

Fairness is More Than Just an Eight Letter Word

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Whether in the playground, at a sporting event or in the workplace, everyone wants to be treated fairly.

It is unsurprising then, that the law requires that workplace investigations be conducted in a fair manner. In fact, if investigators aren't careful, a flawed investigation will not only be of little use to the employer who initiates the investigation, the employer may have to commission a second investigation to replace the original!



For example, in *Toronto District School Board v. Local 4400, Canadian Union of Public Employees*^[1] the Grievor filed a workplace complaint alleging unfair and differential treatment, leading the employer to retain an independent investigator. During the course of the investigation, a number of respondents and anonymous witnesses raised their own complaints/allegations against the Grievor. However, the Grievor was not actually made aware of the allegations against him; the identity of the individuals making the allegations; or provided with an opportunity to address those allegations. Further, during the course of the investigation, the Grievor was transferred to a new work location, presumably as a result of the allegations raised against him. As a result, the Grievor filed a grievance alleging that he had not been provided with a fair investigation and that his transfer was an act of reprisal.

In considering the grievance, the arbitrator noted that because the Grievor's complaint was that the investigation *itself* was unfair and that he was transferred in retaliation for his complaint, the adequacy of the investigation was directly at issue.

In the result, the arbitrator set out that the Grievor was entitled to have his complaint investigated, and that it be investigated properly. Because the Grievor was not provided with a fair and impartial investigation (the investigator didn't properly investigate the original complaint and didn't provide the Grievor with an opportunity to respond to the anonymous allegations), the arbitrator ordered that the employer retain a *different* independent investigator to conduct a new investigation into the Grievor's complaint. In other words, the flaws in the investigation resulted in the employer having to start from scratch - after already incurring the cost of both the original investigation *and* an arbitration hearing.

So, what lessons can we learn from the *Toronto District School Board* decision?

- An unfair investigation, is a flawed investigation!
 - A fair investigation requires:
 - completion in a timely fashion;
 - performance by a qualified investigator;
 - the involvement of both the complainant and respondent, including an ability to provide a statement, identify witnesses and respond to statements adverse to their positions;
 - that it be carried out in a good faith, independent, thorough, balanced, fair, unbiased, non-arbitrary and non-discriminatory manner; and
 - the complainant and respondent be advised of the progress of the investigation as well as the conclusions.
- A flawed investigation has consequences!
 - A flawed investigation puts any decisions made by an employer, which were based on that investigation, at risk.
 - A flawed investigation increases costs for an employer.
 - A flawed investigation may require a second investigation to be performed.
 - A flawed investigation may result in an award of damages (see my previous article *Damages and the Importance of Conducting Proper Workplace Investigations* for more).
- You get what you pay for!
 - Investing in a skilled investigator should provide employers with a solid foundation for making their decisions and avoiding unnecessary costs.
 - Hiring an investigator with experience in assessing credibility, weighing evidence and reaching well-reasoned conclusions puts employers in the best position possible to deal with workplace issues.

In short, *Toronto District School Board* shows us that fairness is more than just an eight letter word, it's a legal obligation, with real consequences, that extends to workplace investigations.

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] *Toronto District School Board v. Local 4400, Canadian Union of Public Employees*, 2016 CanLII 36349

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