

# Quandaries & Queries: Conducting Fair and Thorough Investigations to Ensure Sustainable Discipline

**BC Care Providers Association  
2019 Conference**

**May 27, 2019**

**Whistler, BC**

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# Agenda

- 1 • Introduction
- 2 • Triggers
- 3 • Employer Response
- 4 • Investigation
- 5 • Decision Making
- 6 • Report
- 7 • Conclusion



# What is an Investigation?



*“Personally, I think a question like that says a lot more about YOU than it does about me.”*

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# What is an Investigation?

## Definition:

A **fact-finding activity** in which a fact-finder engages in a process to determine whether or not certain suspected or alleged events have occurred





# Legal and HR Requirements

*“There is no specific standard of investigation that employers must follow; what is required will vary depending on the facts surrounding the employer, its policies, sophistication, experience, and the workplace ...*

*... [H]ow the employer reacts is subject to judicial scrutiny. Its responsibilities do not give it license to conduct an inept or unfair investigation or behave in malicious, vindictive, or outrageous ways.”*

*Elgert v. Home Hardware Stores Ltd., 2011 ABCA 112*





# Why Investigate?

1. Truth
2. Fairness
3. Duty



# Why Investigate?

## 1. Truth

- Things are often not how they seem
- Objective is **to find the truth**



*You want the truth? You can't handle the truth!*

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Why Investigate?

## 2. Fairness

- Procedural fairness
  - Natural justice
  - Reasonableness
  - Prudence
  - Acceptance of decisions
- Build case *before* taking disciplinary action
- Avoid arbitrary or unfair decisions







# Why Investigate?

## 3. Duty

- Procedural fairness
  - Present allegations before taking action
- Due diligence
- Duty of good faith in the manner of dismissal
  - Honesty, sensitivity, etc.
- Wrongful dismissal claims, grievances and human rights complaints

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Triggers

- What could trigger an investigation?
  1. Observed behaviour
  2. Internal or external complaints
  3. Suspicion
  4. Anonymous complaints





# 1. Observed Behaviour

- Red flags
- Something has changed
- Something is outside of the norm (e.g. Watergate tape on the outside of a door keeping it unlocked)





## 2 & 3: Complaints & Suspicion

- Assess critically and seek more information if necessary, before starting an investigation
- Is there a “reasonable basis”



## 4: Anonymous Complaints

- **Challenges:**
  - Uncertainty about accuracy and motives
  - How was information obtained
  - Complaint may be unclear
- **Reducing anonymous complaints:**
  - Improve or add communication channels
  - Specify anonymous complaint criteria
  - Publish complaint criteria

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Triggers

- Four general areas
  1. “Just cause” for discipline or discharge (very broad)
  2. Human rights – prohibited ground of discrimination
  3. Harassment or bullying – other than on a prohibited ground of discrimination
  4. Other collective agreement or employment violations
- Ask yourself:
  - “If the matter complained of is true, does it fall within one or more of these areas?”

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Employer Response

- **Move quickly**
  - Avoid a complaint
  - Effectively address the problem
- **Avoid a cold trail**
  - Fading memories
  - Lost or destroyed documents
  - Situation may evolve





# Employer Response

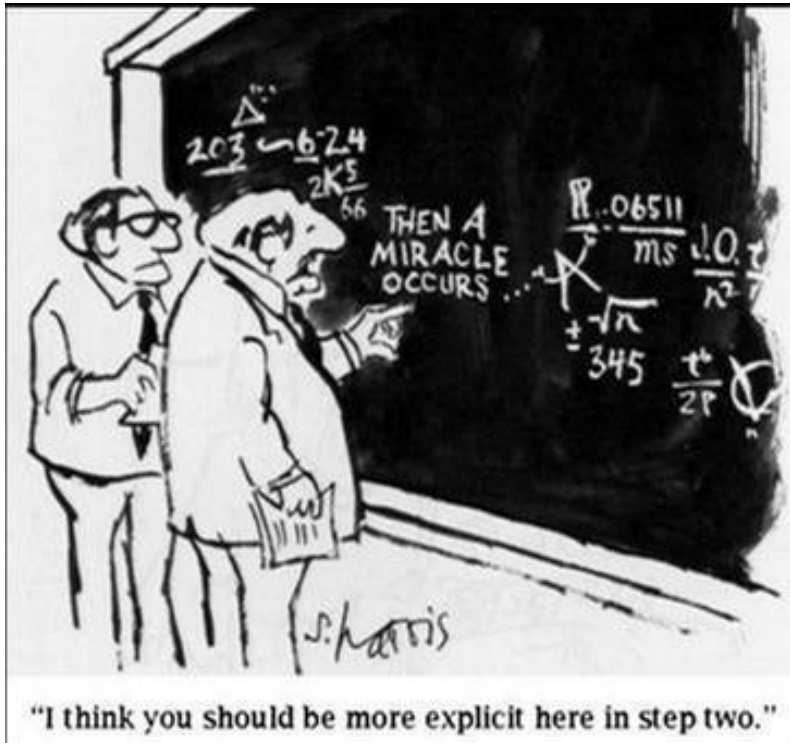
- Possible Delays
  - Waiting for investigator
  - Mental and/or emotional issues
  - Absences from work
  - Respondent requests legal counsel







