Respect in the Workplace

By Gwendoline Allison

I. Introduction

Respect is an important feature of a healthy, productive work environment. In a well-functioning work environment, everyone has a specific job to do and everyone feels important to the success of the organization. Employees feel valued by their employers; all parties are treated with a fairness and dignity that diffuses potential conflict and stress. Productivity is high, conflict is low and business interests thrive. Even in difficult times such as terminations or discipline, a respectful approach by an employer may assist employees to move forward, accept workplace situational change and may avoid expensive litigation or workflow disruption.

Lack of respect in the workplace can also have a toll. A toxic work environment may lead to decreased productivity, increased absenteeism, high staff turnover, severance packages and law suits.

One of the challenges facing employers in dealing with the issue of respect in the workplace is that there is no clearly articulated legal duty on an employer generally to treat an employee with respect, and in British Columbia, there is no express, legally enforceable right to be treated with respect in the workplace. Human Rights legislation provides protection for employees where a feature of the disrespectful treatment is a protected ground, however, there is no certain legal avenue where disrespect in the workplace arises from personal issues. Notwithstanding the lack of a legal entitlement to respect, employers and employees generally expect that people will be treated with respect. Employees seek remedies when they perceive that they are not treated with respect. Both employers and the courts have attempted to fashion policies to frame the issue and provide remedies for mistreated employees.

This paper addresses in summary form some of the legal issues facing employers as they attempt to address the issue of respect in the workplace:

1. General definitions and the legislative framework
2. Bullying, harassment and defamation
3. Costs of a disrespectful workplace
4. Liabilities caused by a disrespectful workplace in 2010
5. General strategies to create and maintain a respectful workplace.

This paper, however, will not address claims of bullying or harassment which fall under the protections of human rights legislation.
II. Definitions and the legislative framework

A. Definitions

Bullying: There is no single legal definition of bullying. It may include verbal, non-verbal, physical abuse, psychological abuse and humiliation. Bullying may occur between supervisors and subordinates but may also occur among co-workers.

“Bullying is characterized by acts of intentional harm, repeated over-time, in a relationship where an imbalance of power exists”: Public Safety Canada, www.public safety.gc.ca


Examples of bullying may include shouting at coworkers, acting with disdain and condescension, gossiping or spreading rumours, sending hostile emails or other correspondence and singling out and humiliating a co-worker in front of others.

Defamation: Words tending to lower the plaintiff in the estimation of right-thinking members of society generally.

Harassment: Harassment occurs when a person or a group of people are subjected to unwelcome behavior that is insulting or demeaning, or is otherwise offensive. Common examples of harassment include name-calling, telling offensive jokes either in person or by email, and making offensive gestures. Harassment does not have to be intentional to be a problem. Harassment in the workplace may affect the victim’s ability to do their job and also poison the work environment at large. “Personal harassment” was broadly defined in Burnaby Villa Hotel, Restaurant and Culinary Employees and Bartenders Union, Loc. 40, (1995) BCDLA 210-66 (McEwen).

Objectionable conduct or comment, directed toward a specific person(s), which serves no legitimate work purpose, and has the effect of creating an intimidating, humiliating, hostile or offensive work environment.

Mobbing: Workplace mobbing is a relatively new term for the bullying of an individual by an abusive group in the workplace. It is synonymous with “ganging up”. The group gangs up on the individual and victimizes them.

“Mobbing is defined as a non-ethical communication situation characterized by repeated hostile behaviours, through a long period of time on the part of one or many persons, systematically directed against one individual who is to react by developing serious physical or psychological problems. This constitutes a destructive process which may lead to permanently handicap the victim or even cause her death. Two conditions must be present in order to consider a situation being one of mobbing: term and repetition”: Isabelle Cantin and Jean-Maurice Cantin, “Politiques contre le harcèlement au travail et réflexions sur le harcèlement psychologique”
B. Legislative framework

Human Rights legislation sets out specific protections for employees against discrimination, harassment and mistreatment based on the protected grounds of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person. Occupational health and safety legislation deals with workplace violence and also harassment forming discrimination contrary to human rights legislation.

There is a legislative gap on the issue of personal harassment or bullying. Some jurisdictions have introduced legislation to address issues of personal harassment or bullying, either by way of new legislation or by revisions to the occupational health and safety legislation.

In 2004, Quebec became the first province to pass legislation to deal with workplace bullying and personal harassment: An Act respecting labour standards, R.S.Q. c. N-1.1. Under section Section 81.18-81.20, "vexatious behaviour" which takes the form of repeated insults, vulgar remarks or gestures that are offensive, demeaning and undermine a person’s self-esteem is prohibited.

In Saskatchewan, The Occupational Health and Safety Act, 1993 was amended in 2007 to include provisions related to bullying and harassment. The statute identifies “personal harassment” as any inappropriate conduct, comment, display, action or gesture by a person that adversely affects a worker’s psychological or physical well-being; and the perpetrator knows or ought to reasonably know would cause the worker to be humiliated or intimidated. However, harassment does not include any reasonable action that is taken by an employer, or a manager or supervisor employed or engaged by an employer, relating to the management and direction of the employer's workers or the place of employment.

