

Procedural Rights for QUFA Members During Harassment Investigations

Introduction

Over the past ten years or so, there has been a legislative and workplace culture trend towards zero tolerance for harassment in the workplace. At Queen's, this has meant that the employer has opted more and more to initiate formal investigations when it receives allegations of workplace or sexual harassment. QUFA Members need to understand how these investigations unfold and what support they can expect from QUFA.

The Legal Context

Queen's University has a legal obligation to prevent, inquire into, and address harassment under both the Ontario Human Rights Code ("the Code") and the Occupational Health and Safety Act ("the OHS Act").

The Code defines harassment as "a course of behaviour that is *known or ought to be known to be unwelcome*" based on any one of seventeen listed personal attributes, including sex, race, disability, and gender. The latter are often referred to as "prohibited grounds" of discrimination.

The OHS Act defines harassment as "engaging in a course of vexatious comment or conduct against a worker in a workplace that is *known or ought reasonably to be known to be unwelcome*." Often referred to as either "workplace harassment" or "personal harassment," the prohibition has been interpreted to include a wide spectrum of unwelcome behaviour, from offensive remarks or actions causing psychological harm, to physical or sexual violence. It has also been interpreted to include bullying and the inappropriate use of texts, e-mails, and social media.

Under the OHS Act, the University must develop and clearly communicate anti-harassment policies, provide anti-harassment training, and respond to allegations of harassment with a timely, fair, and appropriate investigation. Their response may include retaining a neutral and experienced investigator, and separating the complainant and the respondent to an allegation during the investigation.

QUFA Procedural Obligations

QUFA has the obligation to support and represent the procedural rights of Members whether they are complainants or respondents to an allegation of harassment.

QUFA Staff must ensure that Members have a clear understanding of the definition of harassment, and the role that QUFA Staff and the QUFA Executive play in advising and protecting the procedural rights of Member complainants and respondents throughout and following the investigation.

A. Procedural Rights of the Complainant

Right to an Informal Resolution Process

QUFA Staff will listen to complainant's concerns and help to distinguish actions that, if true, would support a claim of harassment under the Code or the OSHA from actions that constitute a reasonable exercise of management rights. Employer actions related to performance, absenteeism, workload, or the enforcement of other provisions of the Collective Agreement (CA) do not constitute harassment. If you are experiencing difficult but non-harassing behaviour, or are interested in trying to resolve the matter on an informal basis, you can contact the Conflict Management Services provided for in the CA, or discuss other options for resolution with QUFA Staff.

Right to File a Complaint

The complainant has the right to file a complaint under the University Harassment Policy. If the University decides to investigate the matter, they must follow the negotiated process found in the CA (Article 20). The respondent will normally have the right to know who raised the allegations and be provided with a copy of the allegations to respond to. During the investigation, both complainant and respondent will be bound by confidentiality.

Right to File a Complaint of Harassment under the Code with the Tribunal

You may elect to file a complaint of harassment under the Code directly with the Ontario Human Rights Tribunal (the OHRT). However, you can only proceed in one forum. If you elect to proceed directly to the OHRT, QUFA will not represent you, and you will be asked to sign a waiver indicating that you have waived any rights under the CA, including the right to grieve with QUFA representation.

Preparing A Complaint

A complaint should document the who, what, where, and when of the actions giving rise to harassment, and should identify any witnesses along with a short summary of what the witnesses will say. The complaint should be accompanied by all relevant evidence, such as communications, documents, or other records that support the allegations. The complainant must make all submissions to the employer or the employer's designated investigator.

QUFA can appoint a support person to accompany the complainant during the process, and QUFA staff are available to them to answer questions and ensure procedural fairness. The complainant also has the right to confidential handling of their allegations and to be free from reprisal for having made an allegation.

The complainant should not be asked to accept changes to their working conditions that could be viewed as punitive.

B. Procedural Rights of the Respondent

The employer is required by law to investigate an allegation of harassment, with a timely, fair, and thorough investigation as required by the relevant provisions of the CA and the law.

The respondent is entitled to know the particulars of the allegations in order to make a full response, but during the investigation both the respondent and complainant are bound by confidentiality. The investigator will interview the complainant and any witnesses before meeting with the respondent to ensure that the respondent has the opportunity to give a full response to all allegations. This may take a few days or a few weeks. If after reviewing the allegations the respondent believes that they have evidence that could expedite or simplify the investigation or render it unnecessary, they should speak to their QUFA representative immediately.

The employer will advise QUFA if they determine that it is necessary to remove the respondent from the workplace or make any other significant changes that could restrict the respondent's ability to perform their job during the

investigation. QUFA will intervene if necessary to ensure such actions are reasonable and necessary.

Responding to Allegations

The respondent has the right to know who is making allegations and to receive a written outline of those allegations. Each allegation merits a response that outlines the truth value, context, and details of the respondent's view of what happened. It is important to note that harassment can happen without any intention on the part of the alleged harasser; what matters is whether the alleged behaviour meets the test of being known or ought to have been known to be unwelcome.

The response should be organized into one of three categories:

- the allegation happened,
- the allegation is false, or
- the respondent has no knowledge of the matter.

Then, add any facts that add context to the event that are relevant to the allegations. For example, a respondent may agree that they raised their voice at a meeting, but they have facts that explain why that happened and why it did not constitute harassment. It is also important to identify personal circumstances such as a disability, family status, an addiction, or other mitigating factors that should be taken into consideration by the employer in assessing the appropriate response to the behaviour.

Responses are normally made at an interview with the investigator. Respondents can bring notes with them and submit additional material (communications, documents, etc.) to the investigator as needed.

QUFA staff generally accompany respondents to these meetings, but staff cannot make any submissions on the respondent's behalf, or edit or amend what they choose to say.

After the Investigation

When the investigator concludes their work, they will prepare a summary of their findings that will be shared with the respondent and their QUFA staff support. If the investigator concludes that the respondent has engaged in harassment, the Member will be given the opportunity to meet with the Dean or Provost to provide any additional information that may be relevant to the Dean's or Provost's consideration of what if any disciplinary action should be taken. QUFA staff will assist the respondent by providing a framework for their response, and will attend the meeting for support and to take notes. Again, they cannot make representations on behalf of the respondent.

Following this meeting, the Dean or Provost will decide on discipline or coaching, and will inform the respondent in writing of their decision. QUFA staff and leadership will review the process to determine if further action is warranted.

QUFA Has Carriage of the Matter

If there is cause for concern about the investigation or the discipline, QUFA legal counsel has the right to review the full investigation file, to ensure that the process was fair, thorough, and non-biased. QUFA will also consider whether the employer's response, if any, was reasonable and proportionate with the findings. If both of these requirements are met, QUFA may elect not to proceed with a grievance against the employer.

If QUFA does grieve the process or the outcome, it retains legal carriage of the process and strategy, and may decide to proceed to arbitration or not. QUFA Executive decides the latter.

There is more information about how grievances work on the QUFA Web site.

Further Reading

- Relevant provisions of the CA are Articles 19, 20, and 21 (see the CA page of the QUFA Web site: <https://www.qufa.ca/collective-agreement/>)
- Grievance and arbitration is explained fully on the Grievance page of the QUFA Web site, including the process for appealing the decision of the Executive with respect to proceeding to arbitration (<https://www.qufa.ca/grievance/>)
- Queen's Harassment Policy (<https://www.queensu.ca/secretariat/harassment-and-discrimination-prevention-and-response-policy>)

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