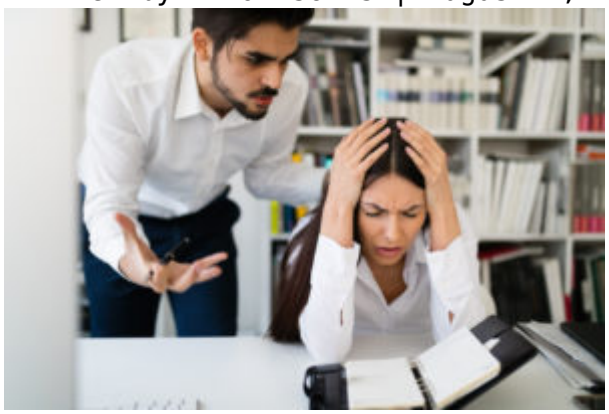
Harassment Investigation Protocols Under Scrutiny Labour, Employment & Humans Rights Law Bulletin

written by Tina Tsonis | August 4, 2022



In *Ahluwalia v. British Columbia (Workers' Compensation Board)*[1], a worker's appeal was dismissed after the Court of Appeal determined that the WorkSafeBC Review Division had properly applied law and policy in relation to a bullying and harassment investigation conducted by the employer.

What Happened?

The employee reported that she was bullied at work by the assistant manager on several occasions. Notably, the employee alleged she had been shouted at on at least one occasion.

The employer investigated the incidents and concluded that the employee's complaints were not substantiated. The employee filed a complaint with WorksafeBC. An occupational health and safety officer investigated and determined that the employer's investigation was compliant with applicable law and policy. The employee applied for a review of the OHS officer's decision. The Review Officer upheld the OHS officer's decision. The employee then sought to appeal the Review Officer's decision to the Worker's Compensation Appeals Tribunal ("WCAT"). The WCAT dismissed the employee's appeal on the basis that they did not have jurisdiction. The employee then sought a judicial review of the WCAT decision dismissing her appeal and lost. Finally, the employee appealed the judicial review to the BC Court of Appeal seeking once again a review of the initial decision of the Review Officer.

The initial decision of WorksafeBC concluded that interviews had been conducted with employees present at the store, and those who were on duty when the events were alleged to have occurred. CCTV footage had also been reviewed at the time, though that footage did not contain audio recordings. The area manager ultimately concluded that the interactions depicted between the complainant and the assistant store manager were not atypical interactions between management and staff: there was no harassment.

The employee argued that the Review Officer had ignored the "facts, rules, regulations and laws of the WorkSafeBC". The employee further submitted that the Review Officer failed to consider video surveillance, which showed the bullying and failed to conduct an impartial investigation because the store manager who conducted

the investigation was involved in the complaint.

What did the Court of Appeal decide?

The court ultimately concluded that the Review Officer made a reasonable decision by reviewing the evidence relating to the employer's investigation process, concluding that its policy was appropriate and that the employee's complaints were investigated in accordance with that policy. The court determined the Review Officer addressed all of the available material before her, including the evidence related to the video surveillance. While the Review Officer was unable to review the video surveillance herself since the store over-recorded every seven days, it took into account the fact that the surveillance had nevertheless been reviewed and considered by the employer in the course of its internal investigation. The court also determined that there was no impartiality issue since the employee's initial complaint was only *addressed* to the store manager. The store manager was not the alleged bully, even if the complaint stated that the store manager had not intervened. Furthermore, the investigation had actually been carried out by the area manager, who was not a subject of the employee's complaint to WorkSafeBC. All of these facts were noted and considered by the Review Officer.

The Court of Appeal determined the decision of the Review Officer was not unreasonable and dismissed the employee's appeal accordingly.

Key Takeaways

This decision is an important reminder to employers of their statutory obligations to prevent and respond to workplace bullying and harassment. Whenever a complaint is made, an employer must make reasonable efforts to investigate the merits of the complaint in accordance with applicable law and policy. Keeping good records of the investigation is important in the event that the process itself is challenged. In this case, the employer had provided detailed evidence describing the receipt and investigation of multiple complaints by the worker.

This case also reinforces how important it is for employers to know and understand the legal framework within which bullying and harassment issues will be considered by the regulator. Those frameworks vary to some extent from one province to another and employers should be familiar with their requirements. In this particular case, the applicable statutory provision to address bullying and harassment is section 21 of the *WCA* as well as WorkSafeBC Policy P2-21-2, which specifically identifies what WorkSafeBC considers as "reasonable steps" in the prevention of bullying and harassment. The employer had met those requirements in its workplace harassment prevention program, and followed its internal process adequately.

Finally, the decision is an important reminder that health and safety adjudicators are not responsible for second-guessing the conclusions of employers as to whether a complaint of bullying and harassment is justified. Rather, their mandate is to investigate whether an employer has complied with the legal framework respecting the actual process of investigating workplace harassment and bullying. In this case, the officer's role was to determine if the employer had taken reasonable steps to prevent workplace bullying and harassment, as set out in the law and policy of WorkSafeBC.

If you need advice on this subject, please contact the author or your regular Fasken lawyer.

Footnote

1. *Ahluwalia v. British Columbia (Workers' Compensation Board), 2021 BCSC 399*

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