

Workplace Investigations – Managing Complaints in Union and Non-Union Context

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Carman J. Overholt, Q.C.

600 – 889 West Pender Street
Vancouver, BC V6C 3B2
(604) 568-5464

carman@overholtlawyers.com

Introduction

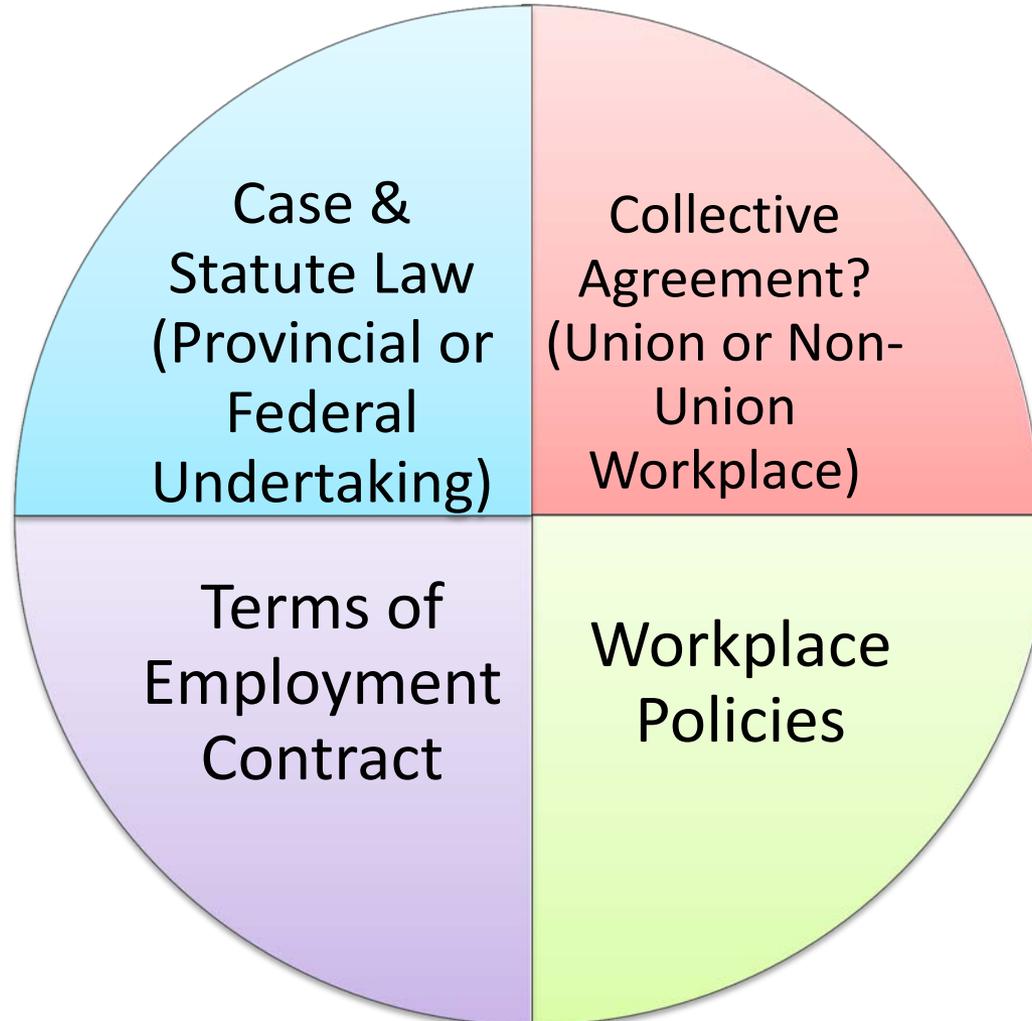
- Workplace investigations have in recent years taken on additional importance
- Human Resources personnel need a good understanding as to when an investigation is required and how to conduct a proper investigation
- The costs of an investigation that is not properly conducted may result in significant liability and additional costs
- The Union's role in the complaint investigation can be significant

