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EMPLOYER DISCIPLINARY INVESTIGATIONS: THE HOW TO'S AND THE DO NOT DO'S!

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I. INTRODUCTION

There has been a lot of focus in the past few years on investigations of bullying and harassment complaints. However, employers are regularly required to investigate a wide range of misconduct in the workplace. In this paper, we discuss an employer's obligations to investigate the workplace misconduct of its employees, the benefits of properly conducting the investigation, and special considerations arising in respect of unionized work environments. We also address the steps that an employer should take to prepare for an investigation, how to properly conduct an investigation, and the tests an employer must meet to defend its decision to discipline and the disciplinary penalty imposed.

II. WHY INVESTIGATE?

There are a number of significant benefits to employers of properly investigating allegations of employee workplace misconduct. Those benefits include knowing all the facts before imposing any discipline, enabling the employer to meet its statutory obligations, increasing the likelihood that discipline, including dismissal for cause, will withstand challenge at arbitration in a union environment, or in the courts in a non-union environment, and ultimately reducing the potential liability of the employer for failure to adequately address misconduct in the workplace, or for unfairness to the accused employee in the investigation.

A. Statutory Obligations

Employers have statutory obligations to investigate alleged wrongdoing arising from the BC *Human Rights Code*, RSBC 1996, c. 210, and from the *Workers' Compensation Act*, RSBC 1996, c. 492. Conducting appropriate investigations enables an employer to meet those statutory obligations.

Section 13 of the *Human Rights Code* prohibits discrimination regarding employment, based on a list of prohibited grounds. The equality guarantees contained in Section 13, and in human rights legislation in other provinces, have been interpreted to require an employer to take reasonable steps to investigate allegations of discrimination in the workplace: *Beharrell* v. *EVL Nursery Ltd.* [2018], BCHRT 62 at para. 21 (CanLII).

As one human rights tribunal has held, the equality guarantee would be:

> … a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. … 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.
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> *Laskowska v. Marineland of Canada Inc.*, 2005 HRTO 30 at para. 53 (CanLII)

Various provisions of the province's *Workers' Compensation Act*, and *Regulations* under that *Act*, also require employers to investigate and address workplace incidents and hazards. Section 173 requires an employer to investigate accidents or incidents meeting certain criteria. Section 174 requires the investigation to be carried out by persons knowledgeable about the type of work involved, and requires the employer to make any witnesses to the incident available for interview by the investigator. Section 175 requires a preliminary investigation, report and follow-up action. Section 176 requires a full investigation, report and follow-up after the completion of the preliminary investigation.

Sections 4.24-4.26 of the *Occupational Health and Safety Regulation*, BC Reg. 296/97 define and require an employer to report and investigate "improper activity or behaviour". Such activity or behaviour includes the attempted or actual exercise by a worker towards another worker of any physical force so as to cause injury, any threatening statement or behaviour which gives the worker reasonable cause to believe they are at risk of injury, and horseplay, practical jokes, and unnecessary running or jumping or similar conduct.

B. Increased Likelihood that Discipline or Discharge Will Withstand Challenge

A key reason to investigate all allegations of employee misbehaviour is to ensure that the employer's determinations of whether or not wrongdoing occurred, and whether and what discipline is warranted, are based on all the facts.

The failure to determine what actually occurred in relation to the allegations before deciding to discipline or discharge an employee can, in the union context, lead to a finding at arbitration that the discipline or discharge was not warranted, and an order reinstating the employee with back pay. Typically, arbitrations for discipline or dismissal take place at least a year or more after the imposition of the discipline, which means that the employer's potential liability for lost wages and benefits can be quite large.

In the non-union context, an employer who discharges an employee for cause without notice, without a proper investigation, may be unable in a subsequent wrongful-dismissal trial to establish facts amounting to cause. As a result, the employer would owe the employee damages equal to pay in lieu of reasonable notice of dismissal, and potentially other types of damages discussed below.

C. Mitigating Liability

A properly conducted investigation of alleged wrongdoing is the first step in mitigating an employer's liability for the wrongdoing of its employees. For example, 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 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.

