Top 10 Considerations For Workplace Sexual Misconduct

Over the past year Jian Ghomeshi went from being the "King of Spain" to eating "Humble Pie" (if you are too young/old to know what this is referring to, search "Moxie Früvous"). Whether it's the CBC or Bill Cosby, issues of sexual misconduct have been dominating the headlines. Even off-duty conduct is up for scrutiny – consider the worker who yells "FHRITP" to a reporter during a live broadcast[1] or heckles a female comedian off the stage during a work party.

Maybe it's time to revisit that Sexual Harassment Policy ("SHP"). Here's a top 10 list of things to consider:

1. Does the SHP conflict/overlap with other policies or processes? In recent years, employers have been adding a Respectful Workplace Policy, a Harassment Policy, and a Code of Conduct to their repertoire. Sometimes these policies are drafted in isolation without consideration of how they might affect other policies already in existence. Does having multiple policies still make sense for your organization? Should they be combined in one policy? Can the same behaviour be challenged under multiple policies?Similarly, it had been common for an SHP to have language prohibiting a complainant from filing a complaint under the SHP and also seeking a remedy pursuant to a grievance or through the relevant human rights legislation. More recently, policies are being revised to allow management the discretion to allow a process through an SHP even though a complainant may also file a complaint through another process to preserve any time limits.

2. Is your policy only about sexual harassment or are other types of sexual misconduct, such as sexual assault, included? How is sexual harassment defined? Is off-duty conduct covered? The definition of sexual harassment should at a minimum include these concepts: (a) A course of vexatious conduct or comments related to sex (b) The conduct or comments are known or reasonably ought to be known to be unwelcome (c) The conduct or comments are repeated over time (or there is one significant event) (d) The conduct or comments may include (but are not limited to) conferring a benefit for a sexual favour.

3. Is the level of confidentiality appropriate? It's never a good idea to have an SHP which promises anonymity. Similarly, an SHP which provides too much confidentiality contributes to a "culture of silence" regarding the reporting of potential sexual harassment. In the fall out from the Ghomeshi investigations, The Toronto Star reported that a former York University Student was at an informal meeting of about 25

students in the fall of 1988 where residence advisors told the group that a couple of female students had said that Ghomeshi hit them. One said she was choked in a stairwell. Nothing official was done because the students were talking to the advisors “confidentially” to get advice. They were told to report it but none of them wanted to. Be careful to strike the right balance when addressing requests for confidentiality. Use wording to the effect of “confidentiality will be provided to the extent possible” and “people who participate in a process under the SHP are required to maintain confidentiality (or face discipline)”. The SHP should also state that managers have a positive obligation to maintain a harassment-free workplace and therefore must intervene if they become aware of an allegation.

4. Who can file a complaint? Too often an SHP limits the ability to file a complaint to the person who was the target of the behaviour. If that person is unwilling to file a complaint then it is much more difficult for management to deal with the behaviour. SHPs are being revised to allow bystanders (those who have witnessed or know about potential sexual harassment) or management to initiate the complaint process. The SHP should also provide for discipline for false complaints made maliciously or in bad faith.

5. What are the time limits? Historically, the time limit in an SHP frequently corresponds to the time limit under the relevant human rights legislation. However, the legislative time limit may have changed. Further, the legislation may allow for extensions of the time limit under certain circumstances. Management may wish to retain discretion to waive a time limit under extenuating circumstances.

6. Have you maintained the right amount of discretion in your investigative process (formal vs. informal; internal vs. external)?

7. Are there various options for resolution (mediation, restorative justice, transformative mediation)? Have you been keeping up to date on emerging alternate dispute mechanisms and is the wording of your policy broad enough to include these? Restorative justice is a process where the perpetrators, victims and other stakeholders all come together to discover what and why something (e.g. sexual harassment) happened and how to fix it. It does not focus on punitive measures, as the thinking is that such measures do not change attitudes or positively influence future behaviour. Transformative mediation, similarly, is designed to get people communicating and working together. Its purpose is not to obtain a “settlement”. Alternative dispute resolution (“ADR”) can take many forms – is your SHP broad enough to include these or is it limited to traditional mediation?

8. What training is ongoing in conjunction with the Policy? Is it time to consider some of the new trends in training such as focusing on bystander intervention and consent? Bystanders are people who observe, or learn about, inappropriate workplace behaviour but who are not themselves the target of the behaviour. Workplaces across Canada are addressing attitudes such as “it was just a joke”; “she must have deserved it” and “it’s none of my business” through bystander intervention awareness campaigns and education. Bystander training empowers men and women to take individual and collective responsibility for preventing sexual violence. These campaigns address fears or hesitation about getting involved. They teach people the skills they need to recognize and intervene when they witness behaviours that are, or may lead to, sexual violence. Similarly, more recent training on consent has abandoned the traditional “no means no” and moved to a “yes means yes” model reflecting that consent does not mean the absence of a “no” and cannot be provided in certain circumstances (e.g. minors, incapacity). Consent goes to the “unwelcome” component of the definition of sexual harassment.

9. What data are you keeping on the number of complaints and the manner in which they

are resolved? Is this information available? If not, should you make it available to executives? What about to the workforce generally?

10. How are you evaluating the effectiveness of your Policy? Have you conducted audits of your staff to test their awareness of the Policy?

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