Is there a Right to Representation in a Workplace Investigation?

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It is no surprise that emotions can run high during a workplace investigation. Whether the complaint concerns harassment, theft or other alleged misconduct, there is often a tendency for parties to vigorously try to advance their version of events. One way this occurs is for employees to insist on independent legal representation throughout the course of the investigation. As explained below, although the law is relatively clear on whether employees can demand representation, the question of whether employers should accede to such a demand is a little more complicated.

The Legal Answer

Generally speaking, absent a provision in an employer's policy to the contrary, a non-unionized employee involved in a workplace investigation has no legal right to independent legal representation. Rather, so long as an employee remains in the employ of his or her employer, that employer is entitled to deal with the employee directly, irrespective of whether he or she has retained legal counsel.

Recall that in *Honda v. Keays*,[1] one of the reasons for the trial judge's award of punitive damages was to denounce Honda's refusal to deal with Mr. Keays through his independent legal counsel. On appeal, the Supreme Court revisited this finding and specifically stated:

> "There is no legal obligation on the part of any party to deal with an employee's counsel while he or she continues with his or her employer. Parties are always entitled to deal with each other directly. What was egregious was the fact that Honda told Keays that hiring outside counsel was a mistake and that it would make things worse. This was surely a way of undermining the advice of the lawyer." [Emphasis added]

Similarly, in *Fleming v. Ricoh*[2] a manager under investigation for sexual harassment was terminated when he refused to answer any questions without first speaking to his lawyer. Rather than view the request as a good faith attempt to avoid self-incrimination, however, the Ontario court saw it as an attempt to "control the investigation process" and to "stonewall the company from hearing his explanation".

This all said, a non-party witness (i.e. not the complainant or respondent) may have a right at common law to independent legal counsel in one specific and exceedingly rare situation: if the non-party witness is legally ordered to testify and there is a risk of self-incrimination.[3] Given

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[1] 2008 SCC 39.
[2] 2003 CanLII 2435 (Ont. S.C.J.).
[3] *Royal Bank of Canada v. Bhagwat*, 2009 FC 1067 at para. 16.

that workplace investigations typically take place outside the purview of the courts and/or statutory adjudicators, this exception is unlikely to arise in most settings.

For unionized employees, whether there is a right to representation during workplace investigations will depend on the parties' particular collective agreement. While many collective agreements require representation during disciplinary meetings, this may not necessarily extend to investigation interviews, which, as part of a fact-finding process, are by definition non-disciplinary. For example, in the federal sphere at least, the Canada Industrial Relations Board has confirmed that "[t]here is no provision in the [*Canada Labour Code*] that expressly provides a union with the right to attend each and every meeting than an employer may hold with its employees."[4]

The Best Practice Answer

From a practical perspective, an investigation may be regarded with less suspicion and more cooperation if an employee's wish for independent legal representation is respected. After all, the ultimate objective of the investigative process is to obtain the best evidence as efficiently as possible. Securing the cooperation of the parties is one way to achieve this goal, even if it means allowing them to retain independent legal counsel..

However, employers who permit participants in a workplace investigation to retain counsel should set boundaries from the outset. Employees' counsel should be informed of the parameters of the investigation, advised that all communication will continue to be made to the employee directly, and informed that the employer (and/or investigator) reserves the right to terminate legal counsel's participation in the process if his or her conduct becomes obstructive.

Remember that absent specific provisions in a policy or collective agreement, it is the employer (and/or investigator) who controls the investigation process, not the parties. As we saw from *Fleming v. Ricoh*, courts show little sympathy for employees who try to usurp control of the process by claiming a right to counsel.

In the unionized setting, employee representation can become a difficult issue as the parties and witnesses may all come from the same union's bargaining unit. In order to avoid actual conflicts of interest, the complainant and respondent should be represented by separate union representatives. Depending on who the bargaining unit's representative is, to avoid perceived conflicts it may also be prudent to bring in someone from the outside to act as the designated union representative.

Conclusion

For the sake of dispelling suspicion and securing cooperation, acceding to a request for legal representation in a workplace investigation may be helpful. That said, employers should know that absent a provision in a policy or collective agreement to the contrary, there is generally no legal right to representation. As this question ultimately turns on the facts and objective of the

[4] *TELUS Communications Inc.*, 2009 CIRB 482 at para. 32.

particular case, thought should be given to consulting with an employment lawyer experienced in workplace investigations in order to plan the appropriate course of action.

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