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Navigating workplace investigations Part 3: Lessons learned: Navigating workplace investigations through case law perspectives

Grow | Protect | Operate | Finance

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Neutrality in workplace investigations

Alison Walsh

Neutrality in workplace investigations

- Key principle: Investigators must maintain their objectivity and neutrality throughout an investigation.
- This requires an investigator to keep an open mind and to not pre-determine any issue before the investigation is concluded by:
 - Presenting themselves in a neutral manner; and
 - Gathering all relevant evidence and information before adopting any particular view of the case.

Neutrality in workplace investigations

Watson v Law Society of Ontario, 2023 ONSC 1154

- Watson was a lawyer facing serious allegations from a former client that he had misappropriated trust fund and altered corporate documents.
- After an investigation by the Law Society, the matter proceeded to a disciplinary hearing which lasted over 56 days before the hearing panel dismissed all charges against Watson. In turn, Watson sought his costs.
- In assessing the cost appeal, the court noted numerous problems with the investigation, including that the investigator:
 - refused to interview witnesses suggested by Watson;
 - failed to acquire all of the relevant documents in order to assess the reliability of the allegations;
 - filed the final investigator report a month before the investigator interviewed Watson;
 - failed to put many of the negative conclusions made in the report about Watson's conduct to him;
 - failed to put information and documents provided by Watson to the complainant.

Neutrality in workplace investigations

Watson v Law Society of Ontario, 2023 ONSC 1154

- The court also found:

“The investigation was one-sided, seeking to confirm the allegations made without approaching the issues with an open mind and looking for evidence to confirm and/or refute the positions taken by both sides”

“Testing the veracity of the complainant by reference to corporate documents and communications between the parties is part of a competent investigation and must be undertaken for the investigation to accord with principles of procedural fairness. Merely taking the complainant’s word at face value without testing it by reference to documents other than the ones she herself provided, is not consistent with procedural fairness.”

“the Law Society’s investigator and its in-house counsel...appeared to be fixated on finding support for Ms. Sweeney’s claims, rather than towards testing their truth and the truth of explanations put forward by Mr. Watson”

- Appeal was granted and a new hearing on Watson’s costs was ordered.

Neutrality in workplace investigations

Watson v Law Society of Ontario, 2023 ONSC 1154

- Key Takeaways:
 - Investigators have a duty to approach an investigation with an open-mind and not prejudge the complaint.
 - The purpose of an investigation is not to find support for one party's position, but to look for evidence to confirm and/or refute the positions taken by both sides.
 - Findings should not be made until all that evidence has been review, i.e., parties and witnesses interviewed, documentary evidence obtained and reviewed, and parties given the opportunity to respond to facts that will be relied upon by the investigator.

Neutrality in workplace investigations

Disotell v Kraft Canada Inc., 2010 ONSC 3793

- Plaintiff alleged he was a victim of repeated harassment in the workplace which created a poisonous work environment and his constructive dismissal.
- Kraft commenced an investigation into the Plaintiff's complaints of harassment.
- Kraft's investigation guidelines provided that the investigator must:
 - "Remain neutral until all facts are in and be considerate of the feelings of both parties".
- Notwithstanding the guidelines, the court found investigation was very limited and rejected the conclusions of the investigator:
 - Investigator accepted the evidence of one supervisor that harassment consisted of one incident that was just "kidding" without further investigation.
 - Investigator did not interview the alleged harassers or potential witnesses.
 - Investigator justified interviewing no-one else on the basis that the supervisor was "an experienced and respected shift leader".

Neutrality in workplace investigations

Disotell v Kraft Canada Inc., 2010 ONSC 3793

- In particular, the court found that the investigator was influenced by her relationship with the supervisor:

“The H.R. investigation, in my opinion, demonstrates the inherent difficulty of in-house investigations between employees of longstanding relationships, especially when there are conflicting reports between supervisory and first level employees. Kraft has clearly invested much time and effort in creating and disseminating a zero-tolerance harassment policy. That policy however is only as effective as the individuals who administer it.”

“Faced with the serious and repetitive allegations made by the Plaintiff against four named employees and given the knowledge of one substantiated complaint that two of the named individuals had committed conduct sufficiently serious that a supervisor verbally reprimanded them, the conduct or conclusions of H.R. were not “neutral”. All the facts were “not in”, as none of the four alleged perpetrators or other floor employees were interviewed as is clearly contemplated in the Guideline’s reference to “both parties”, namely the harasser and the harassed.”

