Trends in Workplace Investigation Jurisprudence

Workplace investigations are now ubiquitous for Ontario employers. It is not surprising that litigation about the investigation process is increasing. In this article, we review two recent cases that address the duty of investigators and employers owed to those being investigated. A third case explores the extent of an employer's obligations to investigate.

Does an investigator owe a duty of care to the parties to an investigation?

In *Mezikhovych v. Kokosis*, (Superior Court, November 18, 2022), the plaintiff was employed as a personal support worker with Extendicare and complained of harassment against a District Director. The defendant lawyer was retained by Extendicare to conduct a workplace investigation into the plaintiff's allegations and concluded that the allegations were unsubstantiated. The Plaintiff was subsequently terminated for failing to provide medical documentation to support her accommodation requests. She brought a claim against her employer and a separate suit against the defendant alleging that the defendant had conducted a poor investigation which had resulted in the termination of her employment.

The defendant brought a motion for summary judgement arguing the suit against her be dismissed because she owed no duty to the plaintiff. Justice Leibovich noted that lawyers generally owe a duty of care only to their own client. In very limited circumstances, a duty is owed to a non-client when 1) the lawyer knows that the non-client is relying on the lawyer's skill, 2) the non-client must in fact rely on the lawyer's skill and 3) that reliance is reasonable.

Justice Leibovich concluded that none of those factors were present. The plaintiff had been advised and had confirmed in written communication that she knew the defendant had been retained by the employer to investigate her allegations and was not acting on her behalf. Following receipt of the report, the plaintiff had also informed the defendant that she had been terminated from her employment for failing to provide necessary medical documentation; she did not claim that the content of the investigation report had been the

cause of her termination. Justice Liebovich granted the motion dismissing the suit:

> Simply put, the defendant had no duty of care with respect to the plaintiff. The defendant was retained by Extendicare to conduct the investigation surrounding the harassment complaint. She completed the report. The fact that the plaintiff was unhappy with the results of the investigation does not give rise to a cause of action against the defendant. There are no exceptional circumstances in which the defendant can be held to owe a duty of care to the plaintiff (at para 10).

Mezikhovych confirms that clear communication to all parties in an investigation may be critical in determining what the parties knew about the investigation process and whether there is any duty, separate and apart from the general duty of fairness, owed to an investigation participant.

Statements made in workplace investigation reports are protected by the doctrine of "qualified privilege", which is a complete defense to a defamation claim.

In *Safavi-Naini v. Rubin Thomlinson LLP* (Court of Appeal, February 8, 2023), the Court of Appeal considered whether an investigation report could be used to sustain defamation allegations. The appellant was a medical resident in the internal medicine training program at the Northern Ontario School of Medicine (NOSM). In 2018, the appellant made complaints of workplace harassment and sexual harassment against the North Bay site director of NOSM's internal medicine program. The appellant also hired a publicist and issued a press release, which resulted in her allegations being seen by the public and the press media. NOSM retained the respondent lawyer to conduct a workplace harassment investigation into the appellants allegations. The respondent provided Executive Summaries of her investigations which concluded that that there was no documentary evidence supporting the appellants claims, that the appellant was not a credible or reliable witness, and that there had been no workplace harassment or sexual harassment as alleged.

The Executive Summaries were not publicly disseminated but were submitted to the Human Rights Tribunal of Ontario in defense to the appellant's human rights application to the Tribunal. The appellant subsequently commenced an action against the respondent alleging defamation regarding the content of the Summaries. The respondents brought a motion to dismiss the claim under section 137.1 of *Ontario's Courts of Justice Act*. The motion judge granted the motion and dismissed the action finding that 1) the Summaries related to a matter of public interest 2) the Summaries were protected by qualified privilege; (3) there was no evidence of malice against the respondent; and (4) a balancing exercise favoured protection of the Summaries. The appellant challenged all four conclusions.

The Court of appeal rejected the appeal finding first, that sexual harassment and workplace harassment were matters in which the public had a substantial interest; the Executive Summaries further engaged that interest because NOSM was an educational institution which garnered significant national, provincial, and local media attention following the release of the appellant's news release which raised issues of patient safety – a public, not private matter. The Court also concluded that the Summaries were protected by the defence of qualified privilege because the respondents were retained to investigate allegations of workplace harassment and to prepare reports as required by the *Occupational Health and Safety Act*. NOSM had a legal duty to provide the written results of the investigation to the complainant and to her alleged harassers.

The Supreme Court affirmed in *Bent v. Platnick*, that qualified privilege exists, "if a person making a communication has an interest or duty, legal, social, moral or personal, to publish the information in issue to the person to whom it is published" and the recipient has "a corresponding interest or duty to receive it" (at para 121). In this case,

> The respondents had a duty to NOSM to complete the investigation and to provide their report to NOSM, and NOSM had a corresponding interest or duty to receive it. The respondents' provision of the Executive Summaries to NOSM' falls squarely within this privilege (at para 27).

The Court concluded that there was no merit in the appellants third and fourth grounds of appeal and dismissed the case.

The duty to Investigate harassment complaints exists even where subsequent complaints are thematically similar to complaints that have previously been investigated.

In *Toronto Metropolitan University v Toronto Metropolitan Faculty Association* (McIntyre, March 27, 2023), a tenured professor at the University filed two grievances alleging that the employer had failed in its obligations to protect her health and safety under the collective agreement and the *Occupational Health and Safety Act* (OHSA) in its response to the unwanted harassing and bullying behaviour of a colleague and in its failure to investigate the grievor's allegations of harassment over the course of eight years, from 2011 to 2019.

The grievor in this case first raised concerns of harassment and discrimination in 2011. In 2013, the Dean investigated the complaints and did not make any findings of wrongdoing. From November 2014 to May of 2015 the grievor reported further workplace harassment to the Dean, Human Resources, and other departments in the University. In early 2015, the University conducted a violence risk assessment and concluded that the respondent posed a "low" risk to the grievor. In June 2015, the University engaged Rubin Thomlinson LLP to investigate the grievor's harassment complaints and complaints from the respondent and other colleagues regarding the grievor. In 2017, the Thomlinson Report determined that some of the grievor's complaints against the respondent were substantiated. The grievor raised further concerns including human rights complaints and further violent risk assessments were conducted in 2017 and 2018, both concluding that there was low risk from the respondent.

The union alleged that the University was dismissive of the grievor's concerns, failed to intervene to protect the grievor, and treated her as a problem to be managed, negatively impacting her health and her career. Arbitrator McIntyre was tasked not with determining the veracity of the grievor's harassment allegations, but with whether the University had fulfilled its statutory and

collective agreement obligations to the grievor. The arbitrator concluded that the University breached its obligations when, upon receipt of the Thomlinson Report which concluded that the respondent had engaged in uncivility rising to harassment against the grievor, it failed to reassign the respondent's office; it failed to provide the grievor with the results of the Report and the corrective action taken in a timely manner; it failed to conduct investigations following harassment complaints in April/May 2017 and March-June 2018; and it failed to conduct a human rights investigation into the grievor's complaints.

While the University had investigated the grievor's initial formal complaint, and responded appropriately by issuing the respondent a written warning, it had failed to take further reasonable steps to protect the grievor or conduct further investigations into similar allegations made by the grievor subsequent to the Report. This case confirms that employers must be vigilant and assess whether the particulars alleged, particularly when new allegations are similar to past allegations, trigger their statutory and collective agreement obligation to investigate workplace harassment.