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WORKPLACE HARASSMENT AND THE DUTY TO INVESTIGATE

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Employees have the right to work in a safe and healthy workplace. Addressing and eliminating harassment/bullying in the workplace has become a priority for employers across Canada, not only because of the media attention that harassment now attracts, but because it is the right thing to do.

Investigations are often critical in determining whether an allegation of harassment can be sustained. They provide what should be an impartial review and inquiry of the circumstances involved in an allegation of harassment and a summary of factual and/or legal conclusions. They also offer information for employers to defend against baseless or unsupportable allegations.

Traditionally, employers have used third-party investigators for more "serious" or systemic issues in the workplace. Other investigations into workplace issues have often been dealt with by human resource staff, or sometimes in-house legal counsel.

But with the growing attention to workplace harassment issues, employers are often unsure as to the precise nature of the investigation required specifically, the scope and substance of the "duty to investigate." Is an investigation required in every complaint? Does a third party need to be retained? What liability exists when an employer acts (and/or fails to act) on a complaint of harassment?

STATUTORY AND COMMON LAW COMPONENTS TO THE ISSUE

These are all good questions. An analysis of the issue should start by acknowledging that there are both statutory and common law components to the issue. In Ontario, for example, the government passed Bill 132,[1] also known as the *Sexual Violence and Harassment Action Plan Act* (Supporting Survivors and Challenging Sexual Violence and Harassment), which will come into effect in September 2016. The legislation, as it relates to the duty to investigate, provides Ministry inspectors the right to order an employer to retain an impartial third-party investigator, at the employer's expense, to conduct an investigation into a complaint of workplace harassment.

How the Ministry will exercise this power is anyone's guess, but it raises a host of issues. For example, given that any order to provide a third-party investigator will not involve Ministry staff, (which would put a practical limit on the number and timing of investigations), will the Ministry be more "liberal" in its decision to appoint? And what about the cost to employers? Investigations are expensive. And what leverage does this give complainants where the allegation of harassment is followed by a human rights complaint or allegations of wrongful/constructive dismissal? Does a failure to appoint automatically lead to liability?

CANADA (AG) V PSAC

A possible approach was outlined in a decision by the Federal Court of Appeal in *Canada (AG) v PSAC,*[2] which addressed the duty of federally-regulated employers to appoint a "competent person" to investigate a workplace violence complaint under Part XX of the *Canada Labour Code*.[3]

The facts are as follows: a poultry inspector at the Canadian Food Inspection Agency ("CFIA") filed a complaint of favouritism, unfair treatment, humiliation and disrespectful treatment in the workplace. The CFIA appointed one of its directors to undertake a fact finding process to review the complaint, which concluded that even if the allegations were taken to be true, there was no harassment and no need for further investigation.

The employee contacted a federal Health and Safety Officer and alleged that the appointed manager was not sufficiently impartial to conduct an investigation and issued a Direction requiring the CFIA to appoint an

[1] Bill 132, Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016, S.O. 2016 C.2

[2] *Canada (AG) v PSAC, 2015 FCA 723*

[3] Canada Labour Code (R.S.C., 1985, c. L-2)

impartial person to investigate the complaint pursuant to the *Canada Labour Code*.[4] The CFIA appealed that direction to an Appeals Officer of the Occupational Health and Safety Tribunal of Canada, who supported the position of the CFIA. The employee then appealed to the Federal Court.

The Federal Court of Appeal found that Part XX to the Canada Occupational Health and Safety Regulations under the *Canada Labour Code* set out the procedural obligations of an employer if it receives a complaint of "workplace violence" (defined as "any action, conduct, threat or gesture of a person towards an employee in their work place that can reasonably be expected to cause harm, injury or illness to that employee"). It held that the alleged harassment could have constituted "workplace violence" if, after a proper investigation by a competent person, it was determined that the harassment could reasonably be expected to cause harm or illness to the employee and further, that under the Regulation, a person is a "competent person" to conduct a workplace violence investigation if he or she is "impartial and is seen by the parties to be impartial" and has the "necessary knowledge, training and experience."

