplace that was a former bastion of male workers?

Strangely enough, this kind of quasi-sexual rough and tumble is indeed common in men-only workplaces. It is not uncommon for men, among other types of "fun," to grab the genitalia of fellow male workers. Whether there is a homoerotic element to this is beyond the realm of this paper. Whether the men at the receiving end themselves feel harassed is not often the issue, as men are not expected to "complain." It could well be that the perpetrator was carrying on with a known history of horseplay, this time with a female colleague. But human rights law has for many years now abandoned the absolute defence of "no intent." What counts is not

<sup>76</sup>Just prior to the IMC case, two women at the Dairy Producers' Co-operative in Saskatoon had complained to the Saskatchewan Human Rights Commission that they had been subject to brutal sexual harassment by male co-workers. The case was notorious as aspects of it had been aired in a documentary on CBC-TV's "The Fifth Estate."

<sup>77</sup>Interview with senior manager at the US parent company.

whether the perpetrator meant to cause distress and humiliation to the victim. For the arbitrator, the important issue in deciding whether discipline is warranted is “effect,” what the victim actually experienced or should reasonably be expected to experience. Nevertheless, the intent of the perpetrator is definitely a consideration in assessing the quantum of the discipline. The fact that arbitrators prize contrition so highly is testimony to this fact. There are a number of other cases across the country that show that sexual harassment is neither irrational nor a joke.<sup>78</sup> What may be irrational is the recent “craze” for zero tolerance as a way of coping with it, because that is like waving a red flag in front of a bull: it seems as soon as arbitrators see or sense a zero tolerance policy, they feel they need to apply the brakes. Arbitration is supposed to be about teaching, and rectifying behaviour, not about punishment.

#### *Summary of IMC Case*

In summary, why was the IMC case so important? The IMC case was the first time an arbitrator used elements of progressive discipline as a way of dealing with a person fired for sexual harassment. In general companies try to “get rid” of the problem by simply firing the wrongdoer. And when there is a union, the union fights to get the member his job back. But this all-or-nothing approach does not address the harm the harassment has done to the victim or others in the workplace. In giving the wrongdoer his job back, the arbitrator does not usually address the issue of harm done to the victim. But in this case, clearly it was addressed. This seems to be a blind spot that unions have. Like gladiators, unions go into the ring willingly. They are prepared for a legal fight, a rear-guard action that establishes that management should not have the right to summarily fire someone for a single, or even more than one, workplace transgression. But unions are less inclined to assist the member who is the recipient of another member’s bad behaviour. Perhaps this stems from unions’ gendered beginnings, or not showing weakness in the face of management’s attack on a union member.

#### *Issue of Contrition*

The reason why in the IMC case B got his job back (albeit with a year-long suspension) and Mr J at Canadian Airlines did not had little to do with the gravity of the offence. It appears both offences were equally reprehensible. What is noteworthy is that in both cases, at IMC and at Canadian Airlines, the arbitrator looked for a sign of contrition on the part of the grievor or an indication that he was trying to change his bad behaviour. For example, at IMC, within five days of the incident, B had penned a personal note to the complainant in which he begged her to accept his apology.<sup>79</sup>

<sup>78</sup>See cases in Section 385 to 396 in Stephen Krashinsky and Jeffrey Sack, *Discharge and Discipline II* (Toronto 1994).

<sup>79</sup>IMC Canada Ltd and Energy Chemical Workers Union, Local 892 and B, unreported, 4.



I'm so terribly sorry for the stupid thing I did the other day and that I can't think of any thing else. I know you're disgusted with me and I don't blame you. I've tried twice to apologize to you but you won't let me near you.... I can't go on very long like this with this on my mind, I have to try and apologize to you some way.<sup>80</sup>

The arbitrator felt the apology was somewhat lacking, though sincere. However, in the Canadian Airlines case, Mr J denied he had done anything wrong; instead he countered that the real problem was that the complainant was angry with him for changing her work schedule.

