

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

[00:02] HUSEIN: This is episode 90 and the Season 9 finale of Lawyered. And I'm Husein Panju. On this episode we're chatting about Workplace Investigations Law with Christine Thomlinson, one of the country's foremost experts in this space. First step, we will speak about the role and impact of a workplace's culture, in particular, a recent case provides some new guidance on whether an employee's participation in a toxic workplace can also impact the legal rights or entitlements.

[00:30] Next, we'll speak about the procedural expectations of a workplace investigation, and focus on a court decision that provides a cautionary tale about investigation gone awry. Later on, we'll discuss some new judicial guidance about what the lawyers who act as investigators in a workplace context, also owe a duty of care to the complaints themselves. And finally, in our Ask-Me-Anything segment, we will relate questions submitted by members of our Lawyered Patron community, about a range of topics including social media in the workplace, protecting sensitive information, and specific tactics for investigations involving C-Suite executives. All that and lots more are coming up in just a bit. This is Lawyered.

[01:16] HUSEIN: Hey, everybody, welcome to another episode of Lawyered. So, this is it. We made it our Season 9 finale, I am so incredibly proud of this Season that we put together, both in terms of the quality and the diversity of guests, as well as the level of audience engagement overall. As I mentioned, at the end of last season, in particular, I really made a concerted effort to curate a guest roster that is providing value in terms of legal information about the range of topics, but the only one that's representative of our profession, and I'm really happy with how this year shaped out.

[01:53] We've had lawyers from a number of different cities and provinces across Canada, and across industries and even different ideologies, as well. Many of these episodes are about topics that are new and emerging, including the previous two episodes. And I hope it's clear I've been taking feedback from our audience along the way. Some of you know I was really fortunate to get a couple of very generous awards this year from some fairly impressive and generous organizations, mostly due to community involvement, which includes this podcast.

[02:23] And I say this, only to draw attention to the fact that I always say both publicly and privately that even though I host and produce this show, and my name is on it, this show very much is a community driven project. And I always want to reinforce that this show literally would not have been possible without all your support. So, I want to give a big shout out to everyone, the guests, the listeners, the patrons, all our supporters in any way. Everyone who is part of that freelance production team, everyone who has had a role in making the season what it is. Thank you so much. Thank you for supporting this initiative, and making this access to

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

justice campaign, as powerful as it currently is. So thanks, everyone, for your support. I can't wait till we hit the triple digits, which according to my math will be sometime next year.

[03:15] Our last episode, we spoke with David Wood, who is a lawyer based out of Calgary, about the area of Psychedelics Law. David's a really interesting guy. He is the General Counsel at Psygen, which is a psychedelics manufacturer, and he also has his own private legal practice. And there's a lot of interesting developments going on in that space of psychedelics. You may have heard that last year Alberta became the first Canadian province to regulate the use of psychedelics for therapy.

[03:47] And they've now been other changes to Canada's Special Access Program that will now allow healthcare practitioners to request access to restricted drugs on a case-by-case basis for patients who have serious or life-threatening conditions. There is obviously a very highly publicized case about whether healthcare practitioners can apply for an exemption to consume psychedelics as part of their own professional developmental practice. So, we spoke about all these legal issues and more, including contextual discussion about psychedelics and the current revolution that we're currently going through. So, it is very compelling stuff. You're going to find a lot more about that, that'd be in our show archive, which is episode number 89.

[04:30] Today's episode, which will be our season finale episode, is an area that's obviously very compelling. We're going to be speaking about Workplace Investigations Law. And while this area may not be a brand-new era of law, I would say it's been getting a lot of attention recently, partly due to some high-profile corporate investigations that have been published in the media. Earlier this year, I had the opportunity to watch a CPD session involving our guest, and I knew that I had to have her on our show.

In addition to her accomplishments as a lawyer and author, she's also the co-founder of one of the most reputable firms that focuses exclusively on workplace and institutional investigations, assessments and trainings. And so with that, please enjoy this interview with our guest, Christine Thomlinson.

[Music Break]

[05:20] HUSEIN: Christine is the co-founder of Rubin Thomlinson LLP, and the Managing Director of RT Workplace Training Inc. And with over 20 years of experience, she's a highly accomplished employment lawyer, one of the country's foremost experts in workplace investigations, and a trusted adviser to senior human resource professionals. Christine and her company work across the country and have conducted various high-profile investigations and

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

reviews in workplaces such as the CBC, the Canadian Olympic Committee, and the government of Newfoundland and Labrador.

