

# Court finds lawyer's communications and conduct during harassment investigation were not privileged

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## Facts

## Decision

In *Clayton v SPS Commerce Canada Ltd* (2018 ONSC 5017 (CanLII)) an Ontario court permitted an employee to refer in her statement of claim for constructive dismissal and bad faith to the communications and conduct of the company's employment lawyer in respect of a sexual harassment investigation.

## Facts

The employee raised sexual harassment and bullying claims against a co-worker. The employer investigated and concluded, without speaking to the employee, that the claims were unsubstantiated. During the investigation, the employee was placed on a performance improvement plan.

The employee retained counsel, who requested a severance package. The employer then also retained counsel. Over a few months, the lawyers communicated by phone and correspondence. They discussed the investigation and the employee's counsel urged the company to conduct a new or more thorough investigation, which the employer did. The employee then commenced a constructive dismissal suit, which included in her statement of claim reference to some of counsel's discussions and conduct.

The company moved to strike those paragraphs from the statement of claim on the basis that the discussions between counsel were without-prejudice settlement discussions.

## Decision

The court refused to strike the paragraphs, holding that the discussions and conduct of the company's lawyer with respect to the harassment investigation did not relate to a litigious dispute, but rather to the company's statutory obligation to investigate claims of sexual harassment under the Occupational Health and Safety Act. The sexual harassment investigation report was not privileged and counsel's conduct during the sexual harassment investigation was "highly relevant and both counsel must have understood its relevance should litigation ensue". Finally, although the outcome of negotiations between counsel may have led to a severance settlement and the employer's lawyer told the employee's lawyer that she wished to engage in without-prejudice settlement discussions before sharing any information with him, the communications in relation to the investigation and the performance improvement plan were directly relevant to the employee's claim for constructive dismissal and bad faith.

As a result, the communications between counsel regarding the sexual harassment investigation and the performance improvement plan were not settlement privileged and thus were not struck from the employee's statement of claim.<sup>(1)</sup>

For further information on this topic please contact [Adrian Miedema](#) at Dentons Canada LLP by telephone (+1 416 863 4511) or email ([adrian.miedema@dentons.com](mailto:adrian.miedema@dentons.com)). The Dentons Canada LLP website can be accessed at [www.dentons.com](http://www.dentons.com).

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## Endnotes

(1) For more information please see [www.occupationalhealthandsafetylaw.com](http://www.occupationalhealthandsafetylaw.com).

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