

IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996, C. 367

AND

**IN THE MATTER OF A REVIEW OF AN ALLEGATION
OF MISCONDUCT AGAINST**

OF THE

NOTICE OF ADJUDICATOR'S DECISION

TO: [REDACTED] (Complainant)

AND TO: [REDACTED] (Member)

AND TO: [REDACTED] (External Investigator)

AND TO: [REDACTED]

AND TO: [REDACTED]

AND TO: Commissioner Clayton Pecknold
Police Complaint Commissioner

AND TO: [REDACTED]

INTRODUCTION

1. This is a review pursuant to s. 117 of the *Police Act*, R.S.B.C. 1996, c.367 (Act). The review relates to a complaint of misconduct against Constable [REDACTED] of the [REDACTED] Police Department [REDACTED]).

2. On December 22, 2019, [REDACTED] made a complaint to the [REDACTED] that she had been a victim of a sexual assault that had taken place in [REDACTED]. Constable [REDACTED] was assigned to conduct the investigation. After conducting the investigation, he concluded that there was insufficient evidence to recommend criminal charges against a male person who was named by [REDACTED].

3. On February 24, 2020, [REDACTED] made a complaint to the Office of the Police Complaint Commissioner (OPCC) that the investigating officer, Constable [REDACTED] had treated her inappropriately in the manner in which he received her complaint and the manner in which he questioned her. While she did have concerns about the quality of the investigation, her principal concerns related to the manner in which she was treated as a victim of sexual assault. The allegation was that in his treatment of [REDACTED], Constable [REDACTED] committed misconduct pursuant to s. 77(3)(m)(ii) of the Act.

ORIGINS OF [REDACTED] COMPLAINT

4. I will review the evidence within the context of s. 117 of the Act. At the time she made her complaint, [REDACTED] was living in [REDACTED]. The assault she was complaining of had taken place in [REDACTED]. The male person who was the subject of the complaint is a law enforcement officer from another agency. She called the non-emergency line of the [REDACTED]. Constable [REDACTED] responded to her complaint. The interview was both in narrative form and a question and answer form. He asked her what happened. The interview did not start out well. She said that while she was relating the incident, he repeatedly interrupted her. She said that on one occasion she took approximately four seconds to think about an answer, the officer snapped at her and said, "Listen! You have to be straight up and honest with me, you have to answer all the questions that I am asking you." She said the officer interviewed her as though she was a suspect as opposed to a victim. The accusatory nature of his voice changed only when she was too emotional to verbally tell her story. She started to cry. She told Constable [REDACTED] she would send him a written statement by email. In her complaint, she said it was difficult to speak to Constable [REDACTED] because of his "attitude". She asked for a different officer, however, he told her that she could not switch officers and she would have to deal with him (Constable [REDACTED]).

5. Constable [REDACTED] told her that he would contact her upon receipt of her email. He told her that he would reply to her in three or four days. In fact, it took approximately two weeks for him to respond since he was off work for that period of time. As well, he felt that since it was a [REDACTED] complaint, a delay of a few days would not prejudice the investigation.

6. Constable [REDACTED] interviewed the suspect at the Police station where he attended voluntarily. He learned that the parties knew each other and often sent text messages to each other. They had gone out on a previous date. He told Constable [REDACTED] that the couple had gone to the beach where they had a picnic. They returned to his residence where they had sex but that it was "consensual". He also told the officer that he was afraid of losing his job.

7. After interviewing the suspect, Constable [REDACTED] resumed his interview with [REDACTED]. Constable [REDACTED] told her that because the suspect was afraid of losing his job that he (Constable [REDACTED]) "had to take that into consideration" regarding the report. He also told her that it was "unlikely" that the male subject would do this to another female again and that she "ought to be more careful the next time she goes on a date". During the course of his investigation, Constable [REDACTED] had twenty seven pages of text messages between [REDACTED] and the suspect. He had received copies of the text messages from the suspect. In his interview with her, he made reference to the texts. She complained that he read back the text messages that were least in her favour. She felt that the officer felt sympathy for the suspect and that nothing serious had happened to her. At one point, he said to her, "sexual assault is serious", in referring to the suspect's life being affected by her complaint. She felt that she was being challenged coming forward with the complaint. She felt that he had a preconception about women who make complaints leading to sexual assault. He also told her that in the event that she wished to see the copies of the text messages, she would have to "request Freedom of Information".

