

## WHO WE ARE AND WHAT WE DO

For those of you who don't know who we are, we are a Toronto based employment law firm focussed on providing optimal legal solutions to our clients' challenging workplace issues. In so doing, we provide our clients legal advice and support on all matters relating to the workplace.

We do have a particular interest in workplace investigations, a topic we first wrote about in 2007, when our book, the *Human Resources Guide to Workplace Investigations*, was first published. In addition to frequently being retained as external neutrals to conduct workplace investigations, we like to think of ourselves as advocates of good workplace investigation practice.

This month, we discuss a recent piece of litigation, brought to our attention by Melanie Kerr of KPMG, that highlights the risk that the conduct of an investigation may be the subject matter of a wrongful dismissal claim.

In the coming months, we will continue to highlight cases that focus on workplace investigation issues. As this is an emerging field in employment law, we hope to capture what courts and adjudicators say employers are required to do to ensure that their workplace investigation processes are fair and legally defensible.

Please let us know what you think of the alert by contacting us at [workplaceinvestigationalert@rt-law.ca](mailto:workplaceinvestigationalert@rt-law.ca). We look forward to hearing from you.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

Experienced investigators expect the unexpected during the course of an investigation but usually close the file and move on once a determination is made and the report is written.

## Negligent Investigation Claimed in Wrongful Dismissal Lawsuit

However, one wrongful dismissal case recently commenced in Hamilton shows that if a party is unhappy with the outcome of an investigation, they may "attack" the investigation process as part of an overall litigation strategy. The lawsuit, started by three former employees of the City of Hamilton who were fired after participating in an investigation as "respondents", raises several interesting issues regarding what is acceptable investigation practice.

In the claim, three former senior managers allege that they were terminated as a result of a negligent investigation and are seeking damages in excess of 6 million dollars from the investigator and the City of Hamilton. The City retained the external investigator after receiving a complaint from an employee who was a standards and licensing inspector in the City's taxi inspection office. The employee alleged that two city councillors threatened his employment and physical well being and also that the managers subjected him to harassment including differential treatment and made unfounded accusations that he was belligerent.

The incident that precipitated the alleged harassment occurred when the employee reported that a taxi had electrical issues and could not be licensed until the issues were resolved. A City Council member, escorted by a

member of management, went to the taxi inspection office where the following confrontation occurred:

Councillor: "...I do have a problem with a [taxi] owner calling me to tell me the barbeque that he is picking me up to go to will be late because he has to go down to City Hall and deal with the asshole in the taxi inspection office and that he is so pissed off that he wants to come down here with a f\*\*\*ing bat."

Employee: "Frankly I am not concerned that he is pissed off."

Councillor: "Well you f\*\*\*ing well better be concerned when I'm f\*\*\*ing pissed off because I'm your f\*\*\*ing boss, I can fire your f\*\*\*ing ass or if I can't fire your f\*\*\*ing ass I'll have you f\*\*\*ing turfed out of this f\*\*\*ing office so f\*\*\*ing fast it will make your f\*\*\*ing head spin..."

Once the external investigator concluded the investigation, the City terminated the managers.

In their Statement of Claim, the managers allege that:

- The conclusions in the investigator's report were the product of a negligent investigation;
- The investigation was biased (however no basis was given for allegation of bias);
- The investigator interviewed each manager on only one occasion and had a follow-up meeting only to report conclusions;

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**"The employee alleged that two city councillors threatened his employment and physical well being and also that the managers subjected him to harassment..."**

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## Negligent Investigation Claimed in Wrongful Dismissal Lawsuit

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- The investigator did not inform the managers that they were under investigation;
  - The investigator “did not allow” the managers to take notes during the interview nor did she provide written summaries of the interviews or of her conclusions with respect to the managers.
- In her Statement of Defence, the investigator pleads that it was her mandate to determine whether any of the individuals named in the complaint had breached the City’s *Personal Harassment and Prevention Policy*. The investigator further pleads that she did the following at each interview including:
- Introduced herself as the investigator and explained to the witness that her role as investigator was as an impartial fact-finder;
  - Advised the witness that her mandate did not include recommending or commenting on discipline or sanctions;
  - Advised the witness or confirmed with the witness that she or he was a respondent in the complaint, where appropriate;
  - If the witness was a respondent in the complaint, detailed the specific allegations that the employee had made against them;
  - Advised the witness that she or he could have representation present if desired;
  - Advised the witness of the need to maintain confidentiality;
  - Advised witnesses and their representatives that they may not take notes for confidentiality reasons but that she would read them her notes at the end of the interview to confirm accuracy;
  - Took detailed notes during the interview. At the end of each interview, she read out her notes verbatim, gave the witness an opportunity to clarify and correct her notes, and sought clarification on unclear issues;
  - Provided the witness with her business card and requested that the witness contact her with additional information or documentation; and
  - Advised each witness that she would send her report directly to the City as required by the Policy.
- As the lawsuit has just commenced we cannot report on the outcome. On our reading of the Defence, it would appear that the investigation was conducted properly, although we obviously do not know all the facts. However, the mere existence of the lawsuit is a reminder to employers of the need to ensure that their workplace investigation processes are defensible and that they are cautious in terms of who they choose to conduct investigations on their behalf. ●

### LESSONS LEARNED FROM THIS LAWSUIT:

1. If relying on an external investigator, make sure you understand the process she or he is going to follow, if it is not your own.
2. Make sure your external investigator is experienced and qualified.
3. If relying on an internal investigator, make sure they are properly trained and are following your workplace investigation policy.
4. If you don’t have such a policy, create one so that all parties know what to expect once involved in the process.

## Are you ready for Bill 168?

Bill 168 will amend Ontario’s *Occupational Health and Safety Act* to include protections against violence and harassment in the workplace. Harassment is defined in the Bill as, “Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known as unwelcome.” This is the first statutory protection in Ontario in relation to psychological harassment.

Once the Bill comes into force, which is expected to be later this year, employers will have an enhanced duty to investigate complaints of harassment. Will you and your organization be ready? Does your organization know how to respond to a psychological harassment complaint? Do your managers know what psychological harassment is? Does your human resource team know how to conduct an effective, thorough and defensible workplace investigation?

Join us at our next workplace investigation training session, where we can help you get ready. You will learn to apply our proprietary investigation template to a prospective workplace investigation. Content will include both human rights complaints and those involving personal harassment and bullying.

You will have the opportunity to investigate mock complaints over both days and practice your investigation skills, such as interviewing, analysis and reporting. And you’ll also learn:

- The legal trigger for a workplace investigation, including Bill 168.
- Know when, and what type of, investigation is required.
- Lay the proper framework for an investigation so as to avoid problems before they happen.
- The costs and consequences of getting it wrong – what are the courts saying?
- Fix investigations which get “off the rails”.

In order to optimize the learning experience, space is limited to twenty (20) participants. Hands-on sessions in small groups enable you to dialogue with, and learn from, your peers. All attendees will receive a certificate confirming their participation.

Our next training dates are:  
**September 15 and 16, 2009**  
**November 23 and 24, 2009**

If you are interested in attending, please contact us at (416) 847-1814 or [seminars@rt-law.ca](mailto:seminars@rt-law.ca).