

# Investigations in the Workplace

---

by

**Maria McDonald**

Labour and Employment Lawyer

October 5, 2010



# Overview

---

## □ Part I

- Workplace Violence and Harassment; The Sexual Harassment of this decade

## □ Part II

- The Occupational Health and Safety Act and Workplace Violence and Harassment Investigations

## □ Part III

- Parts of a Complete Investigation



# Part I

---

## Workplace Violence and Harassment

### The Sexual Harassment Investigations of the Decade





---

*C.R. v. Schneider National Carriers, Inc.,*  
[2006] CanLII 532 (ON S.C)

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ 43 year old employee
- ❑ 3 years of service
- ❑ Promoted to trainer
- ❑ Would be on road with trainees for weeks at a time
- ❑ Would sleep in cab of truck with trainee

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ Feedback from all trainees positive
- ❑ 2 trainees accused her of talking about S&M, displays of nudity, excessive profanity and throwing things around the cab

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ Employee attended investigation meeting
- ❑ Not given specifics of allegations
- ❑ Denied allegations
- ❑ Terminated at the end of the meeting for just cause

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ Court found that the employee's behaviour distasteful but not sufficiently serious to constitute sexual harassment, no invitation for sexual relationship and no touching



# *C.R. v. Schneider National Carriers, Inc.*

---

- Court found the investigation flawed
  - The complainants compared notes before making their complaints to management
  - Complainants were interviewed together
  - Complainants were not cautioned to:
    - refrain from speaking to each other about their respective complaints when writing up their written reports
    - express only their own individual experiences

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ The complainants' story was not tested
  - They were not questioned about their positive evaluations of employee
- ❑ Employee not given advance warning about the nature of the meeting
- ❑ Employee not given specifics of the complaint, such as name of complainants or dates

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ Asked only to respond to general questions and criticized for not giving specific answers
- ❑ only a general synopsis was recorded of the meeting and, accordingly, no complete record existed of what was actually said

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ Regarding the Company investigators, the court found:
  - They were honest and reliable
  - The poor investigation was due to inexperience and lack of training
  - Management not required to meet the standards of criminal investigators, but “basic fundamentals of fair play” must be observed

# *C.R. v. Schneider National Carriers, Inc.*

---

- ❑ Court found employee should have been given lesser sanction
- ❑ Just cause not made out
- ❑ Court awarded 3 month's notice
- ❑ Declined to award damages for mental distress

# Rights of Investigation Subject

---

*Elgert v. Home Hardware Stores Limited*  
2010 ABQB 73 (CanLII)

# *Elgert v. Home Hardware Stores Limited*

---

- ❑ 50 year old senior managerial employee
- ❑ 16 years service
- ❑ 2 employees alleged he sexually harassed them
- ❑ An investigation confirmed the allegations
- ❑ He was terminated with cause

# *Elgert v. Home Hardware Stores Limited*

---

- Plaintiff sued
  - Complainants and Company for defamation
  - Company for wrongful dismissal
  - Company for aggravated damages (for conduct during the course of the dismissal which is egregious enough and which causes mental distress)\*



# *Elgert v. Home Hardware Stores Limited*

---

- Plaintiff sued
  - Company for punitive damages (for conduct in the termination which is harsh, vindictive, reprehensible, malicious, extreme in its nature and deserving of full condemnation)\*
  - \*Note: taken from the judge's charge to the jury

# *Elgert v. Home Hardware Stores Limited*

---

- ❑ Jury found the employee DID NOT sexually harass the two complainants and awarded;
  - \$60,000 in damages based on his claim against the complainants for defamation (not against the Company)
  - 24 month notice for wrongful dismissal
  - \$200,000 in aggravated damages based on Home Hardware's conduct during the course of the dismissal which constituted bad faith

# *Elgert v. Home Hardware Stores Limited*

---

- (continued)
  - \$300,000 in punitive damages
  - Pre-judgment interest starting from May 2002, costs and disbursements @ approximately \$300k
  - **TOTAL = APPROXIMATELY ONE MILLION DOLLARS**