Clearly, zero tolerance was an explicit policy at IMC. At that time all new and existing employees had to sign that they had received a sexual harassment policy along with other information from the human resources department. But interviews with several workers revealed most employees never bothered to read it. And if they had read the sexual harassment policy, without any sort of explanation or warnings, would the policy have had any serious deterrent effect? According to a woman who worked underground as a miner, sexual comments and putdowns were rife, and it was something the women had to endure.<sup>81</sup> So the employer's policy remained rigid and formalistic rather than having the breath of life blown into it.<sup>82</sup>

The research suggests that contrition on the part of the perpetrator is a necessary and even sufficient condition for reinstatement. On the one hand, the person is given a second chance to continue his livelihood. On the other hand, he may be chastised by his firing and the arbitration hearing, and genuinely remorseful for what he did. But does his regret erase or mitigate what happened to his victim? This is a major area of concern to employers and employees because though the harasser gets his job back, there is seldom anything done to "set things right" with the complainant. In fact, many women who fall prey to sexual harassment end up quitting their jobs because they cannot continue to work in the environment or even face the

<sup>80</sup>IMC Canada Ltd and Energy Chemical Workers Union, Local 892 and B, unreported, 4.

<sup>81</sup>An air nailer is a hand-held machine, powered by compressed air, that drives nails into metal poles or beams. In the underground mine at IMC, male workers used the air nailer to fix a female co-worker's clothing to a bench or seat where she was sitting, which would make it almost impossible to rise from the seat, unless the woman shed her clothing or ripped it to shreds when getting up. Sometimes a male worker would turn a water hose on a female worker to embarrass her. These are all forms of "horse play." From a personal interview with a woman at the IMC mine: "The air nailer is a tradition at this place. Then they watch and see how you get up. One woman had to get out of her shirt to get up — she just had her bra and panties on. Big joke. For the first three months on the job, I had my shirt soaked every day."

<sup>82</sup>Note, as well, Canadian National Railway Co. and Canadian Brotherhood of Railway, Transport and General Workers, September 1988, 1 L.A.C. (4th) 207, involving the dismissal of Ed Morgan.

harasser.<sup>83</sup> This problem was recognized by an arbitrator in the Canadian National Railway case when he noted that “the costs both emotional and economic” of Ed Morgan’s firing took a toll on himself, his victims, and the organization.

The grievor has experienced extreme personal anxiety and has suffered both in the loss of his employment and damage to his reputation and his family life. The two complainants, one of whom has had to seek professional counselling, have been ostracized by their co-workers, the victims of adverse media attention, and effectively driven from their jobs; one resigned and the other was forced to take a medical leave of absence. The employer and the union are both faced with a bitter and divisive controversy that has tainted the workplace and undermined morale.<sup>84</sup>

In the CN arbitration it was also clear that rather than face the man who had harassed her, one woman quit CN to take a clerical job in an insurance office, a position which paid considerably less money. The other complainant went on stress leave. So both women wound up leaving their jobs. In an effort to redress this situation, the arbitrator stated that though he did not technically have the right to order a remedy for the two women, he urged the employer “to restore both [women] to positions of gainful employment comparable to those which they enjoyed prior to making the complaint.”<sup>85</sup> He wanted the women rehired for two reasons. First, he believed hiring the women in the first place had been an attempt by the employer to redress the gender imbalance in the workplace, and that as a federally regulated business it had an obligation to implement an affirmative action program. Second, he was distressed because this small but important step had been ruined because the women had been driven from the workplace by sexual harassment.<sup>86</sup> Lawyer Gerri Sanson concurs. She points out that if women take jobs in non-traditional workplaces, sexual harassment is often the *modus operandi* for male co-workers to drive them out.<sup>87</sup>

<sup>83</sup> Padavic and Reskin, *Women and Men at Work*, 49; Paul Phillips and Erin Phillips, *Women and Work: Inequality in the Canadian Labour Market* (Toronto 1993), 41; Aggarwal, *Sexual Harassment in the Workplace*, 127.

