

Poor Workplace Satisfaction Survey Leads to Manager's Constructive Dismissal

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Introduction

What happens when an employee satisfaction survey's consensus is that a particular supervisor should not be managing people? What should an employer do?

In *Chandran v. National Bank of Canada*¹ the Ontario Court of Appeal recently upheld a decision that tackled this question, and in doing so confirmed that a supervisor has a right to procedural fairness when faced with a disciplinary demotion that is based on negative feedback from an employee satisfaction survey.

The result means that employers should consider reviewing policies dealing with the solicitation of feedback in the workplace to ensure that any allegations of serious misconduct are properly investigated and the accused is treated with fairness.

The Facts

The Manager in question had 18 years' service with the National Bank of Canada (the "Bank") and at the time of his dismissal was the Senior Manager at the Bank's Vaughn Commercial Banking Centre. Although the Manager had consistently received positive reviews and was on a steady climb up the Bank's corporate ladder, the performance of the Vaughn branch had fallen below expectations. The Vice-President, whom the Manager reported to, was given a mandate to improve the branch's performance, and to that end, asked the branch's HR Manager to conduct an employee satisfaction survey.

The HR Manager met with employees individually and asked about their experiences at the Vaughn branch. Employees were not instructed to keep their discussions confidential, nor were they instructed not to discuss the survey with other employees. In her report to the Vice-President, the HR Manager reported that nine out of eleven employees at the branch had made "unsolicited" comments about the Manager, including allegations that the Manager:

- Displayed volatile behaviour;
- Embarrassed employees in front of others;
- Made bullying remarks; and
- Generally engaged in bullying behaviour.

¹ 2011 ONSC 777, aff'd by *Chandran v. National Bank of Canada*, 2012 ONCA 205.

The HR Manager also noted in her report that some employees had sought legal advice in response to this alleged negative behaviour.

The Subsequent Discipline

Based on the results of the survey, the Vice-President concluded that it was necessary to remove the Manager from a supervisory position. Before doing so, however, he wanted to know “what [the Manager] had to say”.

When the Manager, the Vice-President, and the HR Manager met to discuss the survey, the HR Manager used her notes to convey the general nature of the allegations against the Manager, but refused to disclose any specific information, including who made the allegations. The Manager vigorously denied the allegations, both in the meeting and again in a subsequent letter.

The Vice-President took this blanket denial as an admission of guilt and issued a discipline letter. In it, the Vice-President categorized the Manager’s actions as constituting a breach of the Bank’s professional conduct and harassment/discrimination policies. The letter chastised the Manager, “a senior Manager”, for the “serious impact [his] behaviour had on...the general morale of the [Vaughn branch]”, and expressed dismay that he “did not take any responsibility for [his] actions”.

The discipline letter gave the Manager the choice of transferring to one of two non-supervisory positions, and in the interim put him on probation, warning that further inappropriate behaviour would result in immediate termination for just cause.

The Demoted Positions

The Bank offered the Manager the choice between two positions: Manager of National Accounts, and Manager of Business Development/Special Projects. Neither position had supervisory duties. Both positions were, however, in the same sector that the Manager worked in while at the Vaughn branch and both paid him the same salary, although there was a suggestion that salary may have been reduced after 14 months.

More specifically, the Manager of Business Development/Special Projects was a new position and did not yet have a job description, though in this role the Manager would have reported to the same Vice-President that had demoted him. In contrast, the Manager of National Accounts position was in fact the Manager’s previous job, and as such he would have reported to his former superior, with whom he still had a good working relationship. Further, both positions also involved a transfer out of the Vaughn branch to the Bank’s corporate office in downtown Toronto.

Rather than accept either position, the Manager sued for constructive dismissal.

Improper Handling of Survey Triggered Constructive Dismissal

The court found that the Bank's handling of the allegations arising from the employee satisfaction survey and the subsequent disciplinary demotion constituted constructive dismissal.

Specifically, the court chastised the Bank for acting on mere allegations, stating that it was improper to conclude that the Manager was "guilty" of the misconduct without making any effort to ascertain the merits of the complaints gathered during the survey. Instead, the Bank confronted the Manager with serious allegations, and when he flatly denied the alleged misconduct, the Bank concluded that the allegations were true and disciplined him for a breach of two important Bank policies.

The Bank's handling of the allegations arising from the employee satisfaction survey, in tandem with the forced choice between two demoted positions, led the court to find that the Manager was constructively dismissed. As a result, the court held that the Manager was justified in "[losing] trust and faith in his employer" when the Bank's discipline letter threatened to immediately terminate him without warning if he engaged in "any further behaviour of the type he had already been found guilty of".

On appeal, the Court of Appeal upheld the trial court's decision of constructive dismissal and agreed the Manager was entitled to refuse both positions offered to him by the Bank. It ruled that "viewed objectively, [the Manager] would have been subjected to... 'an atmosphere of embarrassment or humiliation' as well as a real fragility in his continuing employment with the Bank."

When is a Demotion "Embarrassing and Humiliating?"

Unfortunately, the Court of Appeal did not elaborate on when a demotion is "embarrassing and humiliating". Instead of simply applying *Evans v. Teamsters, Local 31*,² the leading case dealing with an employee's duty to accept a different position with his employer to mitigate damages after being terminated from another position, a more thorough analysis from an appellate court on whether either position was "embarrassing or humiliating" would have provided important guidance to HR professionals dealing with these issues.

Recall that in *Evans*, a Union Business Manager was required to accept an offer to return to work for a portion of the reasonable notice period after he was terminated by a political opponent who had been elected President of the local's union executive. In *Evans*, a majority of the Supreme Court held that Evans' refusal to return to work was unreasonable, as there was no evidence he would have suffered "humiliation or embarrassment".

In its oral judgment, the court did not expand on why it agreed with the trial judge that the Manager was justified in refusing his old job as Manager of National Accounts and was not required to mitigate his damages by accepting one of the positions offered. There was similarly no discussion of the viability of the new Business Development/Special Projects position which

² [2008] 1 S.C.R. 661.

lacked a job description, but would have had the Manager reporting to the same Vice-President that demoted him.

What Does This Mean for Employers?

Though the Court of Appeal's decision in *Chandran* is scant on details, the fact that it found no "palpable and overriding error" with the trial court's decision still offers some guidance in and of itself to employers grappling with whether to issue disciplinary demotions.

For example, the take away for employers who regularly conduct workplace satisfaction surveys and performance reviews is that bald allegations resulting from employee feedback should not be relied on without first investigating the truth of their contents.

To that end, employers should review their policies and practices concerning the solicitation of employee feedback. Allegations of misconduct arising from the feedback process should be subject to the employer's complaint investigation policy. Depending on the nature of the allegations, this may or may not require a formal fact-finding investigation. At the very least, the subject of the allegations should be given enough particulars and an opportunity to respond before any disciplinary action is taken.

Put another way, as a best practice, employers should make an effort to ensure that discipline rendered as a result of employee feedback is both substantively as well as procedurally defensible.

Chandran also appears to reaffirm the high standard set in *Evans* for when a disciplined employee will be required to accept a demotion in order to mitigate his or her damages. Though likely the result of the Bank's missteps with acting on the employee satisfaction survey, the court still excused the Manager from accepting either demoted position as continued employment, despite the fact that both positions involved transferring to a new work location.

As decision-makers increasingly scrutinize instances where investigations have, or should have, been undertaken, employers must strive to ensure in all cases that their processes are thoroughly prompt, and above all else, fair. *Chandran* shows us that when employers fall short on fairness, the entire discipline process can become irrevocably tainted.

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