Overview

1. The Legal Framework
2. Relevant Case Law – What are the Employer's Obligations regarding Workplace Investigations and Employee Complaints?
3. Relevant Case Law - The Role of the Union in Complaint Investigations
4. Complaint Process - Other Considerations
5. Summary & Conclusion

1. The Legal Framework

Legal Framework



Legal Framework, cont'd

- Particular legislation to keep in mind:
 - 1) *Workers' Compensation Act,***
 - *Occupational Health and Safety Regulation*
 - 2) *Labour Relations Code***
 - 3) *BC Human Rights Code***
- Investigations are required in different circumstances (i.e. workplace fatalities, sexual harassment, complaints of discrimination, etc.)

Workers' Compensation Act

- An employer must implement procedures as to:
 - How and when investigations will be conducted
 - What will be included in the investigation
 - What are the roles and responsibilities of employers, supervisors, and workers
 - What does follow-up to the investigation entail including corrective actions and timeframes
 - Record keeping requirements

Workers' Compensation Act

- **Anti-Bullying and Harassment Policies**
 - Nov 1, 2013: all BC employers were required to put in place a policy on workplace bullying and harassment

WCA and Human Rights Code

- An employer has a duty to prevent, investigate, and stop:
 - Bullying and harassment (*WCA*)
 - Discrimination on the basis of race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment of that person (*Human Rights Code*)

BC Human Rights Code

- An employer must not retaliate against an employee who files a Human Rights complaint
- S. 43 = Protection for a person who complains, is named in a complaint, who gives evidence or who assists in a complaint under the Code

BC Labour Relations Code

- An employer must not retaliate against an employee who files a complaint under the *Labour Relations Code*
- S. 5 = Protection for a person who makes an application, complains, exercises a right under the LRC, has participated or is about to participate in a proceeding under the LRC

2. New Case Law: Employer Obligations – Employee Complaints and Conduct of Investigations

Introduction



Jian Ghomeshi - Lawyer to lead investigation

Chris Boyce - Fifth Estate Interview

The Case Law: Investigation Done in Bad Faith

- There are a number of cases that involve examples of poorly done investigations in the context of determining appropriate discipline of an employee for wrongdoing
- Employers need to ensure their investigations are thorough and fair particularly if they decide to terminate an employee for cause

The Case Law: Investigation Done in Bad Faith

- “If the employer draws unfounded conclusions damaging to an employee’s reputation without affording the employee any opportunity to answer those allegations, it exposes itself to a claim for damages for breach of its obligation of fair dealing in the manner of termination of the employment contract”



The Case Law: Investigation Done in Bad Faith

- Employers can be liable for damages for investigations that constitute bad faith actions
- Shoddy and biased investigations = breach of good faith owed to an employee
- The onus is on the employer to conduct a full investigation before reaching conclusions devastating to an employee's reputation

The Case Law: Example of Bad Faith Conduct



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Ogden v. CIBC 2014 BCSC 285

- In this case, the employer determined that the employee should be terminated for cause
- In the wrongful dismissal action the Court determined the investigation was done in bad faith and just cause was not made out

The Case Law: Example of Bad Faith Conduct



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Ogden v. CIBC 2014 BCSC 285

- Employee: 41 year old financial advisor
- Length of service: 7 years
- Exemplary performance reviews
- Terminated for cumulative cause: employer alleged contraventions of its Code of Conduct and Conflicts of Interest policy, plus cited previous disciplinary history

The Case Law: Example of Bad Faith Conduct



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CIBC alleged cumulative cause:

1. Breaches of Branch procedural policies; e.g.) document deficiencies (signatures in wrong places, documents not sent to proper office, etc.)
2. Reduction of loan rates contrary to policy
3. Breaches of conflict of interest policy regarding gift of clothing and a mortgage transaction
4. Wire transfer for client through a personal account was a conflict of interest

The Case Law: Example of Bad Faith Conduct



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Discipline History:

