

Defending Sexual Harassment Claims

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Overview

1. The Law of Relating to Sexual Harassment in Ontario

- a) *Human Rights Code and Occupational Health & Safety Act*
- b) The New Tort of Harassment
 - *Merrifield v Canada (Attorney General)*
- c) Civil Actions for Sexual Harassment?
 - *Rivers v Waterloo Regional Police Services Board*

2. Defending Sexual Harassment Claims

- a) Pre-hearing Procedural Considerations
- b) At the Hearing

The Law of Relating to Sexual Harassment

Human Rights Code, Section 5

Employment

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of...sex, sexual orientation, gender identity, gender expression...

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of...sexual orientation, gender identity, gender expression...

Human Rights Code, Section 7

Sexual harassment

Harassment because of sex in accommodation

7 (1) Every person who occupies accommodation has a right to freedom from harassment because of sex, sexual orientation, gender identity or gender expression by the landlord or agent of the landlord or by an occupant of the same building.

Harassment because of sex in workplaces

(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.

Sexual solicitation by a person in position to confer benefit, etc.

(3) Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

No Sexual Harassment Found

Khan v. 1742248 Ontario Inc. o/a The Harbord Room, 2017 HRTO 635

- frequent unwanted touching that the applicant believed was clearly sexual in nature
- the culture of the workplace was to joke using sexually explicit language and innuendo
- more “common” in certain types of industries
- were complaints made before the claim/application was commenced?

No Sexually Poisoned Work Environment

Kowalczyk v. HBC, 2011 HRTO 2064

- A workplace may become “poisoned” where discrimination or harassment on a prohibited ground becomes a part of the person’s workplace, becoming a term or condition of employment. (See *Vanderputten v. Seydaco Packaging Corp.*, 2012 HRTO 1977)
- not just conduct done to the applicant, but how it affects the applicant
- importance of witnesses – are allegations corroborated?
- credibility important theme

Poisoned Work Environment Found

Crete v. Aqua-Drain Sewer Services Inc. 2017 HRTO 354

- Applicant alleged that the Respondent failed to investigate and to respond to her complaints of sexual harassment and that she was subjected to a poisoned work environment
- Finding of a failure to investigate
- \$20,000 as monetary compensation for injury to her dignity, feelings and self-respect
- Lost wages in the amount of \$21,775

HRTO Remedial Authority

- The Tribunal's remedial powers are broad
- Sections 45.2(1) and (2) of the Code permit the Tribunal to award both monetary and non-monetary remedies (ex. future practice, compliance)
- Damages arising from the finding of discrimination or harassment
- Damages for Injury to Dignity, Feelings and Self-Respect
- In assessing damages:
 - objective seriousness of the conduct and the subjective effect on the person who experienced discrimination
 - monetary awards are compensatory in nature

Range of HRTO “general damages” awards for sexual harassment in employment context

- *Sanford v. Koop*, 2005 HRTO 53 (\$35,000)
- *Chard v. Newton*, 2007 HRTO 36 (\$16,000)
- *Hughes v. 1308581 Ontario*, 2009 HRTO 341 (\$25,000)
- *Smith v. Menzies Chrysler*, 2009 HRTO 1936 (\$50,000 total)
- *Chovalo v. Toronto Police Services Board*, 2010 HRTO 2037 (\$12,000)
- *Newton v. Toronto (City)*, 2010 HRTO 1023 (\$15,000)
- *Payette v. Alarm Guard Security Service*, 2011 HRTO 109 (\$18,000)
- *S.S. v. Taylor*, 2012 HRTO 1839 (\$15,000)
- *Iu v. Markham Marble*, 2012 HRTO 65 (\$20,000)
- *Garofalo v. Cavalier Hair Stylists Shop Inc.*, 2013 HRTO 170 (\$27,000)
- *J.D. v. The Ultimate Cut Unisex*, 2014 HRTO 956 (three applicants - \$40,000; \$40,000, \$25,000)
- *Manu v. Centum Fundamental Financial Inc.*, 2015 HRTO 725 (\$17,000)

