

WORKPLACE INVESTIGATIONS: AVOID ACTING FIRST AND ASKING QUESTIONS LATER¹

Andrea York & Iris Fischer

INTRODUCTION

Workplace investigations may take many forms and may take place for many reasons. Perhaps there has been an incident or complaint of harassment, bullying, sexual harassment or discrimination. Perhaps an employee is suspected of fraud. A complaint may have been made under health and safety legislation or privacy legislation. Regardless of the reasons, there are a number of practices that employers might follow when conducting a formal workplace investigation. The objective of this paper is to outline some of the issues and steps that an employer might wish to consider in the context of an investigation.

I. POLICIES

As a preliminary matter, proper employee policies often form the basis of a workplace investigation and are key to being able to discipline an employee for wrongdoing. All employers have an obligation to maintain a safe workplace, and a workplace that is free from harassment and discrimination. Over and above those basic obligations, employers generally do not want employees to act in any manner that conflicts with their interests. Clear policies can set the parameters of such rights and obligations and may reduce the likelihood of an employer being held vicariously liable where one of its employees commits an act that results in a complaint or litigation.

However, many employers have detailed policy manuals which have been prepared at great expense but which sit tucked away in a manager's office. Some employers believe that these manuals may be taken out as needed and even relied upon when terminating an employee for just cause due to a breach of a policy. If the employee has never seen the policy, it will be difficult to take the position that he or she is bound by it. One way to bring the

¹ *This paper is for informational purposes only. The information contained in this paper does not constitute legal advice or an opinion on any issue.*

employee policies to an employee's attention at the outset is to insert a clause into the offer of employment or employment agreement which indicates that the employee has received a copy of the employee handbook and agrees that it forms part of the terms of employment. Where revisions are made periodically, the employee should be required to sign an acknowledgement form indicating that they have received and read a copy of the manual and the employer should place the acknowledgement in the employee's file

What should the employee policies contain? The policies should inform employees as to what behaviour is not acceptable in the workplace, set out the employer's expectations regarding proper conduct in the workplace, and advise what range of disciplinary action will be taken should an employee be found to have breached the policy. Of course, all such policies must be applied consistently across the workplace. Failure to do so will weaken any argument that breach of the policy constitutes cause for discipline, up to and including termination of employment.

II. INVESTIGATING A COMPLAINT

A number of wrongful dismissal cases illustrate the importance of conducting a proper investigation in the workplace. In *Bhasin v. Best Buy Canada Ltd.*,¹ the Court found that an employer had failed to consistently enforce a company policy, and then conducted an inadequate investigation before improperly terminating the employment of Mr. Bhasin with cause. In the Court's decision, the trial judge sums up his concerns about the employer's investigation by stating: "Rather than blame the plaintiff for what transpired in this case, the defendant ought to review its own ineptitude to properly investigate what was actually occurring at [the] store...". The plaintiff was awarded damages of \$26,000, plus interest and costs.

Similarly, the Alberta Court of Queen's Bench decision of *Paulich v. Westfair Foods Ltd.*² dealt with an employee (Paulich) who was accused of fraudulently using a co-worker's credit card and dismissed with cause. Paulich commenced an action for wrongful dismissal and won. Among other things, the Court found that Westfair Foods conducted a deficient photo line-up, using only photographs of employees that had not been on-site at the time of the incident and who had no access to the credit card. The investigator failed to ask the complainant where he kept his credit card, or when the culprit might have had an opportunity to use it. The investigator did not provide Paulich with sufficient information about the allegations, and asked him very little about the alleged offence at any meeting. Since the employer conducted a

significant part of its inquiries after dismissing Paulich, the Court had no hesitation in concluding that it did not fulfill its duty to fully investigate the matter. Furthermore, the Court found that the investigation was biased. Westfair Foods quickly made up its mind that Paulich was responsible and it failed to consider any other suspect. In the end, the Court found that Westfair Foods had wrongfully dismissed Paulich, and awarded him damages based on a 12-month notice period (which included a 2.5-month extension beyond what would have ordinarily been the appropriate period of reasonable notice), and an additional \$4,000 for mental suffering.

How do employers avoid outcomes of this nature? Although the steps may differ from case to case depending on the nature of the complaint and the precise facts, what follows is an outline of some of the more common considerations in the context of an investigation.

