

"BLUNDER" A WORKPLACE INVESTIGATION AND PAY THE PRICE

Faced with concerns over staff morale at one of its branches in Vaughan, Ontario, the National Bank decided to conduct an employee satisfaction survey, consisting of interviewing a number of employees. The results were less than impressive for Adrian Chandran, the senior manager at the branch with over 18 years' tenure at the Bank. Most of the employees who were interviewed commented that Chandran made condescending remarks, exhibited volatile behaviour, embarrassed employees in front of others and behaved like a bully. Some of the employees claimed they contemplated seeking legal advice concerning Chandran's conduct.

Based on the complaints, the Bank concluded that Chandran's supervisory duties should be removed. However, before acting on that decision, it met with Chandran to tell him about the complaints and listen to what he had to say. During this meeting, Chandran was told about the complaints generally but he was not given enough specific information for him to prepare a proper response, despite his requests.

On the basis of the complaints, Chandran was provided with a disciplinary letter giving him the option of choosing between two available non-supervisory roles. Both alternative positions were at lower job grade levels, although the Bank committed to maintaining his current level of salary for 14 months' time. He was then warned that similar behaviour which led to the employee complaints would be grounds to terminate him for cause.

Chandran argued that both of the positions offered to him were tantamount to a demotion because they were at lower job grade levels and did not include supervisory duties. Further, he argued that the Bank's failure to provide him with a fair opportunity to defend himself in the face of accusations of misconduct compounded his demotion and rendered him free to leave and sue for constructive dismissal.

For its part, the Bank argued that Chandran was offered a transfer to comparable jobs and that, because he refused to accept the transfer and instead quit his job, he must have resigned.

At a recent trial, the court concluded that the two alternative positions were not comparable to Chandran's senior manager job and the Bank's decision to impose discipline without a proper investigation amounted to a constructive dismissal. In finding for Chandran, the court stated:

I find that any reasonable person in Mr. Chandran's position being presented with the disciplinary letter concluding that he was guilty of serious misconduct, being removed from his position, and offered positions of lesser grades, where the supervisory duties were removed, would conclude that the essential terms and conditions of the employment contract were being substantially changed. Mr. Chandran was an eighteen year employee with extremely positive performance

Whitten & Lublin is a team of legal experts who provide practical advice and advocacy for workplace issues.

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appraisals set on a course of continuous promotions who suddenly became an employee who was guilty of very serious conduct in the violation of two very important policies of the Bank. A reasonable person would, in my view, believe that his employment opportunities at the Bank and his employment future at the Bank would be significantly limited, and that his terms and conditions of employment were substantially changed.

As a result of the court's findings, Chandran was awarded 18 months' severance plus his legal costs.

This decision should give employers pause before acting on accusations of employee misconduct. Although Chandran may have engaged in the conduct he was accused of, the Bank's failure to effectively investigate those allegations ultimately prevented it from relying on that conduct at trial. To avoid these misgivings, we suggest employers consider some of the following steps:

- Where there are unproven accusations of employee misconduct, in order to rely on those allegations when making human resource decisions, such as discipline or dismissal, the employee must be made aware of the specific allegations and given a proper opportunity to respond. This includes a written letter or memo setting out the evidence or allegations against them and providing a fair opportunity to develop a response. All of this should happen before any decisions are made on how to deal with the employee.
- In serious cases of alleged misconduct, such as sexual harassment, it is often more appropriate to retain an external investigator to review the evidence of the witnesses and determine whether the complaint is even founded. Consider any mitigating circumstances, such as an employee's long tenure or previous good performance. If the conduct is out of character, a warning may be more defensible than simply firing that employee for cause.

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