
Workplace Indecencies and Indiscretions: Guidance and Best Practices

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Agenda

- Managing and diffusing issues relating to...

- Sexual Harassment

- Workplace Romances

- Off Duty Conduct

SEXUAL HARASSMENT

Harassment Generally

- Human rights and occupational health and safety legislation affords protection from discrimination and harassment
- Harassment commonly defined as:

*“Engaging in a course of **vexatious comment or conduct** that is **known or ought reasonably to be known to be unwelcome**”*

Sexual Harassment

- Human rights and occupational health and safety legislation provides protections against “sexual harassment” specifically
- Sexual harassment is generally defined as:

“unwelcomed conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.”

Janzen v. Platy Enterprises Ltd., [1989] S.C.J. No. 41

Sexual Harassment

- Generally falls into one of two broad categories:
 - Overt *quid pro quo* demands
 - More subtle conduct, comments, actions, *etc.* which result in a poisoned work environment
- Negative and demeaning comments may also constitute sexual harassment
- Anyone can be a victim of sexual harassment

Employer Liability for Sexual Harassment

- Employers have positive obligation to provide a workplace free of sexual harassment:
 - Take proactive steps to prevent it
 - Act immediately to cease and remedy situations
- Employers may be held vicariously liable for employees' conduct.
 - *Mahmoodi v. University of British Columbia*, (1999), 36 C.H.R.R. D/8 (B.C.H.R.T.)

Employer Liability for Sexual Harassment

- Employers may also be liable for actions of:
 - Students
 - Other third parties
- Liability may flow where employers response is deemed to be inadequate
 - *Ford v. Nipissing University et al.*, 2011 HRTO 204

New Legal Developments

- Increasing focus on sexual violence and harassment
- Ontario Bill 132, *Sexual Violence and Harassment Action Plan Act*
 - Requires colleges and universities to implement stand-alone sexual violence policy
 - Enhances employer obligations re workplace harassment:
 - Bolstered policies;
 - Obligation to investigate and report on complaints;
 - Inspectors may order impartial investigation at employer's expense

New Legal Developments

- Damage awards for sexual assault/ harassment on the rise Canada-wide
 - *PN v. RF and another (No. 2)*, 2015 BCHRT 60
 - Nanny sexually assaulted by employer awarded \$50,000
 - *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675
 - Temporary foreign workers awarded \$150,000 and \$50,000 respectively
 - *Silvera v. Olympia Jewellery*, 2015 ONSC 3760
 - Employee and daughter awarded total damages in excess of \$300,000

Investigations are Critical

- In some jurisdictions employers have a *legal obligation* to investigate allegations of sexual harassment
- In all jurisdictions, it is advisable to investigate whenever such a complaint is received
- All too often litigation begins because of the manner in which the complaint was investigated

Consequences of an Improper Investigation

- Claim by dissatisfied complainant (constructive dismissal, human rights complaint, grievance)
- Complaint by dissatisfied respondent (wrongful dismissal claim, grievance)
 - May seek punitive and aggravated damages in addition to compensatory remedies
- Negative publicity and reputational harm
- Internal employee discontent
- Potential for repeated conduct

Consequences of an Improper Investigation

■ *Elgert v. Home Hardware*, 2011 ABCA 112

□ 17 year supervisory employee dismissed after sexual harassment complain filed against him

□ Investigation profoundly flawed

■ Untrained and unbiased investigator

■ No opportunity for accused to respond

■ “You know what you did!”

□ 24 months’ notice + \$75,000 punitive damages + \$60,000 for defamation

Basic Investigation Steps

- Appoint a trained and unbiased investigator
 - Internal vs. external?
- Collect and review relevant evidence
- Separately interview relevant witnesses
- Take appropriate notes / statements
 - No editorials!

Basic Investigation Steps

- Prepare a written report
 - Summarize steps of the investigation, the complaint, the response and evidence
 - Make findings of fact
 - Conclude whether harassment occurred
- Provide report to employer to take action
- Provide results to complainant and respondent

Tips & Best Practices

- Develop sexual harassment and violence policies and procedures
- Follow established processes and Collective Agreements & provide regular training
- Investigate all complaints thoroughly
- Document all steps & complete report
- Offer psychological support where required
- Consult with counsel

WORKPLACE ROMANCES

Workplace Romances

- Are they a problem?

- People spend half their waking lives at work

- Relationships are inevitable

- Employers get nervous

- When is it a problem?

- What can be done?