Employers are obliged to take reasonable steps to ensure that employees are not exposed to harassment. They are also obliged to draft and post a written policy to prevent harassment that includes: a definition of harassment that includes the definition in the Act; a statement that every worker is entitled to employment free of harassment; a commitment that the employer will make every reasonably practicable effort to ensure that no worker is subjected to harassment; a commitment that the employer will take corrective action respecting any person under the employer’s direction who subjects any worker to harassment; an explanation of how complaints of harassment may be brought to the attention of the employer; a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint, required by law; a reference to the provisions of the Act respecting harassment and the worker’s right to request the assistance of an occupational health officer to resolve a complaint of harassment; a reference to the provisions of The Saskatchewan Human Rights Code respecting discriminatory practices and the worker’s right to file a complaint with the Saskatchewan Human Rights Commission; a description of the procedure that the employer will follow to inform the complainant and the alleged harasser of the results of the investigation; and a statement that the employer’s harassment policy is not intended to discourage or prevent the complainant from exercising any other legal rights pursuant to any other law.
The occupational health and safety committee and representatives appointed by employers have the authority to investigate, mediate and resolve complaints of harassment. From there, employees have the right to make complaints to a provincially appointed occupational health officer who may issue notices of contraventions.

On June 15, 2010, Ontario introduced amendments to its *Occupational Health and Safety Act*, R.S.O. 1990 c.1 to include provisions regarding harassment. The act defines "workplace harassment as:

“workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome;

Under section 32.0.1 of the Act, an employer must prepare policies on workplace violence and workplace harassment, and review such policies annually. Under section 32.0.6, an employer must develop and maintain a program to implement the policy with respect to workplace harassment, which would include measures and procedures for workers to report incidents of workplace harassment and how the employer will investigate and deal with incidents and complaints of workplace harassment. The Act also provides a mechanism for reporting complaints of harassment to the Ministry of Labour, and enforcement mechanisms. The Act, however, does not provide a remedy to the complaining employee.

In British Columbia, part 4 of the *Occupational Health and Safety Regulation* identifies workplace violence as a health and safety hazard, including any threatening statement or behavior which gives a worker reasonable cause to believe that he or she is at risk of injury. Part 4 also prohibits, “improper activity or behaviour” including threatening statements, horseplay and practical jokes", and requires that any such incidents be reported and investigated.

Prior to July 1, 2012, in respect of mental stress, the *Workers Compensation Act* provided:

**Compensation for personal injury**

**Mental stress**

5.1 (1) Subject to subsection (2), a worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress

(a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,

(b) is diagnosed by a physician or a psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and

(c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.
(2) The Board may require that a physician or psychologist appointed by the Board review a diagnosis made for the purposes of subsection (1) (b) and may consider that review in determining whether a worker is entitled to compensation for mental stress.

(3) Section 56 (1) applies to a physician or psychologist who makes a diagnosis referred to in this section.

(4) In this section, "psychologist" means a person who is registered as a member of the College of Psychologists of British Columbia established under section 15 (1) of the Health Professions Act or a person who is entitled to practise as a psychologist under the laws of another province.

On July 1, 2012, BC enacted legislation to make injuries caused by bullying and harassment compensable, outside those that are traumatic, one-off events. The new legislation amends section 5.1(1)(a) by substituting the following:

(a) is a reaction to

(i) one or more traumatic events arising out of and in the course of the worker's employment, or

(ii) a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment,

The new legislation does not provide a forum for dealing with complaints of harassment, merely an "escape" avenue for employees.

II. Bullying, harassment and defamation

Three aspects of disrespect in the workplace involve bullying, harassment and defamation. Such claims arise in a number of different scenarios where the employee feels threatened or targeted in his or her employment environment.

Claims of bullying and harassment, in particular, raise several challenges for employers. The first challenge is one of content. "Harassment" and "bullying" invoke subjective feelings. They are imprecise. One particular challenge for employers is where complaints of bullying and harassment arise in the context of supervision, performance review and management, and discipline. It is not unusual for an employee on the receiving end of a negative performance review to feel bullied and harassed by the critical supervisor. Employers then face a difficult task to analyse and define the communications underlying the complaint.

The second challenge is one of forum. Where are such claims litigated? There is no tribunal to deal with personal harassment complaints. When the dispute leading to the bullying or harassment claim is in a union environment, the matter will be under the exclusive jurisdiction of a labour relations arbitrator: Ferreira v. Richmond (City), 2007 BCCA 131 at para 67. In that case, the Court of Appeal determined that while the claim had been framed in tort and other related causes of action, it was essentially a workplace grievance based on harassment by other City employees. In the non-union context, the only avenue left is the court.
The third challenge is the legal nature of the claim. Absent legislative provisions, a claim of bullying and harassment must be framed in either contract or tort. The common law recognizes the important link between employment and self-worth: Reference Re Public Service Employees Relations Act (Alberta), [1987] 1 S.C.R. 131 ¶91

Work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person’s dignity and self-respect.

