

Broken Promises: The Perils Of Guaranteeing Anonymity To Complainants In Workplace Investigations



At the outset of an investigation, a complainant may ask whether their identity will be disclosed to the person who is the subject of the complaint (the “respondent”). Investigators need to be careful about how they answer that question. On the one hand, telling the complainant that their identity cannot be protected risks scaring them away – they may decline to engage in the investigation process. On the other hand, guaranteeing anonymity is problematic, as explained below.

So, how should an investigator respond when asked by a complainant whether their identity will be disclosed to the respondent? I’ve addressed this question in this blog.

Avoid guarantees of anonymity

The starting premise is that, generally, investigators should not give complainants an absolute guarantee that their identity will be protected. The reason for this is simple: it is not a promise that an investigator knows with certainty that they can keep. A recent Ontario court decision illustrates this.

In *Jarvis v. The Toronto-Dominion Bank*¹, the employer terminated an employee with cause (the “plaintiff”). The plaintiff sued the employer for wrongful dismissal. In its statement of defence, the employer relied on its investigation into three complaints made by other employees (one of whom was a whistleblower) about the plaintiff’s conduct. The plaintiff asked the employer to produce the investigation reports, which they did, but redacted the reports to remove names and identifying information of the complainants and other individuals mentioned in the reports. The plaintiff brought a motion to seek production of the unredacted reports.

The court acknowledged that the complainants and whistleblower no doubt delivered their complaints expecting them to remain confidential; the court noted, specifically, that the whistleblower used a process that allowed complaints to be made anonymously. However, the court went on to state, citing from another case: “But a promise of confidentiality does not protect the communication from disclosure.” The court ordered that the unredacted reports be produced, noting, in part, that the correct outcome of the litigation outweighed any interest in protecting the identity of those involved.

Instead of guaranteeing anonymity, investigators should assess whether the investigation can be conducted without disclosing the identity of the complainant to the respondent and have a frank discussion with the complainant about this.

Assess whether anonymity is possible

Investigators should assess whether it is necessary to disclose the identity of the complainant to the respondent. To do so, investigators should consider the context of the case, and any applicable policies.

There are cases in which the interest of fairness will require that the identity of the complainant be disclosed to the respondent. This is usually when the complainant has alleged that the respondent engaged in wrongful conduct against them specifically; for example, a case in which the complainant alleges that the respondent sexually harassed them during one-on-one meetings. In such a case, it would be difficult for the respondent to respond to the allegations without knowing who they are alleged to have harassed.

An organization's policies could also make the disclosure of the complainant's identity inevitable; for example, if a policy requires that a complainant's written complaint be provided to the respondent at the outset of the investigation.

This is in contrast to cases where the organization's policies or the interest of fairness do not require that the name of the complainant be divulged. These are usually cases where the identity of the complainant is not material to the allegations; in other words, when the alleged behaviour is not specific to the complainant. This could be a case, for example, where the respondent was said to have told a lewd joke during a meeting which many people attended. In such a case, divulging the name of the person who came forward may not be necessary for the respondent to have a fair opportunity to respond to the allegations. Conflict of interest allegations can also fall in this category – for example, an allegation that the respondent awarded a contract to a family member.

Have a frank discussion with the complainant

If the circumstances of the case require that the identity of the complainant be disclosed, for one of the reasons noted above, then the complainant should be advised of this, and be provided with an explanation as to why the disclosure of their identity is necessary. It is then up to the complainant to decide what their involvement in the investigation process will be.

If the investigator believes that the investigation can be conducted fairly without disclosing the identity of the complainant to the respondent, the investigator should communicate this carefully to the complainant. By carefully, I mean that the investigator should explain to the complainant that, while the investigator will do their best not to divulge the complainant's identity, this is not an absolute guarantee that their identity will remain unknown to the respondent. In other words, the investigator should be transparent with the complainant about the risks that their identity may become known (for example, because of a court order or because the respondent deduces who the complainant is as the investigation unfolds).

Ultimately, an investigator should avoid securing the complainant's participation by exaggerating their ability to protect the identity of the complainant – doing so could jeopardize the complainant's trust in the investigation process and their willingness to continue to participate in the investigation if their identity becomes known to the respondent.

Footnote

1. 2024 CanLII 62260 (ON SC).

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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