

Conducting Investigations

John Van Massenhoven

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Purpose of Investigations

- Fact Finding
- Meet legislative (WS&H ACT, Human Rights Code) and internally imposed requirements (policy, collective agreements)
- Fair and reasonable employer – takes action, acting reasonably, fair assessments, enforcement of expectations

Investigations: Are They All the Same?

- Due Process requires thorough and impartial assessments regardless of the purpose of the investigation
- The conduct of each investigation will vary depending on its purpose, the parties and the issues involved
- A good investigation will require procedural competency married with informed discretion

Planning for the Investigation

- Is an investigation appropriate / necessary
- What is the mandate / scope of the investigation
- Who should be interviewed
- What documents, policies, legislation is relevant
- What are the timelines
- Who will direct the investigation
- Who should conduct the investigation



Is an Investigation Necessary?

- Policy / collective agreement / legislatively required
 - WS&H Act – safety issues
 - Human Rights Code
 - Whistle Blower policies
- If not Required, is an investigation appropriate?
 - Often dependent on complexity of issue, politically sensitivity, possible consequences, etc.

What is Mandate / Scope of the Investigation

- Informed by policy, legislation
- Informed by Decision Maker – person directing investigation and the Investigator
- Important to Determine and Clarify Before Commencing
- If investigation initiated due to a complaint, what aspects of complaint fall within investigation – all or partial?
- Investigations may run in parallel with other processes: grievances, human rights commission, workplace safety, provincial audits, criminal investigations

Who Should be Interviewed?

- Type of investigation: complaint based versus audit based
- All key parties to the issue:
 - RWC: complainant, respondent, witnesses
 - Audit: all staff , management, union, clients
- Law of diminishing returns



Governing & Relevant Documents

- Letters of Complaint
- Letters in Response
- Supporting documentation
- Computer records
- Relevant legislation, policy, procedures, guides
- Manager notes, employee files

- Example: Don't Underestimate Information Technology!!

Decision Maker

- Important to identify appropriate individual / group of persons to provide directions on the conduct and direction to the Investigator
- Determined based on the issue under review
- Usually internal to organization, high level and frequently someone in Human Resources
- If high level concern, Decision Maker may be the Chair of the Board



Who Should be the Investigator?

- Neutral, no perception of bias
- Requisite skills
- Dependent on issue
- Possible choices:
 - Human resources
 - Internal security
 - Third party – non lawyer
 - Counsel / Lawyers
 - Team Approach



Preparing For and Conducting Interviews

- Before the Interviews
 - Mandatory procedures
 - Planning sequence of interviews
 - Administration of Interviews
- Interviews
 - Start of interview
 - Whilst conducting interview
 - Additional Considerations
 - Note taking
- After the Interviews
 - Do you know the Facts or is more Interviewing Required?

Before the Interview

- Determine procedural requirements: governing policy, legislation, etc.
- Assess appropriate sequence of interviews
 - Dependent on type of Issue
 - RWC: Complainant, Witnesses and Finally the Respondent
 - Workplace Audits: management, staff, union(s), clients

Administration of Interviews

- Determine location of meetings, length of meetings, who will contact
- Advise Union / Appropriate Parties of the Investigation

Determine What will be Said when Contacting individuals:

- Purpose of meeting – limit to general nature and no specifics
- Who meeting with
- Location
- Length of meeting
- Right to union rep / legal rep/ support
- What documents to bring
- Confidentiality / No retaliation
- Who Will Contact – normally someone internal

Start of Interview

- Introduce yourself, your role, your background
- Confidentiality requirements and no Retaliation(if applicable)
- Clarify Purpose of the Meeting / Mandate of the Investigation
- Clarify the role/expectations of the person being investigated – union rep or support person
- Explain the overall process as well as specific interview process
- Clarify what will happen with interview notes, who will see them, what used for
- Ask if there are any questions / concerns before proceeding

During the Interview

- Stay neutral, reserve judgment, be open to all possibilities
- Do not voice opinion or show emotion or reaction
- Do not promise or give assurances on outcome – if asked, explain that determination of facts only occurs upon completion of interviews
- Confirm what you have heard if at all unsure
- Display empathy as appropriate but not sympathy
- Do not lay blame

During the Interview

- Do not accept unacceptable behavior – stay calm, explain what is expected / required; call breaks as necessary and use the union / support person to assist in process
- Start with general questions and get more specific over course of the interview to ensure all relevant matters and information discussed
- Ensure that specific allegations / concerns in the complaint document have been discussed
- Ensure a respondent has had opportunity to respond to all relevant evidence being considered

