



Investigating Misconduct and Workplace Culture: Different Approaches for Difficult Issues

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What is a Workplace Investigation?

Fact-finding exercise with 3 main objectives:

1. Determine what happened
2. Prevent reoccurrence
3. Ensure compliance with internal practices (hiring, discipline, and termination policies) and/or legislation requirements



Overview

1. Why investigate?
2. How to investigate?
3. Evidence?
4. Assessing credibility?
5. Reporting
6. Restoring the workplace
7. Common problems
8. Key takeaways



Why Investigate?

- Not investigating, or not properly investigating = liability
- Duty under legislation (e.g., human rights, occupational health & safety)
- Risk management tool - Mitigate liability/risk for human rights complaint(s), wrongful dismissal, occupational health and safety, grievances, etc.
- Consistency with internal policies



How to Investigate

- Follow legislative requirements
- If you have a policy, follow it!
- Gather key documents
- Identify key issues
- Individual safety considerations
- Reporting requirements
(e.g.: workplace health and safety)
- Publicity
- Legal involvement
- Preservation of evidence (e.g. video/electronic)
- Confidentiality



How to Investigate

- Internal vs. External?
- Evaluate based on several key factors:
 - Privilege
 - Confidentiality
 - Subject matter/who is involved?

How to Investigate

Who to interview?

- Anyone with relevant information
- Consider order of witnesses
- “Respondent” normally at end
- May have to carry out follow up interviews
- Manage expectations

THE SUSPECTS

 <p>PROFESSOR PETER PLUM Age: 37 Formerly a professor of Ancient Mid-Eastern Culture, Plum made several trips to Egypt—all funded by Sir Hugh Black—in search of ancient artifacts. Will he find the secret map that leads to a tomb full of hidden treasure?</p>	 <p>MISS JOSEPHINE SCARLET Age: 25 An aspiring actress with a history of unflattering reviews, wealthy escorts and estrangement from her mother, Mrs. Patricia Peacock. Would she accidentally uncover a well-guarded family secret?</p>	 <p>RUSTY HAYLER Age: 61 Rusty served in the military under Sir Hugh Black, and later became his groundskeeper. Crusty, cynical, short on funds and soon to retire, he's desperate for cash. Who is he blackmailing to keep an old secret?</p>
 <p>MISS AMELIA PEACH Age: 22 After a happy childhood in America, fun turned to tragedy for Miss Peach; her father went broke, she left law school, and her fiancé left her. Bitter, lonely and miserable, she wants someone to pay—but who?</p>	 <p>COLONEL MICHAEL MUSTARD Age: 61 After a mediocre military career in England, he served with some distinction in Africa. Now penniless and hounded by creditors, he's struggling to pen his memoirs. What dark secret from his past is haunting him?</p>	 <p>MRS. PATRICIA PEACOCK Age: 48 This socialite and three-time widow is running low on youth and inheritance. What is she hiding from her daughter, Josephine? And what juicy tidbits can be found in her diary?</p>
 <p>LORD ALFRED GRAY Age: 44 Charming, artistic and temperamental, Lord Gray served as a cartographer in World War I, and now designs water gardens for wealthy clients. With whom is he feuding, and how far will he go to get the upper hand?</p>	 <p>MRS. BLANCHE WHITE Age: 62 She was Sir Hugh's cook, housekeeper, and nanny to his young nephew, John Boddy. With little to show for decades of dedicated service, she now wants compensation. What delicious scheme is she cooking up to get it?</p>	 <p>REVEREND JOHN GREEN Age: 53 A pastor with a shady past, the charismatic "Reverend" had several run-ins with the law in America. Escaping to England, he quickly began courting wealthy patrons. By what unholly schemes will he fleece his new flock?</p>
 <p>MRS. JANE MEADOW-BROOK Age: 44 She's the town busybody and the wife of Boddy's attorney, Miles Meadow-Brook. What dirt will she dig up on her neighbors? And what mischief will she make during her husband's final days?</p>	 <p>PRINCE PHILIPPE AZURE Age: 33 Handsome, worldly and well educated, the "royal" Azure has both an elusive lineage and a knack for cashing in on it. Will his long-standing feud with fellow gun collector Colonel Mustard come to a nasty end?</p>	 <p>LADY SU SIAN LAVENDER Age: 29 Social-climbing herbalist Lady Lavender was widowed when her husband was mysteriously poisoned. Her clients keep her wealthy and entertained, but she wants more. What plan is she concocting to spice up her life?</p>

Some parts stored below.

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How to Investigate

What to ask?

- Laying out general framework for the investigation.
- Identify the goal (not the outcome) of the investigation.
- Asking open ended questions...

When to interview?

- ASAP

How to Investigate

Where to interview?

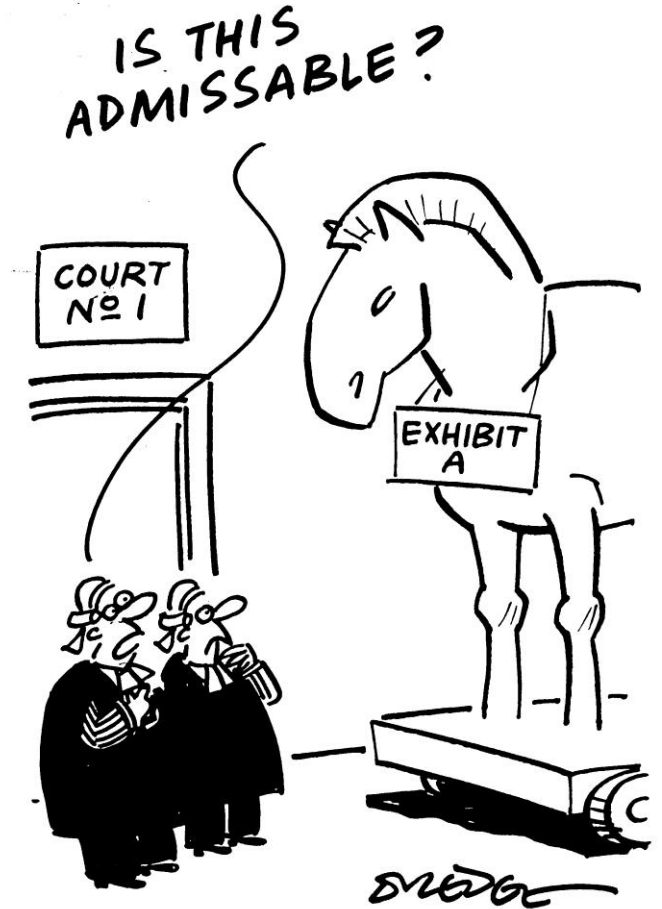
- No general rule
- May be outside the workplace
- Some witnesses may be less forthcoming
- In some cases it is necessary to interview at the site of the alleged incident(s)

Difficult Witnesses?

- Stay calm to avoid increasing hostility
- Avoid badgering questions
- Do not shy away from the important (e.g., tough) questions
- Be respectful
- Listen for inconsistencies and challenge witness based on information already obtained
- Do not accept “I would never do that” – ask what happened
- If witness is lying, highlight importance of telling truth and potential impact on employment
- If witness refuses to answer, advise that refusal constitutes insubordination

Evidence

- Goal: Gather the best possible evidence
- Action: Record, read and retain
- Use of recordings



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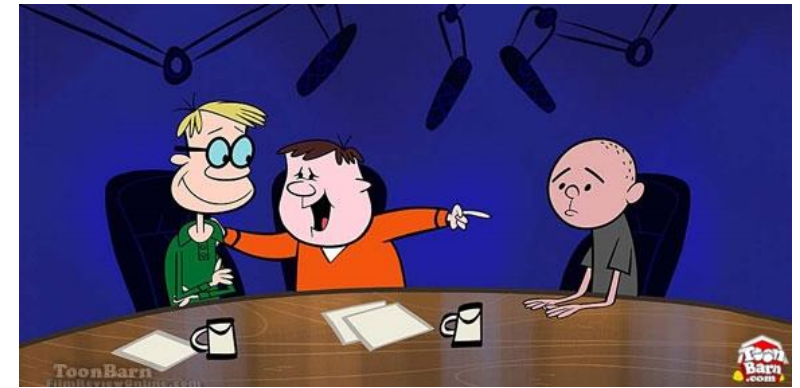
Credibility

- Contradictory versions of events are expected (e.g., harassment)
- Review evidence to determine inconsistencies
- Where credibility issues, additional interviews may be required



Credibility Assessment

- Where two witnesses respond with opposite or contradictory information and there is apparently no issue of credibility?
 1. Interview each witness again asking for more detail
 2. Balance of probabilities



Assessing the Investigation

Gathering facts versus final report?

Weighing Evidence?

- Best Evidence Rule
- Credibility
- Hearsay
- Relevance
- Direct v. circumstantial evidence



The Decision

- Comes after findings of fact, weighing evidence, etc.
- May include recommendations on how to deal with the situation
- Again, always follow applicable policy and legislative requirements

Reporting to the Parties?

- Keep it short, sweet and scripted
- Limit opportunity for questions
- Have a witness present, or lawyer
- Disclose a copy of investigation findings?

Post-Investigation: Restoring the Workplace

- Discipline
- EAP
- Mediation
- Training
- Communication
- Seek feedback
- Team building
- Policy review
- Reset the atmosphere



Top Ten Problems

#1 Failing to Provide Procedural Fairness to Respondent

- What it looks like?
 - Failing to give a chance to respond
 - Failing to provide respondent with sufficient particulars to respond to allegations (i.e., name of complainant or nature of allegations)
- Takeaway: “Avoid taking the respondent by surprise”
- Example: *Lalonde v. Sena Solid Waste* (2017 ABQB) = \$75,000 in damages to employee not given chance to respond to allegations

Top Ten Problems

#2 Not Taking Complaint Seriously

- What it looks like:
 - Ignoring the problem in hopes it will go away.
 - Failing to act or respond in a timely way.
- Takeaway: “Don’t bury your head in the sand”
- Examples:
 - *Wal-Mart* (2014: ONCA) – Employer failed to take complaints seriously, took no steps to end misconduct, did not meet with witnesses, failed to enforce its own policies, and refused to address employee’s concerns. \$200,000 aggravated damages; \$100,000 punitive damages.
 - *St. Michaels* – too slow.
 - *UBC* – too fast.

Top Ten Problems

#3 Using Untrained Investigator

- What it looks like:
 - Investigator does not understand the process/policy or the law
 - Investigator lacks skill, temperament, empathy or experience
 - Investigator not viewed as credible/unbiased by parties
- Takeaway: “Get the right person for the job”

Top Ten Problems

#4 Failing to Follow Policy

- What it looks like:
 - Expectations – and controls – set up by internal policy direction are not met or implemented
 - Difficult to defend as reasonable when in conflict with policy
- Takeaway: “Play by the Rules”
- Example:
 - *Nelson v. OHRC and Lakehead Univ.* (2008: OHRT) – investigation not reasonable where policy in place was not followed.
- Note:
 - Deviation from a policy may sometimes be required (i.e. when seeking assistance from outside investigator)

Top Ten Problems

#5 Using Internal Investigator when External More Appropriate

- What it looks like:
 - Allegations are outside the experience, expertise or comfort zone of internal investigators
 - Allegations involve senior management
 - Internal investigator involved in complaint process at earlier stage
- Takeaway: “Consider the hand you are dealt”
- Tips for Success:
 - Internal generally appropriate where situation within the familiarity and expertise of the employer (e.g. theft, insubordination)
 - External may be appropriate when there is:
 - Complex issues with legal or financial aspect
 - Significant publicity
 - Heightened need for impartiality
 - Need for expert assistance required

Top Ten Problems

#6 Failing to Remain Neutral

- What it looks like:
 - Investigation appears to be “pre-determined” or a sham
 - Conclusions based on character assessments/patterns of past behaviour rather than facts
- Takeaway: “Don’t be quick to judge”
- Example:
 - *Faghihi v. The Black Swan* (2016 HRT0) – investigator’s comments and conclusions showed lack of neutrality. Tribunal found investigator did not want to accept the Respondent was at fault and so did not probe deeply, relied on character assessments. Employer also retaliated against complainant - \$18,000 damages.

Top Ten Problems

#7 Failing to Properly Document the Investigation

- What it looks like:
 - Subsequent disagreements on what was said / reported
- Takeaway: Documentation is key
- Potential Solutions:
 - Meeting notes
 - Recordings
 - Detailed investigation report

Top Ten Problems

#8 Mishandling Reluctant Complainants

- What it looks like:
 - Complainant alerts employer to issue (e.g.: harassment), but asks employer to do nothing or do something anonymously
 - Employer can face liability for failure to respond
 - Unable to verify evidence is accurate
- Takeaway: “Work towards a solution”
- Potential Solutions:
 - Engage other measures if investigation inappropriate (i.e., where complainant is medically unfit to participate)
 - Discuss concerns; provide information on process, protection from reprisals, employee assistance; mediate

Top Ten Problems

#9 Failing to Apply Appropriate Standard of Proof

- What it looks like:
 - Investigator takes criminal approach – “beyond a reasonable doubt”
- Takeaway: Test = Balance of Probabilities
- Tips:
 - Credibility findings still have to be made even if it’s one person’s word against another’s

Top Ten Problems

#10 Failing to Advise Complainant of Outcome

- What it looks like:
 - Complainant is unaware of outcome, even if action has been taken
 - Complainant left confused and uncertain about whether complaint has been resolved
- Ask yourself?
 - Has Complainant been advised of outcome (should be aware of findings even where action taken against Respondent is confidential)?
 - Is Complainant aware of measures in place to prevent future occurrences?
 - Are there measures in place to address concern for reprisals?

Top 10 Things to Remember:

1. Documentation is key
2. Do not delay
3. Keep lines of communication open
4. Be effective in communication
5. Get the facts – do not pre-judge
6. Have and follow a policy
7. Not a criminal investigation
8. Drill down!
9. Do not forget to document
10. Manage expectations



Questions?



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