Re: Duty to Cooperate in Employer Investigations

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This issue at hand is the degree of obligation of an employee to participate in employer investigations of misconduct. This has, unsurprisingly, a practical as well as legal component. It seems generally uncontested that the failure to provide an explanation or alternate theory may result in the Employer completing an investigation and drawing conclusions without the benefit of the Grievor's insight; and of course, failure to provide any alternate explanation at a hearing may lead to an arbitrator making an adverse inference. This has been distinguished – sometimes not very well – from employer's who have imposed discipline for the refusal to answer questions itself.

Overall, the case law generally states that failure to participate in an investigation does not, in and of itself, constitute culpable behaviour, absent some pretty compelling and extraordinary circumstances. The investigation is an opportunity, not an obligation, to respond. However, there is no right to deceive, so where silence may in some way constitute deceit, the employee may have some obligation to speak out. In addition, where silence may compromise "a significant business interest" of the Employer, the Employee may then have some obligation to speak out. However, inconveniently, what constitutes a "significant business interest" has no set criteria which makes advising on when a "significant business interest" may be at risk challenging.

The BC Ferry case set out (below) sets out a good example of extraordinary circumstances; a ferry sank, causing the death of two passengers. Arbitrators have also suggested that when a Grievor is found in possession of stolen property that a response may be required. Arbitrators have been reluctant to spin out precise criteria as to when there is a positive obligation on employee to offer an explanation. It is considered a balancing exercise; therefore, even a very compelling interest of the employee, including the possibility of criminal charges, may be outweighed by a compelling interest of the employer. It is fairly universally accepted, for example that a significant business interest of the employer is involved where an employee is discovered to be in possession of stolen property, that belongs either to the employer or another employee. However, in 2002 when a nurse declined to provide a written statement of events after she had accidentally killed a patient, Arbitrator Mitchnick found did not constitute independent culpable behaviour.

It likely goes without saying that this myriad response makes advising individuals somewhat challenging. Outside of the apparent universal "rule" on being found with stolen property, it is very difficult to say when refusal to participate in an investigation will constitute an independent culpable act. It also creates a fairly counterintuitive situation in which an employee who was found with stolen soap may have an obligation to provide an explanation, whereas an employee who has killed a patient does not.

This kind of highlights the practical difficulties in give advice on this topic:

1) it will most often be the case that a failure to provide any alternate explanation or insight into an investigation will lead to the employer finishing an investigation and coming to a conclusion without the insight of the Grievor, and the arbitrator making adverse inferences. It will be cold comfort to the average Grievor that discipline for refusal to cooperate in an investigation may not be upheld, but that refusal only exacerbates the discipline for the originating act. In addition it is likely that an arbitrator will view refusal to cooperate in such an investigation as lack of remorse and an unwillingness to accept responsibility.
2) Arbitrators have been loathe to provide circumstances or criteria that would constitute "significant employer interests" that would justify the requirement to cooperate, beyond the general proposal regarding theft, except to state that the circumstances must be compelling or perhaps "extraordinary." This put us in an awkward position of giving advice that is subject to a post hoc analysis; it is fairly unpredictable.

It should also be noted that where another employee has been the subject of an investigation, there may be less of a right to decline to participate. So while an employee may be able to decline to participate in an investigation in which the employer is building a case against him or her, that same right may not exist if the case is being built against someone else.

Finally, the participation or failure to participate in an investigation may have some impact on back pay, and on the arbitrator's view of the Grievor taking responsibility or expressing remorse for an incident.

Toronto East General Hospital Inc. v. S.E.I.U. 1975 CarswellOnt 1498, [1975] O.L.A.A. No. 139, 9 L.A.C. (2d) 311

This was a case in which an employee had been accused of stealing six cans of apple juice. At the initial investigation the Grievor provided no additional insight or information, although he suggested some alternative theories later at the grievance meeting. He was terminated for the alleged theft, as well as his inability and/or refusal to provide any explanation at the investigation meeting.

At para 13, the arbitrator clarifies that an employee need not provide clarifying information on *any* matter the employer chooses to question him or her on, that in cases of alleged theft, where an employee is, more or less, found in possession of the employer's or someone else's property, that "in such serious and grave circumstances we would agree there is a sound basis for the employee being obliged, where he can, to offer some explanation for or elucidation of his being in possession of property which is manifestly not his". He goes on to say that "where in fact extreme circumstances exist such as those which prevail in the case before us or the other cases referred to, which, viewed reasonably, call into doubt or jeopardize one of the bases of that relationship, the employee is, we believe, required to offer as best he can some explanation of those circumstances when requested to do so by his employer".

It should be noted that at paragraph 14, the board states that an exact listing of circumstances and criteria should not be attempted by a board of arbitration, and that the requirement of an explanation, as well as the nature and quality will turn on individual facts. It is particularly notable that the Arbitrator

suggests that in some cases, simply denying knowledge of an incident may constitute a sufficient explanation.