- The court accepted that the employer had “not conduct[ed] a serious investigation” and that the seriousness of the repeated derogatory comments created an environment where the complainant was left with no choice but to accept that his employment had been constructively dismissed.
- Complainant was awarded damages for wrongful dismissal.

Neutrality in workplace investigations

Disotell v Kraft Canada Inc., 2010 ONSC 3793

- Key Takeaways:
 - Using internal investigators with a pre-existing relationship can impact their ability to approach an investigation impartially.
 - When choosing an internal investigator, they should not work closely with any of the parties involved.
 - If an impartial internal investigator is not available, consider whether you need to hire an external investigator.

Neutrality in workplace investigations

How can you present yourself in a neutral manner?

- Establish a professional and courteous demeanour when interviewing the parties or any other witnesses.
- When conducting interviews, refrain from expressing your opinions, emotions or judgment and act neutrally to all testimony.
- Avoid phrasing your questions in an accusatory way or in a way that suggests you have already reached a conclusion.
- Do not make any findings until all that evidence has been collected and reviewed.
- Keep an open mind by listening and considering the position of each of the parties throughout the entire investigation process.

An aerial photograph of a coastline featuring golden sand dunes and blue ocean waves. A large, semi-transparent purple shape is overlaid on the left side of the image, containing the text.

Privacy issues

Victoria Merritt

Confidential, sensitive, privileged, private?



CONFIDENTIAL



Privilege

In 2 minutes or less...

- Privilege needs to **asserted** and **protected**, operates to exclude documents that would otherwise be producible
- Types of privilege:
 - **Solicitor-client**: applies to communications that are **between solicitor and client**; entail the seeking or giving of **legal advice**; and are **intended by the parties to be confidential**.



Lawyer ≠ solicitor-client privilege

- **Litigation privilege**: documents or communications created for the **dominant purpose** of preparing for existing or anticipated litigation.

Privilege

Masse v TerraFarma Inc., 2024 ONSC 789

- Chief Commercial Officer terminated for **just cause** following investigation
- Investigation conducted by investigator who produced a 755-page report with appendices
- Issue was whether privilege over legal advice had been waived by disclosure of a comment made in the workplace investigation report
- Ultimately, no waiver

Takeaways?

- Investigation report might be **valuable evidence** in legal proceedings to help support employment decisions, particularly termination for just cause!
- Privilege can be waived inadvertently

Disclosure in legal proceedings

- Legal proceedings can include:
 - Wrongful dismissal or other civil lawsuits
 - Police investigations/criminal matters
 - Professional regulatory investigations
 - Workers' compensation/OHS issues or investigations
 - Human rights complaints
 - Employment standards complaints

Disclosure in legal proceedings

- What must be disclosed in these proceedings? What's the scope of authority to compel disclosure?
- What protections exist for documents disclosed?
- What other methods can be used to protect privacy?

Disclosure in legal proceedings

Stankovic v City of Edmonton et al., 2023 AHRC 72

- HR complaint alleging discrimination in employment based on mental disability
- Complainant suspended from work and placed on paid leave of absence pending the investigation into a workplace complaint made against him
- Part of Complainant's allegations were that the conduct of the investigation of the workplace complaint & the process used by the City of Edmonton in conducting the investigation led to discrimination against him
- **Issue: what had to be disclosed in the HR proceedings?**
- Tribunal reviewed its “**broad authority to compel production of documents**” under the applicable statutes and considered the **relevance** of the documents

Disclosure in legal proceedings

Stankovic v City of Edmonton et al., 2023 AHRC 72

- Two additional issues:

(1) Complainant wanted to disclose documents to Inclusion Alberta

Tribunal granted this request on the basis that Inclusion Alberta would play an “active role” in the hearing of the complaint and that Inclusion Alberta should be granted access to the disclosure so it could assist the complainant (who had a cognitive disability).

Documents at the hearing stage are not reproduced in the public sphere and Inclusion Alberta prevented from publishing, reproducing or disclosing information.

(2) Employer argued that privacy legislation meant the documents that contained personal information were protected from disclosure.

Tribunal pointed out it could not verify whether personal information was contained; regardless, privacy legislation allowed the disclosure of personal information for litigation purposes.

Disclosure in legal proceedings

Cherkashyna v. Madd Pizza Company Inc. dba Domino's Pizza and others,
2023 BCHRT 69

- Allegation that Domino's discriminated against employee by failing to investigate her harassment complaint and terminating her employment
- In its application to dismiss the complaint the employer sought to defend itself on the basis it had completed a "full investigation" and produced a copy of internal investigator's notes
- What was its "full investigation?"

