

Company Columbos:
“Workplace Investigations and... Just One More Thing”

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Introduction

When an employer has grounds to believe that one or more of its employees are engaged in activity that is contrary to company policy and/or contrary to law, there are a number of important issues to consider when deciding how to proceed. These issues can be broken down into a series of questions. The following discussion reflects some of the developments in recent cases that have addressed the subject of workplace investigations.

Should an Investigation be Conducted?

The first question that an HR manager should ask, when faced with allegations or suspicions of employee misconduct, is whether an investigation should be initiated at all. In some cases, employers may be tempted to immediately dismiss the accused employee. The employer may feel that it has all of the information it needs to make its decision. Nevertheless, where the employer intends to dismiss the employee for cause, a properly conducted workplace investigation is not only advisable, but may be necessary to demonstrate the employer's good faith and that it has a legitimate basis for termination. This may result in a stronger case for summary dismissal, or it may reveal that the allegations of misconduct were unfounded.

A number of decisions have held that an employer has a duty to investigate before it dismisses an employee for cause. Not only could a failure to investigate the employee prior to dismissal result in damages for notice or pay, but it may, depending on the circumstances, result in enhanced damages according to the rule regarding bad faith dismissals from *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701. In *Baughan v. Offierski* (2001), 5 C.C.E.L. (3d) 283 (S.C.J.), the Court held that the employer had an obligation to conduct an investigation before it dismissed the employee for cause based on suspected theft. The end result in some cases may be that the employer did in fact have cause, but without conducting a thorough and impartial investigation an employer can never be sure.

Even where the employer initially intends to dismiss the employee without cause, an investigation may still be advisable. An investigation may lead to uncovering workplace issues that were initially considered to be in relation to the departing employee only, but may ultimately raise concerns about other colleagues in the workplace. Further, even an employee who is terminated without cause has recourse to statutory tribunals such as the Ontario Labour Relations Board (Canada Industrial Relations Board federally), or the Human Rights Tribunal of Ontario (Canadian Human Rights Tribunal federally), if the employee believes a statutory provision was violated via the termination. Finally, it is also possible that a termination that started out as one without cause could, following an investigation, warrant consideration as a termination with cause.

The cost of hiring an outside investigator may prove to be a good investment if the end result is that the employer saves the expense of notice pay by dismissing the employee for cause; or if the amount of notice, compensation or legitimacy of a termination is subsequently challenged.

The Special Role of Human Rights Investigators: When is an Investigation Required?

Alleged human rights violations present a special scenario to the employer who is considering whether or not to conduct a workplace investigation. This is because human rights allegations are especially sensitive and generate strong feelings from complainants, respondents and others. Revealing an attribute protected by human rights legislation such as disability, sexual orientation or previous criminal record can also implicate medical and privacy rights or employees in the workplace. A violation of the company's human rights or anti-discrimination policy will almost certainly represent a violation of the *Human Rights Code* as well. If an employer does not have a policy with respect to workplace discrimination, then it should think seriously about adopting one. It is fast becoming a basic requirement for businesses, large and small, to have some form of internal policy, and the lack of one may draw an adverse inference from a human rights investigator, arbitrator or tribunal.

A failure to adequately investigate such allegations can constitute a violation of the *Code* in itself. The danger here is that a single human rights issue can easily multiply into two or more if no investigation is conducted, or if the investigation is conducted in a haphazard way. In *Wall v. University of Waterloo* (1995), 27 C.H.R.R. D/44, at D/65, the following procedural requirements for employers faced with allegations of human rights abuses were set out:

- (i) the response must be prompt;
- (ii) there must be corporate awareness that the conduct complained of is prohibited;
- (iii) the matter must be dealt with seriously;
- (iv) there must be a complaint mechanism in place;
- (v) the corporation must act so as to provide a healthy work environment; and
- (vi) management must communicate its actions to the complainant.

Having a corporate human rights policy may help in satisfying requirement (ii) because it will help to establish that the employer is aware of human rights issues and that it understands its legal duties in the area. It may also aid in establishing that the employer has taken measures to ensure that it provides a healthy work environment. Ultimately, conducting a thorough, impartial, and confidential investigation into allegations of human rights abuses may help satisfy all of an employer's responsibilities in this regard. Should the human rights issue ever proceed to a hearing before the tribunal, the employer's investigation into the allegation is likely to be an important consideration.

