

Canadian Employment Law Guide

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TOP TIPS FOR CONDUCTING A WORKPLACE INVESTIGATION

— By Catherine Coulter. © Dentons Canada LLP.

An employee comes to you with an allegation of workplace harassment by a colleague. What do you do?

Given the nature of most workplace complaints, together with the do-all nature of most human resources jobs, HR specialists are the individuals who are most often given the task of dealing with and resolving workplace complaints. While intended to be a general summary only, this article sets out some of the considerations to be undertaken in the event that an investigation is required.

Formal or Informal?

Formal investigations typically follow a set procedure which includes interviewing all affected parties and witnesses, as well as the preparation of a written report which includes conclusions and recommendations. Informal investigations may simply involve meeting with the affected parties and discussing possible resolutions with them. Generally speaking, a formal investigation should be undertaken where there is a risk of harm to any affected parties or to the company (including the threat of litigation, public relations problems, or workplace violence).

Who Should Conduct the Investigation?

The answer to this question will depend on such things as the seriousness of the allegations, the requirement for impartiality, and cost. While an HR professional may initially seem like the best person to conduct a cost-effective investigation, it can sometimes be helpful to use an impartial external consultant. Internal and external legal counsel often have the skills required to conduct an impartial investigation, but it is important to remember that they will be conflicted from representing the company in the event of litigation. As a result, if costs are not an issue, it is often best to hire an independent consultant who is experienced with conducting workplace investigations.

Preliminary Matters

Anyone being interviewed as part of an investigation should be cautioned: (i) about the requirement for absolute confidentiality; and (ii) against interference with the

investigation (including reprisals). If the nature of the allegations is such that affected individuals may not be able to work together during the investigation, thought should be given to such things as temporarily moving workspaces, changing reporting structures, or permitting work from home. As well, take a look at any company policies which may lay out a framework or timeline for investigations, in order to ensure that the company abides by them.

How to Conduct the Investigation?

Optimally, two individuals will conduct each interview, with one person asking the questions and the other person taking verbatim notes. Generally the complainant will be interviewed first. The respondent may be interviewed second, or may only be interviewed after the complainant and all witnesses have been interviewed. Where the respondent is interviewed second, he or she should be given a final opportunity to respond to all allegations once all other witnesses have been interviewed. Witnesses, including the complainant and respondent, should be advised that if they recall further evidence after the interview is complete, they should still bring it to the attention of the interviewer. If circumstances dictate or witnesses prefer to give written statements, make sure that they are signed and dated by the witness.

Investigation Report

Once all interviews have been completed and the respondent has had a final opportunity to respond to the complaints, an investigation report should be prepared. The report will typically summarize the background of the allegations and the evidence of the various witnesses. The conclusions section should discuss the credibility of the witnesses and their evidence, and reach a conclusion. If the complainant or respondent have requested it, or it appears to the investigator that recommendations may be warranted in order for the parties or the company to move forward, those recommendations should also be outlined in the report.

It is important to remember that, unless the company becomes involved in litigation, the investigation report does not need to be provided to the parties and in fact should not be provided. While the conclusions and recommendations should be shared in a general manner with the complainant and the respondent, a copy of the actual report should not be shared.

Recommendations

Recommendations will vary depending on such things as the nature of the complaint, the personality of the parties, the company's needs, and the conclusions. Among the types of recommendations which may make sense are the following: a simple discussion with the parties, mediation, all-staff training, moving an employee to another position or location, an apology, counselling, or termination of employment on a with or without cause basis.

Closing

The most important things to keep in mind when conducting a workplace investigation are: (i) ensuring confidentiality; (ii) impartiality, and resisting the urge to pass judgment until all evidence has been collected; (iii) following a process (whether it is the process set out in a company policy, or a more general process such as that set out in this article); (iv) giving all involved parties an opportunity to be heard; and (v) giving the respondent an opportunity to respond to all allegations. A workplace investigation which is conducted properly will almost always lead to a result that is in the best interests of all parties as well as the company.