Municipal Liability Risk Management

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Consider this:

- 40% of Canadian workers experience bullying in the workplace on a weekly basis.[1]
- 28% of Canadians have experienced workplace sexual harassment.[2]
- 17% of all incidents of violent victimization in Canada occur in the workplace.[3]

Gone are the days of turning a blind eye to bullying and unwanted workplace interaction, whether physical, verbal or psychological. Government initiatives and a rash of high profile cases have heightened public awareness of these issues. Now more than ever, an employer must take seriously its obligation to respond to and investigate an allegation of workplace harassment or violence. A municipal employer that fails or refuses to get on-board does so at its peril, risking public embarrassment and employee discontent, not to mention a hefty regulatory fine and an award of damages from a court or adjudicator.

To help municipalities navigate this burgeoning area of workplace management, this article addresses four key areas:

1. Relevant legislation across Canada
2. What's at risk for a municipality — three important cases
3. Key considerations when planning and conducting a workplace investigation
4. The benefits of retaining an external lawyer to conduct a workplace investigation

RELEVANT LEGISLATION ACROSS CANADA

Most Canadian provinces and territories have taken proactive steps to enact legislation aimed at addressing (to varying degrees) workplace harassment, bullying and violence. Some provinces have taken a narrow approach, only prohibiting violence. Other provinces have taken a broader approach, imposing on an employer a proactive obligation to take steps to protect against workplace harassment and bullying.

For example, in Ontario, amendments to the *Occupational Health and Safety Act* (the "*OHSA*") enacted under Bill 132 (in force September 2016), considerably expand an employer's workplace harassment obligations. Prior to Bill 132, the *OHSA* required only that an employer implement, and train

workers on, a policy and program to respond to a complaint of workplace harassment. Under Bill 132 the definition of workplace harassment is expanded to include sexual harassment, and an employer has a legal obligation to ensure a complaint of workplace harassment is investigated in a manner "appropriate in the circumstances". The amendments also empower a Ministry of Labour Inspector to order an employer to retain an impartial, third party investigator at the employer's own cost.

An Ontario employer must now also ensure its workplace harassment program:

- Includes measures and procedures for a worker to report an incident to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser
- Outlines how an incident or complaint will be investigated
- Specifies that information obtained about an incident or complaint, including identifying information about any individual involved, will not be disclosed unless necessary to investigate or take corrective action, or as otherwise required by law
- Explains how the complainant and respondent will be advised of the investigation results and any disciplinary action taken as a result
- Is reviewed as often as necessary, but at a minimum, once a year

In several provinces where an employer is statutorily obligated to enact measures to protect against workplace violence and harassment, failure to do so can result in considerable sanctions and fines. In Ontario, for example, this includes a corporate fine up to $500,000 per incident, and a fine of up to $25,000 and imprisonment up to twelve months (or both) against a corporate director.

In addition to legislation focussing on workplace violence and harassment, every Canadian province has human rights legislation prohibiting harassment on the basis of enumerated protected grounds (*e.g.,* race, sex, sexual orientation, disability, religion, family status, *etc*.). An employer's failure to take proactive steps to prevent and respond to human rights-based harassment can result in sanctions such as a damage award and a range of public interest remedies aimed at reducing future incidents.

WHAT'S THE RISK FOR A MUNICIPALITY — THREE IMPORTANT CASES

In addition to legislative sanctions, courts and arbitrators can impose considerable civil liability on an employer (including a municipality) that fails to have and appropriately implement policies and protocols to respond to a complaint of violence or harassment. The following three cases illustrate how matters can quickly spiral out of control if not addressed in a manner consistent with an employer's human rights and occupational health and safety obligations.

Case Study #1: City of Calgary Ordered to Pay $800,000 for Failure to Investigate

The Facts

In *Calgary v. CUPE*[4] an arbitrator ordered the City of Calgary to pay damages of $800,000 for its failure to respond to a case of persistent workplace harassment.

Ms. A. was a unionized clerk employed by the City. In the Fall of 2010, while at her desk, she was repeatedly sexually fondled by Terry Mutton, a co-worker on track to becoming a foreman. Mr. Mutton was a member of the union executive and regarded as a powerful person in the workplace.