Who Should Conduct the Investigation?

There are several options when considering who should conduct the investigation. The first option would be to conduct the investigation internally. The obvious advantage is that this is the least expensive option. As well, time, resources, confidentiality, and control of the investigation are all preserved. The fact is that, without necessarily thinking of it as an "investigation", almost all employers conduct some sort of examination of the facts and legal considerations before making employment decisions. This is particularly true where human resources personnel are available. But not all internal reviews may qualify as properly conducted investigations.

There are, however, significant downsides to conducting internal investigations. The most obvious disadvantage to this approach is that the internal investigator may not be, and will certainly not be perceived to be, independent from the employer's interests. There may have been a pre-existing relationship between the internal employee doing the investigation, and the subject or witness involved. As a result of the investigation, and regardless of its outcome, the internal investigator and other employees would have to face each other in the workplace with unpredictable results. Further, many employers will not have a pool of staff who are trained in investigative techniques. Worse, employers may consider that an in-house human resources staffer or in-house lawyer may have the ability to investigate but, in reality, investigation requires specialized skills, techniques and experience. An improper investigation can permanently damage workplace relations and may prejudice further investigation. The bottom line is that, if the nature of the workplace issue is serious enough, then an outside, independent investigator is warranted. This does not preclude using internal human resources staff, management, or legal counsel in supplementary or decision-making roles. But if the consequences to the employer and the employee are likely to be serious, and allegations of misconduct, material dishonesty, theft, conflict of interest, or misrepresentation are involved, and if the decision is to investigate, an outside investigator is likely warranted.

In all but the largest organizations, it is likely that the individual being investigated will know the internal investigators to some extent, and vice versa. This type of foreknowledge may give rise to allegations of partiality with respect to the investigation, and it may taint the results. Some recent decisions of the Ontario Superior Court have discussed internal investigations where the person under suspicion was familiar with the investigators. In *Emergis Inc. v. Doyle*, [2007] O.J. No. 334, 56 C.C.E.L. (3d) 303 (Sup. Ct.), Justice Morawetz considered a wrongful dismissal case which was on appeal from arbitration. At the arbitration, the employer made an issue of the employee's very negative reaction to the investigators. The Arbitrator identified a number of shortcomings in the investigation, one of which was the fact that the employee knew both of the investigators and felt that they could not be impartial. In the Arbitrator's opinion, the employee's confrontational attitude needed

to be examined in context; it was, in part, a result of the clumsy manner in which the investigation was conducted.

One potentially unforeseen advantage to hiring an outside investigator is that it can create a buffer between the employer and any potential liability which may emerge out of the investigation. A recent case before the Ontario Court of Appeal discussed the differences between professional investigation firms and employers with respect to their duties to the investigated employee. In *Correia v. Canac Kitchens* (2008), 91 O.R. (3d) 353 (C.A.), the Court permitted a claim for damages arising from an allegedly negligent investigation to proceed against the privately retained investigation firm, but not against the corporate defendant. In its reasons the Court noted that private investigation firms specialize in the field of investigation and therefore may have enhanced duties with respect to the people they investigate. Employers, on the other hand, were found not to have the same duties with respect to investigations, partly on the basis of the contractual rights that employers have, as discussed in *Wallace*. In *Wallace*, the Supreme Court declined to recognize an independent tort action relating to bad faith dismissals, even in the context of false allegations of criminal wrongdoing. Bad faith dismissals may result in increased damages in lieu of notice pay, but will not trigger a separate category of liability. This holding was based, in part, on the fact that employers are entitled to terminate the employment relationship with notice. For similar reasons, the Court of Appeal has held in *Correia* that employers which are negligent in the manner of their dismissals are not liable for that negligence as distinct from their liability for notice pay. The same is not true of private investigation firms.

A third option is to hire a lawyer to perform the investigation. One advantage of this approach is that the results of the investigation may be protected by solicitor-client privilege. However, as Janice Rubin and Christine Thomlinson discuss in their text, *Human Resources Guide to Workplace Investigations* at page 123, there is a commonly held misconception that the results of a lawyer-conducted investigation will always be protected by privilege. This is not necessarily the case. Unless the lawyer is providing legal services relating directly to the investigation, the lawyer's notes may not be privileged. Thomlinson

and Rubin suggest that the retainer specifically define the lawyer's role in the investigation as that of a solicitor.