Role of the Employer

- Employers generally *cannot*:
 - Prohibit employees from having romantic relationships with co-workers or students
 - Certain exceptions (e.g. with underage students)
 - Impose work-related consequences for choice of partner
 - Violation of human rights legislation (family status)

Role of the Employer

■ But employers *can*:

- Prohibit differential treatment of employees (favouritism or retribution)
- Prohibit conflicts of interest
- Prohibit sexual acts and conduct at work
- Prohibit harassment and violence
- Protect reputational interests

Striking the Right Balance

- Employers should implement policies to address potential issues:
 - Respectful workplace
 - Violence and Harassment
 - Conflicts of Interest
 - Code of Conduct

Striking the Right Balance

- Employers can also consider implementing policies requiring disclosure of relationships
 - Particularly important where power imbalance or reporting relationship exists
 - Includes extra-marital relationships
 - Confidentiality should be addressed
 - Outline process for resolution of conflicts of interest (e.g. transfers, reallocations, etc.)

Consequences of Not Having Policy

■ *Lethbridge College v. Lethbridge College Faculty Association*

- Instructor had sexual relationships with 3 students, some while enrolled in his courses
- Terminated for cause, faculty association grieved
- Reinstated without back pay on conditions
- Judicial review denied
 - No evidence of coercion or assault
 - No policy governing instructor-student relationships
 - Confusion about what conduct was permissible

Tips & Best Practices

- Implement policy requiring disclosure of relationships
- Communicate and enforce policy consistently
- Investigate rumors of workplace romances and remind affected parties of applicable policies
- Keep a record of all conversations
- Ensure confidentiality for those who disclose
- Discipline for breaches of policy NOT for relationship (not a moral or ethical issue)

OFF DUTY CONDUCT

Fired from the CBC...

- “CBC Radio Star Jian Ghomeshi fired after ‘rough sex’ claims”
- “Jian Ghomeshi’s exit from CBC goes global”
- “2 CBC managers involved in Ghomeshi scandal put on leave”
- “Fallout continues for CBC in wake of Ghomeshi Sex Assault Scandal”

Fired from Toronto Hydro...

- “A social media firestorm touched off by a female TV reporter who fought back against sexually explicit taunts hurled by several soccer fans...”
- “Hydro One firing employee involved in vulgar incident at Toronto FC game”

When is Off Duty Conduct a Workplace Issue?

- Employee is generally not accountable to employer for off-duty conduct
- But, employee has duty of good faith and fidelity
- Off-duty conduct *may* be grounds for discipline if negative impact on legitimate business interests
 - Must be connection between the off-duty conduct and the workplace

Off-Duty Conduct

- Discipline may be appropriate if
 - Employee unable to perform job satisfactorily
 - Harm to employer's reputation, products, or its employees
 - Conduct results in conflict of interest
 - Interference with management of the workplace

Off-Duty Conduct

- When discipline may be appropriate (cont.)
 - Co-workers reluctant to work with employee
 - Conduct undermines
 - Trust of co-workers
 - Ability to provide safe, non-discriminatory harassment-free workplace

Off-Duty Conduct

- Even if the conduct affects employer's interests, consider
 - How will you prove the conduct occurred and its potential harm to your business?
 - What are the aggravating and mitigating factors?
 - Are there any human rights issues to consider?

Dismissal? The Dilemma

- If misconduct becomes public:
 - Lost business opportunities or relationships
 - Marketing and public relations costs
- If the decision to dismiss is wrong
 - Wrongful dismissal damages (up to 24-30 mos' notice)
 - Reinstatement with full back pay
- If the investigation is flawed (or not done):
 - Inability to rely on just cause
 - Creative remedies (*e.g.* public apology)

City of Toronto and Bowman (2014)

- Firefighter with Toronto Fire Services (TFS)
- National Post used tweets in article on culture among firefighters
- TFS recently launched “Pathway to Diversity” to recruit females and diverse workforce
 - It also had a policy on professional conduct
- Terminated for cause



City of Toronto and Bowman (2014)

“The [TFS] faces a challenge in attracting women and members of minority groups to service. It had embarked upon an initiative to encourage recruits from the demographics that are not well represented. [...] I am prepared to draw the inference that an individual from one of these groups who had some interest in the recruitment program might well be put off from the media reports of this firefighters’ comments. [...] I am also prepared to conclude that potential damage has been caused to the Employer’s ability to carry out its work, which work includes implementation of its diversity initiative.”

Investigating Off-Duty Conduct

- Employer must be able to prove discipline appropriate
- Thorough investigation is critical to defend decision
 - Conduct interviews
 - Gather and preserve
 - Documents (e.g. financial data)
 - Other relevant evidence (e.g. media reports)

Damage Control

- Every organization is vulnerable to this situation – particularly with social media
- Balance between managing ongoing relationship with employee versus the public
- Develop a crisis management team and plan

Damage Control

- Questions to consider:
 - Respond proactively or reactively?
 - Terminate now or later?
 - Support your employee and/or denounce the behaviour?
 - When to use ‘no comment’?
 - Promotions or programs in order to regain credibility or support of the community?

Tips & Best Practices

- Develop policies
- Communicate expectations
- Control employee use of name/brand
- Monitor off-duty activity
- Be ready to respond



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