Ms. A. reported the fondling to her district manager without expressly identifying the perpetrator. Other facts she provided might have been sufficient to identify Mr. Mutton but the district manager did not attempt to determine who was being accused. Instead, the district manager had an extension added to Ms. A.'s desk, intended to provide her with protection against a further assault. The manager then left on vacation, placing Mr. Mutton in charge.

Thereafter, assaults continued leading Ms. A.'s husband to install a spy camera which caught one of the incidents on camera. Armed with this

evidence, the harassment was reported to the district manager's boss, Mr. Bell, which led to Mr. Mutton being suspended. Soon after, Ms. A. found rat poison on her keyboard and was transferred to another location; though an investigation into this incident was never completed.

At this point, City management had the opportunity to deal with the complaint in a responsive and appropriate manner, but failed to do so causing matters to spiral out of control.

In early 2011, assault charges related to the fondling were laid against Mr. Mutton, leading to a guilty plea, 90 days incarceration and two years' probation. Around the same time, Ms. A. filed a complaint that Mr. Bell had followed her home. This was investigated and Mr. Bell was cleared of the accusation within a week.

Meanwhile, Mr. Bell received information Ms. A. intended to report matters to the City Mayor. In response, while still under investigation himself, Mr. Bell ordered Ms. A. to attend an independent medical examination with a psychiatrist, which she refused to do. Ms. A. then left on a scheduled vacation, following which Mr. Bell required a medical clearance as a condition of Ms. A.'s return to work - despite the fact she had never asserted she was unable to work. She provided the clearance.

After her transfer, Ms. A. was assigned work on an *ad hoc* basis. She also encountered various negative incidents including reprimands from Mr. Bell. She suffered time off work due to stress and anxiety and received a diagnosis of post-traumatic stress.

Although the final act of sexual harassment had been seven months earlier, Ms. A. became suicidal at the beginning of August, was granted long-term disability benefits and never returned to work.

Grievance and Arbitration

Ms. A. grieved and, by the time the matter came to a hearing, the City admitted Ms. A. had been a victim of assault and the district manager had not handled things properly. Otherwise, the City defended its actions including Mr. Bell's.

In its decision, the arbitration panel did not agree the wrongs against Ms. A. were limited to Mr. Mutton and the district manager. It criticized the City for:

- Breaching the requirement under the collective agreement to use good judgment in resolving disputes
- Failing to maintain a safe and healthy workplace
- Failing to properly investigate Ms. A.'s complaints
- Engaging in adversarial conduct which exacerbated matters
- Responding to the grievance in an unreasonable and arbitrary manner
- Waiting too long to transfer Ms. A. away from danger
- Failing to provide support to Ms. A. in respect of the psychological damage caused by the harassment so that she would feel protected [Note: An employer that appears to be indifferent or even antagonistic may cause an employee who otherwise may have been sufficiently resilient to recover from injury to develop increasingly serious and intractable psychological damage]

In assessing damages, the arbitration panel projected Ms. A. would recover from her disability and be able to find work in 2018. The panel therefore awarded her approximately $800,000 as follows:

- $135,630 for past income loss
- $500,000 for future income loss, to be reduced according to actuarial adjustments
- $68,243 in lost pension benefits
- $28,000 for counselling costs
- $125,000 for loss of dignity and enjoyment of life

Case Study #2: Wal-Mart Ordered to Pay More Than $400,000 For Breach of Duty of Good Faith

In *Boucher v. Wal-Mart,*[5] the Court of Appeal for Ontario appears to extend the duty of good faith to the manner in which an employer responds to a complaint of workplace harassment. While the decision is against retail giant, Wal-Mart, it has potential application to any employer, including a municipality.

The Facts

Ms. Boucher, an assistant manager of a Wal-Mart in Windsor, was the subject of workplace harassment by her immediate supervisor. She was consistently and increasingly belittled, humiliated and demeaned, often in front of co-workers. When Ms. Boucher complained to Wal-Mart's senior management they undertook to investigate her complaints, but did so only half-heartedly. Ultimately, the investigation found the complaints unsubstantiated, following which, after another occurrence of public humiliation, Ms. Boucher quit and sued for constructive dismissal.

