

### **WORKPLACE INVESTIGATIONS FOR JUST CAUSE TERMINATIONS**

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#### **1. When must (or should) an employer conduct a workplace investigation?**

Under the OHSA (and similar legislation in other provinces), employers have a general duty to take “every precaution reasonable in the circumstances for the protection of a worker”<sup>1</sup>. This includes protecting workers from workplace harassment (which includes workplace sexual harassment) and workplace violence. The Ontario Human Rights Tribunal<sup>2</sup> has also held employers have a duty to take “reasonable steps” to address complaints of human rights violations as part of its general duty to ensure workplaces are free from Code-based discrimination and harassment.

Having regard to these requirements, an investigation that is “appropriate in the circumstances” must be initiated in response to a variety of complaints including:

- Workplace harassment complaints (which includes workplace sexual harassment complaints)
- Workplace violence complaints
- Discrimination complaints
- Reprisal complaints (where the complainant is attempting to assert a statutorily-protected right)

This duty to investigate is only triggered where the complaint is communicated to the employer, is accompanied by some level of detail, and is related to a potential violation of the Code and/or OHSA<sup>3</sup>.

While workplace investigations are not required if an employer is considering terminating an employee for just cause for a non-statutory breach (i.e. a breach of policy, contractual term, or implied duties) doing so can be “practical” and “cautionary”<sup>4</sup>.

#### **2. What must an employer do to satisfy a Court it had “just cause” to terminate an employee?**

Regardless of whether a workplace investigation substantiates misconduct, employers must still follow the contextual approach first outlined by the Supreme Court in [McKinley](#)<sup>5</sup> and refined by the Ontario Court of Appeal in [Dowling](#)<sup>6</sup>:

- a. Determine the nature and extent of the misconduct.
- b. Consider the surrounding circumstances.
- c. Decide whether summary dismissal is a proportionate response.

If an employer is trying to uphold a termination on the ESA’s “wilful misconduct” standard, it is not enough to show the employee was indifferent, casual, thoughtless, or neglectful in the performance or

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<sup>1</sup> *Occupational Health and Safety Act*, RSO 1990, c O 1 s 25(2)(h)

<sup>2</sup> [Crete v Aqua-Drain Sewer Services Inc.](#), 2017 HRTO 354

<sup>3</sup> [Zambito v LIUNA Local 183](#), 2015 HRTO 605

<sup>4</sup> [McCallum v Saputo](#), 2021 MBCA 62

<sup>5</sup> 2001 SCC 38

<sup>6</sup> 2004 CanLII 43692 (ON CA)

omission to perform duties. The employer must show the employee purposefully engaged in conduct they knew to be serious (i.e. being bad on purpose)<sup>7</sup>.

### **3. What damages have been awarded against employers who failed to conduct an investigation or conducted an improper investigation?**

- In [\*Elgert v Home Hardware\*](#)<sup>8</sup>, the Alberta Court of Appeal awarded \$75,000.00 in punitive damages after an employee was terminated for allegedly engaging in sexual harassment against a co-worker. The Court found the investigator had no training, lacked neutrality, failed to provide particulars, and made no effort to interview relevant witnesses.
- In [\*Hrynkiw v Central City Brewers and Distillers\*](#)<sup>9</sup>, the Supreme Court of British Columbia awarded \$35,000.00 in aggravated damages after the employer failed to establish “just cause” based on allegations of financial misconduct. The Court found the employer’s investigation was inadequate because it concluded at the outset the employee was guilty and terminated the employee while he was still under investigation.
- In [\*Wexford Residence Inc v CUPE Local 3791\*](#)<sup>10</sup>, an Arbitrator upheld a worker’s discharge for time theft but awarded the worker \$5,000.00 in general damages for their failure to conduct a reasonable investigation into the worker’s sexual harassment allegations.

### **4. How can a workplace investigation assist in having a termination for cause upheld?**

- In *Render*, the Court cited the employer’s internal investigation (during which the complainant, respondent, and relevant witnesses were interviewed) in a decision upholding summary dismissal for sexual harassment.
- In [\*Hucsko v AO Smith Enterprises\*](#)<sup>11</sup>, the employer’s workplace investigation confirmed the employee made inappropriate comments which constituted sexual harassment and the employee’s “just cause” termination was subsequently upheld.
- In [\*Park v Costco\*](#)<sup>12</sup>, the Court held the employer’s internal IT investigation was sufficient to confirm the relevant facts, and subsequently upheld the employee’s termination for just cause and wilful misconduct.

### **5. What other factors should employers consider when conducting investigations it intends to rely on to support a just cause termination?**

- Ensure investigation is conducted by someone who is trained and impartial and considers all relevant evidence
- Consider whether an internal or external investigator is more appropriate
- (Non-punitive) interim measures

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<sup>7</sup> [\*Render v ThyssenKrupp Elevator \(Canada\) Limited\*](#), 2022 ONCA 310

<sup>8</sup> 2011 ABCA 112

<sup>9</sup> 2020 BCSC 1640

<sup>10</sup> 2023 CanLII 39486 (ON LA)

<sup>11</sup> 2021 ONCA 728

<sup>12</sup> 2023 ONSC 1013