<sup>84</sup> Canadian National Railway Co. and Canadian Brotherhood of Railway, Transport and General Workers, September 1988, 1 L.A.C. (4th) 197. Quotation from “Workplace Justice,” *Toronto Star*, 17 April 1988, which presented Morgan’s side, outlined the union defence, and seemed rather dismissive of the women’s claims.

<sup>85</sup> Canadian National Railway Co. and Canadian Brotherhood of Railway, Transport and General Workers, September 1988, 1 L.A.C. (4th) 207.

<sup>86</sup> Canadian National Railway Co. and Canadian Brotherhood of Railway, Transport and General Workers, September 1988, 1 L.A.C. (4th) 203.

<sup>87</sup> Gibb-Clark, “Management Harassment Tragedy.”

*The Role of the Union*

Thus far this paper has touched only briefly on the union's role in cases of member-on-member sexual harassment. Several of the employers studied had tacit or explicit endorsement by the union of its zero tolerance policies. This was the case at Trillium Health Centre, Canadian Airlines, and CN Rail. However, once a complainant came forward, the union felt it had little choice but to climb down from its position and defend the grievor. Though both complainant *and* grievor were union members, the union was compelled to turn its efforts to representing the person disciplined. There is some legal rationale for this as collective bargaining legislation in most provinces mandates unions to fairly represent all of its members. The "duty of fair representation" [DFR] as this obligation is called, does not mean that the union must carry every grievance forward to arbitration. Unions have discretion to decide which cases have merit and which do not. They are enjoined to make these decisions in a manner that is not "arbitrary, discriminatory or in bad faith." Theoretically, a union could refuse to defend a disciplined member if it found his or her actions abhorrent. But Labour Relations Boards have set the bar very high in these kinds of cases.<sup>88</sup> So high, in fact, that most unions have decided to seldom, if ever, exercise such discretion. This is the reason that in the cases of sexual harassment cited in the Appendix and in this paper, and most others in the jurisprudence, unions have taken the offending members' dismissals to arbitration. Usually, the victim's needs are given short shrift.

Just how difficult it is for unions to do otherwise is illustrated in a case involving the Newfoundland and Labrador Association of Public Employees [NAPE].<sup>89</sup> In 1990 a Memorial University security guard with ten years of service was charged with sexually assaulting a woman employee at the university. The university wanted to dismiss him, but the union argued successfully that he had not yet been proved guilty in court. The man kept his job for nine months until the criminal trial in January 1991. At the trial he was convicted and given a four-day jail sentence. Several days after the trial, the university fired him and the union representative filed a grievance. The union representative and management appointed their representatives to an arbitration panel and it looked as if the arbitration was going to go ahead. However, the union executive met in late January and decided that "because of the nature of the offence and the union's policy with respect to sexual harassment in the workplace" the union would not go ahead with the arbitration.<sup>90</sup>

<sup>88</sup> MacNeil, Lynk, and Engelmann, *Trade Union Law in Canada*, 7:320, 7:40, 7:125.

<sup>89</sup> Newfoundland Association of Public Employees v. Benmore, *Canadian Labour Law Reports* 1993 (CCH-14,013).

<sup>90</sup> It turned out the arbitration would have been a moot point. Since the grievor was appealing his conviction, if he lost then the university would not reinstate him. If the conviction was overturned, the university had already agreed to give him his job back.

The grievor made a complaint at the Labour Relations Board that the union had failed to “act in good faith.”<sup>91</sup> The union disagreed, claiming that its policy against sexual harassment, based solely in its collective agreement with the University, precluded taking the case to arbitration. The Labour Relations Board looked at the case carefully. It concluded, first, that the union’s claim of having a policy against sexual harassment was much exaggerated. Second, it was not clear from the collective agreement that a union member would be automatically precluded from grieving if convicted of a crime. In fact the evidence was that other union members had previously been convicted of crimes and the union had grieved their dismissals. The Board said that the union, without a clearly articulated policy, could not discriminate between one member’s grievance and another’s. The board determined the union failed to act in good faith when it refused to handle the grievance.

