

Workplace Investigations for the Human Resources Professional

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Introduction Workplace Investigations

The role of a workplace investigator may be varied and complex. There are different types of workplace investigators. Some investigators are external professional investigators that organizations enlist to investigate allegations of workplace misconduct. Others are in-house investigators where their role is solely to investigate misconduct for their organization. Dedicated in-house investigators are normally found in large and complex institutions such as the military, government, and multinational companies.

Most workplace investigations in Alberta are done by neither external professional investigators nor dedicated in-house investigators, but by individuals working in human resource departments who have the appropriate training and background. This is a growing component of human resource management as the expectation and duty to investigate workplace misconduct is increasing. There is also an elevated standard in which arbitrators in unionized workplaces and the courts in non-unionized workplaces expect organizations to conduct their investigations.

Literature and texts in the field of workplace investigations tend to focus on legal professionals who are conducting third party investigations or professional investigators who are conducting general private investigations. Few resources pertain to the human resources professional who will be conducting day to day investigations as part of their role in a human resources department. This course is designed to provide the skills, knowledge and practice to be able to effectively conduct a variety of workplace investigations.

Although workplace investigations have adopted much of their practice and procedures from legal proceedings, workplace investigations are not criminal investigations. The outcome of a workplace investigation into employee misconduct may, in some cases, result in termination of employment, but criminal charges

are the sole propriety of the law enforcement. Law enforcement officials will conduct their own separate investigation if alleged workplace misconduct is considered to be a criminal matter.

Workplace investigations may also relate to safety infractions or misconduct that has safety implications. Similar to the handling of criminal matters, workplace safety investigations are under the purview of Occupational Health and Safety who will also conduct their own separate investigations which may result in sanctions, fines or possible incarceration that is separate from a workplace investigation. It is not uncommon for two different types of investigations to be occurring simultaneously into the same matter.

The goal of a workplace investigation is to ensure that alleged misconduct is looked into, a thorough review is conducted, a reasonable and well-founded conclusion is made and the matter is dealt with appropriately.

Why conduct workplace investigations?

We will review the legal requirements to conduct workplace investigations later in the course, but besides the legal requirement, why do organizations want to conduct workplace investigations?

Employees want to work in a workplace that is safe, inclusive and treats workers with respect and dignity. Employees want to know that concerns will be taken seriously and that if there is wrongdoing appropriate action will be taken. The foundation of this is trust; employees want to trust that their organization has accepted the responsibility of drafting comprehensive and current workplace policies and procedures that outline the expectations of all employees when it comes to workplace conduct, harassment, discrimination, and other incidents that may create an unsafe or unfair workplace, and that they will implement those policies and procedures when necessary.

Employers also want to create the best environment for their employees. Employees perform best when they feel that they work in a fair and equitable environment.

It is important that employers take the time to conduct a proper investigation to determine if misconduct occurred and if correction

or discipline is warranted. The employer will be required to demonstrate due diligence before taking any action. Disciplinary action taken prior to ensuring that it is justified can result in grievances in a unionized setting and potential lawsuits in non-unionized settings. Due to the fact that most arbitration hearings and court cases are not heard for upwards of a year after a termination, this can mean that the potential liability for wages and benefits can be substantial. Taking disciplinary action prior to establishing the facts of the situation can be a costly mistake and may tarnish the reputation or create additional risk for the organization.

What is a workplace investigation?

A workplace investigation begins when someone (normally an employee) comes forward with a complaint or concern regarding alleged inappropriate behavior or action that has taken place in the workplace. This may be a supervisor who has come to Human Resources with a concern that an incident has occurred, and an investigation is required to determine what happened and if any sanctions are required. An investigation may take place when an employee comes forward with a complaint of discrimination or harassment in the workplace.

Sometimes an employer may have a concern that an employee has engaged or is engaging in misconduct or inappropriate actions or has failed to follow established operating procedures; and they need to gather more information to determine if their concern is valid. Regardless of the reason or circumstance an employer has the responsibility to launch and complete a robust and timely investigation.

What is the scope of the workplace investigation?

Workplace investigations are confined to matters that may affect the employer/employee relationship and successful continued employment. As mentioned above, depending upon the circumstance a workplace investigation may expand into other types of investigation, but the focus of the workplace investigation is to determine if misconduct occurred that will affect the

employee/employer relationship. Has unacceptable behaviour taken place that requires employer intervention, discipline or termination?

It would be simple to say that workplace investigations only focus on whether discipline or termination is the outcome. Employers also want healthy vibrant workplaces, so the outcome of a workplace investigation may also include training or re-training, mediation between employees, a workplace review to determine the health of an organization, additional or revised policies or procedures or a review of roles or reporting structure to reduce ambiguity.

Typical investigations in the workplace may focus on the following:

- Discrimination
- Harassment and bullying
- Sexual harassment
- Employee conduct/behaviour
- Workplace violence
- Employee performance
- Fraud/theft
- Breach of policy/rule/legislation

What does an investigation entail?

When we think of investigations, we often think of our favorite TV police drama, action packed movies or forensic drama. Workplace investigations are not as adrenalin-fueled and will not be resolved within an hour. Workplace investigations follow methodical procedures to collect evidence, interview witnesses and/or other parties to the incident, review organizational policies, and then create a comprehensive report as to the findings of the investigation.

The strength and clarity of the investigation is often dependent upon the existence of strong organizational policies and

procedures. Investigations that take place in the unionized environment will have the added responsibility to ensure that the union is included in the process as defined by the policies and procedures and/or collective bargaining agreement.

Most investigations are going to have the same general process regardless of the type of investigation:

- 1) Determine what is to be investigated
- 2) Seek and collect information and evidence
- 3) Analyze the information
- 4) Establish investigation findings (conclusion)
- 5) Create a report of the findings

The principles of professionalism and ethics in investigations

Human Resources is often tasked with the responsibility of conducting investigations, as such human resource professionals must be well acquainted with the policies and procedures that govern the organization and inform the investigation process. The human resources investigator is expected to act with professionalism and remain unbiased despite being an employee of the organization. Nothing can erode the confidence and trust that employees place in a human resources investigation like poor professionalism and shoddy ethical practices. Human resources investigators must ensure that they abide by the following principles:

- Act ethically, with honesty and integrity
- Demonstrate the highest standard of competence
- Remain unbiased and curious
- Treat all employees and union members with dignity, respect and compassion
- Avoid prejudice, discrimination and stereotyping
- Ensure prescribed policies and procedures are followed
- Seek knowledge and understanding, not to be “right”

- Maintain confidentiality and discretion

While it may seem like the human resources investigator must be perfect, that is not the case. However, they want to ensure that their investigation has rigor and stands up to the scrutiny of those involved within and outside the organization.

I. Chapter I: Investigation Terminology

Like all areas in human resources management there are certain terms and definitions that accompany investigations. Though this list will not be exhaustive of all the common investigation terms it will provide a solid cornerstone from which to build your investigation vocabulary.

General Terms:

Workplace Investigation– “the activity of trying to find out the facts about something such as an incident by an authoritative inquiry.”¹ They are the process of collecting evidence to determine the facts of a situation, to establish if there is a breach of workplace policies, workplace procedures or legislation. Workplace investigations are conducted on the balance of probabilities.

Workplace Assessment – an independent third party or the employer reviews the workplace through interviews to determine if there are underlying, issues, problems, or undercurrents that the employer should know about. This is generally a proactive step taken by employers, to address issues or problems at the earliest stage

Balance of Probabilities– this is the standard in which evidence will be evaluated on in a workplace investigation. It is the threshold in which decision making will be held to. Unlike a court of law where the standard of proof is “beyond a reasonable doubt,” workplace

1. Garner 2014, 953

investigations have a lower standard of proof. The balance of probabilities is simply a balancing of both sides to determine which side has stronger proof. “The greater weight of the evidence. The evidence that has the most convincing force. It is superior evidence but not so much evidence that it frees the mind wholly from all reasonable doubt. It is sufficient evidence to incline a fair and impartial mind to one side of the issue rather than the other.”²

When looking at the balance of probabilities the reasonable person will ask themselves “what is most likely,” this is the standard in which to evaluate the evidence.

Reasonable Person – The reasonable person is a standard of conduct where one assumes that a person is of ordinary intelligence, prudence and judgement.

Parties to an investigation

The people who are involved in an incident that leads to investigation are generally referred to as the “parties”. There are commonly three types of parties to an investigation: complainant, respondent and witnesses.

Complainant– the person(s) who has/have made a complaint or has accused someone of a wrongdoing. This may be an employee, a supervisor or manager, a member of the public, a contractor or others who have contact in the workplace.

Respondent– the person(s) whom have had a complaint(s) made against them. There may be multiple respondents or a single respondent.

Witness – “someone who sees, knows or vouches for something.”³
Witnesses are typically individuals from within the organization.

2. Garner 2014, 1373

3. Garner 2014, 1838

It is difficult to compel external individuals to act as a witness to a workplace investigation, although in some cases an external individual may be willing to participate.

Evidence

In an investigation it is the investigator's job to collect and analyze evidence. When we hear the term evidence it may conjure up images from our favorite police drama or private investigator movies. In a workplace investigation is likely not that exciting; the majority of evidence that a workplace investigator collects will be testimony from the parties to the investigation. There are different types of evidence that are detailed below.

Evidence – “something (including testimony, documents, and tangible objects) that tends to prove or disprove the existences of an alleged fact.”⁴

Witness Evidence – a person's statements or “testimony” garnered through an interview or a written statement. This includes the testimony of the complainant and the respondent as well as witnesses. Basically, it is any statement made either in writing or orally that is provided to the investigator.

Physical Evidence – is physical objects that support a premise or assertion: documents, digital devices (phones, computers etc.) pictures, video, physical objects.

Direct Evidence – is evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.”⁵ Direct evidence supports the truth of an assertion without relying on any additional evidence to establish a fact. Example: video evidence of an employee stealing product.

4. Garner 2014, 673

5. Garner 2014, 675

What this means is that the evidence can stand alone on its own without relying on any other evidence to make it “true.”

Circumstantial Evidence – is evidence based on inference and not on personal knowledge or observation. It is also called indirect evidence. This encompasses all evidence that is not given by eyewitness testimony.”⁶ Circumstantial evidence is often used to support an assertion, theory or premise. Example: witness testimony that they saw an employee run away from the scene of a theft. They did not actually see the theft, but their witness account supports the assertion or premise. Circumstantial evidence cannot stand on its own as a fact but when paired with complementary evidence may support an assertion.

Investigation Procedure Terms

Workplace investigations are not conducted by law enforcement and are not the court of law, but much of the terminology and processes used in workplace investigations come from the legal field. Workplace investigations borrow terms that are well known in the legal field and apply them to an employment setting. Investigations must be conducted in a manner that is fair and just, and investigators need to ensure that investigations can stand up to the potential scrutiny of the court system.

Due Process– “the conduct of legal proceedings according to established rules and principles for the protections and enforcement of private rights.”⁷ This idea has been expanded to non-legal proceedings and it suggests that the person who is accused of misconduct has the right to know what is alleged, present their side of the story and state any objections. An

6. Garner 2014, 674

7. Garner 2014, 610

investigator must have an established process or set of procedures in which to follow to determine what is likely to have happened. An investigation should not be haphazard or vary in its process from person to person or investigation to investigation.

Natural Justice – “Justice as defined in a moral, as opposed to a legal sense.”⁸ Basically natural justice is fair play in action. An investigator should conduct their investigation in a manner that is equitable and unbiased. Both the complainant and respondent have the right to be heard, the respondent has the right to know what the complaint is and the right to defend themselves. The investigator wants to ensure that there is no perceived bias in their actions and that each party is treated fairly.

Confidentiality – “secrecy; the state of having the dissemination of certain information restricted.”⁹ Investigative proceedings must have confidentiality surrounding them to ensure that the principles of natural justice are preserved. People participating in an investigation must not disclose their knowledge of and activities related to the investigative procedures. This may mean that the parties sign a confidentiality agreement that ensures their adherence to confidentiality. Such an agreement may include a clause that should they break confidentiality they will be subject to sanction.

The integrity of the investigation can be brought into question if there are breaches of confidentiality. People in a workplace will be naturally curious about any incident that is out of the ordinary; to ensure that testimony remains uninfluenced by outside parties, the investigator will want to enforce confidentiality surrounding the process.

There is an old adage in the workplace that “when people don’t know what is going on they will make it up”. As difficult as it may be to have speculation, gossip and hearsay in the workplace, the

8. Garner 2014, 996

9. Garner 2014, 361

investigator is limited as to what they may share with the general workplace as this may jeopardize confidentiality and the investigation. As a general rule, the manager or HR professional may state that there is an investigation going on, but any details further than that should remain confidential. Curious colleagues and coworkers will continue to ask questions but it is important that confidentiality be maintained.

Complaint Types Defined

Workplace investigations may be conducted in response to various types of complaints. Sometimes the identification of the type of complaint can be difficult. Below are the definitions for common types of complaints. Complaints may also include more than one type of infraction. It is not uncommon for different types of infractions to be coupled together.

Misconduct Generally speaking, “misconduct” refers to any inappropriate action, offence, or professional fault committed willingly or deliberately by a person while working for an employer. Misconduct occurs when an employee’s behaviour is in violation of the obligations set out in their contract of employment and when, under normal circumstances, the employee should have known that the actions, omissions or faults could result in a dismissal.

“It is not necessary that the alleged action, omission or fault happens during work, at the workplace or even while carrying out duties for the employer. This means that an offence committed outside the workplace could be misconduct when the infraction results in a failure to continue to meet the conditions of employment. For example, a bank teller is convicted of shop lifting and for this reason is fired. Even though the infraction did not happen during work, the employer considers that the employee lost their employment due to their own misconduct, as they no longer meet the

integrity condition, an essential condition of the employment.”¹⁰

Workplace Harassment – defined as a single or repeated incident of objectionable or unwelcome conduct, comment, bullying or action intended to intimidate, offend, degrade or humiliate a particular person or group. It is a serious issue and creates an unhealthy work environment resulting in psychological harm to workers.

Workplace harassment does not include any reasonable conduct of an employer or supervisor related to the normal management of workers or a work site. Differences of opinion or minor disagreements between coworkers are also not generally considered to be workplace harassment if steps are taken to resolve the conflict.¹¹ An employer can investigate harassment if the reasonable person would view the conduct to be harassing.

Workplace violence – Violence, whether at a work site or work related, is defined as the threatened, attempted, or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm. It can include:

- physical attack or aggression
- threatening behaviour
- verbal or written threats
- domestic violence
- sexual violence¹²

Assault – “any willful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the

10. Government of Canada n.d)

11. Government of Alberta n.d)

12. Government of Alberta n.d.

victim reason to fear or expect immediate bodily harm.”¹³ Assault does not need to be a physical assault, it can be the threat of bodily injury.

Sexual and Gender-Based Workplace harassment – any unwanted physical or verbal behavior that offends or humiliates another person. This may be committed by a co-worker or manager.

If a manager solicits a sexual or romantic encounter with a subordinate, even if the solicitation is not graphic, abrasive or threatening the solicitation itself could still be inappropriate if under the circumstances the behaviour was unwelcome. How do you know if it is unwelcome? Obviously if someone's indicates that they are uncomfortable, offended or clearly does not want to participate and rejects the conduct. Or sometimes a subordinate is afraid of offending someone in authority and causing a negative reaction. The investigator must determine whether the recipient reasonably found the conduct to be unwelcome, and it is not based necessarily on their outward rejection of the advance. The power differential is the key point.¹⁴

Sexual and gender-based harassment not only occurs between subordinates and managers but may also occur between co-workers, employees and contractors or anyone else in the workplace. Any unwanted physical or verbal behaviour that offends or humiliates another person can take on many forms including jokes, gestures, comments, images, or other forms.

Discrimination – discrimination in the workplace happens when a person or group of people is treated unfairly or unequally because of specific characteristics. Discrimination in the workplace can happen between co-workers, between an employee and their manager, with job applicants, or between employees and their employers.¹⁵

13. Garner 2014, 247

14. Singh 2019

15. Cooks-Campbell 2021

The Alberta Human Rights Act prohibits discrimination in employment based on the protected grounds of race, colour, ancestry, place of origin, religious beliefs, gender, gender identity, gender expression, age, physical disability, mental disability, marital status, family status, source of income, and sexual orientation.

An employer's liability for discrimination is not necessarily limited to the workplace or work hours. Employers may be liable for discrimination that occurs outside normal work hours and that has implications or repercussions in the workplace. Employees must ensure they do not indulge in offensive behaviour at the workplace or away from the physical workplace. For example, an employer may be held liable for discriminatory incidents during business trips, company parties or other company-related functions.

Human rights issues arising in a workplace must be afforded an employer's utmost attention and diligence. Employers have a responsibility to promptly investigate an allegation of discrimination.¹⁶

2. Chapter 2: Legislation and Other Agreements

When conducting investigations, an investigator must be cognizant of any legislation in force in the jurisdiction or agreements within the organization that may have bearing on the issue being explored. It is critical that the investigator conducts the investigation in such a way that it does not violate any applicable legislation, workplace policies or collective agreements.

A high-level review of applicable legislation and possible policies will be discussed in this chapter. This is not an exhaustive list because organizations are bound by different pieces of legislation and each will have various policies or procedures specific to the organization. Each investigation will be unique and it is incumbent upon the investigator to familiarize themselves with the applicable policies and procedures of the organization as well as seek assistance if they are unsure which legislation is applicable to their investigation.

Privacy

The nature of an investigation is to seek information and to uncover the truth, but in the pursuit of the truth one must be mindful of the various privacy legislation that is applicable in the workplace. An investigator does not have an unfettered right to review employee records, health files, or view an employee's personal information. There is privacy protection via several pieces of legislation in Alberta as well as under the common law.

Employees have a general right to privacy in the workplace. Investigators must have a purpose when they want access to

employee documents such as discipline records, accommodation records or other personal information. The purpose must be clear and reasonable to seek out personal information on an employee for an investigation, and the investigator must not engage in a “fishing expedition” to snoop around and see what they can find that applies to the matter at hand.

- **Alberta Personal Information and Protection Act (PIPA)**
- PIPA applies to provincially regulated private sector organizations, businesses and, in some instances, to non-profit organizations for the protection of personal information and to provide a right of access to an individual's personal information. Under PIPA there are special rules for the collection, use and disclosure of [employee information](#). What this means is that organizations can only collect personal information for reasonable purposes and to the extent reasonably needed for that purpose and they may only use or disclose that information for specific purposes as outlined in the Act.
- For instance: An organization can disclose personal information without consent if: it is reasonable for the purposes of an investigation or legal proceeding; “investigation” means an investigation related to
 - a breach of agreement
 - a contravention of an enactment of Alberta or Canada or of another province of Canada, or circumstances
 - or conduct that may result in a remedy or relief being available at law.¹
- **PIPEDA – Personal Information Protection and Electronic Documents Act** – applies to personal information about customers and employees in the federally regulated sector

1. Government of Alberta 2019, sec 4

such as banking, intra-provincial transportation or ports, including personal health information. PIPEDA's 10 fair information principles form the ground rules for the collection, use and disclosure of personal information, as well as for providing access to personal information. PIPEDA states that any collection, use or disclosure of personal information must only be for purposes that a reasonable person would consider appropriate in the circumstances.²

- **FOIP – Freedom of Information and Protection of Privacy Act**
– applies to public bodies in Alberta, and requires that personal information must be protected. Individuals who work at provincial public bodies have a right to see their personal information that has been collected by the public body. This is important for investigators as it means that an employee may make a request to view any information collected in the course of an investigation that pertains to them. It will be up to the Privacy Officer of the organization and the government to decide what information is disclosed. This is why it is very important to not make personal comments or assumptions in the investigation.³
- **Common Law**– under the common law there is a tort called “intrusion upon seclusion”, this is a tort that gives employees a reasonable right to privacy in the workplace.⁴ What this means is that employers must have a balance between operational requirements such as an investigation and the employee's privacy rights. An employer must have good reason before they go searching an employee's computer or utilizing video monitoring equipment. The Supreme Court Stated in the precedent setting privacy case, *R v Cole* the following:

2. Office of the Privacy Commissioner of Canada 2019

3. Government of Alberta 2009

4. Israel Foulon Wong LLP 2012

*The Supreme Court began by confirming that employees do have a reasonable expectation of privacy in the personal information stored on their work computer, at least when employers authorize or reasonably expect personal use to be made of such equipment. The reasoning behind this is that computers contain information deemed to be “meaningful” and “intimate” regarding their “likes, interests, thoughts, activities, ideas, and searches for information”.*⁵

Discrimination and Harassment

Discrimination and Harassment regulations in Alberta falls under two pieces of legislation. The first is the Alberta Human Rights Act and the other is the Occupational Health and Safety Act.

Alberta Human Rights Act

The Alberta Human Rights Act is a provincial law that exists to protect against discrimination. Essentially, its purpose is to ensure all persons in Alberta have equal opportunities and are free from discrimination. The Act provides protection under a number of grounds, called “protected grounds.” Protected grounds will be explored later in this chapter.

For employers, this means they must:

- Create an inclusive and respectful workplace
- Remove discriminatory barriers from recruitment and hiring practices as well as job promotion
- Accommodate any employees with special needs⁶

If an employer fails to maintain the above-mentioned conditions an employee may be subject to discrimination and a complaint may

5. R v Cole 2012

6. Alberta Human Rights Commission 2017

be made which will require investigation. Employees may also complain directly to the Alberta Human Rights Commission, which would conduct their own investigation if the complaint was accepted. For the purposes of this text we will be looking only at in-house workplace investigations of discrimination.

The basis for a discrimination complaint is that a person feels that a protected ground has been violated by something that has occurred in the workplace. Harassment is a form of discrimination and may take the form of unwanted physical contact, attention, demands, jokes or insults. The Alberta Human Rights Act prohibits discrimination (including harassment) in employment based on the protected grounds of:

Race – Includes belonging to a group of people, usually of a common descent, who may share common physical characteristics, such as skin colour.

Religious beliefs – System of beliefs, worship and conduct (includes native spirituality).

Colour – Colour of a person's skin.

Gender – The state of being male, female, transgender or two-spirited. The ground of gender also includes pregnancy and sexual harassment.

Gender identity – Refers to a person's internal, individual experience of gender, which may not coincide with the sex assigned to them at birth. A person may have a sense of being a woman, a man, both, or neither. Gender identity is not the same as sexual orientation, which is also protected under the Act.

Gender expression – Refers to the varied ways in which a person expresses their gender, which can include a combination of dress, demeanour, social behaviour and other factors.

Physical disability – Any degree of physical disability, deformity, malformation or disfigurement that is caused by injury, birth defect or illness.