8. Constable [REDACTED] then sought the advice of senior officers. He told her that he would send his investigative material to another unit. After getting their advice, he told her that there was insufficient evidence to recommend criminal charges against the male subject. He advised her that he was closing the file.

COMPLAINT TO OPCC

9. On February 24, 2020 [REDACTED] complained to the OPCC by way of registered mail. She specifically requested that the matter be reviewed by a retired judge. Her complaint was deemed to be admissible under s. 82(2)(a) of the Act. That section states that a complaint

is admissible if the conduct alleged, if substantiated, constitutes misconduct by the member. Accordingly, the Police Complaint Commissioner directed the [REDACTED] to conduct an investigation.

10. Sergeant [REDACTED] of the Professional Standards Section assumed conduct of the investigation. On May 22, 2020, Sergeant [REDACTED] conducted an audio recorded telephone interview with [REDACTED]. The interview lasted from 7:43 a.m. to 9:02 a.m. [REDACTED], a support person for [REDACTED] was also on the line. Her complaints to Sergeant [REDACTED] relating to the officer's conduct were consistent with her earlier complaints relating to the way she was treated by Constable [REDACTED]. To summarize, she said that he repeatedly cut her off, interrupted her, did not allow her a reasonable amount of time to respond, challenged her to be honest, made statements about the negative impact the investigation would have on the subject male, indicated his sympathy towards the male person, it was unlikely that the subject male would do this to another female again, told her that she should try to be more careful next time she goes on a date and there was an argument about the issue of consent. She also told Sergeant [REDACTED] that Constable [REDACTED] demonstrated bias by making statements that were sympathetic to the male subject.

11. On June 16, 2020, and September 28, 2020, Sergeant [REDACTED] interviewed Constable [REDACTED]. He denied that he was either sexist or discriminatory towards [REDACTED]. In fact, he said he has never had any complaint regarding treatment of females on prior occasions. After the allegation that he did not give her an opportunity to give her account of the events and that he "cut off", he said it is difficult to communicate over the phone and to tell when she had completed a comment. He agreed that he had spoken to her about honesty but he said that he did it in the context that the allegations had serious consequences. Moreover, his comments regarding sympathy towards the male subject, were not meant to indicate sympathy towards him but rather to keep her updated and to let her know what the suspect was going through. In a response to her complaint, that he told her to be careful on future dates, he said that he was discussing a safety plan which is standard practice to assist victims of crime. The issue of consent was raised. He told Sergeant [REDACTED] that it was not his responsibility to define consent although he believed that any reasonable adult would know the definition of consent.

12. During Sergeant [REDACTED] interviews, Constable [REDACTED] also stated that it was not his intention to interrupt [REDACTED] when she was relating the incident but that it is difficult to know over the telephone when a person has finished speaking. As well he said, that when he

warned her about "going on a future date", he did so with a view to give advice to prevent future victimization. When Sergeant [REDACTED] asked him about his alleged comments that "you must be straight up and honest with me because it is very serious that you are accusing him of, it has serious consequences., he could not recollect the exact conversation. He agreed that he snapped at her in response to a comment she apparently made that "all men are manipulative". He said he was offended by that remark. He said that he denied yelling at her over the phone but agreed that he may have spoken in a "firmer tone". he told Sergeant [REDACTED] that she may have misunderstood either his words or the tone of his voice. He told her that he was not going to recommend charges.