### *Conclusion*

What can we learn from these cases?

First, is a policy of zero tolerance effective in discouraging sexual harassment? Clearly, from the examples in the Appendix, an employer’s zero tolerance policy is difficult to carry out in a unionized environment. Of the eight arbitration cases reviewed, in only three were the dismissals upheld. Six of the eight employers had written policies against sexual harassment; four of these were expressed as zero tolerance policies. In the four cases involving zero tolerance policies, only one person’s firing was upheld at arbitration (at Trillium Health Centre). In the other three cases involving zero tolerance policies, the firing was overturned at arbitration. The perpetrator got his job back. Arbitrators seemed reluctant to uphold firings for sexual harassment, whether there was a zero tolerance policy or not. And a number of arbitrators spoke against such blanket policies in their decisions — notably in the IKO and IMC cases. It is evident that some of the arbitrators thought of zero tolerance as a “lazy” sort of policy. In resorting to it, employers were refusing to deal with the grey areas in breaches of discipline and were seeking to use dismissal as a way of avoiding what is really a complex issue, one that demands much greater attention *before the offence happens* and *much less precipitousness when it does happen*. Yet, surely, having a policy against sexual harassment is basic to the employer setting parameters for behaviour in the workplace.

There are several reasons why arbitrators overturn these dismissals, especially in the case where the perpetrator has any kind of blame-free record prior to the harassment offence. But the overriding commonality among the quashed dismissals is a perpetrator’s regret or remorse about the incident. In some cases there were even multiple incidents of sexual harassment<sup>92</sup> by the same perpetrator and yet contrition won the day — albeit with a suspension from work.

<sup>91</sup>The duty of fair representation comes within the failure to act in good faith, in Section 126 of the Newfoundland Labour Relations Act.

<sup>92</sup>The perpetrator had sexually harassed his victim more than one time at IKO and BCTV.

It is interesting that contrition is such a powerful factor enabling reinstatement in sexual harassment cases. One might profitably compare sexual harassment to another class of wrongdoing — downloading child pornography on a computer at work — to see that contrition, as an excuse, is not universally accepted. Sexual harassment and the downloading of child pornography are in no sense offences of equal magnitude, but a comparison of the two offences is instructive. Sexual harassment is illegal as it is one of the prohibited grounds of discrimination according to all provincial and federal human rights acts. Downloading child pornography is against Canada's Criminal Code.<sup>93</sup> Sexual harassment is not usually subject to punishment of a large fine<sup>94</sup> and/or jail term as is the case if someone is found criminally guilty of downloading child pornography. Clearly because sexual harassment usually has to do with adults and downloading child pornography has to do with children, there are large differences in the way arbitrators and judges view the offences. In the sexual harassment cases discussed above, the man's open contrition figured largely into resolving the case in the perpetrator's favour. Contrition, however, was barely considered when it came to a case of disciplining an employee who downloaded child pornography. In this case, we are not concerned with the criminal charge, but with the employer's disciplinary action against the employee (he was fired), and his union's attempt to have him reinstated.

The Seneca College case<sup>95</sup> concerns a 49-year-old male professor at that institution, with nineteen years seniority and a blemish-free discipline record. He was considered an above-average teacher and colleague. He was fired after the college discovered he was downloading child pornography on a university computer. The employee had been subject to criminal charges and at trial he had been sentenced to two years probation, and ordered not to use the internet during that time. The question of reinstatement to his job then came up at an arbitration hearing. The arbitration panel heard evidence about how the grievor, since being fired, had turned his life around, obtained counselling, and was no longer cruising pornographic websites. The grievor testified that he was extremely regretful about what he had done and apologized to his employer.