- Employee had received “warning letters” for these infractions – which she disputed at the time
- Court found the incidents in which she received “warning letters” did NOT justify discipline (there were reasonable explanations for the incidents each time)
- Nature of the “wire transfer” incident was not a conflict of interest = was an honest mistake of judgment

The Case Law: Example of Bad Faith Conduct



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Ogden v. CIBC 2014 BCSC 285

- CIBC forged ahead with termination for cause based on incomplete and inaccurate information with respect to the earlier discipline letters
- Bank had a higher level of responsibility to “get it right” before making a decision that would have such a severe financial, professional and emotional impact to Ms. Ogden

The Case Law: Example of Bad Faith Conduct



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The Flawed Investigation:

- CIBC failed to provide Ms. Ogden with reasonable opportunity to give a complete explanation of her conduct
- Interviewer's approach = cut her off, not interested in her explanation, claimed to get acknowledgments that he had not obtained
- He failed to determine key facts and jumped to conclusions

The Case Law: Example of Bad Faith Conduct



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The Flawed Investigation, cont'd:

- CIBC understood the purpose of the interview was to give Ms. Ogden a chance to explain her conduct
- However, the interview was conducted in a manner that undermined its very purpose = was an exercise in case building against Ms. Ogden
- When the interview did not achieve its purpose, CIBC had an obligation to send the interviewer back to obtain further information

The Case Law: Example of Bad Faith Conduct



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Decision to Terminate by Panel:

- CIBC management failed to ensure the discipline panel, charged with determining the appropriate level of discipline, had complete and accurate information about the prior “warnings” given to Ms. Ogden
- The panel was not aware of the full circumstances with respect to the previous discipline / warnings and was made to believe she was guilty of 3 prior breaches of the Code of Conduct

The Case Law: Example of Bad Faith Conduct



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- I.e.) CIBC failed to provide the panel with the full and complete context and explanation of the circumstances surrounding all of Ms. Ogden's "alleged" breaches of policy
- E.g.) Some breaches had been approved by her manager; some breaches were "systemic" and common with all lenders, not just Ms. Ogden
- Court characterized CIBC's actions as "cavalier, reckless and negligent"

The Case Law: Example of Bad Faith Conduct



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Court's Decision:

- No intentional malice to disparage Ms. Ogden
- Corporate mindset was to paper files about employee behaviour and be perceived to have taken action
- The hasty incomplete investigation by management resulted in erroneous conclusions and wrong disciplinary actions taken

The Case Law: Poor Investigation

Vernon v. BC Liquor Distribution Branch 2012

BCSC 133

- This case is an example of a poorly executed investigation by the employer in the context of an employee complaint against a supervisor for harassment
- Complainant was governed by collective agreement between BC Government and Service Employee's Union and the BC Government

The Case Law: Poor Investigation

Vernon v. BC Liquor Distribution Branch

2012 BCSC 133

- Ms. Vernon: 49 years old with a length of service of 30 years
- She was known as “The Little General” and was recognized as a top employee
- As Senior Store Manager of a Signature Store, Ms. Vernon was no longer a member of the Union when she was promoted to this position

The Case Law: Example of Bad Faith Conduct



OVERHOLT LAW
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Vernon v. BC Liquor Distribution Branch

2012 BCSC 133

- At the conclusion of the employer's "investigation" the LDB terminated Ms. Vernon for cause without notice

The Case Law: Example of Bad Faith Conduct



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The Complaint:

1. Use of profane language in the workplace
2. Ms. Vernon yelled at the complainant and her tone of voice was threatening
3. Ms. Vernon berated the complainant in front of others
4. Her expectations were impossible to meet
5. Ms. Vernon made the complainant feel embarrassed and humiliated in front of customers

The Case Law: Example of Bad Faith Conduct



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The Investigation:

1. Involved 8 individuals, including various Labour Relations Advisors, the Director of HR, Union representatives, and Liquor Branch General Managers
2. Complainant was interviewed - she simply wanted the conduct to stop and Ms. Vernon to take some training