Mental disability – Any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder.

Age – The Act defines age as **18 years of age or older**, which means that individuals 18 and older are protected from age discrimination. There are three exceptions specified in the Act that allow for age restrictions, but none apply to workplaces. Individuals **under the age of 18** are protected from discrimination in all of the protected areas and on all of the protected grounds **except the ground of age**.

Ancestry – Belonging to a group of people related by a common heritage.

Place of origin – Includes place of birth and usually refers to a country or province.

Marital status – The state of being married, single, widowed, divorced, separated, or living with a person in a conjugal relationship outside marriage.

Source of income – Source of income is defined in the Act as lawful source of income. The protected ground of source of income includes any income that attracts a social stigma to its recipients, for example, social assistance, disability pension, and income supplements for seniors. Income that does not result in social stigma would not be included in this ground.

Family status – The state of being related to another person by blood, marriage or adoption.

Sexual orientation – This ground includes protection from

differential treatment based on a person's actual or presumed sexual orientation, whether gay, lesbian, heterosexual, bisexual or asexual.⁷

Discrimination in the workplace is illegal.

An employer cannot refuse to abide by the Alberta Human Rights Act. In fact, an employer is responsible for preventing, investigating, and taking the appropriate actions to maintain a non-discriminatory workplace.

Beyond the core business responsibilities, it is important that organizations take the time to establish a workplace discrimination policy. The policy should state the grounds of discrimination as they relate to employment and the procedure for employees who experience harassment or bullying in the workplace. The employer should make the discrimination policy available to staff in an employee handbook, review it during new hire orientations, and reference it during disciplinary discussions.

It is important to note that the Alberta Human Rights Act protects employees against discrimination within the workplace as well as away from the workplace. If discrimination is based on one of the protected grounds and the incidents occur in connection with their employment the employer has a duty to investigate.

Occupational Health and Safety

In Alberta all workplaces are bound by the Occupational Health and Safety Act. Employers must ensure, as far as reasonably practicable, the health and safety of all workers at their work site. (Section 3(1) OHS Act).⁸ In 2018, protecting employees from psychological hazards such as violence and harassment in the workplace was added into the Occupational Health and Safety legislation. It requires employers to:

- “Investigate any incident of harassment or violence
- take action to address the incident

7. Alberta Human Rights Commission 2018

8. Government of Alberta 2020

- prevent it from happening again
- prepare an investigation report outlining the circumstances of the incident and the corrective action
- Employers must retain the investigation report for at least 2 years after the incident, keep it readily available and provide a copy to Alberta OHS on request.
- Alberta OHS officers monitor the employer's compliance with the requirement to investigate incidents of harassment and violence. Officers can write orders where work site parties don't demonstrate compliance."⁹

Occupational Health and Safety investigations may fall under the purview of human resources in an organization or there may be a separate health and safety department which handles all OH and S investigations. Depending upon the nature of the OH and S investigation it may be handled by human resources, the health and safety department or by an external investigator from the government. It is not uncommon, however, for complaints of workplace violence and harassment to be handed to human resources to be completed in conjunction with a health and safety department.

Other pieces of Legislation

Alberta Labour Relations Act

The Alberta Labour code outlines the rights and responsibilities of employer, trade unions and employees in unionized workplaces. It is important to understand that in a unionized work place the union has the right to represent its members (employees). Investigations that take place in a unionized environment must

include the union. A collective agreement in the workplace may outline the steps to be taken in a workplace investigation and the role of the union, the employer and the investigator.

Employment Standards

The Alberta Employment Standards Act provides the rules that govern the employment relations and many terms and conditions between employees and their employer. It sets out the laws for minimum wage, overtime, holidays, job-protected leaves, vacations, hours of work, earnings, youth workers and termination. An investigator must know the employment standards act to be able to quickly and easily identify if any law has been violated.

The Alberta Evidence Act

In the event that a workplace investigation coincides with a criminal investigation, knowing how to collect and store evidence may be important.

The Criminal Code of Canada

We will not be discussing criminal investigations in this course, but it can be the case that an employee who has participated in workplace misconduct may also be facing charges under the criminal code. Incidents such as assault in the workplace, theft, fraud or drug related offences may have a workplace investigation occurring as well as a criminal investigation. A workplace investigation must not hamper any coinciding criminal investigation.

Criminal investigations are held to a higher threshold of proof than workplace investigations, thus one can assume that if a criminal investigation results in a guilty finding, the workplace investigation, which has a lower threshold of proof, would automatically also have the same finding of wrongdoing. Thus, if a criminal investigation has been completed and the employee was found guilty of wrongdoing, then the workplace can simply use those findings in place of a workplace investigation.

However, it is not always the case that a criminal investigation is completed, and the person is found guilty. A workplace may want to conduct their own investigation, concurrently with the criminal

investigation. If the person is not found guilty to a higher criminal threshold of proof, they may still be found to have committed wrongdoing in the lower threshold of proof in a workplace investigation. As well, criminal proceedings are notoriously long undertakings. The workplace may not want to wait to find out the result of the criminal case and may want to undertake their own investigation.

Sometimes a criminal investigation may ask to access information, evidence, or witness accounts from the workplace investigation. The investigator should seek legal advice as to how best to provide this information. There may be times where the organization may be reluctant to provide the information if it has a reputational risk or privacy considerations.

Other Agreements, Standard, Policies

Collective Bargaining Agreement

If you are working in a unionized environment there will be a collective agreement in place, also referred to as a collective bargaining agreement. The collective agreement is a contract between the union and employer which lays out the terms and conditions of employment in a unionized workplace.

Often a collective agreement will outline investigation procedures, limitations and/or other provisions that may impact an investigation. The investigation process may be captured in the collective agreement itself, or it may refer to an external policy/procedure.

The Union will want to have an active role in the investigation of any member of the union. Most collective agreements will stipulate that the union must be present when a unionized employee is interviewed by the employer.

“Arbitrators generally agree that whether an employee has a right to union representation in a disciplinary or investigatory

context, and the extent of any such right, is dependent upon the language of the collective agreement. It is therefore highly important that employers review their collective agreements to determine an employee's rights before beginning an investigation of employee misconduct, and certainly before imposing any discipline on the employee.

Collective agreements may contain a variety of union representation rights. They may address issues such as:

- Whether an employee has the right to advance notice of investigation meetings, and how much notice is required;
- Whether an employer must give the union advance notice of an investigation meeting;
- Whether an employee has the right to union representation during investigation meetings;
- Whether the employer must advise the employee of their right to union representation;
-
- Whether the employee or union will be given particulars of the allegations in advance of the investigation meeting;
- Whether employees who will be interviewed as witnesses have the right to union representation; and
- Whether employees have the right to union representation during meetings at which discipline will be imposed.

Collective agreements typically provide for union representation at all “meetings which could potentially lead to discipline”. Others may simply say that employees have union representation rights at “disciplinary meetings” or “disciplinary discussions”.

Arbitrators have tended to interpret all of those types of clauses as providing union representation not only at meetings at which discipline will be imposed, but also at meetings at which the employer plans to confront an employee with alleged misconduct. Therefore, if there is any chance that a meeting

with an employee could lead to disciplinary sanction, it is advisable to have a union representative present at the meeting.”¹⁰

The role of the union is to support the employee and provide representation, it is not to help answer any questions or otherwise participate in an interview. The union advises the employee on the proper processes and ensures that the investigation follows due process but cannot hamper or interfere in the process. Unions can be helpful in supporting their members through the stressful investigation process and may be of assistance to the investigator in helping the party to understand the steps of the investigation. All employees involved in a workplace investigation are entitled to union representation, whether they be the complainant or respondent. In some cases, witnesses may request and be afforded union representation.

When a complainant and respondent are both union members it is most helpful to have different union representatives assist the different parties; however, that is up to the union to decide if separate representation is required.

Professional Standards

Some professions have a professional code of conduct and professional organizations may want to know the outcome of any internal investigation as it may impact the standing of an employee in that organization. Examples are accountants, lawyers, nurses, physicians, and pharmacists.

Organizational Policies

Workplaces often have codes of conduct, discrimination and harassment policies or policies that outline the process for investigations and any reporting responsibilities. It is important that the investigator is aware of the organization's policies and

procedures to ensure that the investigation is following what the company has outlined.

The investigator should request copies of the policies and procedures that relate to investigations as those policies and procedures will serve as the foundation for the investigation. Sometimes investigators have preferred methods or procedures that they feel comfortable using, however they need to be able to set those aside and follow the designated policies and procedures for the workplace where they are doing the investigation. A deviation from the company directives may leave the investigation open to procedural challenges and grievances.

It is important that employers think carefully about how the policies they create or adopt will play out in real life. Employers do not intentionally create policies that are onerous or difficult to administer but often just copy or adopt policies from other organizations that do not necessarily apply to their work site. An investigator may discover that company policies and procedures are not up to date or compliant with current legislation and should advise the employer if this is the case. However, it may not be prudent to adjust any policies or procedures right before an investigation is commenced as it could be construed as changing the rules to benefit one party or another. The investigator should make note of any policies or procedures that are not compliant with current legislation in their report and follow the current legislative requirements.

Policies related to investigations must be practical and not so prescriptive that they cannot be applied when an investigation is required. For example, stating in policy that the entire investigation will take no more than two weeks, or that resulting suspensions with pay will be for no more than 3 days may not be realistic. The desire of all parties in an investigation is to have the matter dealt with as expeditiously as possible, but policies cannot create time constraints on the process that jeopardizes the due process of the investigation.

3. Chapter 3 Obligations of the Employer

If an employer becomes reasonably aware of workplace misconduct, they cannot simply ignore it. It is incumbent upon the employer to investigate in a timely manner and take the appropriate action. What this means is that even if there is no formal complaint and no one has brought forward a concern, if the employer becomes aware of workplace misconduct they must investigate.

Investigating is mitigating liability or risk.

Does this mean that the employer must go looking for problems? Not necessarily, but the employer does have to act when the following occur:

- When an employee submits a written complaint
- When an employee provides a verbal complaint to an authority figure
- When an employee is observed or heard making statements that suggest that misconduct has occurred.

Some supervisors may say that they hear statements or see things in the workplace that are jokes or horseplay, or just part of the work environment and do not need to be investigated. Context does play a role in workplace conduct, but supervisors should not be lulled into thinking that everyone thinks a joke is funny, or a threat is “just kidding.” Clear expectations and rules for workplace behaviour are laid out for a reason. Remember that employees want to feel safe in the workplace and expect that their employer is holding all employees to the same standard.

Duty to Investigate Discrimination and Harassment

Employers have a duty to investigate any complaints of discrimination and harassment and it is important that the employer has a robust and defensible process to conduct these investigations. Complaints of discrimination and harassment have increased in recent years and companies that fail to take the appropriate action potentially face lawsuits, grievances, and public backlash.

Each province in Canada has differing legislation surrounding the obligation to investigate allegations of discrimination and harassment, but some precedent cases have set the stage for common expectations.

Laskowska v Marineland of Canada was a case heard in Ontario where the Human Right Tribunal stated:

“It would make the protection under subsection 5(1) [Ontario Human Rights Code] to a discrimination-free work environment a hollow one if an employer could sit idly by when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a “means “ by which the employer ensures that it is achieving the Code-mandated “ends” of operating in a discrimination free environment and providing its employees with a safe work environment.”¹

What this means is that an employer has the duty to investigate once the employer is made aware of harassment or discrimination. The employer is not obligated to wait for a formal complaint. The employer needs to show that they were proactive in the investigation even before a complaint may be made.

1. *Laskowska v Marineland of Canada Inc.* 2005, at para 53

Wall Test

Employers will be evaluated in the courts and hearings as to how well they answered the questions of the Wall Test. This comes from a case of Wall v University of Waterloo². In the Laskowska case mentioned above the Wall test was summarized into the following questions.

- 1) Did the employer take proper steps to put in place a Human Rights policy and establish a complaint mechanism?
- 2) Did the employer give its management proper training to implement the mechanism?
- 3) Were employees made aware of the policy?
- 4) Once the complaint was known, did the employer treat it seriously and deal with it promptly and sensitively?
- 5) Did the employer reasonably investigate the complaint?
- 6) Did the employer resolve the complaint fairly, provide a reasonable resolution, provide a proper work assessment consistent with legislation, and communicate its findings to the complainant?³

Liability for Failure to Investigate?

In certain provinces in Canada if an employer fails to investigate that failure may result in liability. In Ontario an employee can sue their employer through the courts for failure to investigate. The amounts that they are receiving are quite small between \$5000- \$8000

- 1) Payette v Alarm Guard Security Services, 2011 HRTO 109,

2. Wall v University of Waterloo 1995, at para 160

3. Shearer 2017, 3

\$5000

- 2) Harriott v National Money Mart 2010 HRTIO 353 \$7500
- 3) Chuvalo v Toronto Police Services Board 2010 HRTIO 2037 \$8000⁴

In Alberta the law is not as clear and is developing as it relates to failure to investigate workplace harassment and/or discrimination. An employee may receive damages through an existing complaint mechanism such as an Occupational Health and Safety complaint, labour arbitration or complaint filed with the Alberta Human Rights Commission.

The liability faced by an employer can be quite significant depending on the impact on the complainant. If an employer fails to investigate and it causes the complainant further trauma then there may be damages awarded by a human rights tribunal, arbitral tribunal or court as is the case in *The City of Calgary and the Canadian Union of Public Employees, Local 38*. The City of Calgary failed to protect a unionized employee from further harassment and was held liable for damages and an award of approximately \$800,000.⁵

Failure to investigate in situations that may result in termination for serious misconduct will leave the employer vulnerable to significant liability above and beyond the regular severance claims.

The failure to investigate and address allegations of harassment or discrimination can lead to a number of types of damages awards against the employer. A human rights tribunal, finding that discrimination has occurred, may award a complainant damages for injury to their dignity, and damages for any wages lost due to the discrimination. A court may also determine that the failure to investigate allegations of harassment created an intolerable work

4. Shearer 2017, 5,6

5. *The City of Calgary v Canadian Union of Public Employees Local 38* 2013

environment that constitutes constructive dismissal, with the result that the employer would then be liable for damages for pay in lieu of reasonable notice to the complainant. A court may also potentially find an employer liable for damages for mental distress suffered by the complainant.

*The failure to properly investigate allegations of wrongdoing could also lead to damages to the dismissed employee beyond pay in lieu of notice. Such damages include aggravated damages resulting from the employer's unfair or bad faith conduct in relation to the dismissal of the employee, and or punitive damages. Punitive damages are reserved for situations in which the employer's conduct towards the dismissed employee is particularly egregious, high-handed or vindictive.*⁶

Can't we just fire people for misconduct anymore?

It would seem to be an HR cliché to say “it depends,” but it well and truly does.

In the past employers did not necessarily need to conduct investigations to terminate employees for serious misconduct i.e. just cause. In a recent court decision in Manitoba the courts upheld the premise that an employee is not entitled to an investigation in cases of just cause termination. The case that affirmed this right was the case of *McCallum v. Saputo*.⁷

Saputo, a food company, received information that one of its employees, Mr. McCallum, had taken product from one of their customer's stores without authorization. McCallum was tasked with visiting grocery stores and determining if there was any

6. MacEachern and Blendell 2019

7. *McCallum v Saputo* 2020

unsaleable product. He was to bring it to the attention of the store management and then McCallum would determine whether the store would get a credit (depending on the reason it was unsaleable), document his findings and have the disposal approved by the designated store employee. The store would then dispose of the unsaleable product.

On Friday August 21, 2015 McCallum was found by a loss prevention officer and the assistant store manager loading 14 packages of cheese into the back of his car. Over the next week McCallum tried to approach the store manager to resolve the matter. However, the store manager had reported the incident to Saputo and McCallum was told to take a week off. McCallum was subsequently fired on September 1, 2015. He initially stated that the dumpster at the grocery store was locked so he was assisting the store by removing the unsaleable product, but later stated he was going to donate it to a wedding. The Store Manager had a different account and testified that the cheese was perfectly saleable and the product found in the car included non-Saputo products. McCallum appealed his termination in the courts. The judge found the following:

*In my view, the circumstances known by Saputo as at September 1, 2015 entitled it to terminate the plaintiff's employment. The facts revealed to it thereafter reinforced that decision. Saputo did not owe the plaintiff a duty to investigate. It had a duty to treat him fairly and honestly based on the information that it had at hand on the day it terminated his employment and I find that it fulfilled that duty. Saputo is also entitled to rely on the information that it subsequently obtained after the date of termination.*⁸

What the courts said in this case is that a commercial (private sector) employer owes the employee no duty of procedural fairness. This is based on the “master and servant” law, whereby a master can terminate a servant at any time for any reason or for no reason. The

8. McCallum v Saputo 2021

master does not need to hear the servant's own defense but this will depend on whether the facts are enough to provide breach of contract. This applies to commercial employees unless there is an express term in the employment contract contrary to that effect.⁹

A master and servant relationship would not per se, give rise to any legal requirement of observance of any principles of natural justice.¹⁰

*Where courts have commented on an obligation to investigate prior to dismissing an employee, it is in a practical, cautionary sense rather than as a free-standing legal duty.*¹¹

*As the law in Manitoba continues to be that employers are under no inherent obligation to comply with the standards of natural justice or with any duty of procedural fairness when dismissing an employee for cause, it follows that there is no duty to conduct an investigation prior to termination.*¹²

However, the case of *Paulich v Westfair Food Ltd.* may limit this unfettered right to terminate people without an investigation. Mr. Paulich was accused of a criminal offence (fraud) and the employer wanted to terminate Mr. Paulich due to a lack of trust. The trial judge stated the following:

*In the case at bar, Westfair Foods has alleged that Mr. Paulich committed a criminal act. They indicate that there was a loss of trust. That claim must be reasonable in all the circumstances. There is an onus on an employer to conduct a full investigation before reaching conclusions and in doing so they must give the employee a chance to answer to those allegations. In the absence of a reasonable investigation, it cannot be said that the employer had a reasonable suspicion to warrant dismissal for cause.*¹³

9. *McCallum v Saputo* 2021, at para 17

10. *McCallum v Saputo* 2021, at para 18

11. *McCallum v Saputo* 2021, at para 22

12. *McCallum v Saputo* 2021, at para 20

13. *Paulich v Westfair Foods Ltd.* 2000

The obligation to investigate is again stated in *Prashad v ICI Paints (Canada) Inc.*¹⁴ and *Headley v City of Toronto*¹⁵, there is a “well-established duty to investigate before terminating an employee for dishonest conduct”

So where does this leave future and current HR practitioners? The courts seem to indicate that in private employment contracts if there is an obvious case of serious misconduct the employer can terminate for just cause without an investigation.

In other circumstances where it is not as obvious, where there is perhaps only suspicion of wrong doing or is not a private employment contract the employer may want to be more cautious and conduct an investigation.

HR practitioners would do well to keep in mind the warning that the judges made in the *Saputo Case*:

*It remains the case in Manitoba that, at common law, an employer has no duty to investigate prior to dismissing an employee. That is not to say that such a course of conduct is without risk to an employer because, if it cannot establish just cause at trial, it will be liable for damages for breach of contract, as well as potentially for punitive damages for the manner of dismissal.*¹⁶

Many employers are taking a cautious approach in discipline cases and are still conducting investigations where they feel that it is not obvious misconduct to result in a just cause termination. One must also remember that in cases such as discrimination and harassment there is legislation that mandates an investigation; these are different than standard misconduct cases.

Where an employer is confident that they have just cause for termination, they may still conduct a short investigation which may not be elaborate but confirms their position for termination. Many employers are already conducting investigations as part of their due

14. *Prashad v ICI Paints (Canada) Inc.* 1997, at para 22

15. *Headley v City of Toronto* 2019, at para 392

16. *McCallum v Saputo* 2021, at para 28

diligence when disciplining or terminating an employee but may not consider it a formal investigation. However, the more uniform the investigation process is and the better documentation that is retained, the stronger the defense of the actions taken.

Principle of Good Faith

The Supreme Court of Canada heard the case of *Bhasin v Hrynew* and have stated *a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other.*¹⁷

What this means is that employers are required to be honest and act in good faith when investigating and terminating an employee. An employer cannot simply terminate someone and not tell them why and mistreat them in any way. They have a duty to act in good faith which basically means that the employer acted honestly, objectively and without the intent to defraud the other party.

Even if there was no legislation requiring employers to investigate complaints of discrimination, harassment, workplace bullying and workplace violence, it would be prudent for any employer to do so. It is also prudent to conduct investigations in a sensitive and respectful manner so that the principle of “good faith” is upheld.

Employers should want to know if there is a problem in their workplace, resolve the problem and provide the best work environment possible. This will also protect the employer from later claims if an employee is terminated or disciplined based on the investigation results. The employer wants to be able to show that they acted in a reasonable manner with the best interest of all employees involved.

17. *Bhasin V Hrynew* 2014, at para 60

There is also some comfort for human resources staff who are daunted by the prospect of conducting an investigation and fear “getting it wrong.” An employer who is acting in good faith, does not necessarily have to come to the same conclusion as a court of law or a human rights tribunal with regard to the termination of an employee, provided that the employer conducted a fair and good faith investigation and the claim of “termination with just cause” are based on a fair and reasonable investigation. What this means is that the employer does not need to get the investigation perfect, it does not need to be at the standard of a police or human rights tribunal investigation, it however it is important that it was conducted under the principles of natural justice and good faith.

C-65 Federally regulated employers

This is a bill awaiting adoption where federally regulated employers will be required to carry out a workplace assessment that identifies risks of harassment and violence in the workplace and then develop and implement preventative measures. This is similar to Occupational Health and Safety legislation in Alberta that requires employers to act when it comes to their attention that harassment and violence occur in the workplace. They are required to investigate and provide their findings if required.

Duty to Investigate Occupational Health and Safety obligations

Similar to the proposed federal Bill- C65, in Alberta an employer is compelled to investigate if they become reasonably aware that there

has been harassment or discrimination in the workplace.¹⁸ This is a requirement under the Occupational Health and Safety Act (OH and S Act).

Workplace Policies

It is recommended that every workplace have as part of the suite of policies and procedures a respectful workplace policy, codes of conduct or a discrimination and harassment policy as well as an investigation procedure. This will help to outline the steps to be taken if a complaint or situation of misconduct arises. The policies should be detailed, but not so restrictive that an investigation becomes impossible or burdensome. If a workplace does not have a policy in place, it becomes difficult for human resources to justify their actions.

It is important that these policies are widely distributed and have been brought to the attention of the employee population. It is a best practice to have employees sign off that they have read and understand of the policy. If this is not practical, then it is important that human resources provide training on the policy and record all the individuals who were in the training. This is particularly useful if human resources and managers plan to use a violation of the policy as the reason for discipline. Failure to have these policies will leave the employer liable in an OH and S or human rights complaint investigation or a court case.

