Employment & Labour

Investigating Workplace Sexual Harassment

Since the early 1980s, when the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19 (the "*OHRC*") was amended to include provisions specifically prohibiting harassment on the basis of sex, Ontario has expressly mandated employers to take sexual harassment in the workplace seriously. More recently in 2010, Bill 168 was passed, amending the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (the "*OHSA*") to better respond to workplace violence and harassment. In 2013, protections for gender identity and gender expression were officially added to the OHRC. In 2016, Bill 132, the Sexual Violence and Harassment Action Plan was implemented. Since 2017, however, the #MeToo movement launched the issue of sexual harassment in the workplace into contemporary mainstream discourse. With its successor, #TimesUp, these movements have popularized a common, but historically silent, problem, and empowered those victimized by harassers to speak up about their experiences, and seek redress for discrimination and harassment on a previously unprecedented scale.

Employers, whether as individuals or businesses, who have failed to prevent harassment, failed to protect employees, and/or failed to properly address complaints of sexual harassment, have been publicly reprimanded as a consequence. Damage to the reputation of a business can be much more harmful than a monetary damages award. When a complaint of sexual harassment in the workplace arises, the way the employer manages it will have tremendous repercussions. In the situation where preventative measures have failed, the best way forward is to take the complaint seriously, commence an investigation quickly, and investigate fairly and thoroughly.

Consequences in Damages

Ontario Courts and Tribunals have openly reprimanded employers for failures in their responses to workplace sexual harassment. A series of awards from the Ontario Human Rights Tribunal have revealed a growing trend of high damages awards for extreme cases of sexual harassment and/or assault in the workplace. In the 2015 decision, *OPT and MPT v Presteve Foods Ltd.*, 2015 HRTO 675, the respondent employer was found jointly and severally liable for $250,000 after the personal respondent sexually harassed and solicited two of the company's temporary foreign workers. In a decision published last year, *AB v Joe Singer Shoes Ltd.*, 2018 HRTO 107, the applicant was sexually harassed and assaulted by her boss over the course of many years; she was awarded $200,000 in damages. *In GM v X Tattoo Parlor*, 2018 HRTO 201, an unpaid intern who was sexually assaulted by the owner of the tattoo shop where she worked (she was a minor at the time) was awarded $75,000 in damages.

Outside of the Tribunal context, recent case law also demonstrates the possible outcomes for an employer's failure to take complaints of harassment, sexual or otherwise, seriously. In *Boucher v Walmart Canada Corp*, 2014 ONCA 419, Boucher was harassed over a period of several months by a store manager. She complained to Walmart management. Walmart conducted a brief investigation, found the complaints "unsubstantiated," and told Boucher that she would be held responsible for making unsubstantiated complaints. Walmart concluded that Boucher was attempting to undermine her manager's authority by complaining. Boucher eventually resigned and sued Walmart for constructive dismissal. Boucher was awarded $100,000 for mental suffering and $150,000 in punitive damages (reduced to $10,000 on appeal) against the store manager personally, and $200,000 in aggravated damages and $1,000,000 in punitive damages (reduced to $100,000 on appeal) against Walmart, plus constructive dismissal damages.

Earlier this year, the Court of Appeal found that another employee had been constructively dismissed when Tbaytel rehired a man who, twenty-years earlier, was dismissed for sexually harassing the Appellant and others. In *Colistro v Tbaytel*, 2019 ONCA 197, the employer did not listen to the protests of Colistro, who told her employer about the mental and physical stress she was experiencing after hearing of Tbaytel's intention to rehire her abuser. They did not take her protests seriously and continued with the hiring process. Colistro went on stress leave and never returned. She sued for constructive dismissal and won. She was awarded $280,000 in future economic losses, $194,000 in past economic losses, $100,000 in general damages for intentional

infliction of mental suffering, damages for wrongful dismissal in the amount of $14,000, and an additional $100,000 in *Honda v Keays* damages due to the manner of her dismissal.