[05:50] Christine is frequently called upon to conduct investigations and assessments and reviews, as well as to advise and consult on complex high stakes issues pertaining to complaints of workplace harassment and other misconduct. Christina and her team also develop Rubin Thomlinson extensive training curriculum under RT Workplace Training Inc, enabling employees to conduct effective workplace investigations themselves under increasing regulatory scrutiny.

[06:17] She can readily be found no Lexpert best lawyers and leading practitioners list in Canada, as well as Lexpert leading 500 lawyers in Canada and was also awarded Lexpert Zenith award for her contribution to diversity and inclusion in the legal profession. And finally, Christine is also renowned for his seminal work on employment law, including co-authoring such texts as *For Better or For Worse: A Practical Guide to Canadian Employment*, as well as the definitive textbook *Human Resources Guide Workplace Specifications*, which is now in its second edition. So, Christine, thanks so much for joining us here for our season finale.

[06:49] CHRISTINE: Thank you so much for having me. I'm delighted to be here.

[06:52] HUSEIN: Thank you, I appreciate that. So, we're going to get into the topics in a moment. But first, I was hoping you'd tell us a little bit about your journey into this space. I know you're the co-founder of this firm, which is very well known in Canada, but I was hoping you could tell us a little bit about how you got into this area. And also this what you imagined your career would be like, looking back on your junior lawyer days.

[07:14] CHRISTINE: The answer to that is no. I suspect I'm one of many lawyers who could say if they looked ahead, when they first started, they'd have no idea where they'd be. And I'm squarely within them. Even employment law for me was a surprise. I had studied much more business-oriented courses in law school thinking that that was my path. And then, lo and behold, Article did a large Bay Street firm. And thanks to the rotations we did, I really found a love and affinity for employment laws. So that got me into that practice area.

[07:50] And I did that practice for 20 years of my career, at least. But throughout that time, I had been doing workplace investigations. And the first one, I remember, I got a call from a client, very early in my career, describing the fact that they had this complaint that they've received from an employee in their Human Resources department about the Vice President of Human Resources. So clearly, nobody in that organization could do that investigation, and they

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

wanted to know if I could help. And I said, “Sure. How hard can that be? I’m sure there’s a book that will tell me how to do that” – that was my inside voice.

[08:30] But there was no book. And I stumbled through that investigation, mostly, thanks to I think my legal education. So there were principles of due process, procedural fairness, and I kind of figured it out. But certainly, if I had to revisit that investigation today, I’d be amazed at how much we learned and how far we’ve come. So, doing investigations over the years, and then joining my co-founder, Janice Rubin, starting the firm, and realizing we had that in common that was really something that we wanted to develop as part of our practice. And eventually it had become such a large part of our practice that in 2018, we transition the firm and we do only that work now.

[09:12] **HUSEIN:** Wow. That’s interesting. Thanks so much for sharing that. So, we got a bunch of interesting topics to speak about today. And these are all going to be topics that relate to the area of Workplace Investigations law, and each topic as such, relates to a recent judicial case as well. And the first time we’ve been speaking about relates to the issue of workplace culture. A workplace culture, whether it’s positive or negative, has had significant influence over the behavior and conduct of individual employees.

[09:40] And recent line of cases provide some helpful judicial guidance about the degree to which an employee’s participation in toxic workplace culture may impact their legal rights and/or entitlements. So, Christine, the case we are going to be speaking about is called *Render and ThyssenKrupp Elevator, Canada Limited*. The citation there is 2022 ONCA 310. It’s a recent court of appeal case.

[10:04] Now, this case is significant for a few reasons. There’s one issue that we’re going to not talk about too much. There’s a technical issue that describes the distinction between “just cause for termination” under the Common Law, The Willful Misconduct under the Employment Standards Act. So, that’s one of the principles that this case is about. For today’s discussion, we’re going to focus on some of the takeaways regarding workplace culture. So, why don’t you start by telling us, to the extent that that narrows the scope what was going on in this case?

