When Is An Investigation “Appropriate In The Circumstances”?

Every investigator has had one of “those” files. Allegations are abundant, historical, and/or about things like “he walked past me once without speaking to me.” Can an investigator refuse to look into allegations if they are ancient? What if they wouldn’t constitute harassment even if they can be proven? So far, the case law has provided investigators with little direction as to what the *Occupational Health and Safety Act* (the “*Act*“) means by requiring an investigation “appropriate in the circumstances.” However, a few recent decisions are helpful.

Haarika Stoimenov (the “Complainant”), a nurse at St. Joseph’s Healthcare in Hamilton, Ontario (the “Hospital”), alleged on October 9, 2019 that she had been subjected to workplace harassment. The Hospital conducted an internal investigation and issued a report on January 14, 2019. The Complainant complained to the Ministry of Labour (the “Ministry”) about the quality of the investigation and the Hospital acknowledged that its internal investigator did not inquire into every allegation, some of which were untimely and some of which would not constitute harassment even if proven.

The Ministry issued an Order requiring the Hospital to engage a third-party investigator to report on the allegations which were not investigated internally and report by June 28, 2019. The Hospital appealed the Order, arguing that its internal investigation was “appropriate in the circumstances.” The Hospital also asked that implementation of the Order be suspended until such time as the appeal was heard. In granting the suspension, Vice-Chair McKellar noted1:

> The Hospital has explained in detail why it chose the particular internal investigator, why the investigation parameters were narrower than HS’s complaints, and why it takes the view that these decisions were “appropriate in the circumstances”. Although the Board does not have a large body of case law interpreting section [32.0.7], the words “appropriate in the circumstances” must have some meaning, and the Hospital has in my view made out a strong prima facie case for why its investigation was appropriate.

While it appears that it may be possible for investigators (whether internal or external) to apply some reasonable/appropriate parameters to the scope of an

investigation, it might seem tempting in some circumstances to avoid doing an investigation at all. However, this is **not** recommended.

Arbitrator Diane Gee found that an Employer had failed its duty under the *Act* in a Decision arising from an arbitration hearing before the Grievance Settlement Board.2 The Grievor was discharged for bad behaviour which included sexual gestures, breaches of policies, etc. Two days after receiving a letter outlining the allegations about his bad behaviour, the Grievor filed a complaint of harassment. The arbitrator found that:

> While it might seem absurd to investigate a complaint filed by someone who will never return to the workplace for reasons that are unrelated to the harassment complaint, it is possible that a complaint may advance allegations that should be looked into by the Employer in order to ensure the health and safety of the remaining employees. Where the complainant will not be returning to the workplace and the complaint is not related in any way to their reason for leaving the employer, the investigation "appropriate in the circumstances" may be less extensive than would otherwise be the case, however some "investigation" is required. In this case no investigation occurred and hence the Employer has violated section 32.0.7(1) of the OHSA and the collective agreement.

In at least one Court decision3, an employee has been awarded punitive damages for the employer's failure to investigate her allegations of harassment. In the words of Mr. Justice W.D. Newton:

> I am satisfied on the evidence that the plaintiff was harassed in the workplace and that the employer, rather than investigating, terminated the plaintiff. As such, I find that the employer's conduct was malicious, oppressive and high-handed and must be deterred. Punitive damages are awarded only where compensatory damages are insufficient to deter. In this case, compensatory damages awarded were $10,000 for wrongful dismissal. I have also awarded aggravated damages of $20,000. In my opinion, these awards are insufficient to deter this conduct. I award $10,000 as punitive damages.

The best approach for employers – at least at this point in the development of case law on this issue – is to take allegations seriously, investigate thoroughly and fairly, and advise parties of the outcome of the investigation. If you have questions about the need to investigate certain allegations, it may be one of those times when it's a good investment to seek legal advice.

While simple issues can sometimes be investigated internally, employers often prefer the objectivity and skill exhibited by external investigators. Siskinds' experienced workplace investigators offer timely, efficient, cost-effective services, which may be restricted to fact-finding or which may include legal advice, depending on the employer's needs.

Footnotes

1. *Horner v. 897469 Ontario Inc.*, 2018 ONSC 121
2. *Ontario Public Service Employees Union (Ataw) and Ministry of Community Safety and Correctional Services*, 2019 CanLII 65164 (ON GSB).
3. *St. Joseph's Healthcare Hamilton v. Haarika Stoimenov et al*, 2019 CanLII 45230 (ONT LRB). This decision dealt only with the request for a suspension of the Order. The appeal decision has not yet been released.

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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