Discrimination and Harassment Policies

The Alberta Human Rights Commission has draft discrimination and harassment policies that can be used as a template. Organizations often post their policies on the internet so an employer seeking to develop a new or revise an existing policy can search various types of policies. If an employer is unsure of what to include in a policy, it is not uncommon for lawyers to draft policies for a fee for their clients.

18. Government of Alberta n.d., Chapter 4

A discrimination and harassment policy should contain the following:

- 1) Definition of harassment, discrimination, sexual harassment
- 2) Directions on how to proceed if an employee is being harassed, including how to make a complaint
- 3) Detail the internal process for addressing a complaint.
- 4) Identify the responsibilities of management

The discrimination and harassment policy may include the investigation process for discrimination and harassment complaints, or there may be a separate policy which deals with all types of investigations.

There are two different situations for which human resources will commence an investigation.

The first is when a supervisor or manager brings misconduct or suspected misconduct to the attention of the HR department. This can be considered a “complaint” for policy purposes but often the individual bringing the issue to HR would not characterize it in that way. They might call it a concern or suspicion.

The second is when HR receives a complaint from an employee through a variety of means: complaint line, supervisor, whistleblowing, office of safe disclosure, union etc. These types of complaints are bound by the policies that the workplace has developed.

Complaints may come from several sources, it can be the supervisor, manager, co-worker, client, contractors or others. Organizations may set up different ways to receive various complaints.

Whistle blowing

Whistle blowing is the term used to describe when an employee or outside person anonymously complains about alleged misconduct. Often in large companies or organizations there is a confidential office (i.e. the office of safe disclosure) or a confidential phone number where individuals can make complaints.

It is difficult to provide a pre-screening function for an anonymous complaint as the author of the complaint is anonymous. There is no way to garner more information if additional details are required or the employer wants to know what resolution the complainant seeks.

Organizations should pursue fact finding in each complaint to determine if a full-fledged investigation is warranted. Even though there is no identified complainant, if the fact finding indicates that unacceptable behavior is occurring then the employer should investigate the matter on their own.

Whistle blowing complaint lines often help employees who do not feel that they are in a position of strength report misconduct of those who may be in management positions. A potential drawback is that an individual who makes an anonymous complaint may not know that action has been taken related to their complaint. They may not know that either an investigation is taking place or any potential outcomes.

Complaint lines

Similar to whistleblowing some organizations will have confidential complaint lines where misconduct can be reported. A complaint line can also be available to individuals outside the organization. Employers need to be diligent to ensure the veracity of anonymous complaints received by an anonymous whistleblower or complainant. Due to the anonymous nature of the complaint ensuring that the complaint is valid is even more important than when you have a named complainant. Whistleblower and complaint lines provide anonymity for those who may be experiencing a power differential or fear retribution, but it can also be used as a means of making a vexatious complaint.

4. Chapter 4 Fact-Finding: Pre-Screening/Fact Finding

What to do with a complaint.

In Chapter 1 it was noted that there are different kinds of complaints and, depending upon the type of complaint, the employer may choose to respond differently. These could include complaints of misconduct made by a supervisor or manager, or complaints of workplace discrimination, harassment or violence which can be made by a supervisor, manager, employee, or external individual. When an employer receives a complaint or is advised of an issue of workplace misconduct, they have several options how to handle the complaint. The employer may do one of the following:

- Receive the complaint, file it and do nothing at this point in time, informing the complainant of such.
- Conduct some preliminary fact finding to determine if there is merit to the complaint
- Immediately launch an investigation.
- Recommend a different resolution method: mediation, an environmental scan, referral to law enforcement for criminal investigation, etc.

The employer, however, should not delay acting on the complaint for long periods of time while they consider how to proceed. They should decide what to do with the complaint in an expeditious manner, even if that means informing the complainant that they have chosen to do nothing with the complaint.

If a complaint is not addressed in a timely manner complainants may feel that their complaint was not taken seriously, supervisors

may lose faith that HR is going to act (one way or another), respondents may be lulled into a false sense of security that the organization is going to do nothing and memories of witnesses who can provide information on the issue may fade.

Receiving a Complaint

When HR receives a complaint, they should follow the requirements in the organizations policy and procedure. Although complaints may be made verbally, ideally, they should be captured in writing. This allows the person to list details, dates and particulars of the complaint. This also allows the investigator to later use that information in the formation of questions and follow up.

If a complainant is not willing to take the time to write out a complaint, it may beg the question of how important the complaint is. If someone is reluctant to write out their accusation it is important to find out why; is the reluctance coming from a place of fear, do they feel the issue is not serious enough to warrant the effort, or are they disinterested in pursuing a formal complaint?

A written complaint should list as many details as possible including dates, names, places, and times. It is helpful to have concerns listed in chronological order if possible. If someone cannot remember a specific date, time, or place this does not mean that the complaint is not true, as memories fade and upsetting events can blur in one's mind. The document should also name the person that the complaint is against. It is very difficult for HR staff to look into a complaint without knowing who the concerns are about. If someone has a complaint but does not want to say who it is against, they may need more time to feel comfortable naming the person or have reassurances that retaliation is not tolerated. However, there is a fine balance when looking at a complaint between empathy and scrutiny, an HR professional will want to be empathic but not let it blur good judgement.

The complainant should note what they want as a result of the complaint, although if they don't know at the time of the complaint that is also acceptable. This is important when pre-screening the complaint as sometimes what the complainant wants is something as simple as an acknowledgement and apology. If the person has unreasonable expectations or seeks disproportionate consequences for the alleged infraction it also provides insight into the complainant. For example, if a complainant alleged that someone called them an “old bag” and the only resolution they will accept is that person being fired; there seems to be disconnect between the alleged infraction and the expected outcome. The investigator will want to question if there is something else going on that might be influencing the complainant's expectations.

Pre-Screening

When receiving a complaint, the process should include some kind of pre-screening to determine if a complaint falls within the provisions of the company's policies, human rights legislation or OH and S legislation. This is true of manager/supervisor-initiated complaints, complaints from employees and issues raised by other individuals. Sometimes a supervisor or manager may want to investigate someone whose workplace behavior is bothersome which, while irritating, does not violate any codes of conduct, rules, or policies. There may be situations where a different resolution process than investigation is more appropriate for the circumstances.

The pre-screening criteria should be transparent so that individuals understand how their complaint will be evaluated and what they should include in their complaint. This may help to weed out unwarranted or vexatious complaints.

The HR department should identify who will be doing the pre-screening of complaints and ensure that they have the knowledge

of relevant policies, legislation and/or other rules as well as the pre-screening criteria that need to be considered in reviewing the complaint. Communication to the complainant once pre-screening is completed should be very clear as to whether or not a complaint will be accepted and investigated. Individuals may make several attempts at submitting a complaint believing that if they simply word it differently it will be accepted. The pre-screener should have a conversation with the complainant to ensure that they understand why their complaint was accepted or rejected.

If a complaint is not accepted as it did not meet the criteria established in the organizations policies, there may be an appeal process. An appeal process may be a formal meeting between the pre-screener, union representative (if applicable) and the complainant; where the pre-screener reviews the criteria of a complaint and details where a complaint does not meet the established criteria. Some appeal processes may have an independent third party review the complaint as a second set of eyes. An appeal process in a complaint procedure will assist complainants who feel that they are being “stonewalled” by an organization. The appeal process will not tell the complainant what to write or manipulate the facts it simply reviews the information provided against the policy criteria.

What is Fact Finding?

Prior to jumping into a full-scale investigation, employers may conduct a fact-finding exercise. Fact finding is an opportunity to further identify the issue and clarify relevant facts. At this stage the employer has not committed to a full workplace investigation. Fact finding helps one understand the situation, gather basic information and determine if further action is warranted, which may include a more detailed investigation.

A human resources department will need to determine if there

is potential wrongdoing and if so, is it something that needs to be investigated? Fact finding is a preliminary high-level review of the issue based on the available information. Fact finding may give the employer confidence that they can act on the complaint without an investigation, or it may identify gaps in information that need to be investigated prior to any action being taken.

For complaints of discrimination or harassment made by an employee or other person who is not a supervisor or manager, the fact finding may be conducted by the human resources department as mentioned, or it may be conducted by a third party such as an Office of the Ombudsperson, Office of Safe Disclosure, Whistleblower office, etc. Often in larger organizations a party outside of human resources conducts the fact finding and then passes on complaints that require investigation or other action to human resources to complete. In smaller organizations the human resources office may be acting as both the fact finder and the investigator.

Fact-Finding Information

Prior to reviewing the information in fact finding there are a few key pieces of information that are required:

- If the complaint is not written out it should be written out
- If the supervisor/manager has provided a verbal account of misconduct it should be put into writing.
- If witness statements or other statements are available, they can be reviewed.
- Applicable policies, procedures, legislation, standards, and agreements should be referred to.
- Is there any evidence available at this point? – documents, photos, emails etc.
- A review of any previous infractions that are similar to establish any patterns of behaviour.

The fact finder will want to gather as much available information as possible to help them determine if a detailed investigation is

necessary. Likely there will not be complete information at this point. It is vital to consider the alleged infraction keeping in mind existing policies, procedures, legislation, standards, and agreements to ascertain if there is a potential violation of any of these standards. Sometimes there may be undesirable behaviour in the workplace but the behaviour may not actually violate any policies, procedures, legislation, standard or agreement. In that case a detailed investigation would not be required, but human resources may recommend another approach to deal with the complaint such as coaching and counselling. If the fact finder is not sure if there is a violation, then an investigation may be required to establish that fact.

After the fact finder gathers all the above-mentioned information, they will then need to review the information and refer to the investigation policy or procedure, or applicable legislation, as criteria to determine if an investigation is warranted or not.

Limited Interviewing in fact finding

Fact finding is an informal process used to gather more information prior to an investigation. At the fact-finding stage the fact finder may want to speak with the complainant who has identified an issue. This is not a formal interview, but information gathered in this process should be well documented. The fact finder will want to ensure that the complaint is as detailed as possible with regards to dates, timeline, events, witnesses.

This step is simply to ensure that there is a basic understanding of the situation, and the main facts are captured correctly. This step is easily completed when the complainant is a supervisor or manager (who are out of scope in a unionized setting). It could be completed through a phone call or meeting to understand what transpired in the workplace that might be deemed as misconduct. The complainant should be informed that the meeting is to clarify details that will assist in determining next steps and it is likely that if the matter goes to investigation the complainant will meet again with the investigator to be formally interviewed.

In a unionized environment, the fact finder should confirm if

union representation is required for a complainant at this stage if they are a union member. This is important as any subsequent investigation may be deemed as invalid if the collective agreement rights to representation have been violated. The fact finder will need to remain neutral, and not make any promises to a complainant what the outcome may be. The fact finder should remember to ask, “what does the complainant want,” which may also help to inform the course of action. Sometimes a complainant may want an apology, or they may want someone fired – the fact finder will likely want to know this to be able to pass on to the investigator should the complaint proceed.

The criteria to investigate:

As stated previously, when a complaint is received the fact finder will need to evaluate the complaint to determine if an investigation is warranted. In addition to the policies, procedures, legislation, standards, and agreements that are applicable to the organization, below is a list of possible considerations to help determine whether a complaint should be investigated:

- Consider the type of complaint or issue. Is it something that is within the employer's control to investigate?
- Is there a possibility that harm could come to an employee? Is there a possibility of continued harm to an employee?
- Is there a possibility of illegal or criminal activity that must be investigated?
- Is there a possibility that this misconduct could result in further legal proceedings?
- Does the employer have an obligation to investigate under legislation?
- Could the complaint or issue impact the organization's reputation?
- Have there been similar complaints that have been investigated? The employer will want to be consistent.¹

When are Investigations Necessary?

When deciding whether to investigate a matter, author Hena Singh suggests that the HR practitioner ask themselves the following questions:

- *If what is alleged is true, is the behaviour a breach of policy, procedure, standard or legislation?*
- *Is the alleged behaviour possible?*²

The first question is fairly easy for a fact finder to answer by looking at the policies and procedures, standards and legislation. Most human resources professionals are not lawyers so it may be less clear if a law has been broken and, in those cases, it may be best to seek guidance from legal counsel.

The following typical issues require an investigation according to the first question.

- “Workplace harassment, workplace violence or discrimination – Allegations of harassment, violence or discrimination in the workplace are some of the most investigated issues in workplaces, because these issues involve human conflict. As discussed, employers have an obligation to protect employees and ensure that their work environments are safe. If there is a threat to this safety employers must take action.
- Criminal activity- Employers are generally interested to know the facts surrounding alleged criminal activity. This is especially relevant if the events took place in the workplace and it can impact the company, its reputation, its bottom line and/or the morale of the workers.

1. Queens University Industrial Relations Centre 2015, 3

2. Singh 2019, 1

- Serious breaches of company policy – It is prudent for employers to conduct a proper investigation before drawing conclusions and determining solutions.
- General Inappropriate behaviour – It is common for employers to want to address behaviour or allegations that they feel is inappropriate conduct for the workplace. An investigation or a workplace assessment can be conducted to reveal if there is a problem that requires intervention by an employer. Despite that there have been no formal complaints made, an investigation can potentially save a company a significant amount of future attrition and reputational harm if the behaviour causing the attrition can be identified and addressed and corrected.”³

This brings the HR practitioner to the second question. It may be evident that if the alleged behaviour occurred it is a breach of policy, procedure, standard or legislation, but the second question looks at *possibility* of the alleged behaviour. Is the alleged behaviour or conduct possible? For example, if an employee alleges that they were harassed on a certain date, and is adamant that the date is correct, and it turns out that the alleged harasser was on vacation that date and not in the workplace, that would indicate that the alleged behaviour is not possible. Because in this example the alleged behavior would not be possible, the allegation would likely not require investigation.

When it is not clear cut if an investigation is required?

What about the times when it is not as clear cut, when the alleged behaviour may or may not be a violation of a policy, procedure, standard or piece of legislation, depending upon the context? What if the alleged behaviour is possible, but there is some conflicting information about it (such as the person was not sure on the date

of the harassment). Author Hena Singh suggests that the HR practitioner be guided by an additional question:

Is there is an unresolved issue/conflict that can impact one or more workers and where there is conflicting information? She notes that if the answer to the questions is “yes” then an organization should investigate.”⁴

If the fact finder is simply not sure about the issue and there is conflicting information, but the potential impact to employees, the organization or reputational risks are present, then an investigation may be the most prudent course of action.

Benefits of Investigations

Not all investigations result in punitive action being taken by the company against a respondent but may have additional benefits that are not evident at the time of the complaint. Some results of investigations may include the following:

1. Identified problems can lead to solutions
2. Providing fairness
3. Enforcing company values and policies
4. Company reputation
5. Legal Requirements

If the employer knows (or ought reasonably to have known) that there is an issue in the workplace that can impact the health (including mental health) and safety of the workers there is an obligation on the employee to investigate the issues the proper solution can be found.⁵

4. Singh 2019, 7

5. Singh 2019, 5

In 2021, at a pharmaceutical company in Ontario received a complaint of workplace bullying made by an employee against their supervisor. Fact finding was conducted and it was deemed that if true the allegations would be a breach of the company's harassment policy. An investigation was conducted, the supervisor was found not to have bullied the employee. However, during the course of the investigation the investigator determined that the employee who had made the complaint of bullying was actually engaging in inappropriate work behaviours. This allowed for an external full-scale review of the department and allowed the employer to address a toxic environment.

Typical Issues Requiring Investigation

The type of incidents or workplace behaviours that require investigation is varied and innumerable. Although not an exhaustive list, some of the common issues that require investigation are detailed below:

- 1) workplace violence or threatened workplace violence
- 2) violation of the drug and alcohol policies
- 3) fraud or misrepresentation
- 4) theft
- 5) misuse of property
- 6) accidents, safety violations
- 7) employee misconduct
- 8) inappropriate workplace behaviour
- 9) repeated absenteeism, tardiness or unexcused absences
- 10) repeated performance or behavioural issues

Subjective and Objective Assessment – harassment

One of the challenges for a fact finder is how to determine if certain workplace behaviours constitute harassment. Context is

very important in assessing harassment, and the fact finder must assess whether the behavior is subjectively and objectively harassing.

The subjective aspect is “did the person feel harassed?”

If the target of harassing conduct did not actually feel harassed by the conduct, then there is no harassment. For example, a supervisor Philip and his subordinate Kris are having a discussion, and Phillip comments “that is the stupidest idea I have ever heard, you are a total idiot Kris.” If Kris, the subordinate, did not take offence and did not feel harassed by the comment, then it is not considered harassment in light of the subjective test.

However, this is a two-prong test, in which there is a subjective element and objective element to harassment. Meeting the threshold in one or the other or both will constitute harassing behaviour. If viewed in objective aspect the result may be differently.

The objective aspect is “would the reasonable person feel that the behaviour is harassing?”

This test of harassment looks at the same comment and asks would a “reasonable person” be offended and feel harassed by the same comments. Although Kris as the recipient of above comment was not offended and did not feel harassed, would a reasonable person in the same set of circumstances feel harassed? In this case a reasonable person would consider those comments to be harassing.

Because the behavior was deemed to be objectively harassing, it is considered harassment.

Interim measures

Sometimes a complaint requires immediate action. Either the fact finder or a human resources practitioner must take immediate action to diffuse a situation and allow time to determine if an investigation is required or an alternative dispute resolution mechanism is more appropriate. This may mean putting an interim measure in place that will protect the employees, the worksite, or the company while next steps are determined. Interim measures may include a non-disciplinary suspension of an employee with pay, temporarily moving an employee’s work location or temporarily

changing their work or working hours. This is especially useful in cases of discrimination or harassment when the employer wants to immediately stop any potential for further harm coming to the individuals involved, or any witnesses.

Written Statements (Witness Statements)

Part of the process to determine if an investigation is required is gathering witness information. Sometimes complainants, including supervisors or managers, may know individuals who witnesses the incident, behaviour or conduct. The fact finder may ask these witnesses to write out their statements. This has a two-fold benefit of helping people to capture what they saw or heard while it is still fresh in their minds and providing a written account of what transpired that can be compared to the complaint as submitted.

In a unionized environment most collective agreements will allow supervisors to ask unionized employees to write out a statement of what they experienced/saw; as long as the supervisor does not question the individual. It is important for the fact finder to know what they can and cannot ask for at the fact-finding stage and what would be considered as conducting a formal investigation.

The value of having a written witness statement is that should an investigation move forward, the investigator will have a general idea of what a witness is going to share in their interview. They can also check the veracity of that interview against what was originally written and identify any discrepancies.

Who should investigate (internal or external)?

If a fact finder determines that an investigation is required they have to decide who is the best person to conduct the investigation. If

the organization has a trained and trusted neutral investigator most misconduct can be investigated in-house. If the Human Resources Department is going to investigate it is important that the staff have been trained on conducting workplace investigations.

Managers may also conduct investigations if they have the appropriate training, but it is crucial that they do not have a significant connection to the parties involved, or a personal stake in the outcome. If there will be a perception of bias, then an organization may want to secure an external investigator. In a unionized environment an external investigator may be more appropriate to avoid the perception of bias.

When selecting an external investigator, the organization should ensure that any external investigator is licensed through the province of Alberta and will follow the processes and policy the organization has in place.

An organization may decide that external investigators are costly and time consuming and want to develop the investigation abilities of their own in-house staff. HR professionals and managers who are learning to conduct investigations may want to shadow an external investigator to get some experience in how to conduct investigations.

It is interesting to note that if an organization has an in-house workplace investigator whose job is solely to investigate workplace complaints within that workplace, they will also need to be licensed in the Province of Alberta. It is important that the in-house investigator maintains a reputation for being impartial and unbiased. If their reputation has been brought into question the parties to an investigation may be far less likely to accept the results of the investigation. This is especially true in unionized organizations.

Regardless of if an investigator is internal or external to the organization, they need to familiarize themselves with the organization's policies, procedures and processes. The investigator must conduct the investigation according to the organization's requirements.

5. Chapter 5: Planning an Investigation

When one begins to plan an investigation, they may be preparing for a full scale investigation in which a formal report will be provided to the decision makers, or it may be a brief investigation to determine if a violation of policy, procedures, standards or legislation has occurred. Whichever approach one takes they want to be thorough in their preparation and have a well-grounded investigation that can support any action taken (or not taken) by the employer.

Objectives of the investigation.

There are several objectives when conducting a workplace investigation:

- Determine what happened in respect to an incident.
- Determine who was involved in the incident.
- Determine the events surrounding the incident.
- Determine if there is evidence to support a claim of workplace misconduct.
- Determine if there was a violation of company policy and procedures, a breach of compliance or a violation of the law.
- Complete a thorough investigation that can withstand scrutiny.

THE PEACE Model

When beginning any investigation, regardless of whether the

investigation is going to be lengthy and complex or short and simple, it is helpful to have a template or a model to follow.

Police in conjunction with psychologists in England and Wales developed a model for collecting information that was non-confrontational and not aggressive. They developed a model called the PEACE investigative interviewing model. This model has been adapted to be used for workplace investigations as a way to plan an investigation while keeping it non-confrontational.

“PEACE is an acronym that stands for:

Planning and preparation: This requires investigators to find out as much as they can about the incident under investigation, including who needs to be interviewed and why.

Engage and Explain: The purpose of this stage is to establish rapport and is described in the literature as the most influential aspect in whether or not an interview is successful. It involves showing concern for the subject's welfare by asking how they want to be addressed, how much time they've got available to be interviewed and giving reassurance if the person seems anxious or nervous.

Account — Clarification and challenge: This stage is where the interviewer attempts to obtain a full account of events from the subject without interrupting. Once the interviewee has explained what happened, the interviewer can ask follow up questions which allow them to expand and clarify their account of events. If necessary, this may involve challenging aspects of the interviewee's story if contradictory information is available.

Closure: This stage involves summarizing the subject's account of what happened and is designed to ensure there is mutual understanding between interviewer and interviewee about what has taken place. It also involves verifying that everything that needs to be discussed has been covered.

Evaluation: This stage requires the interviewer to examine whether they achieved what they wanted from the interview;

to review the status of the investigation in the light of any new information that was received; and to reflect upon how well the interview went and what, if anything, could have been done differently.”¹

The premise is based upon good planning of the investigation, no matter how big or small, complex or simple the investigation is.

