

# OPA! A REMINDER TO EMPLOYERS ON THE IMPORTANCE OF PROPER INVESTIGATIONS

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A recent decision out of the Human Rights Tribunal of Ontario (“**HRTO**”) has emphasized employers’ obligation to conduct investigations into complaints regarding alleged breaches of Ontario’s *Human Rights Code* (the “**Code**”). The decision is also a helpful reminder of the potential consequences where investigations into alleged harassment are insufficient.

## Background

In [S.E. v 2474489 Ontario Inc. \(o/a Opa! Souvlaki\) and Fahim Rahmatyan](#), an employee of a fast-food restaurant made allegations of discrimination on the basis of sex, including sexual harassment and sexual solicitation or advances. She also alleged that she was subject to reprisal when she brought these allegations to her employer, contrary to the *Code*.<sup>[1]</sup>

The employee claimed that she had been subjected to repeated sexual solicitation, inappropriate and unwelcome comments, and “jokes” of a sexual nature by her manager.<sup>[2]</sup> After hearing the employee’s complaints about the manager, the employer, without conducting an investigation, offered to move the employee to a different location. The employee refused this offer as it would have resulted in her being unemployed for a number of weeks as she transitioned to the new location.<sup>[3]</sup>

The manager’s behaviour did not stop and eventually culminated in the employee being sexually assaulted on two occasions. The employee again reported these events, to which the employer responded by stating that he would talk to the manager, but there was “nothing else he could do”.<sup>[4]</sup> When the employee then advised the employer that she could not attend her shift because she did not feel safe at work, the employer threatened to fire her for absenteeism. The employee did not return to work after this threat.

## The Decision

The employee brought an application to the HRTO against her employer, naming both the corporate entity and its sole proprietor as Respondents. Despite the seriousness of the allegations, neither Respondent filed a response to the Application and were therefore deemed to have accepted all the allegations and to have

waived their right to participate in the proceeding.

Based on the employee's uncontested evidence, the HRTO found that an employee's right to employment free from discrimination and the employer's obligation to prevent the employee from having to work in a poisoned environment had been breached.<sup>[5]</sup> This was in large part due to the employer's failure to comply with its obligation to investigate complaints of sexual harassment.

### Employer Duty to Investigate

The HRTO stated that the duty to investigate is rooted in an employer's obligation under the *Code* to ensure that workplaces are free from discrimination and harassment. The duty to investigate requires employers to "take reasonable steps to address complaints of workplace human rights obligations".<sup>[6]</sup>

Criteria the HRTO will consider in assessing whether the duty to investigate was met include:

- an awareness of issues of discrimination and harassment in the workplace;
- a suitable anti-discrimination/harassment policy;
- a proper complaint mechanism;
- adequate training given to management and employees;
- once a complaint is made, whether the employer treated it seriously;
- whether the employer dealt with the matter promptly and sensitively; and
- whether the employer reasonably investigated and acted.

The HRTO determined that the employer failed to investigate, and therefore breached its obligation under the *Code* to provide a workplace free from discrimination and harassment.

### Failure to Investigate can be a Factor in Finding a Poisoned Work Environment

Not only was the failure to investigate a direct breach of the *Code*, but it also provided a basis for establishing other breaches—namely, the creation of a poisoned work environment.<sup>[7]</sup> A poisoned work environment can be found in two situations where there has been:<sup>[8]</sup>

1. a particularly egregious, stand-alone incident; or
2. serious wrongful behaviour sufficient to create a hostile or intolerable work environment that is persistent or repeated.

In this case, the persistent and repeated sexual harassment, which culminated in two sexual assaults, established the existence of a poisoned work environment on either ground.<sup>[9]</sup> The failure of the employer to undertake an investigation allowed the harassment to continue and was therefore a factor in creating and subjecting the employee to a poisoned work environment.

## Damages

The damages awarded for employment violations of the *Code* are intended to compensate an employee for an employer's failure to provide a workplace free from discrimination and harassment. Such damages do not depend on the underlying claims of sexual harassment against her manager —which were withdrawn by the Applicant — but rather are focused on the employer's failure to meet its obligations under the *Code*.<sup>[10]</sup>

After considering the employee's experiences of humiliation, hurt feelings, the loss of self-respect, dignity, and confidence, the HRTO ordered the employer pay damages of \$35,000. The HRTO also awarded Applicant back pay of 18 weeks, as she was able to establish that the employer's breaches of the *Code* and the poisoned work environment forced her to quit.<sup>[11]</sup>

## Takeaways

The decision is an important reminder for employers about their duty to investigate employee allegations of harassment and discrimination. Employers must not only take such complaints seriously and in good faith, but must move swiftly to investigate, or they may face significant (and expensive) consequences. Offering to mediate or move employees will never satisfy the duty to investigate, though such measures could be helpful after an investigation concludes.

Costly consequences occur even in situations where a complaint is unfounded or where the allegations are true, but do not arise to the level of harassment or discrimination.

Employers must ensure they have a robust anti-harassment and anti-discrimination policy in place, with proper complaint and investigation mechanisms.

Finally, proper training on discrimination, harassment, and complaint investigation is also essential, which should be given to human resource professionals and managers, particularly in smaller workplaces where managers may hold a disproportionate amount of power over employees.

[1] Para 1.

[2] Para 35.

[3] Para 23.

[4] Para 28.

[5] Para 57.

[6] Para 37.

[7] Para 47.

[8] Para 46.

[9] Para 48.

[10] Para 61.

[11] Para 70.

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### **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.

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