Although such a retainer may aid in establishing privilege over the fruits of the investigation, there is a trade-off in terms of actual or perceived bias. While a lawyer may conduct an investigation as well as give legal advice to the employer who retained him or her, this retainer mechanism diminishes the independence of the investigator. It would be difficult for the parties and witnesses to an investigation, not to mention an external adjudicator or court, to perceive the employer's own legal counsel as not owing loyalty, first and foremost to their own client; therefore the quality of the investigation, its findings and the enforcement of its recommendations may be compromised.

What is the Investigator's Task?

Once the employer has decided who should be conducting the investigation, the next question becomes: What is the investigator to do? In many cases employers will provide the investigator with "Terms of Reference." These can be in the form of a brief document which sets out the investigator's tasks in point form. An example can be found in *Gower v. Tolko Manitoba Inc.* (2001), 7 C.C.E.L. (3d) 1 (C.A.):

1. The Investigator will conduct an investigation as counsel on behalf of the Employer for the purpose of providing a fact finding report and giving legal advice based on the findings in the report.
2. The Investigator's notes, fact finding report and legal advice will be protected by solicitor/client privilege. The Investigator will advise all witnesses, including the Complainant and the Respondent, that she is conducting this investigation as legal counsel for the Employer.
3. All information supplied to the Investigator by the individuals whom the Investigator interviews, including the Complainant and the Respondent, will be supplied in confidence and will be treated by the Investigator as strictly confidential. The information will be revealed only on a "need to know" basis in order to ensure that the investigation is fair.
4. The Investigator will meet with and interview the Complainant, the Respondent and any other employees or other witnesses whom the Investigator believes have information relevant to the investigation.

5. The Investigator will prepare a report for the Area Manager stating her findings of fact and her conclusion as to whether the findings of fact constitute sexual harassment and a breach of the Employer's harassment policy and will provide legal advice based on those findings of fact and conclusions.
6. The Area Manager will treat the report as strictly confidential and will review the report only with their advisors.

This example is provided for illustration purposes only, but it is useful in that it demonstrates a few of the things which can be accomplished by establishing Terms of Reference. In this case, the investigator's report was found to be protected by solicitor-client privilege, partly on the strength of these terms. In addition, the Terms of Reference provide guidance to the investigator by specifying which employees are to be interviewed, and by specifying what form the investigator's final work product should take. Employers should give some thought to whether the investigator's role should be limited to fact finding, or whether the investigator should make recommendations as to the ultimate disposition of the matter. In these Terms of Reference the employer has asked that its investigators make findings of fact, and provide legal advice based on those findings. It would, however, be open to the employer to divide the fact finding and recommendation aspects of the investigation between outside investigators and in-house counsel, for example. This is a decision that may need to be made on a case-by-case basis and is specific to each organization's capabilities.

Although certain aspects of the investigator's task are specified in the terms of reference excerpted above, these terms are still relatively general. Increased specificity may give the employer more control over the investigation, but will also decrease the investigator's independence. Where employers impose a large number of specific accountability mechanisms on their investigators, it can begin to appear as though the employer is interfering with the investigation or attempting to direct the final outcome. The important consideration for HR managers here is to balance the need to provide guidance to the investigator, with the need to avoid tying the investigator down such that he or she cannot be thorough or impartial.

Confidentiality

An important issue to consider when establishing the terms of reference for the investigator is how to protect the confidentiality of all parties involved. A good investigator will be alive to confidentiality issues and will take appropriate measures. This may involve selecting neutral sites for any interviews which are conducted. In close-knit work environments it may become apparent that an investigation is taking place and who the subjects of the investigation are, merely by observing employees entering and leaving the interview room. Employees willing to participate in the investigation process may be identified and singled out for doing so. The risk of reprisals is very real in these situations. Confidentiality is not limited to the content of the interviews, but extends to the very fact that interviews are being conducted.

