

# Labour & Employment Law Bulletin

AIRD & BERLIS LLP  
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## Behaviour Issues in the Workplace: The Investigation

By **Barbra H. Miller**

### Introduction

In the last few years, workplace investigations have become an integral part of the decision making process when an employer is faced with allegations of misconduct on the part of an employee. The employer has a duty of good faith and fair dealing in respect of its employees, particularly when an employee's employment is being terminated. To comply with this duty of good faith and fair dealing, an employer should conduct a workplace investigation when there are allegations of wrongdoing by an employee (or when the employer suspects such wrongdoing even though there has been no actual complaint) as it is incumbent on the employer to ensure that it has full knowledge of the facts relating to the impugned conduct. This duty extends not only to the employee who is alleged to have engaged in some form of improper conduct (the "respondent"), but also to the employee who made the complaint (the "complainant").

The workplace investigation provides a method for the employer to take a balanced approach – recognizing and treating seriously a complaint yet treating the respondent with fairness in dealing with the complaint. It is in the nature of a fact finding procedure which will allow the employer to ultimately determine what, if any, action should be taken with respect to an alleged wrongdoing of an employee.

It is important that an employer take the necessary steps to properly conduct an investigation. Employers that have been found to have conducted a flawed

investigation have been subject to damage awards (including punitive and aggravated damages) for various causes of action, including constructive dismissal, breach of the duty of fair dealing, the infliction of mental distress, mental suffering and unlawful detention.

### When an Investigation Should be Conducted

An investigation is needed when it is necessary to gather evidence related to an alleged incident to determine what exactly happened. In many cases, the alleged incident has been raised by way of a complaint by an employee. In other cases, management has its own concerns about the conduct or behavior of an employee, although there has been no actual complaint. Often the concerns are of such a serious nature that they could constitute cause for termination of employment.

Workplace investigations are often required to deal with complaints or concerns related to:

- the infringement of an employee's human rights
- harassment (sexual or otherwise)
- some form of discrimination
- violence in the workplace
- poisoned work environment

Where there has been a complaint by an employee, it is only fair to the respondent that the employer take steps to ensure that there is truth to the complaint. Similarly, where there appears to be grounds to terminate employment for cause due to the conduct of a respondent, the employer should have direct evidence that the respondent is guilty of such impugned conduct. The respondent should be afforded due process whereby he or she is advised of the complaint or the impugned conduct and provided with the opportunity to respond. It is often necessary for the employer to seek out other evidence which is germane to the issues which evidence is often in the form of other employee witnesses.

### Choice of Investigator

Not all such matters require a third-party investigator to conduct a formal workplace investigation. In some cases, the facts are easily ascertained and therefore, no third-party investigator is required. Such information investigations are often carried out by the human resources department in the ordinary course of business. Where for example, an employee was accused of expressing his anger towards a co-employee by violently shaking a form of scaffolding on which the co-employee was working, the employer was able to complete an informal investigation of the alleged incident on the same day before the shift came to an end. The human resources director spoke immediately with the three employees who witnessed the incident, as well as the accused employee, and was able to determine that the employee did not accidentally “trip” and unintentionally bump against the scaffolding, as he alleged. In this case, the issue related to one incident, which was witnessed by other employees and the employer was able to conduct its own informal investigation. The matter was uncomplicated and it was unlikely that the investigation was going to uncover a more complex issue or problem.

Many workplace incidents about which there is some complaint can be handled in the ordinary course of business by human resources personnel, provided they have some training in the area and can remain impartial. However, when the matter is anything more than simple and uncomplicated, it is often advisable to retain a third-party investigator who can approach the investigation in a more detached manner. The third-party investigator has no connection or history with the employees which makes it much easier for him or her to gather evidence without expressing any

emotion (sympathy, shock, disbelief, etc.) during the interviews. Further, if the third-party investigator is a lawyer with some expertise in questioning witnesses, assessing credibility and weighing evidence, he or she will be in a better position to conduct an investigation which could stand up to scrutiny by a court at some later date.

In many cases, it is advisable for an employer to engage an outside third-party investigator to conduct the investigation. The investigator must understand how to conduct an investigation. He or she must possess the necessary skills to:

- determine the manner in which the investigation should proceed
- assist in determining if other resources are required
- determine who should be interviewed
- prepare for and conduct the interviews
- prepare a report
- make recommendations
- possibly provide a legal opinion

In addition, the investigator must be able to conduct the investigation thoroughly, but without any delay. It is important to collect evidence as soon after the incident as possible. Scheduling difficulties disrupt the flow of the investigation and can reduce its effectiveness. The investigator must be available to take immediate steps to gather the evidence and deliver a report within a reasonably short period of time.