# Complex Issues



- Human rights
- Bullying and harassment
- Privacy law
- Criminal law

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Throughout Process & After

- Confidentiality
- No Retaliation or Reprisal





# Confidentiality – two aspects

1. what witnesses say to investigator/intake will be disclosed on “need to know” basis
  - **DO NOT:** Promise absolute confidentiality
2. witnesses must keep investigation info confidential
  - Breach of confidentiality requirements can be **subject to discipline** up to and including termination of employment





# No Retaliation or Reprisal

- Notify participants of **ZERO** tolerance
  - Act of reprisal or retaliation may result in discipline up to and including termination of employment
- Be aware of **statutory protections** – e.g., under BC’s workers compensation and occupational health and safety regime

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Initial Key Questions

1. **Who** will investigate?
2. What is the **purpose** of the investigation?
3. What is the **scope** of the investigation?
4. Are there **immediate action items**?





# 1. Who Will Investigate?

## Internal vs. External Investigator

### Internal Investigator

- **Pros:**
  - Knowledge of culture, policies, parties, etc.
  - Quick and cost-effective
  - Atmosphere of trust
- **Cons:**
  - Bias
  - Perceived lack of impartiality
  - Lack of expertise and/or experience

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# 1. Who Will Investigate?

## Internal v. External Investigator

### External Investigator

- **Pros:**
  - Expertise or experience with complex issues
  - Prior court room experience
  - Independence
  - Impartiality
- **Cons:**
  - Cost
  - Wait times





# 1. Who Will Investigate?

## Are other sources needed?

- Who will assist the investigator?
- Is help required?
  - Forensic accountants?
  - Computer specialists?
  - Technical experts?
  - Social media specialists?
- Do you need to retain legal counsel?
  - Legal counsel have the skills to conduct the investigation, but may be conflicted from representing the employer in the event of litigation
  - Can help establish the purpose or scope of the investigation

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion





## 2. What is the Purpose of the Investigation?

- Assess the complaint
  - What is the problem?
- Consider any legislation or collective agreement
  - Human rights legislation, workers compensation, occupational health and safety legislation, etc.
- Look at company policies
  - Code of ethics, code of business conduct, harassment policy, etc.
- Review your workplace investigation policy for most serious allegations (harassment)

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



### 3. What is the Scope of the Investigation?

- Crucial step:
  - Determines the evidence you are looking for
  - Identifies the conclusions which need to be reached
  - Ensures you stay on track
- Does the investigator also have the mandate to make recommendations? Be clear about this





## 4. Are There Immediate Action Items?

- Are **temporary measures** required?
  - Removing complainant or respondent(s) from the workplace or moving them to different work locations?
  - Suspension vs admin leave?
  - Paid vs unpaid?
- Public relations and communications strategy?
- Government relations specialists?

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



## 4. Are There Immediate Action Items?

- Involve internal or external security?
- Issue formal “litigation hold”?
- Are there workplace safety issues?
- Is there reason to believe the alleged wrongdoer can be a danger – to the complainant, employer property, or themselves?
- Changing the reporting structure?