However, no appellate court has yet articulated a broadly accepted common law duty to be respectful at work, other than the duty on the employer not to act in bad faith during a dismissal. Where does that leave a bullied or harassed employee?

A. Constructive Dismissal

One area where claims of harassment and bullying have arisen is in the area of constructive dismissal, where the employee quits and claims there has been a fundamental breach of the employment contract as a result of bullying and harassment in the workplace. The employee claims that there is a poisonous work environment that makes it impossible for him or her to work without being bullied.

Over time, the courts have developed certain principles applicable to scenarios where employees allege that personal harassment amounts to constructive dismissal. The burden of proving the particulars of the employer’s alleged harassment which are said to give rise to constructive dismissal lies on the employee: Abel v. Autohaus Barrie Ltd., 2005 CarswellOnt 2411 (Ont. S.C.J).

In Paitich v. Clarke Institute of Psychiatry 1990 CarswellOnt 777, the plaintiff’s manager had an abrasive and unbending management style and criticized certain practices of the plaintiff which had long been condoned, or even encouraged. The manager had a low opinion of the amount of work done by the plaintiff; discussed his criticisms of the plaintiff with other staff members, thus undermining the plaintiff’s position with junior staff members; and questioned the plaintiff’s honesty, without cause. Although the complaints were largely without foundation, the plaintiff attempted to comply with his manager’s requests until it became clear to him that the manager wished to be rid of the plaintiff. The plaintiff, frustrated with his working conditions, wrote memos to several executives. Although the memos could be characterized as subordinate, the Ontario Court of Appeal upheld the trial judge’s finding that “supervisory staff owe a duty to those working under their authority to treat them fairly and not subject them to individual harassment that renders competent performance of their work impossible” and that the conduct of the employer constituted “extremely reprehensible behaviour.”

In Shah v. Xerox Canada Ltd., [2000] O.J. No. 849, the plaintiff alleged that he was constructively dismissed as a result of a deterioration of the employment relationship due to poor communication between the plaintiff and management personnel. The trial judge held that the employer’s treatment of the plaintiff made his continued employment intolerable and, therefore, amounted to an unjustified repudiation of the employment relationship. Cullity J. stated at para. 38:

Where the conduct of management personnel is calculated to cause an employee to withdraw from the employment, it may, in my judgment, amount to constructive dismissal. The test, I
believe, is objective: it is where the conduct of the manager was such that a reasonable person in the circumstances should not be expected to persevere in the employment. As the particular circumstances are crucial, each case must be decided on its own facts. The test should not be lightly applied. An employer is entitled to be critical of the unsatisfactory work of its employees and, in general, to take such measures — disciplinary or otherwise — as it believes to be appropriate to remedy the situation. There is, however, a limit. If the employer’s conduct in the particular circumstances passes so far beyond the bounds of reasonableness that the employee reasonably finds continued employment to be intolerable, there will, in my view, be constructive dismissal whether or not the employee purports to resign.

In upholding the trial judge’s decision, the Ontario Court of Appeal cited a decision of the Supreme Court of Canada (Farber v. Royal Trust Co. (1996), [1997] 1 S.C.R. 846), in which Gonthier J. referred to the following general principle:

In cases of constructive dismissal, the courts in the common law provinces have applied the general principle that where one party to a contract demonstrates an intention no longer to be bound by it, that party is committing a fundamental breach of the contract that results in its termination.

The Ontario Court of Appeal acknowledged that the application of this general principle will vary depending on the conduct of the employer in question, and cited as an example, the case of Whiting v. Winnipeg River Brokenhead Community Futures Development Corp. (1998), 159 D.L.R. (4th) 18 (Man. C.A.) in which the trial judge concluded that an employee had been constructively dismissed because of a series of incidents culminating in the imposition of probation, including the employer unjustifiably criticizing the employee, levelling vague and unfounded accusations against her and creating a hostile and embarrassing work environment for her. According to the trial judge in Whiting, which the Court of Appeal upheld, “viewed objectively, the plaintiff’s continued employment in such environment was no longer possible.” The Ontario Court of Appeal in Shah cited this as an example where the employer had by its conduct demonstrated an intention no longer to be bound by the contract.

In Shah, the court cited the following factors that constituted constructive dismissal: the employee had a successful career with the employer and regularly received good performance reviews, bonuses and pay raises; the performance concerns raised by the manager were largely unsubstantiated and resulted from a misunderstanding; and warning letters did not contain specifics or justifications. Consequently, there was sufficient evidence to find that the employer had made the plaintiff’s position intolerable and had constructively dismissed him.

In Lloyd v. Imperial Parking Ltd., 1999 ABQB 302, the Alberta Court of Queen’s Bench upheld a constructive dismissal based upon the employer’s persistent verbal abuse of the plaintiff. The court held that the conduct amounted to a fundamental breach of the employment contract and Sanderman J. commented as follows:

A fundamental implied term of any employment relationship is that the employer will treat the employee with civility, decency, respect, and dignity. The standard that has to be adhered to by the employer is dependent upon the particular work environment.