The Case Law: Example of Bad Faith Conduct



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The Investigation:

3. Ms. Vernon was advised of the complaint over the phone but not told her job was in jeopardy and not provided with copy of the complaint
4. Subsequently, she was interviewed – Ms. Vernon denied the substance of the complaint, admitted some parts, apologized for some parts and named other witnesses who could corroborate her version of events

The Case Law: Example of Bad Faith Conduct



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The Investigation:

5. Union provided some input as to remedy = did not recommend termination
6. A different labour relations advisor then took over the investigation but was not given notes of the previous interviews with the complainant and Ms. Vernon
7. He interviewed 10 more witnesses and recommended termination

The Case Law: Example of Bad Faith Conduct



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The Termination:

1. Ms. Vernon was told she had engaged in gross workplace misconduct including bullying, harassing and intimidating behaviour = told her conduct was shameful
2. Ms. Vernon refused to resign = was suspended without pay pending written Recommendation Memo to be made to the General Manager for her termination

The Case Law: Example of Bad Faith Conduct



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The Termination:

3. Info in the Recommendation Memo would be relied on for the decision whether or not to terminate
4. The Memo contained inaccurate information – incorrectly set out what the employees said during the interviews and included statements intended to bolster the argument Ms. Vernon was a bully
5. Memo stated the employee interviews corroborated the complaint when they did not

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- “The investigation was flawed from beginning to end. It was neither objective nor fair”
- The person who first conducted the interviews with the complainant and Ms. Vernon had been Ms. Vernon’s labour relations advisor in the past – Ms. Vernon often confided in her
 - A different advisor should have handled the investigation

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- The investigator appeared convinced of Ms. Vernon's wrongdoing after interviewing the complainant
 - The list of witnesses she compiled were people she knew would likely have negative things to say about Ms. Vernon

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- Interviews of the witnesses were conducted by someone else; i.e.) not the person who interviewed the complainant and Ms. Vernon and he did not have the complainant or Ms. Vernon's interview notes (he only had the original complaint)

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- The interview of Ms. Vernon was contrary to its intended purpose and extremely unfair
- Ms. Vernon thought she was meeting with her labour relations advisor and area manager to discuss in an informal setting a complaint against her
- Instead, she was the subject of an intense interrogation

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- The person who she had relied on as her labour relations advisor was now her interrogator
- She was asked in the interview “why would the complainant lie?” = impossible to answer
- Investigator made inaccurate statements in her report that Ms. Vernon had denied all allegations which was not true = showed “lack of remorse” to others relying on the report

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- The interviews of the witnesses were interrogations and not carried out in an impartial manner
- Witnesses who spoke favourably about Ms. Vernon were accused of lying and were chided and yelled at when they gave answers in support of her
- The Advisor chosen to investigate was inappropriate to lead the investigation and recommend the termination; she became "the prosecutor not the objective investigator"

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- The decision to terminate Ms. Vernon occurred less than 96 hours from when the 2nd investigator took over = rush to judgment
- She had 12 years as a store manager and no complaints with glowing reviews
- The LDB should have stopped and reflected first = failed to consider the remedy sought by the complainant and appropriate training or disciplinary measures proportionate to the "misconduct"

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- When Ms. Vernon did not agree to resign, it was egregious to leave Ms. Vernon in limbo from April 19 to May 31 and suspended without pay while they processed the "Recommendation Memo"
- The Recommendation Memo was anything but a balanced report to the General Manager = investigator admitted she was trying to prove Ms. Vernon of misconduct; replete with inaccuracies

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- The Memo Failed to mention that Ms. Vernon had not been given an opportunity to respond to matters raised in the interviews, that she had agreed to refrain from some behaviour and to apologize for others, and that neither the complainant nor the union were seeking her dismissal.

