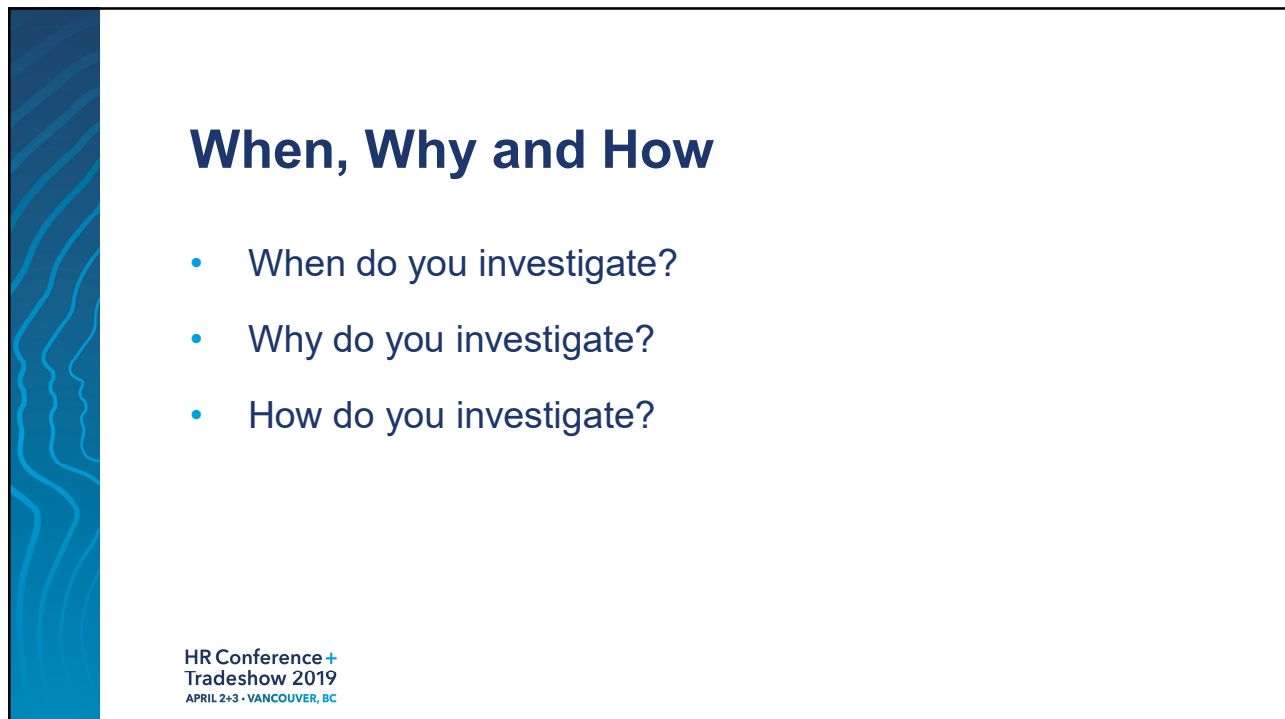




1



2

Internal Investigations - Why Bother?

- Prevention
- Morale
- Ethical and legal obligations
- Liability
- Publicity

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

3

Reflection

If an investigation is about the potential discipline of an employee remember throughout that:

INVESTIGATIONS ARE THE NEW ARBITRATIONS

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

4

Investigations

The investigation is one of the key steps in ***successful decision making***.

It provides:

- ☐ Due diligence
- ☐ Good evidence about what happened
- ☐ Fair process
- ☐ Insight on issues
- ☐ Assessment of the credibility of the witnesses

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

5

A prima facie analysis?

- What if even if true, no violation of law or policy?
- When wouldn't you investigate?
- Why wouldn't you investigate?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

6

What triggers the investigation?

A COMPLAINT OR CONCERN

Does every complaint or concern warrant an investigation?

What options does the Employer have?

- Can't accept the complaint as "truth"
- Can't ignore the complaint

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

7

Other Options

- Environmental scan
- Employee audit
- Employee engagement process
- Ombudsperson role
- Mediation
- Joint appointment
- Agreed use of report

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

8

Developing the Retainer/TOR

Who retains the investigator?
 What is the scope of the investigation?
 Can it change? How can it change?
 What is the process?
 What tasks does the investigator have?
 What is the time line for completion?

