

Workplace investigations: Lessons learned since Bill 132

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Presented by: Meaghen Russell, Partner
Pamela Chan Ebejer, Associate
Dentons Canada LLP

Overview of presentation

1. Recap of Bill 132
2. Early Ministry of Labour statistics
3. Learnings post Bill 132
4. Update on Bill C-65
5. Questions

Overview of Bill 132

- “Workplace harassment” definition was expanded to include “workplace sexual harassment.”
- Bill 132 required employers to implement a workplace harassment policy under *OHSA* that set out:
 - Procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;
 - How incidents or complaints of workplace harassment will be investigated and dealt with;
 - How information obtained about a complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the investigation or corrective action, or is required by law; and
 - How the parties will be informed of the results of the investigation and of any corrective action taken.

Bill 132: Early statistics

- In the first ten months following Bill 132:
 - The MOL's complaint statistics regarding workplace harassment, including sexual harassment, doubled.
 - The MOL received 4,935 calls regarding workplace harassment, including sexual harassment.
 - Of those calls, the MOL received 2,133 harassment complaints and of those, 156 were sexual harassment complaints.
 - The MOL made 1,539 field visits to Ontario employers.
 - The MOL issued 2,168 inspector orders.
 - The MOL issued 35 requirements.
- During the summer of 2017:
 - The MOL issued 1,182 orders relating to the failure to assess the workplace for risk of violence or having a workplace violence and harassment policy in place.

HRTO decisions

McDonald v. CAA South Central Ontario, 2018 HRTO 163

Facts:

- Allegations that a co-worker as well as a manager made race-based comments to her and that another manager treated her differently due to her race.
- Allegations of discrimination on the basis of race and disability and that the employer conducted an inadequate investigation.
- Once a formal complaint was filed, the investigator typed notes in advance of a witness interview:
 - “[w]ith respect to the situation that happened between yourself and Shala on Thursday, I want you to know, you dealt with it great, you kept the focus on her behavior (sic) and not the cultural difference, with that said, let’s walk through what happened in the Thursday conversation.” (Para 105)
- Following the investigation, the Employer found the complaint of racial comments/poisoned work environment to be unsubstantiated.

HRTO decisions

McDonald v. CAA South Central Ontario, 2018 HRTO 163

Findings:

- The co-worker's comments constituted harassment but did not create a poisoned work environment.
- The employer breached the *Human Rights Code* when it failed to appropriately respond to the harassment experienced by the Applicant.

Investigation Flawed:

- Employer omitted significant allegations from the investigation.
- The finding of unsubstantiated due to a lack of intention or motive to harass/discrimination was unreasonable.
- Employer unreasonably prejudged part of the complaint.
- Unreasonable to rely upon accusations that the Applicant's co-workers made against her without providing her an opportunity to respond to them.

Outcome:

- HRTO awarded the Applicant with \$5,000 for injury to dignity, feelings and self-respect.

HRTO decisions

Sheldon v. St. Mary's Ford Sales Ltd., 2017 HRTO 497

Facts:

- The Applicant returned to work following her maternity leave and was not provided with her old position.
- A co-worker stated to her that she was not returned to her old position because she did not “sleep with the boss like others did.”
- Allegations of reprisal and discrimination with respect to employment because of sex and sexual solicitation.
- Allegations that her employer failed to do a prompt and thorough investigation of her sexual harassment complaints when she complained about the co-worker’s comment or comments.
- Allegations that the employer failed to take proper action after the investigation.

HRTO decisions

Sheldon v. St. Mary's Ford Sales Ltd., 2017 HRTO 497

Findings:

- Employer discriminated against the Applicant by:
 - Failing to return her to her original job when she returned from her maternity leave; and
 - Conducting an investigation into the Applicant's allegations of sexual harassment that was not reasonable in the circumstances.

Investigation flawed:

- The investigator was a good friend of the Respondent.
- The investigator was the subject of one of the harassing comments.
- The investigator had no training and was not qualified to investigate.
- The investigator acknowledged it was difficult for him to come to a conclusion like an independent investigator would have.

HRTO decisions

Sheldon v. St. Mary's Ford Sales Ltd., 2017 HRTO 497

Outcome:

- The co-worker was ordered to pay the Applicant \$5,000 for injury to dignity, feelings and self-respect.
- The Company and the investigator were together ordered to pay the Applicant \$15,000; \$5,000 for injury to dignity, feelings and self-respect for failing to conduct a reasonable investigation and for providing no meaningful follow up to ensure a discrimination-free workplace, and \$10,000 for the failure to return her to her old job.

HRTO decisions

Laskowska v. Marineland of Canada Inc.

1. Awareness of issues of discrimination/harassment, Policy Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;
2. Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Act: Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and
3. Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide him/her with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

Post Bill 132 learnings

- An employee does not have to file a formal written complaint to trigger the employer's duty to investigate.
- The policy and program must be reviewed annually.
- There is a requirement to keep the investigation confidential.
- An investigator is required to make a finding (substantiated vs. unsubstantiated) even where it is a he said/she said scenario (credibility determination).
- The outcome of the investigation must be provided to the complainant in writing.
- The complainant is entitled to know what corrective action has been taken.

Post Bill 132 learnings

When to Consider Hiring a Third Party Investigator:

- Risks associated with the matter.
- Severity of the nature of the accusations.
- Importance of objectivity (and perceived objectivity).
- Time and resources versus cost.

Other considerations:

- Complainant is known to be litigious.
- Complainant is distrustful of the employer.

MOL Resources – *Code of Practice to Address Workplace Harassment under Ontario’s Occupational Health and Safety Act, and Workplace Violence and Harassment: Understanding the Law* guide.

Bill C-65

- Bill C-65, *An Act to Amend the Canada Labour Code (harassment and violence)*.
- Legislation aimed at providing better recourse for employees of federally regulated employers with respect to harassment and violence in the workplace.
- Bill creates a specific duty for an employer to:
 - investigate, record and report, all occurrences of harassment or violence known to the employer; and
 - take prescribed measures to prevent and protect against workplace harassment and violence, to respond to such occurrences and to offer support to employees affected by workplace harassment and violence.

Questions

大成 DENTONS

Dentons Canada LLP
77 King Street West
Suite 400
Toronto, Ontario M5K 0A1
Canada

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