LAW TIMES

Does privilege apply to a lawyer's investigative report?

Featured

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An arbitrator has ruled a lawyer's investigative report into workplace harassment at the Durham Regional Service isn't subject to privilege and will allow the Durham Regional Police Association to serve a subpoena on her.

Arbitrator Laura Trachuk made the ruling on Sept. 15 after considering whether the lawyer created the report for the purposes of providing legal advice and, therefore, would be subject to solicitor-client privilege.

Lawyer Joshua Phillips, managing partner at Ursel Phillips Fellows Hopkinson LLP and representative for the Durham Regional Police Association, says the decision highlights the fundamental difference between an independent third-party investigation and collecting information for an employer to guard against or react to potential litigation.

"They [employers] are looking for the notion of independence to add credibility to the result, and I think that's fundamentally at odds with the notion of retaining a lawyer to look after the best interests of an employer," says Phillips.

"The decision highlights that there is a fundamental difference between those two approaches. To put it bluntly, someone who is there to protect the employer's interest is not conducting an independent, neutral investigation."

The association filed a grievance alleging the Durham police services board had violated the collective agreement by failing to ensure its civilian members work in a harassment-free environment. The association was seeking to serve a subpoena on lawyer Christine Thomlinson to obtain her report and any documentation she compiled in the course of her investigation into a 2013 harassment claim by two civilian members of the association. The board refused to produce the documentation based on its argument that it was subject to litigation and solicitor-client privilege because it contained legal advice.

"There is so little evidence that the investigation report was prepared for the purposes of providing legal advice or in contemplation of litigation, that if I were to find that it was privileged, it would effectively mean that any time a solicitor is used for an independent harassment investigation, an employer could claim privilege over the resulting report and related documents," wrote Trachuk.

"That is not consistent with the jurisprudence or with good labour relations."

Thomlinson concluded her investigation in June of 2013 and found the complaints substantiated. The complainants received notice of the findings, including information on correctional measurers against the accused. In that correspondence, the board also noted the complainants were to keep all matters of the investigation confidential, including the outcome, and that Thomlinson's final report would remain confidential as well. In November 2013, the association filed its grievance alleging the board had failed to provide a safe workplace and requested the report in full.

"I find that the board cannot claim privilege over the investigation report prepared by Ms. Thomlinson and documents related to the preparation of that report and that the association may serve a subpoena *duces tecum* seeking those documents," wrote Trachuk, who also ordered the removal of any documents related to advice provided by Thomlinson to the board must be removed. "The board says that the investigation and report were part of the continuum of legal advice and that the report and related documents are therefore privileged. That would be correct if Ms. Thomlinson had been retained to give legal advice from the onset; however, the report was not created in that context — it was a third-party investigation and the report and the board relied upon Ms. Thomlinson's independence in conducting and drafting it before, during and after it was completed."

Labour lawyer Erin Kuzz of Sherrard Kuzz LLP says the case is a perfect lesson for novice lawyers.

"I think this case is highly instructive," she says.

"It's a how-to and a how-not-to-do your retainers if you want to try and argue privilege down the road. It's not a ground-breaking decision but it's certainly helpful. If you are bringing in someone to simply find facts, then those findings of facts aren't going to be privileged, so you want to make sure it's very clear what the investigator's role is. That's what the retainer should say."

Phillips says what employers "can take away is that they have to make sure when they retain somebody that the retainer itself is made clear, that they are establishing a lawyer-client relationship, and that was something absent in this case.

"Ultimately, transparency is at odds with the notion of the cloak of secrecy associated with privilege.
What the ruling makes clear is that it isn't sufficient to hire a lawyer to cloak the communication privilege."

David Cowling, a partner at Johnstone & Cowling LLP and representative for the board, says it maintains that privilege should apply.

"Our view is that the report is privileged, and our firm is currently advising the board about what their options are," he says.