MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Substandard Response to Sexual Harassment Complaint Leads to Catastrophic Consequences

Public awareness of workplace sexual harassment has risen greatly in recent years. Yet, despite this, some employers remain unsure about their legal rights and obligations when faced with a sexual harassment allegation. A recent decision from Alberta illustrates how matters can quickly spiral out of control if they are not addressed appropriately, and in a manner consistent with an employer's human rights obligations.

The Facts

Ms. A. was a unionized clerk employed by the City of Calgary. In the Fall of 2010, while at her desk, she was repeatedly sexually fondled by Terry Mutton, a co-worker on track to becoming a foreman. Mr. Mutton was also a member of the union executive, and regarded as a powerful person in the workplace. Ms. A reported the fondling to her district manager without expressly identifying the perpetrator. The other facts she provided might have been sufficient to identify Mr. Mutton, but the district manager did not attempt to determine who was being accused.

Instead, in response to the complaint, the district manager had an extension added to Ms. A.'s desk, intended to provide her with protection against a further assault. The district manager then left on vacation, placing Mr. Mutton in charge of the district.

Assaults continued during the district manager's vacation, leading Ms. A's husband to install a spy camera which caught one of the incidents on camera. Armed with this evidence, the harassment was reported to the district manager's boss, Mr. Bell, which led to Mr. Mutton being suspended in mid-December, 2010. Soon after, Ms. A found rat poison on her keyboard, and was transferred to another location; though an investigation into this incident was never completed.

At this point, upper management had the opportunity to deal with the complaint in a responsive and reassuring manner, but failed to do so causing matters to spiral out of control.

In early 2011, assault charges related to the fondling were laid against Mr. Mutton, leading to a guilty plea, 90 days incarceration and 2 years' probation.

On January 5, 2011, Ms. A. filed a complaint that Mr. Bell had followed her home. This was investigated and Mr. Bell was cleared of the accusation within a week. Meanwhile, Mr. Bell received

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information that Ms. A. intended to report matters to the City Mayor. In response, while still under investigation himself, Mr. Bell ordered Ms. A. to attend an independent medical exam with a psychiatrist, which she refused to do. Ms. A then left on a scheduled vacation. Following the vacation, Mr. Bell required a medical clearance for Ms. A to return to work, despite the fact she had never asserted she was unable to work. She provided the clearance.

After her transfer, Ms. A was assigned work on an *ad hoc* basis. She encountered various negative incidents during that time, including reprimands from Mr. Bell. She suffered time off work due to stress and anxiety, and received a diagnosis of post-traumatic stress.

Although the final sexual harassment incident was seven months earlier, Ms. A became suicidal at the beginning of August, was granted long-term disability benefits and never returned to work.

Grievance and Arbitration

A union grievance was filed; defended by the City. By the time the matter came to a hearing, the City admitted Ms. A had been a victim of assault and the district manager had not handled things properly, but otherwise defended its actions, including Mr. Bell's.

In its decision in January, 2014, the arbitration panel did not agree the wrongs were limited to Mr. Mutton and the district manager. It criticized the City for:

- Breaching the obligation under the collective agreement to use good judgment in resolving disputes.
- Failing to maintain a safe and healthy workplace.
- Failing to properly investigate Ms. A's complaints.
- Engaging in adversarial conduct which exacerbated matters.
- Responding to the grievance in an unreasonable and arbitrary manner.
- Waiting too long to transfer Ms. A away from danger.
- Failing to provide support to Ms. A in respect of the psychological damage caused by the harassment, so that she would feel protected [Note: An employer who appears to be indifferent or even antagonistic may cause an employee who otherwise may have been sufficiently resilient to recover to develop increasingly serious and intractable psychological injuries.]

In assessing damages, the arbitration panel projected Ms. A would recover from her disability and be able to find work in 2018. The panel therefore awarded her approximately $800,000 as follows:

- $135,630 for past income loss
- $500,000 for future income loss, to be reduced according to actuarial adjustments
- $68,243 in lost pension benefits
- $28,000 for counselling costs
- $125,000 for loss of dignity and enjoyment of life

Tips for Employers

Although this proceeding was a labour arbitration, a similar result could occur in the courts or other workplace tribunals.