The union argued that he had been punished enough by going through an embarrassing court case and being convicted, suggesting that progressive discipline be imposed rather than termination, especially since the grievor had never hurt nor offended any of his students. However, the arbitration panel, noting his criminal

<sup>93</sup>For the relevant part of the Criminal Code, Section 163 (formerly Bill C-15A-2002) see [http://www.media-awareness.ca/english/resources/legislation/canadian\\_law/federal/criminal\\_code/criminal\\_code\\_child.cfm](http://www.media-awareness.ca/english/resources/legislation/canadian_law/federal/criminal_code/criminal_code_child.cfm) (retrieved 18 January 2005).

<sup>94</sup>The purpose of these acts is primarily to educate and advance human rights, not to punish. As a result, most human rights acts limit financial awards (for hurt feelings typically) to successful complainants to less than \$10,000.

<sup>95</sup>Re. Seneca College and Ontario Public Service Employees Union, Local 560, April 2002, Indexed as Seneca College and O.P.S.E.U. (Re) 109 L.A.C. (4th) 334.

conviction, stated that despite his long years of service, his age and his previous good conduct, downloading pornography over a two-year period was evidence of a “continuing pattern of behaviour” which had “irreparably damaged the bond of trust” between himself and his employer. The discharge was upheld.

Taking away the question of the odiousness of the offence, for which in fact he was punished by a court of law, there are three points of comparison between the Seneca case and that of IMC and IKO. First, in all three cases, the grievors had had years of valued service. Second, in all these cases the men were fired, and they showed significant remorse. Third, in all three cases the unions urged the arbitrator to force management to adhere to its own progressive discipline policies. The unions argued that the men’s firing was tantamount to “industrial capital punishment” and was unwarranted for a first offence.

The major difference between the Seneca case and the others was that in the Seneca case, the use of progressive discipline was rejected as soon as it was clear that the law had been broken and the police had charged the professor. The arbitration decision referred to the professor as having broken the law as well as his bond with the employer. In the panel’s view, the perpetrator did not deserve to return to his job. In the other cases, the grievors had not technically broken the Criminal Code but had contravened the collective agreement and the human rights act. So the arbitrators felt it was most appropriate to apply progressive discipline — rather than go along with the employers’ wish to invoke a zero tolerance policy. If the arbitrators in the other cases had gone along with zero tolerance that would have meant they felt the grievors could not be rehabilitated, that they were incapable of reforming their behaviour, and that the original punishment — dismissal — fit the crime. But arbitration is not meant to be the same as a court of law. It is meant to police the collective agreement and to promote management-labour coexistence in the workplace.

The Seneca case most closely resembles the case at IMC. B could have been charged by police with assault or sexual assault, but was not. The arbitrator doubted the value of a zero tolerance policy because it would not change sexist relationships in the workplace nor would it lessen the problem of sexual harassment. Instead he imposed progressive discipline which meant that there was some opportunity for the perpetrator to be rehabilitated after his year’s suspension from work. Indeed, the arbitrator believed that only if there were discussion and education about sexual harassment for all the employees could the workplace be free from the problem.

At Seneca College, the arbitration panel strongly backed the zero tolerance model. This, despite the fact that no one was directly hurt, in the narrow legal sense, by the professor’s web-surfing. One of the reasons given for upholding the dismissal was that the courts had convicted him. Yet in the NAPE case, the Labour Relations Board chided the union for abandoning a member who had similarly been found guilty in a court of law. It does appear that labour relations tribunals have at least an apprehension of a double standard when it comes to zero tolerance. Child

pornography, even in the absence of direct victims, seems to overpower contrition, while sexual harassment, with an actual live victim, does not seem to have the same effect.

In summarizing the cases featured in the Appendix, most of the employers have exhibited a *de facto* policy of zero tolerance for sexual harassment. The employers fired the perpetrators, then they got their jobs back at arbitration. There are two issues that arise from this situation: first by allowing the grievors to return to work, how does that diminish or even address the problem of sexual harassment in the workplace? Does it make the workplace safer for the victim or other women? Second, as one arbitrator<sup>96</sup> made clear, unions have some responsibility in curbing sexual harassment in the workplace. After all, sexual harassment contravenes human rights law whose tenets are written into practically every collective agreement.<sup>97</sup> But unions are damned if they do and damned if they don't. If unions support the union member who is the harasser and he gets his job back, the union member who has been victimized has not had her complaint addressed. If the union declines to help the member who stands accused of sexual harassment or even convicted of sexual assault (as in the NAPE case), that member can claim that in not taking the grievance, the union fails to act in good faith.