A. Assess the complaint

An employee has just advised her human resources representative that she has been sexually harassed by a co-worker. What should the employer do? A complaint or allegations of this nature should automatically trigger an investigation.

Consider who appears to be involved in the events giving rise to the complaint, who might have evidence, what kind of wrongdoing is suspected and what laws and employee policies are in play. In the case of sexual harassment, both human rights legislation and a harassment-free workplace policy should be applicable to the complaint. Consider whether employees involved are unionized. If so, there may be relevant provisions in the collective agreement that are applicable as well.

Consider whether the complaint involves individuals who are not employees (e.g., suppliers or customers). Consider the timing of the alleged wrongdoing and whether there are former employees who might be aware of the facts giving rise to the complaint.

Keep in mind that some complaints may not be dealt with by a human rights commission, such as those that are “vexatious or made in bad faith”.³ The possibility that the complaint is vexatious or made in bad faith might also be a relevant consideration in the context of an employer investigation and not all complaints require a formal investigation. That said, where the complaint is one of harassment or discrimination on a prohibited ground under human rights legislation, an investigation is advisable.

B. Determine the objective

The objectives behind conducting the investigation may depend on the employer's legal obligations and preferred outcome should the complaint be substantiated. In the context of a sexual harassment complaint, an employer will want to ensure that it has discharged its obligations under human rights legislation. Consider whether a criminal prosecution is a possibility in cases of employee fraud or theft. Where civil litigation is contemplated, an investigation may build a case either to recover monies lost or to defend the employer against actions brought by the complainant or the respondent. Furthermore, in most cases, where an investigation concludes with a finding that the complaint was warranted, an employer will want to institute some kind of disciplinary action and take steps to avoid similar wrongdoing in the future.

C. Determine whether to involve a third party

(i) Obtaining legal advice

One consideration for the employer is whether to involve a lawyer to provide advice relevant to the investigation. Generally speaking, an employer's legal advisor would not actually participate in the investigation, but only provide advice to the employer in respect to issues that arise in the context of the investigation. Obtaining legal advice may, in some cases, have the effect of cloaking the investigation and the report that is created as a result of the investigation in solicitor-client or litigation privilege. Privileged documents do not generally have to be disclosed in subsequent legal proceedings. However, involving a lawyer does not guarantee that the investigation or the investigation report would be privileged, particularly if the lawyer does not actually conduct the investigation or if the dominant purpose of the investigation and the subsequent report is not in contemplation of litigation.⁴ Both of these types of privilege may be difficult to make out in the context of a workplace investigation.

(ii) Selecting the investigator

While the complaint may initially come to the attention of a human resources manager, senior manager, or in-house counsel, these are not necessarily the people best suited to conduct an investigation in all circumstances. One of the first steps is to determine whether the investigation will be conducted in-house or whether the situation warrants an external investigator. Reasons for choosing an internal investigator include cost and understanding of

the employer's corporate culture. An external investigator might also be viewed as more neutral.

Regardless of the choice, consider whether the investigator has a prior working relationship with either the complainant or the respondent, and whether either party is a subordinate or a superior. The investigator must have the authority required to make decisions that might negatively influence the career of either of the parties. In addition, consider whether the investigator has knowledge of the circumstances leading to the complaint that might require him or her to be a witness in the investigation. Finally, the investigator must have knowledge of the applicable laws and policies.

(iii) Do you need an expert?

Consider whether it is necessary to involve a person with special training or expertise. While any investigator should have a thorough knowledge of the applicable laws, investigations involving certain fact scenarios would benefit from certain specialized skills. For example, in an investigation involving e-mail and internet abuse, it may be appropriate to retain an investigator who is trained in computer forensics. Where financial improprieties are suspected, a forensic accountant may assist.

D. Determine the status of the parties

(i) Interim status of the complainant

A key interim decision for the employer can be determining the employment status of the complainant while the complaint is being investigated. If the complainant does not feel safe or is concerned about reprisals, a transfer to another area in the workplace, a change in reporting relationships, or a leave of absence might be appropriate. Clearly, the circumstances giving rise to a complaint and the act of formally making the complaint itself could impact on the complainant's desire and ability to continue in the workplace, at least until the investigation leads to a resolution. Where sexual harassment or discrimination is alleged, the complainant must, in most cases, be accommodated.

In extreme circumstances, where the complainant claims to be unable to work as a result of mental distress caused by alleged harassment, the complainant may be able to apply for sick benefits through a company disability program or through Employment Insurance. In

addition, workers' compensation benefits may be available to the complainant in very limited circumstances when there has been an acute and traumatic event.