Disclosure in legal proceedings

Cherkashyna v. Madd Pizza Company Inc. dba Domino's Pizza and others,
2023 BCHRT 69

...Mr. Dobb's notes on his "investigation" are **undated and brief**. They do not provide me with any sense of what his response to Ms. Cherkashyna's allegations involved, including an understanding of how he conducted what he refers to as a "full investigation." His notes include a list of employee names, who he says he interviewed. However, there is **no indication of what questions were put to any of these witnesses**, or **any indication of whether Ms. Cherkashyna was asked about their responses or given an opportunity to provide additional details on her complaint**. Without additional evidence on the steps Mr. Dobb took to address the allegations, I cannot comment on whether the Respondents have a proper understanding of discrimination, whether they treated the allegations seriously and acted sensitively, and whether the complaint was resolved in a manner that ensured a healthy work environment, **factors that would weigh in favour of the Respondents on this issue**.

Access to information requests

Public Service Agency (Re), 2023 BCIPC 89

- Conservation Officer who had to respond to a wildlife conflict between a human, mother bear & her cubs – decision was made to euthanize the momma bear, but not the cubs.
- Workplace investigation resulted in CO being transferred to a different position.
- Request made by CO under FIPPA for access to information about the investigation
- 402 pages of records relating to the workplace investigation
- PSA withheld records on basis of:
 - S.13(1) – that information in the “Confidential Workplace Assessment Report” would reveal **advice prepared for a public body** in relation to how to respond to a workplace situation (upheld)
 - S.22 – that disclosure of personal information (largely in interview transcripts) would be an **unreasonable invasion of a third party’s privacy** (upheld)

Access to information requests

Public Service Agency (Re), 2023 BCIPC 89

- Conclusion: disclosure of any of the third-party personal information constitutes an unreasonable invasion of their personal privacy
- One of the tests is if information was “supplied in confidence”:

I have reviewed the interview transcripts and am satisfied **the interviewees were advised at several points that the investigation was confidential.** I am also satisfied **the interviewees were encouraged to speak openly and honestly.** For these reasons, I find the **interviewees supplied the personal information in confidence.**
- The investigator’s conclusions about credibility of witnesses interviewed also protected against disclosure on the basis it would disclose personal information about third parties relating to their employment/occupational history.

Access to information requests

Revelstoke (City) (Re), 2023 BCIPC 33

- Applicant (former employee) requested copy of a workplace investigation report dealing with allegations of harassment prepared by an outside consultant for the City of Revelstoke
- City engaged a lawyer, lawyer hired a 3rd party investigator who provided a copy of the report to the lawyer. The lawyer used the report to inform their advice to City Council.
- City disclosed the report but redacted majority of information based on:
 - **Solicitor-client privilege** – PC only found some of the information was protected by legal advice privilege, while other information was of a “generic character” that did not reveal advice.
 - **Policy advice or recommendations** – PC confirmed that the Report’s conclusions and summary “consists of factual information compiled and selected by an expert in workplace investigations, the Consultant. It sets out her interpretation of the evidence. The conclusions and summary also lead directly into the recommendations on the next page; the recommendations flow logically from them.” [But, heading “Recommendations” ordered to be disclosed.]

Access to information requests

Revelstoke (City) (Re), 2023 BCIPC 33

- **Unreasonable invasion of third-party personal privacy** – majority of information in Report redacted on that basis, this redaction/non-disclosure upheld by PC.
- Again, third parties supplied personal information in confidence: “complaint process generally was understood by the participants to be confidential.”
- Policy stated: “*Confidentiality will be maintained to the extent possible to encourage employees to come forward. It is the responsibility of all parties involved to respect this intent of confidentiality.*”
- Way the City treated the personal information affirmed confidential nature (i.e., report marked “PRIVATE & CONFIDENTIAL” on its cover and on each of its pages).
- Information also determined to be sensitive in nature: “It was supplied or created for the sole purpose of conducting a confidential workplace investigation. It contains allegations of wrongdoing and descriptions of private workplace encounters. I therefore conclude that this factor weighs against disclosure.”

Access to information requests

Thompson Rivers University (Re), 2023 BCIPC 84

An instructor at Thompson Rivers University (TRU) requested a copy of a report into the investigation of a workplace complaint against him.