The Case Law: Example of Bad Faith Conduct



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Court's Findings re: the Investigation

- If this was an administrative law case, the LDB's decision to terminate would be quashed as a breach of natural justice
- She was awarded 18 months' notice
- \$35,000 in aggravated damages for the insensitive manner of her termination
- \$50,000 in punitive damages for the offer to provide her a reference letter conditional on her resignation = to offer the letter as a carrot to resign was reprehensible

3. Relevant Case Law: Union Obligations in Employee Investigations

The Case Law: Duty of Fair Representation

***Bauer v. United Steelworkers of America,
Local 7884*** 2000 CanLII 27550 (BCLRB)

- Section 12 application under the LRC that the Union failed in its duty of fair representation by declining to pursue a grievance on employee's behalf

The Case Law: Duty of Fair Representation

***Bauer v. United Steelworkers of America,
Local 7884*** 2000 CanLII 27550 (BCLRB)

- Bauer had been removed from bus driving duties by his employer, Fording Coal
- He transported employees to the mine site and was suspended after there were five safety complaints against him

The Case Law: Duty of Fair Representation

***Bauer v. United Steelworkers of America,
Local 7884*** 2000 CanLII 27550 (BCLRB)

- Foreman would not tell Bauer what the complaints were = showed him the forms but Bauer not permitted to read them
- Contents disclosed to him about 5 months later
- Bauer complained when he was told not to pursue the matter and no grievance was advanced on his behalf by the Union

The Case Law: Duty of Fair Representation

Labour Relations Board Decision:

- Common for employees to complain to management and it is up to management to take appropriate action
- It is usually at this time that the Union finds out and its representational duty is engaged

The Case Law: Duty of Fair Representation

Labour Relations Board Decision:

- Agreed with Bauer that the complaints were “mamby pamby” = personal opinions only and no accidents, infractions or other problems reported regarding his driving
- Question to be determined = was Bauer provided the opportunity to respond to the complaints? NO

The Case Law: Duty of Fair Representation

Labour Relations Board Decision:

- Fundamental principle = unacceptable that the specifics of the complaint were not put to Bauer and that the Union did not seek his explanation prior to deciding whether to proceed with a grievance
- Union has at the very least an obligation to seek the grievor's response to the allegations raised against him

The Case Law: Duty of Fair Representation

Labour Relations Board Decision:

- Only after putting matters to a grievor is a union entitled to weigh the grievor's story against that of other witnesses and decide whether a grievance is appropriate
- Union fully entitled to take the welfare of the bargaining unit as a whole into account and any inter-member problems in determining whether a grievance is appropriate

The Case Law: Duty of Fair Representation

Labour Relations Board Decision:

- Union *not* entitled to keep the grievor uninformed while adopting a “father knows best” attitude
- Here, the Union discussed the facts and particulars of the complaints with everyone except Bauer
- Bauer never knew what the substance of the complaints were until long after the Union’s decision had been made = NOT a complete investigation = breach of s. 12 of the LRC

The Case Law: Duty of Fair Representation

Decision Takeaway:

- Where the Union fails to provide a grievor with an opportunity to respond to an allegation, that may provide a basis for finding that the investigation was inadequate

The Case Law: Duty of Fair Representation

Knowles and UFCW, Local 247 2010 CLB
5938 and BCLRB No. B49/2011

- S.12 LRC complaint by employee Knowles
- Complaint related to Union handling of several job performance grievances, the settlement of those grievances and the final termination of Knowles' employment

The Case Law: Duty of Fair Representation

Knowles alleged the Union:

- Refused to provide him with evidence produced by the employer
- Ignored information
- Worked in secrecy while claiming privilege over information it had obtained
- Conducted inadequate investigations = merely paid “lip service” to his concerns

The Case Law: Duty of Fair Representation

Knowles alleged the Union:

- Accepted a settlement offer from the Employer on Knowles' behalf without Knowles' consent or agreement which ultimately resulted in his termination

The Case Law: Duty of Fair Representation

Facts:

- Knowles worked in the shipping department loading delivery trucks that transported products to various retail locations

The Case Law: Duty of Fair Representation

Knowles' History of Discipline:

