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#WHATNOW? SEXUAL MISCONDUCT AND THE WORKPLACE

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I. INTRODUCTION

The #metoo movement has empowered many people to speak up against sexual assault misconduct. From CBC to Hollywood to Google Inc, sexual misconduct in the workplace has resulted in intense media scrutiny, individual employee resignations, and widespread employee walkouts. For employers, shifting societal attitudes are affecting how and when reporting and investigating sexual misconduct in the workplace takes place.

With a renewed emphasis on calling out and addressing sexual misconduct, employers are experiencing challenges: how does an employer appropriately respond to complaints of sexual misconduct in the workplace? How does an investigation balance the needs of complainants while maintaining principles of objectivity and impartiality? And, most importantly, how can employers prevent sexual misconduct from happening in the first place?

This paper is a practical summary for employers in dealing with sexual misconduct and the workplace. It first addresses what constitutes sexual misconduct and highlights best practices for preventing sexual misconduct in the workplace. This paper then identifies an employer's legal obligations in responding to and investigating complaints of sexual misconduct, including privacy considerations in the investigation process.

II. WHAT IS SEXUAL MISCONDUCT IN THE WORKPLACE?

Sexual misconduct and harassment is unwelcome conduct of a sexual nature that detrimentally affects the work environment for the victims of harassment.[1] Sexual misconduct is not a new legal concept and more than 30 years ago, in *Janzen et al v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at pp 1282 and 1284, the Supreme Court of Canada considered its definition:

> Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. …. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.
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> … sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job related consequences for the victims of harassment.

[1] *Calgary (City) v CUPE Local 709 (Schmaltz Grievance),* 2017 AGAA No 12, at para 124 [*Calgary 2017*].

The law is clear that while all sexual harassment must be taken very seriously, there is a spectrum of misconduct.[2] Case law typically regards physical non-consensual touching as at the more serious end of the spectrum, while sexual comments, crude jokes, and suggestive gestures may be at the lower end of the spectrum. In analyzing the spectrum of misconduct, arbitrators have often referred to the *Sexual Harassment in the Workplace* text by Professor Aggarwal, which has put forward "sexual coercion" and "sexual annoyance" as two broad categories of sexual harassment, at p. 14: [3]

> These identified descriptions of "sexual harassment" appear to indicate that such behaviour can be divided into two categories: sexual coercion and sexual annoyance. Sexual coercion is sexual harassment that results in some direct consequence to the worker's employment status or some gain or loss of tangible job benefits. Sexual harassment of this coercive kind can be said to involve an "employment nexus". The classic case of sexual harassment falls in this "nexus" category: a supervisor, using his power over salary, promotions, and employment itself, attempts to coerce a subordinate to grant sexual favours. If the worker accedes to the supervisor's request, tangible job benefits follow; if the worker refuses, job benefits are denied.
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> Sexual annoyance, the second type of sexual harassment, is sexually related conduct that is hostile, intimidating, or offensive to the employee, but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment.
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> This second category contains two subgroups. Sometimes an employee is subjected to persistent requests for sexual favours and persistently refuses. Although that refusal does not cause any loss in job benefits, the very persistence of the demands creates an offensive work environment, which the employee should not be compelled to endure. The second subgroup encompasses all other conduct of a sexual nature that demeans or humiliates the person addressed and in that way also creates an offensive work environment. This includes sexual taunts, lewd or provocative comments and gestures, and sexually offensive physical contact.

[2] *Foerderer v Nova Chemicals Carp*, [2007] AJ No 745 at paras 162 and 163.

[3] *Calgary 2017* at para 110. See also: *City of Grande Prairie and CUPE Local 787 (King)* (2002) 71 CLAS 271.

