



MEMO / NOTE DE SERVICE

To / Destinataire	Mayor and Members of Council / Maire et membres du conseil	File/N° de fichier: n/a
From / Expéditeur	David White, City Solicitor Legal Services / Chef du contentieux a Services juridiques	
Subject / Objet	Remedial Options Available in Response to the Workplace Investigation of a Complaint Against Councillor Chiarelli Pursuant to the City's Violence and Harassment in the Workplace Policy	Date: November 20, 2020

At its regular meeting of July 15, 2020, City Council received an update, *in camera*, regarding the independent investigation of a complaint against Councillor Rick Chiarelli pursuant to the City's Violence and Harassment in the Workplace Policy (the Policy) and the *Occupational Health and Safety Act*, (the OHSA) that determined that Councillor Chiarelli had engaged in harassment in the workplace. Further to that briefing, City Council directed that, "*staff provide Council with an outline of the remedial options available in response to the workplace investigation of a complaint against Councillor Chiarelli pursuant to the City's Violence and Harassment in the Workplace Policy prior to or concurrent with the delivery by the Integrity Commissioner of his second report into alleged breaches of the Code of Conduct for Members of Council, involving two complaints against Councillor Chiarelli from former employees.*"

On November 4, 2020, Integrity Commissioner Marleau filed notice that he intended to deliver his second report concerning Councillor Chiarelli under the Code of Conduct for Members of Council (the Code) at the next meeting of Council, scheduled for November 25, 2020.

Accordingly, staff have set out below an outline of the various remedial options available to Council to address the findings of the investigation conducted pursuant to the City's Violence and Harassment in the Workplace Policy into the allegations involving Councillor Rick Chiarelli.

Background

In conjunction with City Council's receipt of the Integrity Commissioner's first report on breaches by Councillor Chiarelli of the Code, Council also received an *in camera* briefing from staff on an investigation under the City's Violence and Harassment in the Workplace Policy that determined that Councillor Chiarelli had engaged in harassment in the workplace. As a result, Council directed that staff provide an outline of the remedial options available in response to the workplace investigation of a complaint against Councillor Chiarelli pursuant to the City's Policy prior to or concurrent with the delivery by the Integrity Commissioner of his second report into alleged breaches of the Code of Conduct for Members of Council, involving two complaints against Councillor Chiarelli from former employees.

Discussion

In keeping with its legislative obligations under the amendments made to the *Occupational Health and Safety Act* by Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009, the City has adopted a comprehensive Violence and Harassment in the Workplace Policy (the Policy) and associated procedures. The Policy and procedures require, among other things, that all complaints of harassment in the workplace be investigated and that a summary of the investigatory findings be provided to the complainant and the respondent.

Where a complaint is substantiated by the investigation, the City - as an employer - has an obligation to take all reasonable steps to ensure the safety of the workplace and to prevent a recurrence, recognizing the boundaries of its authority in the circumstances of the case. In other words, a "remedial" measure under the Policy is intended to be a remedy or a cure to the finding of harassment. In instances where the harassment is by a member of the public, the City may invoke the Public Conduct Policy as a means to ensure a harassment-free workplace. Likewise, where the harassment of an employee is found to have been occasioned by another employee, the City may have recourse to a variety of measures, ranging from training, changes to the organization or structure of the workplace, to disciplinary sanctions, in order to meet its statutory obligations under the OHSA. All of these remedial measures are within the authority of the City administration. However, there exists no authority in municipal staff to take any remedial action where the harassment is found to have been carried out by a Member of Council. Rather, any such authority resides solely with City Council. Furthermore, it must be noted that the imposition of punitive sanctions by Council is effectively limited by Section 223.4(5) of the *Municipal Act, 2001*, to those instances resulting from breaches of the *Code of Conduct for Members of Council*, as described more fully below.

The Range of Remedial Measures

As previously stated, the aim of remedial measures in cases of workplace harassment under the Policy and the OHSA is both to redress the harm caused by the harassment, as well as to prevent its recurrence. Set out below are listed a range of measures that might normally be used in response to findings of workplace harassment. Where possible, these have been modified to recognize that the harassment in this particular case was carried out by an elected official. Alternatively, potential challenges associated with the implementation of such remedies are noted.

