Employment Law

Peter Bowal and Thomas D. Brierton

No Right to Silence During Employer Investigations

Introduction

"The less you talk," Abigail Van Buren once said, "the more you're listened to." That may be wise counsel for many scenarios but if it is your employer who is asking you to talk, your refusal to answer might also be legal cause for discipline.

Employers are responsible for their employees. They are also running a business and need their employees to co-operate in providing necessary information. When allegations of wrongdoing arise, they must conduct a prompt and thorough investigation balancing the privacy rights and dignity of the employees with the employing organization's right to know.

Refusing to answer appropriate employer's questions, and therefore obstructing an investigation, may present more trouble for employees than the answers themselves would have presented. As a senior public employee recently discovered in Ontario, the choice may be between answering the boss or getting fired.

Legal Duty to Answer Employer Questions

Mark Keating was the Operational Manager at the Windsor Jail. He was charged with criminal harassment in 2005, because he had parked near the home of a woman he knew and sat in his car in the dark looking towards her home through binoculars. This was not the most serious incident in the annals of Windsor crime but a newspaper reported the charge and linked Keating to his job at the prison.

Keating's employer learned of the charge and quickly suspended him with pay for two and a half months, pending investigation. On the advice of his criminal lawyer, Keating participated in the employer's investigation, but he did not answer questions about the allegations or about his relationship with the victim. He saw this after-work activity as his personal business only. The employer found him unforthcoming and unco-operative. He was fired for the binoculars incident and for "failing to co-operate with an investigator."

Several years later, Keating was acquitted of the criminal charge. He grieved his dismissal. In the decision of *Keating v. Ontario* [2009 CanLII 15648], the arbitrator found that Keating, as a senior manager, was held to higher standards than non-managerial employees. Since this was a public sector job, the *Charter of Rights* did apply to criminal investigations, but not to employment investigations. Employees do not have a constitutional right to remain silent when public employers investigate off-duty conduct.

The arbitrator concluded that while Keating did not fully co-operate in the employer's investigation, it was not a serious breach in this particular case. He had co-operated to a point, did not provide misleading information and acted in an honest belief of his personal privacy. In any event, his failure to fully co-operate with the employer investigation did justify some discipline, but not his firing.

What about the off-duty binoculars incident, apart from the criminal proceedings? Was this behaviour of a prison manager deserving of discipline at work? The arbitrator looked at the various criteria determining whether problematic off-duty conduct should attract sanctions:

1. the employee's conduct harms the employer's reputation or product (conviction for a serious crime may have this effect);
2. the behaviour renders the employee unable to perform his duties satisfactorily;
3. the behaviour leads to refusal, reluctance or inability of other employees to work with that employee; and
4. the behaviour unreasonably challenges the employer to efficiently manage its operations.

In this case, the arbitrator said Keating's binocular behaviour, while ultimately not criminal here, was blameworthy and harmed the reputation of the Windsor Jail. It attracted negative press and Keating, a peace officer, might be viewed by some as unfit to manage a prison. Sufficient nexus between his work and his off-duty conduct was established. However, Keating was also entitled to the benefit of his 19-year discipline-free record, his remorse and submission to therapy, and good future prospects.

In the end the arbitrator decided that the failure to fully co-operate and the binoculars incident were not enough to justify the summary dismissal. She reinstated Keating with back pay.

Conclusion

Three and a half years after his dismissal, and at the end of two weeks of hearings, Keating got his job back. Yet there were no real winners in this case. Had he been forthcoming in the investigation, Keating might not have been fired. Employers will be inclined to infer the worst from an employee's reticence, and act accordingly. Employers find themselves under pressure to gather relevant information thoroughly and objectively, and to reach a fair, balanced and prompt decision.

Off-duty misconduct cases are difficult to assess, especially where the criminal charges and appeals can continue for years. For the most part, off-duty misconduct will have to be serious and give rise to a palpably negative impact on the employer before dismissal will be justified. In most cases, progressive discipline in the form of reprimands, suspensions and demotions will serve as a more fitting disciplinary response.

Peter Bowal is a Professor of Law at the Haskayne School of Business at the University of Calgary in Calgary, Alberta. Thomas D. Brierton is an Associate Professor at the Eberhardt School of Business at the University of the Pacific in Stockton, California.