These definitions and categories provide a reference for what may qualify as sexual misconduct, however, each case must be assessed on its own unique facts. While individual remarks on their own might be at the lower end of the spectrum, the fact that they occurred on numerous occasions over a long period of time may bring them into the serious category.[4] As examples, conduct that has been held to be sexual misconduct includes, but is not limited to:

Table 1.0: Workplace Sexual Misconduct Examples

Comments	- Appearance or dress of co-workers or members of the public, ie: positive/negative comments on look/attire/scent - Sexual comments, including spreading rumours of affairs or demands that a co-worker sit on laps during transport - Singling out an employee as responsible for distracting other employees in relation to their gender or appearance
Physical contact	- Massages, such as shoulder or back rubs - Kissing, including 'birthday kisses' - Touching, pinching, or jostling of buttocks, breasts - Repeated brushing up against employees
Other	- Unwelcome advances - Persistent staring of a sexual nature - Sexually explicit gestures - Vulgar pranks and games, such as calling for a co-workers groin area to be used as a target (ie: throwing garbage through the legs of a co-worker)

III. PREVENTION

An employer has a duty to protect employees from offensive conduct and provide a safe workplace. This, in turn, will assist an employer in defending themselves from liability as the result of litigation brought by employees alleging sexual harassment.[5] Implementing a policy prohibiting sexual misconduct in the workplace is the first step in limiting liability. This can be done as a stand-alone policy, or as part of another policy such as a Respectful Workplace or Harassment and Discrimination policy.

A sexual misconduct policy should be aimed at prevention and should encourage employees to come forward with complaints, provide a clear definition of misconduct or harassment, provide a guideline to seek advice about making a complaint, protect complainants from retaliation, provide for an investigation procedure, designate a person or persons to investigate the complaint, and provide for disciplinary consequences if misconduct has occurred or for making

[4] *Calgary 2017* at para 82. See also: *Carewest v AUPE,* [2016] AWLD 2277.

[5] *Calgary 2017* at para 111; See also: *Foerderer v Nova Chemicals* at para 64.

frivolous complaints. The complainant and the alleged harasser should be treated fairly and sensitively in any investigation and should be advised of their right to seek assistance from the union or to retain legal counsel.

Personnel policies are an important tool in establishing a workplace culture in which sexual misconduct does not take place. A policy, however, is often only as good as the extent to which people are aware of it. It is a best practice to implement any sexual misconduct policy in tandem with education for employees and supervisors about the policy and expected workplace conduct standards. It is also recommended that training on the policy be offered on regular intervals. Furthermore, it is recommended that all employees sign an acknowledgement that they have received a copy of and read the policy. Ensuring that the policy is readily available, such as posting it in the workplace, is another way to promote awareness of the policy.

IV. RESPONDING TO COMPLAINTS

An employer is obligated to investigate complaints of harassment. That being said, an investigation can take many forms and an employer is not obligated to conduct a comprehensive investigation of all workplace misconduct allegations. However, a renewed social emphasis on preventing and addressing sexual misconduct may influence the expectations around what an appropriate response to an allegation may be. It is fair to say that employers who ignore complaints of sexual misconduct do so at their peril.

Employers are encouraged to respond and investigate complaints of sexual misconduct promptly. An employer's failure to appropriately respond to complaints of sexual misconduct or harassment in the workplace can give rise to increased liability and damages awards. The courts have long-accepted that sexual harassment is an abuse of power that is an affront to the dignity of employees forced to endure it and prolonging the period in which an employee must contend with unwelcome sexual actions or demands undermines the dignity and self-respect of the victim as both the employee and as a human being.[6] Recent cases continue to support these principles, and there is a growing acknowledgment by human rights tribunals and arbitrators that large general damage awards may be appropriate in particularly egregious circumstances.

A failure to properly respond or investigate complaints may also affect an employer's ability to discipline or dismiss an employee who engages in workplace sexual misconduct. This is outlined in more detail below.

When a complaint is received, an employer should consider whether there is a need to separate the complainant from the respondent in the workplace until an investigation has been completed. This may be achieved through schedule restructuring (i.e.: scheduling so involved

[6] *Janzen et al v Platy Enterprises Ltd* at p 1284.

parties do not work together), or alternative workplace arrangements (i.e.: involved parties working from home or an alternative location). In some circumstances, an employer may remove or suspend the accused employee from the workplace pending the outcome of the investigation. While ensuring a safe workplace is a key objective, employers should be cautious in any action that could be perceived as disciplinary or reprisal toward an employee who is involved in a sexual misconduct investigation. Consultation with legal counsel is recommended prior to requiring any parties to be removed from the workplace pending the outcome of an investigation.