It is worth noting that the scope of remedial action in cases of workplace harassment may extend beyond measures aimed specifically at the perpetrator of the harassment, to encompass broader steps to ensure a harassment-free workplace. In this regard, Council has already adopted the recommendations contained in the City Clerk's Report entitled "Review of Recruitment and Hiring Processes for Councillors' Assistants" (ACS2020-OCC-GEN-0022), and has also directed that Human Resources Services "establish a point of contact within the HR Programs and Planning Branch to support Councillors' Assistants by responding in an independent, impartial and confidential manner to any inquiries arising from their employment, including but not limited to relevant provincial statutes, by-laws, policies or procedures involving employment matters". These steps, coupled with the other measures adopted at the time of that Report and set out below, effectively encompass the range of broader workplace harassment prevention initiatives that might otherwise be recommended:

- 1. A third party from the Office of the City Clerk or Human Resources shall be present during all interviews for Councillors' Assistant positions;*
- 2. All interviews for Councillors' Assistant positions shall take place in a City facility or by electronic means;*
- 3. The Office of the City Clerk and Human Resources be directed to provide mandatory prevention messaging and information for Councillors' Assistant applicants on where to seek support and redress before, during and after the interview process;*
- 4. Human Resources, in consultation with the Women & Gender Equity Specialist and the Council Liaison for Women and Gender Equity, be directed to develop a mandatory workplace sexual violence and harassment prevention campaign for Members of Council and Councillors' Assistants, to augment the mandatory gender equity, diversity and harassment training session described in Recommendation 1(f) of the staff report;*

5. *Staff be directed to develop and bring forward as part of the 2018-2022 Mid-term Governance Review an anonymous reporting mechanism for the filing of workplace concerns and complaints by Councillors' Assistants or job applicants for Councillors' Assistant positions, similar to that in place at OC Transpo; and*
6. *The Office of the City Clerk and Human Resources be directed to promote an open-door culture, in a manner similar to the "no wrong door" concept, to ensure Councillors' staff and/or applicants for Councillors' Assistant positions are supported no matter how they disclose instances of harassment or violence, in a manner that ensures privacy, confidentiality, compassion and support for survivor-led decision-making as well as awareness of where to seek additional support and how the matter may be addressed through relevant statutory provisions, policies and procedures.*

1. Realignment/Removal of Supervisory Responsibilities

In cases where workplace harassment is perpetrated by a supervisor, an employer may modify the supervisory relationship, both to limit the opportunity for a recurrence of the harassment and also to ensure that employees need not fear reprisals, either through the imposition of penalties - for example through unwarranted discipline, withholding of leave, or poor performance appraisals - or the granting of benefits such as promotions, bonuses, etc.

In the instant case, such a realignment might be achieved by having all personnel decision-making for staff in Councillor Chiarelli's office reassigned. The responsibility for all personnel-related decision-making could be reassigned either to one or more other Members of Council or, alternatively, to the Office of the Clerk, recognizing the existing involvement of the Legislative Services unit in related matters.

2. Training

One notable remedial measure employed in cases of workplace harassment is associated with training. Such training can either be directed at the perpetrator of the harassment, such as general or specific sensitivity training, or to victims of the harassment and others in the workplace, so as to ensure that they are aware of the organization's policies, as well as the avenues and mechanisms available to report and address instances of workplace harassment. In this regard, City Council has already directed the development of "*a mandatory workplace sexual violence and harassment prevention campaign for Members of Council and Councillors' Assistants*" to augment the existing mandatory training, as noted in Recommendation #4, above.

3. Public Reprimand

The special nature of the position held by an elected official has long been recognized as limiting the scope of remedial powers available to the body of which the official is a member, whether that be a municipal council or a federal or provincial legislature. Measures that serve to deprive electors of representation within the legislative body are generally outside of the authority of that legislative body. It is for this reason that it is not open for a municipal council to remove a member from the council, regardless of the member's conduct.

A public body may, however, issue a reprimand or otherwise publicly censure or formally rebuke a member whose conduct runs afoul of the acceptable norms of behaviour.

4. Compensation

In some cases, an independent and arms-length tribunal or arbitration panel with expertise in such matters may award compensation to the victim of workplace harassment where evidence has been presented that the harassment has included such things as a denial of advancement or other monetary loss. The rationale underlying such an award is that the victim should be made whole and compensation serves as the means of redressing the financial loss that has been occasioned by the harassment. That said, broader categories of financial compensation, notably for things like mental distress, are not generally available in respect of workplace harassment, due largely to the fact that these categories of compensation are exclusively addressed under the statutory scheme of the Ontario *Workplace Safety and Insurance Act, 1997*. As with other workplace-related injuries, that statutory scheme operates as a bar to independent legal action by a worker against the employer, as well as other employees or officers of the employer.