Courts however have also confirmed that employers are entitled to be critical of their employees, within bounds. In Ata-Ayi v. Pepsi Bottling Group (Canada), 2006 CarswellOnt 6864, an employee brought a wrongful dismissal action on the basis of a poisoned work environment. The plaintiff had worked or the
employer for twenty four years and received good performance reviews over the years, except for during four years. The employee sought early retirement and alleged racism, “bad blood and a poisoned environment” as the reason. He later commenced a wrongful dismissal action.

Echlin J. acknowledged that the plaintiff held negative views regarding his treatment by other employees and, undoubtedly, his perceptions of how he was treated led him to pursue the issues by electing to take early retirement and then pursuing the matter through to trial. Echlin J. acknowledged that constructive dismissal cases are peculiarly fact-driven and then cited several cases in which criticism of employees’ work habits and performance was not held to be constructive dismissal. In one case, *Frankcom v. Tandy Electronics Ltd.* (1984), 4 C.C.E.L. 40 (Ont. H.C.), even “unfair and insensitive” criticism was not found to constitute constructive dismissal as long as the employer acts in good faith and gives the employee an opportunity to improve his performance. In assessing the evidence, Echlin J. was guided by the following principle cited in *Smith v. Viking Helicopter Ltd.* (1989), 68 O.R. (2d) 228 (Ont. C.A.):

...a damage action for constructive dismissal must be founded on conduct by the employer and not simply on the perception of that conduct by this employee. The employer must be responsible for some objective conduct which constitutes a fundamental change in employment or unilateral change of a significant term of that employment.

The court held that there has to be objective evidence of conduct on the part of the employer, beyond a mere perception on the part of an employee of a poisoned work environment, for a constructive dismissal claim to succeed. As such, in that case, a single incident of horrible name calling was not found to be enough of a basis for a finding of constructive dismissal.

There have been only a few cases in British Columbia in which an employee has alleged constructive dismissal on the basis of bullying or harassment in the workplace. In *Morgan v. Chukal Enterprises Ltd.*, 2000 BCSC 1163, a kitchen manager treated the female beverage manager and her staff with rudeness and hostility. He yelled, swore and frequently belittled the beverage manager in front of the customers over a period of two years. The owners of the establishment supported the kitchen manager when the behaviour came before them and the female beverage manager found her work environment so intolerable that she felt forced to resign. The court found that the refusal of the owners to stop the abusive behavior amounted to a fundamental breach of the implied term of the employment contract that employees should be treated with civility, decency, respect and dignity and found that the female beverage manager had been constructively dismissed.

Also, in *Hanni v. Western Road Rail Systems (1991) Inc.*, 2002 BCSC 402, Burnyeat J. determined that an employer had breached the employment contract by making a number of unilateral changes to the employment agreement and additionally permitting a hostile and embarrassing work environment for the employee. In that case, the employee was made a low-ball offer to leave, her office was occupied by a new employee while she was away on vacation, and accusations were made against her but no details were provided.

Overall, however, the paucity of cases may highlight the difficulty of proving a constructive dismissal based on bullying or harassment.
B. Breach of Contract

A second avenue may be an allegation of breach of contract based upon written harassment policies. In one unusual case, an employee brought an action against her employer in breach of contract. In Sulz v. Minister of Public Safety and Solicitor General, 2006 BCSC 99, affirmed 2006 BCCA 582, the plaintiff was an RCMP officer who alleged she was harassed by her superior officer over an extended period of time. The impugned conduct included "angry outbursts" and "intemperate, and at times, unreasonable behaviour". It included negative comments about her pregnancy leave and her abilities (saying she had done something "stupid" at one point), putting her down in front of co-workers, and using harsh language with her.

The employee, after her discharge, brought an action in the BC Supreme Court alleging various causes of action. One allegation was that the RCMP's harassment policy formed part of the employment contract such that the plaintiff could maintain an action for breach of contract based on an alleged breach of the policy. Ultimately, the court ruled that such a claim was statute-barred. However, it remains to be seen whether other employees could make such a claim.

All of the decisions to date have arisen in cases where the employee either resigned or was discharged. An open question now remains as to whether an employee may sue for breach of contract, based on a code of conduct or written policy, and still remain employed.

C. Tort Claims

Although courts have confirmed that there is no tort of harassment, either personal harassment or harassment which contravenes human rights legislation, harassed or bullied employees have several potential claims in tort: intentional infliction of mental suffering and defamation.

The legal test for the intentional infliction of mental suffering was set out by McLachlin J. (as she then was) in Rahemtulla v. Vanfed Credit Union, [1984] 3 W.W.R. 296, 51 B.C.L.R. 200 (S.C.). The plaintiff must establish that the employer engaged in outrageous or flagrant and extreme conduct that was calculated to produce an effect of the kind that was produced and that caused the plaintiff to suffer a visible and provable illness.

