

August 20, 2014

---

# Canadian Employment Law Today

www.employmentlawtoday.com

## No duty to investigate where no discrimination: Tribunal

*Fired employee complained – post-dismissal – that supervisor mistreated him because he was gay*

BY LEAH SIMON

AN ONTARIO employer did not have a duty to investigate a complaint of harassment when no actual harassment took place, the Ontario Human Rights Tribunal has found.

On Feb. 24, 2014, the tribunal issued its decision in *Scaduto v. Insurance Search Bureau*, an important decision for employers regarding the duty to investigate an allegation of workplace harassment and discrimination.

Andrew Scaduto was employed with Insurance Search Bureau of Canada (ISB) for less 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.



CREDIT: DUSIT/SHUTTERSTOCK.COM

# Failure to investigate didn't make things worse

« from **NO DUTY** on page 1

ISB did not launch a formal workplace investigation into the allegation as, at the time of Scaduto's complaint of discrimination, he 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 determined that 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 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

On the allegation of discrimination in the workplace, the tribunal found Scaduto was not subject to discrimination during his employment nor in the course of his termination.

As for the alleged breach of the "duty to investigate," the tribunal held there can be no independent duty to investigate a complaint without the existence of actual discrimination. In Scaduto's case, the tribunal found he had not been discriminated against, so it would be irrational to penalize his employer for not investigating his complaint when

an investigation would not have found any wrongdoing.

The tribunal said:

"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 (Scaduto's) workplace. Therefore, there is no contravention of the code. It does not make sense to say to (IBS) 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.

"(ISB's) failure to investigate (Scaduto'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 (ISB) contravened (Scaduto'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 (IBS) has violated the code... stems from the fact that (Scaduto's) complaint was made after (IBS) 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 employ-

ers, 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."

## For more information see:

- *Scaduto v. Insurance Search Bureau, 2014 HRTO 250 (Ont. Human Rights Trib.).*



**LEAH SIMON**

Leah Simon is a lawyer with Sherrard Kuzz LLP, a management-side labour and employment law firm in Toronto. She can be reached at (416) 603-0700 or visit [www.sherrardkuzz.com](http://www.sherrardkuzz.com) for more information.