

Fair's fair. Was the respondent in an investigation of alleged workplace misconduct denied procedural fairness?

The Federal Court of Canada released a really interesting decision on procedural fairness in workplace investigations last month. Here's my take on it from an investigative, not a legal, perspective.

Full disclosure first. The case involves the Department of National Defence/Canadian Armed Forces (DND/CAF) Ombudsman's Office. I used to be the Director of the Special Ombudsman Response Team there. While I know some of the individuals mentioned in the judgment, I do not know the complainant or respondent. I did know the deceased. The events described occurred many years after I left.

Please also note that my comments are based solely upon my reading of the judgement itself, which is linked at the end of this piece. I have not seen any other supporting material, including the investigators report, affidavits or any other investigative product.

Brief background

A former employee of the DND/CAF Ombudsman office made a series of allegations in writing to the Assistant Deputy Minister, Review Services (ADM (RS)) under the Public Servants Disclosure Protection Act (PSDPA) against other DND/CAF Ombudsman staff. This occurred shortly after the April 2017 suicide of a colleague who was an investigator at the office. Amongst other things, the employee alleged that the Director of Investigations at the Ombudsman's Office (the respondent) had failed to provide the deceased, who reported to her, with suitable accommodation during a disciplinary process that the deceased was undergoing.

In July 2017, the ADM (RS) hired an external contractor to conduct a preliminary assessment to determine if a full investigation was warranted. The respondent was advised in October 2017, by letter, that the ADM (RS) had decided that a full investigation was indeed necessary.

The investigator completed her investigation in May 2018. In her report, she made serious adverse findings against the respondent, including that the respondent's conduct '*...poses a serious threat to public confidence in the integrity of the public service*' and that it '*...amounted to gross mismanagement.*'

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The respondent was advised of the results of the investigation in Sept 2018 and that the ADM (RS) had accepted the investigators findings. She was not provided with a copy of the report. She was also advised that the *'Deputy Minister has been informed ...and will direct whatever corrective action is deemed appropriate.'*

The respondent then alleged that she was denied procedural fairness in both the investigation and decision-making process. She applied to the Federal Court for redress.

Federal Court judgment

What information was the respondent given during and after the investigation?

The respondent argued that she was not given sufficient details of the allegations against her, either at the beginning of the investigation or as it unfolded. Nor was she given an opportunity to respond to the findings in the investigators report.

The only information the respondent was given about the allegations against her was in a letter from the ADM (RS) in October 2017 advising her that an investigation would be conducted. The letter advised she was being investigated for alleged *"Gross mismanagement (disciplinary actions).*" No other details were provided. She was not given a copy of the written allegations made against her by the employee.

In January 2018, prior to being interviewed by the investigator, the respondent wrote to the ADM (RS) asking to *'...know the substance of the allegation(s) made against me prior to the interview so I am able to adequately prepare a response.'*

The ADM (RS) referred her back to his Oct 2017 letter but provided no more information.

The interview went ahead, the investigation was completed and the report was finalized without the respondent being provided with an opportunity for any input.

The respondent argued that if she'd been given an opportunity to respond to the report before it was finalized, she would have been able to provide additional information to counter statements made by some witnesses, corrected what she deemed to be factual errors made by the investigator and identified additional witnesses who she believed had additional or contradictory information.



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Counsel for DND/CAF argued that the only information that could be shared with the respondent was provided – i.e. that she had grossly mismanaged the employee - and nothing more. They also argued that the respondent had been given an opportunity to give her side of the story at her interview, submit any documentation she wished and comment on the summary of her own interview.

What did the Court think?

The Court was largely not impressed with what DND had done procedurally. It found that DND had not clearly apprised the respondent of the alleged wrongdoing and not informed her what evidence had been gathered by the investigator.

DND argued that that the investigator *'afforded the respondent many of the same procedural protections as given in a court process.'* The Court disagreed, finding that DND had not afforded the respondent the following procedural protections:

1. The right to know beforehand exactly what wrongdoing she is alleged to have committed
2. The right to know the evidence against her prior to being interviewed
3. The opportunity to provide a full response to that evidence
4. The right to call additional witnesses to support her position or counter evidence already offered and
5. The right to know the evidence against her before a decision regarding wrongdoing is reached on the basis of that evidence

The Court concluded that the respondent had not been given a meaningful right to be heard or given the opportunity to know the case against her at any stage of the process.

It ordered that the ADM (RS) decision be set aside and the allegation be decided by a different decision maker. It awarded the respondent \$6000 in costs.

What does this mean from an investigator's perspective?

Here are my takeaways from a purely investigative viewpoint.

It's clear from the judgment that respondents should know, in reasonable detail, what they are being accused of. Exactly how much detail, and when that detail should be provided, is not clear. The judgement notes that, in a court process, the respondent had a right to know the evidence against her *'prior to being examined'*, which I interpret as her being interviewed.