How are we to address the questions asked earlier in this paper? Management's role is to discipline, and from the cases studied, management tended to use severe discipline when the "one shoe" dropped and they had to deal with incidents involving sexual harassment. Management's response was to try to limit or eliminate the problem from the workplace. Since progressive discipline takes time and requires supervision, employers relied on the convenient remedy of the zero tolerance policy. By using zero tolerance, management felt they could both rid the organization of the problem employee — and provide a deterrent to others. But some questions have still to be raised. For example, zero tolerance does not address the issue of education. In the IKO case, and even twenty years ago in the CN case, the fact that there was little or no serious attempt to educate and warn employees about sexual harassment figured prominently in the arbitrator's decision. Surely the question of education is at the heart of recognizing and changing behaviours such as a sexual harassment — indeed it seems a necessary precursor to deterrence.

The "other shoe" has to drop with the trade unions. Their response to disciplining their members, especially termination, quite fairly, is to grieve it. Often the matter goes to arbitration and it seems that if the perpetrator is contrite, he gets his job back. Unions are so tied up in defensive mode with the employer that not much attention is paid to the union member who was aggrieved. Either she is cast in the role as witness for the company and a "stool pigeon" not to be spoken to, or she leaves

<sup>96</sup>The arbitrator Dan Ish, in *IMC Canada Ltd and Energy Chemical Workers Union, Local 892 and B*, unreported.

<sup>97</sup>Collective agreements usually say there will be no discrimination on the basis of sex (as well as race, creed, colour, etc.). In this context "sex" means sexual harassment as well.

the workplace — sometimes at high personal and financial cost. This was also spelled out in the CN Rail case, when the arbitrator noted that the young women who had been victimized ended up with no job or a lesser paying one. In these cases, unions have rarely concerned themselves as much with the victim as with the perpetrator. This draws attention to the fact that union responses — much like those of management — is *pro forma*. By that I mean as the employer justifies severe discipline such as firing for a first offence, the union justifies “going to bat” for the fired member. The bigger questions including education of the workforce and support or acknowledgement for the victim tend to go unanswered in the adversarial nature of the union-management relationship. In addition, at least one arbitrator (in the IMC case) noted the onus was also upon the union (not just the employer) to properly educate its union members. The ethical or moral dilemmas inherent in the unions’ cases cannot be addressed in this article. Suffice to say that education on the issue of sexual harassment in the workplace could be a key starting point for the discussion. More research needs to be done on the issue of sexual harassment at work, especially in relation to the rights of the person who suffers the harassment. In addition, little research has been done to date about the union’s obligation to represent its members when they have done something that is anti-social or even illegal.