In Sulz, the plaintiff was awarded damages of $950,000 in respect of her claim of negligent infliction of mental suffering. Under the tort of negligent infliction of mental suffering, the plaintiff must establish that the employer owed a duty of care, the defendant breached that duty of care and the damages or injury resulted from that breach. However, in Ontario, the Court of Appeal has ruled that the tort of negligent infliction of mental suffering is not available in the employment relationship.

Other cases where tort claims have been considered include Prinzo v. Baycrest Centre for Geriatric Care (2002), 60 O.R. (3d) 474 (C.A.) and Piresferreria v. Ayotte, 2010 ONCA 384.

In Piresferreria, the plaintiff brought an action against her former employer and supervisor seeking damages for assault and battery, negligence, loss of past and future earnings, breach of contract, intentional or negligent infliction of emotional distress, mental suffering, and nervous shock. She also sought damages for wrongful dismissal. The court found that the supervisor was intimidating, and was prone to yelling, swearing and banging his fist on the table. By 2004, the plaintiff tried to avoid the supervisor as much as possible as he was regularly abusive and questioned her competence. On May 12, 2005, the supervisor berated the plaintiff for failing to arrange a meeting; yelled and swore at her in
front of other employees, stating she was not doing her job. Later the same day, the supervisor pushed the plaintiff on her left shoulder, telling her to get away from him. She was pushed approximately a foot and had to balance herself against a filing cabinet. After that, the supervisor threatened to place the plaintiff on probation. The plaintiff eventually went on stress leave. The plaintiff declined several offers to return to work and the employer took the position she had resigned.

The trial judge upheld the claims of negligent infliction of mental suffering and intentional infliction of mental suffering. With respect to the former claim, the trial judge rested her finding on the employer's failure to treat the employee “in accordance with [the employer’s] Code of Business Conduct.” The Code guaranteed employees the “right to work in an environment free from violence and threats” and prohibited “all acts of physical, verbal or written aggression or violence”. The plaintiff had argued that the duty of care flowed from the Code of Business Conduct, and that the conduct of the employer constituted “a fundamental breach of the terms and conditions of employment

The Ontario Court of Appeal held that the tort of negligent infliction of mental suffering could not be founded upon a contractual obligation. On the issue of whether an employer owes a common law duty of care to an employee, the court found that although there is sufficient relationship of proximity and that damages may be reasonably foreseeable, there are significant policy considerations which foreclose the recognition of a duty of care at common law.

The court held at paras 56-62:

[56] First, the Supreme Court has already strongly intimated that the recognition of such a tort in the employment context is better left to the legislature. In Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, Iacobucci J. writing for the majority rejected the notion that a tort existed for breach of a good faith and fair dealing obligation by employers in dismissing employees. He wrote at para. 77, “To create such a tort in this case would therefore constitute a radical shift in the law, again a step better left to be taken by the legislatures.” The further evolution of the law in Honda is completely consistent with this view.

[57] The duty rejected in Wallace is not exactly the same duty postulated in this case. This, however, provides more, not less, reason to reject a duty in this case. The duty of care put forward in this case is broader than the duty that was rejected in Wallace. A general duty to take care to shield an employee during the entire course of his or her employment from acts in the workplace that might cause mental suffering strikes me as far more expansive than a duty to act fairly and in good faith during just the termination process. The duty rejected in Wallace would have applied only at the time of termination and to the manner of termination. The duty put forward in this case would apply in the course of employment as well as to its termination. The general duty postulated would require employers to take care to shield employees from the acts of other employees that might cause mental suffering.

[58] In this sense, the asserted duty of care would have a far greater impact on settled jurisprudence than would the duty of good faith and fair dealing that Iacobucci J. described in Wallace at para. 76 as “overly intrusive and inconsistent with established principles of employment law”.

[59] The findings of the trial judge in this case provide an apt example. The trial judge assessed Piresferreira’s damages for wrongful dismissal as comprised of her salary and benefits for 12 months from May 24, 2005 and an additional $45,000 for mental distress under the framework
established by *Honda*. By contrast, the tort damages awarded by the trial judge included lost income between May 24, 2005 and July 2009, less a 10% discount for contingencies. In *BG Checo*, the Supreme Court noted at p. 38 that “it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.”

[60] No particular circumstances or policy that would support different scales of damages for mental suffering in tort and contract in the employment context were brought to the court’s attention. Rather, there are good reasons for avoiding such a scenario.

[61] In a case in which the employer’s allegedly tortious behaviour includes the termination of the employee, compensation for mental distress is available under the framework the Supreme Court has set out in *Honda*. In a case in which the employer does not terminate the employee, the employee who is caused mental distress by the employer’s abusive conduct can claim constructive dismissal and still have recourse to damages under the *Honda* framework. Recognizing the tort in the employment relationship would overtake and supplant that framework and all of the employment law jurisprudence from which it evolved. In other words, in the dismissal context, the law already provides a remedy in respect of the loss complained of here. The recognition of the tort is not necessary.

