

## Winnipeg Bound! Workplace Investigation Training in Winnipeg March 28-30, 2011

Manitoba is set to amend its *Workplace Safety and Health Act* on February 1, 2011 with respect to violence and psychological harassment in the workplace. This change means human resources professionals will need to know how to conduct thorough and fair workplace investigations.

Don't know where to start? Uncertain what types of behaviour constitute psychological harassment? No idea what triggers the legal requirement to conduct an investigation or how to write a report?

We can help. We literally wrote the book on conducting workplace investigations ([Human Resources Guide to Workplace Investigations](#)). Over the past few years we have trained hundreds of HR professionals in Ontario and beyond.

Join our inaugural training sessions in Winnipeg, Manitoba for **Basic Workplace Investigation Techniques** on March 28 and 29 and the **Report Writing Workshop** on March 30. Please register early as registration is limited to 25 people.

Please email [seminars@rt-law.ca](mailto:seminars@rt-law.ca) or visit our website [www.rubinthomlinson.com](http://www.rubinthomlinson.com) for more information.

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.

*Pate v. Galway-Cavendish*, a case that shed light on the legal consequences of conducting an improper investigation, was argued in Ontario's Court of Appeal in late November 2010. The Court has reserved its decision. While we wait for word from the Court on this case, it is worthwhile reviewing the trial decision, as it provides employers, and those conducting investigations for them, many useful lessons on what not to do when conducting a workplace investigation.

## Flawed investigation results in damages (yet again)

After 10 years of service with the Township of Galway and Cavendish, Mr. Pate was called into a meeting with his supervisor, Mr. Beaven. Mr. Pate was provided with no advance notice of the purpose for the meeting. In fact, Mr. Pate was on short term disability at the time of the meeting, and the first half of it was to discuss the sufficiency of the medical information he had provided.

During this meeting, Mr. Beaven advised Mr. Pate that there were some discrepancies in building permit fees, which were allegedly received by Mr. Pate, but not turned over to the Township. Mr. Pate was not provided with any particulars of the allegations against him, nor was he given a chance to respond to the allegations. He was simply told that "the discrepancies existed" and that if he resigned by close of business on the following Tuesday, the police would not be called in. Mr. Pate asked twice what the discrepancies were about and, in response, he was told "the fact that they existed was all that mattered."

Mr. Beaven confirmed at trial that the Township had made the decision to terminate Mr. Pate prior to this meeting.

Mr. Pate, maintaining his innocence, refused to resign. Mr. Pate was terminated for cause. The police were called, having been told by Mr. Beaven that there were four cases of alleged theft against Mr. Pate and that the case "was going to be very big". Mr. Pate was subsequently charged criminally based on the records given to the police by

Mr. Beaven. The records failed to disclose that when the Township had moved its offices a few months earlier, they had lost a number of municipal files which may have provided some exculpatory evidence in Mr. Pate's favour. At trial, Mr. Beaven confirmed that he had withheld exculpatory evidence from the police and could not provide an explanation as to why he had done so. Moreover, it also became clear at trial that had the Township interviewed a co-worker of Mr. Pate's during part of its "investigation", it would have learned that many files had been lost due to a move of premises, and this may have been why building permits could not be found.

After losing his wife, his restaurant business and his reputation in the community (the details of the charges were outlined in the local newspaper), Mr. Pate was exonerated of all criminal charges. By this time, Mr. Pate had become unemployable in his community. He moved to PEI to live with his daughter.

Prior to the trial relating to his employment at the Township, Mr. Pate and the Township agreed that Mr. Pate had been wrongfully dismissed and had settled upon a 12 month notice period. At trial, the judge ordered the following additional damages as a result of the Township's conduct:

- An amount equivalent to four months income as a Wallace bump-up;

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- Special damages in the amount of \$7,500 for Mr. Pate’s legal costs in order to defend himself in relation to the criminal charges;
- General and aggravated damages in the amount of \$75,000; and
- Punitive damages in the amount of \$25,000.

When deciding to award Wallace damages, general and aggravated damages and punitive damages, the judge took into consideration the following:

- The Township’s failure to provide the Plaintiff advance notice of the allegations against him;
- The Township’s failure to provide the

- Plaintiff with particulars of the allegations;
- The Township’s failure to provide him an opportunity to answer allegations made against him prior to making the decision to terminate him; and
- The Township’s failure to disclose information to the police which would have resulted in no charges being leveled against the Plaintiff.

Because of the failure to conduct a fair and impartial investigation, and to treat Mr. Pate fairly and in good faith, the Township paid nearly four and a half times what they would have been liable to pay to dismiss Mr. Pate without cause. ●

## WHAT DOES THIS MEAN FOR EMPLOYERS?

1. Employers are entitled and encouraged to investigate issues of suspected employee misconduct; however these investigations must be conducted fairly and impartially. The purpose of the investigation meeting is to fact-find in an open minded way. If the employee has an explanation, employers should carefully consider it before making a decision to terminate employment.
2. Be mindful of the tone and content of the investigation meeting, particularly because it is a critical link in the chain of events leading up to an employee termination. In particular, the investigation meeting should not be used to pressure an employee to resign, particularly with a threat to involve the police.
3. Once again, courts have indicated that employees are entitled to advance warning of allegations against them, and the particulars of these allegations, prior to being required to respond. Failure to do so in this case contributed to the awarding of damages that went far beyond what the case was worth from a reasonable notice perspective.
4. Ensure that all individuals with information relevant to the investigation are interviewed as witnesses.
5. Think very carefully about whether there is any “upside” in involving the police. If there is a strong rationale for doing this, all relevant information should be presented to the police accurately. Employers should not withhold information that may influence the decision to lay (or not to lay) charges.

## UPCOMING EVENTS

The second edition of A Practical Guide to the Law of Termination in Ontario, co-authored by Janice Rubin and Hena Singh and published by Canada Law Book, is now available. [Click here to order your copy.](#)

### January 21

Our annual breakfast seminar, The Employment Law Roundup, is taking place on January 21 in Toronto. The seminar will cover important trends and notable cases from 2010. To register please visit our [website](#).

## 60 Minutes with RT What’s New on Psychological Harassment: A Legislative and Case Law Update February 3, 2011

Recent statutory changes across Canada require employers to address violence and psychological harassment in the workplace. In addition, courts continue to award damages to employees who have been psychologically harassed at work.

Join Janice Rubin and Christine Thomlinson for an hour-long, interactive teleseminar that will provide you with the latest on these emerging statutory provisions, plus an update on the case law.

Our discussion will include:

- A review of the key statutory provisions from across the country, with a discussion on the newest Manitoba provisions;
- How psychological harassment is being interpreted by provincial ministries of labour;
- An update on the case law: what are employers’ legal obligations to employees who have been psychologically harassed?
- How are damages assessed by the courts?
- What is the latest news from the courts about investigating these cases?
- Our top advice to avoid incidents of psychological harassment in the workplace.

Please visit our [website](#) to register. Train up to four employees for \$99. Registrants will receive written material in advance of the teleseminar. Please note that the \$99 fee allows access to one phone line only.

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at [contact@rt-law.ca](mailto:contact@rt-law.ca).