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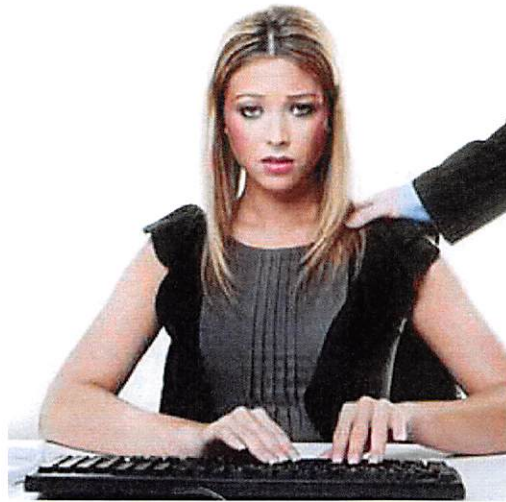
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## Employers Can Be Sued for Failing to Investigate Complaints of Workplace Harassment in a Timely Way

Alan Riddell and Kyle Van Schie



**When tales of** Jian Ghomeshi's predatory sexual proclivities first hit the media a year ago, public interest initially focussed on whether his employers at the CBC had overreacted in terminating his employment. With the release of the report into the CBC's handling of the situation this past April, the question has shifted to what consequences the CBC may now face for failing to immediately investigate complaints about Ghomeshi's sexual harassment of his colleagues as soon as they were first brought to its attention. The report concluded that the CBC had condoned Ghomeshi's behaviour by failing to discharge its legal duty, as an employer, to take adequate and timely steps to investigate and prevent the harassment of other CBC employees.



Alan Riddell

In contrast, the opposite problem arose this past year when the Liberal Party immediately suspended two MPs accused of sexual harassment as soon as the accusations came to light, without investigating or offering them an opportunity to defend themselves. At the time, the Liberal Party was severely criticized in some quarters for this quick trigger approach. Employers who use such an approach when responding to sexual harassment complaints can face equally grave consequences as employers who, like the CBC, acted too slowly. Those who use the quick trigger approach, employed by the Liberal Party, risk being successfully sued by the accused employee. Those who delay for too long, like the CBC, risk being successfully sued by the accused's alleged victims.



Kyle Van Schie

In these circumstances, all employers must act carefully to ensure that they do not run afoul of the rights of either party. HR managers must be sure that they take the proper steps to investigate allegations of harassment so as to prevent the workplace environment from being poisoned and to protect themselves from lawsuits from both the victims of harassment, who claim that the employer failed to do enough, and from the alleged harassers, who claim that they were unjustifiably sanctioned. A failure to navigate properly between these competing concerns could lead to very costly consequences for your organization.

### What is harassment and sexual harassment?

Many employees do not fully understand what acts constitute harassment. Others may be too apprehensive about using such a strong term. As an employer, you must be able to recognize when one of your employees is being harassed, even if they themselves do not. You must also differentiate between workplace harassment and sexual harassment.

Workplace harassment does not involve a sexual component and often occurs between persons of the same gender. It is defined in both the *Occupational Health and Safety Act* ("OHSA") and the *Human Rights Code* as "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." To constitute workplace harassment the

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vexatious comment or conduct must: (i) typically be repetitive (unless it is very serious); and (ii) be known to be unwelcome. Some examples of conduct that amounts to harassment are threats, bullying, intimidation, offensive comments, and belittling behaviour.

Currently, no statute in Ontario provides a formal definition of sexual harassment. However, that could soon change. In March, the Ontario Government announced its intention to amend the OHS Act to include a specific definition of sexual harassment.

Until that happens, sexual harassment will continue to be loosely defined by the Common Law. In *Janzen v Platy Enterprises Ltd.*, the Supreme Court of Canada has stated that sexual harassment in the workplace may be broadly defined as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment."

#### **Consequences to your organization for failing to properly deal with a harassment complaint**

Employers have a legal obligation to provide employees with a harassment free workplace. Any time an employer is faced with a complaint it must investigate and determine the best course of action based on the merits of that complaint. As the Court stated in *Gonsalves v. Catholic Church Extension Society of Canada*, "the employer has a duty to all the employees both to end the abuse and to alleviate its impact upon the employment environment."

