# SEXUAL HARASSMENT IN THE WORKPLACE

## INTRODUCTION

A common theme regarding an employer's duty to their employees in the workplace is captured succinctly by Justice Chadwick in the 1992 case *Robinson v. Royal Canadian Mint.* Chadwick J stated that an employer owes a duty "to see that the work atmosphere is conducive to the well-being of its employees".[1]

Yet, recent statistics reveal that one third of female respondents and 12 per cent of male respondents say that they have been sexually harassed at work.[2]

Now, in the wake of the #metoo movement, the need to be able to properly defend or pursue litigation related to an employer's obligations to ensure that employees are not subject to sexual harassment in the workplace is paramount for lawyers who practice labour and employment law.

## LEGISLATION

The Ontario Human Rights Code, R.S.O. 1990, CHAPTER H.19 (the "Code") defines harassment as "engaging in a course of vexatious comment or conduct that is known, or ought reasonably to be known, to be unwelcome."

With respect to understanding sexual harassment, The Ontario Human Rights Commission explains that:

> Sexual harassment is a type of discrimination based on sex. When someone is sexually harassed in the workplace, it can undermine their sense of personal dignity. It can prevent them from earning a living, doing their job effectively, or reaching their full potential. Sexual harassment can also poison the environment

[1] *Robinson v. Royal Canadian Mint*, [1992] O.J. No. 2270 (Gen. Div.)
[2] **https://www.huffingtonpost.ca/2018/04/12/sexual-harassment-workplace-canada_a_23409493/**

> for everyone else. If left unchecked, sexual harassment in the workplace has the potential to escalate to violent behaviour.

Mirroring the test for harassment under the Code, the Occupational Health and Safety Act, R.S.O. 1990, CHAPTER O.1(the "OHSA") defines Workplace Harassment as: "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome".

Following some well publicized instances of sexual harassment incidents in Ontario, in 2015, the Ontario government introduced Bill 132, the Sexual Violence and Harassment Action Plan Act. Bill 132 resulted in some key amendments to the OHSA, including the expansion of workplace harassment to include a definition of Workplace Sexual Harassment:

> engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or
>
> making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

As a result, the OHSA and the Code define sexual harassment in similar terms. Along with the expanded OHSA definition of sexual harassment, Bill 132 resulted in further obligations to conduct an appropriate investigation into incidents and complaints of workplace harassment.

With such legislative amendments and with the publicity of the #metoo movement, how the Courts and Tribunals interpret and address sexual harassment allegations in the workplace warrants analysis.

## GENERAL PRINCIPLES

When it comes to adjudicating sexual harassment allegations in the workplace, the Courts and Tribunals routinely reference the Supreme Court of Canada case, *Janzen v. Platy Enterprises Ltd.* [3] The Court held, *inter alia*, that sexual harassment in the workplace includes a broad range of conduct which negatively impacts the work environment. This could include sexual gestures and sexual posturing.

Courts and Tribunals would also consider factors such as the balance of power between the parties.[4] The power imbalance analysis was germane to an adjudicator in a recent tribunal decision involving a young paralegal hired in a legal practice.

***Anderson v. Law Help Ltd***[5]

A legal assistant/paralegal alleged that she was subjected to sexual harassment in the workplace by the employer, Law Help Ltd. and specifically by the manager of the organization, Giuseppe Alessandro, who went by the name “Joe”.

The applicant alleged that after she began working at Law Help Ltd., Joe began to request that she meet with him in the office boardroom, whereupon he would tell her how his wife, whom the Applicant reported to, did not like her. Joe also told the Applicant that his wife was jealous of her. Joe, however, advised the Applicant that she need not worry about his wife and that he would side with the Applicant in any disputes.

Subsequently, Joe began to send the Applicant a series of text messages that would ask her what she had planned over the weekend and also invited her to go clubbing. The Applicant alleged that these text messages and the comments that Joe had made about his wife, made her feel uncomfortable.

