



AHBL LABOUR + EMPLOYMENT WEBINAR

WORKPLACE INVESTIGATIONS UPDATE

Presented By:

Derek Frenette, Partner
Iman Hosseini, Associate
Michael Watt, Partner

April 5th, 2023 | 11:00AM – 12:00AM PST



YOUR **PERSPECTIVE** OUR **FOCUS**™



Today we will cover:

1	Legislative update
2	When and why to investigate
3	Who should investigate
4	How to investigate
5	How to use investigation results
6	Q&A



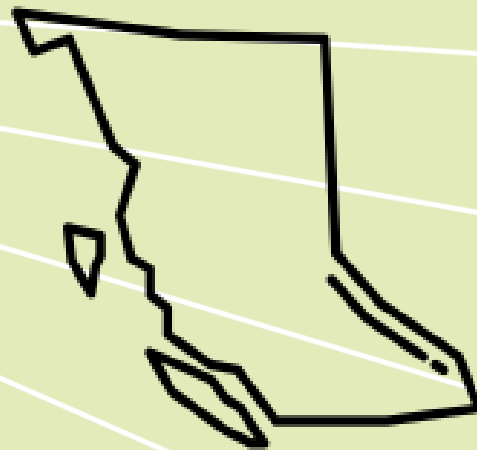
LEGISLATIVE UPDATE

Legislative Update

- British Columbia
- Ontario
- Canada – Federal



BRITISH COLUMBIA



Pay Transparency Act

- March 28, 2023
- once passed, will take effect November 1, 2023
- **Requirements:**
 - wage range in job advertisements
 - not ask pay history
 - not punish if disclose compensation to coworkers
 - reporting (by November 1, 2026 if 50 to 300 employees)

National Day for Truth and Reconciliation

- March 9 – British Columbia's Bill 2, the National Day for Truth and Reconciliation Act, received Royal Assent
- September 30 – new general holiday (now 11)
- check contracts and collective agreements



Update – Single Step Certification

- 55% or more in bargaining unit signed cards no vote required
- increase in certification applications



ONTARIO



Working for Workers Act

March 2023

- information about job to be provided prior to start (pay, location, hours)
- increase maximum OHS fines

Update 2022 changes

- no non-compete agreements – no other provinces yet
- electronic monitoring policy / disconnecting from work policy



CANADA – FEDERAL



Canada – Federal

March 29, 2023 Budget

- restrict misclassification of ‘GIG workers’ through future amendments to *Canada Labour Code*
- prohibit use of replacement workers during strike/lockout

January 18, 2023 Competition Bureau

- guidelines on wage-fixing and no-poaching agreements
- criminal offence for two or more employers to agree to fix salaries/wages or terms and conditions of employment, or to agree not to poach each other’s employees
- effective June 23, 2023

Updated December 2022

- 10 days paid medical leave (in addition to 3 days paid personal leave, and 27 weeks unpaid medical leave)



Today we will cover:

- | | |
|---|----------------------------------|
| 1 | When and why to investigate |
| 2 | Who should investigate |
| 3 | How to investigate |
| 4 | How to use investigation results |
| 5 | Q&A |





WHEN AND WHY ARE INVESTIGATIONS NECESSARY?

When is a Workplace Investigation Necessary?

- Investigations and the evidence which they produce supports much of what employers and legal counsel do in the field of employment law:
 - Employee health and safety, workplace morale, compliance with legal requirements
 - Progressive discipline
 - Terminations (with and without cause)
 - Gathering information and monitoring the workplace to ensure efficient operation
 - Prevent or defend against employee legal claims



When is a Workplace Investigation Necessary?

- This presentation concerns two broad categories of investigation:
 - Employer investigation of worker misconduct 
 - Employer investigation of worker complaints 
- The two categories are not always mutually exclusive
- Section 69 of the *Workers Compensation Act* and mandatory employer investigation of workplace occupational health and safety issues – workplace injuries and “near misses” (outside the scope of this presentation)

Employer-Initiated: Worker Misconduct



- Alleged misconduct comes to the attention of the employer



- **Goal:** confirm facts and support disciplinary action, determine what disciplinary action is appropriate(if any), possible legal action?



