

Legal Corner

LEGAL CORNER

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Workplace Investigations: Is an employer liable for getting it wrong?

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More and more often, employees are finding themselves to be the subject of a workplace investigation. The investigation could be triggered by a fellow employee's complaint regarding harassment, bullying, sexual advances, or other conduct prohibited by an employer's code of conduct.

Employers are duty-bound to investigate such complaints and often conduct these investigations through their own internal staffing, usually their HR department. What if the investigation is done poorly and the accused employee is 'unfairly' disciplined or even terminated from employment as a result of the investigation? Does the employee have any recourse against the employer? Does an employer owe a duty of care to an accused employee in connection with a workplace investigation?

A recent case, *Salina v. Investors Group Financial Services Inc.*, heard in 2023 in the Supreme Court of British Columbia, considered this question and ultimately found that employers do not owe such a duty of care to their employees.

In this case, the plaintiff, Mr. Salina, was an investment advisor for Investors Group. In December 2016, the Mutual Fund Dealers Association of Canada (MFDA) commenced an investigation of Mr. Salina related to his investment practices to determine whether he had violated any rules. After an internal workplace investigation by Investors Group, Mr. Salina was terminated for cause (no termination pay) while the MFDA investigation was ongoing.

The plaintiff claimed that Investors Group had a duty to conduct its workplace investigation in a fair and reasonable manner and had failed in this duty, negligently conducting its internal workplace investigation, causing him damages including the wrongful termination of his employment.

The court rejected the plaintiff's claim and stated that Investors Group did not owe the plaintiff a duty of care in connection with the internal investigation. They applied a two part test, namely,

- Does the relationship between the plaintiff employee and the defendant employer disclose sufficient foreseeability and proximity to establish a prima facie duty of care?
- If so, are there policy considerations that should negate or limit that duty of care?

The first question was answered in the affirmative as Mr. Salina could and did face discipline and other financial consequences as a result of investigation. However, on the grounds of public policy, there were good policy reasons to deny the existence of such a duty of care. Policy reasons include encouraging the reporting and detection of wrongdoing in the workplace. The court held that for public policy reasons, there is no liability in tort for an employer conducting a negligent internal investigation into an employee's conduct.

It appears that the courts wish to encourage employers to conduct internal investigations whenever they deem it appropriate. Employers should take pains to ensure that investigations are conducted in good faith with proper procedures that provide the accused employees with reasonable opportunities to respond to the allegations against them and to avoid claims of unfairness or negligence.

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