Prior to commencing, the investigator should have a basic plan as to how they are going to execute the investigation. It should follow any required procedures or processes outlined by a company policy or in a collective agreement. It should include the following items that are adapted from the PEACE model:

1. Determine the goal of the investigation.
2. Determine the scope of the investigation. Is it a single issue or multiple issues?
3. Identify a timeline of tasks if it is required.
4. Identify resources needed: witnesses, records to be examined
5. Identify if any interim arrangements are required during the investigation e.g. placing an employee on paid leave.
6. Identify if a communication plan is required. Be mindful of confidentiality and reprisals in the workplace.
7. Identify any logistical or procedural obstacles that will need to be overcome.
8. Identify if a report is required, and if so, who it will be provided to.²

Pre-investigation Preparation

As the HR practitioner prepares for an investigation, they will want

1. Schollum 2005, 4
2. Alberta Ministry of Justice and Solicitor General 2012

to collect background information related to the matter being investigated. It is helpful to document the background information already collected either through fact finding or from HR files and capture it along with other information into one place. The following is some of the background information that an investigator may want to collect prior to the start of the investigation.

- What questions need to be answered in this investigation?
- Identify what information is already known.
- Identify what additional information is needed.
- Identify what evidence is already gathered.
- Identify what evidence/records are required.
- Identify witnesses- who they are, where they are, if they require representation at an interview. Determine how they will be notified of an interview.
- Identify logistical challenge. Where will witnesses be interviewed? Is there a communication plan needed? Is travel required? Do employees work different shifts?
- Identify any risks or safety concerns.

An investigator should be sure to read the complaint thoroughly and make note of their questions. This will assist in approaching the investigation with a curious mind. It is helpful to collect this information in either an electronic file or bound notebook where the investigator can refer to it easily throughout the investigation. An investigator may wish to make hand-written notes on a printed copy of the complaint.

Crafting interview questions is a crucial part of the investigation preparation and will be explored in detail later in this chapter.

From a logistical perspective, if a witness interview is going to be recorded, the investigator should ensure that they have all the proper equipment, and the equipment has been tested. At the beginning of the interview the investigator should state in the recording who is in the room. During the investigation it should be

noted if anyone joins or leaves the room, and the investigator may want to explain on the recording any long periods of silence.

If the investigator is taking handwritten notes they should ensure ample paper, pens, etc. are available. They should also determine up front if the interviewee or union is entitled to see their notes or have a copy of the interview transcript.

Interviews should be conducted in a discreet location, out of the view of the general employee population. The space should be quiet and comfortable and accessible for those who may have mobility challenges or other disability. It is advisable to have water and a box of tissues available for interviewees.

An investigator must be flexible, as the interview may not go exactly according to plan. Regardless of what occurs during the meeting the investigator is responsible for running the interview. They should not be distracted or intimidated by others during the investigation – including supervisors or managers, union, or employees. Good planning will enable an investigator to adapt to the circumstances that arise and still meet their objectives.

Crafting Interview questions

An investigation entails gathering evidence in a systematic, impartial, and professional manner. Part of that evidence may be oral evidence from witnesses and individuals involved in the incident being investigated. The success of gathering oral evidence is dependent upon the quality of the interview to uncover the truth. Crafting good interview questions is essential to eliciting the best information from individuals.

An investigator wants to ensure that they get a good grasp of the facts through the interview. This involves questions on the 5 W's

- Who was involved?
- What happened or what was said?

- When did the incident occur?
- Where did the incident occur?
- How did the incident occur?
- Do you know why the incident occurred?

“Why” is probably the least important for the investigation, as the investigator can determine if there was misconduct or the validity of a complaint without ever knowing the reason why. As humans, we want to make sense of the world that we live in and want to know the reasons why events take place so it is natural to want to know why an incident happened. However, an investigator may need to be satisfied to conclude the investigation never knowing the why.

The investigation may start with asking some “housekeeping” questions. These are questions that the investigator knows the person can answer and should be easy for the person to respond to. This will help the person to feel as comfortable as possible and get them used to answering questions. Housekeeping questions are simple, closed questions.

Some housekeeping questions may be asking the person their name, their job title, how long they have worked with the company, what their job entails on a daily basis, or who their supervisor/manager is.

After the housekeeping questions, the investigator will progress to more investigative and probing questions.

Creating Investigative Questions

Investigative questions get more to the heart of the matter. Now that the person has a level of comfort and is talking, the investigator will want to collect the facts and underlying information that is helpful to the investigation. Investigative questions should have the following characteristics:

1. They need to be open ended
2. They need to add clarity to the issue/complaint
3. They need to be on topic and relevant to the investigation
4. They need to be questions not an interrogation

5. They should check for inconsistencies and illuminate earlier answers
6. Should be neutrally worded (not blaming or accusing)

Questions should be prepared in advance to give the interview structure and free up time for the investigator to write accurate notes. Follow-up and probing questions may be used to gather further information. These follow-ups should be more fluid based upon what the interviewee says. The key is to get the interviewee telling the investigator a free flow narrative of what they saw, heard or experienced. An investigator may prepare questions in advance but never end up using them, and that is perfectly ok. It gives the investigator a sense of security to have questions prepared to ask even if they are not used.

Questions prepared in advance are helpful and can guide the investigation, but do not need to be followed strictly if the interview goes in a different direction, as long as the investigator is getting the information they require. Different questions will be prepared for the different parties that are interviewed and for each incident being investigated. What might be an appropriate question for a respondent to a harassment complaint may not be appropriate for a witness to that same complaint.

Different types of complaints will need different types of questions. In a discrimination or harassment complaint the investigator will need to craft unique questions for the complainant, respondent, and any witnesses. In a complaint of misconduct by a supervisor or manager, the investigator will speak to the supervisor or manager to get all of the information surrounding the misconduct, which is likely more like a conversation. However, the investigator will need to craft more formal questions for the respondent and any witnesses in misconduct complaints. A complaint of workplace fraud would again require a completely different set of questions.

It is important to remember to let the interviewee have time to think about an answer to a question, certain individuals may need

more time to formulate their answers, as an investigator do not be afraid of silence. It is also important to conduct an interview not an interrogation. An interrogation is confrontational and accusatory, its goal is to make the interviewee uncomfortable and show the investigator's power. Workplace investigators need to be mindful that at the end of the investigation they will possibly be working with the participants again, seeing them in the lunchroom or around the organization, thus it is important to maintain professionalism and good relations.

Sample Questions for the Complainant

Included are some sample questions for different types of complaints and different types of interviewees.

1. Harassment based questions

Housekeeping:

- What is your full name?
- What is your position at (Company Name), how long have you been in this position?
- What are the typical duties in your job/ what do you normally do in a day at your job?
- What is your working relationship with (Respondent's name)?
- How long have you worked together?

Investigative:

- How would you describe your working relationship with (Respondent's name)?
- You have made a complaint/complaints against (Respondent's name) for alleged harassment. Tell me about the allegations that you have made. Let's start with the first one
- Allegation explained
- Second Allegation explained (if more than one allegation the complainant will be asked to explain the circumstances surrounding each allegation)

- Was anyone else present who may have witnessed the incident? If so what was their involvement?
- How did the complainant respond to this alleged incident?

Follow up with probing questions, identify any inconsistencies and ask for clarification, capture the details required to establish the facts. Be curious. Some investigators will refrain from asking behavioural type questions, but there can be value in asking these questions as it provides insight into the complainant.

- What were you hoping to achieve by bringing forward this complaint?
- Why did you make this complaint now?
- Why do you think the respondent did these actions?
- How do you think the respondent will respond to these allegations?
- What would you like to see happen? What is an appropriate sanction for what is alleged to have occurred?
- What do you think would be a fair outcome?

There are no correct answers to behavioral questions, but an investigator should look for responses that are disproportionate to the allegations or the rest of the evidence that may be revealing.³ If a response is disproportionate there might be something else going on. An example of a disproportionate answer may be “I want the person locked up forever, so they never see the light of day and their soul dies.” This might encourage the investigator to speak to the employer about what they have heard and inquire if there is something else going on.

Sample Questions for the Respondent

1. Misconduct based questions:

3. Singh 2019, 62

Housekeeping:

- What is your full name?
- What is your position at (Company Name), how long have you been in this position?
- What are the typical duties in your job/ what do you normally do in a day at your job?
- What training have you received to be able to do your job?
- Who else do you interact with in your job?
- What is your working relationship with (Complainant's name)?
- How long have you worked together?

Investigative:

- On (DATE) an incident occurred on your job where your Supervisor (Supervisor Name or other Authority Figure) became involved. Can you tell me what happened that day?
- Or
- On (DATE) there was an incident that occurred while you were working, do you recall the incident? Please tell me about what happened?

Follow up with probing questions, identify any inconsistencies and ask for clarification, capture the details required to establish the facts. Be curious.

2. Harassment based questions:**Housekeeping:**

- What is your full name?
- What is your position at (Company Name), how long have you been in this position?
- What are the typical duties in your job/ what do you normally do in a day at your job?
- What is your working relationship with (Respondent's name)?
- How long have you worked together?

Investigative:

- How would you describe your working relationship with (Complainant's?)
- 's name)
- Has your relationship changed at all from when you first met? If so, how?
- In the complaint received by (Complainant's name) allegations have been made against you for (Harassment/Bullying/Alleged Behaviour) I would like you to walk me through each of the allegations from your perspective.
- Allegation #1
- Allegation #2 (if more than one allegation the Respondent should be asked to explain all the circumstances surrounding each allegation)

Follow up with probing questions, identify any inconsistencies and ask for clarification, capture the details required to establish the facts. Be curious.

Sample questions for the Witnesses

1. Misconduct based question

Housekeeping:

- What is your full name?
- What position do you hold at (Company name)?
- How long have you been in that role?
- What do you do in your current role in the typical day?
- What is your working relationship with (Respondent's name)?

Investigative:

- How would you describe your working relationship with (Respondent's name)?
- On (date) there was an incident involving (Respondent's name)

can you tell me about what you saw and heard?

Follow up with probing questions, identify any inconsistencies and ask for clarification, capture the details required to establish the facts. Be curious.

2. Harassment based questions

Housekeeping:

- What is your full name?
- What position do you hold at (Company name)?
- How long have you been in that role?
- What do you do in your current role in the typical day?
- Do you work with (Complainant's name)?
- Do you work with (Respondent's name)?
- How long have you worked together?

Investigative:

- How would you describe your working relationship with (Complainant's name)?
- What is your working relationship with (Respondent's name)?
- How would you describe your working relationship with (Respondent's name)?
- How is (Respondent's name) working relationship with others?
- Have you ever noticed any inappropriate behaviour by (Respondent's name)?
- On (DATE) there was an incident that occurred did you notice anything unusual on that date?
- Did you notice anything unusual about (Complainant's name) on (DATE)?
- Did you notice anything unusual about (Respondent's name) on (DATE)?

Follow up with probing questions, identify any inconsistencies and ask for clarification, capture the details required to establish the facts, be curious.

Prompts or Follow ups

Sometimes an interviewee is not clear or they may be reluctant to expand upon their answers. Prompts or follow up questions can encourage people to continue talking. It also lets the interviewee know that the investigator is listening and interested in what they have to say. Some common prompts are:

- I'd like to hear what your thoughts are on (topic)
- Earlier you said (item), tell me more about that
- That is interesting, can please you expand upon that
- I'd be interested to hear what you have to say on that

Follow ups are questions that follow a question when you need more information. If an interviewee has not been clear or has not provided quite enough detail the following can be used:

- Tell me more
- How so
- Earlier you mentioned (item) now you stated something quite different, why is that
- I am not sure I understand, can you explain that
- What do you mean when you say “.....”
- Really

Even though an investigator may draft their questions in advance, they should be flexible and be prepared to probe or elicit additional information. Interviewees may provide information that the investigator had not thought to ask about but is valuable to the investigation.

6. Chapter 6: Evidence

Gathering good evidence is the purpose of any investigation. It is the quality of evidence collected in an investigation that allows an investigator to make a prudent and wise conclusion. There are many different types of evidence that an investigator can collect and it is important that an investigator be able to separate key pieces of evidence from extraneous evidence.

What is Evidence?

Evidence

Cambridge dictionary defines evidence as “anything that helps to prove that something is or is not true”¹

When we hear the term evidence, we tend to think of what we have seen on television and in movies – physical evidence picked up by hands in latex gloves and placed in clear plastic bags. This is not necessarily the case in a workplace investigation; the most pertinent evidence in a workplace investigation will most often be the oral evidence given by the involved parties or witnesses. Sometimes there will be documentary evidence such as records, files, documents, and occasionally physical evidence like video recordings.

Evidence may take various forms:

1. Testimony from interviews
2. Documents- files, records, documents, emails
3. Physical evidence e.g.- social media post screen shots, ruined

1. Cambridge Dictionary n.d.

product, video recording

Gathering Evidence- Forms of Evidence

Some evidence will be gathered prior to the investigative interviews, while the rest will be gathered throughout the investigation process. There will be some pieces of evidence such as policies, procedures, legislation, or written complaints that are available to the investigator prior to the investigation. The investigator will utilize these pieces of evidence in their decision making.

However, this is preliminary documentary evidence, and it may only give part of the picture. Oral testimonial evidence obtained through interviews may help to round out the picture of what occurred. Interviews may lead the investigator to new pieces of evidence that were previously not known prior to the interviews. An interview may lead the investigator to additional documentary or physical evidence that is in the possession of one of the parties.

When collecting evidence, it may be difficult to know initially if something is relevant and important. It is easier to collect the evidence and then filter it later for relevance and credibility. This can be challenging. The investigator must ask themselves, does this piece of evidence help answer who, what, where, when or why? Can this evidence be trusted? If it does not answer one or more of the 5 W questions or cannot be trusted, then it is likely not pertinent to the investigation. However, an investigator should not completely disregard evidence that does not at first seem to relate. As the investigation unfolds new information may shed light on a piece of evidence that previously seemed irrelevant.

Rules of Evidence

In Alberta there is legislation called the Alberta Evidence Act. This act is relevant to legal proceedings and the evidence collected for the purposes of court actions, but it provides a good

guide for standard acceptable practices related to the collection of evidence for workplace investigations.

In addition to the Alberta Evidence Act, some employers may have policies or procedures for collecting evidence that need to be followed. An investigator must be mindful of privacy policies in collecting evidence to ensure that they do not violate an employee's privacy rights. This is especially true in collecting evidence relating to medical conditions or health information. Most workplaces will maintain separate medical information files from employee records – access to an employee record is not always guaranteed and access to a medical information file is seldom granted.

“In unionized workplaces, many collective agreements also contain limits on the types of evidence and documents that can be used in an investigation to support the imposition of discipline and any subsequent arbitration. Typically, such collective agreements prevent an employer from relying on allegations or documents in an employee's personnel file, if the employee was not made aware of the allegations or documents shortly after the employer became aware of the allegations, or at the time the documents were added to the file.”² What this means is that an employee needs to be aware of the allegations made and any documents used as evidence.

There are two basic types of evidence – direct evidence and circumstantial evidence:

- **Direct Evidence**– Direct evidence supports the truth of an assertion without relying on additional pieces of evidence to show an action or inaction occurred. This evidence can stand alone to establish something as fact. Examples: Video surveillance that captures an employee stealing money from a cash register or an eyewitness who observed an employee

punch their supervisor.

Direct evidence is typically the strongest type of evidence.

- **Circumstantial evidence**– This is evidence that supports a premise, theory or assertion. If one looks at the circumstantial evidence, they can draw a reasonable conclusion as to what took place. Example: A witness sees an employee leave the front office stuffing something into their coat pocket, and moments later someone notices that money has been taken from the cash register in the front office where the employee was seen exiting. The witness did not see the employee take the money from the cash register, but one can reasonably infer what has taken place based upon the set of circumstantial evidence.³

Securing evidence- Documentary or Physical

Although not as common as testimonial evidence, occasionally there is documentary or physical evidence that is pertinent to an investigation. This can be anything from printouts of social media posts, photographs of text messages, computer files or spoiled/damaged product. All of this evidence needs to be secured in some fashion to be referred to later. The question is how and where does one keep these types of evidence.

If an investigator is in receipt of either documentary or physical evidence, it is important that the items be placed in a secure location with the following information recorded:

- Where, when and who found the evidence
- Description and condition of the evidence
- Who collected the evidence
- Date and time it was secured

3. Alberta Ministry of Justice and Solicitor General 2012, 207

Physical evidence should be placed in an envelope/plastic bag sealed with tape and the investigator should initial, date and time the seal of the evidence. If the evidence does not fit in an envelope or plastic bag then the investigator should place their initials discreetly somewhere on the item and record the date, and time it was secured.

For electronic evidence, a copy should be made and stored on an external memory or other device. Screen shots taken should be printed or secured on an external memory device.

For documentary evidence the investigator should secure the original document rather than a photocopy or picture if possible. An investigator will also want to show a chain of possession of evidence, which means that the detail is recorded of where the evidence was at all times. For example, if the investigator becomes aware of documentation of a financial transaction where the employee being investigated signed the document, they should ensure that once this document comes to their knowledge that they can track who had the document and subsequently what happened to the document. It would be detrimental to the investigation to lose the document for a few days and then have it suddenly re-appear on a desk.

Sometimes during an interview, a witness or party to the investigation may bring documentary evidence with them or create evidence in the interview. If any interviewee creates a drawing, diagram, or sketch during the interview it should be considered evidence and properly stored. The investigator should make note of what was created in the interview for future reference. If the investigator is recording the interview, they may want to state what was created so that the activity is captured in the audio recording.

As well, after an investigative interview there will be the investigators notes and/or recording. Notes from interviews should also be stored in a secure location. Some investigators will use a bound book, or they number and initial all loose-leaf pages to demonstrate that the notes have not been tampered with. The goal of the investigation is to be as transparent with evidence as possible.

Employees, the courts, unions and arbitrators want to see original notes. They do not want to see pages torn from notebooks, items covered in white-out or erased. If the investigator needs to erase something they are better to strike through the entry rather than delete or white out physical notes so that it is evident what was stricken. Some investigators will even go so far as to initial any strike throughs on a page.

Who Collects Evidence in a Workplace Investigation?

An investigator may be provided pieces of evidence from the employer, for example, the company's investigation policy or discrimination and harassment policy. Investigators may be given access to employee file information such as performance reviews, previous discipline records, work schedules etc. They could be permitted access to limited medical information like accommodation requirements or requests (if the information is pertinent to the investigation). An investigator may also be given electronic files, photographs, video evidence or other pieces of physical evidence from either a party to the investigation or the employer.

So how does the employer go about getting evidence to give to the investigator, should the investigator go searching around on their own? It will depend on if the investigator is an external third party or part of the human resources department and on the type of investigation. For instance, it is not uncommon for third party forensic accountants be brought in to investigate allegations fraud, theft, or embezzlement. In those cases, the external investigator may be given full access to an organization's computer system and accounting records.

In other cases, it may not be necessary or prudent to give an external third-party investigator unlimited access to company

information. The external investigator may be given documentary and physical evidence from the employer, or the parties involved in the investigation, but will not actively search for evidence on their own. In this case, if an external investigator identifies a gap in the evidence that they require to decide whether misconduct has occurred, they will need to ask for assistance from the employer, union or party to the investigation to find the needed evidence.

When the investigator is a member of the human resources team of the employer, they may have a much better idea of where to find evidence than an outside third party. They might seek out information on their own.

Employers (supervisors and managers) and HR investigators may be unsure what evidence they can obtain or how far they can go to obtain evidence. Some common sources of evidence are discussed below along with the limitations that employers have on obtaining that evidence.

1. Searching Individuals

Employers may feel that they have the right to search employees' bags, purses or clothing when they suspect theft or other transgressions. If an employer has a reasonable suspicion that an employee has stolen something they should refrain from searching the employee unless permission has specifically been given to the employer by the employee. Basically, it is not recommended to touch an employee or their personal belongings unless permission is granted.

An employer can ask an employee to empty their purse, bag, pockets, locker, desk, etc. and an employee may comply. If an employee refuses an employer cannot search them unless the employee has given consent previously by signing off on a policy that permits such searches. Even in those cases the search has to be confined to a situation where there is a good reason to search not just a suspicion that something has been stolen. If an employee has not given consent to be searched or have their belongings searched..... well, the employer may be out of luck. If they suspect that there is theft, they can contact the authorities.

Powers of search are very limited in Canada and fall under the Canadian Charter of Rights and Freedoms section 8. “Everyone has the right to be secure against unreasonable search or seizure.”⁴

Under the Supreme Court of Canada there are two grounds for a citizen to conduct a reasonable search.

1. After a citizen’s arrest to search for weapons or items that could be used as weapons. As well to look for items or tools which would aid in escape. As an HR professional you will not be conducting a citizen’s arrest so you will not be able to use this as a ground in which to search someone.
2. The second way in which to conduct a lawful search is to seek consent from the subject. Consent to be searched can be gained by asking the individual if they are willing to be searched or have something they are carrying be searched.⁵

In short, HR is not the police, security guards or CSIS and should leave searching people and belongings to the appropriate authorities.

2. Searching Electronic Devices

When we discuss searching electronic devices in this section, the discussion is focused only on “company” owned electronic devices. The employer has no right to search personal electronic devices such as personal cell phones.

Even though electronic equipment used by an employee may be owned by the company the employer needs to tread carefully if considering a search. If the employer has permitted employees to utilize company electronic devices for personal use, then it is not simply a matter of looking at the company cell phone assigned to a particular employee. The Supreme Court has again deemed that employees have a reasonable right to privacy, even for electronic

4. Government of Canada 2022

5. Government of Canada 2022

devices that are the property of the company where personal use is permitted or reasonably expected.

An employer does not have unfettered rights to look at electronic devices that employees use, even if the company owns them. Workplace policies and practices may diminish an individual's expectation of privacy in a work computer, but these sorts of operational realities do not in themselves remove the expectation entirely.⁶

What this means is that an employer would need to have a compelling reason to search an employee's electronic device. There would need to be a strong suspicion of wrongdoing, not just a hunch and, not simply a "fishing expedition." This standard is even higher if an employee is suspected of illegal activity. If an employer thinks an employee is doing something illegal and there may be computer evidence that could be used in court, they should immediately contact the police.

If the employer randomly searches someone's computer simply out of curiosity or because they hope to find something, it would be an invasion of the employee's personal privacy and the employer could be sued for what is called "intrusion upon seclusion". This applies to significant and deliberate acts that violate the person's privacy.

The Ontario Court of Appeal in the case of *Jones v Tsige* stated the following:

"The key features of this cause [suing someone for intrusion upon seclusion] are

- 1. The conduct must be intentional, which I would include reckless*
- 2. The employer must have invaded, without lawful justification, the employee's private affairs or concerns.*
- 3. That a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish."*⁷

3. Utilizing Video Evidence

Video evidence has been used successfully in workplace investigations under specific circumstances. The Office of the Privacy Commissioner considers covert video surveillance to be an extremely invasive form of technology and thus has strong guidance surrounding when covert video surveillance can be used.

