

Day 2 – Ontario Employment and Labour Spring Webinar series

The presentation will begin shortly

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Panelists



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Agenda

- Before the investigation
- Identifying a workplace complaint
- When the investigation begins/contacting the parties
- Conducting interviews
- Concluding the investigation
- Post-investigation issues
- Short primer on new Federal Workplace Harassment and Violence Prevention Regulations



Before the investigation

- The best way to ensure that your company can smoothly navigate the workplace investigation process is to be prepared for when a complaint arrives.
- This includes:
 - Making sure your policies and procedures are up to date
 - Mandatory policies and procedures for provincial and federal companies
 - Making sure all employees are trained on the policies and procedures and know how to bring a complaint forward
 - Consider training some internal team members on workplace investigations so they're ready in the event that a complaint is made

Did someone just complain?

- How to identify a complaint
 - Understand what constitutes workplace harassment, including sexual harassment, bullying, discrimination, and violence.
 - Discrimination means differential treatment based on grounds protected by human rights laws, including race, ancestry, age, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, marital status, family status or disability.
 - Workplace harassment is 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
 - Includes workplace sexual harassment
 - Includes stalking
 - Can be one or a series of incidents or comments

Did someone just complain?

Under Ontario's *Occupational Health and Safety Act*, "workplace sexual harassment" means:

- 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 to be known to be unwelcome; or
- b) making a sexual solicitation or advance where the person making the solicitation or advance 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 that the solicitation or advance is unwelcome

Did someone just complain?

Sexual Harassment:

Conduct of a sexual nature covers a broad range of actions and comments, such as:

- **physical contact**
examples include: forced sexual acts, pulling of clothing, hugging, kissing, brushing against, patting, pinching
- **gestures or actions with sexual content**
examples include: leering, ogling, exposing or fondling oneself, giving sexually explicit gifts or persistent romantic attention
- **verbal conduct**
examples include: threats for failure to comply with sexual demands, or promises of job benefits for complying, sexual proposition, persistent romantic propositions, suggestive comments
- **denigration or insults based on gender**
examples include: comments about physical attractiveness, sexist remarks

Did someone just complain?

- Complainant may not use the words “harassment” or “discrimination”
- Complaint may be informal
- Confidentiality considerations
 - No complaint is “off the record”
- Reporting obligations



The reluctant complainant

Fatima v. Biopharma Services Inc. (HRTO, 2018)

- The Applicant alleged discrimination and harassment based on race:
 - Derogatory comments about people eating food with their hands
 - Comments about not being able to tolerate a religion that doesn't permit drinking alcohol
 - Comments about not wanting to live in areas with brown people
- Allegations raised after the Applicant's dismissal
- Employer conducted an investigation, in which the Applicant refused to participate
- Findings:
 - Employer conducted an investigation without the Applicant's evidence
 - Employer changed the investigator after the Applicant raised concerns

When the investigation begins/contacting the parties

- Establish the facts of a complaint:
 - Clarify what, exactly, the complainant is alleging happened.
 - Try to find out:
 - Dates of alleged incidents;
 - Locations of alleged incidents;
 - Times of alleged incidents;
 - The name(s) of the alleged harasser(s);
 - The names of witnesses, if any;
 - The nature of the harasser's behaviour; and
 - The nature of the complainant's own behaviour and actions.
- If possible, have an unwritten complaint committed to writing.
- When proceeding, be mindful of privacy concerns.
- Considerations re: when to advise the respondent.

When the investigation begins/contacting the parties

- Once you have all the details, before contacting the parties or taking any further steps, you will want to determine whether an investigation is necessary.
- Investigations are only necessary if allegations would constitute harassment if true.
- Not all dissatisfaction in a workplace constitutes harassment.
 - Workplace harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of the workplace.
 - There is a difference between the normal abrasiveness of daily life in the workplace, including personal dislikes and personality conflicts; and harassment.
 - Allegations of personal harassment or workplace bullying should not be used to deal with personality conflicts, personal animosity, or dissatisfaction with an individual's work or management style.

