



BEST PRACTICES FOR WORKPLACE INVESTIGATIONS

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Today we will cover:

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| 1 | When a workplace investigation is required or beneficial (e.g., WorkSafeBC/OHS, allegations of wrongdoing, discrimination) |
| 2 | Key legal and practical guidelines for effective investigations |
| 3 | How to use investigation findings in decision-making |
| 4 | Recent case law developments in workplace investigations |



WHEN A WORKPLACE INVESTIGATION IS REQUIRED OR BENEFICIAL

When is a Workplace Investigation Necessary?

Investigations support much of what employers and legal counsel do in the field of employment law:

- Employee health and safety, workplace morale, compliance with legal requirements
- Employee misconduct and discipline
- Terminations (with and without cause)
- Gathering information
- Prevent or defend against legal claims

When is a Workplace Investigation Necessary? (cont'd)

Two common categories of investigation:

- Employer investigation of worker misconduct
- Employer investigation of worker complaints

The two categories are not always mutually exclusive

In order to discipline and in particular to dismiss for cause, employers have an obligation to investigate, express concerns to the employee, and allow the employee an opportunity to respond: *Porta v. Weyerhaeuser*, 2001 BCSC and *George v. Cowichan Tribes*, 2015 BCSC

Employer-Initiated: Worker Misconduct



Alleged misconduct comes to the attention of the employer



Goal: confirm facts, support potential 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 procedural fairness; could result in negative consequences, including allegations of wrongful/unjust dismissal, constructive dismissal, grievance, or other legal action

Dove v. Destiny Media Technologies – 2023 BCSC



Example of correct action by employer and incorrect response by employee



Employee “moonlighting” (co-owner?) in other business with co-worker



Suspension and investigation



Employee refuses to participate, and her counsel alleges company wrongdoing, and refuses participation in the investigation



Investigation concludes without employee participation, and termination for cause results

Dove v. Destiny Media Technologies – 2023 BCSC (cont'd)

At wrongful dismissal trial, court finds for employer:

- investigation had problems
- warning rather than dismissal would have been warranted, but for employee's decision not to participate in the investigation
- “decision not to cooperate with the investigation, coupled with her own counsel's aggressive reaction to the proposed investigation...effectively destroyed Destiny's ability to use the investigation as a means of alerting the plaintiff to the precise nature of its concerns...”

Employee Misconduct Against Employer

Investigation of employee misconduct against the employer

Fraud, criminal or quasi-criminal acts

Making findings of fact, seeking restitution, and appropriate discipline

Negligence and financial losses: ***Movassaghi v. Steels Industrial Products Ltd.***, 2012 BC Supreme Court.

- Standard is “tantamount to wilful misconduct”
- Acts & omissions in question are “more than casual acts of negligence or incompetence”
- Different standard than just cause for termination at common law

Investigation is a must in such circumstances

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 (cont'd)

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

Marentette v. Canada (Attorney General) 2024 Federal Court

- Border services agent complaint against six supervisors
- Workplace violence, threatening body language, name-calling, harassment
- Investigation finding: no workplace harassment or violence
- Judicial review to set aside investigation report
- Court: employer failed to follow its own investigation policies
- Failed to allow the complainant to see a preliminary report, or the opportunity to rebut evidence unfavourable to him, for the investigator to consider and weigh
- Denial of procedural fairness, report overturned and new investigation ordered



KEY LEGAL AND PRACTICAL GUIDELINES FOR EFFECTIVE INVESTIGATIONS

Who should conduct the investigation?

- Policies and procedures; training
- Specialized knowledge
- Identity of complainants and/or respondent
- Nature of the complaint
- Timing of the investigation
- Likelihood of significant litigation
- Jurisdiction
- Cultural sensitivity, trauma-informed, language barrier
- Costs



Appointing an Internal or External Investigator

Neutral
and
unbiased

- Does not decide outcome
- Provide employee with substance of allegations
- Give employee opportunity to respond

Experience
with
process

- Interviewing witnesses
- Making findings
- Follow statutory obligations and policies
- Reporting and recommendations



