HARASSMENT IN THE WORKPLACE: CONSIDERATIONS FOR EMPLOYERS

Jessica Toldo and Anna Karimian, Hicks Morley Hamilton Stewart Storie LLP

With the advent of the #metoo movement and changing workplace laws, harassment has been especially prevalent in the news lately. Municipal employers need to be aware of their obligations regarding harassment in the workplace. Proper policies and procedures must be in place to adequately deal with harassment complaints.

Not only has harassment become an increasing topic of conversation, but the Human Rights Tribunal of Ontario ("HRTO") has also awarded significant damages for harassment related claims in recent cases. Harassment can occur in many different situations other than the traditional employment relationship, and employers should be mindful of potential liability in these situations.

The below decisions will be of practical interest to municipal employers when understanding the implications of harassment.

AB v Singer Shoes Limited

In the recent decision of *AB v Joe Singer Shoes Limited*, the HRTO found the respondents, Joe Singer Shoes Limited, Paul Singer and Buy-A-Hammer Investments Inc., jointly and severally liable for discrimination with respect to employment and housing due to race, colour, place of origin, ethnic origin, disability, sex, sexual solicitation or advances and family and marital status contrary to the *Human Rights Code* ("Code"). The HRTO awarded $200,000 plus interest as compensation for injury to dignity, feelings and self-respect.

In this case, the applicant immigrated to Canada and worked at the respondent shoe store. Following her marital separation in 1989, the applicant and her disabled son moved into an apartment above the store, where she continued to work at the store. The applicant's landlord was the corporate respondent Buy-A-Hammer Investments Inc., a company owned by Paul Singer.

Over a course of several years, Paul Singer repeatedly sexually assaulted and harassed the applicant, and engaged in other egregious discriminatory conduct based on numerous prohibited grounds while she continued to work at the shoe store.
The HRTO determined that due to the acts and circumstances under which they occurred, damages should be awarded jointly and severally. While this case dealt with an egregious set of facts, it is important to keep in mind the amount of damages the HRTO may award in harassment cases.

City of Toronto v Josephs

As reported in a recent Hicks Morley Case in Point, the Divisional Court in *City of Toronto v Josephs*, reviewed a decision of the HRTO and specifically addressed the question of a service provider's liability for harassment issues arising between customers.

In this case, the applicant, who was a paralegal trainee, attended the Toronto East Provincial Courthouse to conduct business on behalf of his client. While the applicant was being served by an intake clerk, an error was discovered and he was informed he would have to speak to a supervisor. The applicant was given a number to wait in line. Another customer at the courthouse, who was also

waiting in line, started yelling at the applicant to wait his turn. The customer yelled racial slurs at the applicant, who identifies as Afro Caribbean, made an inappropriate racial gesture and taunted the applicant.

A witness to the incident approached an intake clerk, a non-managerial employee, who advised that if the altercation escalated into something physical, they would call security. Further, the applicant himself requested assistance. The team lead for the counter staff was made aware of the altercation and left to get assistance from a court officer.

Both the witness and the applicant reported the incident to a security guard. The security guard confronted the aggressive customer and told him that he would have to leave. Shortly after, a court officer also spoke to the aggressive customer in the hallway.

After this incident, the applicant filed an application with the HRTO against the City of Toronto alleging discrimination under the Code with respect to services, goods and facilities on the basis of race and colour. The HRTO determined that the City had an obligation to take prompt, effectual and proportionate action when it became aware of the conduct of the aggressive customer towards the applicant. The HRTO further found all of the City staff and security officers at the court house, except for the intake clerk, had acted promptly and appropriately. The HRTO held that the intake clerk's response was not appropriate and his conduct alone amounted to discrimination against the applicant for which the City was responsible and ordered to pay $1,500 in damages to the applicant.

In an application for judicial review before the Divisional Court, the City sought to overturn the HRTO's decision. The key issue before the Court was whether it was reasonable for the HRTO to find corporate responsibility for the lack of meaningful response by the intake clerk, a non-managerial employee, notwithstanding that the HRTO found that other City employees acted reasonably and responded adequately in the circumstances.

The Court quashed the HRTO's decision and dismissed the human rights application, noting that "corporate responsibility cannot reasonably be fixed on the City in these circumstances because of the inconsequential conduct of [the intake clerk]."

Implications for Municipal Employers

With increasing damage awards at the HRTO, municipal employers should be mindful of their duties when responding to harassment. Municipalities should review their policies and provide training to their employees.

Further, as many municipalities act as service providers in a variety of capacities, the *City of Toronto* decision is helpful. Municipal employers should keep in mind that service providers have an obligation to take prompt, effectual and proportionate action when they become aware of client-on-client harassment in a services environment. While they are not required to provide a perfect response, the response does need to be "reasonable" in the circumstances and the context. Although employers are not responsible for inappropriate outbursts made by clients, they are responsible for how their employees respond. An inappropriate response when advised of harassment could amount to discrimination under the Code.

Hicks Morley

Jessica Toldo and Anna Karimian specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Jessica at 416-864-7529 or Anna at 416-864-7034. They may also be reached by email at: jessica-toldo@hicksmorley.com and anna-karimian@hicksmorley.com.

