

WORKPLACE HARASSMENT: LESSONS LEARNED

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The Regulations - Overview

- OHS legislation became effective July 1, 2020
- The role of OHS
- Enforce the regulations
- Require a Workplace Harassment Policy to be developed by all employers in PEI
- Require the policy to meet the Workplace Harassment Regulations
- Require the employer to follow their own policy – complete investigation

Making Sense of the Legislation

- Human Rights Legislation
- Occupational Health & Safety/ Workplace Safety Legislation
- Interaction between the Legislation & the Differences

Why So Much Legislation?

- Isn't this duplicative?
- No, they have different **purposes** and offer different **remedies!**

Human Rights Legislation

- Purpose: Ameliorate disadvantages based on membership in particular groups.
- Discrimination prohibited in the context of employment.

Human Rights Legislation - Limitations

- To make a claim of harassment/bullying, however, the claimant has the burden of demonstrating that the conduct is linked to a prohibited “ground.”
- Harassment not related to prohibited ground cannot ground a human rights complaint.
- Prohibited grounds include:
 - “age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any individual or class of individuals.”

Occupational Health & Safety Legislation

- **Purpose:** To “secure workers from risks to their health and safety (physical and psychological) being in connection with activities in their workplaces.”
- Harassment Regulations (effective July 1, 2020) pursuant to the PEI OHS Act requires employers “to implement as a policy... measures to prevent and investigate occurrences of harassment (including bullying) in the workplace.”
- All provinces, territories, and federal government have (or will have) same or similar legislation.

Occupational Health & Safety

Workplace Harassment Regulations

- Broad and expansive definition

“harassment” means any inappropriate conduct, comment, display, action or gesture or any bullying that the person responsible for the conduct, comment, display, action or gesture or the bullying knows, or ought reasonably to know, could have a harmful effect on a worker's psychological or physical health or safety, and includes **(i.e. read in "but is not limited to...)**:

 - (i) conduct that is based on any personal characteristic such as, but not limited to, race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin, gender identity or pregnancy, and
 - (ii) inappropriate sexual conduct that is known, or ought reasonably to be known, to the person responsible for the conduct to be unwelcome, including, but not limited to, sexual solicitations or advances, sexually suggestive remarks, jokes or gestures, circulating or sharing inappropriate images, or unwanted physical contact.

Workplace Harassment Regulations Cont'd

- A single incident may constitute harassment. Repeated conduct over a period of time may also constitute harassment.
- Reasonable actions taken by employers relating to workplace management is not harassment.

Workplace Harassment Regulations Cont'd

- Most concerns related to workplace harassment will get dealt with in an informal manner.
- Employer's are not required to contact OHS if a harassment complaint is made.

What about “Bullying”? What is it?

Is it Harassment or Different?

- Bullying is usually seen as acts or verbal comments that could 'mentally' hurt or isolate a person in the workplace. Sometimes, bullying can involve negative physical contact as well. Bullying usually involves repeated incidents or a pattern of behaviour that is intended to intimidate, offend, degrade or humiliate a particular person or group of people. It has also been described as the assertion of power through aggression.
 - Canadian Centre for Occupational Health & Safety

Bullying Cont'd –Some Surprising Facts

- One of the fastest growing areas of workplace violence (ILO)
- A threat to the health of almost one in five workers in Canada (CCOH&S)
- 40% of Canadians have experienced one or more acts of workplace bullying at least once a week for the last six months
- Recent Canadian study shows:
 - 45% of Canadians feel bullied at work (Canadian Centre for Workers)

Bullying – Some examples

- Constantly changing work guidelines? Assigning unreasonable duties
- Impossible deadlines (setting up for failure)
- Making jokes that are 'obviously offensive'
- Intruding on a person's privacy by pestering, spying or stalking

Bullying – Some Examples Cont'd

- Spreading rumors, gossip, or innuendo
- Excluding or isolating a colleague
- Intimidating a person

Bullying – Some Examples Cont'd

- Yelling or using profanity
- Unreasonably criticizing a person persistently or constantly
- Belittling or mocking a person's opinions
- Blocking applications for training, leave or promotion

Don't Forget About Cyberbullying!

- **RCMP Definition:** *use of communication technologies such as Internet, social networking, websites, emails, text and instant messaging to repeatedly intimidate or harass others.*
- **Public Safety Canada:** *willful and repeated harm inflicted through use of computers, cell phones and other electronic devices.*

Cyberbullying Cont'd

Perez-Moreno v Kulczycki, 2013 OHRTD No 1080

- Respondent Eee posted on her personal Facebook wall an account about the Complainant Manager that she had been written up at work for calling the manager a "dirty Mexican."
- She also wrote "now that Mexican is not going to give me anything."
- This was done from Eee's home, after hours from her personal computer.
- The Tribunal upheld the complaint and confirmed that the protections under the Code extend to workplace-related postings on the Internet.
- Conduct was "a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome in employment."
- Employee required to undergo human rights training; employer, who was not a party, encouraged to offer training to all employees.

