

Remedies Available to Employees and Timeliness of Complaints under Bill 168

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Introduction

As a result of Bill 168, the Occupational Health and Safety Act, (the “OHS Act” or “Act”) now imposes obligations on employers to maintain policies and programs with respect to preventing both workplace violence and harassment. While the requirement to maintain such policies and programs is well established, what is less certain is what remedies will be available to an employee who brings a complaint regarding workplace violence or harassment. The OHS Act does not set out a Tribunal where an employee may file a complaint concerning workplace violence or harassment. Bill 168 is unlike the Ontario Human Rights Code which provides for the Human Rights Tribunal of Ontario (HRTO), an independent tribunal, where complaints of discrimination and harassment based on prohibited grounds (such as race, age, gender, etc.) can be filed and where remedies are ordered in proven cases.

It is a requirement under the OHS Act that employers set out, under their workplace violence and harassment program, how they will investigate and deal with incidents or complaints of workplace violence and harassment.² This means that the employer has some discretion, through the development of their own internal policy and program, to determine what remedies may be available to an employee where a violence or harassment complaint is made out.

However, given that a workplace may be unionized or not, and that the nature of the harassment may be personal or based on human rights prohibited grounds, a surprisingly complex web of options is available to an employee experiencing workplace violence and harassment. Employers should be aware of these options and tailor their human resources policies, in particular their Workplace Violence and Harassment Prevention Policy, accordingly.

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² *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, ss. 32.0.2(2)(d) and 32.0.6(2)(b).

What follows is an overview of remedies that may be available to employees in three different contexts. This paper also addresses the role of workplace Joint Health and Safety Committees under Bill 168 and the question of whether there is or ought to be a deadline for filing complaints concerning workplace violence and harassment under Bill 168.

I. Human Rights Based Harassment and Violence

The Ontario Human Rights Code (the “Code”) prohibits workplace harassment where it is based on a prohibited ground of discrimination.³ Where an employee is facing harassment or violence that has a human rights aspect, he or she may initially or ultimately seek recourse by filing an application before the Human Rights Tribunal of Ontario. Where discrimination or harassment is proven, the tribunal has a range of remedies that it can impose, such as damages or reinstatement, as well as public interest remedies.⁴

However, instead of filing an application with the HRTTO, an employee may choose to file an “internal” complaint under the employer’s Discrimination and Harassment Policy which may be separate, part of or associated with the employer’s Workplace Violence and Harassment Policy. If the employee’s complaint is found to be substantiated, the remedies available to the employee would be consistent with those available under the relevant employer policy. Specifically, in respect of harassment or violence based on a prohibited ground, the employer would have a parallel obligation under both the OHSA and the Code to investigate and attempt to resolve incidents of workplace harassment.

The Human Rights Tribunal has indicated that it will look to whether the employer was in breach of any internal workplace policies, such as a policy to investigate harassment complaints, when assessing an employee’s damages.⁵ In *Abdallah v. Thames Valley District School Board*, for example, the Human Rights Tribunal found that the respondent School Board had conducted an investigation that fell below the standard of what would have been expected under its own discrimination and harassment procedures, and under the *Code*. This flawed investigation and failure to adhere to internal policy resulted in liability under the *Code*.⁶

³ Section 5 of the *Human Rights Code*, R.S.O. 1990, c. H.19 [*Code*] provides as follows: 5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability; 5. (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 race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

⁴ *Ibid.* at s. 45.2.

⁵ See: *Abdallah v. Thames Valley District School Board*, 2008 HRTTO 230 (CanLII).

⁶ *Ibid.* at paras. 89, 99.

II. Unionized Workplaces

In a unionized workplace, an employee who is experiencing workplace violence or harassment will be able to file a grievance through their union to obtain a remedy. The employer and union would attempt to resolve the grievance through the usual labour relations mechanisms provided in the collective agreement and, failing that, a labour arbitrator would decide the matter. The grievance must allege a violation of the Collective Agreement. If the Collective Agreement does not contain an explicit provision prohibiting personal or prohibited grounds harassment, the employee could nevertheless bring a grievance on the grounds that the Collective Agreement creates an obligation on the employer to comply with existing workplace law which now includes the Bill 168 amendments to the OHS Act. Any remedies obtained or disciplinary measures imposed through an arbitral award must be in accordance with the Collective Agreement.

III. Non-Unionized Workplaces

As outlined above, the OHS Act does not create a complaint mechanism for workers who have experienced violence or harassment. The Act simply imposes an obligation on employers to develop workplace violence and harassment policies and programs. Therefore, employees' remedies will be limited to those set out in the workplace policy and program, as determined by the employer.