# *Elgert v. Home Hardware Stores Limited*

---

- ❑ Jury decision - so no written reasons
- ❑ But some possible reasons gleaned from plaintiff's allegations

(see *Elgert v. Home Hardware Stores Limited*, 2010 ABQB 65 CanLII)

<http://www.canlii.org/en/ab/abqb/doc/2010/2010abqb65/2010abqb65.html>

# *Elgert v. Home Hardware Stores Limited*

---

- Investigators had no experience in investigations and absolutely no training
- Home Hardware was convinced employee was guilty before it ever interviewed him
- Home Hardware never considered motive or fabrication

# *Elgert v. Home Hardware Stores Limited*

---

- ❑ Plaintiff never provided with information about the allegations prior to his suspension
- ❑ No information on the allegations was provided for 10 days (presumably after plaintiff's suspension)
- ❑ By admission, Home Hardware's investigators were not impartial, neutral or objective. They simply accepted what complainants said at face value without questioning, probing, or challenging allegations

# *Elgert v. Home Hardware Stores Limited*

---

- ❑ Home Hardware did not gather the facts, explore the relationship between complainant and plaintiff, or interview any of the people who worked directly with them
- ❑ After his suspension, Home Hardware refused plaintiff's request to have a lawyer present at the investigation. Home Hardware admits it refused counsel in an attempt to extract a confession from him

# *Elgert v. Home Hardware Stores Limited*

---

- Lessons learned
  - Don't have a knee jerk reaction to particularly offensive allegations
  - Have a measured reaction to allegations under the new workplace violence laws in Ontario's *Occupational Health and Safety Act*





# Part II

---

## The Occupational Health and Safety Act and Workplace Violence and Harassment Investigations

# OHSA: Designing Investigation Procedures

---

- ❑ The *Occupational Health and Safety Amendment Act (OHSA)* requires employers to set out how the employer will investigate and deal with incidents and complaints of workplace violence and harassment in its program(section 32)
- ❑ No guidance or mandatory steps are included in the OHSA advising parties how such an investigation is to be conducted

# OHSA: Designing Investigation Procedures

---

- ❑ The tips and steps provided in this presentation are modeled after the Ontario Human Rights Commission's Guidelines *on Developing Human Rights Policies and Procedures* (“Guidelines”)

# OHSA: Reporting to JHSC

---

- ❑ OHSA built on IRS – Joint effort at minimizing safety risks
- ❑ Sections 25(2)(1) and 25(2)(m) of the OHSA require the employer to provide a copy of all reports in writing to the JHSC (or a worker upon request) if the report is in respect of occupational health and safety matters at the workplace

# Confidentiality

---

- ❑ No guidance if this includes investigation report of violence/harassment
- ❑ Issues of confidentiality may conflict with IRS
- ❑ Under Human Rights, importance of confidentiality is recognized

# Recommendations regarding Confidentiality

---

- ❑ Policy reasons for keeping this confidential – people may not participate in investigation if it will be reported to JHSC
- ❑ Recommendations
  - Harassment issues should be kept confidential and not disclosed to JHSC
  - Violence issues may be advised of the findings of the investigation in general manner – to be decided on a case by case basis

# Mandatory Disclosure

---

- ❑ Breach of OHSA can be prosecuted by Ministry of Labour
- ❑ MOL may demand disclosure of investigation report
- ❑ Wrongfully terminated employees may seek disclosure of investigation report

# Privilege

---

- ❑ Solicitor/client privilege and litigation privilege may protect your records of investigation from being disclosed
- ❑ *R.v Bruce Power Inc. [2009] ONCA 573 (CanLII)*



# Tips from R. v. Bruce Power

---

- ❑ Legal counsel should make written request to the employer to conduct a confidential investigation and report for purposes of obtaining legal advice. This should be done **before** materials are gathered and the report is prepared.
- ❑ Draft terms of reference for the investigation team advising that the purpose of the investigation is to obtain legal advice and that all information collected is to be confidential.
- ❑ Investigation team should acknowledge its acceptance of the terms in writing