Video evidence is considered to be “covert” when the person is not aware that they are being recorded. As such it can only be used in certain circumstances:

1. Under PIPEDA, an organization may collect, use or disclose personal information only for purposes that a reasonable person would consider appropriate in the circumstances.⁸
2. The organization must have exhausted all other less intrusive means of collecting the evidence. This means that if an employee is suspected of defrauding the benefit plan by “exaggerating a disability or illness” the employer must first try to obtain the medical evidence through the employee and their physician, or an independent medical examination agreed to by the employee, before attempting to obtain video evidence.
3. There must be a demonstrable evidentiary need for the collection of this evidence. It is not enough for the company to simply be suspicious or think someone is doing something wrong. There must be more compelling grounds to believe that video evidence is required. Office gossip, for example, is not sufficient as a means of compelling grounds.
4. The video evidence collected must relate to a legitimate business purpose and objective.
5. Video evidence should not include audio.
6. The loss of privacy must be proportional to the benefit gained by the company. It would not be reasonable to have video

7. Jones v Tsige 2012

8. Government of Alberta 2019, subsection 5(3)

surveillance to catch the person stealing mints off of the front reception desk. It may be reasonable to use video surveillance if the employer has exhausted all other means of obtaining information about an employee's medical limitations and the employee lingers on disability leave, when under normal conditions a person would have returned from leave.

7. In order to collect information through video surveillance without someone's consent the organization must be reasonably satisfied that:
8. Collection with the knowledge and consent of the individual would compromise the availability or accuracy of the information
9. The collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or Alberta.
10. In the employment context, an organization should have evidence that the employment relationship of trust has been broken BEFORE conducting covert video surveillance. Organizations cannot simply rely on rumor, suspicion, a hunch or a guess; the organization must have evidence to justify the surveillance.
11. Organizations should limit the duration and scope of surveillance to reasonably achieve their purposes. This means that an employer cannot put the person on video surveillance for the whole day if there is evidence that misconduct occurs only during the lunch hour.
12. Employers MUST NOT record individuals in places where they have a reasonable expectation of privacy i.e. inside the bathroom, locker room, inside their home, in their fenced backyard.
13. The circumstances surrounding the use of video surveillance should be documented i.e. Who approved it, how often is it used by the company, is there a policy as to when it is used.⁹

Workplace Security Camera Video

If an employer is going to use video surveillance regularly in their workplace, they must remember to advise employees of the surveillance, state the purpose and post a notification to advise employees that they are under surveillance. The purpose of the video must also be reasonable e.g. theft prevention at the front counter, or security of personnel. An employer may not use video surveillance that “just happens to catch something,” if that was not the designated purpose of the video. For example, if an employer has video surveillance at the back door or their business and notifies the employees that the video is simply to identify when deliveries arrive, but the camera catches an employee smoking marijuana on their coffee break (which is a violation of company policy), the employer may not use the video evidence in the discipline of the employee because that was not the stated purpose of the video surveillance.

4. Utilizing Audio Evidence

Audio evidence is audio a recording(s) that is/are made by the employer, a party to the investigation or investigator. If someone gives their consent to be recorded, then the audio evidence may be used by the investigator. However, if someone has not given their consent, or was not asked for their consent then the matter may be more complicated.

The Criminal Code of Canada in section 184 states that it is an offence to willfully intercept the private communication of an individual.¹⁰ Thus, you may not covertly record a private conversation, or a conversation where the parties have a reasonable expectation of not being overheard. What this means is that an employer may not record the conversation between employees, or between a union representative and an employee or any two people if the recorder is not involved in the conversation.

9. Office of the Privacy Commissioner of Canada 2009

10. Government of Canada 2022, section 184

Section 2 of the Criminal Code identifies two circumstances where a conversation may be recorded:

1. When the recorder has the consent of the parties involved in the conversation.
2. If an individual is part of the conversation, meaning that they are one of the parties engaging in the conversation (not simply standing beside parties in the conversation, or a silent participant). The recorder needs to be the person who originates the conversation or the person who the other party intended to engage in conversation.¹¹

If the person recording the conversation is a party to the conversation, they do not need to disclose that they are recording the conversation. Consent is only required by one party to the conversation and that can be the recorder.

5. Utilizing GPS on Company Vehicles

For some jobs employees drive a “company vehicle” such as work for municipalities, delivery services, construction companies and a variety of other organizations. Often employers will use Global Positioning System (GPS) to track the whereabouts of company vehicles. This is particularly useful business tool for school or transit buses, municipal vehicles and courier vans, e.g. tracking of vehicles to optimize delivery or services. Vehicle tracking may be used as a performance measurement or for safety monitoring. Other times employers have placed GPS locating devices on their vehicles to deter theft and to facilitate easy recovery of the vehicle if it is indeed stolen.

Alberta does not have vast case law to guide the advice related to GPS tracking, but the following are best practices. If a company is placing GPS on a company vehicle for performance measurement purposes, it needs to advise the employee. If the company is going

to be using GPS monitoring as part of a suite of information for gauging and evaluating efficiency of work an employee must be advised of such in advance. If GPS information will be used to detect misconduct the company must have reasonable grounds to suspect there is misconduct and use the GPS to confirm it, rather than simply snooping hoping to find something to support a hunch.

The Office of the Privacy Commissioner of Canada has stated “Employers must find ways to weed out bad employees without shattering the dignity and privacy right of the good employees – who make up the vast majority of the workforce.”¹²

7. Chapter 7: Testimony Evidence

The most common source of evidence in a workplace investigation comes from interviews with witnesses and parties to the investigation. This evidence is called testimony evidence. Although complainants should always provide their complaints in writing, they should also be interviewed to ensure that the investigator fully understands the complaint and has an opportunity to probe for further information, explore potential inconsistencies, and assess the credibility of the complainant. A respondent will also need to provide a written response to a complaint, but they too should be interviewed to ensure that their side of the issue is fully explored, provide additional insight into the situation, identify any inconsistencies and assess the credibility of the respondent.

What to Record in an Interview?

What notes should an investigator make during the interview what information should the interviewer capture? It would seem obvious that they would record answers given by the interviewee to the questions asked. Later in this book we will discuss interview questions and how to craft effective questions.

When conducting an interview, the investigator should record only what is said by the person and note any direct observations e.g. *complainant is crying, witness is tapping fingers on table*. The interviewer should not write down any conclusions in their notes or make personal commentary e.g. *this guy is obviously lying, this witness is stupid, the complainant is fake crying*. Individuals who were interviewed may request to view an interviewer's notes and/

or the notes may become court documents. Conclusions or personal commentary in the notes will undermine the investigator's professionalism and credibility.

The interviewer strives to capture the facts of the situation. Remember that facts are evidence, and opinions are not. Whether they are the opinions of the complainant, witness, respondent, or investigator, they can be noted, but these opinions should not be confused with fact. The best evidence collected in an interview is what people have personally seen, heard or experienced. An investigator does not want to accept second-hand information – they must get to the source! What this means is that if a witness says they “heard” something, the investigator should find out who said it and then interview that person. It is not sufficient to take the witness's word for it.

Formal Written Statements

Sometimes a witness will be asked to write out a formal statement of what they saw, heard, or experienced rather than be interviewed. This saves time because the investigator does not then need to interview the person and can simply read through the account. However, if there is ambiguity in what the person has written the investigator may have follow up questions which will require an interview. If the investigator has concerns with regard to the authenticity of a witness statement, i.e., they are concerned that the witness did not write the statement, they would be better to conduct an in-person investigative interview. Another reason to conduct an in-person interview is if a witness does not express themselves well in writing. If a witness is not sufficiently fluent in the language that the interviewer will use, there is the option to interview a witness with the assistance of a translator.

Sometimes organizations have a requirement to immediately capture the details of a workplace incident in an incident report. This is common when there is a safety component to the incident or security has attended the incident. These reports should be retained as evidence.

Credibility

When an investigator is gathering testimonial evidence, they will seek to establish whether each interviewee is credible. In a workplace investigation the investigator is evaluating credibility on the lesser legal standard of the “Balance of Probabilities.” The Investigator asks themselves “would a reasonable person believe this interviewee?” Do they have direct knowledge of the events or is it second or third hand knowledge? Is there any type of relationship between the parties that the investigator needs to be aware of? Who provided the name of the witness? Did it come directly from the complainant or respondent? Did it come from a supervisor or another witness? Did the name come from a credible person? All of these things must be kept in mind when interviewing.

Indicators of Credibility

When looking at the credibility of a witness the investigator will look at multiple sources of evidence to establish credibility.

- Can one verify what the person is saying with other evidence? Can they back up their story? If someone says that they have “hundreds of offensive emails” can they really produce hundreds of offensive emails or is that an exaggeration? Can they produce any emails? An investigator should not be afraid to challenge interviewees to provide evidence of their claims.
- Are there inconsistencies in their own accounts? The investigator will need to dig into inconsistencies by asking more questions e.g. “Earlier you mentioned that you saw the incident, but now you are not clear who was involved. Please help me understand that.”
- Are there any earlier written accounts that do not match what a witness is now saying? Has the story changed from when they wrote a witness statement, complaint, incident report or had a conversation with a supervisor?
- An investigator should ask for a timeline of events and then ask

about specific events out of the timeline to see if the story changes at all.

An investigator may be tempted to go with their “gut feeling” with regard to a witness’s credibility, however the more sources of evidence to back up testimony the stronger the case will be. If an investigator is doubtful of someone’s credibility, they should be mindful of the following points:

- Investigators should be curious. If something does not seem right the investigator should keep asking questions until they are satisfied that they have a clear picture of the person’s credibility.
- Any investigator must not be fooled by common “lie detection” beliefs e.g. if the person does not maintain eye contact they are lying, or if they fidget they are making up a story. People react differently to stressors. They may be nervous or there may be cultural differences that need to be taken into account.

Criteria for Evaluating Evidence: Relevance, Admissibility, Privilege

Relevance: An investigator must ensure that evidence used is relevant to the investigation; that it either supports or refutes the allegations. They should consider evidence that pertains to the issue – it may not directly address the question if something happened or did not happen but may support a pattern or treatment of a person or group.

- Patterns of behaviour can make seemingly inconsequential information or actions relevant because they establish or refute a pattern of behaviour.
- Multiple examples of the same behaviour toward other people in the organization may establish a pattern that is relevant to the investigation. If the investigator looks at one event and thinks that is not important, they may change their mind when

it is coupled with two, three or four events that are all the same. That one event now becomes part of a pattern that is relevant.

- If other witness experienced harassment and discrimination it does not automatically mean that the complainant also experienced this, but it demonstrates a pattern of behaviour. This is indirect evidence that will be taken into account on the balance of probabilities.
- Similar facts must actually be similar. If someone was accused of stealing a pen and accused of stealing \$10,000 these are not really similar. They are both thefts, but the degree of theft is very different – many people have “stolen” a pen from their workplace but not many have stolen \$10,000.
- “Character evidence” provided by a witness is an opinion about someone and may be tainted. Investigators should look for actions and behaviours not “traits” of the person. For example, a trait is that someone is “sneaky” or “sleezy” – this characterization not really helpful. The investigator should continue to probe the interviewee about what they mean by sneaky or sleezy; what does the person do that would lead the witness to believe this about the person.
-

Admissibility: Most workplace investigators are HR professionals and not lawyers, but one hopes that if a workplace issue was investigated and went to arbitration or before the court the evidence collected through the investigation would be considered admissible. Investigators make their findings based on evidence; and should strive for admissible evidence. Was the evidence collected in the appropriate manner? Can the investigation show a chain of possession of evidence, detailing who was in possession of the evidence and when? Original documentation should be used and where possible the investigator should ensure its authenticity. It is also important that facts, not opinions, are recorded. Unless a witness is a recognized expert their opinion means little. The

investigator cannot rely on gossip, second-hand knowledge, hearsay or other secondary sources.¹

Privilege: When a lawyer provides advice to a client on a legal matter that information is privileged and may not be used in court. The investigator's job is to investigate the matter at hand. If the investigator is a lawyer they will not be providing advice to the employer so will not be invoking privilege.

Investigators are normally paid by the employer and thus the investigation report at the end of the investigation, including the findings, is the property of the employer. Depending upon the policy in place the employer may not be obligated to share the investigation report. In a unionized workplace there may be an agreement between the union and employer to share any investigation report with the union.

Can I get sued for an investigation?

An HR employee acting as an investigator looking into a workplace incident may have the lingering question of “can I be sued for defamation if a report makes comments on someone’s credibility or character?” If the investigation was conducted and report written in good faith with no malice, then the investigator can rely upon the right of “Qualified Privilege”.

- *Qualified Privilege is usually used in cases where the person communicating the statement has a duty or interest to make the statement. The person making the statement must show that he or she has made the statement in good faith, believing it to be true and that the statement was made without malice*².

1. Queens University Industrial Relations Centre 2015, 12

2. Murray 2021, Chapter 8

What this means is that the investigation report was created without malice and therefore the creator may not be sued for defamation. An investigator does not need to be a lawyer to have the defense of qualified privilege. If an HR representative conducts the investigation and the respondent is upset with either the results of the investigation or feels that comments made defame their character, if the report was not created in malice, the HR representative cannot be sued. For example, if an investigator writes in the report that they do not find someone to be credible and state well-reasoned findings for this assessment, they cannot be sued.

8. Chapter 8: Notification of the Parties

Parties involved in the investigation should be notified that an investigation will be taking place. The first step is to ensure that all the people who will be questioned as part of the investigation have been identified. As the investigation unfolds additional participants may be identified and the investigator will go through the same notification process.

Parties to the Investigation

Complainant= the person(s) who has/have made a complaint or has/have accused someone of a wrongdoing. In some cases, this will be the organization itself.

A complainant may be another employee as is common with harassment, discrimination, and bullying complaints. The complainant may also be the organization in cases of misconduct, which will be represented by the supervisor or manager. Managers and supervisors may not view themselves as “complainants” as they will simply consider themselves a manager informing human resources of suspected wrongdoing. For the purposes of this text the organization representative – whether it be a supervisor, manager, or human resources – will be viewed as either the complainant or witness in the investigative process.

The investigator must clarify in the policies or procedures if the organization is to be considered the complainant, with the supervisors, manager acting as witnesses; or whether the supervisor, manager or HR is considered the complainant. The complainant should be clearly identified before the investigation

begins. Sometimes supervisors, managers or HR personnel do not feel comfortable being the complainant and would prefer that the organization take that role and they act as witnesses. This needs to be ironed out prior to the investigation commencing.

If there is more than one complainant and the complaints are not related to the same issue, a separate investigation may be required for each complaint. This is more common in cases of discrimination or harassment. If there is more than one complainant a single investigation can be completed if the complaints are related to the same issue.

Respondent= the person(s) whom have had a complaint(s) made against them.

Occasionally there is more than one respondent in a complaint. If the issues are related the investigator may conduct one investigation, but where the issues are different there may need to be separate investigations for each unique issue.

Witness = “someone who sees, knows or vouches for something.”¹

An investigator may have a list of witnesses provided to them based upon the complaint. If the complaint is an individual(s) they may provide a list of witnesses in the original complaint. If the complainant is the organization itself, there may already be a list of witnesses that a supervisor or manager identifies. In the event that the organization is the complainant, the supervisor or manager may also be a witness to the issue.

Witnesses may have seen firsthand or overheard the incident, or they may have responsibility for something that is relevant to a complaint (for instance, in the case of suspected fraudulent expense claims, the person responsible for processing those claims may be a helpful witness).

As the investigator conducts their investigation the respondent may identify other people, they wish the investigator to speak to who may be a witness. In addition, the investigator themselves may

1. Garner 2014, 1838

identify people that they need to speak to based on the testimony of the interviewees.

The investigator is not required to interview every witness put forth by the complainant, or respondent. However, the investigator should ensure that they interview critical witnesses, that is those who have crucial evidence. Failure to interview critical witness is an error in evidence collection, and a breach of procedural fairness.

Reaching out to the Parties

Some people may be shocked or dismayed that they are being questioned as part of an investigation and each person will react differently. It is safe to say that being questioned about a workplace incident is not part of an employee's normal working day so receiving a notice to participate in an investigation will cause varied reactions from fear to anger. For this reason, the process of notifying complainants, respondents and witnesses must be well thought out and orchestrated carefully. Each organization should have a procedure for notifying the parties to an investigation, which will vary depending upon the organization.

The following should be considered when preparing to notify the parties of an investigation:

Timing

The investigator will need to plan the timing of the notifications in a manner that is fair and equitable to all parties. This can be a challenge. In the case of discrimination or harassment claims the complainant may know about the complaint weeks before the respondent is made aware of it. This may seem unfair to the respondent, but the investigator must follow the policies or procedures of the organization which may require certain activities be completed before the respondent is notified. For instance, there may be a requirement for due diligence regarding fact finding and acceptance of a complaint. Similarly, if there has been misconduct

suspected by a manager, a complaint may be made to human resources who will need some time to determine if the matter will be investigated. In either case the respondent (employee) could potentially feel a false sense of security since nothing is happening or may be upset that nothing appears to be happening right away.

Knowing the Case to be Met

A fundamental principle of any investigation is telling the respondent what they have been accused of. This is called “knowing the case to be met.” It is a violation of natural justice to deny the person knowledge of what they are being accused. Investigators may want to take the tactic of ambushing the person with the complaint in the investigative interview to get their “real” answers. These investigators believe that if a respondent has time to prepare for the interview, they will somehow distort their answers and “get out of” answering truthfully. This is rarely the case and the courts and arbitrators have been critical of investigators who have used this tactic. In very rare cases the courts have permitted investigators to interview a respondent without first providing details of what the person has been accused of. This may happen in cases where evidence could potentially be destroyed, or the integrity of the investigation will be negatively impacted and the investigation compromised if the person is notified in advance. This is a high standard to be met and these cases will be extremely limited. It is normal to provide the respondent with a copy of the complaint in advance of the interview.

A Copy of the Complaint

Depending upon the workplace policies a copy of the complaint or a redacted version of the complaint will be provided to the respondent. Items that are extraneous, inflammatory, or just nasty for the sake of being nasty, may be removed as they do not add to the complaint and may make the situation worse. Remember, at the end of the investigation if there are no findings of wrongdoing, the individuals may be asked to continue to work together. The complaint may be redacted or summarized; but not to the point

where the respondent does not have enough details to respond to the complaints against them.

The Respondent is not required to see the full witness statements in order to meet the legal obligation to conduct a fair and unbiased investigation.² This is true in both misconduct and discrimination and harassment investigations.

The respondent must be given reasonable time to respond to the allegations against them. An investigator cannot simply give a respondent the complaint and then immediately question them. The investigator must give them time to prepare a response and seek advice if they wish to.

Witnesses do not receive a copy of the complaint or details of the suspected misconduct nor are they entitled to it. They are simply notified that there is an investigation in which they may have some information on.

Representation or Accompaniment

Who can accompany the complainant and/or respondent to the investigative interview will depend on the organizational policies and procedures. Below are listed some of the potential individuals that a complainant or respondent could request be in attendance during the investigative interview process:

Legal Counsel

Attendance of legal counsel to a workplace investigative interview may or may not be permitted under the organization's policies. If the organization allows for legal counsel to attend the counsel is limited to supporting their client, not answering questions for them or intervening in the investigative process.

Individuals may state that it is their "right" to bring legal counsel. The right to legal counsel comes from the Canadian Charter or Rights and Freedoms, but these rights are only in very specific situations as follows:

2. Clarke v Syncrude Canada 2014

- There must be conduct for which the person being questioned is arrested and detained.
- Consideration must be given to where a private person can “arrest and detain.”³

It would be a unique situation where an employee is being “arrested and detained” thus normally a person cannot invoke the right to legal counsel in a workplace investigative interview. If someone is being rather difficult on this point, you as the investigator can simply let them know that they have no right to legal counsel and that they are free to leave at any time during the interview. This will resolve any belief that the person is being “detained” and thus is not entitled to a lawyer.

Support People

If the organization permits an employee to bring a support person to an investigative interview, the investigator will want to remind the third party that they are there for support not to answer the questions. If the third party is interrupting or obstructing the interview you can ask the interviewee if they wish to continue. An investigator can caution a third party that should they obstruct the interview the investigator will stop the interview and it will continue at an alternative time at which the third party may or may not be permitted. Any third party attending an interview should be advised of their duty of confidentiality in the process.

Union Representation

In a unionized workplace union representation must always be permitted to attend the investigative interviews. The union representative is there to support the interviewee, whether they are the complainant, respondent or witnesses, and ensure that any requirement of the respective collective agreement is met. The union representative is not to answer the questions and cannot interfere with the investigation. They may make notes, ask for

clarification, or even ask for a recess with the employee. If, however, a question has been asked by the investigator a recess should only be allowed after the interviewee answers the question. This will remove any speculation that the union representative coached or gave the interviewee the “answers” to a question.

Other Supports

Depending upon the complaint type both the respondent and complainant or the witnesses may need support and guidance. In a unionized environment support to employees is provided by the union. However, if organization size permits it may be helpful to have an HR person assigned to the complainant, respondent and/or witnesses to be a liaison through the process and assist in communication with the investigator whether internal or external. This provides support for all the parties involved.

Interim Measures

Once notification of an investigation has been provided to the parties, the “cat is out of the bag” as is said. It is not uncommon for respondents to feel anger, fear or confusion when they find out that they have been named in an investigation. Sometimes complainants may feel vulnerable now that the complaint has come to light. Either party may fear reprisals or retaliation. Investigators should consider whether interim measures may be required either at the time of notification of the complaint or at another time during the investigation

Interim measures are temporary arrangements that are adopted by the organization to minimize potential interaction of the parties or provide a safe and comfortable working environment.

Interim measures may include:

- Changing supervision
- Suspension with pay pending the investigation outcome

- Change in work location
- Change in work duties
- Other measures to reduce potential negative/inappropriate interactions of the parties

At the time of a complaint a complainant may not think there is a need for interim measures, but things may change. It may also be the respondent who feels that interim measures are required. Employers need to be open to changing working conditions throughout the investigative process at any point in time if any of the parties indicate that they feel uncomfortable, unsafe, or threatened. Normally the individual requesting the interim measures is subject to the change, but that may not always be the case. The organization should minimize the impact to the parties, other employees and the organization itself.