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Gathering Evidence



Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Preparation

- 1. Read the complaint and all allegations**
  - Is it clear? Does it make sense? Inconsistencies?
- 2. Be mindful of legislative context or applicable company policies**
  - Employee's rights and obligations?
  - Employer's rights and obligations?
- 3. Logistics**
  - Location, method (Skype, telephone, etc.), time allotted and scheduling constraints
- 4. Pre-investigation communication**
- 5. Interview outline or script**





# Gathering Evidence

- Gather evidence and documents prior to interview & reassess after interviews

**\*can be the difference maker in fact finding**

- Types of relevant evidence:
  - E-mail messages
  - Internet search history
  - Text messages
  - Personal computer files or personal information stored on computer
  - Information on social media sites
  - Video camera feeds
  - Employee desk or locker contents

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Gathering Evidence

- **Ask parties to support their stories with evidence**
  - Failure to do so may lead to adverse inference
- Independent access to sensitive evidence may be allowed subject to the requirements of privacy legislation
- Company policies
  - Reasonable expectation of privacy?
- Visit location where incidents are alleged to have taken place
  - Take pictures

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion





## Fact Pattern – Draco’s Theft

1. What issues, if any, can you identify with the employer’s investigation?
2. What factors, if any, weigh in Draco’s favour in terms of a lesser form of discipline?
3. Do you think the judge upheld termination for just cause?



## Fact Pattern – Draco’s Theft

- This was a real case. *Lau v. Royal Bank of Canada*, 2015 BCSC 1639
- Draco is Lau, and RBC is Banský’s Bank

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Order of Interviews

1. **Generally, witnesses are interviewed first**
  - Could be interviewed more than once
2. **The alleged wrongdoer is typically second but ...**
  - Should have opportunity to respond to evidence
  - May be interviewed again at the end of the process
3. **Other witnesses**
  - Computer technicians?
  - Internal security personnel?
  - Former employees? This may pose a challenge





# Interviews: Pre-Investigation Communication

1. **Verbal or written notification (usually when external investigation)**
2. **Avoid deception**
3. **Content**
  - Context of investigation
  - Name of investigator and any observer
  - Purpose of the meeting
  - Duty to co-operate
  - Confidentiality
  - Request evidence
  - No tolerance for interference with investigation
  - Retaliation or reprisal could lead to discipline or discharge

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Pre-Investigation Communication

## 4. Notification

- Timing is crucial
- Minimize risk of leaks
- Minimize risk of collusion
- Avoid unnecessary stress

## 5. Support persons during interviews –

- Union right? check collective agreement
- Policy entitlement?
- Consider potential impact

## 6. Witness Identification

- Any identified witness should be interviewed
- Witness identity should **NOT** be kept from parties

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Location

- Consider comfortable, private location
  - No basis to argue coercion, duress, inappropriate environment, etc.
- **Workplace**
  - Take subject back to scene – clarify lines of sight, where people were positioned, etc.
  - Investigator can access documents and view the facilities
- **Outside Workplace**
  - Avoid gossip, discussion, speculation, etc.
  - May facilitate greater participation

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Opening and Outline or Script

- **Opening**
  - Purpose of investigation and process
  - Importance of honesty and complete answers
  - Importance of confidentiality – both aspects
  - No tolerance for retaliation or reprisal
  - Anticipated timeframe
- **Outline or Script**
  - Interview outline or script serves as guide
    - Listen to witness responses – “go with the flow”
    - Refer to outline or script as necessary
  - Include known information that you will put to witness
  - Will likely be exhibit in trial or hearing
    - Avoid editorial comment where not appropriate