[62] That leaves the category of cases in which the employee suffers mental distress from employer conduct that would not provide the grounds for a claim of constructive dismissal. Perhaps it can be said, as the respondents submit, that it is not foreseeable that an employee would suffer mental distress from criticism of poor work performance that is constructive. However, much disagreement can be anticipated as to whether criticism is “constructive”, whether work performance is “poor”, and whether the tone of the former was appropriate to the latter. The existence of the tort would require the resolution of such disputes. The court is often called upon to review the work performance of employees and the content and manner of their supervision in dismissal cases. It is unnecessary and undesirable to expand the court’s involvement in such questions. It is unnecessary because if the employees are sufficiently aggrieved, they can claim constructive dismissal. It is undesirable because it would be a considerable intrusion by the courts into the workplace, it has a real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply indeterminately.

The Court of Appeal held that employees could maintain an action of intentional infliction of mental suffering. However, the court overturned the trial judge’s finding on the claim. In particular, the court found that the trial judge erred in finding that the supervisor’s conduct was calculated to produce harm, the second element of the test, for two reasons: first, the trial judge applied a standard of “reasonable foreseeability” rather than “calculated to produce harm”; and second, the plaintiff had failed to connect the intention to the actual harm suffered rather than general harm. In a statement which underscores the high bar an employee faces, the Court of Appeal stated:

In the seminal case of *Wilkinson v. Downton*, the court further noted at p. 59 that the defendant’s conduct must be “plainly calculated to produce some effect of the kind which was produced” (emphasis added). It is clear, as the trial judge observed, that where the tort is established, the plaintiff is entitled to recover the full extent of the damages suffered even if they could not have been anticipated. As indicated in *Wilkinson v. Downton*, “it is no answer in
law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs.” The extent of the harm need not be anticipated, but the kind of harm must have been intended or known to be substantially certain to follow.

[79] Here, the trial judge found that Ayotte showed reckless disregard “for Piresferreira’s emotional well-being”. She did not consider and the evidence does not support the inference that Ayotte intended or knew it was substantially certain to follow that Piresferreira would suffer posttraumatic stress disorder as diagnosed by Dr. Heney or a major depressive disorder as diagnosed by Dr. Basson, with the result that she would never be able to work in any employment again and that her personal life would be changed so dramatically. At most, the trial judge found, at para. 190, that serious psychological injury was foreseeable to Ayotte. Foreseeability, which indicates only that a result may follow, is much less than knowledge that a result is substantially certain to follow. I agree with the remarks of M.E. Boyd J. in Kedia International Inc. v. Royal Bank of Canada, 2008 BCSC 122, at para. 196, as follows:

I agree with the defence submission that it makes no sense to deem intention on the basis of simple foreseeability, while at the same time denying the defendant the benefits of the limitations of liability applicable in a negligence action. Put another way, the standard of constructive intention must be very high.

The Court of Appeal upheld the claims of assault and battery, and constructive dismissal. With respect to the latter claim, the court also upheld the trial judge’s award of additional damages as a result of the manner of termination. The plaintiff’s application for leave to the Supreme Court of Canada was dismissed in January 2011.

The case highlights the difficulty facing employees who face harassment and bullying in the workplace but who are neither dismissed nor wish to claim constructive dismissal. The case does not address any breach of contract claim, and restates the high bar for intentional infliction of mental suffering.

Defamation claims may also surface in the context of personal harassment. For example, defamation may come up in relation to wrongful dismissal, performance reviews and discipline, reference checks and post-termination documentation. The test for determining whether words are defamatory is whether the words tend to lower the plaintiff in the estimation of right-thinking members of society generally: Sim v. Stretch (1936), 52 T.L.R. 669, at p. 671. The test is objective and the intention of the employer in not relevant to the determination of whether the words are defamatory. The employer may be held liable for general damages, aggravated damages, punitive damages and may be required to issue an apology.

The defence of qualified privilege is available for human resources matters, including performance reviews and post-dismissal reporting. However, one recent case is a reminder to keep the circle of people who receive the comments to those who need to know. In Dawydiuk v. Insurance Corporation of British Columbia 2010 BCCA 35, Ms. Dawydiuk’s position was eliminated during her maternity leave. Ultimately, after failing to choose between several offered positions, she was dismissed. In accordance with company procedures, the manager completed and submitted an email form report required by the human resources department describing the circumstances leading to the dismissal. In the report, the manager selected from a list of potential answers three reasons for the dismissal, including “inadequate performance”. In addition, the manager advised that he considered Ms. Dawydiuk as “not re-hireable” and rated her as “unsatisfactory”. The manager submitted the report to the human resources
department and sent a copy of the report to three other individuals: a member of the human resources department, the manager's own manager, and a third person whose role and title was not identified.

Ms. Dawdyiuk commenced litigation. She alleged that the report was defamatory, and sought additional damages. The Court of Appeal found that the report was defamatory, since the reason for her dismissal was not her performance but her failure to make a decision on the new positions offered. The court, however, accepted that the manager had an honest belief in the contents of the report: his view that her failure to respond was an aspect of "performance".

