

Respondents have severely limited rights in workplace investigation: Employment lawyer weighs in

By **Frank Portman**

Law360 Canada (February 29, 2024, 8:22 AM EST) -- More and more, employers are relying on employment lawyers to conduct workplace investigations in a wide variety of circumstances to evaluate workplace conflict and potential misconduct, and to assist them in managing and dealing with difficult workplace situations. Some employment lawyers also double as workplace investigators.

An employee who is the target of such an investigation can face immense personal, workplace and legal consequences, including dismissal from employment, jeopardy to professional designations, and even criminal charges.

However, a respondent in a workplace investigation, no matter how serious the allegations, simply does not have the same procedural rights as an accuser in a law enforcement investigation. The usual strategies and recommendations followed in criminal law are very different in a workplace investigation.



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Four rights a respondent does not have in a workplace investigation

An employee caught up in such a workplace investigation needs to know which rights they do not have, in order to defend themselves appropriately.

1. No right against self-incrimination

Perhaps foremost among the procedural rights that a respondent is not entitled to in a workplace investigation is the right against self-incrimination. In Canada, this right prohibits a governmental investigating authority from using any statements that a respondent is compelled to make against them in a subsequent prosecution.

This right does not exist in a workplace investigation.

An employer has the legal right to require an employee to answer questions relevant to their employment. Notably, given that off-duty misconduct can also be relevant to workplace discipline, employees can even be required to answer questions about their off-duty activities.

In fact, if an employee refuses to answer questions or be subjected to an interview from a workplace investigator, that itself may constitute fresh misconduct, which could lead to a dismissal for just cause, regardless of the findings of a workplace investigation.

This can lead to a serious dilemma for an executive accused of behaviour which could extend beyond the workplace and attract criminal or regulatory sanctions. In the absence of a right against self-incrimination, any statement during the investigative process can be used in criminal or quasi-criminal proceedings by a prosecuting party. If a workplace investigation could involve such consequences, it is important to consider carefully how to respond to avoid compromising a potential defence in a future prosecution.

2. No right to legal representation

Another right that is not afforded to a respondent in a workplace investigation is representation by an employment lawyer. Even if the respondent is being interviewed, the employer can, and usually will, preclude an employee's lawyer from even entering the room, much less participating in an interview process.

That is not to say that a respondent cannot hire an employment lawyer experienced in workplace investigations during the process. In fact, legal advice from his/her own workplace investigator can be invaluable in assisting a respondent through a complex investigation. An employee may even communicate to their employer through their employment lawyer in certain circumstances.

However, in the vast majority of workplace investigations, it will ultimately be up to the respondent to act on legal advice without his or her employment lawyer being present.

3. No right to confront an accuser

Possibly the greatest single procedural right afforded to a defendant in a governmental prosecution is the right to cross-examine their accuser. This right, which can rightly be called the lynchpin of the adversarial judicial system used throughout the world, is invaluable in helping adjudicators get to the truth.

Unfortunately, there is no right for a respondent to confront an accuser in a workplace investigation.

Many workplace investigations are governed by legislation which strictly enforce confidentiality on the workplace parties involved. This precludes employers from disclosing anything but the most central details of an allegation to a respondent. In most cases, a respondent is only entitled to know the information required to respond to the allegations against them.

This means that, other than denying the allegations that are put to them, it can be extremely difficult for a respondent to challenge the credibility of a complainant, and likewise, it can be difficult for a workplace investigator to engage in the kind of deep credibility analysis we have come to expect from judges.

This means that it is particularly important for the respondent in an investigation to ensure they are able to put their best foot forward by marshalling exculpatory evidence.

4. No right to appeal

Any governmental prosecution includes a right to access either an appeal or a judicial review at a higher court. This allows the higher court to ensure that procedural fairness and reasonableness are consistent among such decisions.

An employer's investigation is not subject to any power. There is no right to appeal the determination of a workplace investigator.

If an employer takes action or fails to do something because of the results of an investigation, there may be legal options available for challenging that employer's action. Unfortunately, however, in most cases such a challenge will be a wrongful dismissal action. In such circumstances, the employee has already lost their employment.

If you are a respondent in a workplace investigation

While the legal rights of respondents are significantly limited, employees who are the subject of significant workplace investigations are well advised to hire an employment lawyer with significant experience in such investigations.

An employment lawyer can help navigate the investigation process, ensure that evidence and statements are presented in a way to maximize the effectiveness of an employee's response, and help ensure that procedural fairness is respected. Given the high stakes involved in workplace investigations, those able to hire an experienced employment lawyer should, whenever possible.

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