D. Investigations Gone Wrong

In *Smith v. Vauxhall Co-Op Petroleum Ltd.*, [2017] ABQB 525 (CanLII), the Alberta Court of Queen's Bench considered the impact of an employer's problematic investigation on its ability to rely on allegations of sexual harassment and sexual assault as grounds for dismissal without notice. The Court held that there were "obvious problems" with the employer's investigation, and held that the employer had failed to establish just cause for summary dismissal. The Court's concerns included the following:

- Although the complainant stated that she had witnesses who could corroborate her allegations, the investigator did not ask their names or interview them;
- The investigator only interviewed the complainant and the respondent employee;
- The investigator did not ask the complainant for specifics regarding her allegations, such as where the respondent had touched her;
- All the complainant had told the investigator was that the respondent was "touchy-feely";
- The investigator did not ask the complainant for specifics regarding the respondent's alleged sexual comments, purportedly because the complainant did not want to repeat them;

- The investigator simply believed the complainant's version of events because the respondent admitted to concealing his personal relationship with the complainant from the employer, and admitted to repeatedly threatening to fire the complainant after their relationship ended.

The Court made the following comment about the standards for an employer investigation of wrongdoing:

> 82 To be clear, **the Defendant was not required to adjudicate Ms. AM's allegations based on the standards expected in a judicial process.** Most private employers are not equipped with the same investigative tools, authority, or safeguards as those available in the judicial system. **This Court, however, cannot rely upon Mr. Longman's problematic investigation as justification for terminating Mr. Smith**. Especially when its conclusions are based on **allegations of sexual harassment and sexual assault that have clearly not been made out on the facts**.
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> Emphasis added

Despite the failings of the investigation, the Court held that other acts of wrongdoing justified the dismissal of the respondent employee, namely dishonesty in concealing his relationship with the complainant, and personal harassment of the complainant once the relationship ended.

The Court also held that had the respondent employee been wrongly terminated, it would have declined to award him punitive damages in relation to the employer's handling of the investigation, or the employer's reliance on the allegations of sexual harassment and sexual assault throughout the trial. The investigator had given the respondent employee an opportunity to respond to the allegations, and had acted in good faith in investigating the allegations. However, the Court held that the employer's continued reliance on the allegations of sexual harassment and sexual assault at trial would likely be reflected in a costs award to the respondent employee. The Court considered that it should have been apparent to the employer that there was little basis for continuing to rely on those allegations at trial in light of the nature and extent of the employer's investigation.

We note that the investigation in this case had been conducted by the dismissed employee's manager. This case provides a good example of circumstances in which an external investigator would have been an appropriate choice.

Arbitrator Somjen in *IG Machine and Fibres Ltd.* v. *International Assn. of Machinists and Aerospace Workers, Local Lodge 692 (Henderson Grievance)*, [2015] BCCAAA No. 30, 2015 CanLII 21507 (BCLA), was also concerned about the employer's investigation into allegations of harassment, discrimination and retaliation. In that case, the grievor had been a complainant in an earlier harassment grievance which the parties had settled. After the settlement, the

grievor's supervisor allegedly made comments during an employee meeting attended by the grievor and others about the impact of the prior complaint on him, and later made further comments to that effect to the grievor and another employee on the shop floor. The employer appointed an engineer without training in workplace investigations to conduct the investigation. The investigator concluded that the supervisor had not made the statements alleged by the grievor. The employer accepted the investigator's conclusions, and took no action in respect of the grievor's complaint.

The Arbitrator was concerned that the investigator's report addressed only the grievor's allegations regarding the second meeting that had taken place on the shop floor. The investigator did not make any findings in relation to the first allegation. The Arbitrator held that the investigator had ignored clear evidence that the alleged comments in the first meeting had in fact been made. The grievor and three other employees told the investigator during their interviews that the supervisor had made the alleged comments during the first meeting. In respect of the second meeting, the investigator concluded that the grievor and the other employee present colluded, because their stories were very similar. The Arbitrator pointed out that the investigator failed to consider that their stories might be similar because they both heard the same things.

Because the supervisor denied making the comments alleged to have been made in the first meeting, contrary to the evidence of the other four witnesses, the Arbitrator was not inclined to accept his evidence that the second meeting had not occurred. The Arbitrator concluded that the supervisor had made the comments alleged at both meetings. The Arbitrator also concluded that the supervisor's comments constituted discrimination and harassment contrary to the prior settlement agreement, the collective agreement, and the *Human Rights Code*. The Arbitrator awarded the grievor $2000 for injury to her dignity and feelings.