- April 14 - 1 day suspension – failure to properly secure a load of eggs
- April 28 - 3 day suspension for improper loading practices
- Employer relied on photographic evidence of the damaged loads for the discipline

The Case Law: Duty of Fair Representation

Knowles' History of Discipline, cont'd:

- Knowles provided written statement of his version of what occurred
- Union investigated both grievances and withdrew them = felt employer had evidence to establish just cause
- Union provided Knowles with photos relied on by the Employer
- Union told Knowles that the employer had advised the Union of its many attempts to correct and coach him on proper loading practices

The Case Law: Duty of Fair Representation

Knowles' History of Discipline, cont'd:

- August - Knowles received a 14 day suspension for poor job performance = failure to load and leaving pallets behind
- January - While 14 day suspension was being investigated by Union, Knowles given a further 2 week suspension and final warning

The Case Law: Duty of Fair Representation

Knowles' History of Discipline, cont'd

- March – Knowles was terminated for failing to ship a cube of product = culminating incident of unsatisfactory job performance
- Union advised Knowles that his two 14-day suspension grievances and his termination had little likelihood of success at arbitration

The Case Law: Duty of Fair Representation

Knowles' History of Discipline, cont'd

- Union accepted Employer's offer of reinstatement on Knowles' behalf on conditions
- Knowles did not return to work on scheduled return to work date (schedule conflicted with his vacation)
= his employment was terminated again for failure to report to work on 5 consecutive days

The Case Law: Duty of Fair Representation

Decision of the LRB:

- The Union is entitled to receive information in confidence in the course of representing their members and to claim privilege over that information
- Knowles not entitled to absolute right of access to the evidence or information considered by the Union in representing him

The Case Law: Duty of Fair Representation

Decision of the LRB:

- The Union cannot reach a “reasoned decision” to settle or withdraw a grievance unless it has conducted an “adequate” investigation
- What that is depends on the circumstances:
 - Grievor’s point of view
 - Information from potential witnesses
 - Offering grievor chance to respond

The Case Law: Duty of Fair Representation

Flawed Union Investigation:

- Coaching and supervision – Union assumed and concluded Knowles was adequately coached regarding loading practices and policies based solely on Employer's assertions to the Union
- This view was ill-founded and not based on adequate investigation of Knowles' circumstances = the Union did not review Knowles' personnel file at any time during its investigation

The Case Law: Duty of Fair Representation

Flawed Union Investigation:

- In progressive discipline case, the Union must determine whether the discipline imposed is supported by the employee's disciplinary record = review of his record is fundamental and rudimentary
- Here, the Union did not investigate Knowles' record to confirm whether it supported the progressive discipline Knowles was given

The Case Law: Duty of Fair Representation

Flawed Union Investigation:

- Employer relied on photographs of damage and video to discipline Knowles
- The Union simply accepted the employer's conclusions without question that Knowles was the cause of the damage based on the photos
- No indication the Union investigated the photo taking process, who took them, and under what circumstances were they taken, etc.

The Case Law: Duty of Fair Representation

Flawed Union Investigation:

- There was video of Knowles wrapping egg crates which were later damaged
- The Union did not ask Knowles to join when viewing the video and therefore did not obtain Knowles' input or explanations
- The Union's investigation of the video constituted arbitrary representation and failed to reach a reasoned decision based on that evidence

The Case Law: Duty of Fair Representation

Flawed Union Investigation:

- Instead of investigating employer's grounds for discipline, Union investigator formulated his own alternative basis for discipline and conducted his investigation accordingly
- The Union investigator acted with "blatant and reckless disregard" and effectively stepped into the shoes of the Employer by evaluating Knowles' conduct himself, rather than evaluating the strength and veracity of the *Employer's* allegations
- The Union kept no notes of any kind – no notes of his discussions, review of the video or analysis of the grievance

The Case Law: Duty of Fair Representation

Decision of the LRB:

- Inadequate record-keeping is a factor in assessing the Union's conduct as a whole
- Lack of records of its investigation or discussions with the employer means effectively the Union has eliminated counsel's ability to represent Knowles at arbitration

