

# Confidentiality Limited: When Anonymous Whistleblowers Must Be Identified



## **Bottom Line**

In [\*Jarvis v The Toronto-Dominion Bank\*](#) (“Jarvis”), the Ontario Superior Court of Justice (“Court”) ordered that a complainant’s identity be disclosed in the context of a wrongful dismissal lawsuit, despite promises of confidentiality extended during a workplace investigation. The employer, TD Bank, claimed it had just cause to terminate the plaintiff employee based on anonymous complaints and a confidential investigation into those complaints. Although TD Bank promised the whistleblower and complainants that their identities would remain confidential, the Court ordered it to disclose the unredacted complaints and investigation report.

This case reveals a tension between the public interest in transparency, and the potential chilling effect of revealing the identity of whistleblowers or complainants in the workplace.

## **Plaintiff Demands Unredacted Complaint and Investigation Report Copies**

Mr. Jarvis (“Jarvis” or “Plaintiff”) worked at TD Bank. TD Bank (“Defendant”), received anonymous complaints associated with Jarvis’s alleged misconduct. After investigating the complaints, TD Bank terminated Jarvis’s employment for just cause, and the Plaintiff then sued TD Bank, alleging wrongful dismissal.

After TD Bank defended against Jarvis’s wrongful dismissal claim by asserting that it had just cause to terminate his employment, Jarvis sought to inspect the complaints and investigator’s report that formed the basis of his termination. TD Bank delivered the requested documents to Jarvis, but redacted the names and identifying information of the complainants and other individuals mentioned therein. Jarvis then sought production of the unredacted documents, which would show the complainants’ identities.

## **Court Rules Public Interest Outweighs Confidentiality**

The Court ordered TD Bank to disclose the unredacted names and other identifying information of the complainants and individuals mentioned in the investigation report. Associate Justice Jolley held that the information was relevant and that TD Bank did not establish that the “disclosure could cause considerable harm ... or would infringe an interest deserving of protection.” She concluded that:

*"[...] the public interest in the correct outcome of the litigation outweighs any interest in protecting the identity of the complainants and other employees who were interviewed or referenced in the complaints and the investigation report."*

The complainants and whistleblower made their complaints using TD Bank's internal reporting processes, which allowed individuals to make complaints anonymously or confidentially. The complainants and whistleblower expected their statements would remain confidential. TD Bank argued that disclosing their names may "damage the trust needed between an employee and the employer for a workplace to function and to allow an employer to address unacceptable behaviour."

On that point, Associate Justice Jolley held that it "would be unfair for the terminated employee not to know the case he has to meet by obtaining disclosure of who made the allegations against him and what they were."

## **Takeaways**

As Associate Justice Jolley states:

*"An employer that intends to rely on complaints made about another employee to support a termination for cause will need to think carefully before assuring complainants that their complaints can and will be kept confidential."*

Accordingly, an employer's internal policies promising confidentiality may not be upheld by a court. If an employer intends to allege that it has just cause to terminate an employee based on a confidential complaint or investigation, a court may balance the public interest to decide whether to maintain the promised confidentiality. The Court's rationale turns on litigation fairness: a party to litigation must know the case against them that they have to meet.

This decision does not specify whether Jarvis was informed of the allegations against him before his termination. On that point, it is best practice for an employer's policies and procedures on workplace investigations to require that an employee under investigation know the case against them. In other words, during an investigation, procedural fairness requires that the employee get enough details of the allegations that they can fully respond. Whether procedural fairness requires the disclosure of the identity of the complainant may well depend on the circumstances.

*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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