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[3] *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R 1252, 1989 CanLII 97
[4] *Smith v. Menzies Chrysler*, 2009 HRTO 1936 (CanLII) at para 147.
[5] *Anderson v. Law Help Ltd*., 2016 HRTO 1683 (CanLII)

The applicant alleged that Joe then propositioned her for a relationship with him and suggested that such a relationship would result in some financial benefits.

The applicant ultimately rejected Joe which resulted in Joe being rude and disrespectful to her, not paying her on time and then failing to pay her full entitlements when everyone else was being appropriately compensated. This finally resulted in the applicant's resignation.

In considering whether the Applicant was subjected to sexual harassment in the workplace, vice-chair Ken Bhattacharjee summarized the legal test to be applied to establish sexual harassment in the workplace:

> In order to establish a case of sexual harassment, the onus is on the applicant to prove that (1) the individual respondent was her employer, her employer's agent, or another employee; (2) the individual respondent harassed her by engaging in a course of vexatious comment or conduct towards her that was known or ought reasonably to have been known to be unwelcome; (3) the individual respondent harassed her in the workplace; and (4) the individual respondent harassed her because of her sex. See ss. 7(2) and 10(1) of the *Code*.[6]

The tribunal, in applying this test, determined that a significant component of meeting this 4-part test was whether a reasonable person would know that that the alleged behaviour would be regarded as unwelcome. What was damning for Joe in the analysis of this component of the test was that Joe actually sent the applicant a text stating "I guess you are NOT interested" when the applicant stopped engaging in text messages. Joe then reverted back to making sexual advances towards the Applicant.

What is noteworthy about vice-chair Ken Bhattacharjee's decision is that he clearly emphasized the power imbalance between the parties by referencing their age gap and by recognizing that the Applicant was a young woman who was starting out in her career. Such factors played a significant part in the determination that Joe should have known that his advances were unwelcome from an objective perspective.

[6] *Ibid* at para 61

Ultimately, the tribunal awarded the Applicant $22,000 in damages for compensation for injury to dignity, feelings and self-respect. In this determination, vice-chair Ken Bhattacharjee considered other tribunal decisions and noted a damages range from $12,000 to $50,000. In his analysis for the damage award, he awarded the Applicant a lower damage value than another factually similar case, because there was no actual physical contact made with the Applicant in this case.

Also noteworthy, the Tribunal did not award the Applicant any compensation for lost income on the determination that the Applicant failed to make reasonable efforts to mitigate her losses by seeking alternative employment.

In contrast to this Applicant who was found to be immensely credible, a recent Ontario case concerning sexual harassment in the workplace involved a restorative hygienist whose credibility was found to be seriously lacking.

This confirms the notion that credibility assessments play a significant factor in assessing the merits of a claim for sexual harassment in the workplace.

***Lancia v. Park Dentisty***[7]

This matter proceeded by way of a summary judgment motion but required *viva voce* evidence related to the allegations of sexual harassment in the workplace in order for the Court to assess the credibility of the parties.

This matter involved a plaintiff who was employed from 1997 to 2016. In 2013, the new owner of the dental practice, Dr. Park, retained a law firm to assist in the transition of all of employees to a standard employment contract.

[7] *Lancia v. Park Dentistry*, 2018 ONSC 751 (CanLII)

The plaintiff alleged constructive dismissal on two fronts; 1) the contractual change related to her vacation pay entitlement and the withholding of wages to recapture previously paid vacation amounts; and 2) constructive dismissal as result of sexual harassment given comments and conduct by Dr. Park.

