

Workplace investigations: Getting beyond 'he said, she said'

Stakes high, morale low and plenty of room for missteps when looking into wrongdoing

BY GARETH JONES

Many people think investigating is easy, probably because most of them see how investigations are done on TV, where everything is resolved in one hour.

Unfortunately, in the real world — and the workplace — investigating is a lot more difficult, particularly if harassment or discrimination is alleged.

There are a number of reasons for that:

The stakes can be very high: The reputations of individuals and organizations are on the line, as may be livelihoods and careers. If the case is juicy enough, the media may take an interest. Often, litigation lurks in the background.

Cases can be complex and nuanced: They may revolve around situations where one person's performance management is another person's harassment. Similar-fact evidence such as, "Did the boss behave the same way as she is alleged to have behaved in this case in a previous position?" may be an issue. Corroborative evidence may be scarce or non-existent. Often, cases boil down to "he said, she said."

Underlying issues: There may be underlying systemic issues that, if ignored or overlooked, lead to a future reoccurrence of whatever the problem is.

Beware the querulant: Even seemingly minor cases can spiral out of control. Sometimes a querulant makes an appearance, someone who will never give up a complaint, no matter how minor the issue appears to be or how reasonable the resolution proposed.

Impact on morale: Workplace investigations can be devastatingly disruptive if not done right, particularly if there is already a toxic work environment. Morale and productivity may plummet. People may be shuffled

around, go on leave or be suspended while the allegations are investigated. The rumour mill goes into overdrive and tempers may boil over, with a potential for violence.

Conflict of interest: Allegations and perceptions of investigator conflict of interest and bias are almost inevitably issues. They have to be dealt with upfront.

In spite of what is at stake, the people assigned to conduct a workplace investigation often have little or no training around how to fact-find. As a result, an investigation can go horribly wrong and the consequences can be very serious.

8 principles of effective investigations

There is a solution — there are eight principles that underpin virtually every kind of fact-finding. They apply to health and safety, fraud, loss prevention and departmental security investigations. In fact, they apply to all investigations.

The principles are simple:

- The investigator must be as independent as possible.
- The investigator must be appropriately trained and experienced.
- All potentially relevant issues must be identified and, where appropriate, pursued.
- The investigation must have sufficient resources.
- All relevant physical and digital evidence must be identified, preserved, collected and examined as necessary.
- All relevant documentation must be secured and reviewed.
- All relevant witnesses must be identified and thoroughly interviewed.
- The analysis of all the material gathered in the investigation must be objective and based solely on the facts.

Not all of these principles apply in equal measure in every case and sometimes one or

two may not apply at all. But investigators should consider all of them. The closer an investigator sticks to the principles, the more likely she will be able to withstand subsequent scrutiny, be it by those involved, a tribunal, the courts or the media.

11 steps to consider

Here are 11 steps to consider when conducting an investigation, based on the eight principles.

Conduct a case assessment, now — not tomorrow: Decide whether an investigation is necessary as soon as possible. Is alternative dispute resolution, mediation or some other informal resolution mechanism a viable option? It might not be — especially in high-profile cases or if the facts are in dispute.

The more independent the investigator, the better: The real and perceived degree of separation between the investigator and those being investigated is critical. Try to get buy-in from involved parties as to the choice of investigator before the investigation is launched. The investigator may be accused of being biased, particularly if she works directly for the organization involved. Bringing someone in from the outside may go partway to deal with that concern, but it is by no means a panacea.

Use trained and experienced investigators: The more serious the allegation and possible exposure, the more necessary it is the investigators know what they're doing. Sending a junior policy analyst from HR — armed only with a one-day workplace investigation course taken two years ago and with no cases under his belt — to investigate serious complaints is a recipe for disaster.

Identify all relevant issues: Decide what is — and what is not — being investigated. Explain the reasoning to those involved. Don't create expectations that cannot be met. Identify any potential systemic issues — perhaps

a policy or training issue, for example — from the get-go. Sorting out the root cause of a complaint can nip future ones in the bud.

Plan the investigation: Planning the investigation gives the investigator a road map to conduct the investigation. It assists in identifying issues, pinpointing sources of evidence, anticipating potential roadblocks and coming up with ways to overcome or avoid them. Planning helps identify specific concerns upfront, such as how to deal with possible retaliation against any involved party or how to handle whistleblowers. A plan helps the investigator develop milestones, timelines and a firm completion date.

Allocate resources: The quicker evidence can be gathered and a conclusion reached, the better. The longer an issue is allowed to fester, the more likely the workplace is going to become dysfunctional and polarized. Evidence is perishable, memories fade (or may be tainted, inadvertently or otherwise) and documents can go missing or be destroyed. Hard drives disappear or are wiped. Assign a sufficient number of investigators to gather the evidence as rapidly as possible, commensurate with the seriousness of the issue.

Keep control of the investigation: Never lose sight of the fact it's your investigation — nobody else's. Nobody will come to your rescue if you screw it up. Don't defer to complainants, respondents, management, unions, lawyers or anyone else. You make the decisions to the extent that you can. You determine what is relevant and what is not; who is interviewed when, where and how; what documents you require; what resources you need; and how long it will take.

Avoid creating waves: Workplace investigations are disruptive by their very nature. Regardless of how low-profile a investigation

is, it's possible everyone in the building will know what's going on within 30 seconds of it getting started. That's another reason speed is critical. There are ways to minimize the impact — including doing as much of the fact-finding off-site as you can or ensuring employees do not discuss the case with anyone else, at least until the conclusion of the investigation. Some organizations, such as Service Canada, make it a disciplinary offence for any party to breach confidentiality in harassment complaint investigations — laudable, but difficult to enforce.

Provide information where you can, but be careful: Generally, parties to an investigation should be provided with information about the investigation, provided it does not affect the integrity of the process. Let parties know where you are in the process and when the investigation is likely to be concluded. Providing an overview of the process may alleviate the concerns of a witness, complainant or respondent, though you obviously can't share anything substantive.

That said, allowing the respondent and complainant to exchange written accounts of the complaint and response, with endless opportunities to rebut the rebuttals, is not a good idea. It tends to raise the temperature, everybody becomes entrenched and it prolongs the process. There are very few other kinds of investigation where this occurs, particularly before the parties are actually interviewed by the investigator.

Gather all the relevant evidence: If an investigation is worth doing, it's worth doing properly. Be methodical and identify witness, documentary and physical/digital evidence. Be prepared to deal with other evidence that will most likely emerge as the investigation progresses. Within reason,

leave no stone unturned. An investigator's worst nightmare is when, after the investigation is concluded, someone or something crawls out of the woodwork with evidence that may contradict the findings. Even something as simple as failing to ask if there is anything the interviewee wants to add at the end of the interview can be fatal. "I would have told you but you never asked me," is a sentence an investigator never wants to hear.

Objective assessment of the evidence: This can be complex in some workplace investigations. In many cases, there is little in the way of corroboration, including evidence from independent witnesses. A case often boils down to an investigator's assessment of credibility, which can be challenging. The assessment should be based on actual evidence, not speculation or personal feelings. Explain why you think you have sufficient, relevant and reliable evidence to support the conclusion. Deal openly and transparently with evidence you discount, explaining why you reject it.

Workplace investigations can be really tough. Screwing them up is easy. Everybody's reputation — including yours — is potentially at stake.

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