

## Workplace Harassment: A legal minefield for employers

There is little doubt that the issue of workplace harassment is fraught with risks for management. Specifically, managers find themselves navigating between the twin shoals of liability for failing to act against the harasser and responsibility where the alleged harasser has been wrongfully disciplined or dismissed.

Under the Ontario *Human Rights Code*, employers are generally liable for sexual harassment only where the harasser is a member of management. However, employers can also be held liable for repetitions of harassment committed by non-managerial personnel, where it can be shown that the employer either knew or should have known about the repeated harassment.

Under federal legislation, employers are liable for harassment committed by anyone in the workplace. They may, however, escape liability if they show that they did not consent to the act of harassment, exercised due diligence to prevent it, and acted subsequently to mitigate its effects.

On the other side of the equation, employers have to be careful to ensure that any investigative and remedial action they do take is seen as having been fair to the alleged harasser. An incompetent, biased or under-resourced investigation may lead to a faulty conclusion or an inappropriate response to the allegations.

In this article, we will discuss two elements of an anti-harassment strategy employers should consider in order to demonstrate due diligence in combatting workplace harassment.

### ANTI-HARASSMENT POLICY

The first step is to establish clearly that the employer prohibits harassment and will act promptly when it is alleged. This is accomplished by developing and circulating a policy on workplace harassment. (See also "[Emerging issues in the digital workplace](#)"). Employers should consider including the following components in the policy:

- A clear, forceful statement that the employer is committed to providing a healthy working environment free of harassment, and that harassment will be regarded as serious misconduct.
- A definition of harassment that includes both the type of conduct that is being targeted as well as the protected categories of persons (e.g., harassment based on sex, ethnicity, disability, etc. as defined in human rights legislation).
- Procedures to follow, for employees who believe they have been harassed, and for managers who receive employees' complaints. Employees' procedures should be sufficiently flexible to respond to individual sensitivities.
- An outline of the formal complaint resolution/investigation process. Assurances should be provided that confidentiality will be respected and good-faith complainants and witnesses protected from retaliation or penalty.
- An indication of potential consequences where a finding of harassment is made. The possibility of penalties for complainants who make knowingly false accusations should be included.

A written policy will assist in making the threshold decision, after a complaint is made, of whether to launch a formal investigation into the allegations. For example, what is being alleged may not constitute harassment under the terms of the policy, because the offensive behaviour either was too trivial or was not based on a ground of discrimination as defined in human rights law. In such cases, informal discussions or counselling with the persons involved may suffice.

## THE INVESTIGATION

### The investigator

It is advisable that the investigator be properly trained, as impartial as possible and, ideally, knowledgeable in human rights law. Sufficient resources should be made available for the investigation and, if the investigator is an employee with other responsibilities, he or she should be relieved of those duties in order to focus on the investigation. An employer should also consider whether the nature of the alleged harassment requires an investigator from a particular background.

### Initial meeting with the complainant

The investigator should present a demeanour both neutral and supportive, and make the complainant comfortable. The role of the investigator should be explained and the investigation procedure outlined. It should be made clear to the complainant that confidentiality should be maintained. Any concerns the complainant might have about personal safety or the impartiality of the investigator should be elicited. The complainant should also be assured there will be no retaliation. Depending on the circumstances, it may be appropriate to explore the complainant's openness to early mediation of the dispute. Possible disciplinary consequences for the accused should not be discussed.

The meeting should be used to determine what evidence exists and who should be interviewed to substantiate the complaint. The investigator should also be alert for other signs that harassment might have occurred, such as a demotion or poor performance review.

Based on this meeting, the investigator should be able to formulate a written incident report that states the allegations as succinctly as possible and serves as a focus for what is being investigated. This should be reviewed with the complainant to ensure that it accurately reflects the allegations.

### Planning the investigation

The incident report should be carefully reviewed to determine what questions must be answered to support or refute the allegations. With these questions in mind, the investigator should develop an evidence case plan comprising who will be interviewed, in what order, and what documentary evidence will be required. While the investigation should be thorough, considerations of cost-effectiveness and maintenance of confidentiality should be kept in mind when determining the length of the witness list.

### Meeting the accused

The investigator must interview the accused. Here, it is vital that the accused be treated with fairness and impartiality, or the whole investigation may be tainted and any subsequent disciplinary action invalidated. In this regard, the accused must be told the identity of the complainant and given the opportunity to answer each allegation. However, absent a collective agreement obligation to permit attendance by a union representative, the accused is not entitled to legal representation, as the investigation is internal. Again, it should be made clear to the accused that the details of the complaint and responses are confidential.

## Interviewing witnesses

As with the complainant and accused, it is important that the investigator maintain impartiality in the way the allegations are discussed with other witnesses. Interviews should take place as soon as possible after the alleged incident, and in an atmosphere that minimizes distractions. All answers should be taken down in writing and confirmed with the witness. As a rule, important witnesses should not be interviewed by phone.

## Assessing the evidence

The investigator should consider the credibility of the witnesses. For example, did the witness directly see or hear the information recounted; does the witness have a motive for not telling the truth; is the witness involved in the dispute itself; are there contradictions or changes in the witness' account; did the witness discuss his or her account with either party before being interviewed; is the witness' evidence corroborated by others?

The investigator should be alert for hearsay evidence, or accounts of what the witness has heard other people saying. In most cases, this has little value. On the other hand, where some witnesses claim they too have been harassed, this information, if substantiated, may serve as similar fact evidence. This can be used as indirect evidence that the conduct complained of likely occurred.

## The report

The investigator should keep in mind that the report not only provides the basis for the internal resolution of the complaint but is also the cornerstone of the employer's evidence of due diligence in dealing with the allegations. It is a confidential document and should be provided only to the ultimate decision-maker.

The report should include all the allegations made by the complainant and the accused's responses. A brief summary of relevant evidence should be presented. It may be necessary to discuss issues of credibility. Based on the evidence, the report should present conclusions as to whether each allegation is substantiated, unsubstantiated or partly substantiated.

Finally, the report should make recommendations for resolution of the complaint. Where allegations have been substantiated, these may range from an apology, to altered reporting lines, to disciplinary action. Factors affecting the severity of discipline should be addressed, such as the attitude of the harasser since the incident, his or her length of service or prior disciplinary record. As well, this would be the place to raise broader systemic issues where it is found that a poisoned atmosphere prevails in the workplace.

## In Our View

The risks of legal liability for harassment can be minimized by the implementation of preventive and corrective measures by the employer. As the Supreme Court of Canada stated in *R. v. Robichaud*, "an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps." (See also ["Court of Appeal sends strong message on sexual harassment by supervisory personnel, twice".](#))

But while remaining vigilant against incidents of harassment, employers must also take care to treat alleged harassers with fairness. Our firm is ready to provide advice and expertise in drafting policies and procedures, conducting investigations and educating managers about their legal obligations.

For further information on this subject, please contact [Carole Piette](#) at (613) 563-7660, Extension 227 or [André Champagne](#) at (613) 563-7660, Extension 229.

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