At Trial and Appeal

At a trial before a judge and jury, the following additional facts were found:

- Wal-Mart had a Prevention of Violence in the Workplace Policy and Harassment and Discrimination Policy, each of which encouraged employees to report incidents, and promised to protect from retaliation or reprisal, an employee who made a complaint
- Wal-Mart paid lip service to its polices (at least in the case of Ms. Boucher):
  - When Ms. Boucher lodged a complaint she was threatened she would be held accountable if her allegations proved unwarranted
  - In breach of the policies, Ms. Boucher's supervisor was made aware of her complaints, resulting in intensified humiliation and harassment
- Wal-Mart did not take steps to end the harassment:
  - It did not take Ms. Boucher's complaints seriously
  - It found Ms. Boucher's complaints unsubstantiated despite considerable evidence to the contrary
  - It failed to enforce its workplace policies designed to protect employees like Ms. Boucher
  - It threatened Ms. Boucher with retaliation for making a complaint
- As a result of the harassment, Ms. Boucher's health deteriorated considerably

A jury found Ms. Boucher to have been constructively dismissed and awarded her the following damages:

- An amount equivalent to 20 weeks' salary, as specified in her employment agreement
- $1,200,000 against Wal-Mart, comprised of $200,000 in aggravated damages for the manner in which she was dismissed and $1,000,000 in punitive damages
- $250,000 against her supervisor, comprised of $100,000 for intentional infliction of mental suffering and $150,000 in punitive damages (awards for which Wal-Mart was vicariously liable as the supervisor's employer)

The Court of Appeal reduced the punitive award against Wal-Mart from $1,000,000 to $100,000, and against the supervisor from $150,000 to $10,000. Still, these awards now rank among the highest in Canadian history for employer misconduct of this nature. All told, Wal-Mart was responsible for 20 weeks' salary, plus aggravated and punitive damages in the amount of $410,000, and the potential for substantial costs (the determination of costs was not reported in the decision).

Case Study #3: City of Toronto Ordered to Pay Damages Related to Workplace Violence, Despite WSIB Coverage

The Facts

In *City of Toronto v. CUPE Local 7,*[6] an Ontario arbitrator awarded damages to a grievor for pain, suffering and mental distress arising out of an incident of workplace violence, finding the damage sustained was not compensable through the Workplace Safety and Insurance Board ("WSIB").

The grievors were two community centre workers shot at in the parking lot of their worksite at the conclusion of their shift. One grievor suffered injuries for which he received compensation through the WSIB.

The second grievor was not shot but claimed to have suffered physical and psychological injury as a result of the attack and his efforts to escape the gunfire. Both employees grieved the employer's failure to take reasonable precautions to protect their safety in the workplace, contrary to its obligations under the *OHSA*. Both grievors sought damages for pain and suffering and mental distress.

At Arbitration

The arbitrator held the City failed to take reasonable precautions for the protection of its employees. While the City was not required to guarantee the safety of employees at the centre, it was required to take "reasonable precautions or steps to provide a safe and healthy work environment". The arbitrator found the City failed to do so, without reasonable explanation, even though many of the precautions it could have taken would have been relatively easy and inexpensive to implement. More specifically:

- The City knew the community centre was in a high risk area
- Violence was common-place in and around the community centre
- Recommendations had been made to senior City staff to improve safety, including, for example:
  - improved outside lighting
  - walkie-talkies or bulletproof vests for workers
  - video security cameras
  - metal detectors
  - trimmed shrubbery and bushes around the front of the centre to improve visibility for employees entering and exiting

The grievor who was shot filed a claim with the WSIB with respect to both his physical and psychological injuries which had resulted in his inability to work. The arbitrator concluded these injuries were appropriately captured by and compensated through the WSIB and as such were not compensable at arbitration.