The lesson for employers is resounding: take sexual harassment seriously. Part of that lesson is taking employer obligations under the *OHSA* and *OHRC* seriously to protect their employees and try to prevent sexual harassment in the workplace through the implementation of anti-harassment policies and programs, as well as providing training and education. The other part is, if a complaint of sexual harassment is brought forward, employers must also take their duty to investigate seriously.

What is Sexual Harassment?

Sexual harassment in the workplace is defined in the *OHSA*. The definition clearly reflects the prohibitions against sexual harassment and sexual solicitation found in the *OHRC*:

(a) Engaging in a course of vexatious comment or conduct against a worker, in a workplace, because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably be known to be unwelcome; or

(b) Making a sexual solicitation or advance where the person making it is in a position to confer, grant, or deny a benefit or advancement to the worker, and the person knows or ought reasonably to know the solicitation or advance is unwelcome.

The behaviours this definition encompasses are broad, ranging from making inappropriate comments to physical violence. Behaviours include the seemingly minor, such as asking inappropriate questions or making unwelcome gender-related comments, to the very serious, which may attract charges under the *Criminal Code* and require police involvement, such as stalking, threats, or sexual assault.

Depending on the circumstances, one incident of misconduct may constitute sexual harassment; a single violent sexual assault will certainly qualify. More commonly, the offending conduct or comments happen more than once, hence the "course of vexatious comment or conduct" found in the *OHSA* definition. The course of conduct or comment may be over many years, months, weeks, or even a single day.

Employer Obligations

All workplaces are required to have a workplace anti-harassment policy. All workplaces with five or more employees are also required to have a written policy posted in an obvious and accessible location. Workplaces also need to have an anti-harassment program in place, which outlines how the policy will be implemented. This is where, amongst other things, employers should formally outline how incidents of harassment will be investigated. The *OHSA* requires that the policy and program be reviewed at least once a year.

The employer obligation to investigate is triggered as soon as it becomes aware that an incident has occurred. An employer may become aware of an incident of harassment directly, through a formal complaint, or indirectly, for example, through workplace gossip or through a third party. There are any number of ways an employer may become aware of workplace harassment. The key is, awareness, in any respect, triggers the employer obligation to investigate.

As evidenced in *Boucher v Walmart Canada Corp.*, employers are prohibited from penalizing or reprising against workers for reporting workplace harassment, or otherwise exercising their rights under the *OHSA*. Employers should also avoid taking any action that could even be interpreted as penalizing a worker for making a complaint.

The Investigator

Employers should not underestimate the importance of selecting an appropriate investigator. The *OHSA* does not specify who should conduct an investigation, unless an employer is ordered to investigate by the Ministry of Labour, in which case the investigator must be "an impartial person possessing such knowledge, experience and qualifications as are specified by an OHSA inspector." Being impartial, knowledgeable, experienced and qualified are qualities an investigator should have even if not ordered by the Ministry. An "impartial" person is defined as someone who is unbiased, with no conflict of interest, and if applicable, is in good standing with their professional body. The Code of Practice to Address Workplace Harassment (the "Code of Practice") also provides some basic and hopefully obvious guidelines for selecting an investigator: the investigator must not be the alleged harasser, nor under the direct control of the alleged harasser, and the investigator must be able to conduct an objective investigation.

Thinking retrospectively and considering how an investigator could be criticized or challenged following an investigation may help in deciding who would be a good choice. Could the workplace investigation be called into question or found to be inadequate because the investigator was biased, incompetent, inexperienced or unprofessional?

