

HUMAN RIGHTS AND WORKPLACE SEXUAL HARASSMENT

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(CLAS)



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BC Human Rights Code

Discrimination in employment

13(1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.



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Harassment = Discrimination

• When harassment or bullying relates to a **protected characteristic**, it is discrimination

• Discrimination is contrary to the *BC Human Rights Code* and the *Canadian Human Rights Act*



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Who is in an "Employment Relationship"

• **Employment protection includes**

- Part-time or casual workers
- Volunteers and unpaid interns
- Migrant workers, temporary foreign workers
- Independent contractors

• "Ultimately, the key is the degree of control, that is, the extent to which the worker is subject and subordinate to someone else's decision-making over working conditions and remuneration" – *McCormick*, [2014 SCC 39](#)



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"Employment"

• **Employment protection includes**

- Conduct that happens away from the worksite
- Conduct that happens outside of working hours
- Conduct by a co-worker
- Conduct by someone working on the same worksite but employed by another employer
- Conduct by a customer or client

"Section 13(1)(b) prohibits discrimination against employees whenever that discrimination has a **sufficient nexus** with the employment context" – *Schrenk*, [2017 SCC 62](#)



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Human Rights as a tool to address sexual harassment (Dr. Bethany Hastie)

- 2000-2018, BCHRT
- 66 final decisions after a hearing
- 45 justified, 21 dismissed
- 65 female complainants; 4 male complainants
- All alleged harassers were male
- 51 involved a supervisor, manager or other person of authority; 12 involved a coworker
- 21 involved service work; 14 involved traditionally gendered, subordinate work; 14 involved women in historically male-dominated work environments
- Awards ranged from \$800 to \$50,000 (injury to dignity)

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Advantages of Human Rights Complaints

- Puts complainant in the driver's seat
 - Settlement options
 - Injury and impact-focused
 - Expert involvement
- Lower burden of proof than criminal cases
 - Balance of probabilities vs proof beyond a reasonable doubt
- Influence on systemic change and policies
- Privacy and/or media strategy options
- Compensation



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University of British Columbia faces new sexual assault human rights complaint
Complaint to the B.C. Human Rights Tribunal comes after similar complaint last year
The Canadian Press - Posted: Sep 15, 2017 1:58 PM PT | Last Updated: Sep 15, 2017 1:58 PM PT

Filipino nanny in Richmond awarded nearly \$56,000 after fleeing humiliation, sexual assault
TARA CARMAN, VANCOUVER SUN | 04.02.2015 |

B.C. motor club hit by sexual-harassment allegations

Former Students to Take Concordia to Quebec Human Rights Commission
Women Say University Failed Them, Mishandled Sexual Violence and Harassment Cases

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HUFFPOST

NEWS POLITICS BUSINESS LIFE PARENTS PERSPECTIVES VIDEO PODCASTS

NEWS 03/30/2018 06:58 EDT | Updated 03/30/2018 19:13 EDT

Ontario Human Rights Tribunal Awards \$75K To Teen Sexually Harassed As An Intern
Her boss' actions were "a cruel betrayal," the tribunal's adjudicator said.

By Emma Palling

\$200,000 awarded by the HRTO for sexual harassment and assault of vulnerable employee
May 4, 2018 | Rudner Law, Employment / HR Law & Mediation | Health and Safety, HR Policies and Procedures, Human Resources, Human Rights, Notice, Damages and Settlements, Payroll

Ontario Human Rights Tribunal gains steam as alternative route for sexual assault cases


SEAN FINN - JUSTICE WRITER
PUBLISHED APRIL 5, 2018

TRENDING

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Remedies

<p>Injury to Dignity</p> <ul style="list-style-type: none"> • Compensatory • Not punitive • Reflect hurt, impact, "pain and suffering" • Greater impact → higher award • "Trend is upward" – <i>Araniva v. RSY Contracting and another</i> (No. 3), 2019 BCHRT 97 	<p>"Real" losses</p> <ul style="list-style-type: none"> • Wages • Commissions • Compensation for benefits • Tax gross-up • Attending hearing • Loss of opportunity • Education or retraining <p>• No compensation for legal expenses and services incurred in the course of litigation.</p>
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Compensation for Sexual Harassment

