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What's an Employer to Do? When is Discipline an Appropriate Response to a False Human Rights Complaint?

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Human rights complaints filed by employees can be expensive for employers, both in investigating the complaints and defending a complaint before the Ontario Human Rights Tribunal (the "Tribunal").

As employers are vicariously liable for the actions of their employees, they can be the subject of complaints even if senior management was not aware of the offending behaviour in cases where those actions are done during the course of employment.[1]

There are, however, cases where complaints are unfounded. Employers often inquire as to what they can do to recoup the losses they have suffered as a result of these complaints. The short answer is nothing. The law is clear that the Tribunal has no jurisdiction to make costs awards against unsuccessful claimants. The parties are left to absorb their own legal fees and any other costs associated with the complaint.

Employers also inquire as to whether they can terminate an employee who files a false complaint. Again, the answer is often "no." The *Code* provides employees with protection against reprisal or threats of reprisal. Section 8 of the *Code* provides:

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.

The Tribunal has never specifically addressed the issue of whether employees can obtain the protection of Section 8 of the *Code* when they knowingly file a false human rights complaint. However, in *Staniforth et al. v. C.J. Liquid Waste Haulage Ltd. et al.*, 2009 HRTO 717, the Tribunal stated that it was "questionable," noting:

It is questionable whether a person who knowingly makes a false allegation of discrimination is protected from reprisal under section 8 of the *Code*. I am doubtful that if an employer was to, for example, take disciplinary action or terminate a person for knowingly making a false allegation of discrimination whether this would constitute reprisal.

However, in that case the adjudicator ultimately determined that he did not have to determine that issue.

The Tribunal has found that a disciplinary response to an unmeritorious human rights complaint can constitute a reprisal contrary to the *Code* (the protection against a reprisal is triggered as soon as the employee makes an allegation of discrimination or harassment under the *Code*). However, in these cases the Tribunal was satisfied that the complaint was *bona fide* even though it was without merit.

For example, in *Bertrand v. Primary Response Inc.*, 2010 HRTO 186, an employee engaged in a dispute with his supervisor and falsely alleged that his supervisor used a racial epithet. Senior management met with him the following day with the intention of disciplining him for insubordination. During the course of the meeting, the Applicant claimed that the only reason he was being disciplined was because of his colour. He was then terminated for his unfounded allegations of racism.

The employee filed a complaint alleging both discrimination and reprisal. The Tribunal dismissed the allegations of discrimination, but it did find that the termination was as a result of a reprisal. The Tribunal found that in raising his race as a possible ground for termination the Applicant was in fact “claiming” his rights under the *Code* and, therefore, was entitled to the protection of section 8. The Tribunal further held that while the Applicant must show that the Respondent intended to reprise against him, he was entitled to advance the claim even if his claim of discrimination was not substantiated.

Further, the Tribunal held that while an Applicant cannot “maliciously make a claim that s/he knows not to be true in order to gain some advantage,” the claim need not be proved so long as the belief in the claim is found to be genuinely held. The Tribunal was satisfied that the Applicant honestly believed that the discipline was racially motivated and thus the Applicant was free to advance his claim of reprisal.

The result was the same in *Anamguya v. Intercon Security Limited*, 2011 HRTO 2186. The Tribunal dismissed an allegation of discrimination, but found that while the Applicant could not establish that he had been the victim of sexual harassment, there was no reason to believe that he had deliberately made a false claim. Accordingly, the Tribunal found his termination as a result of filing the false claim to be a violation of the *Code*.

Although the Tribunal has not yet rendered a decision dealing with the issue of whether disciplining an employee for deliberately filing a false claim is a violation of section 8 of the *Code*, its comments in other decisions suggest that this would not be a violation of the *Code*.

However, even if it can be shown that the Applicant deliberately filed a false claim of discrimination, an employer would still have to establish that this conduct was sufficiently serious to justify termination for just cause. In the unionized workplace arbitrators seem to be willing to make this finding in appropriate cases.

For example, in *Cold Metal Products Company Ltd.*, 1992 CarswellOnt 5457, an employee filed a false allegation of assault against a co-worker. After an investigation, the employer determined there was no merit to the complaint and terminated the employee. The employee's grievance was dismissed as the arbitrator held the employee now had "impossible relations" with management, his union and his fellow workers and thus the work relationship had been poisoned and a return to work impossible.

In *Aspen Planers Ltd.* (2010), 200 LAC (4th) 100, two employees made an allegation that a co-worker brought a handgun into the company lunchroom, loaded it in front of them and made violent threats. The co-worker was arrested and imprisoned. The criminal charges were eventually dropped against him and, after an investigation, the employer concluded that the incident was fabricated and terminated the two grievors. Their grievances were dismissed. The arbitrator concluded that there were no mitigating factors which would cause him to vary the penalty of termination. They had caused serious harm to their co-worker and the employer had lost all trust in them.

In *D.B. Ontario Inc.*, 2014 CarswellOnt 18210, an employee made an allegation that a supervisor assaulted him. There was a video of the event which showed that the supervisor had not assaulted the employee. As a result, the employee was terminated. The arbitrator upheld the termination on the basis that his deliberate and false accusations were such as to "effectively sever the bond of trust essential to his ongoing employment relationship."

Finally, in *Oshawa Foods* (1996), OLAA No. 471, an employee was terminated for making false allegations of sexual harassment against a co-worker. The termination was upheld as the arbitrator found she made false allegations to punish the co-worker because she was unhappy with the fact that he had criticized her behaviour.

One case in which an arbitrator did not uphold a termination for a false allegation of sexual assault, sexual harassment and sexual discrimination, was *OPSEU v. Ontario*, 2001 CanLII 25766. In this case, the arbitrator found that the employee deliberately filed a false allegation in order to obtain an upgrade of her job. The arbitrator noted that accusing someone of sexual assault and harassment is a very serious matter and that "false allegations of sexual harassment cannot be tolerated." The arbitrator drew a distinction between claims of no merit and bad faith claims and stated:

There is a profound difference between concluding that a claim, on a balance of probabilities standard, is unfounded and a conclusion that a claim is filed in bad faith. Bad faith requires an improper motive. It is entirely different than a finding that the claim could not be sustained. The

grievor was not discharged for filing a claim that could not be substantiated on a balance of probabilities. She was discharged for filing a claim in bad faith.

Notwithstanding the grievor's serious conduct, an arbitrator decided to reinstate her without back pay with a lengthy suspension of almost two years. It may be because the employer was such a large employer that the arbitrator felt that the grievor would have learned an important lesson and could reintegrate into the workplace. Given the weight of other authority, it is doubtful whether this result would have prevailed with a smaller employer.

Summary

When considering the appropriate response to unfounded allegations of discrimination or harassment, employees should first have regard to whether the complainant is protected by section 8 of the *Human Rights Code*. This will depend, not on the merits of the complaints, but whether the complainant legitimately believed that he or she was the victim of discrimination or harassment.

It is only if the employer can show that the Applicant deliberately made a false complaint that it can take disciplinary action.

Once that threshold has been met, the employer must still determine whether the conduct is such that it has just cause for termination. As in all other cases of just cause, it is important to look at the conduct in the context of the entire employment relationship and whether it is possible to restore trust to that relationship.

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[1] *Jones v. Amway of Canada, Ltd. et al.*, 2001 CanLII 26217, aff'd at [2002] O.J. No. 1504.