Cyberbullying Cont'd

Canada Post (2012: CLAD)

- Postal clerk, 31 years' service, fired after postings (made over 1-month) that consisted of derogatory and mocking statements on personal Facebook after working hours about supervisors and the employer.
- These comments had potential to harm employer and had greatly harmed the supervisors.
- Grievance dismissed –Facebook postings were abusive, intimidating and mocking and widely accessible, and were an extension of the workplace.
- Two targeted supervisors suffered emotional distress.

The Policy

- A written policy is mandatory – section 4(1)
- Call it what you want, create a new policy or build on an existing policy - but it must comply with the Regulations

The Policy Cont'd

- The policy must, for example:
 - identify every worker is entitled to be free from harassment;
 - commit to corrective action when harassment occurs;
 - identify how to make a complaint and that complaints will be investigated;
 - confirm that parties will be apprised of the result of the investigation;
 - commit to confidentiality;
 - confirm that the policy is not intended to discourage, prevent, or preclude a complainant from exercising other legal rights pursuant to any other law;
 - confirm that the policy does not preclude a worker from filing a complaint under the *Human Rights Act*.

Common Deficiencies in Policy

- Required areas that are often missed from an employer's policy include
 - (g) a statement that the employer's harassment policy is not intended to discourage, prevent, or preclude a complainant from exercising other legal rights pursuant to any other law;
 - (h) a statement that the employer's harassment policy does not preclude a worker from filing a complaint under the *Human Rights Act R.S.P.E.I. 1988, Cap. H-12*; and *Workplace Harassment Regulations PART 3 - INVESTIGATION Section 5*
 - (i) a statement that the employer shall not reprimand, seek reprisal or discriminate against a worker who has made a workplace harassment complaint in good faith.

Common Deficiencies Cont'd

- (e) (ii) how to make a harassment complaint to a person other than the employer or supervisor, if the employer or supervisor is a subject of the complaint,
- Small employer with no HR (Service Provider List)
- Some employer's may have options such as: head office, board of directors, external association, etc.

Confidentiality

- A worker shall keep the details of a harassment complaint confidential unless, and to the extent that, disclosure is necessary in order to report the incident of harassment or to cooperate in the investigation of the complaint...- section 3(1)
- ...the employer shall not disclose any identifying information about any person involved or the circumstances relating to the complaint to any person unless disclosure is
 - (i) *necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint, or*
 - (ii) *permitted by law – section 4(1)(f)*

Confidentiality Cont'd

- Confidentiality is a challenge at many Island workplaces but do your best!
- Some possible suggestions:
 - Minimize discussion
 - Letters to interviewees stressing confidentiality
 - Stress confidentiality at the outset, throughout, and conclusion of interview process

Duty to Investigate

- An employer shall ensure that an investigation appropriate to the circumstances is conducted into a complaint of harassment in the workplace – section 6

Choosing an Investigator

- The investigator must be impartial – section 4(2)
- Can be from inside or outside the organization
- Some consideration when choosing an investigator:
 - Any unique skills required? Legal? HR? Health and safety training? Criminal expertise?
 - Gravity of the allegations, and corresponding risk to the organization

Order for Investigation by Impartial Person

- If employer has failed to appoint an impartial person, OHS may require the appointment of someone impartial – section 7(2)

In addition to an officer's authority under the Act, the officer may issue an order requiring the employer to cause the investigation of a harassment complaint to be conducted by an impartial person possessing the knowledge, experience or other qualifications acceptable to the officer, at the employer's expense

The Corrective Action Process

- The Employer steers the corrective action process – section 9(1)
- *After consideration of any recommendations made by the impartial person pursuant to clause 8(b), it is the employer's responsibility*
 - (a) to determine the corrective action that is required in the circumstances; and*
 - (b) implement that corrective action in accordance with clause 5(b)*

Role of OHS Re. Corrective Action

- Section 9(2):

....where a determination has been made that harassment occurred in the workplace, and the employer has failed to determine the required corrective action or to take the necessary steps to implement the corrective action, an officer may order the employer to take the steps the officer considers necessary to remedy the harassment and prevent further occurrences

References

- Guide to Workplace Harassment
- Sample policy – all areas of section 4 included in sample
- Informal/Formal Complaint
- If employer or supervisor is the nature of the complaint
- “HR Department”



Thank you!