At the End of the Interview

- Ask the interviewee if there are any additional informational items they want to share
- Ask if there are any individuals that should be interviewed and, if so, why
- Ask if they are aware of any relevant documentation
- Thank them for their participation in the process and who to contact should they have any questions or concerns arising in relation to this process

Additional Considerations

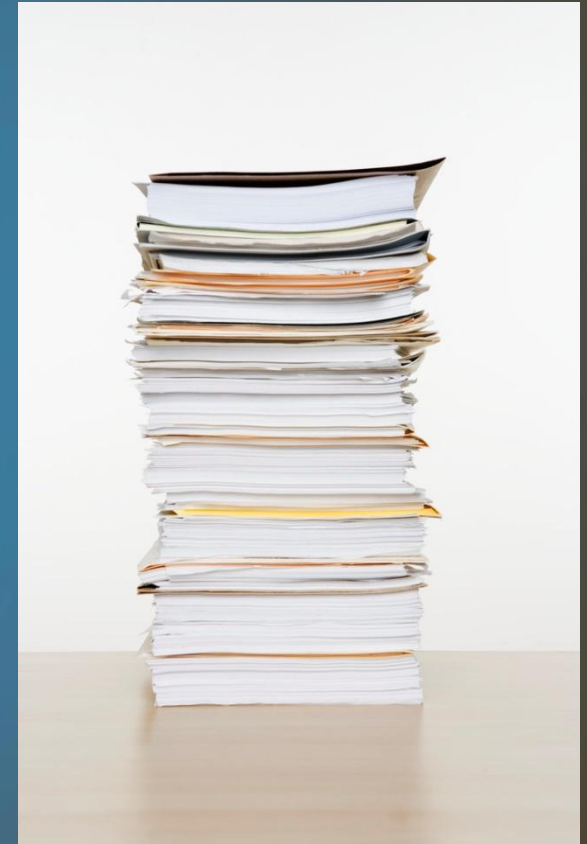
- Keep questions simple
- Don't ask leading questions (i.e. don't try to get an answer you want)
- Direct questions are appropriate – did you say “...”
- Do not share with an interviewee what others have said unless you need them to respond to a specific alleged statement or quote
- Watch the unspoken cues throughout the investigation
- Clarify “loaded words” as to what is meant when used – example “he is a bully” – what behavior is it or examples can be given to explain why they used that word

Note Taking

- Each person interviewed should be captured in a separate set of notes:
 - Record name, date, time and location
 - Record who was all present
 - Record all relevant details discussed during the interview – notes are not a transcript, they are a capture of information discussed
 - Notes may include personal observations made by the interviewer during the interview but should not include judgments made by the interviewer during the interview
 - If notes are to be shared back with person interviewed – cleanse the notes before sharing them by deleting any interviewer comments / observations

Writing the Report

- Compiling the report
 - What to Include
 - Legal Assessment / Test Utilized
 - Report Templates
- Dealing with Credibility Issues
- Making Recommendations
 - When to Make
 - Appropriate Communication Vehicle



What To Include in the Report – It Depends...

- Private & Confidential
- Name of investigator, date of report
- Reference relevant policy, law, etc.
- Name and description of parties to the review
- Summary of the Investigation Process
- Principles of Evidence
- Summary of Issue/Concern investigated
- Summary of Response (RWC)
- Relevant portions of policy, law, etc.
- Findings of Fact
- Analysis / Ruling / Recommendations

Legal Assessment – Test Utilized

- Balance of probabilities
- Reasonable person
- Beyond a reasonable doubt

Review of Two Templates

- Respectful Workplace Complaint
- Workplace Audit

Credibility Assessments

- He said / she said scenario requires a finding of fact
- Look to external evidence – what supports one version versus the other:
 - Documents
 - Witnesses
 - Plauability
 - Demeanor
 - Motivation to lie
 - Truthfulness or lack thereof
- What to do if it's a Tie?
- Inconclusive Findings – When is it okay?

Making Recommendations

- When are recommendations appropriate
- How should recommendations be documented
 - Part of report
 - Separate document

Confidentiality

- Can you guarantee confidentiality?
- What information can the investigator disclose?
- What to do if someone does not respect confidentiality requirements?

Common Mistakes

- Wrong investigator
- Not defining mandate or inaccurate mandate
- Failing to conduct a timely investigation
- Not conducting an investigation – employee didn't want to file
- Poor process
- Failing to ask for help



Assignment

- Group in-class



Process – What's the Big Deal?

- Why is process so important?
 - Due process
 - What happens if due process is not followed?

Wrap It UP

- Feedback on improvements for training
- Thank you