We note that if the employer had appointed a properly trained investigator, the employer would have made its decision regarding the appropriate response to the grievor's complaint based on the actual facts of the case. The employer may have then responded in a way that satisfied the grievor and the union, and avoided the need for a grievance, arbitration, and the payment of a damages award.

III. COLLECTIVE AGREEMENT CONSIDERATIONS

In unionized workplaces, employers must take care to adhere to the requirements of their collective agreement in relation to its investigation and discipline of an employee. Failure to meet the notice and/or union representation rights contained in a collective agreement can potentially result in a reduction of the disciplinary penalty or a finding that no discipline is justified. Another potential result could be the inability of the employer to rely on evidence obtained in contravention of the collective agreement.

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.

Many collective agreements also contain limits on the types of evidence and documents that can be used at arbitration to support the imposition of discipline. 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.

For example, if allegations against an employee are recorded in the employee's personnel file, but the employer never raised the allegations with the employee, the employer cannot rely on these incidents in deciding the appropriate disciplinary penalty in relation to later misconduct. Therefore, it is important that employers properly investigate and make a decision about whether discipline is warranted and the appropriate disciplinary penalty, if any notation is going to be made in the employee's personnel file about the allegations.

Employers should also ensure that they adhere to any time limits set by the collective agreement for imposing discipline. In addition, in deciding the appropriate disciplinary penalty, employers should also know whether the collective agreement contains a sunset clause. Sunset clauses prevent an employer from considering a prior event for which discipline was imposed, if the employee maintained a certain discipline free period after that prior event.

IV. PREPARING FOR THE INVESTIGATION

A. Start the Investigation in a Timely Way

It is essential for an employer to start an investigation into any allegation of misconduct as soon as possible after learning of the misconduct. One of the most serious mistakes made by employers is to delay starting an investigation. With the passing of time, witnesses' memories may fade, and important evidence may be lost. In the union context, arbitrators have made it clear that if an employer unreasonably delays in investigating and disciplining an employee for misconduct, the discipline may be overturned at arbitration. For this reason, an employer must investigate and, if necessary, sanction an employee for misconduct in a reasonably expeditious way. It is also good human resources practice, as the employee is not lulled into a false sense of security.

The decision of Arbitrator Dorsey in *Communications, Energy and Paperworkers of Canada, Local 2000 v. Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. (Sannes Grievance)*, [2007] BCCAAA No. 162, provides a good example of that principle. In that case, the employer had dismissed the grievor, who had a lengthy history of prior discipline, when he failed to notice defects in the printing plates for the newspaper on a particular day. It was his role to make and proof the printing plates based on computer files from others. As a result of the grievor's error, the paper was printed using the defective plates, and a large amount of paper was wasted. Once the defect was discovered, the grievor corrected it and the paper was reprinted.

Arbitrator Dorsey concluded that because of the grievor's prior disciplinary history, the employer was entitled to impose "harsh discipline". However, the Arbitrator nonetheless held that dismissal was an excessive disciplinary response. He reached that conclusion in part because the employer did not conduct an investigation as to how the error had occurred, or how it was corrected. It had never interviewed the grievor about the error, and had simply dismissed him almost one month after the error had occurred. The Arbitrator held that the employer's failure to immediately investigate, and its delay in taking disciplinary action against the grievor, prejudiced the grievor and the union. The original printing plates disappeared. There was no evidence as to how the error remained in the computer file used by the grievor to create the plate. The Arbitrator held that the union and the grievor were thus deprived of information necessary to examine the context and gravity of the consequences of the faulty plates. The Arbitrator reinstated the grievor's employment with a five-week suspension.

The result in that case serves as a warning to other employers not to delay in investigating and disciplining employees for alleged workplace misconduct. Such delay may lead an arbitrator to overturn the discipline imposed.

Despite the need to start an investigation in a timely way, as discussed below, there are a number of steps that an employer should take before launching an investigation into an employee's alleged misconduct.

B. Review the Relevant Policies

An employer should consider the allegations, and determine whether any of its written policies are applicable to the situation. If so, the employer should carefully review the policies. If the employer has any policies regarding disciplinary investigations, or the employee is covered by a collective agreement, the employer should also be sure to review and follow the policies, and the discipline provisions of the collective agreement.