Interim measures should not be viewed as punitive; they are temporary arrangements to minimize the discomfort of both parties. Interim measures will require a change to working arrangements, and change is difficult for most people. HR may be placed in a difficult position where the complainant feels that the respondent should be “inconvenienced” with interim measures and then the respondent feels that since the complainant made the complaint they should be “inconvenienced by interim measures.” The organization will want to implement interim measures that make sense and are least disruptive overall.

The organization should also be sensitive to the impression interim measure give to other people. If a manager who is accused of harassing a subordinate is moved to working from home or placed on paid suspension pending the outcome of the investigation, people in the department may chat or gossip about the reasons for this change. The organization will want to quash this type of gossip while not revealing any confidential information. Those not involved in the investigation should not even know that there is an investigation going on.

The organization must deal with interim measures in a sensitive

and ethical way on a case-by-case basis. There is no one size fits all interim measure. The organization should work with the person being placed on interim measure to find a reasonable situation and reasonable communication about what is happening. Saying that someone is on “sick leave”, when they have been asked to work from home as an interim measure, is not truthful and the person may not appreciate the lie.

Sometimes interim measures may require a complainant or respondent to be removed from the workplace. They are then asked to work from home where possible or placed on unpaid suspension until the end of the investigation. Common law decisions have determined that an employer does not have the right to impose unpaid suspensions without an agreement between the employee and the employer or an accepted practice to the contrary.⁴

According to the Supreme Court of Canada suspensions with pay must meet all of the following requirements:

- The action must be taken to protect a legitimate business interest.
- The action must be made in good faith.
- The interruption in the employee's work must be temporary, for a “relatively short period” and
- The suspension generally must be with pay.⁵

Suspensions must be deemed to be required to support a fair investigation and should not be “until further notice” with an indefinite duration. The employee also needs to be advised of the reason for the suspension.

For complaints of sexual harassment, it is prudent to immediately remove one of the parties upon receiving a complaint or knowledge of the situation. It is recommended that the alleged wrongdoer be

4. Shearer 2017, 46

5. Bhasin V Hrynew 2014, Chapter 9

suspended with pay pending the completion of the investigation. This is to reduce any potential continued harm. Witnesses may also feel that they require interim measures for their participation in an investigation which may potentially bring forth reprisals. These requests should also be dealt with on a case-by-case basis.

Notifying the Parties

All participants in an investigation should receive written notice that they are being called for questioning. If the organization is using an external investigator, it is recommended to have someone who knows or is familiar with the parties contact them to advise them of the investigation. This could be a manager or an HR practitioner within the organization. In any case, whoever notifies the parties will want to provide enough information to help each person participating in the investigation understand the process, but not so much information that the person is overwhelmed.

It is poor practice to simply email a notification letter and information package to the respondent or complainant without any in-person communication. It can be very upsetting to receive notification of an investigation. The person may have immediate questions that they need answered that cannot be addressed in an email. In addition, policies and procedures may be confusing and difficult for employees to understand and they would benefit from an in-person explanation.

For this reason, it is preferable to have a face-to-face meeting to review the complaint and/or the investigation process (especially for the respondent) and in that way the investigator can answer questions that they may have in a timely way. Witnesses will not receive the same level of information as the complainant and respondent so may not require as lengthy a meeting, or may not require a face-to-face meeting at all, but someone should speak with the witness to explain the process and answer questions.

The meeting can be followed up with an information package summarizing all the information discussed in the initial notification meeting. This information package can be provided in the meeting or immediately after. In the event that an external investigator is obtained an HR person should be present for the initial notification meeting. If the workplace is unionized a union representative must be present at the notification meeting.

Below are a few possible notification scenarios for the complainant and respondent:

Scenario #1

The complainant and respondent each receive a written meeting notification that an investigation is taking place, stating the nature of the investigation. If the workplace is unionized the union will also be copied on the meeting notification.

The complainant and respondent meet separately with the investigator and at that time are provided with the applicable policies, procedures, and a copy of the complaint as well as next steps in the investigation.

Scenario #2

The complainant and respondent each receive a written meeting notification than an investigation is taking place, stating the nature of the complaint. If the workplace is unionized the union will also be copied on the meeting notification. The notification will provide a copy of the applicable policies, procedures, and a copy of the complaint.

The complainant and respondent meet separately with the investigator and review materials provided for in the notification package.

Scenario #3

The complainant and respondent each receive a written meeting notification. If the workplace is unionized the union will also be copied on the meeting notification. Nothing is shared in the notification it simply states that their presence is requested at a meeting. Some organizations will state that it is a meeting

surrounding a workplace investigation but will not state the nature of the investigation.

The complainant and respondent meet separately with the investigator and review the policy, procedures, and complaint as well as next steps in the investigation at the face-to-face meeting.

The difference between the three scenarios is when a copy of applicable policies, procedures and a copy of the complaint are provided. The organization's investigation procedures will lay out how notification of the parties occurs, which may be completely different than the scenarios above. It is always advisable to review the investigation procedure.

9. Chapter 9: Interview Openings

Whether a seasoned investigator, or someone doing their first interview of employees surrounding a complaint, there will be some anxiousness. A way for an investigator to minimize any nerves is to be prepared and have a plan. This plan will include drafting a standard “opening” to the investigative interview to ensure consistency and that all important points are covered. The opening provides an opportunity to review the process and cover “housekeeping details.” It is not a recap of the complaint, nor is it a summary of the situation. The less said by the investigator about the details of the incident under investigation, the better.

The opening provides key information about the interview process, roles of the parties and organizational requirements. A standard opening should be delivered with sincerity and interest, ensuring a professional start to the investigation and hopefully alleviating concerns the interviewee may have.

Preparing a standard interview “opening”

A standard “opening” to an investigation will cover the following items:

1. Introductions
2. Rapport Building
3. Reviewing the Purpose of the Interviews
4. Ground Rules
5. Confidentiality
6. Retaliation

1) Introductions of parties

Once everyone is settled in the room the investigator should take the lead and introduce themselves, then take the time to introduce anyone else who is present. This may include note takers or members of the HR team.

The investigator will then ask for the names and roles of anyone who has accompanied the interviewee including any legal representatives, support people or union representatives.

2) Rapport building

As the interviewee may be nervous, the investigator should take some time to put the person at ease. This should not be a long-drawn-out process, which may have the opposite effect of making the person more anxious, but a nice segue to the business at hand.

In an effort to make interviewees more comfortable an investigator may be tempted to give them assurances like “you will just get through this, and everything will be fine,” “Don’t be nervous this is just a formality,” “You are going to be just fine don’t worry”. The investigator wants the person to be at ease, but the investigator cannot provide these types of assurances. This kind of assurance could send a contradictory message that the interviewee is relying upon. In the event that the person is disciplined or terminated they may come back at the investigator who gave them false assurances.

The investigator can be empathetic and make statements such as “I understand that this is a stressful process and appreciate your candor.” This is simply acknowledging their stress and showing appreciation for their honesty about their state of mind.

3) Purpose

Depending on the type of notification process in the organization and the type of interview, the interviewee may or may not know the reason for the interview. The complainant and respondent should have been provided much more information than a witness. Witnesses may know very little as to the circumstances surrounding the investigation.

As discussed in the last chapter, there may also be the extraordinary times in which a respondent has not been provided

notification and explanation of the meeting if prior knowledge of the investigation would seriously jeopardize the results.

The investigator should explain the process and how the interview is going to proceed, ensuring that it follows the organization's policies and procedures. It is important to have a consistent opening to all the interviews where you explain who you are, why the person is being interviewed and what the process is. This will ensure that no detail is missed in any of the interviews and consistency is maintained.

As mentioned previously, the investigator will not review the complaint, provide details of the incident or a summary of the case during the opening. This is especially important for witnesses; the investigator will not want to provide witnesses with any more information than is required for the interview.

Witnesses should also be advised at the onset that they will not be privy to any outcome of the investigation. They will simply be advised when the investigation is complete, they will not be provided any further details of the outcome i.e., any discipline that is meted out.

It is also important to explain the role of the investigator. It should be highlighted that the investigator will be acting as a neutral party to determine the facts of the situation and provide a report to management as to what happened. If the investigator is an HR employee of the organization, it is still possible to be neutral as they have no vested interest in the outcome.

4) Establishing ground rules

The investigator may want to provide timelines as to how long the investigation will go. This helps the interviewee understand how long it may be before the investigation will conclude. This is particularly important for the complainant and respondent who may be working under interim measures or are otherwise impacted by the investigation process.

It should be made clear to the individuals that there are no “off the record” comments in a workplace investigation. Everything they share will be captured in either the investigative notes or on a

recording. It is prudent to advise the interviewee that anything they share may be used in the organization's investigation. Sometimes the interviewee will be ask the investigator if the contents of their interview will be shared with others. The answer to this question is "yes".

Sometimes interviewees will want to tell the investigator something, but not have their name attached to it, or they do not want the complainant or respondent to know that they said it. An investigator must caution the person that they can offer no such protection, there are no anonymous comments in an investigation.

To reduce angst an investigator can identify witnesses as numbers i.e. Witness #1 in the investigative report to reduce identification of statements. This means that the investigator retains the names and identification of the witness numbers. Complainants and respondents are not normally privy to the report, but should the matter go to court or arbitration they will have access to the report and the witness statements. Despite witnesses being numbered, depending on the statement a complainant or respondent may be able to identify the witness based on the circumstances.

It is also prudent to explain the role of support people, legal representatives and union representatives in the interview. These individuals are there to support the interviewee but not to coach or answer questions for the individual.

The investigator should advise the interviewee that they are expected to answer the questions as fully as possible describing what they observed or heard. The goal of the interview is to have interviewees detail what they have personally experienced (seen, heard etc.) not what others said happened. The comments should all be from first perspective describing what they themselves have experienced.

Depending upon the organization's policies and procedures, some investigators will create an audio recording of the interview. It is best practice to seek the person's consent even though it is not required. Having consent makes it easier to use the recording as

evidence later if required. There are benefits and drawbacks to recording interviews; it provides an undisputed record of what was said, but it may also inhibit interviewees' willingness to talk.

Occasionally interviewees will not be willing to participate in the investigation and state that up front. These types of challenges will be discussed in later chapters; however, the investigator should still complete their opening statements to ensure that the interviewee hears all of the information.

5) Confidentiality

If the interviewee has received a notification letter or an information package, they will be familiar with the confidentiality requirements surrounding the investigative process. That said, the interviewee may not have read the information or may have disregarded it. It is important to review the information regarding confidentiality again in the interview.

Some employers may also want the individual to sign a confidentiality statement in advance of the interview. This should be explained to the interviewee, and they should be given time to read the statement prior to signing.

If a unionized organization requires a confidentiality statement to be signed by a union member, ensure that the union is aware of the confidentiality statement and has agreed, otherwise it will be difficult to have the employee sign. If the union objects, it may derail the interview. Nothing about the interview process should be a surprise for the union.

Occasionally an interviewee will question why they must maintain confidentiality about the process, when the investigator will share the results of the investigation with management. The investigator's role is to collect, synthesize and communicate the evidence and findings to the employer. Information received by the investigator is not held to the same standard of confidentiality as the interviewee, since it is accepted that what is shared with the investigator will be passed on to management. However, the content of the interviews must be limited to those who have a need to know in order to deal with the issue. The information collected by the investigator

must not be broadly shared in the organization. In addition, unless required to do so by organizational policy and/or law, the investigator will not provide their investigative notes of the interview to others, only the final report.

6) Retaliation

As either a member of HR or a representative of the employer, the investigator should emphasize that a person who participates in the investigative process cannot retaliate against others or be subjected to retaliation because they:

- make a complaint or identify misconduct
- are named in a complaint or identified in misconduct
- give evidence or help in a complaint, or might give evidence or help

The investigator should provide a contact name in human resources (or themselves) that the interviewee can contact in the event that they experience retaliation.

Retaliation may be overt, for example a manager punishes someone who they think might file a complaint against the employer, or an employee threatens someone who is a witness to misconduct. It can also be far less obvious and may comprise things such as excluding certain employees, gossip or general bad treatment.

How does someone know when they are experiencing retaliation? The British Columbia Human Rights Tribunal has created a three-fold test to determine if retaliation is occurring. Retaliation must contain all three of the following factors:

1. *Bad Treatment- The person must be subjected to bad treatment from others; bad treatment is conduct like:*
 - discharge (firing)
 - suspension
 - intimidation
 - excluding
 - coercing

- *imposing a penalty*
- *denying a right or benefit*

Retaliation may take many forms the above list is not exhaustive.

2. Respondent knowledge—At the time of the bad treatment, the perpetrator of the retaliation must know that the victim:

- *made a complaint or might make a complaint*
- *was named in a complaint or might be named in a complaint*
- *gave evidence or helped in a complaint, or might give evidence or help*
- *took part or might take part in an inquiry under the Code.*
- **Examples:**

The respondent was at the hearing where the complainant testified.

The complainant told the respondent: “I am going to file a complaint.” Or, “You discriminated against me.”

A victim of retaliation must prove that the perpetrator knows of the victim's participation in the investigative process. If the perpetrator did not know that the victim has participated in the investigative process, then the behaviour is likely not retaliation due to the investigation.

3. *Bad treatment because of the complaint or inquiry-* Not all bad treatment is retaliation. A complainant must show the bad treatment is retaliation. A complainant can prove this in two ways.

- *First, they can prove that the respondent intended to retaliate.*
- *Second, they can prove that a reasonable complainant would see the bad treatment as retaliation, if they knew all the facts.*

Example:

An employee files a complaint. They broke a workplace

rule. The employer disciplines them. This is not enough to show the discipline is retaliation.

*The employee shows the employer wouldn't usually discipline someone for breaking the rule. This could show retaliation.*¹

In essence what this does is differentiates retaliation due to a workplace investigation from other bad behaviour in the workplace. There must be a direct connection to the workplace investigation and the bad behaviour.

10. Chapter 10: The Interview

Once notifications have been sent out and the investigator has prepared their opening statement and questions, the interview process can begin. It may be a formal investigative interview that requires extensive preparation, or it may be a more informal interview which can be conducted shortly after an incident.

The interview

Ideally, investigative interviews should be conducted face-to-face. This allows the investigator to meet the person and develop some rapport. It also enables the investigator to watch for visual clues during the interview that might indicate that the person is uncomfortable, does not understand a question or other body language and facial signals that can be helpful in conducting the interview.

If face-to-face is not possible then doing the interview over video chat may be considered. Conducting a video interview using tools such as Skype, Teams, or Google Meet is a good alternative to face-to-face interviews.

Telephone interviews may be conducted if face-to-face or video chat is not possible, remembering that the participant may have support people accompany them to the interview and the arrangements must allow for their attendance. Obviously, the interviewer will not have the benefit of observing the person's body language or facial expressions with a telephone interview.

The investigator should ask if there are any accommodation needs required in advance of the interview. This could be a variety of accommodations ranging from needing an interpreter to using a meeting room which is accessible for those with mobility challenges.

Interview vs. Interrogation

Using the PEACE model of interviewing, an interview is a “a planned, cooperative, and voluntary two-way conversation versus an interrogation. An interrogation is a planned, confrontational and accusatory conversation with a suspect. Interrogations are designed to fairly and impartially collect truthful information on what the suspect did, and through direct questioning of the suspect under conditions controlled by the investigator. The goal of an interrogation is to have the suspect provide an admission of facts and a confession of guilt or provide a story the investigator can prove as false.”¹

In workplace investigations the investigator will conduct an interview, not an interrogation. Employees have a relationship with the employer, and the investigators wants to explore the situation in a manner that respects all the parties in the process and allows each party to maintain their dignity. When starting the investigation process, it is important to remember that not every investigation will have findings of misconduct or wrongdoing.

Interview Steps

Below are the standard steps in an interview. This is simply a suggested template; the investigator may want to adapt and alter the steps in the investigation to suit the situation. Ideally the investigation will begin with interviewing the complainant, after which the investigator may be required to gather additional evidence or information. The next individual to be interviewed is normally the respondent and lastly witnesses.

1. Alberta Ministry of Justice and Solicitor General 2012, 186

- 1) Standard Opening
- 2) Housekeeping Questions
- 3) Investigative Questions
- 4) Interview Closing
- 5) Review Interview Notes
- 6) Interviewee signs off on Notes

1. The Standard Opening. The investigator will deliver a standard opening for the various parties to the investigation, whether it be complainant, respondent, or witness. The opening will review the following:

- Introduction of parties
- Rapport building
- Purpose
- Establishing ground rules
- Confidentiality
- Retaliation

2. Housekeeping Questions. These questions are designed to help the interviewee to become more comfortable and help the person to get talking. They are easily answered and do not require much effort. Housekeeping questions may include questions such as confirming the participant's name, their job title, and length of time working for the employer.

3. Investigative Questions. These questions tend to be open-ended and are designed to get to the issues. These questions will focus on what the person saw, heard or experienced firsthand. If the interviewee has previously provided a written statement, the investigator may ask for them to “re-tell” what happened and note if there are any variances from an original written statement. It is important for the interviewer to let the person talk and practice good active listening skills (nodding the head, smile, etc.). During this step the investigator may identify further questions or additional information that they want to ask about but will attempt

to not interrupt the individual speaking. The investigator should wait until a natural break in the dialogue to ask probing or additional questions that have come to mind.

Listening is of the utmost importance. The investigator must not make assumptions and should ensure that the interviewee provides the required details. If something is missed the investigator can circle back obtain the required information. They should not be afraid to ask an interviewee to repeat something or clarify an answer.

4. Interview Closing. The investigator should close off by asking the interviewee if they have anything else they would like to share, or if they have any questions. They may be surprised what an interviewee will share; it could be something the interviewer completely overlooked. The investigator can then thank the individual for their time and advise them that should additional information be needed they will be contacted for an additional interview or conversation. The interviewee should be provided contact information for the investigator should they want to add anything to the information provided in the interview. The investigator will then advise the interviewee that they will be required to review the notes that the investigator has taken and sign off on their content.

5. Review the Interview Notes. At the end of an interview, the interview notes, whether typed or handwritten, should be shared with the interviewee. The person should be given the opportunity to read over the notes and make any corrections or edits that they feel are required before they sign off that the notes are an accurate description of their responses. The interviewer needs to advise the interviewee that any edits or changes may be noted by the investigator. This protects the original text from variation. If the person reads their statements and then regrets making the statement and wants to change it after the fact the interviewer can allow them to change the statement but note the original text and what the person changed.

6. Interviewee Signs Off on the Notes. The investigator should include the following statement at the bottom of the notes:

“The above X-page statement is given freely and is a true and accurate account of the events regarding the incident I observed. I have read the statement fully prior to signing”

Depending upon the organization’s policies and procedures the investigator may be required to provide a copy of the statement to the interviewee or the union if applicable. Depending upon the organization most investigators will also be required to sign the statement.

More on Interview Notes

An investigator should take notes during the interview; however, it is really up to them how they choose to take notes. Some investigators will use a note pad with removable pages, while others will prefer a bound notebook to reduce any possibility of pages being removed. Some investigators prefer to use a laptop on which they type their notes during the interview. This is ideal for those who can type quickly and accurately.

Whichever method of note taking is used, the investigator needs to capture what the person said, not what the investigator thought that the person said. Notes should be written that the average person should be able to understand what occurred in the investigation. The investigator should try to avoid using their own form of shorthand, using abbreviations or other time-saving shortcuts. It is important that the investigator does not exaggerate or interpret any statements; they are writing out exactly what the interviewee said. It is vital that the investigator NOT put their own impressions, opinions or comments into the notes. The investigator should not have comments in the margin that states their opinion such as “this person is obviously lying” or “cannot trust what this person says.”

An investigator may make “memos to file” which are personal notes as to what was changed by an interviewee. The memo to file does not get signed by the interviewee but is a personal note by the investigator, it may be written in first person or third person.

Complications with electronic notes

Using electronic notes complicates how the interviewee can review and sign off on the notes. When an investigator types their notes on to a laptop, they would then need to print a copy of the notes for the interviewee to sign. This may not be convenient depending upon the location of the interview. An alternative is that the investigator emails the notes to the interviewee, and the interviewee signs off that they agree, however what this means is that a copy of the investigation notes could potentially be altered and/or shared. This may have implications on the confidentiality of what was said in the interview. In the event that an investigator chose to email a copy of the notes, they should set the requirement for the notes to be permanently deleted by the interviewee once they have signed off, and obtain written confirmation from the interviewee that the notes have been permanently deleted and not retained.

The challenge of note-taking

There is of course a downside to either typing or writing notes during an investigation, that is that one can become so focused on writing that they do not listen to the responses and note any observations of the interviewee's demeanor. We normally tend to note what we think is important at the time which may unintentionally support a bias or preconceived notion. It is important that notes reflect the whole interview, not just bits and pieces that the investigator uses to support a preconceived idea.

Accuracy in notes is important, if the investigator has terrible typing, illegible handwriting or they are particularly slow, this may hamper the interview and reduce the effectiveness of the investigator. If the investigator is concerned that they will not be able to concentrate on the interview while writing notes and do

not want to record the interview, they can always have another investigator present to take detailed notes.

It is not uncommon for an interviewee to ask to keep a copy of the notes from their interview. This is dependent upon the organizational policy, procedure or statutory obligations (OH and S investigations for example). As noted above, when sharing notes from an interview there may be confidentiality considerations that need to be taken into account, for instance, how will the notes be stored and secured and kept confidential?

Recording Interviews

As mentioned briefly in the last chapter, an investigator may choose to make an audio recording of the interview, however, the investigator needs to be prepared to share the recording should the parties ask to hear it. Depending upon the policies and procedures of the workplace, a recording may be required to be shared with the individual who is being recorded. In some instances, they may hear the copy of the recording but are not permitted to retain a copy. That being said, it is difficult to maintain control of a recording when shared with witnesses or a party to the investigation, especially if the recording is in digital form. How would the investigator prevent someone from making an additional copy of the recording? As well should the matter proceed to arbitration or court the recording may be subpoenaed.

The employer's investigative policies and procedures will dictate if a recording is permissible, required or not permitted. If the policy or procedure indicates that all investigative interviews are recorded, then regardless if the interviewee objects, the employer has the right to record the interview. However, if someone is uncomfortable being recorded the investigator may find that the quality of interview is affected. Individuals may not feel comfortable expanding upon their answers or providing details knowing that

they are being recorded. Sometimes an interviewee will simply refuse to speak. These issues will be addressed later in this text.

There are benefits and drawbacks to making recordings of interviews. Recording an interview either through audio or video will keep a true and accurate record of what was said, how the party presented themselves and other body language. It also frees up the investigator from focusing on writing to maintain eye contact and more closely observe the interviewee and develop more rapport.