Notwithstanding the issue related to vacation pay and contractual changes, the court determined that the plaintiff's claim for having resigned as a result of sexual harassment was not believable for a variety of reasons, which included the following:

1. That she did not raise the issue of sexual harassment in her resignation letter especially in light of the fact that she did raise other concerns in her resignation letter;

2. That the evidence supported that she was an equal and willing participant in banter and conduct that was risqué, including the sharing of jokes and comments in support of an inappropriate video;

3. That she was not as believable as Dr. Park, especially given that the witnesses who supported Dr. Park's version of events were regarded as credible;

4. That her cordial and friendly text messages with Dr. Park contradicted her assertions that she was sexually harassed by Dr. Park, which negated the argument that he ought to have known that his behaviour and conduct was unwelcome; and

5. That her complaint regarding sexual harassment came well after she resigned.

What is interesting to note about this case is that although Justice Goodman accepted certain allegations of otherwise inappropriate conduct, such as showing the plaintiff an objectively inappropriate video, these incidents were part and parcel of playful workplace banter which the plaintiff participated in and never formally complained about.

In the end, Justice Goodman concluded as follows:

> I do not find that the working relationship was to the point of being strained by the events alleged by the plaintiff. I also reject Lancia's assertion that the atmosphere at Park Dentistry was toxic or that she was subjected to harassment. I do not

> consider Park's conduct, taken as a whole, to be needlessly provocative, harassing or demeaning. The corporate atmosphere was far from toxic. Overall, I do not find that Lancia was treated in a demeaning or humiliating manner or that the defendant acted in a manner intended to humiliate or belittle the plaintiff. [8]

## CONCLUSION

In both the Ontario Human Rights Tribunal decision and the recent Ontario Superior Court of Justice matter, it was clear that credibility assessments were essential components in reaching a determination.

Secondly, the test of whether someone ought to know that their conduct is unwelcome requires an analysis of whether an objective person would know that their behavior is unwelcome. In the *Park Dentistry* case, it was clear that the court found that the plaintiff was an equal and willing participant in a workplace environment that tolerated risqué jokes and banter.

In contrast, *Anderson v. Law Help Ltd.*, established that the respondent manager should have known that his behaviour and conduct was unwelcome.

Justice Goodman reinforced the notion that workplace banter and conduct, even ones that some of us would consider objectively inappropriate would not amount to sexual harassment or even a poisoned work environment if there is no evidence to support that the applicant found such an environment to be distasteful or equally participated in such banter.

Similarly, in *King v. Skyview*[9]*,* the plaintiff complained of sexual harassment, alleging there was an environment of "sexual promiscuity" even referencing a video circulating in the office depicting a woman giving oral sex to a horse. However, the court found that the plaintiff herself found the video amusing and did not express any concerns related to the video.

[8] *Ibid* at para 112.
[9] *King v. Skyview Financial Advisors,* 2006 CanLII 22139 (ON SC)

Although the #metoo movement has reinforced the notion of what conduct is not acceptable in the workplace, it does not remove the requirement that those who claim that their workplace is an unwelcome environment and must show that they were not a willing participant in impugned conduct.

That being said, at a certain point, perhaps the Courts will soon recognize that certain conduct and behaviour, regardless of whether one participates in such conduct or not, cannot be condoned in any fashion. Although one can concede that the plaintiff in the Park Dentistry case may not have objected to the inappropriate video shown by Dr. Park, one can certainly question the judgment of a business owner who feels comfortable enough to show such a video to his subordinates.

Further, is it not management's responsibility to set a tone for the workplace and to model appropriate behaviour? At what point will the Courts and Tribunals consistently recognize that the owner or management, regardless of their respective industry, and regardless of whether subordinates play along likely out of fear of not fitting in, are ultimately responsible for ensuring that the workplace will not tolerate conduct that the ever-evolving reasonable person would find objectionable.

As vice-chair Ena Chadha expressed in *Smith v. Menzies Chrysler*, 2009 HRTO 1936 (CanLII):

> [161] Management at Menzies Chrysler had a responsibility to set a professional tone in the workplace and to ensure that staff is aware that discriminatory and harassing behaviour is unacceptable in the workplace. Instead, management at Menzies Chrysler not only tolerated sexual comments and conduct in the workplace, but also engaged in these behaviours. I find that management at Menzies Chrysler condoned the sexualized work environment.