Regarding the grievor who was not shot but who sought damages for pain and suffering and mental distress, the arbitrator noted he too would not be entitled to damages through the arbitration process if his injuries were compensable through the WSIB. However, as the grievor had not lost time or wages as a result of the incident and suffered no permanent impairment, the arbitrator was not satisfied he could have received compensation through the WSIB scheme. While traumatic mental distress may be compensable through the WSIB scheme it appears the arbitrator was not satisfied the injury sustained was sufficiently egregious to be considered traumatic mental distress. The arbitrator therefore ordered the City to pay the grievor $5000 on account of pain, suffering and mental distress.

Lessons Learned

All three cases illustrate the broad remedial power an arbitrator or court has to compensate an employee for the failure of an employer to adequately address workplace risk, including but not limited to violence and harassment.

To help mitigate the risk to a municipality, consider the following best practices:

- **Workplace Violence and Harassment Policy**: Have one. Train employees and management on its content and how it works. Enforce it consistently and transparently.
- **Conduct A Risk Assessment**: Critically examine your workplace to determine what factors may put an employee at risk. Take active steps to reduce those risks and enhance workplace safety. [For more information, see in this publication, ProActive ReSolutions' article "How Bad Can this *Really* Get? Assessing and Managing Threats of Violence in Local Governments"].
- **Know Your Collective Agreement**: If you have a collective agreement in the workplace, be familiar with any procedures for handling a complaint, as they may require the municipality to go beyond legislative requirements.
- **Investigate**: An investigation is critical and in some cases mandated by law. This is not the time to take shortcuts or ignore the problem [see the next section of this article for helpful tips].

- **Offer Support**: Where appropriate, offering support to an alleged victim can be an important aspect toward avoiding or reducing liability.
- **Mediate and De-escalate**: Where appropriate, make efforts to mediate and de-escalate animosity among the parties. This is particularly important if they will have to re-integrate into the workplace and learn to work together again. When in doubt, consult with experienced employment counsel who will help navigate these sensitive issues. [See also ProActive ReSolutions' article "Back to Work, Now! Supporting People After a Workplace Investigation"].
- **Consult with Counsel**: Some situations are more complex and sensitive than others. If you think you may be in over your head, or want to bounce an idea off of someone knowledgeable but neutral, consider early consultation with employment counsel experienced in the intricacies of workplace harassment, violence and risk in the workplace.

KEY CONSIDERATIONS WHEN PLANNING AND CONDUCTING A WORKPLACE INVESTIGATION

A successful workplace investigation requires planning, preparation, organization, skill, speed and discretion. How the investigation is handled can affect whether a lawsuit or grievance is filed or a complaint made to a regulating body. A municipality that neglects to conduct an investigation, or conducts an inadequate investigation, faces increased risk of legal liability.

Preliminary Considerations

There are a number of preliminary considerations before an investigation can begin, each necessitating a frank discussion with legal counsel. This includes:

- Should the investigation be conducted by an internal or external team? While an internal investigator may have the advantage of lower cost, he/she may lack the skills, experience or time necessary to carry out a thorough investigation. An internal investigation team may also not be appropriate if the subject of the investigation is a senior employee. [see below, The Benefits Of Retaining An External Lawyer To Conduct A Workplace Investigation]
- Steps necessary to maintain privilege over the investigation and any resulting report.
- Whether to report the matter to the police.
- Whether there is a legal requirement to conduct an investigation and/or to report the outcome of the investigation to a government regulating body (*e.g.,* to a ministry of labour (or equivalent) in the case of a serious workplace injury).
- Whether it is appropriate for the complainant and/or subject of the complaint to remain in the workplace during the investigation.
- Whether assistance will be required from any third party expert in order to complete the investigation — for example a psychiatrist or psychologist specializing in the impact of violence or harassment.

Gather Relevant Documents

All relevant documents and electronic files should be reviewed by the investigation team as soon as possible. This includes practices, policies, procedures or codes of conduct, complaints and documents relating to prior incidents involving the parties or similar circumstances (*e.g.*, a dangerous scenario, etc.).

Interview

Ideally, each interview should be conducted with two people present — one to ask the questions and the other to take notes.