The Impartial Investigator

The Code of Practice guidelines essentially direct that the investigator should be an unbiased neutral party. A neutral party is not only one who has no close connections to the alleged victim, the alleged harasser, or main witnesses, but ideally should be someone who has not been exposed to workplace gossip about the incident or course of conduct being investigated. This also means that investigators should be, to the extent possible, isolated from the workplace both before an incident arises and during the investigation. During an investigation, an investigator should only be providing updates to a designated contact person, or the alleged victim or alleged harasser as required under the *OHSA*. Communication or interference by a party who is not within the circle of people who "need to know" risks creating the perception that the investigator and/or investigation lacked objectivity.

While it may be near impossible to find an entirely unbiased party, the ideal investigator should be alive to implicit bias. Implicit bias refers to the subconscious attitudes or stereotypes about other people that affect our understanding, actions, and decisions. The ideal investigator will be a person who actively works to uncover and disengage their implicit biases, and works to prevent

preconceived notions or judgements about people or their behaviours from affecting the investigation and the conclusions they draw.

The Experienced and Professional Investigator

The ideal investigator will also be someone with experience conducting workplace investigations, especially if the allegations require a more complex investigation. For sexual harassment in particular, having subject-matter expertise in sexual harassment is ideal. The more experienced and professional an investigator, the more satisfied the parties to the harassment complaint, and the workplace as a whole, will be that the investigation was taken seriously and investigated properly. Further, there will be lower risk that the investigator's competence will be called into question: the more experienced and professional, the better the investigator will be able to describe their methods and findings, making them a more credible witness should the allegation become litigious.

The Internal or External Investigator

Employers will have to decide whether the investigation should be carried out by someone within the workplace, or an external party. Larger workplaces will likely find it easier to find an appropriate internal investigator who has no connection to the parties. Smaller workplaces may have more difficulty finding an internal manager or supervisor to carry out the investigation who is not involved in the incident, or who does not have a relationship with the alleged victim or alleged harasser that could colour their investigation, or lead to an accusation of bias. A number of factors will influence the decision of who an appropriate investigator will be, including the type or degree of severity of the allegation(s) made, the anticipated complexity of the investigation, the size of the workplace and the relationships between workers, as well as the availability of the investigator. The Ministry of Labour suggests considering:

- Someone in the workplace, such as a manager, supervisor, or someone from the Human Resources department;
- Someone in the organization, but from another location or corporate head office;
- Someone associated with the workplace or organization, such as someone from another franchise, or a business association;
- Someone external to the workplace, such as a licensed private investigator, Human Resources professional, professional workplace investigator, or a lawyer.

The Investigation

The purpose of an investigation is, at its core, to conclude what happened. The results of the investigation are what the employer will rely on to determine what remedial and/or preventative actions need to be taken. The investigation is also an opportunity for the parties to be heard, make assessments of credibility, and in some cases, gain a better understanding of what is going on in the workplace broadly. The starting point for any investigation will be to develop an "investigative plan" outlining the investigator's mandate, the scope of the investigation, the steps to be taken, timelines, and an action plan for dealing with further accusations that may arise in the course of investigating.

Investigations must be "appropriate in the circumstances." This means that not all incidents will require a full-fledged investigation. For example, if the employer receives a complaint where worker A accuses worker B of making a lewd comment, and worker B admits to doing so, a formal investigation may not be necessary. Regardless, an employer should take reasonable steps to find out what happened and correct unwelcome behaviour.

An investigation should at minimum meet the criteria laid out under the *OHSA*. Though, much like choosing the right investigator, conducting an investigation or developing an investigative strategy with a mind to how it could be scrutinized should matters become litigious, may be helpful in making sure the investigation is thorough and compliant with the rules.

The hallmarks of a good investigation are fairness, timeliness, and thoroughness. Employers are required to treat incidents or complaints of sexual harassment seriously, to act promptly, and to allow sufficient time and resources to investigate and bring a resolution.

Fairness

Investigations must be fair. Both sides of the story must be heard, and confidentiality must be respected and protected. As addressed above, the selection of the investigator is also very important to the fairness and objectivity of the investigation.

