

HUMAN RIGHTS CLAIMS

**When are they an option in cases
involving sexual assault?**

**Presented by Laura Track, BC Human Rights Clinic
Director**

We provide free legal services to people who need help with a provincial human rights complaint

- Province-wide
- Information by phone (live) – available to all
- Short Service Clinic – available to all
- Legal advice and representation – by application
- Education workshops
- www.bchrc.net

Human rights legislation

- BC *Human Rights Code* protects people from **discrimination** connected to **protected characteristics**
- It applies in three main **areas** of daily life:
 - Employment
 - Housing (tenancy, co-ops, stratas)
 - Access to services, accommodations and facilities “customarily available to the public”
- *Canadian Human Rights Act* provides similar protection in **federally-regulated organizations**

Harassment and Discrimination

- When harassment, bullying, or poor treatment is based on a protected characteristic, it is discrimination

Sexual harassment, sexist bullying, sexual assault

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discrimination on the basis of sex

- If it occurs in a protected area, the victim/survivor may file a human rights complaint

Intersectionality

- Multiple grounds of discrimination may intersect and overlap
- Grounds cannot necessarily be separated out or parsed on an individual basis
- “The complainant is an integrated person, with a number of characteristics...all of which are alleged to have been factors in how she was treated.”
 - *Radek v. Henderson Development (Canada) Ltd.*, 2005 BCHRT 302
 - *PN v. FR and another (No. 2)*, 2015 BCHRT 60

Making a human rights complaint

To prove a case of discrimination, the complainant must prove:

1. Negative treatment or negative impact
2. In a protected area
3. On the basis of a protected characteristic

There must be a **connection**, or **nexus**, between the protected characteristic and the negative treatment

Respondent's defences:

- No negative treatment
- Non-discriminatory explanation
- The negative treatment was justified

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.

BC Human Rights Code

Discrimination in employment

13(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

“Employment”

- **Employment protection can include**
 - Part-time or casual workers
 - Volunteers and unpaid interns
 - Migrant workers, temporary foreign workers
 - Independent contractors

“Employment”

- **Employment protection can include**
 - 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

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
- Free to access
- Mediation services
- More flexible rules and processes
- Indigenous Members, processes
- Works to be trauma-informed

Challenges of Human Rights Complaints

- Very, very slow
- Compensation awards are not terribly high (\$15,000-\$50,000)
- Potential for litigation abuse
- Privacy is not guaranteed (see *Hilger v. Dr. Terry Abel Dentistry and another*, 2023 BCHRT 32)
- Challenges posed by parallel criminal proceedings

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 |



THE
GLOBE
AND
MAIL*

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

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 Paling

\$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](#)



THE
GLOBE
AND
MAIL

CANADA

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

SEAN FINE > JUSTICE WRITER

PUBLISHED APRIL 3, 2018

UPDATED APRIL 4, 2018

TRENDING

Remedies

Injury to Dignity

- Compensatory
- Not punitive
- Reflect harm, impact, “pain and suffering”
- Factors: seriousness/severity; social context; impact
- Greater impact → higher award
- “Trend is upward” – *Araniva v. RSY Contracting and another* (No. 3), 2019 BCHRT 97

Other losses

- Wages
- Commissions
- Compensation for benefits
- Tax gross-up
- Expenses
- Attending hearing
- Loss of opportunity
- Education or retraining

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
 - *Torres v. Royalty Kitchenware Ltd.* (1982), 1982 CanLII 4886 (ON HRT)

Remedies

Systemic

- Policy change
- Accommodations
- Education and training



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

Sexual Harassment

Three primary elements:

- (1) Conduct of a “sexual nature”
- (2) The conduct was “unwelcome”
- (3) The conduct produced adverse consequences for the complainant

Janzen v. Platy Enterprises, 1989 CanLII 97, [1989] 1 SCR 1252

“Unwelcomeness”

- Sexual assault law → consent must be affirmatively provided
- Human rights complaint → “unwelcomeness” is part of complainant’s case; C must prove conduct was unwelcome
- Presumes consent?
- Improperly places onus on victims to protest?
- Invites stereotypes and gendered myths?

“Unwelcomeness”

- A complainant is not required to expressly object unless the respondent would reasonably have no reason to suspect it was unwelcome;
- Behaviour may be both tolerated and unwelcome;
- Not only overt, but also subtle indications of unwelcomeness may be sufficient to communicate that conduct is unwelcome; and
- The reasons for submitting to conduct may be closely related to the power differential between the parties and the implied understanding that lack of co-operation could result in some form of disadvantage.
 - *Mahmoodi v. University of British Columbia and Dutton*, 1999 BCHRT 56

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
- If there is an adverse impact, then the conduct was by definition “unwelcome” and unwanted: *Ms. K v. Deep Creek Store and another*, 2021 BCHRT 158
- Intention is not relevant. Focus is on the effect of the conduct: *Code* s. 2
- Conduct that is not “sexual” may still be sex discrimination: *Sales Associate v. Aurora Biomed (No. 3)*, 2021 BCHRT 5

Is the complaint filed in time?