Tober Enterprises Ltd. v. U.F.C.W., Local 1518 1990 CarswellBC 2995, [1990] B.C.L.R.B.D. No. 51, 7 C.L.R.B.R. (2d) 148, 90 C.L.L.C. 16,045

This is the review of an arbitration award. The Grievor worked in a Grocery store, as well as running several side businesses, and competing as a bodybuilder. He was eventually the subject of a police investigation and charged for selling what appeared to be steroids to an undercover police officer. The charges were dropped when the substance was not proven to be steroids. The Grievor did admit, at the hearing, to trying to sell steroids.

The Grievor was invited to provide an explanation to the Employer, but declined on the advice of his criminal counsel. The arbitration board found that some discipline was warranted, but that termination was excessive and reinstated the Grievor; however no back pay was awarded.

The Panel finds that "a failure to explain misconduct, particularly where the employee also faces criminal or quasi-criminal charges, cannot amount to an independent cause for discipline. " They go on to say that:

> In my view, the obligation to explain only gives rise to evidentiary consequences and must, therefore, be described as an "opportunity" to explain behaviour. While the consequences of remaining silent may ultimately lead to dismissal, the failure to explain, standing alone, does not constitute just and reasonable cause for discipline. The failure to explain cannot be regarded as an offense which jeopardizes the employment relationship. It is the substantive misconduct alleged by an employer which must be proven on the balance of probabilities, with or without an explanation from the employee. Further, it is the proven substantive misconduct, and not the failure to explain, which constitutes just and reasonable cause for discipline or discharge. The failure to explain, without more, simply cannot be regarded as culpable behaviour.

The employee's behaviour is equally blameworthy where he knowingly allows his silence to damage the legitimate business interests of the employer. Absent these kind of circumstances, however, an employee's decision to remain silent when accused of wrongful conduct by his employer does not form a proper basis for the imposition of discipline.

This board also notes that allowing the employer to rely on the absence of explanation would serve to reverse the onus on the employer to prove there was just cause for discipline: "if the "obligation" itself comprised an independent cause of action, it would constitute an effective circumvention of the normal onus which rests upon the employer to prove substantive misconduct. If an employer is entitled to rely on the failure of the explanation rather than the substantive misconduct it puts it to the employee to justify his lack of explanation rather than the event which gives rise to the charge in the first place."

The arbitrator does, however, find that as part of assessing the general conduct of the employer in substituting another disciplinary measure that an arbitrator may consider the failure to provide an explanation: "it is clear the conduct of the employee, including his failure to offer the employer a

timely explanation for alleged misconduct, may be taken into account in assessing the appropriate remedy."

GDX Automotive v. U.S.W.A., Local 455 2003 CarswellOnt 3893, 116 L.A.C. (4th) 265, 72 C.L.A.S. 336

In this case a Grievor was summoned to a meeting regarding an absence from work. In the meeting the Grievor was, as the arbitrator noted, aggravating and uncooperative; he was disciplined for his absence from work as well as for insubordination during the investigation. The arbitrator further noted that the Grievor was an un-credible witness. However when the arbitrator turned his mind to the question of "whether the Grievor's conduct during the May 29, 2001 interview meeting merited discipline" he found that the Grievor was uncooperative, unprofessional and his conduct would have annoyed any reasonable person (para 30); however finds that the Grievor did not breach any of his employment obligations under the collective agreement.

He finds that while on the "plant floor" an employee is obliged to follow directions and answer questions relating to the workplace, but that it is not necessarily the case in an investigation meeting that may lead to discipline being imposed against the employee being interviewed.

> Although an employee cannot be abusive or otherwise insubordinate in such a meeting, he is not obliged to cooperate to the extent that he admits wrongdoing. An employee has the, right to remain silent in that respect and to require to employer to discover and subsequently prove its case without his assistance. Of course unlike the case in a criminal proceeding choosing to remain silent can subsequently work against an employee at least to the extent that mitigating factors such as admitting misconduct at an early opportunity remorse and apology may not be available if the matter goes to arbitration and the employer proves the misconduct alleged. (para 30).

BC Ferry British Columbia Ferry Services Inc. v. B.C.F.M.W.U. - 2007 CarswellBC 3334, 159 L.A.C. (4th) 165, 89 C.L.A.S. 185; *affirmed on Judicial Review:* B.C.F.M.W.U. v. British Columbia Ferry Services Inc. 2008 CarswellBC 2301, 2008 BCSC 1464, [2009] 5 W.W.R. 337, [2009] B.C.W.L.D. 439, 171 A.C.W.S. (3d) 124, 177 L.A.C. (4th) 289, 300 D.L.R. (4th) 170, 88 B.C.L.R. (4th) 375

In this case a ferry boat sank, apparently killing two passengers. Several investigations commenced, including one by the Employer's insurer. The two grievors attended several investigations that were designated as privileged and answered all questions put to them. They were asked to attend the Employer's investigation and did so, but declined to answer any questions about the time period most relevant to the sinking unless the Employer guaranteed that the conversations would be privileged. The Employer did not agree, and placed the individuals on an unpaid suspension until they agreed to complete the interview. Notably, the individuals were also under a criminal investigation, and had received advice from criminal counsel.

