

THE WHISTLEBLOWER WHO CRIED WOLF: ARBITRATOR UPHOLDS TERMINATION OF FALSE WHISTLEBLOWER

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Organizations have legal obligations to protect employees from workplace violence and harassment. Consequently, employers have expended substantial resources to develop and maintain employee whistleblower programs. Canadian employers which have implemented robust whistleblower programs will be pleased to know that there is support from a recent case to terminate an employee who takes advantage of these programs to falsely blow the whistle.

On November 13, 2014, labour arbitrator Mary Ellen Cummings released her decision^[1] in *Canadian Union of Public Employees, Local 3261* ("CUPE") and the *University of Toronto* ("U of T"). The dispute in this case arose over an allegation by a U of T employee, Ihor Tropak, that a co-worker had threatened him with a knife. U of T terminated Tropak on the basis that Tropak fabricated the allegation. In response, CUPE argued that U of T did not have sufficient evidence to conclude that Tropak had fabricated the allegation. CUPE also claimed that Tropak had been a victim of an escalating pattern of bullying and harassment which culminated in a knife incident and that U of T failed to investigate and remedy his complaints.

This case is significant because it addresses the issue of what happens when a whistleblower takes advantage of an employee whistleblower program to falsely accuse another employee of violence or harassment.

After a series of bullying incidents, Tropak reported to Director Mark Simpson that a co-worker, Mark Ford, threatened him with a knife. Simpson inquired why Tropak did not report the incident on the day it occurred, and Tropak replied that he did not want to report every little incident. Simpson asked Tropak for details about the time and location of the incident, and Tropak replied he did not have those details at that time. Simpson asked him to come back with the details, but Tropak did not return.

Investigation and Decision by U of T

After receiving a complaint from CUPE, U of T investigated the incident. U of T concluded that the knife incident was fabricated on the following basis: (1) it was discovered that Ford was on vacation on the day Tropak first alleged the incident occurred; (2) Tropak had a history of filing complaints against co-workers when his own behavior or performance was called into question, and only mentioned the knife incident to deflect

from his own behaviour; (3) Tropak did not follow-up with Simpson after the initial meeting; and (4) he did not raise the allegation again until three weeks later, only after a meeting had been scheduled by U of T to discuss unrelated behaviour and performance issues. U of T also had concerns about the vagueness of the content of the complaint and there was a concern that Tropak changed the date the incident occurred multiple times. The employer's investigators also noted that Tropak was unable to provide details when the incident was first raised.

Based on these conclusions, the investigators recommended that U of T should terminate Tropak's employment for cause because he had fabricated these allegations. Although less severe disciplinary responses were considered, U of T determined that a termination was warranted because: (1) they could no longer trust Tropak because of the severity of his allegations; and (2) it would be unfair to require others to work with Tropak because they would reasonably fear that he would lie about their conduct.

Decision by the Arbitrator

The arbitrator upheld U of T's decision to terminate Tropak, agreeing with the investigators that Tropak fabricated the story to get Ford into trouble because he believed Ford had complained about him. In her reasons, the arbitrator relied on the following main points: (1) Tropak did not pursue the knife incident until U of T scheduled a meeting regarding performance issues; (2) during the hearing, Tropak was able to recall dates of incidents that occurred years ago with precision. Consequently, the arbitrator found it odd that Tropak could not provide an accurate date of the incident; and (3) Tropak's story was inconsistent.

Conclusions and Employer Takeaways

This case is important because it shows that one incident of false whistleblowing can be sufficient grounds to terminate employment. Despite there being potentially mitigating factors (i.e. Tropak was bullied, Tropak's long service of 10 years, and Tropak's lack of disciplinary record), the arbitrator upheld the termination. It is notable that a lesser penalty was not substituted, in part, because of the aggravating factor that Tropak did not take any responsibility for his actions and that he continued to maintain his version of events throughout the proceedings. It remains unclear whether a court or other adjudicators would uphold such a severe penalty under similar circumstances if this aggravating factor was absent.

Additionally, this case highlights the need for employers to have a robust complaint and investigation system in place. U of T's consistency and timeliness in investigating all complaints allowed the arbitrator to dismiss CUPE's accusation that U of T did not investigate Tropak's complaints sufficiently. Furthermore, U of T's investigation history of Tropak's complaints provided strong evidence that was at odds with Tropak's inability to recall specific details about the knife incident.

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1 [Canadian Union of Public Employees, Local 3261 v University of Toronto](#), 2014 CanLII 70956 (ON LA), retrieved on 2015-02-26.[ps2id id='1' target='']

A Cautionary Note

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