Introduction

Triggers

Employer  
Response

Investigation

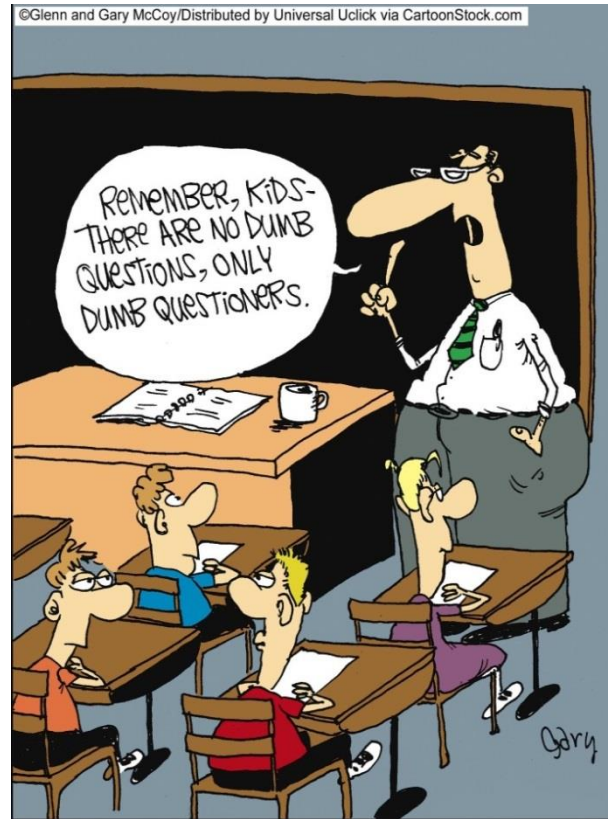
Decision  
Making

Report

Conclusion



# Interviews: Questions



Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion





# Interviews: Questions

- Interview outline or script as a guide
- Ask witness to explain what happened in their own words
  - If possible, in chronological order
- Leading vs. non-leading questions
  - Move from general to specific
- Put all information to witness – ensure they are **committed** to their story
  - Get their explanation of gaps or inconsistencies
  - Even if the story is that they do not remember
- Use silence as a tool – do not fill gaps

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Types of Questions

## Multi-stage, funnel-like approach

### 1. Broad, open-ended questions

- Who, what, where, when, why, and how?

### 2. Specific questions

- Pin down detail
- Test witness credibility

### 3. Catch-all questions

- “Is that all?”
- “Do you remember anything else?”
- “Is there anything you wish to add?”

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Interviews: Opportunity to Respond

- Where suspected or alleged wrongdoing is at issue, ensure that the accused has the **opportunity to respond** to all of the allegations and the critical (new) evidence
- Same for complainant and witnesses
- Due process





# Interviews: Quick Tips

- **DO NOT:**
  - Leading questions – unless and until appropriate
  - Fail to recognize your own bias
- **DO:**
  - Find facts
  - Exercise caution and inquire about everything relevant
  - Ensure neutrality
  - Ask open-ended questions
    - Ask specific questions later

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Notes

- Investigator to take notes, or use a note-taker
- Note-taker will likely be a witness
- Notes must be **accurate, clear, and legible**
- Keep **detailed** notes
  - Questions asked and answered
  - Investigation steps from start to end (dates, times, persons in attendance, etc.)
- Retain a file
- Avoid editorial comment where not appropriate
- Keep all **versions of notes**

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Obligation to Co-operate

- Failure to co-operate creates evidentiary vacuum and possible **“inference of wrongdoing”**
- Do not need to rely on inference where the nature of the employee’s duties includes an obligation to provide facts
  - Example: person in a fiduciary role such as a security guard
  - *St. Paul’s Hospital v. Hospital Employees’ Union (Easton Grievance)*, [1999] BCCAAA No 121 (Hope)
- Refusal to co-operate or answer or provide an explanation can result in discipline or discharge
  1. Employee deliberately attempts to deceive by providing false or misleading information
  2. Employee knowingly allows silence to damage the legitimate business interests of the employer
    - *British Columbia Ferry and Marine Workers’ Union v British Columbia Ferry Services Inc*, 2008 BCSC 1464

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Closing

- Example: *“Is there anything else that you would like to tell me or that you think I should know?”*
- Reminder about confidentiality
- Reminder about retaliation or reprisal
- Ask person who has been interviewed to review and sign any statement he or she provided

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Follow-up

- Follow-up on information raised in interviews
  - Gather new information
  - Follow-up interviews with new information
  - Focus on inconsistent allegations and responses







# Decision Making: Are You Ready?

- Standard for workplace investigations is the “**balance of probabilities**” or “preponderance of evidence”
- It involves:
  - weighing the evidence
  - assessing the credibility of witnesses
  - determining whether the complaint is substantiated or unsubstantiated (in whole or in part)





# Decision Making: Are You Ready?

1. When all necessary witnesses have been interviewed or re-interviewed
2. When you are confident there are no material loose ends, gaps or crucial questions left unanswered
3. When the accused has been given **a final opportunity to respond** to any new facts uncovered

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Decision Making:

## Assess Witness Credibility

- Weigh the account of events provided by each witness against “the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances”

*Faryna v Chorny*, [1952] 2 DLR 354 (BCCA)



# Decision Making: Assess Witness Credibility

## 1. Actual Knowledge

- Did witness have opportunity to observe and perceive?

