

A photograph of two women in a meeting, one pointing at a document. The image is dimmed and serves as a background for the title text.

# **Strategies, Considerations, and Pitfalls to Avoid in Negotiations and Settlements of Sexual Harassment Claims**

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**SHARP**  
**WORKPLACES**

Sexual Harassment Advice,  
Response, and Prevention  
for Workplaces

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# Overview

## Chapter 31 - Negotiations

- Trauma awareness
- Client interview
- Forms of negotiation – demand letters, mediation
- Offers
- Releases

# Trauma Awareness

- Client may be traumatized
- Being triggered - heightened states, hyperarousal
  - Fight or flight
  - Impact on recall, sequencing
- Client may not have told events as one story before
- Retelling can be triggering
- Dealing with other side can be triggering
- Factor in interviews, negotiations, settlement

# Steps to take

## Chapter 3 – Trauma Informed Practice

- Objective is to do no harm, or as little harm as possible
- Provide choices
- Explain reasons for process or procedure
- Ascertain a client's triggers
- Reduce exposure to triggers as much as possible
- Be adaptable in your process
- Listen and build a partnership

# Interview

- Detailed interview is key to negotiation and settlement
- Understanding events
- Understanding losses and harms
- Understanding current situation, if actions required now
- Understanding what client wants

## Considerations re trauma may limit interview

- Do in parts?
- Care in framing questions
- Use written statement – fill in gaps

# Keep in mind

(from Chapter 3 – Trauma Informed Practice)

- Rape myths
- Myths about how people respond
- Victim blaming
- Social stigmas
- Cultural taboos
- LIVES (listen, inquire, validate, enhance safety, support)

# Interim Issues

- May be matters that need to be addressed through negotiation before final resolution
  - Investigations
  - Return to work or continued sick leave
  - Workplace modifications to avoid contact
- Investigation process should be reviewed and alternations should be requested if necessary
- Workplace modifications and unproven allegations



# Form of discussions

- Demand letter, verbal discussions, mediation
- Demand letter contents
  - Without prejudice
  - What happened
  - Why it was illegal, discriminatory
  - What the claim will be
  - What client is looking for now
- Pros, cons of demand letters

# Mediation - Pros

- Power of first person narrative
- Opportunity to speak directly to lawyer, client
- All parties focussed
- Ability to explore options
- Can be more interest focused
- Third party assistance

# Mediation - Cons

## Cons

- Time consuming – preparing, attending
- Difficult for client, triggering
- Risk of cross-examination of client
- Settlement under pressure, regrets
- Process can generate conflict client/counsel

# Mediations – Unrepresented Complainants

- Risk to unrepresented complainants of pressure from mediator and respondents
- Risk of disadvantageous terms
- Risk of being triggered – need to manage contact with other side

# Offers

## Main claims

- Lost wages and benefits, CPP, EI
- Future losses
- Expenses – eg. medical, including future losses
- Injury to dignity – Torres Factors

## Systemic remedies

- Difficult to negotiate for
- Cost to client in negotiation

# Torres Factors

- Nature of the discrimination
- Period of the discrimination
- Frequency of the discrimination
- Age of the victim
- Vulnerability of the victim
- Psychological impact on the victim
  - Will there be medical evidence of psychological impact?

*Torres v. Royalty Kitchenware Ltd.* (1982), [1982 CanLII 4886 \(ON HRT\)](#), 3 C.H.R.R. D/858 (Ont. Bd. Inq.)

# Considerations

- Tax implications of income
- Tax implications of general damages
- Injury to dignity is rising – Tribunal has recognized  
*Araniva v. RSY Contracting and another (No. 3)*, 2019 BCHRT 97,  
para. 145.
- Employment Insurance payback
- Tax gross up
- Interest
- Checklist?

# Strategic Questions

- Who goes first
- How high to start
- Issues with high first offers
- Common increments
- Bridging the gap



# Releases

Bear in mind – both parties are bargaining for closure – release can affect closure for client

## Common release terms

- Release language
  - Watch for overbreadth
  - Watch for other issues between parties
- Release against claims of third parties
- No admission of liability
- Confidentiality of settlement terms, fact of settlement
  - Exemptions for family members, financial and legal advisors

- Problematic release terms
  - Tax indemnification
  - Liquidated or guaranteed damages
  - Non-disclosure, Non-disparagement

# Non-disclosure, Non-disparagement Clauses

- Issues
  - Harm to client
  - Lifetime need to process traumatic events
  - Continued control over client by respondent
- Strategies
  - Say no
  - Agree to limit to public disclosure, rather than private
  - Agree that persons receiving disclosure will promise confidentiality
  - Agree not to identify respondents in disclosure

# Non-disclosure, Non-disparagement Clauses

- Longer term strategies
  - Legislation – now been introduced in Maritimes
  - Ontario
  - Ongoing defamation risk – Galloway litigation – courts are not recognizing public benefit in discussion of these cases

Questions?