

The Duty To Investigate Workplace Harassment Exists, Even In The Absence Of A Complaint



A common question that workplace investigators are often asked is whether suspected incidents of workplace harassment have to be investigated, even if a complaint has not been filed. The answer, at least in Ontario, is a resounding “yes.” Ontario’s *Occupational Health and Safety Act* (the “OHS Act”) requires an employer to investigate all **incidents** and complaints of harassment, regardless of the existence of a formal, or even an informal, complaint.

The Ontario Labour Relations Board (the “Board”) confirmed this interpretation of the OHS Act back in 2020 in *E.S. Fox Limited v A Director under the Occupational Health and Safety Act*, 2020 CanLII 75931 (“*E.S. Fox*”). The Board found that the OHS Act contemplates investigations of incidents of harassment, even where a complaint has not been filed since harassment, in and of itself, is grounds for an investigation.

Recently, the Ontario Divisional Court also confirmed that incidents of harassment have to be investigated even in circumstances where there was no complaint, the harassing conduct was undertaken after working hours and away from the workplace, and the victim of the conduct did not wish to file a complaint.

In [*Metrolinx v. Amalgamated Transit Union, Local 1587, 2024 ONSC 1900 \(CanLII\)*](#), five employees of Metrolinx filed a grievance following the termination of their employment for cause as a result of an investigation, which concluded that they had engaged in workplace harassment. The five employees sent messages on a WhatsApp group chat on their personal phones in which they stated that a number of female employees, who they identified by their names, engaged in sexual acts, including for the purpose of career advancement. One of the female employees who was discussed in the group chat received screen shots of these messages and reported them to her supervisor. She did not file a formal complaint and did not want the matter investigated. Metrolinx, aware of its obligation to investigate, commenced an investigation notwithstanding the absence of a complaint and despite the female employee's request that the matter not be investigated. The investigation was completed and the employment of each of the five employees who sent the messages was terminated for cause based on the conclusions of the investigation.

The five employees filed a grievance that went to arbitration. The Arbitrator found that the grievors were terminated without just cause. The Arbitrator found that a fair and impartial investigation could not be conducted in the absence of a complaint and the complainant's cooperation, and was in fact critical of the employer for proceeding with the investigation in those circumstances. Had the complainant truly experienced a hostile work environment or felt like she was a victim due to the messages sent by the grievors, she would have filed a complaint, the Arbitrator concluded. The Arbitrator also found that even if the conduct was inappropriate, it took place outside of the workplace and while the grievors were off duty, and therefore it was not conduct that engaged the legitimate interests of the employer.

Metrolinx applied for judicial review of the Arbitrator's decision on the basis that the Arbitrator made several

unreasonable findings. The Divisional Court agreed. The Court found that the Arbitrator's reasons were wrong in law because they failed to recognize that even where a victim of workplace harassment does not report the harassment or participate in the investigation, the employer retains an obligation to investigate to protect not only the victim, but also others in the workplace. In its decision, the Court reiterated the Board's findings in *E.S. Fox* that the *OHSA* requires employers to investigate both complaints and **incidents** of workplace harassment where no complaint was filed. Once harassment is known to the employer, the obligation to investigate is triggered. The Court also noted that engaging in chats outside of the workplace on personal phones and off hours does not necessarily insulate the conduct from employer scrutiny. In this case, the messages made their way into the workplace, and therefore became a workplace issue.

The Divisional Court confirmed that employers have an obligation to investigate all incidents of workplace harassment, even absent a complaint or a specific complainant. Victims of harassment may be reluctant to bring complaints forward for a variety of reasons, including fear of reprisal, embarrassment or concern over the impact on their reputation in the eyes of their colleagues and supervisors if a complaint is brought forward. The workplace harassment provisions in the *OHSA* are designed, in part, to ensure that all incidents of harassment are investigated by employers, thereby taking the pressure off of victims to report the incident. The Divisional Court's decision only goes to strengthen this legislative purpose and provides clarity on this issue.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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