The best defence for any employer is to avoid harassment incidents altogether. However, if and when an incident does occur, it is critical to address it directly and thoroughly. In our experience, employers should consider the following best practices:

- **Harassment Policy:** Have one. Train employees and management on its content and how it works. Enforce it consistently and transparently.
- **Know Your Collective Agreement:** If you have a collective agreement in the workplace, be familiar with any additional procedures for handling a complaint.
- **Investigate:** An effective investigation is critical. It should not be left to an individual or team not skilled and experienced in this role.
- **Consider the Best Available Tools:** The manner of investigation may depend on the nature of the complaint and the workplace. In some situations the use of an independent, outside investigator may be advisable to avoid actual or subconscious bias. When in doubt, contact experienced labour or employment counsel who can assist you to make the best decisions.
- **Document:** Documentation is critical and should include only the facts; no editorial or extraneous comments.
- **Offer Psychological Support:** When appropriate, offering psychological support to a harassment victim can be an important aspect of avoiding or reducing psychological problems.
- **Consult with Counsel:** Some situations are more complex and sensitive than others. If you think you may be in over your head, or want to bounce an idea off of someone knowledgable but neutral, consider early consultation with employment counsel, experienced in the sensitivities of workplace harassment and criminal conduct in the workplace.

To learn more about how to design and carry out an effective and legally compliant workplace investigations, contact a member of Sherrard Kuzz LLP. Our team is available 24 hours a day at 416.603.0700 or 416.420.0738.

DID YOU KNOW?

Under Ontario's *Education Act*, anyone who employs an individual under the age of 16 ("student") to work during the school day is subject to an offence punishable by fine. A student may only work during the school day if he/she is a high school graduate, or through an approved equivalent learning program.

To learn more, contact a member of Sherrard Kuzz LLP.

Complaint of Harassment Cannot be Reprised Against

– so says Ontario Labour Relations Board

When Bill 168 came into force in 2010, employers became statutorily required under the *Occupational Health and Safety Act* (the "*OHSA*") to devise, post, and implement a workplace harassment policy and a workplace violence policy. Bill 168 also requires an employer to take every reasonable precaution to protect its workers from workplace *violence*. However, the extent of an employer's obligation with respect to workplace *harassment* remained murky. A recent Ontario Labour Relations Board (the "Board") decision—*Ljuboja v Aim Group Inc and General Motors of Canada Ltd* ("*Ljuboja*")—has clarified this lingering ambiguity. In the past, an employer's only duty was only to develop, educate employees about and implement an anti-harassment policy that included a complaint procedure. There was no duty to investigate. That has now changed.

What happened in *Ljuboja v Aim Group Inc and General Motors of Canada Ltd*?

Peter Ljuboja was employed by Aim Group, a staffing agency, and placed in a managerial position at a General Motors plant. One evening, as a consequence of being understaffed, Ljuboja reassigned a relief worker to the assembly line—leaving no one available to stand in when other workers took a washroom break. Jamie Rice, one of Ljuboja's supervisors, chided Ljuboja about this reassignment during an end-of-shift meeting. While Rice was alleged to have "screamed" and sworn at Ljuboja, there was no allegation he threatened or attempted to exercise physical force. During a meeting the following day, Rice accused Ljuboja of having an attitude problem and inciting a fight.

Ljuboja reported the incident to General Motors' human resource department, and his employment was terminated shortly thereafter. He argued his dismissal violated subsection 50(1) of the *OHSA*, which prohibits a reprisal by an employer against a worker for exercising or enforcing a right under the *OHSA*.

> *An employer cannot reasonably be expected to guarantee every aspect of its operation will "run in a manner that avoids offending every individual's subjective sensibilities."*

Aim Group and General Motors relied on earlier Board decisions to argue that making a complaint of workplace harassment was not a right under the *OHSA* and, therefore, Ljuboja was not afforded protection from reprisals on this basis. In particular, the Board's 2011 decision in *Conforti v Investia Financial Services Inc* ("*Investia*") held that the extent of an employer's obligation under the *OHSA* as it related to workplace harassment was only to develop, educate employees about, and implement an anti-harassment policy that includes a complaint procedure. There was no duty on the part of the employer to investigate a harassment complaint. Accordingly, the Board reasoned, if there was no duty on the part of an employer to investigate, the Board had no jurisdiction to adjudicate an allegation of reprisal for making a workplace harassment complaint.