(ii) *Interim status of the respondent*

In most cases, there should be no change to the working conditions of the respondent while the complaint is investigated, having regard to the presumption of innocence. However, where the alleged misconduct is so egregious as to cause concern for the safety of the complainant and other employees, consider placing the respondent on a paid leave of absence until there is a conclusion to the investigation. A policy which permits the employer to remove an employee from the workplace in those circumstances may assist the employer in defending any allegations that a suspension or forced leave of absence constitutes a constructive dismissal.

E. Conducting Interviews

Once the framework of the investigation is in place, interviews of the complainant, the respondent, and any witnesses with knowledge of the circumstances of the complaint may be conducted.

(i) *Where?*

It is important to decide on a location and prepare the room prior to the first interview. Interviews are usually conducted in a private room in the workplace during office hours. If there is an issue of confidentiality, the interviews may take place off-site. In addition, if the interviewee requests a location for the interview other than the workplace, and that request is reasonable, consider accommodating the interviewee.

(ii) *Consider whether to include a witness to the interview*

It may be appropriate to have a third person sit in on the interviews in order to assist the investigator so that he or she does not have to worry about taking detailed notes and can focus on listening, or because there is a concern that the person being interviewed might impugn the fairness of the process or the impartiality of the investigator. For example, if a male investigator is interviewing female witnesses in a sexual harassment complaint, the employer might wish to ensure that another female is present. In addition, there may be safety concerns that the presence of a witness could help address.

If the investigation is being conducted by an external investigator, there may be additional reasons for using a witness. A representative of the employer acting as a witness can learn a great deal about avoiding a similar complaint in the future, as well as about the investigation process.

(iii) Order of interviews

It is not uncommon to interview the complainant, followed by any witnesses suggested by the complainant, followed by the respondent and any witnesses suggested by the respondent. Finally, required follow-up interviews would be conducted. That said, the facts of the complaint may suggest an alternative ordering and the interviewer(s) should maintain some flexibility.

(iv) Best practices in interviews

Investigators generally communicate certain information to the interviewee at the outset of the interview, including that the investigator has been asked by the employer to conduct the investigation as a result of the receipt of a complaint. A description of the nature of the complaint, using only those details necessary to make the interview meaningful, may be provided. The role of the investigator and the third person witness should be explained to the interviewee.

In all cases, the interviewee should be advised that the investigation process is confidential. Since the interviewee will be provided with limited information so that the investigator can conduct the interview, the interviewee must understand that such information, along with anything else discussed at the interview, should be kept confidential. If there is a possibility of a legal proceeding in the future, the investigator might also advise the interviewee that he or she may be called as a witness at that proceeding.

It is good practice to ask the interviewee to review the notes taken during the interview by the investigator or the third person witness, and sign them to indicate that they are accurate. Alternatively, a witness statement may be prepared and presented to the employee to sign at a later date. Not surprisingly, not everyone can recall every detail during a short interview. For this reason, the interviewee should be advised to contact the investigator if he or she has any additional information, corrections or clarifications to the facts discussed in the interview.

The kinds of questions to be asked should also be considered. Where the investigator wishes to give the interviewee an opportunity to tell the story in his or her own words, open-ended questions (such as “What happened next?”) can be useful. On the other hand, the interviewee may be more likely to admit a fact when asked a question that requires a “yes” or “no” response. Using a combination of such questioning techniques is often the most effective during an interview of this nature.

(v) *Interviewing the complainant*

An investigator would generally want to reassure the complainant that the employer is taking the allegations seriously, but explain that more information is required in order to conduct a complete investigation. In addition, the investigator should explain that he or she will be meeting with the respondent and relevant witnesses.

In interviewing the complainant, the investigator will want to obtain a clear understanding of what happened before, during and after the incident(s) and whether there were any witnesses to those events.

(vi) *Interviewing the respondent*

The respondent should be given the opportunity to fully respond to the allegations. For this reason, the complainant interview usually precedes the respondent interview and the allegations raised by the complainant should be disclosed to the respondent. The investigator should reassure the respondent that the complaint is being dealt with in as confidential a manner as possible, and advise him or her to maintain that confidentiality.