Presumably, the program may provide for disciplinary measures to be taken against individual employees who have engaged in acts of workplace violence or harassment. Any disciplinary measures imposed by the program must be consistent with the employer's legal right to discipline. In a non-unionized work environment, an employer may be restricted to written warnings and dismissal,⁷ as suspensions without pay may trigger a constructive dismissal scenario. It will be prudent for any employer to establish a clear and straightforward policy, and to obtain legal advice on the soundness of any proposed remedies.

If the workplace violence or harassment creates a situation where it becomes untenable for the complainant employee to continue working, the employee will also have the option to file a claim for constructive dismissal. In circumstances where the employer has created or condoned a hostile, intimidating or volatile work environment, an employee may be entitled to consider this a repudiation of the employment contract and claim for damages for wrongful dismissal.⁸

⁷ See: *Geluch v. Rosedale Golf Assn.*, 2004 CanLII 14566 (ON S.C.) at paras. 94-104.

⁸ For constructive dismissal claims on the basis of harassment see *Shah v. Xerox*, 2000 CanLII 2317 (ON C.A.) and *Stamos v. Annuity Research Marketing Service Ltd*, 2002 CanLII 49618 (ON S.C.).

Employees experiencing severe harassment and/or violence can also seek remedies by commencing civil claims based on intentional torts. One example is the tort of intentional infliction of mental suffering. An employer or fellow employees may be liable in tort for the mental anguish they cause to an employee. Liability will follow where the plaintiff can demonstrate that 1) there was conduct that was flagrant and outrageous; 2) that the conduct was calculated to produce harm; and 3) that a visible and provable injury resulted.⁹

Note that prior to Bill 168, employees who experienced personal harassment were often without a remedy where the harassment did not rise to the level of constructive dismissal or an intentional tort. With the advent of Bill 168, it appears that there will be an increased opportunity for harassment complaints to be examined without a termination of the employment relationship.

As a practical matter, employees who are experiencing harassment should first try, where possible, to raise the matter with the alleged harasser and advise him or her to stop. If this does not resolve the matter the employee should ensure that the allegations are reported to a supervisor. The employee may then seek to involve Human Resources and/or a compliance officer. Depending on the circumstances, and the degree of violence or harassment, the employee may also seek to contact the Ministry of Labour and/or advise the OHS Joint Health and Safety Committee, as it is charged with the implementation of safety procedures under the Act, including workplace violence programs. Any employee bringing a complaint forward is protected under the anti-reprisal provisions of the OHS.¹⁰

It remains to be seen whether the Ministry of Labour will respond to individual allegations of harassment as well as violence. It is likely that the Ministry of Labour will only respond if an employer has failed to prepare and develop its mandatory workplace violence and harassment policy and program. Note that pursuant to ss. 55.1 of the OHS, a Ministry of Labour inspector may require an employer to create a written policy with respect to workplace violence and harassment, and post such a policy in a conspicuous place, even if the employer has five employees or less. Likewise, a Ministry of Labour inspector may require under s. 55.2 that an employer conduct a workplace violence assessment or reassessment. In our view, given the limited resources of the Ministry in terms of inspectors, and the more subjective nature of a harassment allegation, it is unlikely that the Ministry will respond to an employee complaint of harassment as opposed to a complaint of workplace violence.

⁹ See: *Prinzo v. Baycrest Centre for Geriatric Care*, [2002] O.J. No. 2712 (C.A.); *Zorn-Smith v. Bank of Montreal*, 2003 CanLII 28775 (ON S.C.); and *Piresferreira v. Ayotte*, 2008 CanLII 67418 (ON S.C.).

¹⁰ *Supra* note 1 at s. 50.

The Role of the Joint Health and Safety Committee

Pursuant to s. 32.03.3 of the Act, an employer is required to advise the Joint Health and Safety Committee (JHSC) or a health and safety representative of the results of any workplace violence assessment or reassessment conducted under the Act. If there is no committee, the employer has an obligation to advise all employees of the results of the assessment and provide them with copies upon request.