In most cases it is recommended that the employer engage a lawyer to conduct the investigation – an independent lawyer who does not otherwise provide legal services to the employer and who has some expertise in employment/labour matters. However, in some cases, other experts may need to be retained for assistance (for example, a forensic accountant).

### Mandate of Investigator

The investigator must be provided with instructions as to his or her role and must be provided with a clear mandate to be followed. In some cases, the mandate is as simple as fact finding related to a particular incident.

In other cases, the mandate is for the investigator not only to determine the facts related to an alleged incident, but also to determine if the facts as found constitute a breach of a particular employee policy or a breach of a statute (such as the *Human Rights Code*). The mandate can also require that the investigator provide a recommendation and/or a legal opinion. Clearly, if a legal opinion is required, the investigator must be a lawyer. The mandate of the investigator will depend on the nature and extent of the allegations made.

If at any time the investigator has questions respecting the mandate he or she can seek clarification. Similarly, if the employer has concerns that the investigator is overstepping the mandate, the employer can refocus the investigator, reminding him or her of the specific guidelines under which the investigation is to be conducted.

The investigator can obtain instructions to expand his or her mandate. If, for example, in the course of the investigation of an alleged incident the investigator becomes aware of related incidents, he or she may seek and obtain approval to expand the investigation to include such other related incidents.

Although the employer cannot interfere in the investigation, it can seek progress reports from the investigator, receive questions and respond with respect to the mandate and revise the mandate if necessary. However, these communications are procedural in nature and do not infringe on the conduct of the investigation.

### Process to be Followed

The employer should engage an investigator who has experience and credentials to properly conduct an investigation without requiring the employer to provide any details regarding the procedure to be employed. Most proper investigations commence by way of obtaining a written complaint by the complainant which contains sufficient detail and is in a form that can be provided to the respondent.

The respondent is provided with a copy of the written complaint, and provided with time to review same, consider his or her position and prepare to be interviewed. Any third-party witnesses are usually interviewed before the respondent so that the investigator is aware of all of the evidence before meeting with the respondent. However, in most cases the list of all the witnesses to be interviewed is not

finalized until the end of the investigation. As the interview process proceeds, witnesses who have knowledge of the facts in issue are identified. The investigator will determine if any newly identified witnesses need to be examined and to what extent, based on the mandate of the investigation and the relevance of the potential evidence. Although most investigators try to interview the respondent last, in some cases the identity of other witnesses is disclosed after the respondent is interviewed or a witness has to be examined more than once. In some such cases the investigator will interview the respondent a second time in order to disclose any other facts which were uncovered. The rule to follow is complete disclosure to the respondent so he or she is treated with fairness and given full opportunity to respond to any and all allegations.

The investigation should generally be conducted off-site. In many cases, witnesses are interviewed at the investigator's office or at some other off-site location. Unless access to certain company documents, files or material is required, it is preferable to have the investigation conducted off-site. This avoids disruption in the workplace, prevents a loss of productivity and reduces embarrassment and anxiety for the individuals involved. If the investigation is conducted on-site, the process should be discreet with individual witnesses being advised by human resources or management that it is a confidential process, that they are prohibited from speaking about the investigation to others and that they are to co-operate with the investigator and answer truthfully. The witnesses should not be spoken to en masse and no global announcement should be made that an investigation is taking place.

### Result of Investigation and Report

There are a number of possible remedies that are available, depending on the findings made by the investigator:

- no action, since the allegations were not substantiated
- termination of employment, not for cause
- an apology
- a debriefing with the respondent, counselling him or her on the inappropriateness of his conduct and providing assistance to assure no further incidents occur

- some form of training for the respondent
- an explicit warning to the respondent that further infractions could lead to termination of employment
- termination of employment for cause

As one would expect, the more serious the finding against the respondent, the more serious the consequence. It is advisable to seek legal advice as to the nature and extent of the remedy that should be imposed. The remedies noted above can also be applied to the complainant in circumstances where it has been determined that the complaint was completely unsubstantiated.

The investigative process is not a perfect science. In some cases it will be difficult for the investigator to make a finding of fact, particularly when there are only two witnesses, the complainant and the respondent, and they are equally credible. This can happen, for example, in sexual harassment cases when there is little, if any, corroborating evidence.

## Conclusion

A workplace investigation is a form of due process which is in keeping with the employer's duty of good faith and fair dealing in respect of its employees. Although simple complaints can be handled by the employer in the ordinary course of business, more serious complaints or concerns should be investigated by an independent third party, which in most cases should be a lawyer with the required expertise. A clear mandate needs to be provided to the investigator and proper process should be followed in the conduct of the investigation. The employer should be aware of the legal consequences relating to any action taken against an employee as a result of an investigation. Above all, employers should be aware that the investigation may have to survive the scrutiny of a court at some later date.

If you have questions regarding any aspect of labour and employment law, please contact any member of the Aird & Berlis LLP Labour & Employment Group:

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