THE WSIB CHRONIC MENTAL HEALTH POLICY: WHAT MUNICIPAL EMPLOYERS NEED TO KNOW AND HOW IT WILL IMPACT THEM

Anna Karimian and Jessica Toldo, Hicks Morley Hamilton Stewart Storie LLP

Recent amendments to the *Workplace Safety and Insurance Act ("WSIA")* allowing for benefits for chronic mental stress arising out of and in the course of employment came into force on January 1, 2018. Previously, only traumatic workplace mental stress was compensable for WSIB purposes. However, the Workplace Safety and Insurance Appeals Tribunal (WSIAT) found that the exclusion of workplace chronic mental stress injuries from entitlement was unconstitutional. As a result, the Ontario Legislature passed Bill 127, which amended the legislation to allow benefits to be granted for chronic mental stress injuries arising out of or in the course of employment.

It is important to note that the new WSIB Policy Document 15-03-14 *Chronic Mental Stress (Accidents on or After January 1, 2018)* ("***Policy***") is a stand-alone document and is separate from the *Traumatic Mental Stress Policy* (Document 15-03-02). Differences between the two mental stress entitlements are outlined in the latter *Traumatic Mental Stress Policy*. Both the new *Policy* and the amended *Traumatic Mental Stress Policy* came into force on January 1, 2018. The change impacts all workplaces that fall under mandatory WSIB coverage or have obtained optional coverage from the WSIB.

Key Takeaway Points of the Chronic Mental Stress Policy for Municipal Employers:

Municipal Employers should be aware of the following key provisions in the *Policy*:

- Entitlement for benefits to chronic mental stress will be granted to workers where there is an appropriate diagnosis and the injury is shown to be caused by a substantial work-related stressor arising out of and in the course of employment;

- What is considered to be an "appropriate diagnosis" must be made by a qualified regulated health care professional and in accordance with the Diagnostic and Statistical Manual of Mental Disorders (DSM). The *Policy* will also permit nurse practitioners, in addition to general physicians, psychologists and psychiatrists, to provide the appropriate diagnosis. This gives rise to concerns that general physicians and nurse practitioners may not have the qualifying expertise to provide a DSM diagnosis. However, the *Policy* states that in complex cases, a further assessment from a psychologist or psychiatrist may be required;

- A "substantial" workplace stressor means stressors that are "excessive in intensity and/or duration in comparison to the normal pressures and tensions experienced by workers in similar circumstances";

- However, it is important to note that claims will not be denied simply because all workers in an occupation are exposed to high levels of stress;

- Interpersonal conflicts generally will not give rise to entitlement for chronic mental stress benefits, unless there is evidence to suggest that the conflict amounts to workplace harassment as defined by the *Occupational Health and Safety Act* or results in egregious or abusive conduct;

- The substantial work-related stressor(s) must be shown to be the predominant cause of an appropriately diagnosed mental stress injury, meaning that the substantial work-related stressor is the primary or main cause of the mental stress injury, rather than a "significant contributing factor";

- There is no entitlement to benefits for chronic mental stress which is caused by decisions or actions that are part of the employment function, such as disciplinary action, modification of working hours, demotions or terminations.

- The new *Policy* only applies to chronic mental stress injuries that occur on January 1, 2018 or later. This means that chronic mental stress claims that arose prior to that date will continue to be denied by the WSIB at the Operational and Appeals Branch levels. There are no transitional provisions.

Implications of the New *Policy* for Municipal Employers

The *Policy* will have a significant impact on all municipal employers covered by the WSIA. A significantly expanded scope of entitlement for mental stress under WSIA may impact WSIB rates. It will also put increased pressure and focus on municipalities to limit and address stressors in the workplace and to create modified work opportunities that take into account psychological restrictions, as opposed to purely physical restrictions.

Municipal employers that have ongoing mental stress cases should ensure that the events giving rise to these cases have been, and continue to be, well-documented. More generally, they should be reviewing their practices, policies and procedures in order to ensure that they are protecting themselves to the extent possible from potential mental stress claims.

Municipal employers will need to take additional steps to reduce workplace stress and minimize the existence of substantial workplace stressors in order to limit costly and complicated stress-related lost time claims, particularly in departments with stressful workplaces. Some ways in which municipal employers can prepare themselves for potential chronic mental stress claims is by developing cognitive/psychological demands analyses for key roles that are exposed to high routine stress and ensuring effective systems and processes are in place to investigate and remedy workplace harassment or other workplace stressors. Finally, municipal employers would do well to think creatively about possible suitable modified work in chronic mental stress claims situations in order to minimize exposure to loss of earnings benefits, which can be a very costly part of such claims.

Hicks Morley

Anna Karimian and Jessica Toldo specialize in labour and employment matters facing municipalities. If you have any questions about this or any other employment matter, do not hesitate to contact Anna at 416-864-7034 or Jessica at 416-864-7529. They may also be reached by email at: anna-karimian@hicksmorley.com and jessica-toldo@hicksmorley.com.