

WORKPLACE HARASSMENT INVESTIGATIONS: DO THEM RIGHT OR PAY THE PRICE

By: Brad Lawson

In the months since the passage of Bill 168, many employers have faced an increasing number of harassment complaints, with a corresponding need to investigate them. Harassment investigations can be very tricky and unless you are well versed in the law of harassment and proper investigative procedure, you can find yourself in legal hot water.

This is exactly the situation in which the Toronto Police Service recently found itself, when one of its female constables, Ivania Chuvalo, filed a sexual harassment complaint against one of her supervisors, Alfred Iannuccilli, a sergeant with the police service. Although PC Chuvalo's complaint was promptly investigated, the professional standards investigator who conducted the investigation did not fully understand either the law or the corresponding evidentiary standard, and dismissed what was ultimately found to be a valid complaint. PC Chuvalo subsequently escalated her complaint to the Human Rights Tribunal, which not only awarded her damages for the sexual harassment but also made an additional award of damages for the flawed investigation.

Background

In September 2007, PC Chuvalo filed an internal harassment complaint against her supervisor, Sgt. Iannuccilli, citing nine specific incidents of sexual harassment including sexually suggestive comments about her body; leering; racist comments; possessive and intrusive conduct; and hostile behavior that she alleged was a reprisal against her for refusing to accept Sgt. Iannuccilli's conduct. Shortly after he found out about her complaint, Sgt. Iannuccilli initiated four complaints against PC Chuvalo, including a claim that she had been insubordinate to him..

The Flawed Investigation

Det. Young, the internal investigator assigned to the complaint, had never investigated an internal harassment complaint before, nor had he received any training on either the law of harassment or how to conduct a harassment investigation. His lack of knowledge and experience resulted in an incorrect finding: after interviewing the parties and witnesses Det. Young determined that because there was no independent evidence available to corroborate PC Chuvalo's allegations, her complaint could not be substantiated. Essentially he considered it to be a "he said/she said" situation and declined to make a finding of harassment.

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PC Chuvalo's "failure" to prove her allegations was later raised against her in Sgt. Iannuccilli's insubordination complaint against her. Because Det. Young found that PC Chuvalo's allegations had not been substantiated, she was not allowed to raise Sgt. Iannuccilli's conduct as a defence to the insubordination charge. To compound matters, since her complaint was not substantiated, the police service assumed her allegations were fabrications and used this as evidence of "attitudinal, conduct and performance issues"; and as a basis to recommend the termination of her employment.

The Human Rights Tribunal's Review

After reviewing the evidence, the Tribunal found that not only was PC Chuvalo sexually harassed, but also that Det. Young's investigation was flawed in two key respects. First, Det. Young had decided that since it was one person's word against another's, he could not make a finding. This ignored the fact that he could have considered other forms of evidence, such as similar fact evidence (this was not the first complaint of this kind against Sgt. Iannuccilli), or the credibility of the respective parties. Det. Young also failed to realize that sexual harassment often takes place in private, without witnesses and, even where there are witnesses, they may be reluctant to participate in an investigation. Second, there actually were witnesses in this situation whose testimony corroborated some of PC Chuvalo's allegations, which Det. Young had inexplicably disregarded. The Tribunal stated that these flaws placed an unnecessary burden on PC Chuvalo and noted that the assumption that her allegations were false, resulted in punitive repercussions to PC Chuvalo.

Finding and Damages

The Tribunal found that PC Chuvalo was sexually harassed and discriminated against and that both Sgt. Iannuccilli and the police service had engaged in a reprisal against her. This conduct caused significant mental and emotional harm to PC Chuvalo, including depression and panic attacks. Therefore, the Tribunal awarded \$12,000.00 for injury to her dignity, feelings and self-respect.

The Tribunal also found that the flawed investigation had a profound negative effect on PC Chuvalo, not only by exonerating Sgt. Iannuccilli, but also by "effectively concluding that the problem lay with [PC Chuvalo]". Adding to that, she experienced significant injury from being prosecuted for insubordination and from the threat and eventual loss of her job, without being able to raise the harassment in her defence. The Tribunal made a separate award of \$8,000.00 for the flawed investigation. Interestingly, it also ordered the police service to retain an external human rights consultant to train its internal investigators on how to effectively investigate harassment, discrimination and reprisal complaints.

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What This Means

While this is not the first time an employer has been found liable for a negligent investigation, the *Chuvato* decision makes it clear that employers will be held to a high standard. Unfortunately, the types of errors made in this case are all too common. Employers frequently decline to make findings in “he said/she said” cases and make other fatal legal and procedural errors when conducting investigations.

As a result of this and other decisions, it is incumbent upon you to ensure that any internal investigators you use are properly trained in both the law and process of investigating harassment complaints. The same is also true of any external investigators you retain. You would be wise to ensure that they have the appropriate credentials, as you may be held vicariously liable for any errors made by an external investigator.

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