C. Consider Potential Sources of Evidence and Take Steps to Protect the Evidence

An employer should also consider potential sources of evidence in relation to the allegations, and take steps to secure and protect the evidence for later use by the investigator. The evidence to be gathered could include physical evidence, documents (physical and/or electronic) such as reports, policies and procedures, texts, and emails, as well as video surveillance footage, photographs, and social media posts. Depending on the nature of the allegations, it may be necessary to take possession of and search the computer, laptop, or cellular telephone that the employer issued to the employee. However, steps will need to be taken to protect an employee's privacy in relation to personal information stored on those devices.

D. Select the Investigator

Another matter to be decided before the start of the investigation is the selection of the investigator. Potential investigators could include a manager, a member of the human resources staff, an employee whose usual role is that of investigator, or an external investigator. The more complicated, controversial, and/or serious the allegations, the more likely that an external investigator will be the appropriate selection. For less complicated issues involving minor infractions or performance concerns, the employee's manager may be adequate. In situations where an employee has made relatively simple allegations against another employee in their department, a manager from outside the department or human resources personnel may be the appropriate investigator. In cases involving complex issues such as harassment or discrimination, cases involving many witnesses, or cases with potentially significant outcomes such as termination of employment, an investigator on the employer's staff, or an external investigator may be the appropriate choice.

In selecting an investigator, especially from amongst its managers, an employer should also consider the ability of the individual to perform the functions on an investigator. The investigator should be someone that is seen as credible and trusted within the organization. An investigator must be able to determine the relevant issues and ask suitable questions. They must be able to analyze all of the information gathered and make the appropriate findings of fact and reach conclusions that are consistent with the employer's policies and the applicable law.

It is also important that, where possible, the investigator is, and will be perceived by the employees involved, to be impartial. The employees and union are more likely to accept the result of the investigation when the investigator selected is, and is perceived to be, objective. An impartial investigator is also more likely to reach the correct findings of fact. A person should not be selected as an investigator if they have had any significant involvement with any of the witnesses or parties, or have been involved in the matter in another capacity. A person with such prior involvement will not be seen as neutral. An investigator must also understand that their role is to find the facts, and is not to get admissions from the alleged wrongdoer to prove the allegations.

It may be prudent for an employer to seek legal advice before selecting an investigator. Legal counsel can advise whether in light of the allegations an external investigator should be selected, and can assist in identifying qualified external investigators. Legal counsel can also provide guidance to a member of the employer's staff selected to conduct the investigation.

E. Determine the Scope of the Investigation

Once the investigator is selected, it is important that the employer make the investigator aware of the full scope of the investigation, and advise them that if additional allegations outside that scope arise during the investigation, they should inform the employer who will decide whether to expand the scope of the investigation. In cases in which the employer has decided to hire an

external investigator, formal terms of reference for the investigation should be developed with the investigator. If the employee being investigated is covered by a collective agreement, it is advisable to try to reach an agreement with the union as to these terms of reference. Such an agreement may increase the likelihood that the union will be satisfied that the investigation was fairly conducted.

F. A Case in Which the Wrong Investigator Was Selected

Arbitrator Love in *Western Forest Products Inc. v. United Steelworkers 1-1937 (Whittaker Grievance)*, [2018] BCCAAA No. 17, provided some advice to employers about the use of internal investigators. In his reasons, he commented as follows in that regard:

> 263 This employer has used external investigators in the past; it is however not required to use them. If the employer is going to use an internal investigator the employer must ensure that she is properly trained in the policy, reads the policy before commencing an investigation and that she has the investigation skills necessary to conduct a full, thorough and fair investigation process. This includes taking full and complete notes of the questions that she asked and the answers that are provided. A proper harassment investigation takes planning and preparation.

Arbitrator Love ultimately held in the case that the employer had not proved the alleged misconduct, in part due to difficulties with the employer's investigation of a bullying and harassment complaint. In that case, the employer had selected a chartered accountant on its staff to investigate the complaint. The investigator had no training in human resources or in harassment investigation. The complaint was the first matter she had ever investigated. The arbitrator was concerned that the investigator had not followed the investigation procedure set out in the employer's harassment policy. Arbitrator Love considered the investigation to be properly characterized as an "investigation by ambush", and "unfair and perfunctory". The following concerns were identified by the Arbitrator:

- The investigator had not informed the grievors that she was conducting an investigation into a harassment complaint against them before she interviewed them. Contrary to the employer's harassment policy, the investigator did not provide the grievors with a copy of the written complaint against them. As a result of the lack of notice, the grievors had no opportunity to exercise their right of union representation under the harassment policy.

