



Workplace Harassment - Alternatives to Termination

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In June 2010, Bill 168 came into force, amending Ontario's *Occupational Health and Safety Act* ("OHSA"). With this amendment in place, Ontario became the third province in Canada to enact protection for employees against violence and harassment in the workplace and, in turn, placed an increased obligation on employers to provide a workplace that is free from harassment and violence.

Essentially, the legislation imposes the obligation on employers to self-police the workplace with a view to the prevention and, if necessary, the management of violence and harassment in the workplace. In particular, employers are required to conduct risk assessments, develop and implement policies and programs, conduct training for employees and investigate complaints of violence and harassment in the workplace.

With respect to workplace harassment, the most important obligations now placed on an employer are: (i) the obligation to introduce policies which prohibit workplace harassment; and, (ii) the creation and implementation of a program which will set out how an employer will address complaints of workplace harassment. However, what is not set out in the legislation is what an employer can or should do after it has made a finding that there has been harassment in the workplace.

Upon receipt of a complaint, or of information which the employer determines is necessary to review, the employer must determine how it will respond. The OHSA requires all organizations (with more than five employees) to have a policy addressing these concerns however every complaint of harassment is likely to involve various competing factors and circumstances meaning that customized approaches will be required in most cases. Therefore, employers would be well advised to ensure that there is sufficient discretion built into its policy so as to reserve flexibility to allow it to deal with the uniqueness of each situation. For example, the employer should ensure that its policy provides discretion in order to determine whether a formal investigation is necessary in the circumstances. If an incident is relatively minor or can be attributed to a misunderstanding or other legitimate reason (e.g. performance management), a formal investigation may not be required. On the other hand, a written complaint addressing more serious conduct or a situation which has already escalated between the parties may require a formal investigation.

Employers should also include in its policy guidelines which will assist employees in determining their own expectations and also to equip employees with the tools required to attempt to address incidents in the workplace themselves. For example, employees can be encouraged to directly approach someone in the workplace to advise that there is certain behaviour that is unwelcome with the hope that the issue can be resolved without the need for any further process.

The growing body of case law on investigations into incidences of workplace violence and harassment tell us that not every finding that an employee has engaged in such behaviour contrary to an internal policy or the law should necessarily result in the employee's termination. When deciding on the appropriate internal mechanism to deal with a finding of workplace violence and/or harassment, there are

a variety of factors that should be considered. For example, the severity of the act of harassment and/or violence, whether there are mitigating factors involved in the employee's behavior, whether the employee has engaged in previous acts of violence and/or harassment in the workplace, and the employee's length of service.

Upon making a finding of harassment, an employer has, broadly speaking, three choices to make regarding how to handle the situation (and these choices are not always mutually exclusive): (i) terminating the harassing employee's employment for cause (i.e. without severance); (ii) terminating the harassing employee's employment without cause; and, (iii) no employee's employment is terminated and, therefore, the employer is left with a consideration of the types of disciplinary measures or internal mechanisms that can be used short of termination. In our experience, this latter situation is most common.

The following examples of alternatives to termination can be useful tools in restoring the workplace while also addressing the findings of the investigation in a meaningful way:

1. Mediations or Conferences

Where it appears that the working relationship between the parties may be salvageable, a mediation or conference which includes all parties involved in the incident may be a useful tool in restoring the workplace. Such a setting allows all of the people involved to openly discuss the situation, the effect on the people involved, allow for the possibility of a better understanding of the other person's experience and, potentially, an apology. The intent of the session would be to create a plan to which all would agree which would facilitate them working together effectively in the future. The benefit of mediation is that it provides an opportunity for all parties to be part of the plan to repair the harm and therefore more committed to the solution in the long run.

We would advise that the mediation should be conducted by an independent third party so as to reduce the risk that the participants feel that the issues discussed will have a negative impact on their employment and instead can focus on achieving resolution. Mediations are usually not appropriate where there is clear wrongdoing by one party against another (e.g. a finding of sexual harassment).

2. Support

There are times when offering support or coaching to an employee can be enough to rectify the problematic behaviour that gave rise to the investigation. For example, sensitivity training or anger management coaching may assist an employee in recognizing his/her inappropriate behavior and learn to prevent it from happening again. The employer must demonstrate its commitment and support to the employee undergoing training in these circumstances; the session should not simply be another "checkmark" down the road toward a future termination. The employer could consider placing the employee on a paid leave until the required training is complete, provide paid time off to attend the sessions or allow the employee to continue with additional sessions should he/she express an interest in doing so. Employers should also take care to ensure the quality of the program and should also insist on proof that the program has been completed.

3. Last Chance Agreements

As the name suggests, last chance agreements provide an employee with his or her last chance to rectify problematic behaviour. Typically, last chance agreements are used when the employee has had prior behavioural issues in the workplace and the employer is contemplating termination as an alternative.

In essence, a last chance agreement provides that the employee is allowed to return to the workplace as long as he or she abides by the terms set out in the agreement, which typically include standards for appropriate behavior. It is not unusual for last chance agreements to include a provision that states that the employee may be terminated for cause if he or she breaches the agreement. The drafting of

this type of last chance agreement should include input and involvement from both the employer and the employee and it should be signed before the employee returns to the workplace.

Last chance agreements should contain reasonable terms, be effective for a reasonable duration and should be used only when the agreement truly provides the last chance to correct the behaviour as an alternative to termination. Because the enforceability of these agreements can be questionable if they are not prepared properly, employers should canvass the suitability of this option with legal counsel before proceeding.

Developing useful policies, conducting proper investigations into allegations of harassment and subsequently dealing with the findings can be complex and challenging, especially given the body of case law that is quickly developing on the subject which place a standard of care on the quality of the investigation itself. As practitioners, keeping employers aware of the many tools they can draw upon to restore the workplace, through mediation, training, support and consultation with the individuals involved is likely to contribute to more sustainable, respectful workplaces following complaints of workplace harassment.

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