The Court of Appeal also found that insofar as the report was sent to the human resources department and to a senior manager, the report was protected by qualified privilege. In that regard, the manager had an interest in making the report, and the human resources department and senior management had a duty to receive the report. The court, however, did not extend the defence to the third person who received the report. Since there was no evidence about that person's position or status within the employer, the court found that it could not conclude that person had a duty to receive the report.

III. Costs of a disrespectful workplace

"If an employer wishes to have a successful business, it is incumbent upon the employer to foster congeniality amongst employees by providing a good working environment which results in good employee productivity": Morland v. Kenmara Inc. [2006] O.J. No. 657 (S.C.J.)

A workplace that is controlled or influenced by bullying and harassment has immense cost implications for employers. The bully and the victim are just the beginning of the problem. The work atmosphere as a whole may become toxic and other employees will become stressed or disengaged from the workplace.

Employers will begin to see patterns of:

- more absenteeism, sick leave, short-term disability leave and or workers compensation claims;
- reduced productivity;
- difficulty in recruitment and retention issues for good employees;
- decreased morale and strained team work;
- potential litigation and/or hostility with the employees’ union, including multiple grievances and challenges to management;
- reduced corporate image and possible customer confidence concerns which may translate into lack of business;
- poor public relations; and
- obvious trust issues between management and employees which make daily functioning stressful.

IV. Liabilities Caused by a Disrespectful Workplace: a Review of 2010 Cases

In addition to the costs to the workplace associated with a disrespectful work environmental, employers are at risk of liability if they do not comply with the basic tenets of respect. There have been a number of decisions in 2010 which indicate that employers must take pro-active measures to engender respect in their workplaces.
The cases set out below not only address direct claims related to harassment and bullying, but also where the courts have commented or made findings of a lack of respect shown by to the plaintiff.

*Bomford v. Wayden Transportation Systems Inc.*, 2010 BCSC 1506

In this case, the court rejected a claim of cause for dismissal, because the employer had failed to communicate warnings in an appropriate manner. The court found that the employee had been wrongfully dismissed and awarded the employee ten months’ pay in lieu of reasonable notice. In that case, the employee was a tugboat operator. The employer dismissed the employee following a landing incident which resulted in damage to a dock. In court, the employer relied on nine incidents of poor performance and argued it had cause for dismissal, based on those incidents and the employee's failure to respond to warnings. The warnings consisted of several terse, verbal warnings that the employer was unhappy and that the employee needed to be more careful. The employer provided a written reprimand on one occasion that indicated the seriousness of the matter and that the conduct would not be tolerated, but nothing more. The court found that the employer’s warnings were insufficient communications to the employee. The court stated that with respect to the warning itself, the employer must use clear and not oblique language and must not merely criticize the employee’s performance or simply urge improvement. In addition to warning the employee, the employer must bring home to the employee that the performance was inadequate, ensure that the employee understands the significance of the warning and meaningfully assist the employee to improve.

*Nishina v. Azuma Foods (Canada) Co. Ltd.*, 2010 BCSC 502

The court awarded punitive damages against the employer for breach of the duty of good faith. The plaintiff was employed as a quality control associate in a food production plant. The employee was a Japanese citizen who was permitted to work in Canada through her US employer. The plaintiff noticed that her supervisor was setting up the production line to prepare a food that had yet to receive governmental approval. When she informed her supervisor, he called her “omae”, indicating a rank quite inferior to his and refused to listen to her. A number of events followed, including the employer demanding an apology from the employee. When the employee refused to apologize, she was (1) warned, (2) demoted to factory worker, and (3) dismissed for cause. The court concluded that the employee was wrongfully dismissed and awarded damages. The court stated:

> Not only did Azuma Foods fail to adequately establish that there was cause to terminate Ms. Nishina’s employment without notice, it failed to adequately investigate each of the incidents it relies on to establish cause. It rarely occurred to Ms. Nishina’s employer to ask her about the instances of alleged misconduct; when it did ask, it discounted what seemed to be reasonable explanations, preferring instead to view her as disrespectful, untrustworthy, or guilty. Azuma Foods’ response and sanction to the instances of Ms. Nishina’s alleged misconduct was out of any reasonable, objective sense of proportion. Azuma Foods’ conduct at the point of termination reveals a shocking disregard for Ms. Nishina’s vulnerability as an employee, and shows a significant lack of good faith. [para. 264]

The court awarded $20,000 in punitive damages against the employer.

In addition to the *Piresferreria* decision, a number of decisions from Ontario dealt with harassment and bullying in the workplace. The Ontario courts found that the disrespectful behaviour in the workplaces amounted to constructive dismissal and the employers were held liable.
**Disotell v. Kraft Canada Inc.,** 2010 ONSC 3739

The Ontario Superior Court of Justice found that the employee had been constructively dismissed as a result of harassment at his workplace as a result of “degrading, impolite and derogatory comments” by fellow employees. The offensive comments involved graphic negative description of sexual acts between the employee and other employees. The employee repeatedly complained to his supervisor who did not intervene to stop the abuse. The court found that the employer had not conducted a serious enough investigation into the serious nature of the allegations in this case and awarded damages equal to 12 months as the appropriate length of notice for the dismissal.