The Arbitrator decided, and was upheld on judicial review, that while ordinarily refusing to participate in an investigation will not constitute an independent ground of discipline, that where silence may constitute deceit, or where the employee "allows his silence to damage the legitimate business interest of the employer", there may be culpable conduct (BCSC, para 35) However the judge does comment at paragraph 81 that it is not the case "that *any* business interest of an employer, however mundane or marginal, will be sufficient to negate the rule" and finds that the circumstances at play were extraordinary.

The Arbitrator had found that the Employer required the information, that there was no alternative way to get it, and that there was a compelling public interest in ensuring that the accident would not be repeated. He finds that the interests of the employer and employee have to be balanced, and that ultimately it is a factual question. The Arbitrators acknowledges the very serious interest and the potential repercussions against the employees, but finds nonetheless that the compelling public interest is weightier.

It is notable that neither the arbitrator nor the judge viewed this as "new law" that deviated from a settled rule, and both viewed the circumstances as being extraordinary, and stress that each case would be decided on its own facts.

I.B.E.W., Local 636 v. Niagara Peninsula Energy Inc. 2012 CarswellOnt 4332, 110 C.L.A.S. 166, 217 L.A.C. (4th) 307

After behaving belligerently in a grievance meeting, an employee was suspended without pay pending completion of counselling and an anger management program. The initial allegation, that led to the investigation was spraying a supervisor with a high pressure hose.

The Employer took the position that in refusing to participate in an investigation (in which he was the subject) that the Grievor had engaged in culpable behaviour, and this formed part of the basis for discipline.

Vice Chair Disssanayake disagreed; at paragraph 108 he states that if an employer policy "purports to compel an employee under investigation by the employer for allegations of wrong-doing to cooperate with the employer under the threat of discipline for failure to so cooperate, such policy would be contrary to the arbitral jurisprudence." He further quotes a Surdykowski decision, which finds that refusal to participate in an investigation is not insubordination.

Further, at paragraph 110, he states that "an employee may not be disciplined for failure to cooperate with an investigation by the employer into allegations of misconduct attributed to him. He is entitled to remain silent, although his silence, in the absence of a reasonable explanation, may be regarded as indicative of a lack of remorse or admission of wrong-doing."

This case, like GDX, doesn't deal in the "exceptions" to this rule, and just imports a "right to remain silent".

Huron-Superior Catholic District School Board and Huron-Superior Occasional Teacher Local (OECTA), Re -- 2013 CarswellOnt 13479

In this case an occasional high school was accused of some undisclosed sexual molestation against his daughter. This allegation was found to substantiated by CAS, however he was never criminally charged or convicted and the College of Teachers declined to proceed with any disciplinary proceeding. The Employer requested that the Grievor consent to share the CAS file and he refused. He was suspended with pay until the end of his contract, and subsequently was not renewed.

The arbitrator finds that "Subject to an extraordinary circumstances exception, arbitrators have generally considered such situations to represent an opportunity for an employee to respond, as distinct from being legally obliged to do so, or as an independent ground for discipline" (para 35). He does point out that failing to respond may nonetheless harm the employee's interests, as a failure to provide any alternative explanation may influence any investigation.

He considers the circumstances in BC Ferry, and finds that the exceptional circumstances in BC Ferry were exceptional, and that there were no exceptional circumstances involved that would displace the ordinary result that the Grievor should have an opportunity, not an obligation, to the respond to the request for information. He notes that there was no "notoriety" stemming from the case, as there was in BC Ferry, and that the Employer did have alternative ways to investigate.

O.P.S.E.U., Local 426 v. Integra (2011)

This is an OPSEU case about a care home; it involved an employee who witnessed abuse to a resident, and was reluctant to participate in an investigation. This is maybe a little notable because it doesn't involve any suggestion that the grievor herself was involved in any independent wrongdoing.

Arbitrator Cummings finds that there is an obligation to participate in such an investigation

42 There is no doubt that Ms. Larocque did not want to get involved in the abuse investigation. She demonstrated that attitude from the first meeting with the employer. Ms. Larocque appeared to believe that she could determine whether or not to be involved in an investigation. In other words, if Ms. Larocque did not believe she had witnessed anything of importance, she was under no obligation to participate

48 Ms. Larocque put her own interests ahead of those of the residents when cornered. I conclude that Ms. Larocque did not co-operate with the employer in its investigation of the alleged abuse, contrary to her employment obligations. I believe that Ms. Larocque saw more then she claims but has damped any recollection to avoid being involved in the investigation of Mr. Labrèche and Mr. Laviolette

The Arbitrator finds that there is serious wrongdoing, but that a termination is excessive – but a significant reason here is that she goes to great pains to distinguish the "honest service" case from an abuse case. But this provides I think a pretty high bar in terms of your duty to report and to participate in investigations.