[10:32] **CHRISTINE:** Sure. This case for me is such a great example. So often, I encountered people who say like, these kinds of things don’t really happen in workplaces, right? No, they do, they still do. So, the plaintiff in this case, Mark Render, interestingly, was actually the son of the founder of ThyssenKrupp. So, the company had been sold, and he had been appointed the Operations Manager of their Mississauga office, it was 13 people working out at that Mississauga office, 10 of whom were men, three of whom were women.

[11:06] And as it was described, in the case, this was a very social office, people had lunch together, lots of events, but also a lot of joking and a lot of banter. And Mr. Render said, in fact, he fostered this as a way to help people reduce stress. But the problem was the jokes and the banter also included a lot of inappropriate type jokes, a lot of sexist jokes, a lot of offensive comments. And as an example, one of the things that the male employees would do is that they would often kind of pat each other on the buttocks, as a means of interacting with each other, they'd say, good game, as if we're all on a football team or in a locker room.

[11:53] So, the women of whom there were few, but they would participate in this culture. But as an example, the complainant in this case, so the woman about whom this case came up, she said the reason that she participated was that she didn't want to be ostracized by the male majority, and she did it so that she would be respected. So here we are. In fact, this organization did something which some don't, which is that they trained on their anti-harassment. They had, first of all an anti-harassment and anti-discrimination policy, they rolled it out.

[12:30] They talked about zero tolerance for certain types of inappropriate behavior. And they very specifically talked about sexual type of behavior and sexual touching. Both the complainant who ultimately brought the complaint about Mr. Render and Mr. Render attended the training about a week before this interaction that took place. So, fast forward a week, a group of about six employees are again, sort of joking in the workplace. And there is the banter, there's all sort of the normal stuff, but then Mr. Render, slaps this complainant on her behind, and the energy in the room just shifts.

[13:09] She is aghast, she gasps physically and audibly. And she's very upset by this. And she tells him so in the moment. And he of course, is surprised, because, he thinks that this is all just part of the culture. So, in the case, there's a bit of dispute about exactly what happened. But one of the things that the trial judge and ultimately, the Court of Appeal affirmed was that Mr. Render did say after he did this, "Good game." So again, kind of consistent with that locker room banter.

[13:41] HUSEIN: And so ultimately, I assume Mr. Render was terminated after all this?

[13:46] CHRISTINE: Mr. Render was fired; he was fired for cause. And he took real issue with that, because he had very long service, he been with the company for 30 years. And he believed that in light of the culture, and also, in light of this only being a one-time occurrence in his

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

lengthy employment history, that this was an overkill, and it should have been a lesser punishment.

[14:13] HUSEIN: So, what do you think like, as someone who's been practicing in this area, these stories are unfortunately not new. What do you think this case tells us about participation in inappropriate workplace behavior? Because as you mentioned, it's unfortunately common to acquiesce to that's to fit in.

[14:32] CHRISTINE: I think the decision really said everything here as affirmed by the Court of Appeal. This is one of a number of decisions that we've seen like this over the last recent number of years, where there have been these complaints of sexual misconduct. So, it's frequently been some form of touching. And the respondent who acts this way says, "I've been here a long time. I can't believe I've been fired for this. This was only a one-time occurrence? Why are you making such a big deal out of this?"

[15:05] And in some cases, we've even seen the original decision maker take the same line, like it was only once, and they've had a long career, and why are we making such a big deal of this? And so the Courts of Appeal who've considered these cases have said absolutely not. First of all, times have changed, people should know better. A lot of these organizations are doing training. And so people have attended sessions where they've been told what is appropriate, even if they haven't paid attention. And the fact is, it is sexual assaults. So, even on a one-time occurrence, it is very serious. So, we've heard that.

[15:42] And the other thing we've heard is that it's going to be tough for respondents. So, somebody who engages in this behavior to sort of sit back and say, "Well, it's not my fault. That was the culture." Particularly in a case like this, where Mr. Render was the Operations Manager, he was responsible for the culture, he was responsible for setting the tone. And if he wasn't sure about that, he'd been trained on it a week before. So, he should have known his role. And he should have really been watching for that and he didn't.

[16:13] HUSEIN: So, what are employees to do in situations in which there is this culture that's very like jokey and this sort of behavior is common. What are they to do in situations where they're unsure about what the actual expectations are, if anyone else is going along with it?

