

Employer Held Liable for Shoddy Workplace Investigation

In a recent decision, the Human Rights Tribunal of Ontario ordered an employer to pay \$55,000.00 in compensation to its former employee plus \$2,904.00 for lost wages due to an improper workplace investigation. The Tribunal described the conduct of the workplace investigator as egregious and insensitive, resulting in a lack of respect and loss of dignity to the employee.

In the case of *AB v. 2096115 Ontario Inc. c.o.b. as Cooksville Hyundai*, 2020 HRTO 499, the applicant claimed that she had been discriminated against on the basis of sex while working for her employer, Cooksville Hyundai. The Tribunal found that section 5(1) of the Ontario *Human Rights Code* (the “Code”) had been violated and affirmed that “an employer is under a duty to take reasonable steps to address allegations of discrimination in the workplace, and that a failure to do so will itself result in liability.”

Background

The following facts are provided as background in order to fully appreciate the seriousness of the sexual harassment allegations brought by the applicant against her supervisor. One evening, the applicant was invited to her supervisor’s hotel room where she agreed to attend and the two of them had had a few drinks. The next morning, the applicant woke up in bed fully clothed and her supervisor was lying next to her wearing only his boxer shorts. Her supervisor kissed her, put her hand in his boxer shorts and was stroking his genitals with her hand. The applicant immediately got off the bed and tried to leave the room. However, the supervisor blocked her way and tried to apologize for what he had done. The applicant ultimately pushed past him and left the room.

The applicant complained about the incident to her employer, who put her in touch with an external human resources representative who was retained as the workplace investigator. Not pleased with the proposed solutions offered by the investigator, which were limited to an apology from the supervisor and information about the company’s Employee Assistance Plan (“EAP”), the applicant requested permission to report to a different supervisor. The investigator told the applicant to take one week off of work while she interviewed the supervisor. The next day, the investigator asked the applicant to provide a written record of the incident. Thirty minutes after it was sent, the investigator informed the

applicant that the investigation had been completed and that her request for another supervisor would be accommodated. The investigator never advised the applicant what she had concluded about the allegations or the manner in which she had conducted her investigation.

Although the applicant did have less contact with her supervisor in the time that followed, her job required her to continue to interact with him. After approximately one month, she e-mailed the investigator explaining that she was having a hard time working near the supervisor and wanted to know what employment opportunities were available at other locations. The investigator simply responded that she was “sorry to hear that” and asked whether she had spoken to the general manager. A few days later, the employee came up with her own resolution and found a lower-paying position at a different dealership. She transferred there shortly thereafter. While working at the new dealership, the applicant e-mailed the investigator on a few occasions explaining that she was still distraught about how the situation was handled. In particular, she expressed that she was not happy that she had transferred to another job but felt like she had no other option. The investigator responded that the company had investigated the allegation and that this was a classic “he said/she said situation.” The investigator also made clear that accommodations had already been put in place for the applicant, which allowed for her to report to a different supervisor.

Findings

The Tribunal found that the applicant experienced discrimination due to the inadequate investigation and her employer’s failure to properly address her complaint. This deprived the applicant of respect and the right to be ensured a poison-free work environment. The Tribunal found that at the time of the incident, the employer had two relevant anti-violence and harassment policies in place. The latter detailed the steps to be taken when investigating a complaint, which included: explaining the

allegations to the person about whom the complaint was made, asking them to reply in writing, providing this response to the complainant, and then informing both parties in writing of the investigation's findings and any actions that had or would be taken. The investigator did not refer to these policies during her investigation.

The Tribunal found that the investigator made several errors. First, she did not take adequate notes of her meeting with the supervisor, did not speak with any other employees who may have had information about the situation, and provided no details as to what she had concluded and how she had completed the investigation. She also did not behave in a way that was sensitive to or respectful of the applicant, who had come to her as a victim of sexual harassment. Her conduct did not reflect a person who was neutral or who could be trusted, which is what would have reasonably been expected in the circumstances. Finally, and most troubling perhaps, is that she did not put to the supervisor any of the allegations against him. In fact, she did not discuss with him a single concern raised by the applicant, instead she asked him if there was "anything [she] needed to know about." The investigator explained that because she was given different information from the applicant and the supervisor, she was not in a position to determine whose version of events was accurate. The Tribunal did not agree, holding that her inability to determine whose version of events was accurate was due to her own failure to conduct a proper investigation, leading to a breach of the *Code*.

Tips for Employers

This case is a reminder that employers must be vigilant in ensuring that adequate and proper workplace investigations are conducted at all times. We recommend that employers:

- maintain policies outlining the process for how workplace complaints can be addressed and how they will be investigated
- promptly follow the process outlined in the policies when conducting investigations
- provide training to employees who conduct workplace investigations
- ensure that the accused person is aware of the specific allegations when a complaint is made and is provided an opportunity to fully respond
- inform the parties when an investigation is complete, what findings were made, and whether any corrective action will take place
- maintain confidentiality
- be empathetic to the parties, while remaining neutral
- consider retaining an experienced outside workplace investigator to avoid conflicts of interest or allegations of bias
- provide their internal investigator with access to legal advice to ensure compliance with employment and human rights laws

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