# Tips from R. v. Bruce Power

---

- ❑ Advise witnesses as to confidential nature of the process -- results of the interview will be provided to counsel to obtain advice and will not be provided to any third party
- ❑ All files should be marked Privileged and Confidential and should be provided to counsel
- ❑ All files should be kept segregated from other accessible materials within the work place
- ❑ Refuse any third party requests for disclosure of the investigation file. Only disseminate to third parties on the advice of legal counsel



# Part III

---

## Parts of a Complete Investigation

# Assessing the Complaint

---

- ❑ Interview the complainant or obtain information about the complaint
- ❑ Carefully document the complaint
- ❑ Review company policies and collective agreement provisions that relate to the substance of the allegation (if applicable)

# Assessing the Complaint

---

- Determine whether the complaint allegations, if true, violate a company work rule, policy or procedure: when the complaint is one of harassment or discrimination on a prohibited ground under human rights legislation, an investigation is advisable

# Assessing the Complaint

---

- ❑ Determine whether the complaint allegations require immediate intervention
- ❑ Timeliness is key

# PRE-INVESTIGATION: Team Member Selection

---

- Consider consulting legal if
  - Protecting privilege is important, i.e. future civil proceedings against company are likely
  - Alleged misconduct involves possible criminal activity or breach of statute such as human rights, occupational health and safety

# PRE-INVESTIGATION: Team Member Selection

---

- Internal vs. external, consider
  - Cost
  - Understanding of corporate culture
  - Expertise: Forensic accountants , computer forensics, specific training in investigations
  - Credibility/objectivity



## PRE-INVESTIGATION: Team Member Selection

---

- ❑ Members should not have any connection to the situation or the people involved in the incident = bias,
- ❑ Investigator should not be potential witness based on his knowledge of facts before investigation
- ❑ Supervisors of either complainant or respondent should not lead the investigation (as information revealed during investigation may implicate the supervisor in not performing his/her duties to a satisfactory degree)

## PRE-INVESTIGATION: Team Member Selection

---

- ❑ Investigators should be properly trained or experienced in conducting investigations
- ❑ Internal investigators should have some clout in organization to obtain required information
- ❑ Investigators must have knowledge of the applicable laws and policies

# PRE-INVESTIGATION: Team Member Selection

---

- Investigators must understand the need for confidentiality of the
  - Investigation itself
  - The subject matter
  - The processes followed
  - The materials gathered
  - The results

# PRE-INVESTIGATION: Team Member Selection

---

- Must have proper mindset
  - Be open to any answer
  - Skeptical
  - Do not assume honesty on any party
  - Patience
  - Attention to detail

# PRE-INVESTIGATION: Status of Complainant

---

- Complainant
  - Consider whether transfer or leave of absence required
  - Consider sick leave if applicable

# PRE-INVESTIGATION: Status of Respondent

---

- Respondent
  - Presume innocence
  - Paid leave of absence if safety is an issue, but consider
    - Type of conduct
    - Timing of the complaint/behavior (Has a lot of time passed?)
    - Complainant's previous history

# PRE-INVESTIGATION: Evidence Collection

---

- Review policies and collective agreement provisions that may pertain to evidence collection, e.g. privacy policies
- Determine what documents or sources of documents are relevant
- Consider restricting respondent's access to information or sources of information

# PRE-INVESTIGATION: Evidence Collection

---

- Consider issuance of a preservation order to any employee who may have access to sources of information relevant to the matter
  - Suspend routine corporate document destruction policies for potentially relevant documents
  - Notify employees to preserve potentially relevant electronic and paper records, or other evidence
  - Consider denying or limiting access of specific employees to particular items



# PRE-INVESTIGATION: Evidence Collection

---

## Preservation order, cont'

- ❑ Gather paper records, emails and electronic records from relevant employees and from their servers/hard drives
- ❑ Obtain professional advice on data preservation and recovery, as necessary
- ❑ Document what was done to preserve evidence\*

\* McCarthy Tetrault's presentation "*Practical Advice on Conducting a Successful Internal Presentation*" January 2009  
[http://www.mccarthy.ca/pubs/Toronto\\_Internal\\_Investigations\\_Seminar\\_2009.pdf](http://www.mccarthy.ca/pubs/Toronto_Internal_Investigations_Seminar_2009.pdf)