A Note on Apologies

"Apologies have been promoted and supported in many jurisdictions as a way to reduce suffering, encourage healing and facilitate dispute resolution." Such was the statement of the Honourable Christopher Bentley, then Attorney General of Ontario, on the introduction of the Ontario *Apology Act*. Given the stated benefits of apologies, the purpose of the *Apology Act* is to obviate the reluctance of a person to apologize for fear of having the apology used against her or him in a legal proceeding. The *Act* therefore deems that an apology does not constitute "*an express or implied admission of fault or liability by the person*" in connection with the relevant matter, and furthermore stipulates that evidence of the apology is not admissible in "*any civil proceeding, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter.*"

There are, however, legal challenges to mandating that a person issue an apology. While requiring the perpetrator of harassment to deliver an apology to victims has historically been viewed as an appropriate remedial measure, courts and tribunals have more recently declined to issue such orders. This is due, at least in part, to concerns regarding the constitutionality of forced expression and considerations of Section 2(b) of the *Canadian Charter of Rights and Freedoms*, namely, the right to freedom of thought, belief, opinion and expression. Furthermore, and perhaps more importantly, the value to victims of an apology that must be extracted from the harasser, and which therefore may not reflect a sincere expression of remorse, is questionable.

As noted above, it is important to distinguish between sanctions that are intended to punish misconduct, and remedial measures directed at preventing a recurrence of the misconduct and ensuring a harassment-free workplace. The courts have made clear that a municipal council's only authority for the imposition of penalties against a member of council resides in Section 223.4(5) of the *Municipal Act, 2001*. This statutory authority can be invoked only in response to a finding by the Integrity Commissioner that the relevant Member has breached the Code of Conduct.

The scope of a municipal council's remedial authority in relation to the conduct of its members has only rarely been the subject of judicial comment. The most notable example comes from the case involving Toronto City Council and Rob Ford, where the court noted the following in respect of what constitutes a true "remedial" action under the *City of Toronto Act* (the COTA):

67. That is not to say that the COTA precludes other remedial measures to carry out the objectives of a Code. For example, the Toronto Code permits the Integrity Commissioner to recommend "Other Actions". Those "Other Actions" include a request for an apology. Such a request is not in and of itself a penalty or sanction. In some cases, an apology would be a reasonable and efficacious way to deal with an infraction of the Code, rather than to penalize with a reprimand or suspension. Similarly, a request to return City property if someone used it improperly may be a remedial measure. We agree with the application judge that a generous reading of the City's power to pass a code of conduct, in accordance with s. 6(1) of the COTA, would support the validity of including remedial measures in such a code. We need not determine the precise ambit of permissible remedial measures in this appeal.

Magder v. Ford (Ont. Div. Ct.)

While the court in the *Ford* case declined to determine "the precise ambit of permissible remedial measures" available, a more recent decision, arising out of the Town of Whitchurch-Stouffville,

provided the courts with an opportunity to elaborate further on what are **not** considered remedial measures:

The offending terms encompass the applicant: restricting the applicant's right to communicate with staff by email only with exceptions authorized by the CAO, that he return his access keys and cards to the municipal facilities and shall have no access to municipal facilities except to pick up Council packages, meetings with constituents, make bill payments, attend council meetings or rent facilities for municipal election purposes. In effect, the offending terms have limited the applicant's ability to be the mayor of the Town and a private citizen of the Town with access to municipal facilities, events and benefits. He is not permitted to attend the library or municipal community centre to take his family swimming, attend a book reading, a blood drive or attend a private party at the municipal building or utilize a municipal building for a private purpose. There are no remedial characteristics in the offending terms. The offending terms do not remedy the failure of the applicant to provide an apology. The offending terms do not remedy the relationship between the applicant and the Town's staff and employees. The offending terms do not provide a remedial path to find a solution to end the applicant's inappropriate conduct to Town staff and employees.

Altmann v. The Corporation of the Town of Whitchurch-Stouffville (OSCJ)

In the case of findings of bullying and harassment perpetrated by the Mayor of Sarnia against several senior staff, Sarnia's City Council in 2016 moved to restrict the Mayor from entering City Hall and from communicating with City staff, other than through an intermediary. Such measures were clearly warranted in that instance by virtue of the nature of the harassment involved, namely, that the Mayor had engaged in "*a course of vexatious comments and conduct which created a poisoned work environment for the complainants*", being the City Manager, the City Clerk, the Director of Planning and Building, and the Director of Parks and Recreation. As a result, there existed a clear nexus between the conduct complained of and the remedial action taken.

Similar measures are not proposed in the instant case, recognizing the specific nature of the complaints involved.

Taken together, the cases cited above suggest that a *caveat* is warranted regarding the range of available remedial options discussed above. Put simply, a remedial measure that requires action by the Member of Council at whom it is directed may be of little effect unless the Member is prepared to voluntarily acquiesce in it. Given that the failure or refusal by the Member to carry out

the Council direction does not, itself, make the Member subject to disciplinary penalty, Council should ensure that any remedial action adopted can be carried out irrespective of the willingness of the Member to accept the action.

In summary, any action taken by City Council in response to the finding of workplace harassment by Councillor Chiarelli under the *Occupational Health and Safety Act* should be rationally connected to the remediation of the harm caused by the harassment and/or the prevention of a recurrence of the harassment, and not be dependent on the Councillor's willingness to accept the measure(s).

David White