

WELCOME to our FIRST ISSUE

You are reading the very first edition of Rubin Thomlinson's *Workplace Investigation Alert*. For those of you who don't know who we are, we are a Toronto based employment law firm focussed on providing optimal 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.

How fitting that in this first issue we should be discussing a recent case from the Ontario Superior Court of Justice, *Piresferreira and Bell Mobility*. Here an employer's failure to conduct an investigation properly resulted in a significant damage award to the employee.

In the coming months, we will 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. 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.

In a recent decision, *Piresferreira v. Bell Mobility Inc.*, 2008 CanLII 67418 (Ont. S.C.J.), a Court in Ontario highlighted the mistakes that can be made when conducting a workplace investigation and the significant costs that result when things go wrong.

WORKPLACE INVESTIGATION GONE WRONG: *Piresferreira v. Bell Mobility*

The Abusive Boss

In *Piresferreira v. Bell Mobility*, Marta Piresferreira was an exemplary sales associate who (for reasons the Court acknowledged were out of her control) was having problems meeting her sales quota. Her manager Richard Ayotte became increasingly frustrated at Piresferreira's perceived failure to implement strategies he had recommended to her to improve her performance.

When dealing with his team, Ayotte was known to be abusive and would frequently swear and use phrases such as "Jesus Christ" or "God damn it". He also would yell and swear at this team when the team was below target. Ayotte considered this to be an effective and acceptable strategy to get people motivated.

Ayotte's relationship with Piresferreira deteriorated. One morning, things came to a head, when Ms. Piresferreira and Ayotte had an argument about a work issue. Ayotte yelled at her in front of others, and accused her of not knowing what she was talking about. Piresferreira held her Blackberry up to Ayotte's face to show him a chain of emails by way of

reply. Ayotte said he wasn't interested, glared at her, and then pushed her out of anger and frustration. Piresferreira told Ayotte that he shouldn't have done that. He told her to "get the hell out of his office". As a strategy to ward off any complaint from Piresferreira, Ayotte then put her on a performance improvement plan immediately after the incident.

Piresferreira felt violated and shortly afterward was diagnosed with post-traumatic stress disorder. She was unable to return to work. She lodged a formal complaint against Ayotte with human resources.

Mistakes made in the Investigation Process

Notwithstanding the severity of the complaint, Bell's investigation consisted of Ayotte's supervisor asking him a number of questions as to what occurred. The supervisor did not interview Piresferreira, nor did he interview anyone else who reported to Ayotte. The Court concluded that this was ultimately an exercise in "damage control", as opposed to a thorough fact finding exercise.

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Workplace Investigation Gone Wrong

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The Aftermath

The Court was very concerned about Bell's conduct following the conclusion of the investigation. First, while it did accept that Ayotte had pushed Piresferreira, it downplayed the severity of this behavior and simply stated that Ayotte had acted "inappropriately" and that such behaviour was "unacceptable." While Ayotte was initially referred to counseling, he reported that he did not need to continue after he completed the first session. This was accepted by Bell.

Most seriously, Piresferreira was placed on a performance improvement plan, which had at least the appearance of being a reprisal for filing her complaint.

Bell's Legal Liability

As a result of the manner Piresferreira had been treated by Ayotte, as well as the flawed investigation Bell conducted, the Court concluded that Bell had not lived up to its obligation to treat Piresferreira with civility, decency, respect and dignity. As a result, the Court held both Bell and Ayotte liable for damages for assault and battery, as well as intentional infliction of emotional distress, mental suffering, nervous shock and/or psycho-traumatic disability. The Court also concluded that Ms. Piresferreira had been constructively dismissed. In total, Ms. Piresferreira was awarded more than \$600,000 in damages. ●

WHAT CAN WE LEARN FROM PIRESFERREIRA?

- 1. Employers must be prepared to conduct workplace investigations in a thorough and fair manner.** This means interviewing complainants to obtain the full picture of their complaint, interviewing all available witnesses, as well as the respondent. Employers who take shortcuts in this process will be held legally accountable for a flawed process.
- 2. If your investigation is being conducted by someone within your organization, as opposed to an external investigator, be aware of the impact of conscious and unconscious bias.** Our reading of Piresferreira suggests that the objectivity of the manager who conducted the investigation may have been clouded by the relationship he had with Ayotte in that he based his conclusions almost exclusively on information obtained from him.
- 3. Beware of actions taken at the end of an investigation that are or appear to be retaliatory.** In this case, the fact that the complaining employee was placed on a performance improvement plan, showed remarkably bad judgment on the part of Bell, and did contribute to undermining the legitimacy of the investigation process.
- 4. Make sure that the people who conduct investigations within your organization understand the seriousness of the task imposed on them, and the possible legal ramifications if they do a lackluster job.**

Need to Know How to Conduct a Workplace Investigation?

For human resources professionals and managers, conducting a workplace investigation is fraught with many challenges. Who do you interview and in what order? How do you ask tough questions? What evidence can you consider? How do you make credibility decisions and how to organize everything in a clear and concise report?

Join us at our next workplace investigation training session, where all these questions will be answered and more. 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 how to:

- 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.