[16:33] CHRISTINE: Yeah, I mean, you can appreciate in those kinds of environments, how hard it is for people to complain. So, that is a good reason why so many don't. And it's why part of the movement in the last number of years, MeToo movement being a good example, as employers have said, Okay, well, maybe we should check. Just because nobody is complaining

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

doesn't mean that we don't have this happening, there could be very good reasons why people aren't coming forward. So maybe we should check and see what's happening in our organization.

[17:04] So, we get involved in processes called Workplace Assessments or Workplace Reviews, it can be done by survey or interview, and we ask employees what their work experience is like. And oftentimes we're able to extract this behavior, we're able to track it down and get some information about it. And then that may, in fact, then prompt an investigation depending on what's heard. So, that's a strategy that a lot of organizations use.

[17:32] The other thing we've been doing much more of in light of cases like this is you can see how important the training is. So, training that really communicates clearly to employees, what expectations are around behavior, and what steps they can take when those expectations aren't met. And they're effective. For me through training, we sometimes get clients who call and say, "We've had all these complaints, since you've done the training, what's happening?" We say, well, this is a good thing. We didn't make the behavior start happening, it just means people now have some context in which to understand what's happening. And this is exactly what you want is that they come forward.

[18:09] HUSEIN: In terms of actually changing a culture, I imagine it takes a lot of time and energy. But are there any other resources that employers or we should look at in terms of not just removing the harassment but actually changing the culture?

[18:26] CHRISTINE: Yeah, I think it really starts at the top. So, organizations that want to maybe become aware that they had a culture that they didn't know about, or there's new leadership that really wants to shift a culture, it starts very much at the top. And leaders do have to role model behavior. And then it's really kind of living your values. So, we've seen situations in our investigation practice where an organization gets an investigation report from us telling them about misconduct.

[19:02] And those really progressive forward-looking organization say, okay, well, we don't care how valued this person is, we don't care how critical they are to our business, we'll figure it out. But what's most important is that we make sure that this isn't happening anymore. And if it means having to get rid of somebody, because they're not going to change, we're absolutely going to do that because that is what we commit to you that we will make sure that you can work in a place that is safe. And those are bold decisions that organizations have to make sometimes, but if they don't make them, the system falls apart, and you'll never get people to come forward and complain.

[Music Break]

[19:45] HUSEIN: In the context of a workplace investigation, the process of the investigation can be at least as important as the findings themselves. And while employers are expected to conduct these processes in a manner that is fair, objective and confidential in recent Ontario court decision provides a cautionary tale about investigation gone awry. So, Christine, the case we're going to be speaking about today is a case called Rutledge and Markhaven, the citation there is 2022 ONIC 3183. So, probably you can start by telling us about the underlying facts.

[20:17] CHRISTINE: So, this was a case that involved the Executive Director was Ms. Rutledge and she worked at Markhaven, which is a long-term care facility. And the facts arose out of an unusual situation where Markhaven had a particular contractual relationship with a supplier that they used to provide food services, to provide cleaning, and Ms. Rutledge had become involved in a particular decision to promote an employee of the supplier.

[21:00] And then shortly thereafter, became romantically involved with that employee who had been promoted. So, she actually disclosed to Human Resources, the fact that this relationship had been started. And what she was told by HR was that it didn't violate any policy. But several months later, the board of Markhaven received a complaint about this relationship. And they didn't do anything about it, didn't take any action as a result, received a second complaint, still didn't take any action, although they did get some legal advice at that stage. And then they received the third complaint.

[21:42] So, when they received the third complaint, they accelerated that and commenced an investigation into this relationship. They began the investigation by getting some IT consultant to actually look at Ms. Rutledge's emails, and then took sort of a variety of additional steps connected with investigating this relationship. And ultimately, when the investigation was concluded, Ms. Rutledge was fired, because of whatever was determined as the outcome of the investigation. She sued for wrongful dismissal.

[22:20] And the court ultimately decided she had not been fired for cause, which was the employer's position, Markhaven's position, and she was a long service employee, she was awarded 22 months of severance. And perhaps more akin to our discussion here, she was also awarded \$50,000, in bad faith damages, because she had suffered mental distress as a result of the way the investigation was conducted.