Relevant factors:

- Nature of the harassment: physical or verbal
- Degree of aggressiveness and physical contact in the harassment
- Ongoing nature, time period of the harassment
- Frequency of the harassment
- Age of the victim
- Vulnerability of the victim
- Psychological impact of harassment on the victim





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Remedies

Systemic

- Policy change
- Accommodations
- Education and training
- Posting of notices

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The Complainant

- **Individual Complaints**
 - May bring complaint on behalf of someone else
 - May result in both individual and systemic remedies
- **Group Complaints**
 - A number of specific, identifiable individuals
 - For example, people who work for the same employer, or people who are members of the same society or association
- **Class Complaints**
 - A number of individuals who can be identified by characteristics they share
 - For example, residents of Vancouver who are visually impaired



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What is Sexual Harassment?

Three primary elements:

- (1) Conduct of a “sexual nature”;
- (2) The conduct was “unwelcome”; and,
- (3) The conduct produces adverse consequences for the complainant.



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Traditional test for sex discrimination

- Section 13 of the *Code* protects employees from any adverse treatment or impact in employment that is connected to their sex: *Moore v. BC (Education)*, 2012 SCC 61 at para. 33
- Intention is not relevant. Focus is on the effect of the conduct: *Code* s. 4
- Conduct that is not “sexual” may still be sex discrimination: *Sales Associate v. Aurora Biomed (No. 3)*, 2021 BCHRT 5



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Adverse Impacts

- Negatively affects the work environment
 - e.g., a sexualized and/or hostile work environment
- Job-related consequences for the target
 - e.g., not hired, reduced shifts or hours, denied a promotion, fired → concrete economic loss
- Devaluing women's skills and contributions in the workplace, and reinforcing gendered expectations and hierarchies
 - e.g., comments on appearance and manner of dress; requests to "smile more".



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Sexual Harassment is about Power

• "Sexual harassment is primarily about power imbalance/abuse of power as opposed to actual sexuality. As a result, not every case of sexual harassment necessarily involves explicit sexual demands or invitations for a sexual relationship with the perpetrator. Actions and comments that are more subtle may be just as demeaning in their attack on the target's dignity and self-respect, both as an employee and as a human being.

- *Al-Musawi v. One Globe Education Services*, 2018 BCHRT 94



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Sexual Harassment is about Power

• "Economics is only one axis along which power is exercised between individuals. Men can exercise gendered power over women, and white people can exercise racialized power over people of colour. The exploitation of identity hierarchies to perpetrate discrimination against marginalized groups can be just as harmful to an employee as economic subordination."

- *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62



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Unwelcome Conduct

- Engaging in a course of vexatious* conduct that a person **knows or ought to know** is unwelcome
- * annoying, irritating, bothersome, upsetting, distressing



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Unwelcome Conduct

- Clear communication that conduct is unwelcome → harasser is on notice
- A person does not have to expressly object unless the other person would reasonably have no reason to suspect the behaviour was unwelcome
- "A complaint, protest, or objection by an applicant is not a pre-condition to a finding of harassment and it does not mean that the behaviour or conduct wasn't unwelcome." - *Bento v. Manito's Rotisserie & Sandwich*, 2018 HRTO 2013
- Toleration of behaviour does not = acceptance



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Unwelcome Conduct

- *Mahmoodi v. University of British Columbia and Dutton*, [1999] B.C.H.R.T.D. No. 52
- Behaviour may be both tolerated and unwelcome
- The reasons for submitting to the conduct may be related to the power differential between the parties
 - E.g., belief that lack of co-operation could result in consequences



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Unwelcome Conduct

Taking into account all the circumstances, would a **“reasonable person”** know that the behaviour was not welcomed by the complainant?

- A reasonable person knows that touching, sexualized comments, repeated come-ons, pornography, etc., are unacceptable in the workplace
- More subtle behaviour may require express objection, especially if complainant has consented to or participated in the behaviour in the past



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Unwelcome Conduct

- Several factors are relevant in evaluating the limits of “reasonable” social interaction:
 - Nature of the conduct at issue
 - Workplace environment
 - Pattern and type of prior personal interaction between the parties
 - Whether an objection or complaint has been made
- **Question is always: Would a “reasonable person” know that the behaviour is unwelcome?**



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Is a single incident sexual harassment?