In this case, the employee who filed the complaint did not agree that the manager was impartial and the Court agreed and stated that whether specific conduct in the circumstances constituted workplace violence could only be made by a person with a full understanding of the circumstances following an investigation under the legislation.

Therefore, the manager's investigation was not binding and the court referred the matter back to the Appeals Officer for re-determination.

This case demonstrates the importance of process as set out in applicable legislation and could very well impact the credibility of "in house" investigations by employers which do not involve a third party.

JOSHI V NATIONAL BANK OF CANADA

The necessity of an adequate and proper investigation was also addressed in the recent decision of *Joshi v National Bank of Canada*,[5] where the Ontario Superior Court of Justice suggests that an inadequate investigation may give rise to a breach of the independently actionable duty of good faith (a contractual duty recognized by the Supreme Court of Canada in *Bhasin v. Hrynew*[6]).

The case was premised on an allegation of intentional interference with economic relations. Mr. Joshi, a bank employee prior to his resignation, alleged that the National Bank of Canada breached its duty of good faith owed to him by adding his name to a database of the Canadian Bankers Association Bank Crime Prevention and Investigation Office (which is intended for member banks to report individuals found guilty of serious banking crimes), as well as commencing an investigation into possible misconduct.

Joshi alleged that not only was he not made aware of the investigation prior to his resignation from the National Bank, but he was also not provided the opportunity to respond.

The Bank brought a motion to strike out that aspect of Mr. Joshi's claim as disclosing no reasonable cause of action. However, the Court held that the facts as alleged could qualify as a breach of an independent and actionable duty of good faith owed to Mr. Joshi and further, that there existed an implied contractual obligation where, in the course of its investigation, the Bank would afford Mr. Joshi due process and allow him to respond to any allegations of misconduct.

The National Bank's conduct in adding Mr. Joshi to the database without a proper investigation and making the representations to member banks would then form the basis of the allegation of a breach of the duty of good faith.

[4] *Ibid.*
[5] *Joshi v National Bank of Canada*, 2016 ONSC 3510
[6] *Bhasin v. Hrynew*, 2014 SCC 71

The takeaway from this case is that, where there is an allegation that may impact an employee, that employee must be afforded a fair and reasonable opportunity to respond to the allegations that form part of the complaint(s) against them. Process is important. As well, if an investigation is to take place, then it has to be done fairly.

MORGAN V UNIVERSITY OF WATERLOO

That does not mean that an internal investigation cannot be fair and appropriate. In the case of *Morgan v University of Waterloo,*[7] the applicant complained to the University that another employee sexually harassed her at a conference. The University, in response, conducted an internal investigation and found that there was no direct evidence to substantiate an allegation of sexual harassment.

The HRTO stated that employers have a duty to investigate complaints of harassment and/or discrimination and that the "duty to investigate" is the means by which an employer ensures they are achieving the "Code-mandated" responsibility of operating a discrimination-free environment.

Even though, following further complaints, the HRTO held the alleged harasser personally liable for sexual harassment, it determined that the University had satisfied its duty to investigate a complaint under the Ontario *Human Rights Code* [8] by conducting a "reasonable" investigation. No damages were ordered against the University.

CONCLUSION

Time will tell how ministries, courts and administrative tribunals will judge employers' efforts in this area. Much of the case law has yet to be written. But employers can expect more complaints and higher expectations from employees on how they are addressed, and the nature of the investigation.

Developing a strong process for the investigation of complaints, the assessment of risks and the consequences of non-compliance, as well as confidentiality and awareness of any reprisal issues, is critical. Above all else, employers need to recognize that the social and political importance of eliminating harassment in the workplace will drive the need for better and more complete investigations and clear processes that employees can trust.

[7] *Morgan v University of Waterloo*, 2013 HRTO 1644

[8] *Human Rights Code*, RSO 1990, c H.19