4. Managing the Complaint and Investigation Process: Other Considerations

Policies & Effective Communications



Managing the Complaint Process

Union Representation:

- Who is entitled to representation and at what point in the disciplinary process?
 - Varies with the terms of each collective agreement and the facts of each case
 - Typically, collective agreements limit the employee's right to a union rep where matters of discipline are at stake
 - Meetings where there is a reasonable possibility of disciplinary action
 - Where the Employee may inculcate themselves in some way
 - Situations where discipline is actually imposed

Managing the Complaint Process

Union Representation:

- Generally, representation rights are not applicable:
 - To investigations still in fact-finding stage
 - To informal meetings initiated by the grievor to give their version of events
 - To general staff meeting concerned with broad policy questions
 - To sessions with non-managerial personnel

Managing the Complaint Process

Union Representation:

- Some arbitrators have held that an employee's rights to union representation do not apply when non-disciplinary sanctions and terminations are at stake

Eg.) ***Canadian Mental Health Assn*** (2012), 217 L.A.C. (4th) 250

- Collective Agreement specifically allowed for a Union rep when discipline imposed on an employee
- This included disciplinary discharge or suspension NOT non-disciplinary release or termination
- In this case, probationary employee was not entitled to Union rep when she was terminated as not being suitable for the job

Managing the Complaint Process

Employee Complaint Process:

- Do you have a clear and well-defined Employee Complaint policy and process?
- Are all of the steps and expectations in the Complaint Process clearly laid out?
- Ensure you fully understand the Complaint
 - Get it in writing
 - Provide the Respondent (and Union representative) with the Complaint and time to respond

Managing the Complaint Process

- Be proactive and seek legal advice where necessary
- Ensure the investigative process is fair, unbiased
 - Who is conducting the investigation?
 - Respondent = given an opportunity to respond to allegations?
 - Witnesses for both sides are interviewed?
 - Do you have good record-keeping processes of discussions and interviews?

Managing the Investigation Process

- Determine whether the investigation should be conducted by an internal or external party
 - Use common sense in choosing an appropriate person and if an external investigator, vet their qualifications
 - Confirm in writing the terms and scope of the investigation
 - Is the investigator required to do more than gather evidence and make findings of fact (ie. Make recommendations? Can the investigator advise on legal issues?)

Legal Issues to Consider

- Vicarious liability of the employer for an employee's wrongful actions
- Constructive termination if workplace is unsafe
- Possible human rights complaints
- Grievances and litigation arising from complaints that are not properly addressed or investigated by the employer

Legal Issues, cont'd

- Should the respondent be suspended pending the investigation?
- Discipline must be appropriate in the context
- Has the complaint been addressed to the satisfaction of the Complainants / the Union?
- Has the Union fulfilled their duty of fair representation under the LRC?

Managing the Investigation Process, cont'd

Confidentiality and Privacy issues:

- The complaint cannot be kept confidential once submitted in writing = employer has a duty to act and investigate
- Confine the investigation to those who are affected by it until conclusively determined
- Redacting of personal information may be necessary (PIPA or FIPPA) if report is requested

Legal Issues



Successful Investigation

***Madill v. Steelworkers* (Larry Brown Grievances), BC Labour Arbitration**

- Complaint by co-worker from bargaining unit alleging personal harassment
- Evidence of bullying, rude and disrespectful behaviour confirmed by independent investigation agency
- Dismissal of Mr. Brown was upheld after 8 days of hearing

5. Almost wrapped up...

Summary & Conclusions

- Investigations are being more commonplace in the workplace and therefore, are coming under more scrutiny
- Important to have HR personnel trained in at least how to manage the complaint process, if not the investigation process
- Reach out for professional help
- Goal: To keep our workplaces functioning properly for all and safe

QUESTIONS?

Thank you for attending!

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Carman J. Overholt, Q.C

Direct: (604) 676-4196
carman@overholtlawyers.com