Beyond this requirement, Part 111.0.1 of the Act, which contains the workplace violence and harassment provisions, does not expressly identify what role a workplace JHSC will have in managing risks of workplace violence and harassment. Nevertheless, it is likely that the JHSC will play a role in developing any workplace violence and workplace harassment programs and policies, and in conducting the workplace violence assessment. This is because the JHSC has the power under the Act to make recommendations for the improvement of the health and safety of employees, and to recommend that programs, procedures or measures be put in place to address the health and safety of workers.¹¹

What is less certain is whether the employer will have *an obligation* to involve the JHSC when an allegation of harassment is made. Employers may be legitimately concerned about sharing sensitive information about a complainant, respondent or witnesses with members of the JHSC who could inadvertently or advertently compromise the confidentiality of an investigation. It may be that a reasonable compromise between privacy of individual complainants and the safety of workers is to involve the JHSC towards the end of a workplace investigation that has resulted in a conclusion that harassment occurred.

Section 32.0.5 of the OHS Act appears to contemplate that there are circumstances in which personal information relating to both violence and domestic violence can be disclosed to some or all employees in a workplace. Section 32.0.5(3) creates a positive duty on employers to provide information to workers, including personal information, related to a risk of violence from a person with a history of violent behaviour if the worker can be expected to encounter that person in the course of his or her work and the risk of workplace violence is likely to expose the worker to physical injury. Section 32.0.5(4) provides that the employer shall not disclose more personal information than is reasonably necessary to protect the worker from physical injury. In light of this last provision, it may be that the employer cannot disclose

¹¹ *Supra* note 1 at s. 9(18).

personal information related to employees unless other workers are at risk of being exposed to physical injury.

Timeliness of Complaints under Bill 168

In the normal course, a legislative enactment is effective on the day it comes into force.¹² Therefore, as Bill 168 does not provide otherwise, it is fairly clear that the workplace harassment and violence provisions of the OHSA do not have retroactive effect, and are only effective as of June 15, 2010. This appears to be the position of the Ministry of Labour.¹³

As the OHSA does not set out a statutory complaint mechanism, it will be at the discretion of the employer, with input from any JHSC, to prescribe limitation periods within individual policies. It is likely that the employer can require that employees bring their complaints to the attention of the employer in a timely manner. The employer may determine, for example, that going forward it will not investigate incidents that occurred over two years in the past, as this is consistent with the basic limitation period under the *Limitations Act, 2002*. Alternatively, the employer may choose to use the more restrictive but still lengthy one-year discretionary deadline for filing workplace violence and harassment complaints akin to the one-year period in the *Human Rights Code*. Given the challenges of document retention and failing witness memory, the employer may even opt for a shorter six month time frame recognizing, however, that it may, in fact, also be in the employer's interest for information to come forward about alleged workplace violence and harassment. Too restrictive a deadline could discourage valid complaints. A clause permitting the employer to use its discretion to permit the filing of late complaints where the delay was incurred in good faith and there has been no prejudice seems like a sensible way of balancing the need for timeliness with the recognition of occasional extenuating circumstances for delay.

In developing such a policy around when "late" complaints would be permitted, a number of factors will be relevant such as:

1. Was there a good faith reason for the delay?
2. Did the delay in bringing the complaint result in prejudice to any party?
3. What was the length of the delay in bringing the complaint?

¹² *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F., s. 9.

¹³ Ministry of Labour, Occupational Health and Safety Branch, "Workplace Violence and Harassment: Understanding the Law," (Queen's Printer for Ontario, March 2010) at i. Online: www.labour.gov.on.ca/english/hs/pubs/index.php.

4. Could the complainant, with due diligence, have brought the complaint to the attention of the employer at the appropriate time? If he or she didn't, was the failure to do so related to an underlying medical issue or disability or any other relevant factor?
5. What was the overall context that resulted in a delay in bringing the complaint?

The OHSA does not require that any particular limitation period for workplace violence and harassment complaints be imposed. Employers are simply required to have programs that set out how the employer will investigate and deal with incidents or complaints of workplace violence and harassment. If any limitation period is prescribed in the program, the employer should also consider prescribing a timeframe in which the employer will respond to and/or conduct an investigation in response to any employee allegations of violence and harassment.

Conclusion

As employers and the Ministry of Labour gather more experience responding to complaints of workplace violence and harassment, the procedural and remedial uncertainties that arise from Bill 168 will become clearer over the coming months and years. In the interim, employers must determine how they will implement the workplace violence and harassment provisions of the OHSA, and how they will manage practical issues such as timeliness and providing complainant employees with remedies where harassment or violence has occurred.

One question that remains outstanding is whether the Ministry of Labour will respond to individual complaints of workplace harassment. While it is likely that the Ministry of Labour will inspect workplaces where a serious incident of workplace violence is alleged, it remains to be seen whether the Ministry will intervene in cases of individual harassment where an employer is not in contravention of the requirement to have a violence and harassment prevention policy in place.