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The Court appears to equate an investigation of this type as akin to a court process, with all that entails as far as procedural fairness is concerned (see para 26). It found that this *was not merely an investigation, it was a process leading to a decision that there was workplace wrongdoing.....not unlike wrongful dismissal actions or arbitration hearings*’.

That kind of blurs the line between the actual fact-finding part of an investigation and the decision-making bit, to my untrained legal mind. But it does emphasise the need to bend over backwards to be ultra fair in the investigative process.

As far as I can see, the judgment leaves unanswered precisely how much information should be provided to a respondent prior to an interview, which leaves a lot of questions. For example, is a respondent entitled to witness statements and other investigative product gathered during an investigation, in order to prepare for an interview? Or any digitally stored evidence, such as emails, key-card logs, Facebook posts or texts?

I think many investigators, including me, would argue no, in order to protect the integrity of the investigative process. Being provided with everything the investigator possesses pre-interview could allow the respondent to tailor their responses accordingly, or consult with other parties. An important component of investigative interviewing is deciding if, when and how to reveal information as an interview progresses. The investigator loses that advantage if the interviewee knows precisely what is coming.

That being said, I think it is only fair to provide the respondent, prior to the interview, with substantive information about what is being investigated and overall areas that will likely arise in the interview. But I would not provide them with a copy of the actual questions, and certainly not transcripts of other interviews.

What about providing the respondent with a draft copy of the investigators report for comment? The Court noted that while DND policy had ‘virtually nothing’ in their policy about the process to be followed after an investigation report was completed, the PSDPA was clear. It provided that if at any time during an investigation it appeared that adverse findings would be made, then the person subject to those adverse findings *‘should be given a full and ample opportunity to answer any allegation.’*

And why on earth wouldn’t you provide that opportunity? Firstly, it’s a great investigative quality control tool. You might have missed or misinterpreted something. Better to find out now than 6 months down the road at Federal Court. It is a safeguard for everyone involved.



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Secondly, lots of investigative agencies already do it. It is standard practice in the Ombudsman world to provide anyone who is subject to an adverse finding an opportunity to comment on that finding, prior to any report being finalized. Normally they are given a draft or preliminary copy of the report. Any comments they may make are considered and changes to the report made, if appropriate. If changes are not made, those comments are incorporated into the report or attached to it, with an explanation as to why they have not been accepted.

So, subject to any compelling confidentiality concerns (which can often be dealt with by redacting information where necessary), I do not see any reason why an investigative report would not be shared with someone who may be adversely impacted by it.

Some other issues

Firstly, the investigator refused to allow the respondent to take notes during her interview. DND has a guideline that does not expressly forbid interviewees to tape record or take notes during interviews, but rather requires that any such record is handed over to the investigator.

My two cents worth is that I discourage interviewees from recording their own interviews, as it may adversely impact the integrity of the process. It may also leave the interviewee open to allegations that he or she shared those notes or recordings with other parties. I have no problem providing them with a copy of their interview recording once the investigation is complete, subject to any confidentiality or privacy concerns.

That said, there is little an interviewer can do if the interview is recorded surreptitiously or information is shared by the interviewee verbally, post interview, other than by taking that into account when weighing the evidence from person(s) with whom the interview has been shared.

Secondly, this is a very, very serious allegation. From my reading of the judgment, the respondent is implicitly accused of being a factor in the suicide of an employee. That kind of mud can really stick, to put it mildly. Given the high stakes, the whole investigation process should be as close to perfect as possible, albeit there is no such thing as a perfect investigation.

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Conclusions – mine, not necessarily the Court's.

1. The respondent in a workplace investigation has a right to procedural fairness.
2. The more serious the potential consequences, the more the need for procedural fairness.
3. Provide as much information as you reasonably can to a respondent, (or anyone else involved in the investigation) unless doing so may adversely impact the integrity of the investigative process
4. Give everyone involved every reasonable opportunity to tell their side of the story
5. Provide anyone you may be making an adverse finding against the opportunity to respond to your findings before you finalize them. Explain why you accept or reject any response they provide.
6. Above all – and this isn't in the judgement but I think is implicit in it – why would anyone acting in good faith want to do an investigation that isn't fair? And that includes during the decision-making process.¹ Good investigators want to be fair investigators. They want to find out the truth. They want to hear every side of the story. They want to be meticulously objective when coming to conclusions. They want to be able to explain why they have reached those conclusions.

If you got this far, thanks for reading. A case like this highlights the complex and sometimes nebulous nature of workplace investigations.

And being one never to miss an opportunity to shamelessly market, here is a link to the suite of investigations courses we delivered to thousands of participants across Canada and beyond. The courses, we think, help anyone involved in any capacity in a workplace investigation avoid some of the problems that this case raises, as well as many others.

Link to our Investigations Courses:

<https://www.investigationstraining.com/>

Link to the Judgment here

¹ To be clear, I am not for a moment suggesting that anyone acted in anything other than good faith in this case.