- The investigator did not ask the complainant or the grievors whether there were any potential witnesses, and did not interview persons who were in a position to observe the interactions between the complainant and the grievors.

- The investigator did not record in her notes any introductory comments she made, or the questions she asked or the answers given.

- The investigator did not question the grievors about each and every allegation made by the complainant, but intended to rely on all of the allegations as a ground of discipline for the grievors.

- The investigator had not asked the grievors some questions that the Arbitrator considered to be relevant. The Arbitrator considered the failure to ask the questions supported the union's argument that the employer was searching for a reason to discipline the grievors, and that it was seeking to simply confirm the complainant's story, rather than engage in a reasonable search for the facts.

- The investigator did not request or obtain documents and electronic records that were relevant to the issues; and

- The investigator also decided that the grievors were not credible in their answers, as she believed they had lied during an earlier harassment investigation against them, and had lied in respect of another matter unrelated to the harassment investigation, but the investigator did not interview all of the witnesses with information about that other matter.

Arbitrator Love held that the "investigation by ambush" was prejudicial to the grievors, as the employer disciplined them based on the investigation, and sought at the hearing to use their answers during the investigation to attack their credibility. The Arbitrator could not "fathom" how the employer could have concluded that the grievors were dishonest during the investigation given the inadequate and perfunctory nature of the investigation.

The Arbitrator ultimately held that that the grievors had not harassed the complainant, and overturned the three-day unpaid suspensions which the employer had imposed on them.

V. HOW TO CONDUCT AN INVESTIGATION

A. No Specific Standard

The decision of the Alberta Court of Appeal in *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 (CanLII), confirmed that there is no specific standard of investigation that employers must always follow. Instead, what is required varies depending on the circumstances of the case, the nature of the workplace, the employer's policies, and the employer's sophistication and experience. That finding has been adopted and applied by courts across Canada. Despite that finding, there are a number of best practices that employers can adopt when investigating alleged wrongdoing by an employee.

B. Best Practices

We recommend that any person selected to conduct an investigation into alleged employee misconduct use the following best practices as a guide in determining their investigation procedure:

Pre-Interview Steps:

- Review any relevant employer policies, collective agreement provisions, and legislation.
- Make sure that any requirements in the collective agreement or applicable policies regarding notice of the investigation and/or the right to union representation have been met.
- Determine the initial witnesses to be interviewed and the order of the interviews. Generally, the person making the allegations and supporting witnesses should be interviewed before the employee alleged to have engaged in the misconduct. The person making the allegations could be a complainant, a supervisor, or perhaps a member of the public, depending on the nature of the allegations. All persons who were present for and may have independent knowledge of the events or interactions being investigated should be interviewed. The witnesses are not limited to the employer's managers and employees and could include members of the public, contractors, or suppliers. It is better to interview too many people than not interview people who may have relevant information.
- Determine what evidence should be gathered and preserved, including physical evidence, documents (physical or electronic) such as reports, emails, text messages, policies and procedures, as well as video surveillance footage, photographs, or social media posts, and take steps to gather that information.
- Review any written complaints and the evidence gathered.
- Determine the key questions for each of the witnesses identified. Realize, however, that the script prepared is just a guideline. It may be necessary to ask additional or different questions based on the information provided by the witness.
- Arrange for a quiet and private place to conduct the interviews.
- Arrange for someone to attend the witness interviews whose only role is to take notes to ensure that an accurate record of the discussions is kept. The notes should be dated and should indicate the persons present at the interview. They

should also record any non-verbal behaviours of the witnesses as they occurred, such as fidgeting, grimaces, frowns, smiles, sighs, long pauses, nervous or sarcastic laughter, tearing up, or crying.

- It is also a good idea for the investigator to create a separate timeline of the investigation in which to record each step of the investigation. The timeline could record, for example, the dates that documents were requested and received, the names of witnesses and when they were interviewed, and the dates that notice was provided to the accused employee.

Steps at the Interview:

- During all witness interviews, explain the purpose of and procedures to be followed in, the investigation.