V. INVESTIGATING SEXUAL MISCONDUCT

The extent to which an employer fulfills its legal obligation to investigate allegations of sexual misconduct before making any disciplinary decisions will depend to some degree on the nature of the allegation, and relates to the employer's ability to meet its burden of proof in court. These principles were summarized in *Mejia v LaSalle College International Vancouver Inc*, 2014 BCSC 1559 at paras 50 and 51:

> 50 The extent to which an employer has a legal obligation to investigate allegations against an employee before making a decision to dismiss will depend to some degree on the nature of the allegation. In Echlin, ch. 6 at 2, the authors note that the Courts are moving to "a modest duty of fairness", requiring, in certain circumstances, such as where theft is alleged, an employer to undertake a proper investigation and provide the employee with an opportunity to respond to allegations of misconduct. Cases involving allegations of theft or financial impropriety indicate that an employer must undertake a sufficiently broad investigation to establish the nature of the misconduct in question (see e.g. *Porta v Weyerhaeuser Canada Ltd*., 2001 BCSC 1480, at paras 14, 113-15, 133 [*Porta*], where an employee was accused of taking merchantable lumber from a mill site).
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> 51 The importance of an employer conducting a sufficiently broad investigation is said to relate to its ability to meet its burden of proof in Court. As stated by Cullen J. (as he then was) in *Porta*, at para. 14:
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> > In my view, the requirement of a contextual approach and an analysis of the nature and circumstances of the misconduct established by McKinley places an onus on a defendant asserting just cause to take a similar contextual approach in its investigation of misconduct and in its determination of the appropriate sanction. Where the investigation conducted in the first instance by a defendant asserting just cause is insufficiently broad to

> establish the full nature and circumstances of the misconduct and thereby the ability of the court to conduct the sort of analysis envisaged in McKinley is impaired, it follows that the defendant will similarly be impeded in discharging its onus of proof in connection with its claim of just cause.

The following sections summarize legal and practical considerations an employer should take into account in conducting a fair and sufficiently broad investigation into workplace sexual misconduct.

A. Appoint an Investigator

Objectivity and impartiality are crucial to an investigation process, and these characteristics must be present in determining who will conduct an investigation into allegations of sexual misconduct. One of the initial considerations is whether an investigation should be conducted internally or by an external third party. There are strengths and challenges with both types of investigations, and the employer must make the call as to who, simply put, would be the most appropriate person for the job. For unionized workplaces, employers may consider whether it would be appropriate to appoint an investigator jointly or to agree to a roster of agreed-to investigators.

Whether investigated internally or by an independent consultant, the investigator should be sufficiently removed from the parties and the direction of the person who may ultimately make any disciplinary decisions. Additional considerations for an objective and impartial investigation include the appointment of an investigator who has appropriate training and the ability to competently conduct an investigation and assess credibility.

It is also recommended that the terms of reference for any investigation include the ability of the investigator to engage in a conflict resolution process instead of proceeding with a formal investigation. Whether this is appropriate will depend on the facts and whether the parties are agreeable to such a process. In reality, it is likely that neither the complainant or respondent will be satisfied with the outcome of a formal investigation. An option for a conflict resolution process provides for the opportunity to repair the relationship to allow both parties to move forward and continue working.

B. Gather Facts and Supporting Evidence

An investigation is a fact-gathering exercise. As with any fact-gathering exercise in the workplace, an investigation into sexual misconduct allegations should be conducted in accordance with principles of objectivity and impartiality.

Where there are gaps or conflicts in the evidence, efforts should be made to pursue potentially corroborating evidence, such as interviews with co-workers who may also have a sense of what is going on in the workplace.[7] In some circumstances, the use of recording technology may be an effective way of reducing the potential for conflicts in the evidence. Conducting a broad set of interviews may be necessary in instances of rumours, hearsay, and "she-said/he-said situations", or there are other conflicts in the evidence. While an increased number of witnesses may extend the time it takes to complete an investigation, it will likely result in a more conclusive investigation on which appropriate decisions about the workplace and its employees can be made. A reviewing body, such as an arbitrator, human rights tribunal or court, may overturn any employer decisions made in relation to the investigation on the basis that there are significant omissions in the investigation or it was not conducted appropriately.