Internal

- HR
- Manager/supervisor
- Guidance from counsel



External

- Professional investigator
- **Terms of Reference**
- Managing scope



Legal counsel

- Ideally not employer's usual employment counsel

When Conducting an Internal Investigation

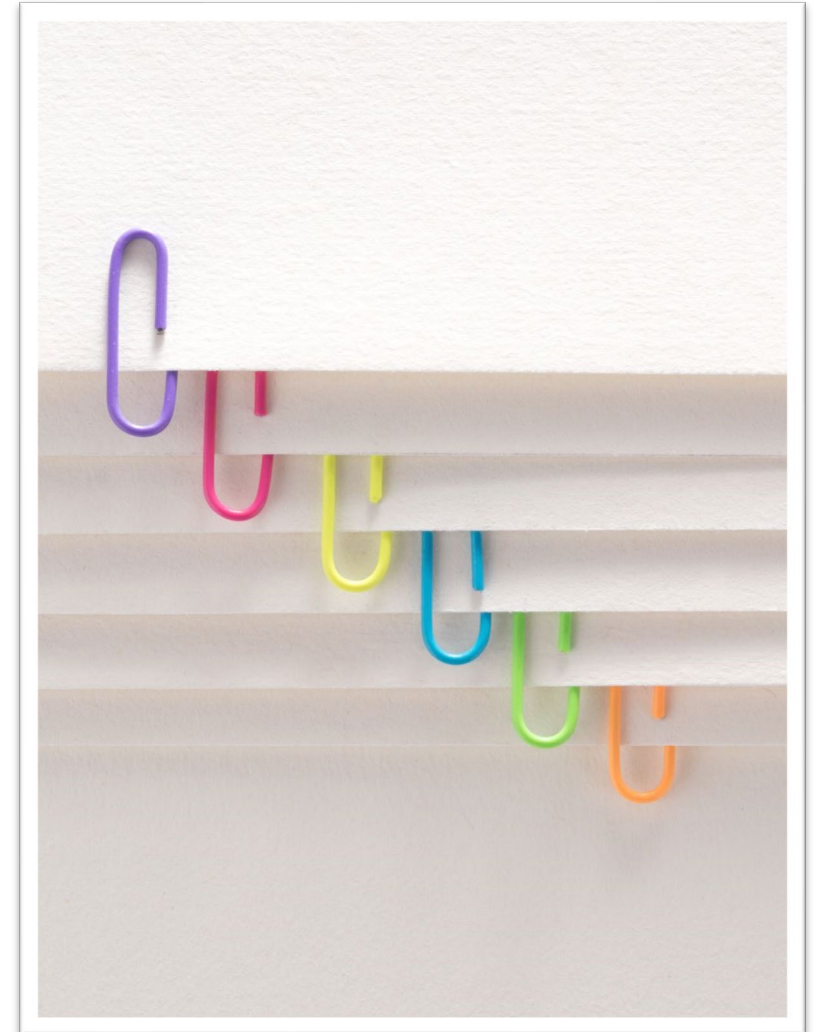
■ Ensure prompt, impartial, neutral, and objective

■ Competent and knowledgeable

■ Trained on conducting investigations

■ Necessary skill and authority

■ Guidance of counsel



Investigations: General Principles



Standard: not perfection, but “reasonableness” and “fairness”



In practice, adjudicators will scrutinize an employer’s investigation, and flaws can jeopardize an employer’s legal position



Have an investigation policy: “roadmap” for the procedures or considerations which will inform 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 (cont'd)

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
- Appropriate role of counsel
- Interview witnesses
- Confidentiality
- Written report of investigator with reference to evidence and findings
- Written letter outlining discipline and connection to investigator findings

Special Considerations

- New allegations and cross-complaints
- Investigator retainer/instruction letter and investigation file
- Privacy and access to information
- Confidentiality – expectations and breaches
- Procedural flexibility / Accommodation requests
- Role of counsel
- Suspensions – paid vs. unpaid; contractual terms
- Reprisal



HOW TO USE INVESTIGATION FINDINGS IN DECISION-MAKING

Investigation Outcomes

Reports

- Disclosure obligations
- Factual findings – whether allegation is substantiated
- Conclusions
- Recommendations
- Advising the parties
- Preserving evidence for use in legal proceedings