Where the complaint is regarding a potential breach of human rights legislation, the investigator should caution the respondent and every other witness that reprisals in response to such complaints are prohibited.⁵

(vii) *Interviewing witnesses*

As noted above, the witnesses named by the complainant are usually interviewed after the complainant, and the witnesses named by the respondent are usually interviewed after the respondent. Not all witnesses who are named need necessarily be interviewed. The more witnesses that are interviewed, the more the confidentiality of the investigation is likely to be compromised. If a particular witness is named by both the complainant and the respondent, that

witness should be chosen for an interview. Generally speaking, witnesses to the more significant events indicated in the complaint are interviewed, while those witnesses to more trivial incidents may not be interviewed.

People to whom the complainant or the respondent described the events as they were unfolding, or “character witnesses” for the complainant or the respondent, may have no “first hand” knowledge of the incidents in question. People without any first hand knowledge of the incidents in question can only provide “hearsay” evidence, which is generally considered unreliable. Given the issues of time and resources in conducting an investigation, as well as the focus on determining which events actually took place, character witnesses are not necessary.

Since memories fade with time, it is important to meet with witnesses as soon as possible. The witnesses should be advised about the role of a witness in an investigation. They should be provided with enough information so that they may comment on the incidents they may have observed, while at the same time limiting information that would reveal names and identities if at all possible. Once again, the confidentiality of the investigation should be highlighted.

(viii) Assessing interviews and witnesses

Once all of the necessary interviews have been conducted, the investigator should assess the credibility of each witness, including the complainant and the respondent. This may have been done during the interview, or immediately after each interview. Divergences in evidence should be noted, and any gaps in evidence filled to the greatest extent possible. This is the time to determine whether any follow-up interviews or additional interviews are required, and to conduct those interviews.

(ix) Dealing with missing evidence

There may be evidence in the possession of third parties that the investigator requires for the proper completion of the investigation. This may include physical evidence such as paper or electronic documents, banking or financial records, and expense accounts. The investigator should determine how best to obtain such evidence.

The investigator will presumably have the ability to review records belonging to the employer, such as employee files, e-mail messages sent to and from the employer’s computer

system, and expense reports. However, an investigator does not have the power to compel an employee or third party to provide documents that belong to them. In addition, privacy legislation may be applicable to the collection, use or disclosure of certain information relevant to the investigation. Where there is an outright refusal to disclose relevant documents and no reasonable explanation is provided, the investigator may choose to draw an adverse inference against that witness or party.

IV. FINALIZING THE INVESTIGATION

It is important to complete the investigation as soon as possible. All notes, evidence, tapes, and other materials obtained during the investigation should be secured for future use. If the employer has not done so already, it should consider obtaining legal or compliance advice before making a final determination.

A. Making a determination

The investigator's role is to make findings of fact which lead to a conclusion. That is not to say that the investigator makes a determination in every case. Often others will make a determination based on the investigator's findings of fact.

A determination is based on all the evidence and whether it is more probable than not that the alleged harassment, fraud, or other misconduct occurred. Unlike a criminal investigation, where the standard is "beyond a reasonable doubt", the standard used in an investigation is generally based on a "balance of probabilities". The application of this standard means that, if the conclusion reached is that there is more than a 50% chance that the alleged misconduct took place, the complaint is substantiated. Having said that, in some cases where the respondent is being accused of criminal wrongdoing, it may be appropriate to use a higher standard of proof.

Factors to consider in making a determination include the demeanour and credibility of the parties and witnesses involved, whether any witnesses were able to corroborate the facts or allegations, and the adequacy and consistency of the facts provided by each individual. Possible outcomes of the investigation include a determination that the complaint was substantiated, a determination that it was not substantiated, or a determination that the investigation was inconclusive.

In many cases, it is appropriate for the investigator to prepare a report containing his or her findings of fact, and his or her conclusions if the investigator is charged with making a determination. It is important to keep in mind that investigation reports may become evidence in further legal proceedings.

While the outcome of the investigation should be communicated to the parties, this generally does not include providing a copy of the final reports to the parties, or to anyone else. Ideally, the reports should be circulated only among the final decision-makers for several reasons. First, they likely contain sensitive personal information. Second, widely circulating the reports will negate any future claim that they are privileged and should not be disclosed in a legal proceeding.

If, however, one of the parties makes a request for access to the reports, a federally-regulated employer may be obliged to disclose them under the *Personal Information Protection and Electronic Documents Act* (PIPEDA)⁶ or applicable provincial legislation in British Columbia, Alberta and Quebec. While PIPEDA permits individuals to request and obtain access to personal information about themselves, there are several exceptions which might apply. Where the information requested contains personal information about other individuals that cannot be severed, the request may be denied. An employer is not required to provide access if the information is protected by solicitor-client privilege.⁷ PIPEDA provides a further exception to the requirement to provide access to information that was generated in the course of a formal dispute resolution process.⁸ Equivalent legislation applies to provincially regulated employers in Alberta, British Columbia and Quebec.

B. Taking Action

Once there has been a determination of whether the complaint was substantiated, appropriate action should be taken depending on the circumstances.

(i) *Where the complaint is substantiated*

If the complaint is substantiated, action should be taken to (a) prevent the harassment, fraud or misconduct from recurring in the future, (b) correct the negative impact of the incident on the complainant, and (c) discipline the respondent.

The first goal, that of preventing the misconduct in the future, can often be achieved through training and education. If the relevant misconduct was harassment or discrimination, this may involve counselling for the respondent and training for other employees. The employer should undertake a review of its policies and make necessary amendments. The second goal, that of correcting the negative impact of the misconduct on the complainant, may be achieved by accommodating any requests for relocation, be it within the workplace or to another of the employer's sites. An apology from the respondent or a change of duties can often have a similar, mitigating effect. The final goal, disciplining the respondent, can be satisfied by a broad range of disciplinary actions, depending on the circumstances.

The severity of the discipline imposed ought to be rationally connected to the severity of the misconduct, having regard to the employer's policies. An isolated incident of unintentional harassment may warrant a written warning or reprimand, while more severe or on-going harassment or harassment of subordinates may warrant suspension or even dismissal.

The employer should understand that a suspension or a dismissal may result in a complaint by the respondent under the *Employment Standards Act, 2000*, litigation for wrongful dismissal, or a human rights complaint.

(ii) Where the complaint is not substantiated

If the complaint was made in good faith, but the conclusion of the investigation was that the complaint was not substantiated, the employer should notify the parties accordingly, and explain how the conclusion was reached. In these circumstances, the relationship between the parties, or between the parties and members of management, may have broken down as a result of the complaint and the investigation and may have to be rehabilitated. Alternatively, it may be beneficial to reduce the extent to which the complainant and the respondent work together.

(iii) Where the investigation is inconclusive

In addition to the measures that should be taken when a complaint is unsubstantiated, if the investigation is inconclusive, the employer should explain that inconclusive results are not a finding of guilt or innocence. The complainant should be encouraged to come forward with any further allegations.

V. CONCLUSION

An employer that fails to properly investigate a complaint of discrimination could be liable to the victim of that discrimination for failure to meet its obligations under human rights legislation. On the other hand, if an employee is improperly accused and dismissed due to allegations of wrongdoing, the employee may have difficulty finding alternative work and will look to the employer for recovery of his or her losses. In addition to the usual pay in lieu of reasonable notice, a court might be inclined to award the employee additional damages for the manner in which the employee was dismissed, as well as punitive and aggravated damages. Unnecessary liability can be avoided by implementing clearly worded policies setting out workplace rules, ensuring that employees are aware of those rules, consistently enforcing those rules, and conducting a thorough and thoughtful workplace investigation for any breach of those rules. In the vast majority of cases, the workplace is no place to act first and ask questions later.

END NOTES

¹ [2005] O.J. No. 5282 (Sup. Ct. J.).

² [2000] A.J. No. 138.

³ Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19, s. 34(1)(b).

⁴ See *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321. There must be more than a mere possibility of litigation in order for litigation privilege to exist; the litigation must be a pending or definite prospect, *Lattanzio v. Jones* (1989), 33 C.P.C. (2d) 160 (Ont. Dist. Ct.).

⁵ Ontario *Human Rights Code*, *supra* note 3, at s. 8.

⁶ *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c. 5.

⁷ *Ibid.*

⁸ *Ibid.* Note, however, that there is at least one finding of the Privacy Commissioner which provides that, by withholding an individual's personal information related to a human rights investigation, the employer contravened its obligation to provide an individual with access to his or her own personal information. See: PIPEDA Case Summary #88, *Former telco employee denied access to certain employment file information*, October 31, 2002, online: <http://www.privcom.gc.ca/cf-dc/2002/cf-dc_021031_e.asp>.