



November 2012

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At Issue:

Proper Investigations

Kevin Robinson will be speaking at the Canadian Bar Association's 11th Annual Employment Law Issues Conference.



Jan 23-25
2013

Kevin Robinson is speaking at the HRPAs Annual Conference and Trade Show.



Oct 18
2012

James Heeney is quoted in CBC news article "How an online posting can cost you your job" by Janet Davidson.



Given amendments to relevant legislation and greater media attention, employers are dealing increasingly with complaints of workplace harassment and bullying and having to take appropriate steps to investigate those complaints.

The Ontario *Occupational Health and Safety Act* defines "workplace 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." Because of the inherent difficulty in characterizing whether behaviour of which an employee complains constitutes proper behaviour, unlikeable behaviour which does not constitute harassment, or behaviour which breaches the OHSAs, employers are becoming increasingly aware of the importance of conducting proper workplace investigations.

However, in the face of this growing awareness and the greater importance being placed on an employer's response to a complaint, we are now seeing cases in which employers were found to have failed in their duty to conduct an appropriate investigation.

The Human Rights Tribunal of Ontario recently issued a decision which considered the impact on an applicant of a faulty investigation. The applicant, Ms. Chuvalo, returned to work with the Toronto Police Service after a lengthy disability-related absence in 2007. Several months after her return to work Ms. Chuvalo filed a complaint of harassment against her supervisor alleging that he had harassed her on the basis of her colour, ethnic origin or place of origin or alternatively had sexually harassed her. A series of specific incidents were alleged to have occurred, including:

- when he offered her a cookie and she responded, "I don't want your cookie", he said, "oh, but I want your cookie," in a sexually suggestive manner;
- making a comment about Ms. Chuvalo's physical appearance and suggesting that he preferred seeing her in civilian clothing as opposed to what he implied was a less-than-flattering uniform;
- acting in a possessive fashion when Ms. Chuvalo mentioned her husband; and,
- making several references to Ms. Chuvalo's ability or inability to properly speak and read English.

When the complaint was filed, an internal investigator was assigned. The detective assigned to head the investigation had never investigated an internal harassment complaint prior to Ms. Chuvalo's. Upon learning that there were independent witnesses to just two of the several allegations that were asserted, the investigator concluded,

None of the officers interviewed were able to describe any incident in which the personal respondent behaved or spoke inappropriately toward Constable Chuvalo.

There is no *independent evidence* to support any allegation which would constitute misconduct. Therefore, in light of all of the available evidence, misconduct as alleged cannot be substantiated [emphasis added],

The day after Ms. Chuvalo was advised that her harassment complaint had been dismissed, she was advised that the respondent had made a counter-complaint and alleged that she herself had been insubordinate toward him. Ms. Chuvalo's response to the allegation of insubordination against her was based on the harassment which was the subject of her original complaint. However, the investigator concluded that, with respect to the Ms. Chuvalo's harassment allegation, it was simply her word against his. As a result, there could be no finding of wrongdoing and therefore, for purposes of determining the second complaint, the harassment did not occur. Therefore, Ms. Chuvalo was found to be insubordinate and subject to discipline.

It is not an uncommon error for an investigator to conclude that, because it is a question of he said-she said, the investigator is unable to make a finding however this conclusion is erroneous. An investigator is obligated to review all of the relevant evidence, including the credibility of the parties involved in the complaint, to assist in making a finding one way or the other. It may be that there still is insufficient evidence which would allow the investigator to make a finding; however, simply identifying a lack of corroborating evidence and therefore dismissing the complaint does not meet the expectations of a properly completed independent investigation.

In this case, the impact of the problematic investigation was significantly exacerbated by the fact that her very defense to counter-allegations rested on a more comprehensive consideration of the allegations she put forward. When they were dismissed and ignored, it resulted in a recommendation that her employment be terminated.

When Ms. Chuvalo complained to the Human Rights Tribunal of Ontario, it said,

I find that the officer who conducted the investigation had little understanding of the issues of harassment as was evident in his failure to recognize critical evidence in his insistence on the need for corroborating evidence. This faulty analytical framework placed an unnecessary burden on the applicant when she attempted to have the Service deal with a complaint of harassment.

The problems with the investigation had further repercussions for the applicant. The failure to refer the complaint against the personal respondent to hearing, and the requirement for corroboration, were raised by the hearing officer deciding the case of insubordination by the applicant. Thus, the failure by the investigator to find her complaints "substantiated" meant that the applicant was effectively precluded from raising her history with the personal respondent as a defense to the insubordination charge against her.

The Tribunal concluded that Ms. Chuvalo had been harassed and awarded her damages for injury to her dignity, feelings and self-respect. However, the Tribunal went further and stated that because the applicant suffered from emotional damages arising from the flawed investigation, she would be awarded an additional \$8000. Finally, the Tribunal ordered that the employer retain outside consultants within expertise in human rights to prepare training materials and provide training to investigatory personnel regarding the investigation of harassment, discrimination and reprisal complaints.

There are at least three conclusions to draw from the analysis of the Tribunal in this case.

1. Ensuring that the investigation of a complaint within the workplace is conducted by trained staff, or outside consultants with the necessary experience and expertise, will be crucially important going forward. Not only did this investigator make an error in his conclusions but the fact that he did so without having received any real training from his employer appears to have caused the Tribunal considerable concern.
2. In the event that an investigation is not properly conducted, it appears that the Tribunal is prepared to consider awarding damages to an applicant as a result.
3. Related to the second point above, the implication of the Tribunal's award of damages is an implicit recognition that bringing forward a complaint and participating in a workplace investigation is fraught with emotional difficulty and where the handling of the investigation itself, regardless of the findings that are made, is problematic, that in and of itself can cause emotional harm. This decision may open up employers to additional damages for the fact of a negligent investigation in addition to any other damages that may flow from the conduct itself.

FYI...

Most workplaces that are governed by the *Employment Standards Act* are required to post a poster entitled *What You Should Know About the Ontario Employment Standards Act*. In addition, as of October 1, 2012, the *Occupational Health and Safety Act* ("OHSA") requires that employers not only post a copy of the OHSA itself but also post a new poster entitled *Health & Safety at Work - "Prevention Starts Here"*.

The poster outlines the rights and responsibilities of employees, supervisors and employers and must be displayed in English and also in the language spoken by the majority of people in the workplace.

The poster is available in 17 languages and can be accessed, free of charge, at

<https://www.labour.gov.on.ca/english/es/pdf/poster.pdf>. For

more information about the poster, visit

<http://www.labour.gov.on.ca/english/hs/pubs/posterinfo.php>.

Stay Tuned...

In our next issue, we will discuss the approaching deadline for compliance reports under the *Accessibility for Ontarians with Disabilities Act*.