

# The Duty To Investigate



In Ontario, employers have a statutory duty under the *Occupational Health and Safety Act* (the “*OHSA*”) to conduct an investigation into complaints and incidents of workplace harassment that is “appropriate in the circumstances”. If a complaint is related to any human rights ground(s) which are covered by the *Ontario Human Rights Code* (the “*Code*”), employers have a similar duty to “reasonably investigate” the complaint.

## **When is the Duty to Investigate Triggered?**

An employer has an obligation to take steps to deal with workplace harassment of employees once the harassment is known to the employer – whether or not the employee who has experienced the harassment wants to make a formal complaint.

In a recent decision of the Ontario Divisional Court (*Metrolinx v. Amalgamated Transit Union, Local 1587*, 2024 ONSC 1900), the employer became aware of a WhatsApp group chat conversation with a number of its employees which included sexually harassing references to another employee, Ms. A. When the employer asked Ms. A if she wanted to file a complaint, Ms. A declined. The employer continued to investigate the matter without Ms. A’s participation. The Court found that was reasonable for the employer to proceed with the investigation in the absence of a formal complaint.

The Court notes that a victim’s reluctance to report or complain cannot relieve an employer of its statutory duty to conduct an investigation if an incident of harassment comes to its attention. The employer’s duty to investigate is not just a duty owed to the complainant, but a duty owed to all employees in the workplace. All employees – not just the direct victim of the harassment – have a right to work in an environment that is free from harassment.

## **What is a Reasonable Investigation?**

As noted above, employers are required to conduct a “reasonable” investigation that is “appropriate in the circumstances”.

Generally, adjudicators will consider three aspects of an employer’s response when assessing whether an employer met its duty to investigate:

(1) *Awareness of issues of discrimination/harassment, policy, complaint mechanism and training:* Was there an awareness of issues of discrimination and harassment in the

workplace at the time of the incident? Was there a suitable anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

(2) *Post-complaint: seriousness, promptness, taking care of its employee, investigation and action:* Once an internal complaint was made, did the employer treat it seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and

(3) *Resolution of the complaint (including providing the complainant with a healthy work environment) and communication:* Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and actions to the complainant?

For example, in a recent decision of the Ontario *Human Rights Tribunal* (*Bidwai v. Ontario Teachers' Pension Plan Board*, 2024 HRT0 1092), the Tribunal held that the employer failed to reasonably conduct an investigation because it did not communicate the findings of the investigation and steps taken to address the complaint to the complainant.

In another recent decision, (*S.E. v. 2474489 Ontario Inc. (o/a Opa! Souvlaki)*, 2024 HRT0 343), an employee had complained to the owner of the restaurant she was employed that she was sexually harassed by her manager. The owner did not investigate the complaints but offered to move the employee to another restaurant location. The employee refused this offer because it would have resulted in her being unemployed for a few weeks as the new location was not yet open. The Tribunal found that the employer had failed to investigate and therefore breached its obligations under the *Code*. Not only was the failure to investigate a direct breach of the *Code*, but it also provided a basis for establishing other breaches—namely, the creation of a poisoned work environment. Here, the repeated sexual harassment the employee was subject to created a poisoned work environment for her. The employer's failure to investigate was found to be a factor in creating the poisoned work environment.

## **Liability for Employers**

If an adjudicator finds that an employer did not satisfy its duty to investigate, it can award damages against the employer, even if the underlying allegations of harassment/discrimination which led to the complaint are ultimately dismissed. It can also lead to the establishment of other violations of the *Code*, including the creation of a poisoned work environment (as was the case in *Opa! Souvlaki*, above).

Moreover, as a remedy for a complaint under the *OHSA*, an inspector may order an employer to retain an independent third party, at the employer's expense, to conduct an investigation into an employee's harassment complaint and to produce a written report.

## **Takeaways for Employers:**

In order to fulfil its duty to investigate, it is prudent for employers to take the following steps (amongst others):

- Ensure that the workplace has a robust anti-discrimination/harassment policy in place, including a proper complaints mechanism, and that employees are aware of the policy;
- Ensure that employees and management receive anti-discrimination/harassment training, which should be updated on a regular basis;

- Once an employer becomes aware of an incident of workplace harassment or discrimination, respond promptly, sensitively and take reasonable steps to investigate (whether or not the complainant wishes to participate);
- Post-investigation, ensure that employees involved in the investigation are able to return to work in a healthy working environment.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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