HR Conference+
 Tradeshow 2019
 APRIL 2+3 • VANCOUVER, BC

9

Investigations – Process Matters

- Any important decision of an organization will be made based on:
 - Sound research
 - Thoughtful deliberation
 - Weighing the risks and benefits to the organization as a whole
- Proportionality applies to investigations (just as it does to arbitrations and any litigation)

HR Conference+
 Tradeshow 2019
 APRIL 2+3 • VANCOUVER, BC

10

Investigations – Process Matters

“There is no specific standard of investigation that employers must follow; what is required will vary depending on the facts surrounding the employer, its policies, sophistication, experience and the workplace ...

... [H]ow the employer reacts is subject to judicial scrutiny. Its responsibilities do not give it license to conduct an inept or unfair investigation or behave in malicious, vindictive, or outrageous ways.”

Elgert v. Home Hardware Stores Ltd., 2011 ABCA 112

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

11

Investigations – Process Matters

An investigation that was not done at all, or done poorly, may lead to:

- The wrong decisions being made
- The right decision being made, but losing the ability to defend that decision
- Extra damages in court (breach of duty of good faith)

PROCESS MATTERS

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

12

Investigations - Purpose

The purpose of an investigation is to find out:

- What happened
- Why it happened
- Gather details
- Assess credibility

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

13

Reflection

- What is your role?
- When ***shouldn't*** you be the one to investigate?
- Who are you conducting the investigation as and for?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

14

Notice

- Does your policy require notice?
- If not, when and why would you give notice?
- How is notice given?
- Who gets notice?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

15

Pop quiz

Scenario 1:

An allegation has arisen that Employee A has stolen. Employees B, C and D were all witnesses. In what order would you interview them?

Scenario 2:

Employee A has filed a written harassment complaint against employee B. In what order do you interview the witnesses?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

16

Pre-investigation Considerations

- ✓ Representation (union, lawyer, colleague?)
- ✓ Are there criminal issues?
- ✓ Are there medical issues?
- ✓ Are there potential media issues?
- ✓ What is the timing?
- ✓ Who are the witnesses? Other staff members?
- ✓ What is the capacity of the witnesses?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

17

Pre-planning

- Who will be your dedicated note taker?
- Need to consider order:
 - ✓ Interview source of allegation/complaint
 - ✓ Then witnesses
 - ✓ Then respondent/accused
- Re-interview if necessary or interview accused last
- Consider risk of influence between witnesses

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

18

Sources of Information

- What other sources of information will assist?
- What documents might be relevant?
- Are there privacy issues?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

19

Other Sources of Information

- Email
- Text
- Phone records
- Video
- Surveillance
- What other records may be relevant?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

20

Information Prior to Interview

- What information do you provide to the Complainant prior to the interview?
- What information do you provide to the Respondent?
- What about the witnesses?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

21

Conducting the Interview - The Script

- Prepare a script prior to the investigation where you have listed the questions to be asked
- The script may be an exhibit in the hearing
- Be aware that others, including an adjudicator, may review your material
- Avoid editorial comments in the script
- Include a prepared statement:
 - Remind them of their role in the investigation, and
 - Underline the importance of honesty in the investigation

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

22

The Interview – Opening Comments

- Explain investigator's role/mandate
- State purpose of the investigation
- Clarify role of "representative"
- Obligations: honesty; confidentiality (to a point)

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

23

The Dedicated Note Taker

- When taking notes, other than the words that are said, what can you include in your notes that is relevant about demeanour/credibility?
- What should you NOT put in your notes?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

24

Setting the Tone/Creating Comfort

Creating the best opportunity to get information:

- Who is in the room?
- Where do you hold the interview?
- How do you set tone?
- What other tools can you use to communicate?
- How do you test for credibility?
- What other tools might you use to get this information?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

25

Creating Comfort & Credibility

Consider the following situations:

1. You are interviewing a senior manager in a large organization. What tools might you use to try to optimize obtaining information?
2. You are interviewing a brand new custodian at a large school district. What tools might you use to try to optimize obtaining information?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

26

Representation

What is best practice?

Why would you allow representation?