- Also advise the witness of the need for confidentiality and of the prohibition on retaliation against any complainant or witness, and that breaches of confidentiality or acts of retaliation could result in discipline. However, the witness should also be advised that the investigator may have to inform the complainant, the accused employee, or other witnesses, of the identity of the witness and the information provided by the witness. The accused employee has the right to know the allegations against them, and the names of the persons making the allegations so that they have a fair opportunity to provide a full response.

- Inform each witness of the need to be honest and forthright in their answers, as dishonesty could lead to discipline for dishonesty.

- Ask the witness whether they have any questions about the discussion to that point, before moving to the interview questions.

- Once the preliminary discussion has ended, begin to gather the facts by questioning the witness.

    - Ask open-ended questions to determine the who, what, where, when, how and why of the situation. Avoid closed-ended questions which can be answered with a simple “yes” or “no”. Also avoid asking leading questions which suggest the answer.

    - Ask questions about the demeanour of the persons involved in the event under investigation. For example, what was the person’s facial expression, tone of voice, or volume of voice.

    - Make sure to ask the questions in a neutral, non-accusatory way. Actively listen to the responses.

- If relevant, ask the witness how the events in question impacted them, or how they felt about the situation.
- Ask relevant follow up questions to the information provided by the witness.
- When the witness makes statements indicating conclusions that they reached (e.g., I was "harassed"), ask them to explain the basis upon which they reached that conclusion.
- Ask whether the witness has or is aware of any relevant documents that should be obtained.
- Ask the witness for the names of any other potential witnesses.
- Try to end the interview with a "scoop" question: "Is there anything else I need to know?"

- Collect and review any additional documents identified by the witnesses.
- Once the full nature of the allegations against the accused employee are known, give the employee notice of the nature of the allegations, and schedule their interview. More detailed particulars of the allegations are recommended for serious allegations.
- The accused employee should initially be interviewed using open-ended questions to allow them to provide their statement of events. Be sure that the employee is made aware of all the allegations against them.
- After going through the events using open-ended questions, ask follow up questions using information provided by the accused employee, the complainant or other witnesses.
- Make sure to ask the accused employee to respond to differences between what they said occurred, and what the complainant and other witnesses have said.
- The accused employee should be permitted to consult privately with their union representative as needed before responding to questions.
- After interviewing the accused employee, interview any potentially relevant witnesses they have identified, and gather and review any documents that the accused employee has identified.

- After interviewing the accused employee and the witnesses they identified, the interviewer may need to interview the complainant and other witnesses again to get their responses to new information that the accused employee and witnesses have provided.

- If possible, prepare witness statements for each person interviewed and have them review the statement for accuracy. Once the witness has confirmed that the statement accurately reflects the contents of the interview, have the witness sign and date the statement.

Post Interview Steps:

- Make findings of fact and determine what actually happened, after resolving any issues of credibility as discussed below. The applicable standard of proof is whether the allegations have been proved on a balance of probabilities (51% or greater).

- Determine whether the actions of the accused employee as reflected in the findings of fact constitute a breach of the employer's policies and procedures, or other wrongdoing.

- If the situation requires an investigation report, prepare a report, recording the scope of the investigation and the issues, an explanation of the investigation process, a discussion of the evidence relied upon by the investigator, a statement of the applicable employer policies and procedures, a discussion of the evidentiary standard used and the reasons why one witness' evidence was preferred over another's, and the investigator's factual findings and conclusions.

The above best practices can be adapted for investigations involving less serious misconduct. All misconduct needs to be investigated, even the most minor offences. In those cases, there may be no documents that need to be reviewed and the only interview required is that of the employee being investigated. One must always keep in mind during an investigation that the employee being investigated must be given the opportunity to provide their story. This is one of the most critical parts of all investigations and helps ensure employers have all of the facts before making disciplinary decisions.

VI. ASSESSING CREDIBILITY

After an investigator has conducted interviews of the accused employee and witnesses, the investigator will need to make findings of fact and determine what actually happened. That can be a very difficult task as there are often conflicts in the evidence. An investigator must not simply accept a witness' evidence or explanations at face value. The investigator must determine the facts on a balance of probabilities (51% or greater), or in other words, must determine what most likely occurred.