Restoration Strategies

- Reorganization
- Risk assessment
- Education, coaching, training

Corrective Action

- 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

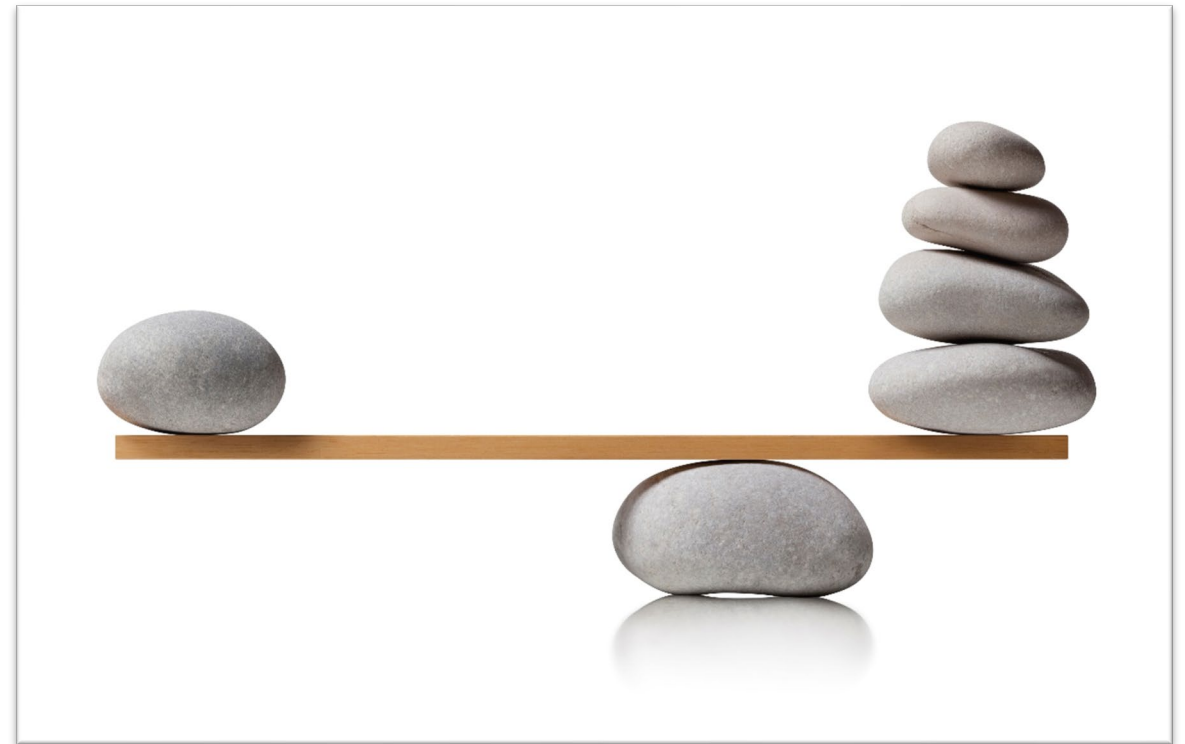
■ Breach of duty of good faith

■ Extraordinary Damages

■ Human Rights Damages

■ Privacy Violations

■ Defamation





RECENT CASE LAW DEVELOPMENTS IN WORKPLACE INVESTIGATIONS

Sarba v. Ruskin Construction Ltd. and Others, 2025

BCHRT 74

Facts:

- Employee subjected to the use of a racial slur in the workplace
- **1st investigation**: Racial slur repeated by the investigator
- Employee reported the investigator's use of the racial slur and a second investigation was conducted
- **2nd investigation**: There was insufficient evidence that the racial slur had been used by the investigator



Sarba v. Ruskin Construction Ltd. and Others, 2025

BCHRT 74 (cont'd)

Holding:

- **1st Investigation:** Investigator's use of the racial slur constituted discrimination
- **2nd Investigation:** Second investigator also discriminated against the employee



Zheng v. China Southern Airlines Company Limited,

2023 BCSC 1763

Facts:

- Employee ordered to attend a meeting, where she was advised that she was being placed on administrative leave and was under investigation
- Prescribed anti-depressants and was provided with a note stating that she could not work due to her illness.
- Employer demanded that she attend a meeting to be advised of the result of the investigation
- Employee was terminated



Zheng v. China Southern Airlines Company Limited, 2023 BCSC 1763 (cont'd)

Holding:

- Investigation was a sham
- The employer had conducted a “biased and inadequate investigation”
- The adversarial and biased investigation into unfounded allegations of serious misconduct constituted a breach of the employer’s duty fo good faith and fair dealing



Zheng v. China Southern Airlines Company Limited, 2023 BCSC 1763 (cont'd)

Award:

- General damages: \$98,832.75
- Aggravated damages, to account for breach of duty of good faith and fair dealing: \$35,000
- Punitive Damages: \$75,000





ANY QUESTIONS?

THANK YOU



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