[22:47] HUSEIN: Can you tell us about some of the more important findings that the court found about the conduct of the investigation?

[22:52] CHRISTINE: Yeah. It was really interesting, because the court commented on what we'll call the flaws in the investigation a couple of times in the decision. So, one of the things that Markhaven did – and I mentioned this – is that they started the investigation before they notified Ms. Rutledge that it was happening. And that was deemed to be not appropriate. We typically say that you don't commence an investigation until you tell the employee you're investigating, that that is in fact what you're doing.

[23:20] When they ultimately communicated with her, they were not completely honest. They told her that they were going to be getting legal advice in connection with what was happening. And in fact, by this point, they'd already received considerable legal advice. And they also told her that the investigation was going to be independent, when in fact, the investigation was done by a company that had a very clear contractual relationship with the lawyers who were acting for Markhaven. So, not so independent.

[23:53] When the investigation began, the firm that was doing it decided that they were going to hold – believe it or not – interviews at the Tim Hortons near the workplace of business. And so this was a place that people who worked at Mark Haven would come and they'd eat lunch and get their coffee. And so the interviews were taking place and presumably in the full view of potentially people that these people worked with.

Lastly, the other thing I'll mention here is that as Ms. Rutledge understood it, the initial investigation was into the timing of the relationship that she entered into. There were some beliefs that she was in this relationship before the promotion and that she therefore it had some influence over this promotion. And so she went into the investigation prepared to speak to that and what she later learned well after this investigation had been ongoing and far into the process was that they were looking well beyond that into how she was actually managing this supplier relationship far more generally.

[24:57] HUSEIN: I assume this is not common practice, or at least it shouldn't be. In light of this response, are there any takeaways that workplace investigation lawyers are to be considering?

[25:08] CHRISTINE: Yeah, for sure. These are the kinds of cases that we frequently see where we continue to learn, or it reinforces our learning about what do investigations need to look like? So, here's some great takeaways: Don't start the investigation before the person you're investigating is made aware of it. So, that's a good tip. Don't mislead the parties. And in this

case, there was no complainant per se, but frequently in our investigations, you have both a complainant, so somebody who's brought the complaint forward.

[25:42] In this case, it was anonymous complaints that actually prompted this investigation. But complainant and then respondent. So, the person who's alleged to have engaged in the misconduct. So, these are our parties. And they should both be treated fairly during the process, they should both be provided with communications that are transparent. We talk about, respondents are quite a few cases where legal decision makers have said, if one is a respondent to an allegation of misconduct, and there's going to be an investigation, they really have a right to know what the investigation is about. So that when they're actually asked to respond and speak to it, they're not operating in a vacuum, they have full transparency.

[26:30] They're not unlike our traditional Canadian legal processes, where people know the case they have to meet. So, we had some real fairness issues here in terms of it starting too early, before Ms. Rutledge was notified, and the lack of transparency. And then we also had some confidentiality issues. So, we talk about investigations to really be on solid footing to be sound as needing to hit four pillars. We wrote in our book and doing training on this topic, we kind of talk about these four pillars is underpinning a solid investigation process.

[27:10] So, fairness, one pillar, we've talked about that. Thoroughness. So, unlike legal proceedings, where a legal decision maker sits at the front and lawyers decide what gets put in front of them, an investigator has some ability to go and seek information to seek evidence by talking to people, collecting documentation, etc. So, thoroughness is important. Confidentiality, which I mentioned, these are internal, typically sensitive topics, and the investigator has a responsibility to ensure that those remain confidential. So, not conducting interviews in a public place, and really securing all the data that is collected during the investigation.

[27:57] And then timeliness. So, these are internal matters and businesses have to continue to run and people, particularly the parties are stressed, these are difficult processes that they're involved in. So, we want to make sure that they're done in a timely way, and that they don't languish or linger.

[28:15] HUSEIN: I know another issue that came up in the decision was that the employer had advised employee that there was going to be an independent third-party investigation, but ultimately was done by someone who was internal to the workplace. Is that something that is permitted? Should it be done by someone internal or does it need to be done by a third party?

[28:35] CHRISTINE: It can absolutely be done internally. Increasingly, organizations have very sophisticated, good experienced people doing these internally, sometimes teams of people in larger organizations. So, there can be real depth of expertise within organizations themselves. And in fact, some organizations managed to set up an internal investigation process in a way that it's never going to be truly independent, because of course, they do work for the employer, but they can carve them apart from the general employee population and maintain some element of independence.

