

Professional Practice and Liability on the Net

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Conducting Investigations in Discipline and Employment Cases

One of the most challenging problems for both regulators and employers is investigating allegations of misconduct or wrongdoing. Both regulators and employers want to ensure that they conduct a thorough and fair investigation because if someone should be disciplined, all relevant evidence should be obtained before proceeding with any action. On the other hand, the investigation may show that discipline would not be appropriate.

While courts do not require that all investigations be conducted perfectly, they do require that they be conducted fairly. For example, an investigator is allowed to believe that the subject of their investigation did something inappropriate, but unless the investigator has a “closed mind”, the courts will typically not find that the investigation was conducted unfairly.

The importance of conducting a fair investigation is difficult to overstate; if an investigation is not conducted fairly, not only is an injustice done to the person investigated, not to mention any complainant, but anyone harmed by the investigation may take steps to seek redress against the regulator or the employer responsible for the investigation. In the case of a regulator, the subject of the investigation may ask the courts either to stop proceedings against them in their entirety or they may try to sue the regulator for damages. In the case of an employee, an employer may open itself up to a claim for wrongful dismissal and related damage claims.

In 2007, the Supreme Court of Canada arguably expanded the scope for bringing civil actions against investigators (and possibly their employers) when an investigation is not conducted properly. In *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129, the Supreme Court of Canada recognized that police officers could be found liable for damages for conducting a negligent investigation. In that case, Chief Justice McLachlin held that the police owe a duty of care in negligence to suspects being investigated. The next question was whether *Hill* would be extended to recognize a duty of care on so-called “private actors”, such as regulators and employers.

It is first important to note that most regulators and employers are somewhat differently situated. In particular, most regulators, especially statutory regulators, have what is loosely called “statutory immunity” from civil actions. In other words, unless the plaintiff can prove that the regulator acted with malice or acted in bad faith, they are allowed to be simply “negligent” without running the risk of paying damages in a law suit. On the other hand, most employers are not usually so lucky; for the most part, an employer is like anyone else, and may be liable for damages in the event that their negligence causes harm to someone.

In *Correia v. Canac*, (2008), 294 D.L.R. (4th) 525, 67 C.C.E.L. (3d) 1, 240 O.A.C. 153, the Ontario Court of Appeal considered the legal implications when an employer investigates possible criminal conduct by its employees.

The facts in *Correia* are quite interesting, if someone complex. As its essence, the case can be summarized as follows:

“In 2002, Joao Correia’s employer Canac Kitchens and its parent company Kohler Ltd. suspected that there was theft and drug dealing occurring at the Canac plant. They therefore retained a private investigation firm [Aston] to conduct an investigation. The firm placed an undercover agent in the firm and he identified several employees engaged in theft and drug dealing. The firm kept the local police force apprised of the investigation, but the police force did little if any independent investigation.

“On October 24, 2002 Mr. Correia, a long-time employee aged sixty-two years, was brought into his employer’s human resources office, accused of theft and fired for cause. He was then taken to another office and arrested by police officers for theft. The only problem is that Mr. Correia was innocent. Through a series of mistakes, he was confused with another employee with a similar name but who was almost forty years younger. Eventually, the mistake was discovered, but by then Mr. Correia claims to have suffered serious injury.

“Mr. Correia and his family sued his employer, the parent company, the private investigation firm, the police force and several individuals.”

The main issue in the case was whether the Court of Appeal would permit a claim of negligent investigation to proceed against the private investigation firm and whether it would allow a claim for intentional infliction of mental distress against Kohler and Marilyn Smith (the HR manager) and the Aston defendant. Ultimately, the Court allowed those claims to be made. It did not however permit the claim for negligent investigation to proceed as against the plaintiff’s employer.

The Court distinguished between many different parties involved in the investigation and the different causes of action alleged. For example, while the Court found that the action against the employer for negligent investigation must fail in that case, it allowed the action to proceed against the HR manager for intentional infliction of mental distress.

This case suggests that it may be advantageous for employers (perhaps including regulators) to hire professional investigators, as this may reduce their possible legal exposure. But regardless of who conducts an investigation, it is clear that the courts are increasingly requiring that investigations be performed reasonably thoroughly in light of the real harm that can result from a poor investigation.

The *Correia* case can be found at:

<http://www.canlii.org/en/on/onca/doc/2008/2008onca506/2008onca506.html>

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