

Shoan v. Attorney General, 2016 FC 1003, is a cautionary tale for organizations about what can happen when an investigation is examined critically by a legal decision-maker.

Shoan v. Attorney General: Five lessons learned the hard way

In 2014, the Executive Director of the Canadian Radio-Television and Telecommunications Commission (“CRTC”) filed an internal harassment complaint alleging that one of the Commissioners—Shoan—had sent her a series of “inappropriate” emails.

Following an investigation, the allegations were found to be substantiated and, as a result, Shoan’s appointment to the CRTC was terminated.

At Federal Court, Shoan argued that the investigation had violated the basic principles of procedural fairness and natural justice. Justice Zinn, who presided over the case, agreed.

What follows is a summary of some of the more egregious investigation mistakes identified in the decision and the lessons that we can learn from them.

1. Do not assume that your investigator is competent

Although the decision did not specifically address the investigator’s background conducting investigations, the facts suggest that the challenges she experienced may have been compounded by a lack of experience.

The investigator was chosen from a pre-established roster

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of service providers who had already met the threshold competency, security and confidentiality requirements. She was also selected, in part, because of her designation as a lawyer.

Lesson

Organizations looking to retain services should never rely on preconceived notions about an investigator's level of experience or skill based on assumptions about their qualifications.

Whenever possible, they should use the Request for Proposals or interview processes to probe a prospective investigator's background to ensure that they have experience conducting investigations of the level of formality and complexity required by the allegations.

2. Keep your notes

Perhaps the most significant gaffe committed by the investigator during the course of the investigation is that she destroyed her notes following the completion of her report.

According to Justice Zinn:

“Given the potential for a future application for judicial review of the Report's conclusions, one would reasonably expect that an experienced and impartial investigator would retain his or her notes, correspondence and audio recordings until well after the time limit for such an application.”

Although Justice Zinn did not reach an adverse inference from the destruction of the notes this time, he suggests that in another case “such an inference might well be justified”.

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Lesson

It is important to note that there is no universally agreed upon timeframe for which investigators should retain their notes.

At Rubin Thomlinson LLP, we recommend that investigators hold on to their notes for a very long time – until there is no longer a possibility of litigation either flowing from the investigation itself or from decisions that have any kind of nexus to the investigation. In fact, we still have notes from investigations that were done over a decade ago.

3. Always use a neutral tone in interviews

One of the major tip-offs to the fact that the investigator was conducting the investigation without an “open-mind” was the fact that she engaged in behaviours that suggested a lack of objectivity.

According to Shoan, the investigator interrupted him and was “argumentative”. Additionally, he stated that her body language (i.e. shaking her head and frowning) was suggestive of a negative predisposition. Other witnesses indicated that they had been asked “heavily leading questions” about Shoan.

Lesson

It is important for investigators to note that, in some cases, the perception of objectivity and impartiality is as important as the actual possession of these qualities.

In light of this, it is critically important that investigators maintain a professional and neutral tone at all stages of the investigation. Among other things, they should be mindful of their body language and facial expressions during interviews.

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December 8 in Vancouver

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4. Consider and weigh all relevant evidence

In *Shoan*, the investigator seemed to “cherry pick” the evidence that she collected and analyzed to fit her own pre-determined narrative of what took place.

In particular, Justice Zinn found the investigator’s analysis of the emails to be one-sided – she considered the emails sent by Shoan but not the responses sent by the Executive Director.

According to Justice Zinn:

“I find that the Investigator failed to critically and impartially analyze some if not most of the impugned email chains, with the result that her tainted analysis supports the finding that she was closed-minded.”

Lesson

Investigators must always collect and analyze all of the evidence that is relevant regardless of how that evidence might fit with a particular narrative.

As the emails formed part of a broader dialogue, it was incumbent on the investigator to understand them in their full context. Indeed, some of the emails that were deemed to be “offensive” or “inappropriate” by the investigator were more innocuous when read in the context of the dialogue.

5. Stick to your mandate

At the same time as the investigator was excluding relevant evidence that did not fit her theory of the case, she was seeking out evidence outside of the scope of the complaint that further supported her theory of the case.

Among other things, the investigator allowed a witness to

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express personal views on Shoan and to raise new allegations about his behaviour creating a “toxic environment”. She also considered additional emails that were not within the scope of the investigation.

According to Justice Zinn:

“Absent a direct relationship with the incidents under investigation, it is unfair and prejudicial to examine other e-mails even if they are “consistent with the tone of the e-mails referred to in the complaint.””

Lesson

Investigators should always begin their investigation with a formally articulated “mandate” which clearly defines the scope of the investigation and those issues it is intended to cover.

If the organization decides to expand the scope of the investigation to capture new issues, this should be done by amending the mandate to reflect the agreed upon changes.

Conclusion

Shoan serves as a solemn reminder of how quickly an investigation can spin out of control and how this can lead to the types of fatal errors described above. The only upside to workplace investigation cases like this one is that they enable other investigators to learn from the mistakes without having to make them themselves. 

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