Members Quarterly Spring 2014 Edition

Feature

# Don't Fan the Flames with Workplace Investigations

*Avoid costly damages in the courts*

*Hendrik Nieuwland, LL.B., Senior Partner*

*Brandin O'Connor, J.D., Associate*

In the modern workplace, companies are often faced with the unenviable task of investigating serious accusations against their own employees. Typically, the alleged wrongdoing takes one of two forms: harassment of fellow employees, as in the context of a human rights complaint, or misconduct requiring disciplinary action up to and including termination, as in the case of fraud.

Either type of investigation places intense strain on the employment relationship. However, if the employer fails to act with measured grace under pressure, a court or adjudicator could hand down serious aggravated or punitive awards against the company. Some recent cases have cast light on the type of behaviour that will attract the ire of the courts.

First, a proper investigation provides an opportunity for the accused employee to properly answer the case against him or her – no matter how credible the initial allegations appear to be. In presenting the allegations to the accused, the investigator must be careful to reiterate only the facts without characterizing the allegations. For example, the investigator should state: "The complainant said that last Monday you said the following to her…" The investigator should not state: "You have been accused of sexual harassment".

In *Chandran v. National Bank of Canada*, 2011 ONSC 777, a bank interviewed workers for a survey of employee satisfaction. The bank discovered that many employees considered their supervisor to be a volatile bully. Management began to explore a demotion before it had even interviewed the supervisor, and when it did, it refused to give any examples or details beyond the allegation of "bullying." The bank demoted the supervisor. Litigation ensued and a court found that the employer had reached damning conclusions without the benefit of a proper investigation. In the circumstances, the employee could not properly answer the allegations. The result of this botched investigation was a finding that the supervisor had been constructively dismissed.

In *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112, a supervisor at Home Hardware was accused of sexual harassment. He was immediately suspended without being told why; the investigator simply quipped "you know what you did." The supervisor was not allowed to gather his belongings, some of which were lost, and learned only later through his son – also an employee – that he had been accused of sexual harassment. The complainant in this case was an employee that the supervisor had previously reassigned to a new work area in order to address certain performance issues and separate her from her boyfriend. She vowed to get even. Unfortunately for the supervisor, the complainant's father was the manager and the manager decided to appoint his long-time friend to investigate the allegations. The friend had little experience investigating harassment.

Members Quarterly Spring 2014 Edition

## Feature

This leads to our next point: an investigator should be experienced and impartial. Bias may be actual or perceived – in the Home Hardware case it was both. The investigator failed to explore concerns that the allegations were retaliatory and declined to interview any number of employees who had signed a petition in support of the supervisor. The investigator refused to let the supervisor's lawyer attend the interview and later admitted this was because he was hoping to obtain a confession. In ensuing litigation the supervisor was cleared of any misconduct and, unsurprisingly, he walked away with $75,000 in punitive damages.

Even experienced investigators must guard against preconceived notions about an employee's guilt. In *Chapell v. Canadian Pacific Railway*, 2010 ABQB 441, the Director of Human Resources investigated allegations of fraudulent expense claims by one of the railway's employees. The employee was fired. However, the alleged "fraud" involved only a handful of irregularities in almost 2,200 expense claims. The employee explained, quite credibly, that he had simply made mistakes. Unfortunately, the internal investigator became pre-occupied with unrelated past conduct (an off-site altercation involving alcohol) and engaged in offensive speculation about the employee's financial obligations to his family and whether he was an alcoholic. The investigator's bias culminated in an attempt to unfairly "blind-side" the employee during his interview, ambushing him with dozens of new impugned expenses for which he had no previous notice.

The railway's biased investigation cost the company $20,000 in punitive damages at trial. Particularly troubling was that the investigator had attempted to access confidential personal records from the Employee Assistance Program. In this case, that attempt simply factored into bad faith damages for wrongful dismissal, but it now appears that such behaviour could constitute a tort action for breach of privacy.

A recent arbitral decision, *Alberta v. AUPE,* [2012] A.G.A.A. No. 23, interpreting Ontario's new privacy tort of "intrusion upon seclusion", suggests that employers may be liable when their investigators breach employee privacy by using or disseminating sensitive information obtained by virtue of the employment relationship. The test is whether intentional conduct on behalf of the employer causes an unjustified invasion into the employee's private affairs such that a reasonable person would regard it as causing distress, humiliation or anguish. The invasion must be "highly offensive." Sensitive information could include health records, sexual practices and orientation, personal finances, a diary or private correspondence. In this particular case, an overzealous police detective was assigned by the Alberta government to investigate fraud. He used confidential employee information to obtain credit checks against dozens of government employees. Fortunately, the government was apologetic and proactive following the breach, so the damages awarded by the adjudicator were nominal.

In most workplaces, investigators are never actual police officers, but they can be overzealous. Investigators sometimes overstate their case and threaten to involve police in an attempt to intimidate employees. It is an abuse of process and potential extortion to threaten criminal charges to obtain a resignation or release. Further, if charges are laid, an employer must provide any exculpatory information to the police or face potentially devastating civil liability for malicious prosecution: see *Pate v. Galway-Cavendish*, 2013 ONCA 669.

A proper workplace investigation will allow an employer to make the right decisions and move forward. However, a negligent investigation will be frustrating, disruptive and costly. Employers should carefully consider the scope of an investigator's mandate and ensure that the values of procedural fairness, impartiality and confidentiality are observed in any investigation.

Members Quarterly Spring 2014 Edition

## Feature

*Hendrik Nieuwland is a partner and Brandin O'Connor is an associate with the employment litigation firm Shields O'Donnell MacKillop LLP of Toronto.*