

January 2020

## Inadequate Workplace Harassment Investigation Results in \$75,000 Damage Award

A recent decision of Manitoba's Human Rights Commission (the "Commission") serves as an important reminder that developing a clear and reasonable plan at the outset of a workplace investigation is essential.

In *T.M. v Manitoba (Justice)*<sup>1</sup>, an employer was required to pay \$75,000 in damages for injury to the dignity, feelings and self-respect of an employee who was traumatized by having to repeat his experiences multiple times during an inadequate workplace investigation.

### The Facts

The Complainant, T.M., alleged that he endured an egregious, multi-year shaming campaign regarding his sexuality, which included degrading comments, sexual propositioning, humiliating gestures, threats of sexual violence and, ultimately, a sexual assault by a co-worker at a work event.

The Complainant submitted a detailed complaint to his employer, who refused to investigate the allegations unless he provided the names of the assailant and witnesses. When the Complainant ultimately did provide several names of alleged harassers, the

---

<sup>1</sup> 2019 MBHR 13.

employer still did not conduct a thorough investigation, stating that it “did not feel [it] had enough information to go forward with the matter”.

Over the next year, the Complainant repeatedly raised the allegations to his employer and requested follow-up regarding his complaint. Each time, the Complainant was forced to retell his experiences and provided additional information. His mental health deteriorated and he eventually commenced long-term disability leave.

Several months later, the employer began a renewed investigation in which it failed to put any of the specific allegations to the alleged harassers. Despite witnesses confirming that derogatory and discriminatory comments were made, the employer found the Complainant’s claims to be unsubstantiated and only recommended harassment-related training for frontline staff.

The Complainant ultimately resigned and filed a complaint with the Commission, alleging harassment on the basis of sexual orientation and, in particular, that his employer failed to take reasonable steps to provide a safe working environment.

### The Commission’s Decision

The Commission did not award the Complainant lost wages because he was unable to work for medical reasons over the period claimed.

However, the Commission recognized a link between the workplace harassment and the Complainant’s disability, and considered the humiliation, victimization, hurt feelings and loss of self-respect, dignity, self-esteem and confidence experienced by the Complainant, as well as the seriousness, frequency and duration of the harassment, in determining that the Complainant was entitled to significant damages.

In particular, the Commission noted that requiring the Complainant to repeatedly detail his allegations had further traumatized him and made him feel as though his employer did not trust or believe him.

Another aggravating factor that weighed in favour of a substantial award of damages was the finding that management knowingly permitted the harassment to continue and delayed some 19 months before commencing a (still inadequate) investigation.

The Commission found that the employer did not have a clear understanding of what constitutes harassment on the basis of sexual orientation, had no mechanism in place to handle workplace harassment complaints, and had generally failed to take the matter seriously.

In addition to a significant award of \$75,000 in damages, the Commission ordered mandatory training for all staff regarding workplace harassment, including how to respond to and investigate such allegations, and how to proactively respond to workplace harassment using a trauma-informed approach.

### Takeaways For Your Business

To maintain a safe workplace, comply with applicable laws and avoid potentially significant liability, employers must implement a complaint process that includes a reasonable investigation procedure to address reports of workplace discrimination, violence or harassment. Though such a policy cannot anticipate every potential circumstance that may arise during the course of an investigation, transparency about the company's general investigation procedure is important. Employees are more likely to feel comfortable bringing forward complaints of workplace mistreatment when they understand what will happen next.

When faced with a workplace complaint, employers should always consult internal harassment, violence or occupational health and safety policies and programs (and the collective agreement, if any), in addition to all applicable legislation, to ensure that the workplace investigation is carried out both in accordance with company policy and the law.

Employers are cautioned not to dive right into a workplace investigation without first carefully considering and setting out a roadmap for how the investigation will proceed. Liability can arise even when a well-intentioned employer loses sight of the purpose

and scope of the investigation. A clear plan of action (with flexibility to adjust as the investigation unfolds) can help limit the risk of a misstep.

Before beginning the investigation, employers should consider, for example, whether external and/or specialized supports are required (e.g. an external investigator, emotional support services, interpreters, etc.), where the investigation will be conducted and by whom, the number of witnesses that may be involved, and what information is necessary to make a determination regarding the substance of the complaint.

Employers should also ensure that investigation participants understand the importance of confidentiality and reprisal protections, and should offer appropriate support to participating employees, for example by pointing out the availability of an employee assistance program or other benefits.

Investigators should have the proper training and experience to conduct a thorough and fair investigation. Though specific training in a “trauma-informed approach” (as ordered by the Commission in this case) may not be strictly necessary in all circumstances, employers should handle complaints of workplace mistreatment with care, dignity and respect for all involved, and, where possible, avoid requiring an employee to unnecessarily retell his or her allegations.

Whether faced with a novel or complex workplace investigation, or simply wondering where to start when a complaint is received, employers are invited to speak with a member of McMillan’s Employment & Labour Relations Group to assist with determining next steps.

by Alexis Lemajic and Kristen Pennington

For more information on this topic, please contact:

Toronto	<a href="#">Alexis Lemajic</a>	416.865.7084	<a href="mailto:alexis.lemajic@mcmillan.ca">alexis.lemajic@mcmillan.ca</a>
Toronto	<a href="#">Kristen Pennington</a>	416.865.7943	<a href="mailto:kristen.pennington@mcmillan.ca">kristen.pennington@mcmillan.ca</a>

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2020