When there are conflicting versions of events, or the accused employee has completely denied the alleged conduct or interactions, the investigator must be able to articulate why the evidence of one witness was preferred over the evidence of another. The credibility determination cannot be based simply on the investigator's gut feeling about who is telling the truth or on the witnesses' demeanour in the interviews. While demeanour is certainly a factor, it cannot be the only factor upon which an assessment of credibility is made. The British Columbia Court of Appeal, in the leading case on assessing credibility, stated the following in that regard:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a 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. …
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> *Faryna v. Chorny*, [1952] 2 DLR 354, at 357, 1951 CanLII 252 (BCCA)

In assessing credibility, investigators should consider such factors as:

- The witness' opportunity to observe the events about which they give evidence;
- The existence or non-existence of any bias, or interest on the part of the witness;
- Whether the witness attempted to answer the questions to the best of their ability or whether they were evasive;
- Whether the witness' statements are consistent or inconsistent with other statements that they made during the interview;
- Whether any of the "facts" to which the witness gave evidence actually existed or not; and
- Any admission of untruthfulness the witness makes.

An investigator will need to compare the evidence given by each witness, and compare the oral evidence of each witness to the documentary evidence, to decide the facts of the case. In doing that comparison, the investigator should ask themselves the following questions:

- Is the story consistent?
- Does the story make sense?
- Is the story probable?

VII. IMPOSING DISCIPLINE AFTER THE INVESTIGATION

In the union context, if the investigator has determined that the accused employee engaged in wrongdoing, an employer's managers other than the investigator, must decide whether to discipline the employee, and if so what disciplinary penalty to impose. Section 84(1) of the *Labour Relations Code*, RSBC 1996, c. 244 requires an employer to have "just and reasonable cause for [the] dismissal or discipline of an employee".

The BC Labour Relations Board in the all-important decision of *Wm. Scott & Co. (Re)*, [1976] BCLRB No. 98, [1977 1 Can. LRBR 1, BCLRB 46/76 held that in order for an employer's decision to discipline an employee and its decision as to the appropriate disciplinary penalty to be upheld at arbitration, the employer has to prove that the employee's conduct constituted just and reasonable cause for some form of discipline, and that the disciplinary penalty imposed was not an excessive response in all of the circumstances of the case. The first issue is a factual one, requiring a judgment from the evidence about whether the employee actually engaged in the misconduct alleged. If the employee did in fact engage in misconduct, the second issue is whether the misconduct is serious enough to warrant the discipline imposed. That determination is to be made in light of all of the circumstances of the case. If an arbitrator finds that the penalty was excessive, a third issue arises as to what alternative measure should be substituted, again based on all of the circumstances of the case.

In determining the second and third issues established in *Wm. Scott*, arbitrators typically consider the following factors identified by the Arbitrator in *United Steelworkers of America, Local 3257 v. Steel Equipment Co. (Unjustified Discharge Grievance)*, [1964] OLAA No. 5:

- The previous good record of the grievor;
- The long service of the grievor;
- Whether or not the offence was an isolated incident in the employment history of the grievor;
- Whether the grievor was provoked;
- Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated;
- Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances;
- Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination;

- Circumstances negating intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it;
- The seriousness of the offence in terms of company policy and company obligations;
- Any other circumstances which the board should properly take into consideration, such as:
  - Failure of the grievor to apologize and settle the matter after being given an opportunity to do so;
  - Whether the employer had existing rules or policies governing the employee's conduct, or whether rules or policies were only created after the grievor's discipline, with the latter circumstance being a mitigating circumstance;
  - Failure of the company to permit the grievor to explain or deny the alleged offence.

We strongly recommend that employers faced with selecting an appropriate disciplinary penalty also consider and apply the above factors in making their decision. Obtaining legal advice is also a good idea, especially when the employer is considering imposing a substantial disciplinary penalty. An employer's decision is much more likely to be upheld at arbitration if the employer has given thoughtful and appropriate consideration to those of the above factors that are relevant to the particular case.

VIII. CONCLUSION

Although a proper investigation can consume a lot of employer resources and employee time, it is a critical part of an employer's response to addressing misconduct in the workplace including discrimination and harassment claims, and to the discipline process, for both union and non-union employees. We hope that with the guidance provided by this paper, and with legal advice as needed, local government employers will be able to meet their statutory, common law, and collective agreement obligations to conduct fair workplace investigations and that their decisions to discipline will be able to withstand challenge.

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