Earlier Board decision "flawed"...

Two years after *Investia*, in *Ljuboja*, the Board changed course, holding its earlier position was unfair and "flawed".

Vice-Chair Nyman, writing for the Board, held that in addition to the legislative requirement to implement a workplace harassment policy, an employer was also required by Bill 168 to "investigate and deal" with harassment complaints as they arose. That being the case, it was clear these two mandates would be "completely undermine[d]" if an employer was permitted to discipline, terminate, or otherwise retaliate against a worker for making a harassment complaint. Should that be the state of the law, the Board noted, "only the most intrepid or foolish worker would ever complain".

On this basis, the Board found, when a worker makes a workplace harassment complaint, the worker is seeking to enforce a right under the *OHSA*; as such the worker will be brought within the ambit of protection afforded by the anti-reprisal provisions contained in section 50.

...but an employer is still not required to provide a harassment-free workplace

While the Board expanded an employer's obligation to include the *investigation* of a complaint of harassment, it also reaffirmed that an employer is not required to provide a harassment-free workplace, nor to provide a specific type of investigation to a harassment complaint. As well, a worker cannot insist on any particular resolution to his or her complaint.

The Board also acknowledged an employer cannot reasonably be expected to guarantee every aspect of its operation will "run in a manner that avoids offending every individual's subjective sensibilities." The phrase "workplace harassment" could capture a broad range of conduct, and the Board recognized it may be functionally impossible to absolutely prohibit every behaviour which could possibly fall within that definition.

Tips for employers

The Board's decision in *Ljuboja* clarifies three aspects of Bill 168 with respect to workplace harassment: (1) a workplace harassment policy must contain a mechanism by which a worker may bring a complaint; (2) an employer must 'investigate and deal' with a complaint made under the policy; and (3) an employer will not be permitted to take reprisals against a worker who brings a complaint.

That said, an employer is still provided significant leeway to determine the complaint process it will adopt, and the process by which those complaints will be investigated and resolved. Neither the *OHSA* nor *Ljuboja* specifies any procedural criteria. An employer must, however, take some active steps to implement and carry out its policy—simply posting the policy will not be sufficient.

To learn more and/or for assistance reviewing your organization's workplace harassment policy and other Bill 168 obligations, contact a member of Sherrard Kuzz LLP.

MANAGEMENT COUNSEL

HReview Seminar Series

Please join us at our next HReview Breakfast Seminar:

Employee Misuse of Workplace Technology - How to protect your organization

The undisciplined use of workplace technology is one of the key security threats facing Canadian employers. On the one hand, employers want employees to have access to company information remotely and whenever necessary, including outside regular business hours. However, with this flexibility comes increased risk of misuse or inappropriate disclosure of company information. For example, a recent study found 45% of Canadian organizations had at least some employees circumvent or disengage core security features installed on their workplace technology (*i.e.*, passwords or key locks).

To help your workplace identify risk and implement measures to protect confidential information at all stages of the employment relationship, join us and learn:

- How to set expectations in the hiring process
- Best practices for using confidentiality, non-competition and non-solicitation clauses
- The importance of technology use policies, including social media
- Best practices for dealing with employee-owned devices
- What to do if a departing employee takes company information

DATE: **Thursday June 5, 2014; 7:30 – 9:30 a.m.** (breakfast at 7:30 a.m.; program at 8:00 a.m.)

VENUE: **Hilton Garden Inn Toronto/Vaughan**, 3201 Highway 7 West, Vaughan, ON L4K 5Z7

COST: Complimentary

RSVP: **By Friday May 23, 2014 at www.sherrardkuzz.com/seminars.php**

Law Society of Upper Canada CPD Credits: This seminar may be applied toward general CPD credits.

HRPAO CHRP designated members should inquire at www.hrpa.ca for certification eligibility guidelines regarding this *HReview Seminar*.

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Jean Cumming Lexpert® Editor-in-Chief

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