**Qubti v. Reprodux Ltd.,** 2010 ONSC 837.

Verbal name calling and abuse of an employee over a period of six years created a hostile and poisoned workplace for the employee justifying a claim for constructive dismissal in this case. The manager swore at the employee, used foul language when addressing him, called unflattering nicknames and make bigoted and racist remarks. The court awarded damages equal to four months. The judge stated at paragraph 79:

> This abuse was sufficient to create a hostile and poisoned work environment which caused him to seek medical attention for mental stress. It resulted in his having been constructively dismissed. The offensive behaviour to which I have referred “was such that a reasonable person in the circumstances should not be expected to persevere in the employment”: Shah v. Xerox Canada Ltd., [1998] O.J. No. 4349, affd at [2000] O.J. No. 849 (C.A.).

**Cooke v. HTS Engineering Ltd.,** 2009 CarwsellOnt 8326, 79 C.C.E.L. (3d) 223

The court found that the evidence provided by the employee was insufficient to prove sexual harassment but that some of the conduct complained of constituted psychological harassment or bullying in this case. The supervisor repeatedly called the employee “an idiot” and “pathetic”. There were angry outbursts and the employee ended up in tears on at least two occasions. The court found that a reasonable person in the employee’s circumstances would have found the situation intolerable and allowed the claim of constructive dismissal:

> In my view, a reasonable person in Ms. Cooke’s circumstances should not be expected to persevere. Although Mr. Comeau may well have raised legitimate performance issues with Ms. Cooke, the degeneration of those discussions into shouting matches in which he was an active participant was unwarranted. His other outbursts of anger in the office, albeit directed at customers, suppliers or a shelf of books, would reasonably have contributed to the intimidation of Ms. Cooke, particularly given the very close physical proximity in which they were working. His demeaning statements and references to Ms. Cooke and her boyfriend were unacceptable. No employee should have to tolerate such conduct in the workplace. [para. 52]

The court went on to determine that the failure to report abusive conduct by the employee does not preclude the recovery of damages for constructive dismissal. The judge stated that victims of abuse are often reticent to report that the abuse has taken place and this failure does not nullify or reduce the veracity of the claim; para. 63. The employee was awarded two months payment in lieu of notice, a prorated bonus and damage award for mental stress of $3,500. The court declined to award punitive damages.
V. General strategies to create and maintain a respectful workplace

While, the current legal status of claims of harassment and bullying may be for now unclear, what is clear is that even the fact of such litigation is time consuming and expensive.

Employers therefore should be proactive in minimising claims. Strong policies, procedures and systems are necessary to create the atmosphere of organization and mutual respect that will limit the employer’s potential for liability. This environment can be achieved by:

Training

- employers should include respectful workplace training for all managers and employees;
- employers may hold orientations for new or promoted employees to review their rights, responsibilities and obligations to the workplace and other employees; and
- employers may include conflict resolution training for management and supervisory staff.

Policy. Employers should develop and publish a clear, written policy on workplace harassment and bullying. A good policy should include the following provisions:

- a clear statement of what harassment and bullying are, and that they are unacceptable;
- a clear statement of what conduct does not constitute harassment, and in particular addressing performance reviews, criticism and discipline;
- a clear statement that the employer is committed to protecting employees from harassment and bullying;
- outline consequences of behaviours covered by the policy;
- encouragement to workers to report all incidents of workplace harassment; and
- a commitment to investigate and deal with concerns promptly and a clear procedure.

The Ontario Ministry of Labour has published a checklist prepared by the Occupation Health and Safety Council of Ontario, which sets out what policies and procedures it recommends for employers. The checklist is attached as Appendix A.

Building accountability

- employers should be encouraged to establishing objective and confidential internal investigation processes for complaints under their policy;
- employees should be encouraged to report abuse, discrimination and harassment;
- all complaints should be evaluated respectfully and sanctions must be implemented if the complaint if founded;
- if harassment is found not to have occurred, there should be a discussion and debrief; and
- practices should be reviewed with management and employees on a regular basis.

Communication

- employers should communicate with their employees in an open and frank manner;
- bad news items should be communicated to an employee in person and not sent out by email or correspondence;
- employers should take particular care to be respectful when dismissing an employee;
employers should be careful about internal and external email communications concerning the employee and the dismissal, as these can be subject to disclosure in any subsequent litigation.

VI. Conclusion

We should encourage our employer clients to put “RESPECT” as their utmost priority in their workplaces. Respectful treatment of employees permits employer clients to manage in a cooperative and productive manner and engenders a team-like mentality in the workplace. Further, being respectful in the difficult times, such as during restructurings, time of job loss and lay-offs, in disciplinary situations and when dealing with illness, may assist the employer to limit conflict and avoid destructive litigations. Employers should be aware of their obligations and risks when addressing their employees and act with care and compassion.