C. Do Not Rely on Assumptions

An objective and impartial investigation does not rely on assumptions about how victims respond to sexual misconduct. The courts have acknowledged that there is no one typical response by victims of sexual misconduct in the workplace, and have accepted that whether sexual misconduct occurred is not determined on the basis of when the complaint was made, or how the complainant responded to the alleged sexual misconduct. Reporting timelines for instances of sexual misconduct may vary: one employee may immediately notify management while another may "go along to get along". Delays in disclosing sexual misconduct do not rise to an inherent adverse inference against the complainant's credibility.[8] Behavioural responses to instances of sexual misconduct may also vary: one employee may refuse to work alongside an employee who is alleged to engage in sexual misconduct, and others may continue to work with that employee because they feel they have no other choice. The courts have held that it is incorrect to determine simply because an employee continues to perform their work duties 'confidently' or has 'continued aspirations of joining the management team' that they are exaggerating how difficult it is to deal with their work environment.[9]

D. Maintain Procedural Fairness

A fair investigation will both appropriately investigate a complaint and provide a reasonable opportunity for the accused employee to respond to the allegations.

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[7] *Calgary 2018* at paras 47 and 49.

[8] *Jane Doe v Canada (AG),* 2018 FCA 183 at para 41. See also: *R v DD*, 2000 SCC 43.

[9] *Jane Doe v Canada (AG)* at para 42.

The difficult role of the employer in appropriately balancing allegations of sexual misconduct with the duty to ensure a fair investigation has been recognized by the courts. For example, in *Leach v Canadian Blood Services*, [2001] AJ No 119, the courts upheld the dismissal of an employee for sexual harassment on the basis of two complaints by employees involving unwanted touching and kissing. In considering whether the investigation was fair and proper, the Court noted at paras 153-154:

> 153 Sometimes no matter what the employer does it is criticized. Here, in the 1994 incident when [the Supervisor] and the [Director] asked questions to ensure the complaint was not malicious [another complainant] formed the impression that the employer was questioning her integrity. On the other hand, [the investigator], in perhaps being "too sensitive' to [the complainant] is now accused of not conducting a fair investigation.
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> 154 My other criticism of the comments [the investigator] made to [the complainant] is that such comments raise the expectations of the complainant as to what action the employer will take. If the employer, after investigating further, determines that the allegations are not substantiated, then the employer is in effect "backtracking" on their position, in the eyes of the complainant.

As will be outlined below, an employer's failure to properly investigate can result in inadequate evidence to prove the allegation when the employer's disciplinary response is challenged at arbitration, or in court. Providing a reasonable opportunity for the accused employee to respond to allegations serves an important function in ensuring a fair investigation process. While the accused employee is not necessarily entitled to all information about the investigation, including a copy of the complaint itself, it is generally consistent with principles of procedural fairness that an accused employee is notified of the complaint, provided enough detail about the complaint to allow them to adequately respond, and provided time to consider their response prior to being interviewed by the investigator. Subject to the terms of the Collective Agreement, employees in unionized environments are likely to be entitled to representation by their union in an investigation process. While a non-unionized employee is generally not entitled to representation in an investigation, such a determination must be made on a fact-specific basis. In practice, many investigators allow non-union employees to bring a support person to the interview.

