

Workplace Investigations: Key Reasons For Hiring An External Investigator



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Lisa Corrente is a partner with the Employment & Labour Group. She conducts neutral workplace investigations into all types of matters, offering timely and thorough expertise from the start of the investigative process through to providing comprehensive written reports and recommendations.

Various situations arising in the workplace can trigger the need for an investigation – alleged discrimination or harassment, workplace bullying or abuse, inappropriate use of the internet or social media, theft of company property, fraud, policy breaches, statutory violations, allegations of just cause and so forth. Often times, employers try to resolve minor issues informally through discussions with the individuals involved. When the allegations are more serious, employers may rely upon company managers to conduct internal investigations. However, in many situations, having an employer deal directly with the problem is not the best approach – informal discussions can easily breakdown and basic investigative steps may be overlooked by inexperienced managers, making matters worse.

An invaluable skill for any employer is recognizing when a formal investigation by an external investigator is appropriate. Some

of the most important reasons for hiring an external investigator include the following:

1. The Allegations are Serious

Serious allegations of employee misconduct can carry significant consequences. The reputations of the individuals involved are often at stake. As well, accused employees may be at risk of losing their jobs or facing criminal prosecution. Therefore, it is not uncommon for an employee to insist upon representation by his or her own lawyer in such cases. Also, the more serious an allegation (especially one that may amount to criminal conduct), the more vigorously lawyers, arbitrators, courts and tribunals will scrutinize the investigation. Not only will the allegations themselves be closely examined by lawyers and adjudicators, but the investigative process that was followed will also be dissected. If the investigation was flawed, employers can be exposed to legal liability. Therefore,

in cases involving serious allegations, it is prudent to hire a trained and experienced investigator to conduct a fair and thorough investigation capable of withstanding intense scrutiny.

2. The Stakes are High

When allegations are made against an employee, the employer's business and reputation may be on the line. For instance, a violation of law or policy by an employee may expose an employer to civil or criminal liability. In regulated industries, an employer can potentially lose its operating license, have terms and conditions imposed upon its license, be required to take corrective action or pay considerable fines as a result of employee wrongdoing. When the stakes are high, employers need an independent investigator who is skilled in identifying the pertinent issues, gathering the relevant evidence, maintaining control of the investigation, providing an objective assessment of the situation and making helpful recommendations. This kind of an investigation can go a long way toward demonstrating that an employer is taking the matter seriously and hopefully, minimize the potential losses to business and reputation.

3. The Need for Impartiality

One of the hallmarks of a proper investigation is that it has been conducted impartially – the parties

must feel that they have been treated fairly throughout the investigative process. An impartial investigation (real or perceived) is more likely achieved where the investigator has no personal or other connection to the parties and can objectively consider the evidence. Certainly, it is far easier to accuse an investigator of being biased if he or she works directly for the employer – an external investigator is more likely to be seen as neutral. Selecting a neutral investigator is crucial for many reasons. For instance, individuals are more likely to be forthcoming with information if they believe that they will be treated with an open mind. Anyone scrutinizing the investigation will be less inclined to challenge its outcome if they feel that the investigation was unbiased. As well, employers will be in a better position to make necessary changes within their organizations in response to recommendations made by an independent investigator, as opposed to an employee who may feel pressured to report what his or her employer wants to hear.

4. Lack of Training and Experience

Investigating is not an easy task. Cases can be complex and an investigator can run into a variety of challenges. Aside from basic investigative techniques such as interviewing witnesses and gathering relevant documents, an investigator must be adequately trained and experienced to evaluate the evidence and reach a conclusion supported

by the evidence. In most cases, the investigator is unlikely to uncover the proverbial "smoking gun". Therefore, he or she must be skilled in assessing credibility and weighing corroborative, circumstantial and similar fact evidence. The investigator must also be able to figure out when forensic expertise is required to gather, preserve and analyse evidence. In addition to evidentiary issues, the investigator must know how to appropriately deal with unexpected hurdles such as uncooperative witnesses, possible retaliation against a party, privacy issues, and third parties seeking to meddle in or control the investigation. The more convoluted and thorny the case, the more necessary it is to hire a seasoned investigator.

