

SEXUAL HARASSMENT AND SEXUAL VIOLENCE: PURSUING A CLAIM AT THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

Survivors of sexual harassment and violence in the workplace and in other specific social settings (for example, in schools, at your doctor's office, on campus) have the right to protection under Ontario's *Human Rights Code*. This is in addition to participating in a criminal process, or, as an alternative to a civil lawsuit. Claims of sexual harassment can be filed directly at the Human Rights Tribunal of Ontario. If you want to pursue a claim, you can obtain free legal services from the Human Rights Legal Support Centre.

The *Human Rights Code* prohibits sexual harassment and violence, including sexual solicitation and gender-based harassment, if it occurs in everyday social settings. The Human Rights Legal Support Centre (Legal Centre) offers free legal services to individuals who have experienced sexual harassment or violence. The Legal Centre will provide legal assistance to individuals who apply to the Tribunal for financial compensation for sexual harassment and violence. The Legal Centre will also help individuals achieve other remedies at the Tribunal, including changes to policies or practices that would help protect future potential victims.

Sexual or gender-based harassment is a form of discrimination. It involves any unwanted physical or verbal behaviour that harms, offends or humiliates. The *Code* defines sexual harassment as "engaging in a course of vexatious comment or conduct that is known or ought to be known to be unwelcome." A single, serious incident can also be considered harassment. An act that constitutes sexual assault is also very likely to constitute sexual harassment.

A person who has experienced sexual harassment or violence can bring a human rights claim against the individual responsible and against the organization/institution where it occurred, if the behaviour is experienced in the following situations:

- at work or in the context of employment
- in a housing situation, such as in an apartment building, condominium, co-operative, or another kind of shared residence
- while using a service, such as attending university or school, seeing a doctor, or shopping at a store
- in a facility, such as a gym or in the context of a commercial lease
- in a contractual relationship
- as a member of a vocational association such as a trade union

The *Code* also protects individuals from reprisal or "payback" when issues or complaints of sexual harassment are raised. A remedy can be sought under the *Code* if the individual can show that they were targeted, excluded, or experienced other negative behaviour when they rejected a sexual advance or complained about it.

What are the possible outcomes of a human rights claim at the Human Rights Tribunal?

If a claim of sexual harassment (including assault) or sexual solicitation is successful, the Tribunal has the power to hold responsible both the offending individual and the organization where the harassment occurred. The Tribunal can order a monetary payment to the person who was subjected to the harassment or solicitation. The Tribunal also has unique powers to order systemic or public interest remedies, such as mandatory training for managers or a new investigation procedure for all future sexual harassment complaints. By seeking changes in training or policies, survivors of sexual harassment and violence can help ensure that nobody else faces the same kind of treatment.

The financial compensation that the Tribunal can order for a person subjected to sexual harassment, solicitation or violence includes:

- an award for injury to dignity, feelings and self-respect as a result of the harassment (called “general damages”; can vary widely depending on the facts but generally between \$10,000 and \$40,000;
- compensation for special expenses incurred because of the harassment, including lost wages if the individual had to quit their job or were terminated following the harassment (called “special damages”).

How does the Human Rights Tribunal process compare to criminal court?

- **Control over your own claim:** Unlike in a criminal proceeding (where the survivor of sexual assault is not a party to the legal process and the accused and the Crown are the parties), in the human rights process, a survivor exercises significant control over the conduct of the case.
- **Free legal services:** Every individual with a potential claim has the opportunity to receive legal assistance from the Legal Centre.
- **Survivor behaviour/reaction:** Protest or objection to the harassing conduct is not necessary to find harassment. For example, the Tribunal recognizes that, because of the power imbalance in the supervisor/employee relationship, and the risks involved in challenging the behaviour of a supervisor, an employee may appear to go along with unwelcome conduct.
- **Burden of proof:** The survivor needs to establish, on a balance of probabilities, that the offending individual subjected them to inappropriate sexual harassment, solicitation or violence and/or that the associated organization did not take reasonable steps to address the conduct or condoned it. Compared to the burden of proof in a criminal trial – beyond a reasonable doubt – this is easier to achieve.
- **Anonymization:** A survivor can request that the Tribunal anonymize their name and any other identifying information in the decision.
- **Limitation period:** The claim must be brought within one year of the last act of harassment or assault. If there was a series of incidents, the claim must be brought within one year after the last incident in the series. An individual who is otherwise late in bringing the claim could argue that the delay was incurred in good faith, and that no substantial prejudice will result to any person affected by the delay.

What will happen if there are concurrent criminal charges?

Importantly, a human rights claim can be filed against the offending individual and against the organization where the harassment took place (for example, the corporate employer or the university) even if a criminal proceeding has started involving the same facts. The human rights application will be deferred pending the resolution of the criminal proceeding. If there is a finding of fact and a guilty verdict arising from the criminal proceeding, then the Tribunal will accept the facts and the verdict and the respondent will not be allowed to challenge these.

What about concurrent civil claims?

An individual cannot bring both a civil claim and a human rights claim at the same time. If a person raises an allegation of sexual harassment or violence in a civil proceeding, the *Code* bars that person from also filing an application before the Tribunal to claim a *Code* infringement arising out of the same factual context. A lawyer can help a survivor choose which forum is the most appropriate.

Contact the Human Rights Legal Support Centre:

Anyone in Ontario can contact the Legal Centre for free legal advice. We offer services in 140 different languages, including ASL. Lawyers and other legal workers help people claim and protect their rights by: providing advice on its telephone inquiries line; assisting individuals to file human rights applications; and representing claimants at mediations and hearings at the Human Rights Tribunal of Ontario. We also offer:

- Priority service to disadvantaged human rights claimants
- Culturally appropriate service for Aboriginal clients
- Accommodation of physical, mental, language and cultural needs
- Regional staff in Windsor, Thunder Bay, Guelph, Ottawa and Brampton

Tel: (416) 597-4900 Toll Free: 1-866-625-5179

TTY: (416) 597-4903 TTY Toll Free: 1-866 612-8627

Website: www.hrlsc.on.ca

Recent important sexual harassment decisions:

O.P.T. v. Presteve Foods Ltd., 2015 HRTO 675 <http://canlii.ca/t/gi60b>

G.G. v. [...] Ontario Limited, 2012 HRTO 1197 <http://canlii.ca/t/frsjx>

Smith v. Menzies Chrysler, 2009 HRTO 1936, <http://canlii.ca/t/26lrd>

Ontario Human Rights Commission Resources:

Policy on preventing sexual and gender-based harassment

<http://www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0>

Policy on preventing discrimination because of gender identity and gender expression

<http://www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression>