

Workplace Investigations – When and How to Conduct Them

By Marcel Faggioni & Geoff Jeffery*

Workplace investigations have become more popular in recent years with many employers in both the private and public sector. An investigation can be useful in a variety of circumstances in organizational contexts. Generally, investigations are being used in four general areas: (i) cases of employee misconduct; (ii) alleged human rights and occupational health & safety breaches; (iii) harassment situations; and (iv) general organizational circumstances. The first three of these categories are driven by legislative or contractual requirements. For instance, in the case of a disciplinary investigation, for purposes of due process and often times requirements found in collective agreement, the employer undertakes an investigation to determine whether misconduct has occurred and to verify that cause can be established for the purpose of imposing discipline. In terms of general organizational circumstances, the investigation is not driven by legislation or contractual obligations. In these types of investigations, an employer may undertake an investigation in order to assess and fix a problem within a department or team. This type of investigation usually involves some form of organizational development as a by-product of the investigation. Investigations of this nature are not only meant to conduct a fact finding, but to also provide some recommendations for fixing the organizational problem(s).

Regardless of the nature of the investigation, the employer needs to establish the purpose of undertaking such an investigation as a first order of business. In other words, why is the investigation necessary given the circumstances facing the employer? The purpose of conducting an investigation may include the following:

- Determine the cause of an accident
- Identify the perpetrator of an intentional act
- Provide misconduct in a disciplinary matter
- Protect company assets and reputation
- Maintain order and discipline
- Ensure healthy and safe work environment
- Establish due diligence
- Comply with statutory obligations

The need to conduct an investigation should be assessed prior to launching into one, since it may not always be required given certain circumstances. Employers should consider the following points:

- Is the allegation serious? Is what is alleged to have occurred misconduct, harassment or illegal?
- Without judging the legitimacy of the allegation, is there any apparent ulterior motive for the complaint?
- Are the facts of the matter in dispute?

- Are there any human rights or occupational health & safety elements involved in the matter?

Another important consideration prior to undertaking a workplace investigation is determining who should do the investigation. The choice of investigator should be based on a number of factors, which include the following:

- How serious is the allegation or complaint?
- How important is objectivity? Is there a conflict of interest in conducting the investigation internally?
- What are the optics of conducting the investigation internally versus externally?
- Can an external neutral third party do a better job than an internal member of staff?
- What are the time/cost implications?
- How disruptive will the investigation be?
- How expediently can the investigation be completed?
- Is a competent third party investigator available in a particular area requiring the investigation?
- Is specific expertise needed or warranted?

In many cases, we see employers using external investigators. It should be noted that all third party investigators are not created equal. In fact, this area of practice is virtually unregulated and the term “Buyer Beware” certainly applies when selecting an external party to conduct a workplace investigation. Alternatively, in most cases an investigation can be conducted by an objective manager within the company, particularly if that individual has the ability to secure advice and assistance from a consultant or lawyer. If the organization decides to retain an external investigator, it should consider and verify the following:

- What credentials and competencies does the investigator possess? Does he/she have any references to verify the quality of his/her past investigation work?
- Establish performance standards, including costs and deadline for completion.
- Define the mandate of the third party investigation – is the investigation only for fact finding or will it also include recommendations?
- Determine the authority given to the external investigator and his/her reporting requirement with an internal member of the employer’s staff.

The hallmarks of a successful investigation are fairness and objectivity. It is important for the investigator to conduct the investigation with an open mind, rather than with a preconceived idea as to what has occurred and who is responsible. The structure of the investigation should reflect these principles. For instance, if an employee alleges harassment, the investigator should insist that the complaint be reduced to writing with full detail of what the complainant says happened. The alleged harasser should then have an opportunity to consider the allegation and respond, identifying documents and witnesses that he or she claims support his/her story.

All relevant witnesses should be interviewed, even if the investigator is confident that the truth has been revealed. This will ensure that the results of the investigation cannot be attacked on the basis of the investigation being incomplete.

When an employer is investigating the conduct of one of its employees, it is often necessary to consider whether the employee should be removed from the workplace pending completion of the investigation. Generally speaking, an employee should only be suspended pending the outcome of an investigation as a last resort. If the interests of the organization and its employees and clients can be protected by leaving the employee in his or her position, or transferring them to another position pending the outcome of the investigation, this option should generally be preferred. However, if suspension is the only viable way to protect those concerned, the suspension should be non-disciplinary and with pay, as the employer should not assume the investigation will result in a finding of misconduct.

One of the most important skills that an investigator must possess is the ability to assess an individual's honesty or credibility. Often, witnesses will tell very different stories about what has occurred. If this happens, the investigator must be able to determine which story is closest to the truth. This assessment can be made based on the demeanour of the witness during the interview (whether he or she is hostile and defensive or open and confident), whether the witness' story is internally consistent and whether the witness has a motive to give false information.

Once the investigator has completed interviewing all witnesses, he or she must come to a conclusion as to what has occurred. This conclusion will be based on all the witnesses' statements, assessments of the credibility of those witnesses, documents and other physical evidence, a review of the location of the incident, and an overall assessment of the evidence. A clear written investigation report that indicates what happened will allow management to determine whether a violation of policy, law or employee misconduct has occurred, identify solutions to a problem or the appropriate disciplinary penalty to impose, and to generally determine what action is appropriate.

Any investigation must be conducted in such a fashion as to ensure inclusivity, integrity and completeness. An investigation lacking in these elements can lead to untenable results, which may adversely affect the corporate image and reputation of the organization in the eyes of the staff and the public as well as the corporation's ability to defend any action taken as a result of the investigation.

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