5. Lack of Time or Resources

Time is of the essence in every investigation. Delay in commencing an investigation can only lead to pitfalls including witnesses that can no longer be reached, memories that have faded or documents that have been lost or destroyed. Further, failure to investigate a complaint as soon as it becomes known to the employer can suggest that the employer is also responsible for the misconduct and can negate a defence of due diligence. However, if complaints are to be investigated promptly and thoroughly, an employer needs sufficient resources. For an internal investigation, this means allocating an adequate

number of employees to gather and review all of the evidence quickly and thoroughly. This can be challenging, especially when internal investigators have other work-related duties and responsibilities which can distract their focus away from the investigation. Therefore, an external investigator should be retained whenever an employer does not have the internal resources to conduct a speedy, yet comprehensive, investigation.

6. Dealing with the Media

Scandalous allegations such as those involving discrimination, harassment or abuse often attract unwanted media attention. In these cases, investigators must ensure that information regarding the investigation is not prematurely disclosed to the public or they risk compromising the integrity of the investigation. It is not hard to imagine leaks of information in cases where an incident is being investigated by management within the workplace. Having an external investigator in control of the investigation can help to minimize the information which is disseminated both inside and outside of the organization. An external investigator can also act as a “buffer” for the employer who may be able to avoid answering tricky questions from reporters if the organization is not directly involved in the investigation.

7. Maintaining Privilege

The fact that an investigation is conducted by a lawyer does not automatically mean that privilege (or confidentiality) attaches to the investigation. However, in situations where an employer wishes to conduct a privileged investigation, hiring a lawyer as the investigator can help to protect privilege. The lawyer-investigator can advise employers on how the investigation should be structured and planned in an effort to protect privilege. The lawyer-investigator can also conduct investigations while at the same time provide their employer clients with legal advice, ensure that communications with them remain confidential, and prepare for anticipated litigation. Although the law does not guarantee that a workplace investigation conducted by a lawyer is privileged, privilege is far more likely to apply to a lawyer’s investigation than an investigation undertaken by an internal investigator.

8. Simplifying Litigation

Investing in an external investigator can help employers save money in the long run. When litigation is commenced by a complainant, a comprehensive investigative report, if it is favourable to the employer, can be used to shut down legal disputes at an early stage. Adjudicators can rely upon the findings of a sound investigation to swiftly determine issues of employer

liability. For example, human rights adjudicators have accepted the findings of an investigator in order to dismiss complaints of workplace discrimination using a summary dismissal procedure. As well, investigative reports may be accepted into evidence by adjudicators avoiding the need to call direct evidence from witnesses. These options available to adjudicators can streamline litigation and save employers the considerable time and expense of a full-blown hearing. However, if an investigative report is going to be accepted by an adjudicator, it must stem from a well-conducted and impartial investigation – that is, the kind which is typically completed by an external investigator.

9. Avoiding the Consequences of a Flawed Investigation

In the same way that a well-conducted investigation can help an employer save money, a flawed investigation can have expensive repercussions. A biased or negligent investigation can subject employers to lawsuits for wrongful dismissal, infliction of emotional distress, breach of privacy, defamation and other claims. Even referring suspicions of non-violent criminal activity to police (such as theft or fraud) can be a costly proposition for employers if the suspicions turn out to be unfounded and the employee sues for malicious prosecution and punitive damages. Hiring an external investigator to conduct a proper

investigation can help minimize the potential damages arising from legal proceedings.

10. Rebuilding Trust and Morale

Complaints of wrongdoing by employees can seriously hurt workplace morale. An employer who fails to conduct a fair and thorough investigation into allegations of wrongdoing risks creating more toxicity in the workplace. In order to maintain a positive and safe environment for workers, employees must feel comfortable reporting incidents to management and know that their concerns will be taken seriously. When an employer engages the services of an external investigator, it can go a long way toward inspiring employee confidence and rebuilding trust.