Workplace Investigation Alert – August 2013



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A June 19, 2013 decision of the Quebec Labour Relations Board, *Azeff and Bobrow*, 2013 QCCRT 299 (Can LII) is a cautionary tale of process decisions made during the course of a workplace investigation leading to a conclusion that an investigation was unfair. It also illustrates the extent to which legal decision makers scrutinize how workplace investigations are conducted. The fact that the employer's process was found to be lacking undermined the employer's ability to successfully argue that the employees in question had been terminated for just cause.

Bad process decisions along the way result in an unfair investigation

The case involved two former employees of the CIBC World Markets ("CIBC") who were investment professionals. While still employed at the bank, they were subject to an Ontario Securities Commission investigation (the "OSC"). The OSC alleged that the employees engaged in prohibited practices of insider trading and tipping. These allegations triggered the CIBC to conduct its own investigation of the two employees. This investigation was conducted by a lawyer who was not employed by the CIBC, but, as the Board noted, was a member of a firm for whom the CIBC was a major client.

After they were terminated, the employees brought an unjust dismissal complaint under Quebec's *Labour Standards Act*, and they were successful. In its decision, the Board was highly critical of the investigation and concluded that based on the totality of the evidence, the complainants had not been treated fairly. The Board identified the following deficiencies:

- ***Advance Notice of Investigation Interview:*** In the Board's view, the employees were "summoned" to Toronto to participate in the CIBC's investigation on very short notice. Moreover, prior to the commencement of its own investigation, the employees had the assistance of the bank's counsel. However, shortly before the investigation interview, they were advised that this counsel would no longer be able to assist them.
- ***Failure to provide relevant documents before the investigation interview:*** The Board noted that counsel for the employees had asked for copies of documents on which they were to be interviewed, prior to the interview. This had not occurred. This was particularly difficult for the employees because they had been suspended and did not have access to their computers or offices.

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- ***Credibility Assessment:***The Board was highly critical of the investigator’s assessment that the employees’ explanation and demeanor during the investigation was not credible. After what the Board said was a careful read of the investigator’s report, it concluded that these were not founded on fact, and were assumptions.
- ***Suitability of the Investigator:***As noted above, the Board identified the investigator as a lawyer who was a member of a firm in which the CIBC was a major client. While the Board did not say so explicitly, as we read the decision, the Board inferred that the investigator’s interests were to support the bank and that he was not entirely neutral.
- ***Communicating the outcome:***The Board noted that while the CIBC conducted the investigation in November 2010, and terminated the employees on December 3, 2010, it did not provide the employees with the reasons for their termination until April 3, 2012.

What does this case mean?

Be prepared to be scrutinized:This case illustrates the extent to which elements of the investigation process are de-constructed and scrutinized by legal decision makers, and how the fairness of an investigation process, or lack thereof, is determined in hindsight. This is an important consideration when you are considering mid-investigation process issues such as how much notice to give a respondent, how much detail should a summary of the allegations contain, as well as whether you provide a respondent with copies of key documents before the investigation interview.

Not every external investigator is truly an objective investigator:It is our strong practice bias that if it is the employer’s intention to rely on the objectivity of the workplace investigation process, its own lawyers should not conduct it. When you act as an advocate you are not objective or neutral, and you will not be viewed as objective and neutral.

Advance notice and evidence:The workplace investigation case law is clear that respondents are entitled to notice of the allegations made against them before the investigation interview. This case suggests that in some circumstances, this advance notice may also need to include the evidence on which the employer relies and intends to ask the respondents about. If there is a critical piece of evidence that you intend to ask the respondent about (for example, video surveillance, or an expense report), it may be prudent to include it with the notice, or arrange for the respondent to review it in some other manner, before he or she is interviewed.

Impact on employees:This case is yet another example of how the respondent’s experience of the investigation will be relevant. The Board made note of the fact that the respondents were disadvantaged in terms of obtaining information because of their suspension, as well as the fact that they didn’t feel that the investigator heard them out. When making process decisions, therefore, it is important to consider how it will impact on the subjects of the investigation.

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.