Timeliness

As noted, the degree and depth of an investigation is likely to vary depending on the context, but under the *OHSA* all investigations must be conducted within 90 days. A quick response to a complaint demonstrates to the alleged victim, the alleged harasser, and the workplace as a whole, that the employer takes complaints of sexual harassment seriously. As well, as with any investigation, the closer to the date of the incident, the better, as memories will be fresher and evidence more accessible. As time passes, people forget, details become fuzzy, documents can be disposed of and messages deleted.

Thoroughness

Finally, investigations must be thorough. This means that all parties and witnesses are interviewed separately, all relevant documents and evidence, including emails, text messages, notes, photographs, videos, social media posts, and so on, are gathered and examined. Importantly, every part of the investigation should be well documented. Document the investigation with the mindset that you will one day need to prove that a thorough, timely and fair investigation was conducted.

The investigative steps required under the *OHSA* are outlined in the Code of Practice:

1. The investigator must ensure the confidentiality of the investigation, only disclosing identifying information as necessary to conduct the investigation, or as required by law. The investigator must explain confidentiality obligations to the parties involved, including witnesses. This is to ensure the fairness and integrity of the process. To have an investigation derailed by workplace gossip about the investigation is not a situation an employer wants to be in.

2. The investigator must thoroughly interview both the alleged victim and the alleged harasser. If the alleged harasser is not a worker of the employer, the investigator must make reasonable efforts to interview the alleged harasser. Usually the alleged victim should be interviewed first. This allows the investigator to understand what the allegations are, identify potential witnesses, and ensure a fair process for the alleged harasser.
3. The alleged harasser should be provided a written document outlining the complaints made against them. Procedural fairness means that the alleged harasser must know the case against them, and be given fair opportunity to respond. Witnesses, however, should be restricted to the "need to know."
4. The investigator must separately interview any relevant witnesses. The investigator must make reasonable efforts to interview any relevant witnesses who are not employed by the employer.
5. The investigator must collect and review any relevant documents.
6. The investigator must take appropriate notes and statements during interviews.
7. The investigator must prepare a written report summarizing the steps taken during the investigation, the complaint, the allegations of the alleged victim, the response from the alleged harasser, the evidence of any witnesses and all the evidence gathered. The report must set out findings of fact and come to a conclusion about whether workplace harassment was found or not. The report must be provided to the employer, supervisor or designated person to take appropriate action.

The Follow Through

An investigation is generally completed once the investigator has presented his or her findings in the report. If the investigator has also been tasked with providing recommendations, it may be a good idea to have these provided in a separate document. Workplace investigation reports (unless the investigator drafting it is a lawyer and was hired to provide legal advice) are unlikely to attract privilege and may have to be disclosed down the line. As well, if the incident gives rise to a workplace illness or injury, the Workplace Safety and Insurance Board may request the report for review.

The outcome of the investigation should be shared with the parties. It may not be necessary to share the entire report with the parties, but the results of the investigation need to be communicated in some manner. Obviously, if the complaint is founded, the discipline to follow will need to be communicated to the harasser. If the complaint is unfounded, it is especially important to explain the basis of that finding to the alleged victim and address any further concerns they may have.

There is no excuse for not taking sexual harassment in the workplace seriously. Failure to do so can cost an employer dearly and perpetuate workplace toxicity. It is advisable to be prepared with a solid workplace anti-harassment policy and program. Once an employer becomes aware of an incident, it is always good practice to immediately seek legal advice to develop a sound investigative plan, and ensure that a fair, timely and thorough investigation is conducted.

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Pallett Valo Employment & Labour Practice

Our Employment & Labour lawyers have the legal expertise to provide creative and pragmatic solutions for a wide variety of employment-related issues that arise in today's workplace. Our approach is to provide advice that will minimize the time, costs and disruption associated with labour and other employment disputes. We represent our clients before various provincial quasi-judicial tribunals and in court, and frequently attend at conciliation, mediation and other settlement proceedings.

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