Why would you refuse representation?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

27

Representation

- The right to a union representative present in an interview is provided for in the collective agreement.
- In the absence, the employee does not have entitlement to union representation.

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

28

Representation

- Representative may try to speak for the witness, or ask questions during the interview
- Representative may object to some questions, or ask to see and review your copy of the script prior to participating in the interview
- As the one conducting the interview, you need to be prepared to deal with these issues

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

29

Scenario - the Advocate

- ❖ You are interviewing an employee.
- ❖ His “advocate” (a fellow employee) keeps answering questions instead of the employee.
- ❖ What do you do?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

30

Scenario - the Difficult Witness

- ❖ You have asked Employee A to answer a question about her whereabouts on a particular day.
- ❖ Employee A refuses to answer and says it's private.
- ❖ What do you do?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

31

Scenario - the Angry Witness

- ❖ Throughout the interview, the witness keeps raising her voice, pounding the table and being belligerent.
- ❖ What do you do?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

32

Asking for Documents/Records

- ✓ Phone records
- ✓ Emails
- ✓ Text communications
- ✓ Journals
- ✓ Speaking notes
- ✓ Social media

What if they refuse? The adverse inference in action.

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

33

“But these are my personal notes”

Examples of what staff say are personal notes:

- Observations about other staff members
- Recording interactions with supervisors
- Day timer / journal
- Notes from ‘informal’ meetings with staff

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

34

Notetaking in the process

What is the purpose of note taking?

What are the ingredients of good note taking?

What are the top mistakes of note takers?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

35

What comes next?

You have:

- Interviewed the witnesses
- Reviewed the documents

WHAT'S LEFT TO DO?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

36

RE-INTERVIEWING

When?

Why?

When would you not have to re-interview?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

37

Assessing Credibility

- Opportunity of witness to observe
- Powers of observation of witness
- Attentiveness of witness
- Memory of witness
- Demeanour of witness
- Motivation of witness to be untruthful
- Communication style of witness

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

38

Assessing Credibility

Faryna v. Chorny (BC Court of Appeal)

“... its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

DOES THE STORY “ADD UP,” “HANG TOGETHER,” AND “MAKE SENSE”?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

39

**how much
better life
would be if a
liar's pants
really did
catch fire?**

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

40

Scenario - What if they are all lying?

- You have three witnesses, and they all have conflicting stories.
- Nothing aligns.
- What do you do?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

41

After the interviews

The last stage of the investigation is the decision and justification for it.

- Set out findings of fact
- Explain any findings of credibility
- If asked to, recommend:
 - ✓ Whether discipline is warranted
 - ✓ What level of discipline

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

42

The Report

Ask first:

- How will the report be used?

Depending on the answer:

- What are the essential elements of a report?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

43

After the Process

Important to consider next steps:

- Communication of outcomes
- Other staff involved
- Government agencies (WorkSafe, Canada Labour Board?)
- Third party witnesses
- Media
- Post Mortem / What did we learn today?

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

44

Case 1: An incomplete investigation

Howe Sound Pulp and Paper Corp and CEP, [2013] B.C.C.A.A.A. No. 11, 230 LAC (4th) 1 (Holden); reversed in part on other grounds BCLRB No. B32/2013 by Arbitrator Saunders (2013)

An incomplete investigation conducted by the Employer resulted in the reinstatement of an employee and the Employer taking the arbitrator's findings to the Labour Relations Board

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

45

Case 1: An incomplete investigation

During the initial investigation, the Employer's investigator *did not*:

- Review the statement of the contractor's representative
- Seek other witnesses to the event
- Give the respondent the opportunity to respond to the allegations
- Take the credibility of the contractor's representative into account

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

46

Case 1: An incomplete investigation

The respondent's termination was revoked by Arbitrator Holden because she decided:

- The dismissal was excessive because the Employer's investigation was flawed

Reinstatement was appropriate

But it didn't end there...