# PRE-INVESTIGATION: Evidence Collection

---

- Do not alter original documents that you receive, even if they are copies.
  - Put the original in a file and note when and from whom (or where) you obtained the document
  - Make working copies of documents for your use during the investigation

# PRE-INVESTIGATION: Evidence Collection

---

- Consider collection of physical evidence, e.g. photos of damaged property
- Document the chain of custody of information actually conducted (i.e how the information was obtained, when it was collected, who has handled it, where and how it was transported, and where it is stored and maintained.
- Utilize specialized support for collection of email or other computer related information
- Consider whether creation of evidence, e.g. surveillance, is required

## INVESTIGATION: Who to Interview

---

- ❑ Interview all potential witnesses (including non-employees or former employees); anyone with firsthand knowledge of substantial matters
- ❑ Don't interview people with knowledge of trivial matters or second hand knowledge
- ❑ Don't interview character witnesses

# INVESTIGATION: Order of Interviews

---

- ❑ Complainant
- ❑ The witnesses named by the complainant
- ❑ The respondent
- ❑ The witnesses named by the respondent.
- ❑ Required follow up interviews

Note: the specific facts of the complaint may suggest an alternative ordering and the interviewer(s) should maintain some flexibility.

## INVESTIGATION: Location of Interviews

---

- ❑ Usually a private room in the workplace during office hours
- ❑ Issues of extreme confidentiality may necessitate off-site interviews
- ❑ Consider accommodating interviewees reasonable request for off-site interview

## INVESTIGATION: Who is Present during Interviews

---

- ❑ The interviewee, the main interviewer, a co-interviewer
- ❑ Co-interviewer takes notes, freeing the main interviewer to focus on the questions and answers
- ❑ External interviewers will probably require company representative
- ❑ Interviewee's lawyer or representative, if requested; they **cannot** interrupt or participate in the interview

# INVESTIGATION: Generally

---

- ❑ Consider any policies or collective agreement provisions regarding interviewing witnesses
- ❑ Meet as soon as possible
- ❑ Develop rapport
  - ❑ Show respect regardless of who is being interviewed
  - ❑ Consider sitting next to and not across from the interviewee; sharing corner of a table best



# INVESTIGATION: Generally

---

- ❑ Advise of role of persons in attendance
- ❑ Advise that this is a confidential process and the interviewees are expected to maintain that confidentiality

# INVESTIGATION: Generally

---

- ❑ Start with general probing questions
  - ❑ **Tell**, describe explain
  - ❑ Use what, where, why, when and how
- ❑ Avoid
  - ❑ Leading questions
  - ❑ Multiple or rapid fire questions

# INVESTIGATION: Generally

---

- ❑ Interviewee should do 75% of talking
- ❑ Be patient
- ❑ Be an active listener
  - Summarize or echo back what interviewee said
  - Use silence - 5 seconds and then “I’m still listening”
  - Use prompts, i.e. nodding, “go on”

# INVESTIGATION: Generally

---

- ❑ Follow with more specific questions
- ❑ Suspend disbelief – be objective
- ❑ Is the witness's version logical?

# INVESTIGATION: Generally

---

- ❑ Carefully observe the witness's body posture and physical activity. Watch for changes in appearance in response to certain questions
- ❑ Press for facts; don't accept conclusions (e.g. "he stole the money" is not acceptable: how does the person know, what did he see, where was he, when etc...)

## INVESTIGATION: Generally

---

- ❑ Ask questions about past and present relationship between complainant and respondent
- ❑ Ask who else may have information about material events
- ❑ Finish with scoop question, e.g. any other information that might be important?
- ❑ Thank them for their time

## INVESTIGATION: Generally

---

- ❑ Take notes and have interviewee sign off on them to indicate they are accurate or follow up with witness statement
- ❑ Advise interviewees to come forward with additional information or corrections after the interview

## INVESTIGATION: The Complainant

---

- ❑ Assure allegations are being taken seriously
- ❑ Explain process/confidentiality
- ❑ Obtain a clear understanding of what happened before, during and after incident
- ❑ Get list of witnesses