- Must file complaint within one year of alleged contravention (*Code* s. 22(1))
- Continuing contravention (*Code* s. 22(2))
 - Repeated acts of similar character
 - Must be one instance of discrimination within last year to anchor older events
 - Substantial gaps between acts may mean contravention is not “continuing”
- Discretion to accept late-filed complaints (*Code* s. 22(3))
 - Public interest to accept complaint
 - No substantial prejudice to any party

Is the complaint filed in time?

- Tribunal has discretion to accept late-filed complaints if it is in the public interest
- Factors it will consider:
 - Length of delay
 - Reasons for delay (e.g., disability-related factors)
 - Good reasons: disabled, in hospital or jail, extremely traumatized, erroneous legal advice
 - Bad reasons: unaware of BCHRT or right to make a complaint
 - Public interest in complaint itself
 - Unique, novel, unusual issues
 - Vulnerable complainant
 - Gaps in jurisprudence
 - Systemic issue, the resolution of which would benefit others
 - Prejudice to respondent

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.

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

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

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

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.

Retaliation

- To prove retaliation, a complainant must show
 - Respondent was aware of complaint, or possibility of a complaint
 - Respondent treated the complainant negatively
 - There is a **sufficient connection** between the negative treatment and the complaint or prospect of a complaint (i.e., the Respondent intended to retaliate or can reasonably be perceived to have intended to retaliate)

The Process

- Complaint filed with BCHRT → Complaint accepted (~12 months)
- *Complainant can apply for free representation from the Human Rights Clinic*
- Tribunal serves Respondent with complaint
- Response due (8 weeks)
- Settlement Meeting (voluntary)
- Disclosure (3 months)
- Case Path decision
- → Application to Dismiss (timelines vary)
- → Hearing scheduled (~12 months)
- Decision (timelines vary)

Privacy and Anonymization

- Proceedings are presumptively public
- Public access to the complaint file and proceedings is governed by Rule 5 of the Tribunal's Rules
- A party can apply to limit public disclosure of personal information, such as their name or witnesses' names
 - Must show why their privacy interest outweighs the public interest in access to the Tribunal's proceedings.
 - Factors the Tribunal will consider include:
 - the stage of the proceedings
 - the nature of the allegations
 - the private details in the complaint
 - the harm to reputation
 - other potential harm

Privacy and Anonymization

- “Certain types of allegations are more likely to attract the public’s attention, including cases involving allegations of sexual harassment or impropriety”, justifying anonymity: *J. Y. v. Various Waxing Salons*, 2019 BCHRT 106 at para. 30
- However, mere speculation about potential damage to one’s reputation, career, or psychological well-being may not be enough to justify anonymization, even in cases involving allegations of sexual harassment: *Hilger v. Dr. Terry Abel Dentistry and another*, 2023 BCHRT 32

Publication Bans

- For criminal sexual offences, publication bans are mandatory on application of the prosecutor or the victim (*Criminal Code* s. 486.4)
- The publication ban prohibits publishing, broadcasting, or transmitting information that could identify the victim in the criminal proceeding
- Unclear how a human rights matter could proceed without anonymization if there's a criminal publication ban
- Bill S-12: would make it easier for victims to lift a publication ban

Deferral of a human rights complaint

Rule 16 – Requirements for deferral

(1) The tribunal may defer consideration of a complaint until the outcome of another proceeding or a date set by the tribunal, if it determines that:

(a) another proceeding is capable of appropriately dealing with the substance of the complaint; or

(b) it is fair and reasonable in all of the circumstances to do so.

- Person applying to defer must explain why it would be “fair and reasonable” to defer complaint
 - Respondent/Accused: to protect right to a fair trial
 - Complainant: to prevent fishing expedition
- Either party may request deferral in complaint/response form

Implications of criminal proceedings

- Conviction in criminal case may be determinative of human rights complaint
- Proof of the conviction or the finding of guilt (e.g., guilty plea) is admissible in evidence in a civil action to prove that the person committed the offence, whether or not that person is a party to the civil action: *Evidence Act* s. 71
- Acquittal is not the end of a civil matter given different standards of proof
- But, judge's adverse findings about the credibility of a complainant or their witness can be detrimental to a civil case