Failing to properly investigate, and deal with, a harassment complaint could result in a costly lawsuit against you. In such circumstances, your organization may be ordered to pay the victims of harassment damages for constructive dismissal, mental distress, and for the violation of the victim's human rights.

In *Piresferreira v. Ayotte* the employer never investigated the merits of the victim's complaints, and never spoke to her to get her side of the story. As a result, the court awarded her a year's salary for constructive dismissal, in addition to \$60,000 in damages for physical and mental suffering.

#### **Consequences to your organization for over-reacting to the harassment complaint**

On the other hand, an employer who acts too swiftly in the face of harassment, without providing an accused with due process in investigating the complaint, can also expose itself to significant and costly consequences.

The alleged perpetrator in a harassment complaint is entitled to know the case against him and to have an opportunity to defend himself against the allegations before the employer takes definitive action affecting his job. If the employer either summarily dismissed the employee or placed him on an unwarranted leave of absence without due process, then the employer can be successfully sued.

In *Emergis Inc. v Doyle* an employer suspended the employee without conducting a proper investigation, without interviewing two important witnesses and without providing him with timely disclosure of all relevant particulars of the allegations against him. Ultimately, the court found that the employee was wrongfully dismissed and ordered the employer to pay the alleged harasser an additional 2 months' salary as a result of its flawed investigation into the accusations.

Similarly, in *Elgert v Home Hardware Stores Limited* the alleged harasser was awarded \$75,000 in punitive damages due to the flaws in the employer's investigation into the complaint. Amongst the many flaws identified by the court were the failure to interview all relevant witnesses, the inexperience of the individual whom the employer appointed to conduct the investigation and its failure to provide the employee with particulars of the allegations against him.

By acting prematurely in their treatment of an alleged harasser and in conducting an unfair and/or biased investigation, employers' expose themselves to the possibility of very significant financial consequences.

#### **Common mistakes made by employers which can expose your organization to liability**

Employers need to guard against certain common errors when faced with workplace harassment complaints. The following is a list of some of the mistakes that courts have commonly found in workplace investigations into harassment complaints:

- Failing to immediately investigate when first made aware of an alleged incident of harassment;
- Excessive haste in suspending or terminating the alleged harasser;
- Failing to provide the alleged harasser with a meaningful opportunity to respond to the allegations against him;
- Failing to provide the alleged harasser with sufficient particulars, including the name(s) of the complainant(s) and the dates of the alleged incidents;
- Using an investigator who is insufficiently trained and/or lacks objectivity;
- Failing to properly document the investigation, and to keep records of who was interviewed and what they said; and
- Failing to complete the investigation in a timely manner and failing to advise the complainant of the outcome.

#### **Tips for conducting an effective and balanced investigation**

In addition to avoiding the common mistakes above, employers should observe the following guidelines when investigating allegations of harassment:

- Draft a zero tolerance workplace harassment policy with sanctions that are regularly enforced;
- Reduce allegations of harassment to writing;
- Show empathy and concern for the victim but do not prematurely admit that the alleged behaviour amounts to sexual harassment – wait for the investigation to be completed;
- Segregate the alleged perpetrator from the victim;
- Maintain strict confidentiality over the process and ensure that the process is discussed only with the individuals who are directly involved or affected;
- Ensure that the latter do not discuss the accusations with others;
- Ideally, ensure that parties are given the opportunity to consult with legal counsel; and
- Ensure that the result of the investigation is shared with the complainant in a timely fashion.

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Workplace investigations can be complicated and must be approached delicately, with a view to minimizing the risk of future liability for the employer. Before starting such an investigation, employers should consult with an experienced employment law lawyer to ensure that their plan of action fully complies with all legal requirements.

*Alan Riddell and Kyle Van Schie are Ottawa lawyers who specialize in labour and employment law and who work at the law firm of [Soloway Wright LLP](#).*

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