## INVESTIGATION: Generally

---

- ❑ Obtain notes of incident or documentary evidence relating to incident
- ❑ Be aware of becoming sympathetic especially in claims involving egregious conduct

## INVESTIGATION: Witnesses

---

- ❑ Provide only enough information about the substance of the complaint as to make interview meaningful
- ❑ Do not interview witnesses together
- ❑ Caution witnesses against comparing notes prior to their interviews

## INVESTIGATION: Respondent

---

- ❑ Review respondent's personnel file prior to the interview
- ❑ Provide respondent with information regarding the allegations against him/her, i.e. what he/she is accused of having done
- ❑ Generally, not necessary to provide all evidence collected or names of all witnesses

## INVESTIGATION: Respondent

---

- ❑ Advise that the investigation is being conducted in a fair and impartial manner, no decisions have been made about whether the complaint is valid or true
- ❑ Do not necessarily have to provide respondent with a copy of the written complaint if any exists
- ❑ If allegations may lead to termination, may be better to provide summary of allegations in writing

## INVESTIGATION: Respondent

---

- ❑ Advising of all the evidence you have upfront depends on strength of your case
- ❑ Provide respondent with opportunity to fully respond to the allegations
- ❑ Warn against reprisals against complainant or any witnesses

## INVESTIGATION: Interview Memos

---

- ❑ Draft the interview memo shortly after the interview; this is for the interviewer's use when writing the final report, not to be signed by interviewee
- ❑ Should contain description of how interviewee responded to questions, e.g. interviewee would not make eye contact, or avoided answering questions

## INVESTIGATION: Interview Memos

---

- ❑ Should contain only facts and not your opinions
- ❑ Use direct quotes as much as possible
- ❑ Avoid inflammatory or judgmental words; assume others will review your memo

## INVESTIGATION: Assessment of Witnesses

---

- ❑ Assess the credibility of each witness, including the complainant and the respondent
- ❑ Note divergence in evidence or gaps in evidence
- ❑ Determine whether follow-up or additional interviews needed



# INVESTIGATION: Final Report

---

- Summarize
  - the scope of the investigation, e.g. the allegations and the company policies in issue
  - what steps were taken during the investigation
    - the witnesses interviewed
    - the documents reviewed
  - the evidence gathered

# INVESTIGATION: Final Report

---

- Determine whether is it more likely than not that the alleged misconduct occurred
  - The standard should be - if there is more than a 50% chance the misconduct occurred, the complaint is substantiated
  - Accusations of criminal misconduct or sexual harassment require higher threshold

# INVESTIGATION: Final Report

---

- ❑ Make specific conclusions on each issue, although a conclusion might be that the results were:
  - substantiated
  - unsubstantiated
  - inconclusive

# INVESTIGATION: Final Report

---

- Base your findings on “good evidence”
  - Relevance: related to the matters at issue and makes a material issue more probable than not
  - Reliability: you can trust that the evidence is valid
    - E.g. Third party (“I heard this is what happened”) or hearsay evidence is not reliable

## INVESTIGATION: Final Report

---

- ❑ Do not make legal conclusions, e.g. supervisor actions resulted in a constructive dismissal
- ❑ Be as brief as possible, do not repeat every piece of information gathered
- ❑ Write for educated audience, but don't assume the reader understands your business

# INVESTIGATION: Final Report

---

- ❑ The report should only be circulated to decision-makers
- ❑ The report should not address what actions the Company will take

# Post Report

---

- ❑ Because of confidentiality may not be able to disclose to Complainant steps taken against Respondent
- ❑ Parties (complainant and respondent) should be advised of conclusions reached, but not provided with the report
- ❑ Advise complainant about general steps taken to prevent a reoccurrence, i.e. retraining, reissuance of violence and harassment policy

# Post Report

---

- ❑ Advise complainant about right to be free from reprisals for filing complaint
- ❑ Follow up after a few months to ensure no reprisals



# QUESTIONS

---



Maria McDonald – Labour and Employment

[mm@ddohealthlaw.com](mailto:mm@ddohealthlaw.com)