When the investigation begins/contacting the parties

- Decide whether an investigation should be internal or external:
 - Consider:
 - Expertise
 - Experience
 - Actual or perceived neutrality
 - Speed
 - Efficiency
 - Resource allocation
 - The investigator should be at arm's length from the individuals involved.
 - If the complaint involves a senior employee, an external investigator is advisable.

Conducting interviews

- Location
- Order of interviews
- Timing
- Best practices during all interviews
- Requests for legal counsel to attend
- Review and acknowledgment of contents of notes
- Confidentiality
- Necessity of follow-up interviews



Concluding the investigation

- Review all evidence (including interviews and documents)
- Assess witness credibility:
 - Demeanor of the parties
 - Inherent plausibility of the testimony
 - Motive to falsify evidence
 - Corroboration
 - Past record
 - Spontaneity
 - Forthrightness
 - Observation
 - Memory capacity
- Make findings and draw conclusions based on policies and procedures

Concluding the investigation

- If the complaint is well-founded, determine appropriate next steps:
 - Relationship management?
 - Coaching?
 - Formal training?
 - Discipline?
 - Termination?



Concluding the investigation

- Advise the complainant and the respondent of the outcome.
- Provincially regulated employers do not need to provide a copy of the investigation report, which is employer property.
- Federally regulated employers are required to provide a report that includes:
 - A general description of the occurrence;
 - The investigator's conclusions, including those related to the circumstances in the workplace that contributed to the occurrence; and
 - The investigator's recommendations to eliminate or minimize the risk of a similar occurrence.

Post-investigation issues

- One party is unhappy with outcome – what now?
- Claims of bias or lack of neutrality
- Employee recourse
- Orders to re-investigate



What happens if I don't investigate properly?

Frolov v Mosregion Investment Corporation (2010 HRTO 1789)

- Employer's investigation was based on the sexist belief that older men sexually harass younger women, such that the employer did not take the applicant's complaint seriously
- Investigative time frame was found to be inappropriate since action was only taken after a third complaint was filed
- Investigative results were not communicated to the Applicant
- Applicant awarded \$7,500 in damages

What happens if I don't investigate properly?

Harriott v National Money Mart (2010 HRT0 353)

- Employer did not take applicant's complaint seriously or properly deal with her complaints
- Employer also did not take care of its employee and did not demonstrate the appropriate sensitivity to her concerns
- Human Rights Tribunal awarded \$30,000 in damages (\$7,500 for failure to investigate)

What happens if I don't investigate?

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

- On April 17, 2018, Bassanese wrote to Perske about “being constantly harassed by [Dhanani] yelling and screaming at me ... telling me that I am an idiot and that I should be fired, etc, etc.” She added, **“I am sorry Chris. I have never ever filed a complaint but I want you to step in and make sure this never happens again.”**
- Perske wrote back to Bassanese the same day, on April 17, 2018, stating, “Sorry to hear that. We’re a little short-staffed this week (2 illnesses, 1 sick child and a vacation) but I’ll run it by Anne Marie, she’s our HR person.”

What happens if I don't investigate?

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

- Employer did nothing to investigate.
- On June 21, 2018, Bassanese alleges Dhanani slapped her across the face three times.
- Bassanese's employment was terminated for cause that same day.

Findings

- Company did not file a Defence and was noted in default.
- Court awarded 19 months' notice PLUS \$65,000 for damages for assault and battery and punitive damages and \$10,000 in legal fees.

New Federal Work Place Harassment and Violence Prevention Regulations

- In force as of January 1, 2021.
- Complaints (a.k.a. notices of occurrence) to be received by either supervisors or “designated recipients”.
- Complainant can choose to end the process at any time.
- Alternate options for conflict resolution – negotiation and conciliation.
- Timeframes for responses to notices of occurrence.

New Federal Work Place Harassment and Violence Prevention Regulations

- **Content of response to Principal Party/Complainant:**
 - That their notice has been received or that they have been named or identified as a principal party by a witness
 - The manner in which the workplace harassment and violence prevention policy is accessed
 - Each step in the resolution process
 - That they may be represented during the resolution process
- **Content of response to Respondent:**
 - That they have been named or identified as a responding party
 - Balance same as response to Principal Party
- Timeframes for completion of the investigation report.

Thank you



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