Range of Damages at HRTO

- lower awards in Applications where:
 - there were few incidents
 - the incidents were determined to be of a less serious nature; and/or
 - the incidents did not include physical touching
- higher awards in matters involving:
 - multiple incidents and/or “serious incidents”;
 - serious physical assault or criminal conviction; and/or
 - reprisal or a loss of employment related to the incidents have generally had higher damages awards

Highest HRTO Awards

A.B. v. Joe Singer Shoes Limited, 2018 HRTO 107

- HRTO recently awarded one of its highest damages awards to date
- Awarded \$200,000 for injury to dignity, feelings and self-respect (plus pre-judgment interest dating back to 2008 and loss of income related damages on top) to a former retail worker who alleged that she was sexually harassed and assaulted by her landlord and employer
- Also *O.P.T. v. Presteve Foods Ltd.*, 2015 HRTO 675 (\$150,000)
- Particular vulnerability of applicant(s) a factor in quantum of these awards

Human Rights Code, Section 46.1

Civil Remedy

46.1 (1) If, in a civil proceeding in a court, the court finds that a party to the proceeding has infringed a right under Part I of another party to the proceeding, the court may make either of the following orders, or both:

1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

Same

(2) Subsection (1) does not permit a person to commence an action based solely on an infringement of a right under Part I.

The Tort of Harassment

Merrifield v Canada (Attorney General), 2017 ONSC 1333

Mr. Merrifield Alleged that:

- His reputation was damaged;
- His career advancement was impaired; and,
- He suffered severe emotional distress.

Mr. Merrifield Brought Suit for:

- Harassment;
- Intentional infliction of mental suffering;
- Loss of income; and,
- General damages.

Test for Establishing Tort of Harassment

- 1) Was the conduct of the defendants outrageous?
- 2) Did the defendants intend to cause emotional stress or have reckless disregard for causing emotional stress?
- 3) Did the plaintiff suffer from severe or extreme emotional distress?
- 4) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

***Merrifield v Canada (Attorney General)*, 2017 ONSC 1333**

What is “outrageous”?

■ Things that are:

- Deeply shocking
- Unacceptable
- Grossly cruel
- Immoral
- Offensive
- Highly unusual or unconventional

■ Examples include:

- Being harassed to go back to work after being injured and deemed unfit to do so (*Prinzo v Baycrest Centre for Geriatric Care*)
- Sexual battery (*McIntomney v Evangelista Estate*)
- Belittling, humiliating, and demeaning a worker in front of others continuously and relentlessly for nearly six months (*Boucher v Wal-Mart Canada Corp*)

Merrifield v Canada (Attorney General), 2017 ONSC 1333

Mr. Merrifield was Successful

- He was awarded \$100,000 in general damages for harassment and intentional infliction of mental suffering

Harassment Before Merrifield:

McIntomney v. Evangelista Estate, 2015 ONSC 1419

- The court found harassment because:
 - The defendant threatened to kill the plaintiff
 - The defendant followed the plaintiff home and pounded at her door
 - The defendant continuously came to the plaintiff's home and:
 - Pounded her door
 - Looked through her windows and mailbox
 - Instigated calls to the plaintiff from other people
 - The plaintiff suffered severe anxiety
- The court awarded the plaintiff \$5,000 for harassment

Quantifying Damages for the Tort of Harassment

\$5,000 vs. \$100,000

McIntomney

Merrifield

New Tort of
Harassment

+

#metoo

=

New Tort of
Sexual
Harassment
?



Civil Action for Sexual Harassment?

An Independent Tort of Sexual Harassment?

- No independent tort recognized to date
- See e.g.:
 - *Desjardins v Society of Obstetricians and Gynecologists of Canada*, 2012 ONSC 7294;
 - *Lorion v 1163957799 Quebec Inc*, 2014 ONSC 2417; and,
 - *Rivers v Waterloo Regional Police Services Board*, 2018 ONSC 4307.