- Without confirmation of facts through investigation, discipline is not “anchored” to firm factual basis and could result in negative consequences, including allegations of wrongful/unjust dismissal, constructive dismissal, grievance, or other legal action

Employer-Initiated: Worker Misconduct



- *Porta v. Weyerhaeuser Canada Ltd.* (2001 Supreme Court of British Columbia)
 - Where investigation of misconduct is flawed, an employer will not be able to rely on an allegation of just cause for dismissal
 - Proportionality: need to prove that the full nature and circumstances of the misconduct is known to the employer, in order to prove that discipline is proportional



- *George v. Cowichan Tribes* (2015 Supreme Court of British Columbia): 30-year employee; dismissal following off-site verbal altercation. Negligent investigation and employer misconduct results in 20 months' notice, and aggravated damages

Worker Complaints



- Variety of complaints: relatively benign to very serious and even quasi-criminal



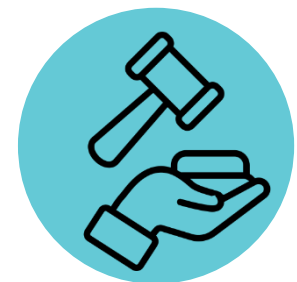
- As seriousness of allegations and possible disciplinary response increases, so does the need for a properly-conducted investigation, natural justice, procedural fairness



- Serious complaint and sanction by employer: increased risk of litigation, including constructive or wrongful dismissal actions, and human rights complaints

Worker Complaints

- Alleged misconduct of a worker toward another worker is reported to the employer – by victim of misconduct, or a third party
- **Goals:**
 - Protect against allegations of wrongdoing, from alleged perpetrator and victim alike
 - Protect employee morale
 - Protect organizational coherence
 - Comply with internal employment policies
 - Demonstrate responsiveness and responsibility for employee protection
 - Support legal action?



Employer Duties

- Statutory duties:
 - WorkSafe *Policy Item P2-21-2*: employer obligation to ensure health and safety of workers, to prevent or minimize workplace bullying and harassment
 - Employer obligation to develop and implement procedures for reporting, investigation, roles and responsibilities, and record-keeping
 - Ontario *Health and Safety Act* obligations
 - *Canada Labour Code* obligation to investigate, and follow certain procedures in investigating complaints
- Common law obligation to *properly* investigate complaints of harassment and discrimination under human rights legislation



WHO SHOULD INVESTIGATE?

Appointing an Internal or External Investigator

- Policies and procedures
- Specialized knowledge
- Identity of complainants or respondent
- Nature of the complaint
- Timing of the investigation
- Likelihood of significant litigation
- Jurisdiction
- Language
- Costs



Who should conduct the investigation?

Independent
and
non-biased

- Does not decide outcome
- Confront employee with details of allegations or complaint
- Give employee opportunity to respond

Experience
with process

- Interviewing witnesses
- Making findings and reporting
- Follow statutory obligations and policies



Internal

- HR
- Manager/supervisor
- Guidance from counsel



External

- Professional investigator
- Scope and terms of reference



Legal counsel

- Ideally not employer's usual employment counsel

When Conducting an Internal Investigation

- Ensure impartial, neutral, and objective
- Competent and knowledgeable
- Trained on conducting investigations
- Necessary skill and authority
- Guidance of counsel



When Retaining an External Investigator

Consider

- Professional and academic qualifications
- Years of practice
- history of conducting similar types of investigations



Clear retainer / terms of reference

- Define scope
 - Full authority vs. narrow
- Nature of allegation
- Breach of policy, applicable law, contractual obligations
- Outcome
 - Fact finding
 - Conclusions on merit
 - Recommendations
- Privilege?



Erin MacKenzie v. Orchestra SCS Inc., 2023

CanLII 13891 (ON LRB)

Facts

- Employee made harassment complaint against the CEO of her company shortly after the employee was given notice of her termination.
- Employer appointed an investigator from the employer's human resources department. The employee successfully lobbied for the removal of this investigator, alleging that the investigator was biased towards the company.
- Employer hired a second investigator, but the employee refused to participate due to the investigator's inexperience and alleged "working relationship" with the first investigator.
- Employee asked the Board to appoint a new investigator.

Erin MacKenzie v. Orchestra SCS Inc., 2023

CanLII 13891 (ON LRB) (cont.)

Issue

- Can a worker complaining of harassment ask the Board to appoint an investigator because they believe the employer-appointed investigator is unsuitable?

