



Sherrard Kuzz dispenses wisdom during webinar on harassment investigations

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Ontario contractors were warned during a recent webinar that when a case of workplace harassment erupts, due diligence of the highest degree is required in undertaking the investigation to avoid damage to their firm's reputation and ensure justice is served.

Ontario General Contractors Association president Giovanni Cautillo served as host of a recent panel discussion featuring workplace lawyers Michael Sherrard, Samia Hussein and Patrick Ganley of Sherrard Kuzz LLP. The event was billed as Building a Respectful and Inclusive Workplace: How to Conduct a Workplace Harassment Investigation.

"The purpose of today's exercise is really to get folks comfortable," said Ganley. "We work with employers all the time on their own internal investigations, and sometimes it's beneficial to have a second set of eyes or ears, or just to bat around the issues. It might not be that you want to hire an external investigator, but you want to check the report to make sure any holes can be plugged before finalizing that report."

"That can be a really efficient spend of your legal dollars."

Employers are required by law to investigate claims of harassment in the workplace under the Occupational Health and Safety Act (OHSA), and there are also anti-harassment standards in the Ontario Human Rights Code (OHRC) and many workplace labour agreements. Part 3 of the OHSA dictates that an employer must investigate alleged incidents of harassment or complaints of harassment, even if not in writing.

There should be no barriers for employees to overcome if they feel they have been victims of harassment, Sherrard argued.

"What we want to do is make sure that everybody on our worksites, they feel comfortable raising any kind of complaint with us, so that we have an opportunity to look at it and potentially investigate it," he said.

Both the OHSA and the OHRC outline behaviour amounting to harassment, with Sherrard suggesting the OHSA has broader terms than the OHRC. The OHSA defines workplace harassment separate from sexual harassment.

Sherrard said his firm's counsel is often required to determine exactly when a person is in a position of authority in cases claiming sexual harassment.

"If you're a site super, a working foreman, anybody in a position of authority, you want to be very, very careful with respect to sexual solicitation or advances," he said. "I have seen people not really realize that they have authority. And sometimes that authority can be as simple as a working foreman who may be able to impact a promotion, start-time hours, overtime."

Sherrard referred to language used by EllisDon CEO Geoff Smith last summer during discussions of anti-Black racism in Ontario.

"It's about respect," said the senior lawyer. "It's all about figuring out how to be respectful with our workers. My favourite phrase, as we were all growing up, treat people like you want to be treated yourself, right? Forget about the law a little bit."

At one point Cautillo asked Ganley what the responsibilities of a general contractor are on a site when there is malfeasance alleged among subcontractors.

"To the extent that that conflict is getting in the way of other activities on the site, we need to make sure that it's addressed," said Ganley. "And whereas we're requiring that our subs and our trades have harassment policies, safety policies, there is an element of wanting to make sure that that's carried out. So, to the extent that we're aware that something's happening on site that isn't being effectively addressed, we can absolutely take responsibility to step in."

Hussein noted once the investigation is done and the report is being prepared, the investigator must make a decision based on the balance

of probabilities. The 1951 case of *Faryna v. Chorny* sets out a test for reasonableness as determined by a practical and informed person.

Botched investigations can lead to appeals by either the complainant or the respondent requiring outside investigations, Hussein noted, which can mean onerous payouts.

“I think many people on this call may have some experience with external investigations, and they can be quite costly,” she said. “One of the outcomes of not having conducted an appropriate internal workplace investigation is the potential liability of having to do another investigation with an external investigator.”

Cautillo added, “Each circumstance, each case would be different. Please seek out proper legal advice.”

And if the case escalates, “The liability is off the charts. And there’s the factor of damage to your reputation.”

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