Confidentiality may also involve developing a policy with respect to how the information gleaned from one interview can be put to another interview subject in a responsible manner. It is important that the investigator be able to compare differing accounts by asking interview subjects to respond to the accounts of their co-workers. However, it is equally important that employees who have been interviewed keep the content of their interviews confidential. The purpose, again, is to do what is reasonably necessary to avoid reprisals. One option is to seek promises of confidentiality from interviewed employees. Naturally, there is a limit to what investigators can do in terms of ensuring that interview subjects maintain confidentiality. In the recent Alberta decision, *Foerderer v. Nova Chemicals Corp.*, 2007 ABQB 349, the investigators sought confidentiality assurances from the employees they spoke to, however one of the employees chose to reveal information he had learned from the investigators. The investigators were not faulted for this lapse; rather it was seen as a valid reason to suspend the person who was the subject of the investigation, pending its outcome.

To What Degree Should the Investigated Employee be Aware of the Investigation or be Permitted to Respond?

One of the first decisions that the employer needs to make with respect to an investigation is whether to involve the suspected employee, and if so, at what stage. Some investigations, such as the one in *Correia*, may be best conducted in secret, at least in their initial evidence gathering phase. At some point prior to dismissal, however, an employee under investigation should always be presented with the nature of the allegations against him or her, and preferably with the evidence that the employer has collected with respect to those allegations. The advantage in doing this is that it will make the employer's case for just cause dismissal stronger if the employee was given an opportunity to respond to the allegations, and a chance to either to correct his or her behaviour, or to explain why the allegations are false. It will aid in establishing that the employee was subjected to progressive discipline prior to his or her ultimate dismissal.

It may be challenging for the employer to do so but the employee should be provided not only with the inculpatory evidence of their misdeeds but also with any exculpatory evidence, assuming that such evidence is not going to risk or compromise another employee's personal information. There are also ways to redact certain documentary evidence so that the material information is separated from the identity of the employee associated with that information. An experienced investigator will be able to assist with these judgment calls. What clearly should be avoided is an investigation with blinders on that pre-determines the guilt of its subject. The subject employee may very well have an innocent explanation for what at first appears to be highly inappropriate behaviour.

The practical reason for demonstrating that progressive discipline measures were adopted is that in many cases of employee misconduct the main question is really one of degree. Not every employee violation of workplace conduct standards will automatically result in sufficient grounds for just cause dismissal. This point was made in *Stone v. SDS Kerr Beavers Dental, A Division of Sybron Canada Ltd.*, [2006] O.J. No. 2532 (Sup. Ct.) (QL). In *Stone*, the Court held that not every incidence of sexual harassment or drinking on the job

would necessarily result in a valid just cause dismissal. Therefore, it would aid the employer if it could demonstrate that it had attempted appropriate alternatives to dismissal, but that none were effective. In this case the Court said that the employer, “cannot show that no appropriate alternatives were available when, during the course of its investigation, it did not make clear to Mr. Stone the nature of the allegations against him.” Involving the employee in the investigation, in terms of providing the opportunity to study and respond to the allegation, would likely have been seen as cogent evidence that alternative measures to summary termination were attempted.

This principle was recently discussed in *Emergis* where the employee was dismissed without being first subjected to progressive discipline measures:

The Arbitrator noted at p. 7 of his Reasons that “Counsel for the defendant (Emergis) conceded, correctly in my view, that not every incident of sexual harassment justifies immediate dismissal. To determine the appropriate response to any given incident of sexual harassment, one must consider a variety of factors ...” The Arbitrator considered a number of factors. In my view, the award of the Arbitrator is consistent with the approach mandated by the Court of Appeal in the trilogy. His decision that dismissal was without cause is, on the facts of this case, correct.

The lesson here is that, although there is no obligation on the employer to provide any kind of a hearing to the suspected employee, and although the employee does not have a right to be heard, failing to provide the suspected individual with a chance to respond to any allegations may result in a finding that the dismissal was without cause. One important thing the case indicates is that when conducting workplace investigations, the content of any company policy documents and employment contracts will often become relevant. An issue raised by the plaintiff in *Emergis* was that the company policy was to use a progressive discipline model. In light of that policy, the employer’s decision to dismiss the plaintiff without providing an opportunity for him to be heard appeared contradictory and hasty.

