

Labour, Employment and Human Rights Group NEWSLETTER

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Transparent & available employment policies should outline code of required conduct and consequences of misconduct.

By Derek Knoechel and Mark Colavecchia, Vancouver

Amid parliamentary inquiries into travel and hospitality expenses, Canada's federal privacy commissioner, George Radwanski, resigned from his post in June 2003, just three years into his seven-year term. Several months later, the auditor general released a report that led to a lengthy police investigation of Radwanski's expense claims.

Radwanski was subsequently charged with fraud over \$5,000 and breach of trust. The fraud charge stemmed from a \$15,000 travel advance, while the breach of trust charge arose from contraventions of policies governing federal public office holders.

At trial, Radwanski testified that he had requested the travel advance on the recommendation of senior officials at the Office of the Privacy Commissioner. He also claimed that the remaining expenses were legitimate. He denied directing anyone to act in violation of government policies.

In February 2009, Radwanski was acquitted of all criminal charges. The trial judge clearly struggled with the decision, noting that it was "an understatement to say that Mr. Radwanski was less than meticulous and careful in his record keeping relating to expenses he incurred while traveling." The judge also observed that Radwanski should have recognized that his record-keeping practices were deficient and should have corrected them. Radwanski's administrative shortcomings, however, were not enough to justify branding him a criminal. There was at least a reasonable doubt that Radwanski possessed the intent necessary to be found guilty of a criminal offence.

The facts in the Radwanski case raise an interesting question for employers: Would there have been just cause for termination of employment in a civil lawsuit? This hypothetical question and the following discussion deliberately ignore the fact that public office holders often have additional procedural protections by virtue of their office. However, the answer to the question is: Perhaps.

SHARE. AWARE. BEWARE. (continued)

“In a case involving employer allegations of dishonesty or deceitful misconduct, an employer must first establish deceitful conduct on the part of the employee.”

In a wrongful dismissal case involving employer allegations of dishonesty or deceitful misconduct, an employer must first establish dishonest or deceitful conduct on the part of the employee. Next, the employer must establish that the nature and degree of the misconduct is such that it actually warrants dismissal. The test is whether the employee’s dishonesty or deceit goes right to the heart of the employment relationship and gives rise to its fundamental breakdown.

In cases involving breach of policy, employers must establish that the employee was aware of the policy and the consequences of its breach. They must also establish that the policy was consistently enforced. From the trial judge’s comments in the Radwanski case, it appears that the employer might have had problems proving this.

For example, the government failed to prove that Radwanski was familiar with the specific terms of the applicable expense policy. The judge accepted Radwanski’s testimony that he relied upon “administrative experts” in his office for advice regarding such policies. The judge also observed that Radwanski had little experience in administrative matters.

Of course, the standard of proof in a civil wrongful dismissal case is significantly lower than the criminal standard. Merely raising a “reasonable doubt” is not sufficient for an employee to avoid a finding of just cause. The employer need only present “clear, convincing and cogent” evidence to support its allegation “on the balance of probabilities.”

Also noteworthy is the fact that Canada’s Parliament had found Radwanski in contempt for providing it with misleading information about his spending. This did not seem to factor into the criminal case. In a civil wrongful dismissal case, however, an employee’s conduct during the course of an investigation may itself give rise to just cause for termination even where the initial misconduct did not.

Following his acquittal, Radwanski told reporters that he believed that there were things he could have done differently, such as paying more attention to the administrative side of the operation. Ironically, had the government taken greater steps to ensure that Radwanski had paid more attention to these details, his defense may have been less likely to succeed at trial.

LESSONS TO BE LEARNED: BEST PRACTICES

The Radwanski case illustrates the importance of ensuring that expense policies are distributed throughout all levels of an organization and not just to administrators. This will not only encourage compliance across the entire organization but will also make it easier to establish just cause should an employee engage in inappropriate transactions.

Employers should consider implementing the following best practices:

1. Employment contracts should include language that states that the employee agrees to abide by all employer policies, as may be amended from time to time. Policies should also reference the employer's right to amend the policies from time to time.
2. Employees should be required to review applicable policies at time of hire and at regular intervals during employment. Each review should be documented, and the employee should be required to acknowledge the review in writing.
3. Any amendments to policies should be announced to employees prior to their taking effect. Note that policy amendments that constitute a fundamental change in the terms of employment have the potential to lead to claims of constructive dismissal and may require other measures such as "reasonable" period of advance notice or constitute a fundamental change.
4. Policies should be easily accessible to employees between formal review periods. This can be achieved by maintaining copies of policies on an employer intranet or in another accessible central location.
5. Appropriate audits should be performed to ensure that policies are being properly implemented. Failure to monitor and enforce a policy may compromise the ability of an employer to rely upon breach of the policy as cause for termination.
6. Breaches of policy should be investigated promptly and dealt with in a consistent manner, with due consideration for all the circumstances surrounding the breach. Any warnings or other disciplinary consequences should be documented.
7. A breach of policy will not necessarily justify termination of employment. An employer may be required to provide the employee with an opportunity to correct their behaviour, particularly where the breach of policy is an isolated event or is out of character. A single breach can provide grounds for immediate termination where it goes to the heart of the employment relationship.
8. Employers should review all of the circumstances surrounding the alleged breach(es) of policy when determining whether to terminate employment. A court will engage in an extensive review of all of the circumstances if the employee brings a claim for wrongful dismissal to trial. An employer's failure to engage in this step prior to termination can prove costly.

"Take the necessary steps to ensure all members of your organization are aware and compliant."

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