Analysis

- It is not clear that an employee can allege that an investigation is inappropriate preemptively, rather than allowing the investigation to run its course.
- Regardless, the employer complied with the request for the removal of the first investigator. The allegations against the qualifications of the second investigator did not make out a *prima facie* case for a requested order

Conclusion

- The employee's appeal was dismissed



THE CONDUCT OF INVESTIGATIONS

Investigations: General Principles

- Standard: not perfection, but “reasonableness” and “fairness”
- In practice, adjudicators will scrutinize an employer’s investigation, and flaws jeopardize an employer’s legal position
- Have an investigation policy: “roadmap” for the considerations which apply to workplace investigations



Investigations – Best Practices

- Conduct investigations promptly after a complaint
- Follow investigation policies (and any collective bargaining agreement, if applicable). Departing from written policies undercuts the effect of an investigation
- Investigations should be conducted by a neutral, unbiased, and competent person (internal or external, context-dependent)



Investigations – Best Practices

- **Procedural fairness:**

- Unbiased, neutral and trained investigator
- Written statement from victim/employer
- Person under investigation must know grounds of complaint
- Person under investigation must be given ample opportunity to respond to specifics of complaint
- Representation?
- Interview witnesses
- Confidentiality
- Written report of investigator with reference to evidence and findings
- Written letter outlining discipline and connection to investigator findings



Special Considerations

- Investigator retainer/instruction letter and investigation file
- Privacy
- Security
- Strategic interview
- “Defensive” complaints – to defend against discipline/termination
- Suspensions – paid vs. unpaid; contractual terms
- Reprisal



Canada Labour Code – New Regulations

- Application to federally-regulated employers
- *2021 Workplace Harassment and Violence Prevention Regulations:*
 - Timelines
 - Acknowledge receipt of complaint within 7 days
 - Start investigation within 45 days
 - Complete investigation within one year (note: this includes fully implementing recommendations)
 - Representation: non-unionized employers must inform the parties that they may be represented through the investigation process

Canada Labour Code – New Regulations (cont.)

– Expertise:

- Investigators must be trained in investigative techniques
- Investigators must know the *Canada Labour Code* and the *Canadian Human Rights Act*

– Other:

- New requirements surrounding appointment of investigator
- Must offer an alternative to formal investigation
- Former employers can bring complaints up to three months after end of employment
- Prescribed content of report
- Government reporting
- Penalties for non-compliance



McGraw v. Southgate (Township), 2021

ONSC 7000

Facts	Analysis	Conclusion
<ul style="list-style-type: none">• Administrative assistant and volunteer fire captain for employer fire department• Termination without cause and severance: sexist rumours regarding texting inappropriate photos, inappropriate sexual behaviour, and effect on morale	<ul style="list-style-type: none">• Employer did not speak to the employee about the allegations• Employer did not speak to witnesses• Employer engaged in conduct that was unfair and in bad faith during the course of dismissal	<ul style="list-style-type: none">• Employer did not conduct a reasonable investigation.• Employee was awarded \$190,000 in damages, including \$75,000 for moral damages (embarrassment and humiliation); \$35,000 for sex-based discrimination; \$20,000 for defamation; \$60,000 for punitive damages

McGraw v. Southgate (Township), 2021

ONSC 7000

Takeaway

- Sanction against an employer for an improper investigation is not limited to just cause terminations, and an employer may be found liable for increased damages in the case of a bad faith without cause termination



OUTCOMES: THE USE OF INVESTIGATION RESULTS

Investigation Outcomes

Reports

- Factual findings – whether allegation is substantiated
- Conclusions
- Recommendations
- Advising the parties
- File retention



Corrective action

- Reorganization
- Risk assessment
- Education, coaching, training



Discipline

- Warning of progressive discipline if further misconduct
- Termination
 - Without cause
 - For cause

Litigation Risks Arising from Improper Investigations

- Failure of Just Cause Defence
- Constructive Dismissal Claims
- Breach of duty of good faith
- Extraordinary Damages (Chu v. China Southern Airlines Company Limited, 2023 BCSC 21)
- Human Rights Damages
- Privacy Violations
- Defamation





Q&A SESSION

HOUSEKEEPING



Join our mailing list to receive updates from the Labour + Employment group by clicking [here](#).



For more information about our firm, please visit AHBL.ca. You can email us at info@ahbl.ca for any general questions you may have.

Presenter(s) contact details are on next slide.

THANK YOU



Contact



Derek Frenette

Partner

T: 604 484 1780

dfrenette@ahbl.ca



Iman Hosseini

Associate

T: 604 484 1725

ihosseini@ahbl.ca



Michael Watt

Partner

T: 604 484 1733

mwatt@ahbl.ca

DISCLAIMER

*This presentation is for educational purposes only.
Please seek legal advice if you have a particular
situation. Use of these materials does not create a
solicitor client relationship.*

OFFICES

Vancouver

TD Tower
2700 – 700 West Georgia Street
Vancouver, BC V7Y 1B8
Canada

T: 604 484 1700

Toronto

Bay Adelaide Centre
2740 – 22 Adelaide Street West,
Toronto, ON M5H 4E3
Canada

T: 416 639 9060

LEARN MORE AT AHBL.CA

FOLLOW US ON SOCIAL MEDIA:



YOUR **PERSPECTIVE** OUR **FOCUS**™