TRU withheld the entire report under:

- s. 13(1) (advice and recommendations)
- s. 22(1) (unreasonable invasion of third-party personal privacy)

The adjudicator found that ss. 13(1) and 22(1) applied to some of the information but ordered TRU to disclose the remainder.

Access to information requests

Thompson Rivers University (Re), 2023 BCIPC 84

- TRU argued: “While an investigation report is not always explicitly framed as advice, it is fundamentally a recommendation and advice to an employer about questions including: whether or not they should accept an allegation as true, whether they should take action on it, and whether it amounts to violation of law, policy or other employment obligations.”
- This argument was accepted by PC: “the purpose of the Report was to inform TRU’s decision about the complaint of workplace harassment it received.”
- Term of Reference?

The report will include a summary of the allegations; evidence considered; any assessment of credibility that is required to render a determination; the findings of fact; and a determination of whether there has been a breach of applicable TRU policies, Article 9 of the TRU Faculty Association Collective Agreement and/or the law ("Confidential Investigation Report").

Although the Investigator will make findings of fact based on the investigation, the final determination with respect to the appropriate response to the Complaint rests solely within the discretion of TRU.

Access to information requests

Thompson Rivers University (Re), 2023 BCIPC 84

- But following information did not constitute “advice or recommendations” and was directed to be disclosed:
 - the purpose of the Report;
 - who the Report is by and for;
 - description of the complaint process;
 - a summary of the complaint;
 - a factual description of some of the evidence;
 - and direct quotes from the social media posts.
- TRU also tried to rely on “investigation into a violation of law” on the basis the *Workers Compensation Act* requires investigations into B&H...but: “While investigations pursuant to the WCA may fall within the provision of s. 22(3)(b), **nothing before me indicates that the Report at issue was the result of an investigation under the WCA.** The text of the Report does not mention the WCA in any respect. I also note that the terms of reference do not include any mention of the WCA.”

Access to information requests

Thompson Rivers University (Re), 2023 BCIPC 84

- TRU successfully relied on “**unfair harm**” to weigh in favour of non-disclosure
 - Evidence that disclosure of the information could cause harm to the employees by causing stress and anxiety, as applicant had history of retaliation/criticizing co-workers publicly
- Summary: “I have found that the employees supplied their statements in confidence in accordance with s. 22(2)(f). I have also found that disclosure of the statements may cause the employees to suffer unfair harm in accordance with s. 22(2)(e) and may damage their reputations in accordance with s. 22(2)(h). Similarly, I find that, given his previous actions, it is likely the intent of the applicant to publicize this personal information of the employees. These are relevant circumstances favouring withholding this information.”

TL; DR?

- Many, many different forums in which workplace investigation reports or other documents may ultimately be disclosed or demanded
- Jurisdiction specific, need specific advice
- Many ways to protect information, both proactively & after the fact:
 - Redaction
 - Multiple reports
 - S/C privilege (assert & protect!)
 - Protections inherent in certain proceedings
- Remember: ultimately, your investigation report – especially if drafted with privacy considerations in mind – may be a useful tool to demonstrate compliance & support decision-making!

“An assurance of confidentiality is not a veto on disclosure. There can be no absolute guarantee of confidentiality...”

An aerial photograph of a coastline featuring golden sand dunes and blue ocean waves. A large, semi-transparent purple shape is overlaid on the left side of the image, containing the text.

The duty of care in workplace investigations

Cristina Wendel

Are employers liable for negligent investigations?

Salina v Investors Group Financial Services Inc., 2023 BCSC 86

Facts:

- The Plaintiff worked for the Defendant for 27 years as a consultant investment advisor.
- The Defendant was a member of the Mutual Fund Dealers Association of Canada (MFDA), a self-regulatory body for mutual fund dealers.
- A 2002 consulting agreement between the Plaintiff and the Defendant expressly incorporated the MFDA rules as a term.
- In 2016, the MFDA initiated an investigation of the Plaintiff relating to certain investment consultation services he had provided to one of the Defendant's clients, a 95-year-old woman.
- In 2018, the Defendant terminated the Plaintiff's relationship with it for cause.
- The Plaintiff commenced a wrongful dismissal action against the Defendant.

Are employers liable for negligent investigations?

