

# Duty of Procedural Fairness in Workplace Investigations

Case Law Update

Pam Costanzo, Young Anderson

# Background

Past CLEs considering this issue:

- Employment Law 2015: Workplace Investigations: Case Law Update (Eastwood)
- Human Rights Law 2017: Workplace Harassment Investigations: an Update (Beharrell and Plomp)

# CLEs: 2015 and 2017

- an inadequate investigation is not, on its own, a basis for awarding damages in wrongful dismissal cases. However, judges may be more likely to find an employer did not have cause and award damages for the manner of dismissal.
- flawed investigations – particularly failing to give an employee a chance to respond to the allegations against them – may make it difficult to allege cause for termination.
- arbitrations may invalidate discipline due to a failure to follow procedural requirements in collective agreements.
- if human rights grounds are included in a complaint, a failure to investigate can be a breach of the Human Rights Code.

# 2015 CLE

“Given the recent Supreme Court of Canada Decision in Bhasin, it seems likely that Canadian courts will also continue to carefully scrutinize the conduct of employers during workplace investigations, and the process in the investigation itself.”

# Golob v. Fort St John, 2021 BCSC 2192

- Former Deputy Fire Chief subject of complaint
- City investigated but never told him
- Procedure followed wrong policy
- Termination letter said he breached City policy
- Refused to provide reasons in termination meeting

# Golob v. Fort St John, 2021 BCSC 2192

Paras. 41-45:

...no duty of procedural fairness is owed by an employer to an employee where the employment relationship is governed by a contract...

...in spite of my criticisms of the investigation, and strong views that it was deeply flawed, such considerations are irrelevant...

# Golob v. Fort St John, 2021 BCSC 2192

Relies on Vernon v. BC Liquor Distribution Branch, 2012 BCSC 133

- 30 year employee, no history of discipline, positive record of employment
  - investigation conducted by the LR Advisor who had advised her on the complaint
  - report contained mistakes and lead to the decision to terminate Ms. Vernon.
  - other procedural flaws were reviewed including evidence that people who gave evidence in favour of Ms. Vernon were yelled at and accused of lying.
-

# Vernon v. BC LDB, 2012 BCSC 133

- The unfair investigation, however, does not give rise to aggravated damages...The foundation of the claim for aggravated damages is the manner of dismissal.
- She was told she was an embarrassment
- Then suspended without pay for six weeks before termination
- Aggravated damages for mental distress: \$35,000
- Punitive damages: \$50,000 for reference letter offer



# Lightstream Telecommunications v. Telecon, 2018 BCSC 1940

- Breach of services agreement, not a wrongful dismissal
- Mr. Wray accused of theft from Telecon warehouse
- Telecon barred Wray and sent them no further work
- No explanation sought from Lightstream or Wray
- Plaintiffs claimed Telecon breached their duty of good faith (*Bhasin v. Hrynew*, 2014 SCC 71)

# Lightstream v. Telecon

- No contract between Wray and Telecon
- “Telecon owed Lightstream a contractual duty of honesty and good faith...Telecon’s substandard investigation of Wray...was a breach of Telecon’s implied contractual duty of good faith.”
- Damages awarded for loss of work
- No claim of aggravated damages by Lightstream
- Conduct did not merit punitive damages

# McGraw v. Southgate 2021 ONSC 7000

- Ms. McGraw terminated without cause
- Township argued it did not act in bad faith because we believed rumours about her were true
- CAO investigation was flawed
- Ms. McGraw never interviewed
- Court determined that rumours were “mostly unfounded, malicious, sexist falsehoods”

# McGraw v. Southgate 2021 ONSC 7000

\$75,000 compensatory damages (mental distress)

\$35,000 damages for a breach of the Human Rights Code

\$20,000 damages for defamation

\$60,000 in punitive damages - awarded because rumours were inflated to justify termination

# Teamsters v. CN Railway, 2021 SKCA 62

- Union member terminated for offensive online comments
- Grievance upheld due to procedural flaw in investigation
- Collective agreement required disclosure of all evidence
- “Extraordinary turn of events”: disclosure provided ahead of arbitration included previously undisclosed complaints
- Article is the “basis for a ‘fair and impartial’ investigation, a precondition to the assessment of discipline against any employee.”

# Teamsters v. CN Railway, 2021 SKCA 62

- Standards adopted by the parties are mandatory
- “Integrity of the investigation process...bears directly on the integrity of the expedited form of arbitration.”
- Decision is rooted in specific industry case history, not general legal principles
- Focus is on CROA system, not case specific concerns

# Squamish v. CUPE, 2020 CanLII 34506

- Harassment complaint by HR Advisor against Union President
- External investigator retained in August
- Union asked for the complaint, particulars, and some changes to the terms of reference in September
- Respondent would not confirm participation
- Union grieved delay, lack of particulars in October
- Respondent went off on medical leave

# Squamish v. CUPE

- More detailed particulars provided in December
- Interview conduct in January
- Employer asked Respondent to review report and respond
- Union demanded Employer act on the findings
- Both claimed procedural fairness at stake
- Arbitrator found delay arose from both parties, and there was no evidence of prejudice to the Respondent



# *Jamal v. Translink Security*, 2020 BCHRT 146

- Application to dismiss
- Complaint that the investigator relied on myths about women who experience sexual harassment
- Internal investigator named personally with allegations about: “how he chose to conduct his investigation and whether he treated Ms. Jamal adversely in the course of that investigation because of myths, stereotypes, or misconception about her gender and place of origin/ancestry.”

# Jamal v. Translink Security, 2020 BCHRT 146

- Failing to investigate complaints appropriately can be discrimination under the Code, whether or not the conduct being investigated was found to be discriminatory
- Factors:
  - does the investigator understand discrimination;
  - does the employer treat the allegations seriously;
  - was the complaint resolved in a manner that ensured a healthy workplace?



# Conclusions

- Breaching procedural requirements in a collective agreement may invalidate discipline
- A failure to investigate or a biased investigation may breach the Human Rights Code
- Still advise employers they can't know if they have cause without a proper investigation