

Damages and the Importance of Conducting Proper Workplace Investigations

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In the world of human resources, issues surrounding employee misconduct and discipline are becoming increasingly complex and difficult to navigate. So much so, that when investigating alleged misconduct, not only is the result important, but the *process* used to reach that result.

While the investigative process used by an employer hasn't always been in the spotlight, provided that the employer reached the correct result, the law has changed (and continues changing) to the extent that employers now face exposure for poorly conducted investigations. In fact, a recent decision illustrates just how easily employers may expose themselves to significant liability for their failure to conduct proper and thorough investigations.



In *Doyle v. Zochem*^[1], Ms. Doyle lodged a complaint with her employer, Zochem, after having been subjected to a course of sexual harassment from the plant manager. However, unbeknownst to Ms. Doyle, Zochem had already made the decision to terminate Ms. Doyle's employment without cause, prior to having received the complaint and for unrelated reasons. Given the pending termination, Zochem performed only a cursory investigation of the complaint and failed to give Ms. Doyle an opportunity to respond. Further, during the course of Ms. Doyle's termination meeting, Zochem suggested to Ms. Doyle that she was being irresponsible for having lodged the complaint and ought to abandon her claim against the plant manager.

Ultimately, Ms. Doyle brought a claim against Zochem for wages in lieu of notice of termination; damages for sexual harassment under the *Human Rights Code* (Ontario); and moral damages for Zochem's treatment of her - which included the alleged failure to properly investigate her sexual harassment claim. In the result, the trial judge awarded Ms. Doyle ten

months' wages in lieu of notice; \$25,000 in damages for sexual harassment; and \$60,000 in moral damages, which the Ontario Court of Appeal upheld. Importantly, the Court of Appeal also concluded that Zochem's cursory investigation and dismissal of the sexual harassment complaint were proper considerations for the moral damages award.

So, what is an employer to take from this decision? There are some clear principles:

1. Employers should not ignore or take complaints lightly - even if the employee is to be terminated for unrelated reasons. Once a complaint is made, employers need to investigate in a timely, good faith and thorough manner;
2. Investigators should take care to compile all relevant evidence and give all witnesses an opportunity to provide their version of events; and
3. Not only does a flawed investigation place an employer at risk of making the *wrong* decision, conducting a flawed investigation may, in and of itself, result in an award of aggravated or moral damages being made against the employer.

In light of the above principles and, in particular, the ability of judges to award damages resulting from flawed investigations, employers need to remain live to those circumstances where not only is an investigation required, but where they would benefit from retaining external counsel to conduct such an investigation, as a way to mitigate against the risk of performing a flawed investigation.

While not every complaint or investigation warrants retention of an external investigator, those circumstances are arising much more frequently and may include scenarios where serious allegations are made; a complex factual matrix is alleged; or even where the employer wishes to ensure a degree of independence from the investigation is maintained. As a result, whether the circumstances/allegations warrant retaining an external investigator ought to remain front of mind for employers.

Scott is a partner at TDS LLP practising in labour and employment law; and also conducts workplace investigations. Scott is happy to assist with any needs you may have in these areas.

[1] *Doyle v. Zochem Inc.*, 2017 ONCA 130

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