However, recording the investigation also makes for a tense atmosphere and people may not be as open and forthcoming as they would otherwise be. The investigator needs to understand the workplace environment and whether recording the interview will be acceptable or be viewed as heavy handed. Despite the policies, recording of interviews may not be well received and can cause an immediate lack of trust. Consistency is important; if the investigator records one interview, all interviews should be recorded.

There are additional administrative details with regards to audio or video recordings. The investigator will be required to ensure secure storage of the recording, as well as prevent copies of the recording from being released or distributed. The investigator may also be asked if the recording is going to be transcribed. If this is required it can be costly and tedious to do. Any transcription will need to be read and signed off by the interviewee to confirm that it captured accurately what was said.

Regardless of recording an interview or not, an investigator will still need to maintain a written/typed record of the interviewee's responses.

II. Chapter II: The Investigative Report

Depending upon the nature of the investigation there may be different requirements for reporting at its conclusion. In less formal investigations the conclusion of the investigation may be a meeting with human resources, the manager and investigator to discuss the findings. Findings are the conclusions that the investigator has made after looking into the incident; they are the outcome of the investigation. Findings in a less formal investigation may be captured in an email to management or they may be noted in an investigation file or employee file. It is recommended that some written record be made of the findings.

In a more formal investigation, there may be more rigorous reporting requirements. This may include a requirement for a formal report to be prepared at the end of the investigation that will be shared with management, human resources, and the union (if applicable). The investigative report will provide a summary of the investigation, an account of how the investigation was conducted, evidence provided and findings.

Investigative Reports

If we recall the objectives of the investigation.

- Determine what happened in respect to an incident.
- Determine who was involved in the incident.
- Determine the events surrounding the incident.
- Determine if there is evidence to support a claim of misconduct.
- Determine if there was a violation of company policy and

- procedures, a breach of compliance or a violation of the law.
- Complete a thorough and complete investigation that can withstand scrutiny.

The investigator's goal is to answer all of these questions; the who, what, where, when, how and possibly why questions. The investigative report captures this information and puts it into a concise format for the employer to review the results of the investigation. Depending upon the nature of the investigation the report may be a simple one-page email, the notes taken at a meeting or it may entail a comprehensive report. For the purposes of this text we will look at a more comprehensive report which can be edited or reduced by the investigator for the specific type of investigation conducted. The following is a typical report format. It is not an exhaustive format and can be altered to suit the type of investigation.

Report Format:

- 1.. Executive Summary
 - a. Mandate / Terms of Reference
 - b. Summary of Issue
 - c .Summary of Statement of Respondent's position
 - d. Summary of the Investigation Process
 - i. Documents Reviewed
 - ii. Witness list
 - iii. Physical Evidence Reviewed
 - e. Summary of Conclusion
2. Mandate Terms of Reference
3. Investigation process
4. Summary of Evidence
 - i .Documentary Evidence
 - ii. Physical Evidence
 - iii. Witness Evidence – including witness statements as appendices
5. Summary of Facts not in Dispute
6. Summary of Facts in Dispute

7. Analysis and Findings
 - i. Facts
 - ii. Definitions
 - iii. Power
 - iv. Ought to have known or Knew
 - v .Reasonable person standard
 - vi. Context
 - vii. Timelines
 - viii. Credibility
 - viii Past Practice
 - x. Extenuating Circumstances
8. Conclusion¹

1) Executive Summary

The executive summary is intended to provide highlights of the investigation for quick and easy analysis. It is a high-level summary of the entire investigation; normally one page and can be used to provide the core information in a short, concise format. It is a snapshot of the issue under investigation, the process and the results of the investigation. The finer detail of the issue and the investigation will be provided in the rest of the report. The executive summary includes the following elements:

1. Mandate / Terms of Reference – This is where the report reader is told of the objective of the investigation and the scope of the investigation. Basically, what was the investigator's purpose.
2. Summary of Issue – A brief summary of the issue(s) under investigation.
3. Summary of Statement of Respondent's position- This is the respondent's position on the issue. For example, do they deny participation in the issue, accept their participation in the issue or dispute the factors surrounding the issue? What is the

1. Queens University Industrial Relations Centre 2015, sec 6, 2

position the respondent has taken with regards to their involvement in the issue?

4. Summary of the Investigation Process- a high level summary of the investigation process taken.

- Documents Reviewed- a list of documentary evidence
- Witness list
- Physical Evidence Reviewed- a list of any physical evidence in the case

5. Summary of Conclusion- This is a short concise summary of the investigation findings.

2) Mandate or Terms of Reference

This part of the report clearly outlines what the scope of the investigation was. This is where the matter investigated is detailed. This is done to ensure that the investigative report focuses on the matter that the investigation was intended to explore, and there is no scope creep.

Sometimes scope creep happens in an investigation. For example, an HR employee is asked to investigate suspected theft of the cash float in one department and finds out that the whole cash management processes of the department is flawed. The investigator will want to limit themselves to the original purpose of the investigation but may in a separate document outside of the scope of the investigation detail their concerns about the cash management practices of the department.

As tempting as it may be to delve into other areas of misconduct or poor behavior, one should limit themselves to reporting on the investigation at hand. That does not mean that the investigator turns a blind eye to other misconduct, but they limit the report to the matter that was intended to be investigated. Other issues or misconduct that surface would be considered a separate matter and addressed through another investigation.

3) Investigative Process

In this section the investigator will walk the reader through the

process that was used in the investigation. Why is it important to detail the processes of the investigation? A description of the process will show that it was in accordance with any workplace policy or procedure. If questioned, this will also establish if the investigation was robust and thorough.

- Detail of the interview process – A summary of the investigation process
- Introduction and explanation of the process to the interviewees- The investigator should detail how they interviewed participants, including what was told to the participants at the beginning of the interview process. This is where it is valuable to have a documented standard opening that is modified depending on the party being interviewed. It is important to disclose what was stated to participants in the interview to establish that the process was an interview and not an interrogation and that no threats, coercion or false promises were used.
- Detail of union representation or other supports present (if applicable) – if the investigation is taking place in a unionized environment, it will be important to state if union representation was present, if an interviewee was entitled to union representation and it was not provided the investigation may be grieved.
- Review of confidentiality requirements – This should outline what confidentiality requirements were reviewed with the participants and that the provisions surrounding retaliation were also reviewed. Provide reference to any policies that directed the process.

4) Summary of Evidence– This section of the report is a listing of all pieces of evidence. This includes any documents, physical evidence, and witness evidence, including any written witness statements that have been provided. The investigator will provide a list of all documentary and physical evidence; and the witness evidence or

important statements will be detailed. Any witness statements or comments that have a direct impact on the findings should be noted here. This does not mean that the investigator provides a transcript of each and every interview, nor do they need to include the notes from the investigation, but they should provide a summary of key witness statements that the investigator will be relying upon. This may be a lengthy section as key witness statements may be detailed and numerous depending upon the investigation. Witness statements should be first-hand knowledge of what the witness has seen, heard or experienced.

- a. Documentary Evidence

- b. Physical Evidence

- c. Witness Evidence – including witness statements as appendices

To maintain as much confidentiality as possible in the report witnesses may be identified by a number (e.g. Witness 1, Witness 2) rather than their name, particularly if the report is going to be shared with many levels of management or is subject to a FOIP request. In this case, the investigator should keep a separate list of witnesses and which number they are represented by.

5) Summary of Facts not in Dispute: The investigator will list in point form any facts that were substantiated by two or more witnesses or documentation. These are considered to be facts not in dispute, as these are facts that can be substantiated or supported by more than one person. If presented to the respondent and complainant, they would likely agree that these are facts of the case. The facts will be listed in chronological order for ease of analysis. The investigator should note where a fact is backed up by more than one piece of evidence (testimony or documentation).

In an investigation where it is one person's word against another person's word it is not uncommon to end up a very short list of facts not in dispute. This is expected and acceptable. In the absence

of documentary evidence, physical evidence, or witness accounts it may be difficult to establish facts that are not in dispute.

6) Summary of Facts in Dispute: Facts in dispute are facets of the case where there are differing accounts depending on the testimony and or physical and documentary evidence. This is the grey area in the investigation. The investigator will identify issues where contradictory evidence was presented; key differences in stories, what interviewees saw, heard, or experienced need to be noted.

Facts in dispute should be listed in chronological order and noted where the item came from – complainant, respondent, witness, or relevant documentation. The investigator can also label which allegation the facts in dispute pertain to if there are multiple allegations of wrongdoing.

When reviewing the facts in dispute the investigator needs to look at them with a critical eye. A piece of information may look inconsequential on its own, but when paired up with other points that show a pattern of behaviour it may strengthen the information. Likewise, if contradictory information is located, it may weaken the strength of the information.²

The investigator should assess the contradiction based on all the information available. Eventually the investigator will accept one “side” of the fact in dispute.

The investigator may grapple with what information to include in the “facts in dispute” area. There may have been many disparate statements and comments, and the investigator may not know whether something is relevant to the investigation. When assessing information for relevance the investigator must determine if the information is directly related to the allegations. Does the information prove or disprove the allegations? If it is not relevant, does it support other information that is relevant? If the information or evidence does neither then chances are it is not relevant to the investigation.

The investigator should note where any contradiction occurs, and which pieces of evidence may back up one version or the other. They will note which witness may have the same story and which do not and how it relates to the allegations of wrongdoing.

It may be challenging to have many facts that are in dispute, and the investigator may have gaps of information that will never be filled in. The investigation does not need to be perfect, remember that the standard for looking at the evidence is on the balance of probabilities – or what would the reasonable person think?

7) Analysis and Findings

This section is where the investigator will conduct an analysis of all of the information collected, looking at all of the evidence (documentary, physical and witness). The investigator will identify any policies or legislation that will impact the decision and then apply the evidence to the policies and legislation and determine if there was any breach of policy or legislation.³ To begin, they will look at the facts and other contextual elements to determine if an allegation of wrongdoing occurred. We will look at facts first. a. Facts – It is simple for the investigator to consider the facts not in dispute, they are verifiable and can be trusted. It may not be that simple with the facts in dispute. The investigator will look at all of the available information and determine which side of the story they prefer (that is, which is more likely) for each situation where the facts do not align. The investigator will take into account the credibility and relevance of the information and determine which “version of the events” they prefer.

b. Definitions– When conducting the analysis, the investigator will provide any pertinent definitions to help guide the analysis. These definitions may be from applicable workplace policies, procedures, or legislation. For example, if examining whether harassment occurred, the investigator will want to know what the definition of harassment is in that workplace to determine if

harassment occurred. Similarly, the investigator wants to know what the definition of misconduct or assault is if that is the matter being investigated. The investigator may want to restate the definition in the analysis to ensure that they are seeking the correct evidence to support any claim of misconduct.

c. Power– When determining what occurred in a workplace the investigator needs to be cognizant of the power dynamics that surround any incident. An investigator should identify any power differentials between people, and note if someone was a subordinate and may not have felt that they could speak out or speak up. The investigator should look at the power of the group versus the power of the individual; for instance, was there peer pressure or other undue influence? When assessing the likelihood of an occurrence, the investigator will want to keep power dynamics in mind. How likely is it that lower power individuals who have maintained a low power position for a long time will take a high-power action in the workplace? An example of this may be an administrative person who has worked in a support role for 12 years, and one day crafts a message as if it is from the president of the organization and sends it out on their own. How likely is this based on the power of the position? It is not impossible, but how likely is it?

d. Ought to have known or Knew– When assessing the actions of employees, the investigator will ask, did the person know or ought to have known that their conduct was incorrect? Has the person been trained or have knowledge that they ought to have known that their behaviour was wrong?

e. Reasonable person standard– The reasonable person standard has been discussed previously in this text. When conducting the analysis of a situation, the investigator may ask themselves, would a reasonable person find someone's behaviour offensive, a violation of the rules, etc.? Investigators consider the reasonable person, not someone who is super-sensitive or overwrought, but the average reasonable person in the workplace. If an investigator is struggling with the culture of a workplace or the context of an incident, they

can step back and consider what would the reasonable person think of this situation, would the reasonable person find someone's actions or behaviour to be wrong?

f. Context- An internal investigator may have a much easier time understanding the culture of an organization than an external investigator, and they may have better context surrounding a workplace incident. An investigator will want to take the context of the incident into account when conducting their analysis of the situation. Was someone provoked? Is the behaviour commonplace in the workplace? Has the behaviour been tolerated in the past? These are all questions about the context of the incident that need to be factored in when assessing a complaint of workplace wrongdoing.

g. Timelines- What are the timelines of the events? Do they make sense to the average person? Plausibility of the timeline of events may help the investigator to determine witnesses' credibility or the veracity of witness statements.

h. Credibility - When assessing credibility, the investigator will assess if the person has direct knowledge of the events, if they actually experienced the events or witnessed the events. Does the person have any stake in the complaint, would they gain in any way by the complaint or have direct involvement in the complaint? However, just because something is credible doesn't make it relevant, and vice versa.

Credibility assessments- The credibility of an interviewee is central to the weight an investigator gives the evidence provided. Given its importance, credibility assessment should not be based on a "gut feeling", rather these assessments should be based on rational observations that account for the plausibility of an advanced narrative.

Hena Singh in her book, *A Practical Guide to Conducting Workplace Investigations* notes several factors to consider when assessing credibility. She suggests that when determining whether an

interviewee lacks credibility, the investigator may want to consider the following:

1. The recollection and description of events does not make logical sense.
2. The interviewee provides contradictory or inconsistent statements.
3. The interviewee provides a version or sequence of events and thereafter cannot recall the same version or sequence of events.
4. The interviewee has biases or a motive to provide a certain version of events.
5. The interviewee avoids expressly denying the allegation or specifically answering relevant questions.
6. The interviewee provides answer that are specific to the point of being misleading rather than providing a clear response. Question: "Did you see Louise steal?" Response: "I did not see Louise steal office supplies."
7. Avoids answering the question, answers a different question, asks the investigator a question in response.
8. Exhibits fake emotion, the emotion comes at a time that does not make sense.
9. Experiences memory failure. Especially when it would put them in a bad light.
10. Mentions that other people will corroborate their version of the events, but those people are not available.

It is important to note that none of the above can be wholly relied upon. This is not also an all or nothing people may be credible

with respect to some topics or allegations but not with respect to others.⁴

Assessing Credibility through Body Language – Good investigators are not sidetracked by trying to read body language as a means to detect lying. *Body language indicates emotions, not deception.* An investigator should focus on the likelihood of something occurring, rather than trying to determine if a witness is lying because they fidgeted and looked at the ceiling 6 times. Body language is very culturally bound and can be misleading. Gestures and physical responses mean different things in different cultures. In the typical North American culture, we perceive people to be deceitful if they do not look someone in the eye when speaking to them, however in other cultures looking at someone directly is considered to be very rude. Just as crossed arms may indicate discomfort or nervousness... but not necessarily deceit. Rather than trying to interpret body language, the investigator should instead look for consistency in the account and the likelihood of an account.

The British Columbia Court of Appeal stated in their decision in *Faryna v Chorny* that:

*“the real test of the truth of the story of the witness in such a case must be 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.”*⁵

What this means is that to test a witness's story one must look for consistency between the likelihood of the scenario and what the person is saying. Look at it from the perspective of a practical and informed person. Would this practical and reasonable person think that the story is reasonable given the place it occurred and the conditions in which it occurred?

Credibility when people work together – In cases when

4. Singh 2019, 95

5. *Faryna v Chorny* 1951, 357

complainants have worked together in crafting their complaints, their credibility has been affected in the courts. It may be plausible that individuals have experienced the same discrimination or harassment in the workplace, and they may even experience it from the same person or people. However, arbitrators, judges and adjudicators want to see complaints that are based on individual experiences, not influenced by others. Complainants should be encouraged to record their own experiences rather than those of others or be influenced by what others have experienced. That said, sometimes there is “strength in numbers” but there can also be “group think.”

Just as it is not uncommon to receive a rush of complaints after an anonymous hotline is set up or discrimination or harassment training takes place in an organization, it would not be uncommon for people who felt that they did not have the power to make a complaint as an individual to feel empowered once they hear that others are making complaints.

Ideally, one wants to have complainants record or share their own experiences uninfluenced by others. It is okay that there are multiple complainants, but ideally each person will provide their own account of what happened, and not be influenced by others.

Analysis of the Facts is Dispute – In the face of contradictory evidence, an investigator must make a conclusion. They will look at the relevance and credibility of the information. The investigator will weigh the value of the information provided; they need to determine how important the evidence is. Then the investigator must make an assessment on the balance of probabilities whose testimony they prefer, in essence the investigator is saying “I believe this person’s information”. In the facts section of the analysis it is not enough to simply say that the investigator prefers one version of events over another, there should be rationale as to why one person’s testimony is preferred over another. The standard used will be the balance of probabilities, and the investigator should specifically refer to the standard. They can preface their statements

in such a manner that evokes the standard when resolving contradictions in evidence.

I.e. *“Based on the evidence presented on the balance of probabilities*”

“When reviewing the evidence through the lens of the balance of probabilities.....”

It may also be that there is simply not enough information to conclusively say one way or the other so the investigator can state that there was insufficient evidence to support whether a fact happened or not.

“Based on the witness testimony and office supply order receipts, it is found, on the balance of probabilities, that it was commonplace for employees to utilize office supplies for home use. It is found that the respondent also utilized office supplies purchased by XYZ company for personal use. There was insufficient evidence to substantiate whether it was the respondent who “stole” the printer cartridges.”

i. Past Practice – When an investigator is faced with the problem of conflicting statements it may be helpful to look at past practice of the organization. What is the past practice, what has happened in the past that may be impacting the current situation? Have the supervisors in the past condoned something so that it is reasonable that it could have occurred again? What has happened in the past that employees have used as a guideline for future actions?

J. Extenuating Circumstances- When conducting the analysis of what happened, the investigator may want to keep in mind there may be extenuating circumstances surround the incident. Are there medical accommodation or other accommodation needs that have not been considered? Are there addiction issues or financial duress? Extenuating circumstances may be anything under the sun; the investigator just needs to be aware of them and take them into consideration. Sometimes extenuating circumstances may force employees into taking actions that they would normally never take.

Findings – Once all of the analysis is complete the investigator will make statements of their findings. As

mentioned previously, findings are the conclusions that the investigator has made after looking into the incident; they are the outcome of the investigation. A finding indicates that the evidence supports that the person is guilty of a breach of policy or piece of legislation. The investigator must clearly state if there are any findings. They may stipulate that certain allegations are found to be true while others are not. The investigator will make a statement such as.

Finding Statement Sample

- The facts **SUPPORT** a finding that the Respondent breached the organization's Respectful Workplace Policy and Organizational Rules of Conduct as stated in the Employee Handbook.

- The facts **DO NOT SUPPORT** a finding that the Respondent's conduct violated the Harassment and Discrimination Policy.⁶

Utilizing the areas of analysis mentioned above the investigator will need to explain why they came to the conclusion stated in their findings. It is not enough to simply have findings as to what version of events an investigator preferred; they need to justify that position with the information from the analysis. Investigators must look at the facts that lead them to their conclusions, assess the credibility of the evidence and discuss the context, timeline, power dynamics in which the events took place. In addition, the investigator will take into consideration the context of the workplace and extenuating factors as well as whether someone ought to have known their behaviour was wrong and how the reasonable person may view the behaviour.

Being Definitive – When making a final decision in the matter the investigator must be very clear as to their findings and that they are able to justify their decision on the balance of

probabilities. The investigator needs to be confident in their abilities.

The company or organization may or may not take action based on those findings. This is risky because the findings will be relied upon, but we know that the courts do not require workplace investigations to be perfect. A mediocre investigation is always better than no investigation.

8) Conclusion

The conclusion restates a summary of the findings. It should be short and to the point. The conclusion will not have any new information; everything in the conclusion should already be stated in the report.

Unless specifically asked to do so the investigator will not give their opinion about the situation or any suggestions as to what should happen to the parties involved. That remains up to the managers and human resources.

12. Chapter 12: Post Investigation

Once the interviews are completed, the investigator conducts their analysis, determines their findings, and writes the report, one would think that the investigation process is complete. For an external third-party investigator, once the report is delivered their role concludes (unless they are subpoenaed, which will be discussed later in this chapter), but for internal investigators who are part of the organization the task is not complete. After an investigation there remains the tasks of notifying the parties, dealing with potential reprisals, and handling any fallout from the investigation process.

Notifying Parties, Witnesses of Completion

Depending upon the workplace policies and procedures it may be the investigator who is notifying the complainant/respondent or employee accused of misconduct, or it may be another HR professional.

As part of the investigation process, the report or results of the investigation are shared with management, and it is management who determines if there is any action warranted. Management and human resources will be responsible for meting out any discipline or sanctions to those involved in the investigation. However, what happens to the other people who are involved such as witnesses? As part of the investigation the internal investigator needs to determine who will be notifying the parties involved and how. Will this be the investigators job or some other HR person's job?

Regardless of who provides the notification, all parties need to be

informed that the investigation is now complete. Different parties receive varying amounts of information as to the outcome of the investigation. For witnesses, the investigator or HR will provide a “form letter”, send an email or make a phone call to advise that the investigation is complete, thank them for their time and remind them of their confidentiality requirements, as well as a reminder about reprisals.

Depending upon the outcome of the investigation the complainant will also be notified. This may be a personal meeting or phone call, followed up with a written notice that the investigation is complete. If the respondent is another employee, the complainant is not entitled to know any potential discipline that may have resulted from the investigation. If the complainant is the supervisor or manager, they will be privy to the results of the investigation.

If the organization is a unionized workplace the union will need to be informed of the results. Depending upon the workplace policies, the union may or may not be entitled to see a copy of the investigator’s report. In some workplaces the union is only provided a summary of the investigation but not the whole report, in other workplaces the executive summary is provided and, in some organizations, the whole report is provided to the union. The union will, however, want to be informed of any potential actions being taken as a result of the investigation. Employee representation will be required if any discipline is being issued.

For the respondent of the complaint, the potential outcomes are quite numerous. If the investigation has resulted in no findings, the respondent should be notified as soon as possible. This is normally through a meeting or a phone call, followed up in writing.

Reprisals

Reprisals are acts of retaliation taken against a party to an incident. Reprisals can happen any time during the investigation process,

but they may also occur after the investigation is complete. This is especially true if discipline is an outcome of the investigation.

It is important that all parties are reminded either in writing or verbally about their responsibilities surrounding reprisals. Who deals with complaints of reprisal will depend on the Human Resources structure and the workplace policies as they may be outside of the scope of the original investigation. If the investigation was conducted in-house the original investigator may be asked to look into any situations of reprisal because they are already familiar with the complaint. This is a decision that human resources management will make.