FINAL INVESTIGATION REPORT (FIR)

13. Sergeant [REDACTED] examined the relevant parts of the [REDACTED] Policy and Procedure. He stated that in order to substantiate the disciplinary default of "neglect of duty" contrary to the Act, there must be clear and convincing evidence proven on a balance of probabilities that Constable [REDACTED] conduct fell within s. 77(3)(m)(ii). In his report, he carefully went through all the steps that were taken by Constable [REDACTED] in his investigation and concluded that he conducted all "investigative steps in his sexual assault investigation with due diligence and complete thoroughness". Essentially, he concluded that Constable [REDACTED] had taken all necessary steps to conduct a fair investigation. In the FIR, he relied on the law relating to civil standard of proof and concluded that on a balance of probabilities Constable [REDACTED] conduct did not meet the standard of misconduct. On November 7, 2020, Sergeant [REDACTED] completed his final investigation report (FIR) and submitted it to the Discipline Authority.

DISCIPLINARY AUTHORITY

14. Pursuant to s. 112(1) of the Act, the Discipline Authority has a duty to review the FIR. Inspector [REDACTED] was the Discipline Authority. He considered the circumstances including [REDACTED] [REDACTED] initial complaint of December 22, 2019, her initial complaint to the OPCC on February 24, 2020 and Sergeant [REDACTED] report dated November 9, 2020. He then considered the provisions of s. 77(3)(m)(ii) of the Act relating to neglect of duty. He concluded that Sergeant [REDACTED] completed a thorough investigation and analysis of the incident. He examined the scope of the standard Police investigation for a sexual assault investigation and concluded that the conflict in the relative positions of the parties was attributed to a difference of

"interruption and voice tone rather than explicit words or dialogue". On November 24, 2020, Inspector [REDACTED] issued his decision pursuant to s. 112 of Act. He concluded that the allegation of misconduct was not substantiated.

SECTION 117 REVIEW

15. After being apprised of decision of the Discipline Authority [REDACTED] requested that the matter be referred to a retired judge pursuant to s. 117 of the Act. In her complaint to the OPCC, she said that the report that she received from the [REDACTED] was "almost entirely focused on the investigative steps taken by the officer during a sexual assault investigation, which was not the matter of her complaint. Her complaint was about the manner and treatment she received during the investigation. [emphasis added] She felt that the way she was treated by the Police was minimized. It is useful to refer to an earlier email she sent to Sergeant [REDACTED] on August 23, 2020, wherein she stated:

"I do not think my complaint is a matter of taste, feelings, and miscommunication. The definition of bullying is seeking to intimidate someone perceived as vulnerable. Yelling, confronting and expressing rage and resentment for female gender, by an officer to a victim is bullying.

To reclarify, the issue was never just the manner in which he spoke to me but the treatment I have received.

I said it before and I will say again [sic], I know my offender was treated with respect and dignity which has been reconfirmed by Cst. [REDACTED] and I, the victim, have been treated very poorly (as well as having the complaint leading to impunity).

I know that your [sic] are not reviewing the investigation but I would like to mention that Cst. [REDACTED] has interview the rapist's friends as witness but did not care about my witness who is the first person to be made aware of the assault". [sic]

16. A decision of a Disciplinary Authority is subject to review by the Police Complaint Commissioner (see s. 112(5)(b)). The Commissioner concluded that "there is a reasonable basis to believe that the decision of the Discipline Authority is incorrect." He went on to state that:

"Officers investigating sexual assaults have a positive obligations to employ trauma-informed practices in interviews and interactions with survivors of sexual assaults ..."

17. Accordingly, the Commissioner ordered a review under s. 117 of the Act.

THE LAW

18. The law is not in dispute. Pursuant to s. 117 of the Act and the guidance in *Scott v. British Columbia (the Police Complaint Commissioner)*, 2016 BCSC 1970, it is my duty to determine whether the "conduct of the Member ... appears to constitute misconduct". (per s.117(9)) based on a review of the Final Investigation Report, statements of all relevant parties, evidence and records supplied to me. This is not an appeal from any previous finding that a misconduct allegation was not substantiated. In this review, I do not hear live witnesses or consider any additional evidence or submissions by any of the parties. This is commonly called a paper-based review. Moreover, my focus is not on the correctness of an earlier finding but rather, I am to reach my own conclusion about whether the materials support a finding of apparent misconduct. I note that s. 117(1)(b) states that a retired judge conducting the review is to "make her or his own decision on the matter".