Appendix: Sexual Harassment Cases, 1988-2002

Sector/ employer/year	Union/ Grievor	Complainant(s)	Disposition	Ramifications/ policy
CN Rail 1988	CBRT & GW. Grievor male, married, age 36, no disciplinary record, 12 years seniority.  Two female co-workers complained.	Two women under 21, new to job, accused him of sexual touching, unwanted massage, and sex talk.	Firing upheld, mainly because he denied everything and refused an apology. Story revealed in <i>Toronto Star</i> article inflamed co-workers on his side.	How could other women work there unless he was fired? This could jeopardize efforts to have employment equity.  Arbitrator said both women should get their jobs back as they had been forced out. Remedy beyond arbitrator's jurisdiction.
IMC 1992	CEP. Grievor male, married, age 52, three children, 26 years of service with IMC, minor disciplinary record but not involving sexual harassment.  Female co-worker complained.	Woman, age 24, who had worked a short time as underground miner, said he had grabbed her crotch.	Fired, but firing reversed. He received a one-year suspension, told to apologize, and ordered to take training about sexual harassment.	He admitted to offence, tried to apologize but apology declined.  At arbitration hearing, evidence came out that if firing upheld, few women would be willing to complain if they knew the person would be fired on first offence. <b>IMC had a zero tolerance policy.</b>
Western Grocers 1992	UFCW. Grievor male, 30s, married, one child, seven years service, no disciplinary record, admitted his behaviour but rationalized it.  Female co-worker complained.	He harassed a younger female co-worker, called her names and embarrassed her.  Union had an anti-sexual harassment policy.	Fired, then given job back. As punishment, he was given a three-month suspension.	Company had no sexual harassment policy in place; established policy immediately after this case.  Grievor was a good worker and apologized about what had happened.
West Coast Energy 1999	CEP. Grievor male, age 44, 24 years at plant, no prior discipline problems at work.  Female co-worker complained.	He often sent co-worker (younger woman) suggestive emails. In his defence, he blamed two male co-workers and tried to implicate a manager.	Fired; firing turned into suspension after he apologized to those he had maligned.  Tried to apologize earlier but she was very frightened by him.	Company had a policy on internet and email use. Grievor ignored policy.

<p>Canadian Airlines 2000</p>	<p>IAM. Grievor male, middle-aged, lead hand, touched and kissed a female co-worker at work and hinted that her job was at stake if she did not cooperate. Female co-worker complained. As grievor was lead hand, his position was one of authority over her.</p>	<p>Lead hand a factor, he had some power over the woman. Grievor denied touching, kissing, and then threatening woman.</p>	<p>Fired; firing upheld because he was unapologetic and denied any wrongdoing.</p>	<p><b>Company had a sexual harassment policy agreed to by company and union.</b> Grievor complained unable to get another job because company had put him on a "black list."</p>
<p>Trillium Health Centre (London, ON). 2001</p>	<p>CUPE. Grievor male, middle-aged, kitchen worker, denied harassing a female co-worker and refused to apologize. Female co-worker complained.</p>	<p>He touched and kissed co-worker in elevator and store room. Co-worker young female dietary aide who had worked there only a short time.</p>	<p>Fired; firing upheld because he denied any role in harassment.</p>	<p><b>Employer had a zero tolerance policy on sexual harassment.</b> Grievor accused employer of discrimination on basis of his birth country. No merit found for this complaint.</p>
<p>BCTV 2002</p>	<p>GEP. Grievor married, early 40s, two children, many years seniority at BCTV, no disciplinary record. Several female co-workers complained. While not directly supervised by him, they worked with him on camera assignments. He was a conduit to management, the women not yet permanent employees.</p>	<p>Three women, under 30, reporters at television station, were pressured by grievor to go out with him. He used harassing language; arranged assignments where he could be alone with one or more of them; also swam naked in front of them.</p>	<p>On sick leave, but arbitrator said offences were on "medium range" of sexual harassment continuum. Arbitrator ordered six months of pay in lieu of notice. He was not fired.</p>	<p><b>Company had a clear zero tolerance policy on sexual harassment, agreed to by union and company and in the collective agreement.</b> Decided that what he had done was not clearly sexual harassment as he had stopped when requested to do so; behaviours not repeated.</p>
<p>IKO Roofing Supplies 2002</p>	<p>USWA. Grievor male, middle-aged, 26 years seniority, no previous disciplinary record, contrite -- had written a letter apologizing to complainant. Female co-worker complained.</p>	<p>He made sexual/personal comments and grabbed the hem of woman's sweatshirt. She merely wanted the harassment to stop. She was one of two women in production but not in union.</p>	<p>Fired, but firing overturned. Could he be rehabilitated? He received an eleven-month suspension, but kept seniority. He apologized.</p>	<p><b>Company had a policy against sexual harassment.</b> Policy not distributed to all employees, nor any education on this matter. A lawyer had trained all workers about policy, but not all understood the training.</p>