



MILLER THOMSON
AVOCATS | LAWYERS

FORWARD TOGETHER

Workplace Investigations: Getting it Right in the #metoo Era

Lisa Goodfellow

May 16, 2018

Outline

- A. Legal Imperatives for Workplace Investigations
- B. Employer's Liability for Poor Investigations
- C. Best Practices
 - 1. Preparing for the Investigation
 - 2. Conducting the Investigation
 - 3. After the Investigation

Legal Imperatives for Workplace Investigations

- Occupational Health & Safety Incident/Accident
- Complaints of Bullying, Harassment, Discrimination—
OHSA or OHRC
- Legal Obligations of Good Faith in Termination
- Allegations of Misconduct Relating to Protection of Assets
or Reputation

Recent OHSA Obligations

- Must investigate all incidents of workplace harassment
- Incidents can be formal or informal complaints, or where employer is otherwise aware
- Investigation must be “appropriate in the circumstances”
- Results and corrective action must be communicated in writing
- MOL can order an investigation by a third party at the employer’s expense



MILLER THOMSON
AVOCATS | LAWYERS

Employers' Liability for Poorly Conducted Investigations

Employers Not Responding to Complaints

City of Calgary and CUPE, Local 38, 2013 CanLII 88297

- \$800,000 for damages for mental distress, and lost income for failure to investigate sexual harassment
- Grievor was sexually assaulted
- Instead of investigating, manager left on vacation and left abuser in charge of worksite
- Second manager found evidence inconclusive and did nothing

City of Hamilton v Amalgamated Transit Union, Local 107, 2013 CanLII 62266

- After finding supervisor engaged in sexual harassment, arbitrator also awarded \$25,000 against City for its “egregious conduct in handling complaint”
- Managers failed to take complaint seriously
- Did not contact “Human Rights Specialist” immediately
- Investigator failed to interview witnesses, failed to deal with all allegations, and failed to look for systemic issues
- Response to complaint was “half-hearted and insensitive”

Boucher v. Wal-mart Canada Corp. 2014 ONCA 419

- Court of Appeal upheld jury award of \$200,000 aggravated damages, and awarded \$100,000 for punitive damages for failure to adequately respond to complaints of harassment
- Harasser found out about complaints – harassment got worse
- Investigation found complaints were unsubstantiated and that Boucher would be held accountable for making false complaints
- No evidence that investigators considered numerous incidents or that they interviewed relevant witnesses

Sears v. Honda of Canada Mfg., 2014 HRTO 45

- Tribunal confirms “well established jurisprudence” that failure to investigate discrimination complaints can attract liability, even if the Tribunal ultimately dismisses the underlying allegations of discrimination”
- Failure to adequately investigate complaints of harassment incompatible with respect for dignity
- No investigation in respect of complaint
- Did not investigate whether supervisory employees involved in accommodation efforts understood their responsibilities

Scaduto v. Insurance Search Bureau, **2014 HRTO 250**

- “Internal investigations provide employers with the opportunity to remedy discrimination, if found, and can prevent Applications being filed with the Tribunal. They also limit employers’ exposure to greater individual and systemic remedies. The failure to do so is at their peril. But, if they fail to investigate discrimination that does not exist, that failure is not, in and of itself, a violation of the *Code*.”

Poorly Conducted Investigations

Pate Estate v. Galway-Cavendish and Harvey (Township),
2013 ONCA 669

- Court awards \$450,000 in punitive damages against employer for part in flawed investigation leading to malicious prosecution
- Plaintiff had to show Township “initiated criminal proceedings”
- Township employee withheld evidence and provided false information to police
- Undermined independence of police investigation

Lau v. Royal Bank of Canada, 2015 BCSC 1639

- Wrongfully dismissed account manager awarded \$30,000 in aggravated damages, in part due to “flawed” investigation
- Video surveillance inconclusive and lost before trial
- Insufficient evidence
- Failed to investigate employee complaint
- Employee not given chance to view surveillance video or respond to allegations

Faghihi v. Black Swan Pub and Grill, 2016

HRTO 1109

- Employee awarded \$18,000 for reprisal and failure to conduct a reasonable investigation into harassment allegations
- Lack of neutrality undermined reasonableness of investigation
- One-sided investigation
- Failure to communicate results



MILLER THOMSON

AVOCATS | LAWYERS

Investigations – Best Practices

1. Preparing for the Investigation

1. Review your Complaint & Investigation Procedure

- Is it adequate to address the current needs? If so, follow the procedure
- If changes required, document changes and ensure that everyone affected understands amended procedure

2. Choose the Investigator

- Ensure he/she has the skills required (legal, HR, psychologist, health and safety training)
 - Impartial
 - Internal vs. External
 - Privileged vs. Not Privileged

3. Define Scope and Purpose

- Specific incident or complaint
- Systemic issues
- Discipline and reputation
- Statutory compliance

4. Evidence + Process

- Interview format: location, interviewers, notes/recordings
- Secure the evidence - both paper and electronic

