Must You Disclose Privacy-Sensitive Harassment Report to OHS Investigator?



The Workplace Harassment Policy

An Ontario company's policy requires immediate investigation of all workplace harassment complaints. Once the investigation ends, the investigator creates a Findings Report summarizing the details of the case. The Findings Report is so sensitive and confidential, that the company doesn't share it with anyone, not even the accuser and accused. Instead, it sends the parties a letter indicating whether the investigation found the harassment allegation to be true and logs the Findings Report into an electronic case management system to which access is highly restricted.

Situation

Two employees claim they were harassed by their supervisor. The MOL official sent to investigate requests copies of all notes from the investigation. The company offers her the letters it sent to the parties and a redacted version of the Findings Report. But she wants an unredacted version. The company objects on the grounds of privacy and the case reaches the Ontario Labour Relations Board (OLRB).

Key Background Facts

Fact 1: Section 54(1)(c) of the Ontario OHS Act gives OHS investigators the power to "inspect, examine and copy" any record or report necessary to investigate workplace complaints and carry out their other duties under the law.

Fact 2: The OHS Act also requires employers to carry out "appropriate" investigations of workplace harassment complaints but doesn't say they must prevent harassment.

Question

Does the employer have to let the OHS investigator see the unredacted Findings Report?

1. No, because it contains sensitive and private information
2. No, because the investigator just needs to determine if there was an appropriate investigation, not whether harassment actually occurred
3. Yes, because Section 54(1)(c) powers cover any and all documents related to workplace harassment

4. Yes, because the unredacted report will enable her to determine if the company met its OHS harassment duties

Answer

4. **Demanding access to the unredacted report is a legitimate use of the investigator's Section 54(1)(c) powers**

Explanation

Investigating workplace harassment complaints is a legal obligation not just in Ontario but all jurisdictions. But such investigations often uncover personal and confidential information, including personal medical information, information about private family matters and compromising photos and text messages. Employers must keep this material confidential and not disclose it, except where the law requires. This scenario, which is based on an actual Ontario case, illustrates where the lines are drawn.

The OLRB ruled that disclosing the unredacted Findings Report *was* required by law, specifically Section 54(1)(c). The company's argument that the investigator had no authority to determine if harassment occurred might ultimately prove true. But that wasn't the issue in this case. All this case was about is whether the investigator was entitled to see the unredacted report to determine if the company did an appropriate harassment investigation. "I have difficulty accepting that the Act leaves it to the employer" to decide what information from the Findings Report the investigator does and doesn't need to make that determination, the OLRB concluded [*Wal-Mart Canada Logistics ULC v Gail Stewart*, 2020 CanLII 2070 (ON LRB), Jan. 10, 2020].

Why Wrong Answers Are Wrong

A is wrong because OHS investigator powers override personal privacy protections; investigators are also legally bound not to disclose the private information they access for purposes of carrying out their investigatory duties.

B is wrong because the investigator's purpose in accessing the unredacted report was, in fact, to determine if the company did an appropriate investigation and not to decide if harassment occurred.

C is wrong because an OHS investigator's Section 54(1)(c) powers can be used only to exercise *bona fide* investigation activities. But accessing the unredacted report to investigate whether there was a proper investigation of a harassment complaint was well within those limits.