Depends on:

- egregiousness or virulence of the conduct
- nature of the relationship between the involved parties
- the context in which the comment was made
- whether an apology was offered
- whether or not the recipient of the comment was a member of a group historically discriminated against



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Time limit for filing a complaint

22 (1) A complaint must be filed within one year of the alleged contravention.

(2) If a continuing contravention is alleged in a complaint, the complaint must be filed within one year of the last alleged instance of the contravention.

- "A succession or repetition of separate acts of discrimination of the same character" - *School District v. Child (Litigation Guardian of)*, [2018 BCCA 136](#)
- Sufficiently close in time, with no large gaps



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Time limit for filing a complaint

22 (3) If a complaint is filed after the expiration of the time limit referred to in subsection (1) or (2), a member or panel may accept all or part of the complaint if the member or panel determines that

- (a) it is in the public interest to accept the complaint, and
- (b) no substantial prejudice will result to any person because of the delay.

- The onus is on the complainant to establish that both of these requirements are met



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Time limit for filing a complaint

Public Interest factors

- Complainant's interest in accessing the Tribunal
- Length of delay
- Reason for delay
 - ✓ Due to disabling health factors
 - ✗ Did not know about human rights system
 - ✗ Was engaged in another process to resolve the issue
- Access to legal advice
- Unique, novel, or unusual complaint

Does accepting the complaint further the purposes of the Code?



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Institutional or Corporate Respondents

• Style of cause for proceedings

44 (2) An act or thing done or omitted by an employee, officer, director, official or agent of any person within the scope of his or her authority is deemed to be an act or thing done or omitted by that person.



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Institutional or Corporate Respondents

- An employer is liable for sexual harassment committed by its employee when those actions fall within the course of the employment relationship
- Whether or not the employer knew about the harassment does not affect its potential liability for the actions of its employee
- Lack of awareness may go to award quantum



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Response and Investigation

- Employers must educate themselves on their obligations under the Code
- Employers must respond reasonably and appropriately to complaints of sexual harassment.
- Must treat allegations seriously and sensitively, and resolve the complaint in a way that ensures a healthy work environment
- Where an employer fails to respond reasonably, that failure itself can amount to discrimination "regardless of whether the underlying conduct ... is found to be discriminatory": *The Employee v. The University and another* (No. 2), 2020 BCHRT 12



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Anti-Harassment Policies

- Where an employer's failure to address a complaint of sexual harassment results from their lack of process and policy, this could constitute a breach of the *Human Rights Code*: *Beharrell v. EVL Nursery*, 2018 BCHRT 62
- Workplace rules and policies may also impact whether conduct is considered unwelcome → harasser ought to have known that sexual comments were not welcome in the workplace: *Huhn v. Joey's Only Seafood Restaurant*, 2002 BCHRT 18
- Excellent guidance for policy development in *Sales Associate* para. 200



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Individual Respondents

- Leading case: *Daley v. BC (Ministry of Health)*, 2006 BCHRT 341
- Sexual harassment has a "measure of individual culpability"
- "No plausible argument can usually be made that the harasser was acting within the scope of his or her authority."
- Furthers the purposes of the *Code* to hold harassers individually liable



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BC Human Rights Code

Protection from Retaliation

43 A person must not evict, discharge, suspend, expel, intimidate, coerce, impose any pecuniary or other penalty on, deny a right or benefit to or otherwise discriminate against a person because that person complains or is named in a complaint, might complain or be named in a complaint, gives evidence, might give evidence or otherwise assists or might assist in a complaint or other proceeding under this Code.



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What happens next?

- Complaint filed → Complaint accepted (~6 months)
- Complaint accepted → Early Settlement Meeting (~4 months)
- No settlement → Response due (35 days)
- → Complainant's disclosure (35 days)
- → Respondent's disclosure AND Application to Dismiss, if any (35 days)
- Decision on Application to Dismiss 8-12 months (or more)
- Hearing scheduled (8-12 months)
- Decision (6-8 months)