VI. CONSEQUENCES OF AN IMPROPER INVESTIGATION

An employer that fails to conduct an adequate and fair investigation into an allegation of sexual harassment or other misconduct runs the risk that it may not be able to discharge the burden of establishing cause for discipline or dismissal. As summarized in the recent decision of *Caron Transport Ltd v Williams*, [2018] FCJ No 196 at paras 69 and 71:

> 69 While there is no general duty on an employer to conduct a thorough and impartial investigation of workplace misconduct, "an employer that fails to conduct an adequate and fair investigation into an allegation of sexual harassment or other misconduct and does not afford the employee a reasonable opportunity to respond to the allegations of misconduct, runs the risk that it may not be able to discharge the burden of establishing cause for dismissal" (*van Woerkens v Marriott Hotels of Canada Ltd*, 2009 BCSC 73 at para 150). This point has been confirmed in a number of other decisions: see *Paulich v Westfair Foods Ltd*, 2000 ABQB 74 at paras 11-14; *Dziecielski v Lighting Dimensions Inc*, 2012 ONSC 1877 at paras 35-41; more generally: Gillian Shearer, *The Law and Practice of Workplace Investigations* (Toronto: Emond Montgomery Publications Limited, 2017) at 16-22.
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> ….
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> 71 A further reason to demand an adequate investigation arises from the evolution in society's attitudes on this topic, which means that today it is reasonable to conclude that both the individual bringing the matter forward, and the person accused of wrongdoing, have important interests that should be reflected by the employer's response. As is evident from the facts before me, being accused of threatening a co-worker is a very serious charge, which should require an equally serious and even-handed investigation into the facts. I agree with the following statement of Arbitrator Monteith in regard to the employer's obligations where workplace violence is alleged: see *CNR* at para 22:
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> > As with all discipline cases, the employer bears the onus of establishing, on the balance of probabilities, that the employee, in fact, committed the alleged offence. In order to meet the balance of probabilities standard of proof, the employer is required to establish that the misconduct occurred with clear, cogent and convincing evidence. This is, particularly, the case where, as here, the allegations are very serious and egregious.

Significant omissions in an investigation may result in a reviewing body, such as an arbitrator, human rights tribunal or court, overturning the outcome and finding that the discipline is not warranted. In practical terms, this means that an inadequate investigation can result in an order for the reinstatement of a dismissed union employee with back pay, or a non-union employee being awarded damages in addition to pay in lieu of reasonable notice. This is clearly illustrated in the summary of the *City of Calgary* arbitration attached as Appendix 1 to this paper.

VII. CONFIDENTIALITY AND PRIVACY

A. During the Investigation

Sexual misconduct and workplace investigations are sensitive matters that necessitate discretion in how information is received and managed. However, employers must be careful in making blanket promises of confidentiality to those who provide information for workplace investigations. An investigation requires evidence gathering and documenting facts in relation to allegations of workplace sexual misconduct. Given the procedural fairness requirements noted above and the right for the respondent to have enough details of the complaint to adequately respond, information provided by the complaint and witnesses will need to be disclosed to the respondent. The investigator will need to be careful to only disclose information required to ensure the investigation is fair.

While affected parties are not entitled to all information obtained in the course of an investigation, the baseline assumption should be that the identity of the complainant will be disclosed to the respondent along with certain details of the complaint, and that the investigator's findings will be disclosed to the complainant and respondent.

The employer and investigator will want to ensure that all parties in an investigation, including the complainant, respondent and witnesses are clearly advised that they must keep all matters related to the complaint and investigation confidential and are not to gossip or talk about the investigation with others. As well, the employer and investigator will want to be clear that any retaliation or reprisals in relation to the complaint will not be tolerated.

B. Privacy Outside of the Investigation

Employers must exercise caution in making any public statements about an ongoing workplace sexual misconduct investigation, as such statements can result in a finding of a breach of the respondent's privacy rights and damages awarded. For example, in a recent arbitral decision, the Arbitrator awarded $167,000 in damages to a former employee who was accused of sexual misconduct on the basis that certain communications made by UBC contravened the employee's privacy rights and harmed his reputation.[10]

[10] *University of British Columbia v UBC Faculty Association*, [2018] BCCAA No 45 (Hall).

After this arbitration decision was released, the now-former employee made various public statements about this matter. In response, UBC released certain communications, which the Faculty Association alleged breached the confidentiality terms agreed in a Consent Order issued by Arbitrator Hall as part of the above grievance. The matter was referred back to Arbitrator Hall.[11]

The Arbitrator undertook a review of all of the statements and concluded that the former employee did address the allegations against him and the resulting investigation in the public statements at issue. However, the Arbitrator ultimately concluded that UBC had breached the confidentiality terms and ordered UBC to pay a further $60,000.00 in damages to the former employee.