No Findings Fallout

Sometimes an investigation will be conducted on a good faith complaint (not vexatious) and there will be no findings. One would think this is an ideal situation that once the investigation is complete everyone involved will just go back to their regular jobs and work relationships will continue as before. This may be the case with more informal investigations or suspected misconduct where the supervisor/manager has asked for the investigation. However, in cases such as discrimination and harassment where a complaint has been brought forward by another employee this may not be the case. Investigations can be awkward, upsetting and may cause resentment. Human Resources needs to be cognizant of this and be prepared that even though the investigation is complete the parties involved may not be able to simply pick up and move on as if nothing happened. People may feel that their reputation and credibility have been impacted, and despite the best attempts at confidentiality, gossip or speculation about the investigation may have spread. As an employee of the organization, the internal investigator may have specific insight into potential fallout and can work with their HR

colleagues to minimize negative impacts from the investigative process.

It is important for HR and the internal investigator to understand that just because the investigation is complete the matter may not be over. Sometimes mediation, alternate working arrangements or different work schedules are required to help people heal the relationship. Ultimately the investigation may have resolved the complaint, but it may not have resolved the relationship.

Bad Faith Complaints

Occasionally the outcome of an investigation will have no findings, but the investigator may believe that the complaint was made in bad faith. A finding of bad faith is reserved for extreme cases where:

The complainant brings forward allegations which they know to be untrue, and they do so with an ulterior, usually malicious motive.

Bad faith complaints should not be confused with unsubstantiated allegations in which a complainant genuinely believed the allegations, but there is insufficient evidence to support. Bad faith is when the complainant brings forward a knowingly false accusation. No one is required to raise allegations of bad faith in order for an investigator to make these findings.¹

If the investigator believes that the complaint is made in bad faith, they should notify HR of their concerns and bring forward the evidence that supports this conclusion. The investigator may have enough evidence to support a determination of bad faith without completing the entire investigation. It is important to ensure that enough evidence of bad faith has been collected, as complaints of

1. Singh 2019, 99

bad faith may result in disciplinary action against the complainant. As mentioned, bad faith complaints are very rare – most complainants genuinely believe there has been some wrongdoing. Even if that allegation is not found to be true it would not be considered a bad faith complaint.

Debriefing the process

No investigation is perfect, and it is important that internal investigators sit down after the investigation and determine what went well and what did not go as planned. They may want to speak with their HR colleagues as to how the process worked. Are there any indications that there needs to be changes to any policies, procedures, or rules? Is it evident that further training in the organization is required or that the culture is not healthy?

The internal investigator should review the situation with a critical eye and discuss with colleagues what could have prevented the situation that resulted in investigation and make any appropriate changes.

Storage of materials

Once the investigation is complete, no matter how big or how small the documents, interview notes, reports and all other materials should be retained. All investigation materials, documents, statements etc, must be retained according to the document disposition requirements of the organization. The documents should be stored in a secured location and not kept with the employee file.

Court Cases, Arbitration and being Subpoenaed

Occasionally an employee feels that either the investigation process was flawed or that the organization's actions based on the investigation were incorrect. In these situations, an employee may sue the employer or file a grievance in a unionized environment. Some external investigators may also be sued as well, which is why they are required to have liability insurance in the province of Alberta. As the investigator, either external or internal, the investigation materials may be subpoenaed and the investigator may be asked to testify at a hearing or arbitration.

If the investigator is subpoenaed it will be very important that they have followed the organization's policies and procedures. This is also a reminder to the investigator to ensure that they have not made statements in investigative notes that could be considered inflammatory, derogatory, or accusatory.

What if you get it Wrong?

Sometimes an investigator may come to the wrong conclusion or a conclusion that is later overturned by the courts/tribunal/arbitration. In the case of Mulvihill vs Ottawa the trial judge noted that

The mere fact that cause was alleged, but not ultimately proven, does not automatically mean that Wallace damages are to be awarded. So long as the employer has a reasonable basis to which to believe it can dismiss an employee for cause, the employer has the right to take the position without fear that failure to

*succeed on the point will automatically expose it to a finding of bad faith.*²

What this means is that even when an investigation is completed and the investigator comes to the wrong conclusion, and the employer then terminates an employee for just cause (because they believed that either misconduct or harassment occurred) the employer will not be held liable. If the employer did its due diligence in conducting the investigation and acted in good faith the courts/tribunal/arbitrator may disagree and change the decision, but the employer is not liable for damages.

This was evident in the case of *Ralph Watkins v Willow Park Golf Course*. Mr. Watkins was terminated, but the investigation was insufficient. Mr. Watkins wanted a summary judgement (judgement without a trial) from a judge to throw out the termination, but the judge felt that even though the investigation was flawed, it was not enough to immediately decide if the termination was justified or not. The judge denied Mr. Watkins request to find in his favour and noted that it should go to trial.³

Errors in Investigations

As mentioned before, no investigation is going to be perfect, no matter how experienced the investigator is. For those beginning investigating, below are some common errors that investigators make.

- Failing to investigate at all- remember you do not necessarily need a complainant.
- Investigating with bias

2. *Mulvihill v Ottawa (city)* 2008, para 49

3. *Watkins v Willow Park Golf Course Ltd* 2015

- Investigating toward a predetermined outcome
- Failing to interview the complainant
- Failing to interview the respondent
- Failing to provide particulars of the allegations to the respondent
- Rushing the respondent to respond
- Interviewing irrelevant witnesses
- Ignoring relevant witnesses⁴

One needs to remember that even a simple, short investigation may be better than no investigation. Investigations do not always need to be a large, formal affair. Every complaint is different, and the scope of the investigation may vary. What starts out as a small, simple concern by a manager may become a large-scale formal investigation and likewise, what appears to be a complex complaint on the surface may turn out to be a rather simple matter.

13. Chapter 13: Investigation Challenges

Every investigation is going to have challenges regardless of the nature of the investigation, whether the investigator is internal or external to the organization, or whether the workplace is unionized or not. Below are some the challenges that an investigator may face, although this is not an exhaustive list. Each investigator will be able to add their own experiences to this chapter.

Difficult Interviewees

Being involved in an investigation can be a stressful or uncomfortable thing for an employee, whether they are being investigated for misconduct, are a party to discrimination or harassment or a witness. People will have different reactions and sometimes unexpected behaviours and attitudes.

Interviewees may be reluctant to participate, they may be aggressive or challenging, or may simply be scared. The investigator needs to be aware of how the interviewee is reacting to the investigation and possibly adjust their approach to create a suitable environment for an interview to take place. It is important to maintain consistency in the process, but the approach may be differentiated. It is important for the internal investigator to remember that the interviewee is a fellow employee, and that the investigator may have interactions with the employee after the investigation. This will help the investigator to maintain a respectful and collegial approach regardless of how the interviewee may be acting.

Reluctant Interviewees

One of the biggest challenges that investigators have is that of the reluctant witness or respondent who will not participate in an interview. This can be especially true in a unionized environment where speaking to the investigator may be seen as breaking union solidarity and the person is viewed as a “rat” or a “fink.” Quite often union members feel that they, with other union members, are on one team and that management, including the investigator, are on another team. Someone may be reluctant to provide information because of fear of reprisals or retaliation from colleagues. There may also be a fear that the investigation will lead to further discipline that could include the interviewee.

The question of whether an employee is required to participate in an investigative interview will depend upon the policies, procedure, and direction of the managers of the organization. An employee can be compelled either by a policy or by their manager to be interviewed as part of an investigation, but their actual participation may be lacking. The investigator will try to explain that they want to hear what the interviewee has to say, and they are there with an open mind. They should try to set a positive environment through body language, tone and volume of voice. The investigator should be present in the interview, giving the interviewee their fully attention, so that the person feels they will be listened to. On a whole, even if the person is compelled to participate in an interview, if they don’t want to be there the investigator will get very little out of them. They are considered “participating,” when they answer, “I don’t remember” or “I don’t know.”

If after the introduction and explanation of the process someone refuses to answer a question, the investigator can remind them that this is a workplace investigation, and that the employer has requested their participation. The investigator does not want to threaten or intimidate the interviewee, but the investigator can

stress that they want to hear their side of the story or what the interviewee has to say.

If an interviewee is belligerent or rude, the investigator can remind them that failure to participate may result in further action by the employer. The investigator should be careful not to threaten an interviewee or appear to be bullying them.

Non-answer Answers

Sometimes an interviewee will think that they are satisfying the requirement to participate in an investigation if they provide oblique or ambiguous answers to all of the questions posed. Another approach may be to simply say “they cannot remember” or “they don’t know.” The investigator can advise them that their failure to fully participate may create an adverse perception of the events or may reflect badly upon their side of the issue. As the investigator will weigh all of the evidence to make a decision, if the interviewee does not articulate their story the investigator is left to accept other evidence which may contradict their story.

If someone says that they do not have to answer the questions because they “have the right not to incriminate themselves,” this stems from the Charter of Rights and Freedoms but would not apply to workplace investigations. Protection under section 11(c) allows the accused person to be free from the compulsion to testify against him or herself. However, this is only if the individual is being questioned by a law enforcement officer in a criminal investigation.¹

There is one unique circumstance that an investigator should be cognizant of. If the employer is the government and the investigator is conducting an investigation on behalf of that employer, the investigator needs to be aware of section 11 9c of the Charter of Rights and Freedoms. The reason for this is because the protection of section 11 9c is invoked if two conditions are present – one, if a person is being interviewed by a “government actor” and second, if the investigation could result in a penalty that is penal in nature

1. Government of Canada 2202, sec 7 part 1, c11

(criminal). Both conditions must be present, which would be very rare. For this unique situation to exist the investigator would need to work for the government and be representing the government as a “government actor” and the potential punishment for wrongdoing must include the possibility of going to jail.²

Someone may contend that they have the right to remain silent... or they are “taking the 5th.” First, “taking the 5th” is an American term and has no implication for Canadian workplace investigations. In the Canadian context the right to remain silent comes from Section 7 of the Canadian Charter of Rights and Freedoms, which is a fundamental right in both common law and under the Charter in court proceedings. This does not necessarily apply to workplace investigations, as it is not a court proceeding³.

However, someone cannot be forced to talk to an investigator. The investigator can point out that this is a workplace investigation and that there may be further action taken by the employer for failing to abide by the policies and procedures of the employer. As mentioned previously, the investigator can remind the person that they will make conclusions based on the information gathered in the interviews and their non-participation may lead the investigator to make adverse conclusions. If someone does not respond to questions the investigator is left to question their credibility. The investigator should make a notation in the interview notes that the person refused to participate.

If done very tactfully, the investigator may point out that an interviewee refusing to answer appears to lack remorse or is implying admission, which can be taken into account should there be findings from the investigation. In the case of unionized environments, some arbitrators have found that refusing to participate in an investigation can be found culpable if the silence has a negative impact on the employer’s business or public interest,

2. Government of Canada 2022, sec 11, 9c

3. Government of Canada 2202, sec 7

however this ruling is being tested all the time in arbitrations and may not always hold true.

Suggestions have been provided as to how to encourage people to share their side of events in an investigation. Some are gentle prods while others are more direct statements. All should be delivered in a professional and respectful manner. The investigator must not:

- threaten, cajole, or try to trick individuals into talking.
- get upset with difficult interviewees.
- jump to conclusions of culpability when someone won't answer questions. The investigator must look at all the evidence. Just because someone is being difficult does not mean that they are culpable of the misconduct being investigated.

Challenging or Manipulative People

When dealing with uncooperative or difficult people, the investigator should try to avoid being baited into a confrontational exchange. Investigators need to be aware of what their own triggers are i.e. sarcasm, attempts to bully or belittle. An investigator should not be afraid to pause or stop an interview if they feel that they are becoming irritated or emotionally involved.

Every investigator should be prepared that at some point in time someone in an interview is going to try and “push their buttons” as the investigator may be seen as an authority figure and the outcome of the investigation may alter someone's career trajectory. Individuals who have not dealt with authority well in the past may not hesitate to try to challenge or to manipulate the situation.

Just as it is uncomfortable to deal with people who are aggressive, loud or challenging, individuals who attempt to manipulate by using flattery, humour or trying to get out of answering questions with funny or charming anecdotes can be challenging to interview.

Hostile or Violent People

There may be reluctant interviewees, there may be challenging or manipulative interviewees and unfortunately, there can also be hostile or potentially violent interviewees. The investigator needs to

ensure their own safety at all times. Some precautions may need to be taken to ensure the safety of the investigator such as having another person in the room, conducting the interview in a room with multiple exit points, posting security personnel outside the room and ensuring multiple communication methods are available. The investigator needs to be aware of the following, as not all volatile individuals present themselves that way at the beginning of the interview:

- Watch for signs of escalation in an interview. Things like increased volume of voice, agitated body language, increased swearing, threats or aggressive actions.
- Recognize when someone is hostile about a situation or hostile towards the investigator. People may get very worked up when talking about a situation in the workplace, but that hostility is not directed at the interviewer.
- When the hostility is directed at the situation the investigator may be able to help the person calm down by allowing the person the space to vent their feelings about the issues.
- Always give the person the opportunity to end the interview if they themselves feel that they are getting too worked up.
- Identify when the hostility is directed at the interviewer and is escalating, at this point stop the interview and ensure personal safety.

If the interviewer remains calm, with a normal voice it may have a calming effect. The investigator should not agree or disagree with what the person is saying, the investigator listens actively and reflects the emotions that they are experiencing. However, the investigator is not a therapist so should be sure to stay focused on the purpose of the interview.

Problems with interviews

Interviewers can easily fall into common perception mistakes. These can be cognitive mistakes such as succumbing to stereotypes, biases, jumping to conclusions and letting their own agenda or ego take charge. Interviewers need to be aware of the following common pitfalls listed by the Alberta Ministry of Justice and Solicitor General:

- 1) Perception and Memory Problems: interviewers are not always objective in how they view the world. One's memories are not always accurate. Memory is limited and information can be lost or intentionally altered. Recall is fallible and not always accurate. A mistake in memory of key facts can become a firm belief as something one "knows," even though it is based on a mistake in memory. Intuitively individuals place greater weight on evidence that supports their beliefs than evidence that contradicts it.
- 2) Tunnel Vision: neglecting other points of view and being exclusively focused on one's own view of a problem. An investigator with tunnel vision is unable to imagine any view of the situation except their own. This occurs when one focuses only on information that supports their view; they limit information to that which supports their hypothesis. An investigator may focus on one piece of information, or one event while discounting other information that may contradict that view.
- 3) Making assumptions: when investigators are quick to make judgements without all the evidence they are likely relying on assumptions. Once an investigator makes an assumption, they may inadvertently seek out evidence that supports that assumption or discontinue seeking out evidence at all based on their assumption.
- 4) Failure to keep an open mind: when one anchors their assumption on a single piece of evidence, they have

unconsciously excluded other evidence. Interviewers may focus on easily remembered pieces of evidence and fail to include other evidence.

- 5) Relying on Intuition: Typically people use two kinds of decision-making processes: rational and intuitive. In the rational approach, conscious thought takes place, evidence is considered and a reasoned deliberate decision is arrived at. Intuition is different. Intuition suggests an unconscious, automatic process where decisions are reached based on prior experience and mental shortcuts. Intuition can be influenced by emotion and bias and is prone to error. In an investigation, intuition should be acted upon with caution. When it is used, rational analysis should be used to examine it prior to conclusion.
- 6) Failure to recognize key evidence: interviewers are influenced more by vivid information than abstract data. More attention is given to witness statements than physical evidence. The weight attached to witness statements is not always warranted. International research has repeatedly shown a high rate of inaccuracy in witness statements. It is not unusual for the vividness of eyewitness evidence to overshadow the important of other more reliable evidence.
- 7) Ego: Ego can prevent investigators from acknowledging their mistakes and overriding input from others who the investigator deems as less knowledgeable or skilled.
- 8) Fatigue: Investigators who are trying to complete the investigation too quickly and are tired are more prone to making mistakes. Investigators who interview multiple witnesses in one day are less likely to be as attentive to the last witness than the first.
- 9) Too much or too little information: Too much information or evidence can lead to investigators becoming overwhelmed in details, fatigued, confused and possibly losing sight of the big picture. In the case of too little information or evidence,

investigators may resort to drawing inferences from the evidence they have and making quick conclusions.

- 10) Groupthink: When an investigator is part of an HR team or part of an HR department, they may discuss the investigation with colleagues. The group may start to advise or help the investigator to make decisions. Decisions may be made by the group which are based on false assumptions, incorrect or incomplete information, previous history or interactions with employees. In these situations, individuals may be afraid, reluctant or hesitant to challenge or question a decision or assumption made by the larger group. This occurs in highly cohesive groups under pressure to make important decision. Common wisdom goes unquestioned, sometimes with disastrous results. In groupthink there is a reluctance to think critically and challenge the dominate theory. In any investigation, it is wise to question assumptions, evidence and procedures. You want to question yourself “How do we know what we think we know.”⁴

Biases

Investigators also need to be aware of their own biases in conducting investigations: Biases are cognitive shortcuts that we take to minimize the work our brains have to do. Sometimes investigators succumb to these biases:

- Anchoring bias: when one is overly reliant on the first piece of information they hear.
- Availability heuristic: when people overestimate the importance of information that is easy to remember.
- Clustering Illusion: the tendency to see patterns in random events.
- Confirmation bias: we tend to listen only to the information that confirms our preconceptions. Once you have formed an

4. Alberta Ministry of Justice and Solicitor General 2012, 175,176

initial opinion about someone, it is hard to change your mind.

- Conservatism Bias: when people believe prior evidence more than new evidence or information that has emerged.
- Halo effect: where we take one positive attribute of someone and associate it with everything else about that person or thing.
- Recency Bias: the tendency to weight the latest information more heavily than older pieces of information.
- Stereotyping: expecting a group or person to have certain qualities without having real information about the individual.⁵

Listening

Active listening goes beyond just listening. Active listening means being attentive to what someone else is saying. The goal of active listening is to understand the feelings and views of the person. In fact, active listening comes from the person-centered therapy of Carl Rogers. However, active listening is not only used in the therapeutic setting – it's an essential component of effective communication. An effective interview is reliant upon good communication. The interviewer wants to show the interviewee that they are actively listening by doing things that show their engagement like head nodding, mirroring body position, eye contact, leaning in, using encouraging prompts such as “I see” “uh-huh” “right” “tell me more” etc. Part of that good communication is active listening; it is a skill or tool which helps the investigator to understand those in an interview.

Two components of Active Listening

- Seek genuinely to understand the other person

- To communicate or reflect that understanding back to the person⁶

Active listening is important in an investigative interview because it tells the other person that they have been understood. If someone does not feel that they have been heard and that the investigator understands what they are saying they will have little confidence in the outcome and likely will not accept the findings of the investigation.

When trying to be an active listener the investigator will need to keep four points in mind:

Suspending judgment of the speaker

People want to believe that they are right, and investigators need to suspend their judgment about what may be right or wrong and just listen. One must work to see the world as the other person sees it. This is very difficult because the investigator is expected to make an assessment at the end of the investigation and, naturally, judgements are made along the way. However, sometimes additional information comes to one's attention that changes their judgments. People may say things that do not align with the investigator's own values, and it is difficult for the investigator not to judge that person. As much as possible the investigator wants to reserve any kind of judgment until all the evidence is collected and a thorough analysis has taken place.

It is not however, easy to suspend judgement when interviewing parties to an investigation. One may infer that suspending judgment means that they are agreeing with the speaker, which is not so. An investigator in an interview is seeking to understand, not confirm. Sometimes investigators are afraid that if they listen to another's view carefully it may affect their own views in negative ways. An investigator must have confidence in their own views but be open to looking at things in a different way.

Focus on emotion as well as content.

Look for the emotion not just what the person is saying. The investigator is not a therapist and is not there to counsel the interviewee, but they want to try and listen with empathy and pick up on the emotions being conveyed. The investigator cannot become too wrapped up on the other person's emotion to the point where they lose objectivity. Just as they cannot be frosty and unemotional, the investigator is not there to help the interviewee feel better or counsel the person on their emotions.

Following not leading the conversation

Let the interviewee talk. It is easiest to ask open ended questions and just let the person tell their story, even if it is not exactly the direction the interviewer thought it would go. This is hard because we often start to ask questions that are important to the investigation and it may be frustrating to let the speaker go where they want. An investigator will have a list of questions that they want to ask and may focus on getting their questions out of the way. However, the person will likely answer many of those questions if the investigator just lets them talk and listens.

Reflecting accurately what is understood.

Reflecting accurately what is understood is paraphrasing information back to the speaker to ensure that the interviewer has accurately captured what the person has said. The investigator will want to confirm the information and that it has been captured correctly. This will be very important as the investigator is trying to take notes and listen at the same time. It does not hurt to take a quick break and repeat back what has been heard to make sure that it is understood correctly. DO NOT parrot back to the person what they have said, it makes people think they are being mocked. The investigator should also be careful not to overstate what the speaker has said as they may feel that they are being manipulated. Remember, at the end of the investigation an interviewee will review the notes and sign off if the notes are correct. It will save much time

and effort if the investigator periodically checks to see that they have understood what is being said.⁷

Listening and Responding to the Excessive Talker

Sometimes investigators have the problem of getting people to talk, other times there is the opposite problem – the excessive talker. When practicing active listening it is suggested to let the person lead the conversation and tell their story, but this can sometimes be excessive. However, it is important to remember that what is excessive talking for one person may be just the right amount of information or enthusiasm for another. Many people are most comfortable processing information by thinking aloud. To a person who talks little and moves quickly to conclusions, this seems like far too much talk. To another person whose brain works the same way, it may seem perfectly normal.

People may also be very nervous in an investigative interview and may find themselves talking more than normal out of nervousness.

Listening and responding to the excessive talker is challenging, but it is not impossible. However, the interviewer must actively engage in the conversation to get the information they need presented in the way that they need it. There are two tools interviewers can use to do this.

1. Interrupting. As a child, most people were probably taught not to interrupt, but an investigator can use interrupting to better participate in the conversation. Phrases such as “Excuse me, but . . .” or “Let me see if I understand you . . .” allow them to break into the conversation and ask for specific information without putting the speaker on the defensive.

2. Focusing. In effect, focusing is asking the speaker to come to

the point. A simple phrase such as “So, your point is . . .” or “Then the bottom line is . . .” will usually help put the conversation back on track.⁸

This chapter has focused on just some of the challenges of investigative interviews, but undoubtedly there are many more that could fill additional pages. There is no perfect formula for convincing the reluctant witness to be more forthcoming, calming a hostile or upset interviewee, nor is there the ideal advice on how to best deal with an excessive talker. Each investigator will develop their own style and method of interviewing that works well for them. Like any professional the workplace investigator will determine what is successful and continue to develop and hone their skills to be able to tackle any investigation.

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