In a recent Alberta decision, *Foerderer v. Nova Chemicals Corp.*, 2007 ABQB 349, the Court looked favourably upon an investigation in which the accused employee was given an opportunity to respond to the allegations. The Court was cognizant of the fact that the

employer did not have a positive duty to conduct an investigation, or to interview any of its employees prior to dismissing the individual under suspicion. Nevertheless, the Court saw the fact that the investigators at least interviewed the suspected employee in a positive light.

Should the Employee be put on Leave? Should the Leave be Paid or Unpaid?

If the decision is to proceed with a secret investigation then this will not become an issue until the suspected employee is notified of the investigation. An employer considering whether to place a suspected employee on leave may be concerned about whether the employee's continued presence in the workplace could intimidate potential witnesses or pose some other threat. The employer may also be concerned about attracting liability if it does not remove an employee whom it has reason to suspect of wrongdoing, especially if that employee subsequently harms a co-worker, for example. In these situations there may be little choice but to place the employee on suspension.

At that point the Supreme Court's ruling in *Cabiakman v. Industrial Alliance Life Insurance Co.*, [2004] 3 S.C.R. 195, becomes relevant. In that case the Court held that an employee should only be suspended pending an investigation if the following requirements are met:

- (1) the action taken must be necessary to protect legitimate business interests;
- (2) the employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension;
- (3) the temporary interruption of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a resiliation or [page218] dismissal pure and simple; and
- (4) the suspension must, other than in exceptional circumstances that do not apply here, be with pay.

Because the Court did not specify under what circumstances a suspension could be without pay, suspensions should generally be with pay unless some compelling reason exists.

The issue of a suspension without pay arose in the *Emergis* case discussed above. The Arbitrator in that case found that the suspension without pay of the employee suspected of

misconduct was one of the flaws in the workplace investigation which related directly to the employee's negative attitude and repeated denials.

When the Investigation Involves Allegations of Criminal Wrongdoing: Should the Police be Involved?

In *Correia* the employer/defendant was found not to be liable for its flawed investigation tactics, but only to the extent that those tactics could be considered negligent. However, when a poorly conducted investigation reaches the level of *intentional* wrongdoing, the considerations are different. Employers are vulnerable with respect to allegations involving the intentional infliction of mental distress. In *Correia* it was found that there was enough evidence to legally proceed against one of Canac's management employees *personally* for the mental distress her decisions caused to the wrongfully accused employee. Specifically, the Court held that the management employee, "was the person who terminated Mr. Correia and facilitated turning him over to the police to be charged with criminal offences following the negligent investigation, in which she herself made the error that caused blame to be falsely cast on him. In law she may be held personally liable for her conduct." The Court went on to say that although corporate employees are normally protected from liability for claims which may arise due to their performance of duties that they undertake on behalf of the corporation, this was not true where the harm inflicted was not necessary to the performance of the job. Managers are not personally responsible for wrongful dismissal damages because it is part of their job to dismiss people. However, the intentional infliction of mental distress is not (one would hope) part of a manager's duties with respect to dismissals. It is a separate wrong committed by the manager in his or her personal capacity, and as such the liability is personal.

The *Correia* case, in particular, stands as a warning to managers, that when their investigations involve suspicions of criminal wrongdoing, the stakes become higher, not just for the employee, but for the employer as well. Extra care needs to be taken if one is conducting a workplace investigation which may ultimately result in criminal charges. If the police do not investigate further and the person has been wrongfully accused by the

employer, the result could be personal liability for the manager. More generally, it remains to be seen what other flawed investigation tactics may result in personal liability for human resources managers, but the door to further claims has been opened.

Conclusion

There have not been a large number of cases released recently with respect to workplace investigations; however, both *Correia* and *Emergis* contain useful discussions of some of the current issues in this field. Although it was only considering a preliminary issue, the Court of Appeal's reasons in *Correia* raise the spectre of personal liability for human resources managers who conduct flawed investigations. In addition, the importance of implementing a policy of progressive discipline was underscored in *Emergis* and *Stone*. Generally a workplace investigation is advisable, especially where the employer seeks to dismiss the employee for cause where an element of misconduct is involved; however, it is equally advisable to conduct the investigation in a professional and thorough manner. This will not only protect the employer's interests, but will also protect the individual human resources managers who work on the file from personal liability.

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