For an investigation arising out of a complaint, the complainant will typically be interviewed first in order to get additional information about the complaint and how the complainant would like to see the issues resolved. Thereafter the alleged wrong-doer and any other witnesses should be separately interviewed.

The objective of the interview is to elicit and record as much detail about the complaint or incident

as possible, including: date, time, location, persons who saw or heard the incident(s), what happened before, during and after the incident(s); whether the incident was reported and any previous action taken. Whenever possible, open-ended questions should be used to allow the interviewee to tell the story in his or her own words.

Document the Interview

Careful, accurate and succinct notes should be taken at each interview. The notes may ultimately have to be produced in subsequent litigation. Notes should record:

- The date of the interview
- Who was interviewed
- Who was present during the interview
- The author of the notes
- Where the interview took place
- The questions asked
- Verbal and non-verbal responses given in as much detail as possible
- Whether the information provided arises from direct knowledge or is *hearsay*

The notes should not contain any conclusions, opinions or editorial comments by the note-taker.

There is no requirement for the interviewee to sign the notes to confirm accuracy, but the interviewee may be asked to do so or to sign a statement prepared after the interview setting out the information provided.

Assess, Evaluate and Report

The investigation team will then analyze the evidence obtained, make conclusions based on the evidence, and prepare a report. The report should:

- Summarize the complaint
- Identify any remedial steps taken pending completion of the investigation
- Summarize the evidence obtained
- Identify and evaluate inconsistencies
- Assess credibility and weigh competing evidence to attempt to reach factual conclusions
- Explain the reasons for conclusions reached

Communicate the Outcome

In most cases, the investigation report should be kept confidential and only provided to legal counsel and the municipal representative charged with making the final decision regarding remedial action or discipline. However, general information regarding the outcome of the investigation should be communicated to the individuals at issue. In Ontario, new requirements introduced as a result of Bill 132 require parties to the investigation to be advised of the outcome of the investigation and any disciplinary action imposed as a result.

THE BENEFITS OF RETAINING AN EXTERNAL LAWYER TO CONDUCT A WORKPLACE INVESTIGATION

While an internal investigation may at times seem like a more cost-effective approach, failure to conduct an appropriate investigation of workplace violence or harassment can leave a municipality facing considerable exposure.

Generally speaking, an investigation will be considered 'flawed' if the investigator is not objective or sufficiently skilled to carry out the mandate; fact gathering is incomplete or biased; or the law is misunderstood, misconstrued or misapplied to the facts.

Using an external lawyer to perform a workplace investigation has the following benefits:

1. **Objectivity**: A lawyer understands the importance of objectivity; it's part of their legal training. An external lawyer brings the added benefit of insulating the employer's internal team from having to investigate and make findings of fact potentially against the interests of one of its own (which can be extremely disruptive to the workplace).
2. **Credibility**: Having an external lawyer perform the investigation fosters employee and public confidence in the process.
3. **Fact Gathering and Evaluation:** A lawyer is trained to and skilled at identifying what is relevant and what is not, including which witnesses to

interview, how and when to interview them, and how to synthesize and evaluate evidence consistently, fairly and efficiently.

4. **Knowledge of the Law:** A lawyer will have expert knowledge and understanding of the relevant law, and equally important, how courts and arbitrators are likely to assess and weigh the facts (including the credibility of witnesses) in light of that law. In other words, a lawyer is best able to critically assess whether conduct will be found to violate legal requirements or standards.
5. **Report Writing**: A lawyer is trained and skilled at drafting the report to appropriately explain the process (this is key), findings of fact (including the weighing of credibility), and the application of the law.
6. **Privilege**: To the extent legal analysis and recommendations are keep separate from findings of fact, there may be an ability to claim privilege over the legal advice provided by an external lawyer. There is no such ability if the investigator and report writer is not a lawyer providing legal advice.
7. **Investigator as Witness**: In the event the investigator is called as a witness, a lawyer may be more comfortable in that role.
8. **Cost and Efficiency**: The benefits identified above not only translate into a higher quality and defensible investigation, but one that is likely to be completed more efficiently and ultimately at a reasonable (and in some cases, lower) cost.

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