5. Protect Confidentiality

- Minimize discussion (no gossip)
- Location of evidence
- Determine in advance who will have access to information gathered
- Letters stressing confidentiality

6. Identify Witnesses

- Enough witnesses to get facts
- Don't overdo and disrupt operations
- Be flexible – new witnesses may be identified after interviewing others

7. Plan Timeline – Remain Flexible

- More witnesses and/or availability of witnesses
- Direction of investigation may change as information gathered
- May identify other issues (investigation may reveal systemic issues)

2. Conducting the Investigation

1. Scheduling Interviews

- Recommend 2 people present when interviewing
- Remain objective: let the investigators do their job
- Do not pre-judge or jump to conclusions
- If unionized workforce, enlist union's assistance with witness co-operation. May be right to union representation in CBA

Conducting the Investigation

2. Goals for conducting investigative interviews:
 - Provide an opportunity for the employee involved in the misconduct to explain his or her actions
 - Gather evidence from employees
 - Gather evidence from other third party witnesses
 - Review documentary evidence (including computers, phones, PDA's)

Conducting the Investigation

3. Interview questions:

- What happened?
- When/where did it happen?
- Who was present? Who did or said what? In what order?
- Why did it happen? (self-serving information not helpful, but may discover other relevant facts)
- Is there documentary evidence?
- Who else may have relevant information?

Conducting the Investigation

4. Recording Information:

- Take detailed notes, including questions asked and responses given
- Record the names of those present, the date/time/place of the interview
- Keep original notes in a safe place, as they may become evidence
- Provide copies to witnesses to read and confirm accuracy

3. After the Investigation

1. Assess Credibility - Factors to be considered (in light of contradictory evidence)

- Witnesses' demeanour (i.e. tone of voice, anxiousness, defensiveness)
- Consistency of the story (Does it make sense? Does it conflict with other witnesses' testimony, physical evidence and/or documents?)
- Motives of the witnesses

After the Investigation

2. Review Evidence

- Standard of proof is “balance of probabilities” - Is it more likely than not that the event occurred?
- Courts have said that the more serious the alleged misconduct, the more convincing the proof should be

After the Investigation

3. If Evidence Inconclusive

- Determine if gaps can be filled by follow-up interviews or documentary evidence
- Do not take action against an employee if no clear evidence of misconduct
- Consider preventive measures, such as training and monitoring
- Notify the parties of conclusion

After the Investigation

4. Final Report

- Include a summary of the complaint, steps followed, information obtained, and conclusions on the evidence
- The report may become evidence in further legal proceedings - it should be carefully drafted
- Circulate only amongst the final decision makers

After the Investigation

5. Communicate the Findings

- Meet separately with the parties, explain findings and remedial action to be taken
- Communicate on a need-to-know basis only
- Provide the accused with a chance to respond
- Parties should be reminded of the obligation of confidentiality

After the Investigation

6. Punishment Should Fit the “Crime” – Relevant Factors:

- Findings and the recommendations of the investigator
- Seriousness of the conduct
- Was incident a single episode or a series of incidents?
- Was incident unplanned or premeditated?
- The respondent’s employment record, position and length of service
- Were any policies breached?

After the Investigation

More Relevant Factors for Response

- Can the respondent's conduct be appropriately addressed through training or accommodation (i.e. Counseling, anger management training)
- Whether discipline was imposed on previous cases of similar misconduct
- Whether there are any policies or procedures relating to progressive discipline
- Position of the employee – managers held to a higher standard

After the Investigation

7. Take Action

- If misconduct, employer should take prompt action to implement discipline, corrective and/or remedial measures
- Occasionally, complaints are brought for improper purposes or in bad faith - determine whether discipline would be appropriate for the complainant
- Carefully implement suspensions or demotions because of constructive dismissal concerns

After the Investigation

8. Reduce Risk

- Do not terminate in haste
- Remind affected supervisors that retaliation is not tolerated
- Keep all information, including the results and consequences to any employee, confidential
- Consider having someone else objectively confirm the conclusion

After the Investigation

9. Keep a written record of the investigation, including the following:
 - Complaint details
 - Summary of interviews with the affected parties
 - Any supporting documents reviewed during the investigation
 - Findings/conclusions reached
 - Action taken

After the Investigation

10. Take Steps to Prevent Future Occurrences

- Updated workplace policies needed?
- Further preventative measures needed?
- Consider opportunities to provide or refresh education, training and information for employees

After the Investigation

11. Other Considerations

- Was the complaint process effective? Was the investigation process effective? If not, consider what improvements can be made.
- Did the investigation disclose any weaknesses that should be noted in employee evaluations?
- Is any post-investigation monitoring required?
- Consider whether the nature of the issue requires wider messaging to the organization as a whole, or other stakeholders (customers, suppliers, etc.)



MILLER THOMSON
AVOCATS | LAWYERS

Questions?

FORWARD TOGETHER



MILLER THOMSON
AVOCATS | LAWYERS

MILLERTHOMSON.COM



© 2016 Miller Thomson LLP. All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the presenter(s).

This presentation is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and viewers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.