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

47

Case 1: An incomplete investigation

Arbitrator Holden's conclusions were challenged by the Employer because:

- The Employer said it was denied a fair hearing due to an understanding re: Wm. Scott Question 3

A new arbitration was heard by Arbitrator Saunders who agreed with the Employer re: Wm Scott Question 3

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

48

Case 2: Failure to interview the respondent

Lifestyle Retirement Communities Ltd. (Whitecliff) and BCGSEU,
[2007] BCCAAA 120 (Hickling)

A failure to hear the respondent's side of the story may mean all the evidence is not uncovered and a reduction in penalty may be imposed through arbitration

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

49

Case 2: Failure to interview the respondent

During the investigation, the Employer's investigator *did not*:

- Put the complainant's allegations to the respondent
 - Ask the respondent for her version of the event in question
- ... before the Employer made the decision to terminate.

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

50

Case 2: Failure to interview the respondent

Arbitrator Hickling concluded that during the arbitration, failure to afford the grievor an opportunity to give her version of the event may be taken into account when considering mitigation of penalty.

“Fair dealing requires that grievors be given an opportunity to explain their version of the facts before any decision is made, not afterwards. Even if they admit the offence alleged, they may have something to say in mitigation of penalty.”

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

51

Case 2: Failure to interview the respondent

Arbitrator Hickling concluded that dismissal was excessive.

*Termination was substituted with a
one-month suspension without pay*

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

52

Case 3: An unwarranted, flawed investigation

Minolta Business Equipment (Canada) Ltd. and OPEIU, [2002]
BCCAAA 180 (McConchie)

The Employer needs to understand when an investigation is warranted, and if it is, to conduct it properly so that its conclusions do not get challenged and revoked at arbitration.

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

53

Case 3: An unwarranted, flawed investigation

The Union grieved termination of the employee for several reasons including:

“... the Employer's investigation of the complaint was so seriously flawed that the discipline to the grievor must be rescinded ... [the investigator] became investigator, prosecutor, witness and judge all in the same proceeding.”

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

54

Case 3: An unwarranted, flawed investigation

The investigator himself played a role in the allegations – he should have excused himself once he discovered this

The investigator did not put newly discovered evidence to the grievor before making his decision to terminate

HR Conference +
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

55

Case 4: Flawed investigation leads to aggravated damages

Vernon v. British Columbia (Liquor Distribution Branch), 2012 BCSC 133

30 year Senior Manager fired after investigation found she engaged in bullying

Internal investigator was not impartial

Interview of Manager was an “interrogation” with no notice

Investigation “was neither objective nor fair”

\$35,000 aggravated damages (based on manner of dismissal), and \$50,000 punitive damages (offer of a reference letter for resignation)

HR Conference +
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

56

Case 5: Allegation not put to accused

George v. Cowichan Tribes, 2015 BCSC 513

Executive Director of Child and Family Services fired for allegedly threatening to have a woman's children taken away and then conspiring with supervisor to fabricate documents following the incident

Independent investigator was retained, but he never asked her specifically whether she had conspired with her supervisor

Investigation ultimately found employee was dishonest, but court found she never had the opportunity to respond

\$35,000 aggravated damages award.

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

57

Case 6: Flawed investigation leads to training

McDonald v. CAA South Central Ontario, 2018 HRT0 163. \

Complainant alleged manager discriminated on race and disability

Internal investigation prejudged complaint and left out certain allegations

Investigator : "[on] the situation that happened between yourself and [the complainant] on Thursday, I want you to know, you dealt with it great, you kept the focus on her behavior and not the cultural difference, with that said, let's walk through what happened..."

Investigator relied on statements from co-workers without allowing complainant to respond

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

58

Case 6: Flawed investigation leads to training

Tribunal ordered that the respondent retain a third-party consultant to conduct training of the respondent's HR department on investigations, with a particular expertise in anti-Black discrimination and harassment

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

59

Top Pitfalls in Investigations

- Poor communication – before, during and after
- Delay
- Forgetting that having fairness, and the feeling of fairness, are paramount
- Bias
- No notes/poor note keeping
- Not giving the employee a chance to respond to allegations

HR Conference+
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

60



HR Conference +
Tradeshow 2019
APRIL 2+3 • VANCOUVER, BC

Lisa Southern, Terry Honcharuk, Christopher Munroe

Anatomy of an Investigation: Step by Step Tips on Effective Investigations

THANK YOU

ropergreyell
EMPLOYMENT + LABOUR LAWYERS

 **SOUTHERN
& ASSOCIATES**

 **THE INTEGRITY GROUP**
Education & Conciliation Ltd.