Salina v Investors Group Financial Services Inc., 2023 BCSC 86

Facts:

- In 2021, the Plaintiff amended his claim to raise new allegations, including a claim of negligent investigation.
- In 2022, the Plaintiff and the MFDA entered into a settlement agreement in the MFDA investigation into his conduct. In this agreement, the Plaintiff made several admissions including:
 - That his recommendations to the client gave rise to a conflict of interest that he had not addressed; and
 - That he had failed to disclose to the Defendant that he was the beneficiary in a deceased client's will;
 - That he had obtained 24 pre-signed account forms for 13 clients.
- All of these admissions involved conduct that was contrary to the Defendant's policies and procedures, as well as the MFDA Rules.
- The MFDA described the Plaintiff's conduct as misconduct, and in some instances "serious misconduct".

Are employers liable for negligent investigations?

Salina v Investors Group Financial Services Inc., 2023 BCSC 86

Issues:

- The Defendant applied to have some of the Plaintiff's claims struck for failing to disclose a reasonable claim, being bound to fail, and/or being an abuse of process.
- The Plaintiff conceded the Defendant did not owe him a duty of care in respect of information provided to the MFDA.
- The Plaintiff maintained that the Defendant owed him a duty of care in obtaining information that formed the basis of the decision to terminate him.
- His claim alleged that the Defendant negligently conducted its internal investigation.

Are employers liable for negligent investigations?

Salina v Investors Group Financial Services Inc., 2023 BCSC 86

Decision:

- The law is clear that there is no liability in tort for an employer conducting a negligent internal investigation into an employee's conduct.
- The court did not accept the Plaintiff's argument that the circumstances of this case were different and analogous to cases where the tort of negligent investigation had been recognized for police officers investigating suspects.
- The court considered whether the Defendant owed the Plaintiff a duty of care in respect of its investigation, applying the classic two-part test:
 - Does the relationship between the Plaintiff and Defendant disclose sufficient foreseeability and proximity for a *prima facie* duty of care?
 - If so, are there policy considerations that should negate or limit that duty of care?

Are employers liable for negligent investigations?

Salina v Investors Group Financial Services Inc., 2023 BCSC 86

Decision:

- The court struck the Plaintiff's claims of negligent investigation as they did not disclose a cause of action.
- It was not disputed that it was reasonably foreseeable that the Plaintiff could face discipline and other financial consequences as a result of a negligently conducted investigation.
- The courts had previously reviewed the policy considerations, finding that no duty of care was owed to an employee by an employer who conducted a negligent investigation of the employee's conduct.
 - Public policy favours the reporting of wrongdoing, even where the report may be mistaken.
 - The court was concerned that recognizing a duty of care could create a potential chilling effect on reports of criminality by honest citizens.
 - "Someone not in the business of private investigation who honestly, even if mistakenly, provides information of criminal activity should be protected."

Are employers liable for negligent investigations?

Salina v Investors Group Financial Services Inc., 2023 BCSC 86

Decision:

- Imposing a duty of care on the employer in these circumstances would be inconsistent with established employment law principles.
 - It would essentially allow for an action in tort for breach of good faith and fair dealing, something that the Supreme Court of Canada has expressly rejected.
- The Court noted that these policy considerations may not necessarily apply to:
 - An individual decision maker alleged to have been guilty of malicious investigation; or
 - An investigation firm because the public policy considerations are different for an investigation firm that is in the business of investigating and performing functions analogous to the police.

Are investigators liable for negligent investigations?

Mezikhovych v Kokosis, 2022 ONSC 6480

Facts:

- The Plaintiff was employed as a personal support worker.
- She raised a harassment complaint with her employer against a Director.
- The Defendant was a lawyer who had been retained by the employer to investigate the complaint. She investigated and concluded there was no inappropriate behaviour.
- The employer subsequently terminated the Plaintiff for not providing some requested medical documentation.
- The Plaintiff started a wrongful dismissal action against her employer, but also started this action against the Defendant asserting the Defendant had conducted a poor investigation which resulted in the Plaintiff's employment being terminated.
- The Defendant applied for summary judgment.

Are investigators liable for negligent investigations?

Mezikhovych v Kokosis, 2022 ONSC 6480

Decision:

- The Defendant's application was granted as the court found there was no genuine issue requiring a trial.
- The court decided the application focusing on the Defendant's status as a lawyer.
 - She was not retained by the Plaintiff.
 - This situation did not fall within the very limited set of circumstances where a lawyer owes a duty to a non-client.
- The fact the Plaintiff was unhappy with the results of the investigation did not give rise to a cause of action. There were no exceptional circumstances in which the Defendant could be held to owe the Plaintiff a duty of care.

Thank you



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