VIII. CONCLUSION

Employers are in a difficult and unenviable position when it comes to dealing with complaints of sexual misconduct and harassment. While employers cannot ignore complaints of sexual misconduct or harassment, they also need to ensure they do not over-react. Employers need to take a balanced and measured approach in investigating complaints or concerns about sexual misconduct.

That is why all employers need to have a comprehensive sexual harassment policy that is workable for their organization. It is also strongly recommended that employers take steps, such as training and education, to create a workplace culture in which everyone understands what sexual misconduct is and that it will not be tolerated. It is preferable to try and prevent sexual misconduct at the outset than to face litigation later.

If an employer does receive a complaint, the employer needs to review the applicable policy and determine the best investigation process and investigator to investigate the particular complaint. Where appropriate, employers should consider whether an alternative dispute resolution process would be a better approach than a formal investigation. While retaining external investigators is expensive, it is better to spend money on a fair and proper investigation that contains outcomes and recommendations upon which an employer can rely.

[11] *University of British Columbia v UBC Faculty Association*, [2018] BCCAA No 74 (Hall).

APPENDIX 1

Case Study: ***Calgary (City) v CUPE, Local 37 (Workplace Harassment Grievance),*** **2018 AGAA No 12**

After experiencing 18 months of harassment in the workplace, causing her to go on long-term disability for mental health reasons, a woman truck driver filed a grievance against her employer. At arbitration, the employer's failure to appropriately respond to allegations of sexual misconduct and discrimination in the workplace resulted in an award of $75,000 in general damages for injury to dignity, in addition to three years' lost wages.

The grievor was hired as a truck driver with the City of Calgary in 2013. She was the City's first female employee with a Class 1 licence, and joined an all-male crew to drive a large dump truck with a tractor trailer arrangement picking up and delivering loads of aggregate. Some months after she started, the grievor's foreman and supervisor began to engage in misconduct including repeated inappropriate comments about her appearance and dress, inappropriate overtures, and spreading sexualized rumours about her. When she complained about the misconduct to her supervisor, she was called "crazy" and "paranoid," and told to go see a doctor. After enduring 18 months of harassment in the workplace, the grievor went on medical leave.

Around the time she went on medical leave, the grievor filed a grievance regarding workplace misconduct and an investigation by an internal investigator from the Human Resources Department was conducted. However, the investigator did not interview any co-workers, and did not follow-up on the availability of any potential recordings of relevant conversations. The investigator submitted a report concluding that the foreman had used inappropriate language (swearing), but that other allegations were unsubstantiated. After the investigation, the union provided additional statements from co-workers that corroborated many of the grievor's allegations. The City refused to re-open the investigation, and the union advised the grievor that it would not proceed with the matter.

The grievor then retained legal counsel and filed a complaint against the union at the Labour Relations Board. While that complaint was settled, an outcome was that a second investigation would be conducted by the City. The second investigation concluded that the grievor's allegations were substantiated, and the supervisor's failure to address inappropriate behaviour by his staff had "created an environment where [the grievor] was isolated and constantly felt singled out."

The matter proceeded to arbitration, where the first investigation and the actions taken following the report were characterized as a joint failure of the City and the union with respect to their commitments under the Collective Agreement to maintain a work environment that is free from all forms of harassment and the commitment not to tolerate, ignore or condone workplace harassment. With regard to the second investigation, the City had accepted the findings of the second investigation and accepted liability for its employees' "clear violation" of its Respectful Workplace policy at arbitration.

The arbitration panel identified remedy as the sole issue before the board, and determined that the medical documentation supported an "inescapable" conclusion that the harassment and discrimination caused the grievor's mental health issues and held she was entitled to damages for three years' lost income. She was also entitled to $75,000 in general damages for injury to dignity as the misconduct was extremely serious, extended over 18 months, and had a significant impact on the grievor.

NOTES