[29:12] So as opposed to you know, I'm your Human Resources representative, and today, I'm helping you with a benefits application, and tomorrow, I'm going to be investing in you for misconduct. So, that's far trickier. Happens a lot. But those folks who do that work really have to recognize that when they shift into an investigation, they have to understand that they're putting on a very different hat.

[Music Break]

[29:42] HUSEIN: In a workplace context, an employer often retains an independent investigator to collect the facts and to make findings. And this sequence of events often presents important legal questions about the dynamics between the parties. A recent Ontario case held that lawyers acting as investigators in a workplace investigation do not owe a duty of care to the complainants. And this outcome may be instructive for how to manage the party's expectations from beginning to end. So, Christiane, the case we want to talk about involves employer that did just that, that hired a law firm to conduct an investigation. How often do investigations follow this format?

[30:20] CHRISTINE: Often. And I would say, it's been interesting to watch the progression over the years, I've been doing investigations because I think it was not uncommon when I first started doing investigations because there weren't a lot of people that really knew what they were or how to do them. And I think as investigation practice continued, and people became more acquainted with the process, more and more people were getting trained to do them internally. So, there was then a period of really building up an internal resource, whether that was one person and getting them trained up or even building a team of people for large organizations.

[31:00] Now, I think interestingly, the pendulum has shifted a little bit even more, because investigations, we hear a lot more about them, we hear about a lot more of them that are high stakes, that are ones that the public is paying attention to. And so there continues to be lots of investigations that gets sent out to external investigators, because well, for a lot of reasons. But

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

if there's any kind of perception that an internal investigation will be biased, if there's any senior person involved, were like, who's going to do this investigation? Nobody here wants to investigate the CEO. Public interest in an investigation where even if we don't think the investigator is biased, per se, we just don't trust the institution, to give us an honest answer at the end of this. And then just resources. We might have a terrific team, but we have a lot of investigations. And so we need some external help. So, not at all unusual.

[32:00] HUSEIN: Similar to our court process, it's important that the outcome be fair, but it's to be seen to be fair as well. So, having just one person helps to create this atmosphere of neutrality as well.

[32:13] CHRISTINE: I think that's right. And particularly when you talk about certain types of misconduct. Take the issue of harassment in a workplace where, despite all the work we've done, over many, many years to try to educate people and train people, we continue to face resistance, people being scared to report it, if there is any belief that the system that's put in place to investigate internally doesn't have integrity and isn't going to really get to the root of it. Of course, nobody's going to complain in that system. So, sometimes bringing in an external can give people that belief that it will actually be addressed properly.

[32:50] HUSEIN: Yeah, that makes sense. So, the case we're going to be speaking about relate to this concept of duty of care. And people remember from the first year of law school, it's also known as the Neighbor Principle. So, the case is called Mesicovic and Kakosis. The citation is 2022. ONFC 6480. So, why don't you start by telling us about the facts about what happened here?

[33:14] CHRISTINE: So, this wasn't a trial. This was actually a motion for summary judgment. So, an unusual case where a complainant in an investigation in her organization actually sued the investigator who was an external investigator was a lawyer who was hired by the organization to do this investigation. So, Ms. Mesicovic, was a personal support worker for the ParaMed Home Health Center owned by Extended Care. And she brought a harassment complaint – just like we were talking about – against a director in her organization.

[33:50] So, Ms. Kakosis, was hired externally to conduct this investigation, which she did. And what she concluded at the end of this investigation was that the director had not engaged in any inappropriate behavior. So, not at all uncommon. We do investigations like this at our firm. Some of them we find misconduct, some of them we don't. So, this was the decision of Ms. Kakosis. Ms. Mesicovic was subsequently fired. And so she sued the company, and that's a separate action. But she brings this particular lawsuit against Ms. Kakosis. And really, in order to

Lawyered – Episode 90

Workplace Investigations Law ft. Christine Thomlinson

underlie any claim she has against Ms. Kakosis, she has to demonstrate that there is a duty of care that's owed by this external investigator to her a complainant in an internal workplace investigation.

