

Workplace Investigation Gone Wrong: Court Awards Bad Faith Damages Due to Improper Investigation

August 15, 2023

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A recent decision of the Ontario Superior Court of Justice serves as a cautionary tale for employers of the importance that workplace investigations are conducted in a thorough and impartial manner.

In *Rutledge v Markhaven Inc*, 2022 ONSC 3183, the Ontario Superior Court of Justice awarded a terminated employee \$50,000 in bad faith and moral damages in part due to an improper workplace investigation. The employer initiated a workplace investigation after it received allegations that its Executive Director was involved in a workplace relationship and potential conflict of interest.

The decision involved the wrongful dismissal of Ms. Rutledge, the Executive Director of Markhaven Inc. (“Markhaven”), a long-term care facility, who had worked there for approximately 21 years. As Executive Director she was the highest-ranking employee, a member of senior management and had authority over all employees and contractors of the facility.

When the Manager of Maintenance and Supply Services was having performance issues, Ms. Rutledge met with Human Resources and Marquise (a contract company that provided dietary, housekeeping and laundry services to Markhaven) to reassess the responsibilities of some of the roles in the facility. They decided that Mr. Sathyaseelan, who was already working at Markhaven in affiliation with Marquise, would begin managing the laundry and housekeeping staff to relieve the work of the Manager of Maintenance and Supply Services. Mr. Sathyaseelan began his new position as Director of Support Services in November 2014.

At some point thereafter, Ms. Rutledge and Mr. Sathyaseelan began a romantic relationship. Ms. Rutledge disclosed their relationship to Human Resources. The timing of the relationship was at issue in the action; Markhaven alleged that the relationship began prior to Mr. Sathyaseelan being promoted and that Ms. Rutledge was conflicted when she approved his promotion.

Markhaven’s Board of Directors (the “Board”) received three complaints on different occasions about Ms. Rutledge and Mr. Sathyaseelan’s relationship. Most of the complainants were anonymous and raised complaints regarding Mr. Sathyaseelan’s promotion and his relationship with Ms. Rutledge.

Markhaven commenced a workplace investigation into these allegations. Justice Dow took issue with several features of the investigation which ultimately contributed to the Court awarding Ms. Rutledge \$50,000 in bad faith and moral damages.

The Employer made False Representations about the Investigation Process

At the outset of the investigation, the Board provided Ms. Rutledge with a letter advising her that the investigation would be conducted by an independent third party. Markhaven, through its Board, and its legal counsel retained Visio Investigations. The Court found that Visio Investigations was not an independent third party as they had an association and “apparent link” with Markhaven’s legal counsel (without providing further detail regarding the nature of the link). Visio Investigations never revealed their connection to

Markhaven's counsel to Ms. Rutledge.

Further, the Board in its initial letter to Ms. Rutledge stated the investigation would be completed by Visio Investigations. The Court found that the investigation had actually commenced prior to the initial letter (and the involvement of Visio Investigations) through the Board and its legal counsel, who were both involved in capturing and analyzing Ms. Rutledge's email account weeks before.

The Investigation was not Confidential

The Board requested that Ms. Rutledge keep the investigation process confidential. Ms. Rutledge subsequently ended her romantic relationship with Mr. Sathyaseelan because she believed she was restricted from discussing the investigation with him.

Despite the stated need for confidentiality, the Court found that Visio Investigations did not conduct its investigation in a confidential manner. The investigators arranged to interview Ms. Rutledge and Mr. Sathyaseelan in the open seating area at a nearby Tim Hortons that was frequented by many of Markhaven's employees. Mr. Sathyaseelan's interview was conducted near the main entrance.

The Scope of the Investigation was Expanded to Irrelevant Matters

Markhaven's original stated scope of the investigation was to inquire into Ms. Rutledge and Mr. Sathyaseelan's romantic relationship. In particular, the focus was on whether the romantic relationship between Ms. Rutledge and Mr. Sathyaseelan influenced his promotion, and Ms. Rutledge's conduct after Mr. Sathyaseelan was promoted.

However, well into the investigation process Markhaven expanded the investigation beyond the originally stated mandate. The investigation shifted to review how Markhaven's services were managed and whether Ms. Rutledge was being honest given her fiduciary relationship with Markhaven. Both Ms. Rutledge and Markhaven's Director of Human Resources expressed concern to the Board regarding the expanded scope of investigation.

In holding that there was no just cause for Ms. Rutledge's dismissal, the Court also noted that Markhaven failed to produce portions of the investigation file to support its termination decision under the guise of solicitor-client privilege. The Court found in this context that the Board had not acted reasonably in assessing Ms. Rutledge's conduct and whether it amounted to just cause.

Ms. Rutledge was subject to Coercion and Intimidation

Ms. Rutledge was interviewed and asked to answer questions about the nature of her relationship with Mr. Sathyaseelan prior to his promotion. She denied any romantic relationship prior to his appointment. However, the Court found that efforts were made to coerce or intimidate her to change her answers.

The Board subsequently suspended Ms. Rutledge without pay. The Court took issue with this action because the Board failed to assess Ms. Rutledge's interview responses and make an informed decision based on the information disclosed.

Ms. Rutledge eventually applied and was approved for long term disability benefits due the stress she endured throughout the course of the investigation.

The Court concluded that Ms. Rutledge suffered damages resulting from her dismissal. The actions taken by Markhaven during litigation and the investigation was found to be bad faith conduct. The Court also accepted that Ms. Rutledge suffered damages beyond the ordinary psychological damage resulting from Markhaven's conduct in the dismissal. As a result, the Court awarded Ms. Rutledge \$50,000 for bad faith and moral damages.

Key Takeaways

Employers are legally required to conduct workplace investigations in many circumstances, including in response to allegations or known incidents of workplace harassment or sexual harassment as required by the *Occupational Health and Safety Act*. In other circumstances it is a best practice for an employer to investigate, like in *Rutledge*, where suspected misconduct arises that may result in discipline or termination. Where done correctly, investigations can help employers uncover all of the information it needs about the misconduct at issue and take appropriate action in response.

As the *Rutledge* decision shows, a workplace investigation must be done in a manner that provides the requisite confidentiality and procedural fairness to all parties. A primary consideration is always the impartiality of the investigator; the investigator must not have a vested interest or bias (or even be perceived as such) towards any of the parties. Where an investigator is seen as biased, the integrity of the investigation, and any outcome of that investigation may be seriously compromised as was the case in *Rutledge*.

In this case, the procedural flaws of Markhaven's investigation contributed to two negative findings against it. First, the lack of apparent fairness in the investigation process was a factor in the Court's decision that just cause did not exist for Ms. Rutledge's dismissal. Second, the flawed process also led to the Court awarding bad faith and moral damages of \$50,000 in addition to Ms. Rutledge's termination notice entitlements.

If your organization requires assistance with a workplace investigation or advice relating to any other employment law matter, feel free to contact Dan Wong or Seth Holland or your regular lawyer in WeirFoulds' Employment & Labour Practice Group.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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