

# NO DUTY TO INVESTIGATE WHERE THERE IS NO DISCRIMINATION

## *Says Ontario's Human Rights Tribunal*

by Sherrard Kuzz LLP Lawyers

On February 24, 2014, the Human Rights Tribunal of Ontario (the "Tribunal") issued *Scaduto v. Insurance Search Bureau* 2014 HRTO 250, an important decision for employers regarding the duty to investigate an allegation of workplace harassment and discrimination. The case was argued by Sherrard Kuzz LLP lawyer, Leah Simon.

### WHAT HAPPENED?

Andrew Scaduto was employed with Insurance Search Bureau of Canada ("ISB") for fewer than four months when his employment was terminated for poor performance.

There had been numerous attempts to provide Scaduto with additional training and multiple discussions with him about his performance prior to the decision to terminate.

At the termination meeting, Scaduto advised ISB, *for the first time*, he believed his performance became more harshly scrutinized after he told his supervisor he was gay. If Scaduto's allegation was accurate, his termination could have been discriminatory under Ontario's *Human Rights Code* (the "*Code*").

ISB did not launch a formal workplace investigation into the allegation, as at the time of making his complaint of discrimination, Scaduto had already been terminated. Shortly thereafter, Scaduto filed an application with the Tribunal, alleging ISB had violated the *Code* by discriminating on the basis of sexual orientation, and failing to investigate his allegations.

### IS THERE A DUTY TO INVESTIGATE?

Scaduto's argument that the *Code* had been breached by ISB's failure to investigate was not novel. Prior decisions of the Tribunal had held an employer *could* be liable for damages for a failure to investigate, even absent a finding there had been workplace harassment or discrimination.

Other cases from the Tribunal also suggested the duty to investigate could survive the employment relationship, such that an employer would have an obligation to inquire into a claim of discrimination even when raised post-termination.

### THE TRIBUNAL'S DECISION

Scaduto was not successful in his application.

On the allegation of discrimination in the workplace, the Tribunal found Scaduto was not subject to discrimination, either during his employment or in the course of his termination.

As for the alleged breach of the "duty to investigate," the Tribunal held there is no independent duty to investigate a complaint absent actual discrimination:

"This case demonstrates the difficulty of finding a breach of the *Code* solely for the failure to investigate. I have found there was no discrimination in the applicant's workplace. Therefore, there is no contravention of the *Code*." [It does not make sense to say to the respondent you have contravened the *Code* because you have failed to investigate the applicant's complaint, but had you investigated, you would not have found discrimination.]

"...the respondent's failure to investigate the applicant's complaint did not cause or contribute to discrimination in the workplace because it did not exist." [It is inconsistent with the wording of ... the *Code* to conclude the respondent contravened the applicant's rights by failing to investigate his complaint when that failure did



not deprive him of a workplace free from discrimination.]

The Tribunal also held there was no duty to investigate a complaint made after an employee is no longer in the workplace:

"A further difficulty with finding the respondent has violated the *Code*.... stems from the fact that the applicant's complaint was made after the respondent decided to terminate his employment." [The purpose of the duty to investigate is to ensure a complainant is not required to work in a discriminatory environment. In this case, the applicant was no longer in the workplace. It could not then be said that the applicant's right to be free from discrimination in his workplace was infringed by the failure to investigate because he was no longer there.]

### LESSONS FOR EMPLOYERS

While this decision is helpful for employers, it should not be interpreted as relieving employers from *any* responsibility to investigate a complaint of discrimination. Employers should continue to be vigilant in addressing claims of workplace discrimination and harassment from employees who remain in the workplace. As noted by the Tribunal:

"Employers are well-advised to investigate human rights complaints as the failure to do so can cause or exacerbate the harm of discrimination in the workplace. Internal investigations provide employers with the opportunity to remedy discrimination, if found, and can prevent Applications being filed with the Tribunal. They also limit employers' exposure to greater individual and systemic remedies. The failure to do so is at their peril. But, if they fail to investigate discrimination that does not exist, that failure is not, in and of itself, a violation of the *Code*."

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