What Not To Do When Conducting A Workplace Investigation



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The recent labour arbitration decision of *Sterling Crane v. International Union of Operating Engineers Local 955*, 2024 CanLII 46844 (AB GAA) serves as an excellent reminder of the importance of conducting a proper workplace investigation.

In this case, the grievor who was terminated for making a comment in violation of the Employer's Workplace Harassment Policy, brought a grievance for wrongful dismissal. While the employer had conducted an investigation, it was not done properly. This failure resulted in gaps in the employer's case at arbitration to support its termination decision. The arbitrator held that the employer overreacted and that termination was excessive.

Background

The grievor is a crane operator who was engaged in conversation with a male colleague. As they entered a lunchroom trailer, the grievor made a sexist comment referring to women as "hos". This comment was overheard by others in the lunchroom, including two female crane operators.

Two employees who overheard this comment advised a supervisor who had recently given a talk about respect and being mindful of what is said in the lunchroom so that everyone is comfortable in the workplace. The supervisor asked these employees and, on the advice of his boss, another employee who was present in the lunchroom to provide written statements. The supervisor provided the statements to his boss who instructed him to remove the grievor from the site. The grievor was terminated later that day. The only opportunity for the grievor to learn of the concern and provide a response was in the termination meeting.

Grievance Hearing

At the hearing for wrongful dismissal, the union submitted that the employer's actions amounted to a rush judgment after a "very poor investigation." It took the position that, while discipline was likely warranted, at most it should have been a written warning or suspension. The employer argued that the evidence established just cause for discipline and emphasized its obligation to ensure a safe and respectful work environment, particularly for female employees in a male-dominated industry.

The arbitrator acknowledged and recognized the employer's efforts in taking swift action on the complaint, given that, in the past, employers have often been chastised for not acting on workplace harassment. However, she held that the employer overreacted in this case, and that termination was excessive in the circumstances. She emphasized that the context in which the comment was made was critical, including that the comment was not directed at anyone in the workplace and, while there was a need to change culture, termination was not required to achieve it. A number of disciplinary options were available to the employer short of termination. The arbitrator also noted that the employees who had overheard the comment and testified neither expected nor wanted the grievor to be fired.

The arbitrator ultimately allowed the grievance and substituted the termination with a three-day suspension.

Key Takeaways

In her decision, the arbitrator highlighted the key deficiencies in the employer's handling of the incident and, in particular, its failure to properly conduct a workplace investigation.

Based on her comments, here are five things *not* to do when conducting a workplace investigation.

1. **Fail to investigate the allegations.** The supervisor did not fully interview the witnesses, i.e. ask probing questions, ask for details and specifics, and take notes of what was said in answer to the enquiries.
2. **Fail to interview and collect statements from key witnesses.** The supervisor did not speak to the colleague with whom the grievor was speaking at the time the comment was made. His evidence as to the context in which the comment was made was critical. Also, the employer argued that other people laughed and relied on that fact to justify termination, but failed to interview the employees who were alleged to have laughed.
3. **Fail to interview witnesses in a timely fashion when events are fresh in their recollection.** While evidence from witnesses who were not interviewed could have been called at the hearing to support the termination decision, it would not have been as strong as if it had been obtained in a more timely manner. With the passage of time, there is an increased risk of mistaken recollection, rendering the evidence less reliable.
4. **Fail to interview the grievor.** The grievor was entitled to provide his version of the events and to answer to the allegations made against him. These are principles of procedural fairness and ought to be upheld in every workplace investigation.
5. **Fail to document termination meeting and witness discussions.** The arbitrator found there was essentially no excuse for the management team to have no notes from the termination meeting nor from any of the discussions or meetings with employees concerning the investigation. The employer witnesses and the grievor gave contradictory evidence of what was said at the termination meeting. The arbitrator was unwilling to fully accept the employer witnesses' unassisted recall of the events of the termination meeting, finding that the grievor's recollection was more reliable in the absence of notes to the contrary.

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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