No Room Left for Doubt: Ontario Introduces New Workplace Harassment Obligations

By: Jessica Young

Workplace harassment has been at the forefront of labour and employment law over the past several years, particularly in relation to the employer's duty to investigate. The trend continues with the Ontario Government's recent introduction of Bill 132, the **Sexual Violence and Harassment Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016**. Bill 132 amends various pieces of legislation including the workplace harassment provisions of the **Occupational Health and Safety Act** ("OHSA").

Bill 132 fills in the gaps left by its predecessor, Bill 168. The existing workplace harassment provisions of the OHSA were a result of the Bill 168 amendments in 2010. Most of the Bill 168 requirements pertained to workplace violence. Although Bill 168 also imposed some requirements with respect to workplace harassment, these were much more limited in scope. Bill 168 required employers to put in place policies with respect to workplace harassment that include measures for reporting and investigating complaints, as well as training for employees. Although Bill 168 required that a policy and procedure be put in place, it did not dictate the content of the workplace harassment policies or procedures nor did it impose any duties in relation to workplace harassment.

The Ontario Labour Relations Board (the "Labour Board") and labour arbitrators grappled with the deficiencies in the Bill 168 workplace harassment provisions. The early Labour Board decisions interpreted these provisions very narrowly, finding that the OHSA requirements were purely procedural, i.e. to create and implement workplace harassment policies and procedures. The Labour Board rejected complaints by employees alleging reprisal for bringing forward a workplace harassment allegation on this basis. However, the case law developed, and the Labour Board reasoned that if employers are required to put in place workplace harassment policies and procedures, they must also be prohibited from retaliating against an employee who lodges a complaint. To hold otherwise would undermine the creation and implementation of the policy.

Bill 132 imposes a positive duty on employers to investigate allegations of workplace harassment. It also dictates what an employer must include in workplace harassment investigation procedures. This will have implications for employers in relation to the content of their policies and how workplace investigations are carried out. These changes effectively enshrine the thrust of more recent case law, explicitly setting the standard that an employer must meet in order to avoid liability associated with a faulty investigation.

Bill 132 Amendments

Definition of Workplace Harassment

The pre-existing definition of workplace harassment in the OHSA is broad. It defines workplace harassment as "engaging in 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."

Although this definition does not explicitly mention sexual harassment, it is broad enough to encompass sexual harassment. Nevertheless, Bill 132 has amended the definition of workplace harassment to explicitly include sexual harassment. It adds a fulsome definition of workplace sexual harassment, as follows:

> (a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
>
> (b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Employers already have duties with respect to sexual harassment in the workplace under the **Human Rights Code**, including the duty to investigate allegations of workplace sexual harassment. As explained in more depth below, Bill 132 now imposes a similar duty to investigate under the OHSA. Particularly in relation to section 50 reprisal complaints, this could lead to duplicative litigation, i.e. an employee filing a human rights application and a section 50 reprisal complaint under the OHSA. It will be interesting to see how this issue is treated by the Labour Board and the Human Rights Tribunal.

Bill 132 also seeks to clarify what is <u>not</u> workplace harassment, i.e. reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace. Although this is nothing new, the fact that it has been included in the definition suggests some recognition of a growing problem faced by many employers, which is the rise of harassment allegations in relation to legitimate exercise of managerial authority.

Consultation with Joint Health and Safety Committee

Bill 132 requires that employers consult with the joint health and safety committee or a health and safety representative, on the development and maintenance of a written program to implement the workplace harassment policy. Previously, no such consultation was required.

Workplace Harassment Investigation Procedures

As we mentioned above, the pre-existing workplace harassment provisions in the OHSA do not specify what procedural steps must be included in a workplace harassment investigation policy.

Bill 132 imposes specific requirements on employers with respect to workplace harassment investigation procedures. These include:

(a) providing measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser,

(b) setting out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purpose of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law,

(c) setting out how a worker who is allegedly experiencing workplace harassment and the alleged harasser, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.

Duties re Workplace Harassment

Bill 168 imposed duties on employers and supervisors in relation to workplace violence, including the general duty to take every reasonable precaution in the circumstances for the protection of a worker. However, it did not impose a similar duty in relation to workplace harassment.

Bill 132 includes new duties in relation to workplace harassment. It imposes a duty to ensure that incidents and complaints of workplace harassment are investigated, and to follow certain procedural steps as outlined below. However, it does not go so far as to impose a general duty to take every reasonable precaution in the circumstances to protect a worker from harassment.

Bill 132 provides that in order to protect a worker from workplace harassment, an employer shall ensure that:

(a) an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances,

(b) the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation,

(c) the workplace harassment program is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment required under the OHSA.

As outlined above, employers now have a duty under the OHSA to conduct an investigation into workplace harassment allegations as is "appropriate in the circumstances". This means that when a workplace harassment complaint is received, employers should assess the seriousness of the

allegations and determine what type of investigation is appropriate. Such an assessment should take into consideration, for instance, whether a formal investigation is required in the circumstances and if it is an appropriate case to hire an external investigator. However, as discussed below, OHSA inspectors will have the independent power to order the appointment of an impartial investigator.

Powers of Inspectors

Bill 132 provides new powers for OHSA inspectors to order an employer to retain an "impartial person" to conduct an investigation into allegations of workplace harassment. The selection of the investigator will be made by the employer. However, the inspector can impose certain criteria related to knowledge, experience or qualifications of the investigator selected. The employer must retain the investigator at the employer's expense. This means that an inspector could order an employer to hire a third party investigator to conduct an investigation into workplace harassment allegations.

"Impartial *person*" is not necessarily synonymous with "impartial *third party*." Thus, we anticipate that inspectors will have discretion whether to expressly require that the investigator be a third party. Time will tell whether that discretion will be treated with deference, or subject to challenge on the basis that an impartial and competent internal investigator was available (at less cost to the employer – of course).

Notably, the Bill does not provide any criteria for when an inspector may make such an order, leaving it up to the sole discretion of the inspector. This means that an inspector may order an employer to conduct a third party investigation into less serious allegations where a third party investigator is not necessary. This would lead to a time consuming and costly exercise that is not warranted in the circumstances.

Bill 132 also clarifies that a report generated as a result of a workplace harassment investigation, whether internal or external, is not a "report" for the purpose of the OHSA that needs to be shared with the joint health and safety committee. This is consistent with the obligation to protect confidentiality to the extent possible during a workplace investigation.

Implications for Employers

The legal landscape with respect to workplace harassment investigations continues to develop and Bill 132 is consistent with this trend. Increasingly workplace harassment investigations are being put "under the microscope" so to speak by adjudicators in various forums, including courts and tribunals. Bill 132 outlines certain procedural steps that must be taken when conducting workplace investigations, which will likely subject such procedures to further judicial scrutiny.

At the **17th annual Ontario Employment Law Conference**, presented by Stringer LLP and First Reference Inc., employment lawyer Jessica Young will provide employers with guidance on how to comply with the new Bill 132 requirements. The Ontario Employment Law Conference will take place at the Corporate Event Centre at CHSI in Mississauga on June 2, 2016. We look forward to seeing you and helping you apply the latest employment and labour law changes. **Come and learn the latest!**

The Bill 132 amendments to the OHSA come into effect in September of 2016. Bill 132 will require employers to revisit their workplace harassment policies and make changes where necessary. Though having the process in place is the first step, the more challenging aspect is ensuring that the process is consistently followed and that investigations are conducted by an investigator with the necessary experience. Having a full understanding of the employer's obligations, not just under these new changes, but also the developing case law, will assist employers in avoiding the perils of a faulty investigation.

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