## 2. Plausibility

- Is witness' version of facts believable? Does it make sense?

## 3. Demeanour

- Does witness seem to tell truth? Facial expressions?  
Body language?

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Decision Making: Assess Witness Credibility

## 4. Motive

- Does the person have a reason to lie?
- Does the person have a bias or interest in the matter?
- Consider relationships, context, history

## 5. Material omission

- Was a material piece of evidence omitted despite having a reasonable opportunity to provide it?

## 6. Material Admissions

- Did witnesses or accused acknowledge facts even if not helpful to their version of events?
- Did witnesses or accused dispute even obvious facts?

## 7. Corroboration and Consistency

- Is witness' version of facts supported by the evidence?

## 8. Past record

- Has alleged wrongdoer acted inappropriately in the past?
- Note: Past record is not an indication of guilt

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Decision Making:

## Assess Witness Credibility

- Common pitfalls
  - Over-reliance on demeanour
  - Unconscious bias
  - Confirmation bias
  - Making the determination too soon
  - Failing to make the determination



# Decision Making: Assess Witness Credibility

- Investigator may need to conclude that witness is:
  - Mistaken or lying
  - Unreliable
  - Obstructing the investigation
- Investigator may conclude that some tangent issues remain unresolved – but must make findings on core issues

Introduction

Triggers

Employer  
Response

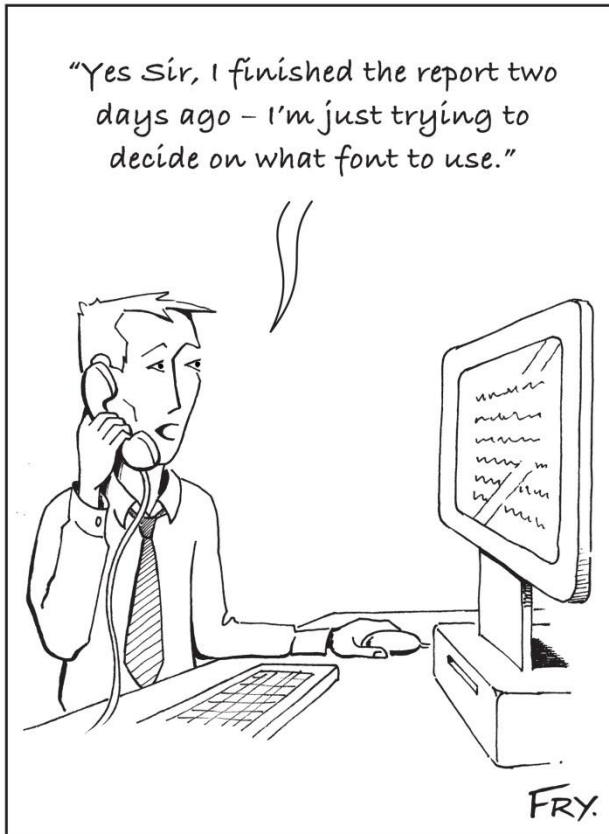
Investigation

Decision  
Making

Report

Conclusion

# Written Reports



## Importance of written reports

- Reflects on employer
- Could lead to liability
- Parties will have a right to see, unless privileged
- May be introduced as evidence

## Notes should be ...

- Complete
- Structured
- Well drafted
- Balanced
- Fair

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion





# Type of Recommendations

## 1. What should be done in the particular situation?

- Disciplinary action
- Training or counselling
- Mediation
- Demotion or transfer – caution
- Apology
- Notifying police

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Type of Recommendations

## 2. What should be done to prevent the incident from occurring again?

- Increased training and better training
- Employer policies and procedures need to be better known, understood and applied
- Improve security systems
- Implement better accounting checks and balances

Introduction

Triggers

Employer  
Response

Investigation

Decision  
Making

Report

Conclusion



# Questions?



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