ANALYSIS AND CONCLUSION

19. The issue in this review is whether the conduct of Constable [REDACTED] appears to constitute misconduct within s. 77(3)(m)(ii) (*emphasis added*). That Section reads as follows:

"1. *Neglect of Duty* pursuant to section 77(3)(m)(ii) of the *Police Act* by neglecting, without good or sufficient cause, to promptly and diligently do anything that it is one's duty as a member to do."

20. My review of the material discloses the following evidence, which if proven, may have relevance to the question of misconduct raised in this review. I note, of course, that identifying the facts that appear to form the basis of evidence relevant to the allegations, does not result in the conclusion that such facts will ultimately be proven.

21. In her email to Constable [REDACTED] [REDACTED] gave a lengthy, detailed and comprehensive statement concerning the events that lead to the complaint. Since the focus of this review relates to the manner in which the complainant, [REDACTED] was treated, I will not make any lengthy reference to her allegations concerning the event itself. In her statements, she recounts how she was manipulated and intimidated by the suspect into having sexual

intercourse with him without her consent. Having read her lengthy statements, the allegations concerning the event are compelling. She said that she was placed in a compromising position in his residence, felt intimidated, overwhelmed and made it clear to him that she was not consenting to the sexual act.

22. The criminal justice system has historically and justifiably been criticized for the manner in which it has treated victims of sexual assault. It has been said that inappropriate questioning of victims of sexual assault has the inevitable effect of discouraging women from reporting assaults. There appears to be evidence that the officer repeatedly interrupted [REDACTED] although he says that he was seeking an accurate account of what took place and that it was difficult to communicate with her on the phone. In addition, the officer's observations that the suspect was concerned about an adverse effect on his employment and his sleep coupled with the officer's admonition to her that she should be more careful when she goes on dates could allow the inferences to be drawn that [REDACTED] was being blamed and that the Domestic Violence protocols in these circumstances were not being followed.

23. Accordingly, based upon my review of the whole of the material, and the standard of review at this stage of the proceedings, pursuant to s. 117 of the Act, I conclude that the evidence, if proven, would constitute misconduct within s. 77(3)(m)(ii). In addition, the evidence at this stage of the proceedings, based upon the manner in which she was apparently treated by the officer, if proven, would constitute misconduct under s. 77(3)(g) of discourtesy, which is defined in the Act as follows:

"Conduct which is failing to behave with courtesy due in the circumstances towards a member of the public in the performance of duties as a member."

NEXT STEPS

24. As required by s. 117 of Act, I hereby provide notice to Constable [REDACTED] as follows:

25. Taking into consideration the relevant factors of s. 120 of the Act and in particular s. 120(3), I am prepared to offer a Pre-Hearing Conference to Constable [REDACTED] with respect to the misconduct allegations. Accordingly, I am directing Constable [REDACTED] to advise the

Registrar as to whether or not he wishes to accept the offer of a Pre-Hearing Conference. The range of disciplinary and corrective measures set out in s. 126 of the Act, which are relevant in the circumstances of this case, include:

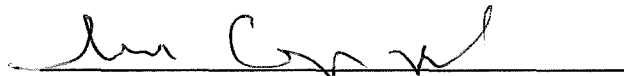
- a) Give the member advice as to his comment;
- b) Reprimand the member verbally; and
- c) Require the member to participate in trauma-informed program(s) and practices with respect to interviews and interactions with survivors of sexual assault.

26. Pursuant to s. 113 of the Act, the Complainant [REDACTED] has the right to make submissions:

- a) At a Disciplinary Hearing under s. 117(8)(v); or
- b) if the member accepts a Pre-Hearing Conference under s. 120(6) of the Act.

27. Pursuant to section 119, at a disciplinary hearing, Constable [REDACTED] may request permission to question witnesses. Such a request must be made within 10 business days of this notification. Any such request will be directed to my attention through the Registrar.

28. Section 118(1) of the Police Act provides that a discipline hearing concerning the substantiated misconduct allegations must be convened within 40 business days of notice of this decision. That date is March 26, 2021.



The Honourable Wally Oppal, Q.C.
Retired Justice of the Court of Appeal for British
Columbia

DATED at Vancouver, British Columbia, this
28th day of January, 2021.