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The Employment Law Roundup: Mishandling of Workplace Investigations

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Mishandling of Workplace Investigations by Marie-Hélène Mayer

Pate v. Galway-Cavendish (Township,), 2009 CanLII 70502 (Ont. S.C.J.), rev'd 2011 ONCA 329

Pate v. Galway-Cavendish (Township), 2009 CanLII 70502 (Ont. S.C.J.), rev'd 2011 ONCA 329, is a warning for employers who purport to terminate an employee for misconduct and refer complaints about that misconduct to the police. Employers who do not conduct a proper investigation of alleged misconduct, or who fail to make proper disclosure to the police, face exposure to damages for wrongful dismissal and additional damages.

Pate was the chief building official for the defendant township, and briefly, a building inspector. While on short-term disability in March 1999, Pate was called to a meeting with his supervisor, Beavan. At the meeting, Pate was dismissed from his position without notice after the township became concerned about perceived irregularities regarding permit fees. The allegation was that Pate had received permit fees but had not forwarded them to the township. Pate was given no further details, nor any opportunity to respond to the allegations about him. He was told that the matter would not be reported to the police if he resigned immediately. Pate refused to resign. Beavan, a retired police officer, then conducted an investigation into Pate's dealings with building permit fees and provided the results of his investigation to the police. Pate was charged with theft. Pate was later acquitted of the charges in December 2002.

Following his acquittal, Pate sued the township for wrongful dismissal and malicious prosecution. Only on the eve of the trial did the township acknowledge that Pate had been wrongfully dismissed and that he should have been given a 12-month notice period. The focus of the trial was Pate's claim for malicious prosecution and additional damages arising out of the manner of his dismissal.

The trial judge awarded four months' "Wallace" damages to Pate, concluding that the township had acted in bad faith in the manner of his dismissal.

The trial judge held that Pate had failed to make out all of the elements of the tort of malicious prosecution. In particular, he held that Pate had not shown that the township had acted with malice because it had not "intended to subvert or abuse the criminal justice system". The trial judge held that the township's misconduct had come "very close" to the line, but that in the end Pate had not made out a case of malicious prosecution. However, the trial judge awarded aggravated and punitive damages against the township, based on the fact that it had terminated Pate without advising him of its reasons for doing so, without providing him with an opportunity to answer the allegations against him, and critically, that the township's investigation occurred only after Pate had been terminated, "in order to build a case to justify the termination".

The township had failed to provide exculpatory evidence about Pate to the police. In particular, there was evidence that many of the township's files had been lost in the course of a move to new offices, and that this was widely known internally. As well, there had been a previous investigation in 1995 by a committee of the township council into one of the files in issue, and no action had been taken against Pate as a result of that investigation. Finally, Beavan had failed to provide Pate's journal (which contained notes relating to building permit applications and fees, and which Beavan had retained) to police.

The trial judge awarded Pate \$75,000 in general and aggravated damages and \$25,000 in punitive damages, plus \$7,500 in special damages (Pate's legal costs incurred in defending himself in the criminal trial) and four months' income in "Wallace" damages.

Pate appealed to the Court of Appeal, arguing that the trial judge had erred in failing to award damages for malicious prosecution, and that the award of damages had been too low. The Court of Appeal agreed. It held that the trial judge made three errors. First, he had set the standard for malicious prosecution too high. Second, he had made findings about the township's malice in the context of awarding aggravated and punitive damages that were not consistent with his findings on malice in his treatment of malicious prosecution. Third, the trial judge had erred in holding that to prove malicious prosecution, the plaintiff must show that the prosecution was initiated by the defendant. The Court of Appeal held that a defendant may be found to have initiated a prosecution even though he did not lay the information that commenced the prosecution.

The Court of Appeal also agreed that the trial judge's award of \$25,000 in punitive damages was too low. The only explanation that the trial judge had given for this level of damages was that he was "bound by the principles of proportionality". The Court of Appeal held that given the trial judge's other findings about the township's significant misconduct and the devastating impact it had had on Pate, the trial judge's award of punitive damages should be set aside.

Given the trial judge's errors on malicious prosecution and damages, the Court of Appeal ordered that there be a new trial on these issues. An application for leave to appeal to the Supreme Court of Canada was subsequently filed, but appears not to have proceeded further. Interestingly, the Court of Appeal expressed doubt (without deciding the point, which appears not to have been in issue on the appeal) about whether Wallace damages were appropriate on the facts of the case.

What does this mean for employers?

1. First, any investigation of employee misconduct should, except in unusual circumstances, occur before a decision is made as to whether to terminate the employee. The courts tend to be suspicious of after-the-fact investigations unless there is a compelling reason to have terminated the employee before a full investigation could be conducted
2. Second, employers should not terminate employees for cause unless they have properly documented grounds for doing so. Employers must not “shoot first” and “ask questions later”.
3. Third, employers should exercise care in referring complaints about employee misconduct, and disclosing the results of investigations, to the police. Serious flaws in the employer’s investigation on process can, in some circumstances expose the employer to liability for malicious prosecution if it turns out that the complaints against the employee were unjustified.