Sexual Harassment: the “Piggy-Back” Claim

“In 2008, the *Code* was amended to allow a plaintiff to advance a breach of the *Code* as a cause of action solely in connection with another wrong; under s. 46.1, a plaintiff who has a civil claim properly before the court may “piggy-back” their *Code* claim so that the entire dispute can be adjudicated in one forum.”

Rivers v Waterloo Regional PSB, 2018 ONSC 4307 at para 55

Sexual Harassment in Civil Courts

- There is no independent tort for sexual harassment (as per *Desjardin, Lorion, Rivers* and the *Human Rights Code*)
- A claim for sexual harassment can still be brought before an Ontario court if it is brought with another cause of action (section 46.1 of *Human Rights Code*)
- Query: Can an action for sexual harassment be pursued as a tandem claim to a harassment action?

Defending Sexual Harassment Claims

Pre-Hearing Procedural Considerations

- 1) Forum and/or Jurisdiction
- 2) Limitation Period
- 3) Parties
- 4) Preliminary Motions
- 5) Mediation

Procedural Considerations

1) Forum

- has claim been pursued in one forum or in multiple fora?
 - is there a benefit to proceeding in vs. the other?
 - consider: cost, likelihood of success of primary cause of action, pre-hearing procedural steps (i.e. mandatory mediation in certain civil jurisdictions vs. optional and voluntary mediation at HRTO), potential range of damages
- jurisdiction
 - does court have jurisdiction over claim? does HRTO have jurisdiction over the claim?

Procedural Considerations

2) Limitation Period

- under the *Human Rights Code* the limitation period is one year
- can be extended in certain circumstances with good reason (see section 34 of the *Code*)
- regardless of where claim being pursued - court or HRTO - consider whether you have a tenable limitation defence for the Code-related claims

Procedural Considerations

3) Parties

- in certain instances an individual may be named to an action or a Tribunal application
- Tribunal has a direction regarding when it is appropriate to name individuals as personal respondents
- can lawyer retained defend both the corporate defendant and the personal respondent or individual defendant? - is there any conflict of interest?

Procedural Considerations

4) Preliminary Motions before HRTO

- Request for Order during Proceedings or Summary Hearing Request

- RFOP
 - Remove personal respondent?
 - Remove certain allegations or seek particulars?

Procedural Considerations

- **Summary Hearing**
 - Can be referred to in Response
 - Tribunal may order – typically prior to delivery of Response
 - Typically convened by way of conference call
 - Test:
 - is there a reasonable prospect that the application discloses a connection between the allegations and a *Code* ground?
 - assuming the allegations are true, is there a reasonable prospect that there could be a finding of a *Code* violation?

Procedural Considerations

5) Mediation

- voluntary process
- parties indicate willingness in application and response forms
- typically convened by Vice-Chairs or members of Tribunal
- typically half day
- often non-monetary remedies are important to applicant
 - apology (Tribunal does not typically order) vs. letter of regret – implication?
 - workplace policies
 - workplace training

Tribunal Hearing

At the Hearing

- **Production prior to hearing**
 - Notice of Hearing establishes dates by which parties exchange Lists of Arguably Relevant Documents, Witness Statements and documents parties intend to rely on at hearing
 - No pre-hearing examinations
 - Do you have all relevant documents?
 - Should you think about pursuing RFOP to request production?

At the Hearing

- **Case Conferences**
 - New process by Tribunal
 - To be held weeks prior to the Hearing
 - Intended to deal with procedural issues prior to Hearing

At the Hearing

- **Mediation-Adjudication Process**
 - Assistance from Vice-Chair to settle the application
 - If settlement not reached, move right into hearing with same adjudicator

At the Hearing

- If case does not resolve by way of preliminary issue motion, mediation or mediation-adjudication, hearing proceeds
- Typically one date set at a time – in some cases two days
- No court reporters at Tribunal hearings – do you think you have a case where transcript may be important?
- Expert evidence?

Questions?