[34:45] HUSEIN: You mentioned, she needed to establish duty of care to be successful. Why is that exactly?

[34:48] CHRISTINE: I haven't seen the claim, and I didn't say this exactly in the case. I'm assuming what she sued for was in negligence. And in order to make a claim of negligence there has to be established a duty of care as between the two parties where the negligence has taken place. And so that was really the issue. Ms. Kakosis said in this case, "I was hired by the employer to conduct this investigation. I owe no duty of care to this complainant. And therefore, there's no basis on which this case can stand. It should be struck down at the motions stage. And it was.

[35:28] HUSEIN: And so in these cases, who does the investigator have a duty of care to? Is it to the employee, who hire them? I know, there's also supposed to be this impartial, neutral standpoint as well.

[35:42] CHRISTINE: The language here is interesting, because I wouldn't want us to think that because there's no legal duty of care, then investigators can just be careless, because I don't think that that's the case. And so they would certainly owe a duty to conduct an investigation that hits all those same pillars that we speak about, you know, fairness, thoroughness, timeliness confidentiality. Because any investigator is going to have to demonstrate that their process was sound, often more important, frankly, than the outcome... not to say the outcomes aren't important, but two different investigators, depending on how they conduct the investigation, can get different outcomes.

[36:27] What they have to demonstrate as their process was reasonable. It may not have been perfect, it may not have been identical to another investigator doing the same investigation, but they're going to have to show that they did a reasonable job.

[36:37] HUSEIN: I know that this case made some reference to specific scenarios in which the investigator might owe a duty of care to the complainant. Can you tell us a bit about those niche areas?

[36:48] CHRISTINE: Yeah. So, what was important here was that in order for there to be a duty of care in this case, what would be a non-client, the client was the employer, the investigator's

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

client was the employer, this complainant was a party or so how do I owe a duty to a party. And really, it goes against the principles of investigation, if we're really conducting an independent investigation, we shouldn't have any relationship with the parties that they could suggest would give rise to a duty of care.

[37:22] So, you think about the test for a duty of care. Typically, if a lawyer is going to owe a duty of care to a non-client, they have to know that the individual is seeking to rely on their advice or their skill, the person has to have relied on their skill and then that reliance has to be reasonable. Now here any investigator, internal or external, who's trying to do an independent job, we want to make very sure that the parties are thinking the exact opposite, which is you are not relying on my skill. I am not here for you. I'm here as an independent, who's looking at this objectively.

[38:01] HUSEIN: Are there any best practices that investigators can use to make these points clear for the parties?

[38:07] CHRISTINE: Yeah. And in fact, that's exactly what Ms. Kakosis did in this case. She had sent a letter to the complainant in this case, saying, "I have been retained by the employer." And she said what her process was and what she would do. And we strongly recommend that. In fact, it's not unusual for both the employer to provide that initial information and the investigator to then reiterate it, both in writing, and again, in an interview. So, there's really no misunderstanding at all. And so important to put these things in writing, because the parties can be, as I said, very stressed by these processes and not necessarily hear things that they're told. So, reinforcing any oral communications in writing can be really important.

[38:52] HUSEIN: You mentioned a moment ago that the absence of a duty of care towards the complainant does not mean that there's a license for the investigator to be careless. But beyond that, what other things should they be keeping in mind?

[39:02] CHRISTINE: So, we talked about starting at the process on the right foot where there's communication in writing, explaining what the investigator's role is. And especially for internal investigators, where you might have a day job within the organization where you are interacting with the parties in a different way, it's going to be really important to make that distinction clear. And then of course, throughout the investigation itself, it's really important to maintain that same neutrality and independence.

[39:34] And that can be tricky. Sometimes you can get into interviews with folks and they can be experiencing great distress, or they can ask for advice. And it's true for all investigators, but

particularly again, those internal investigators who in their day job this would be their job is to support the employees. They really have to understand that during the course of the investigation that is not the role. The role has to be to stay independent and neutral.

[Music Break]

[40:11] HUSEIN: And wrap up our episode, as always, we're going to end with our Ask-Me-Anything segment where Christine will be answering the questions submitted by members of our Lawyered Patron crowd-funding community. As listeners of our show will know, this is a feature that we have on every episode, we'll get questions they want to be answered on the show. These can be questions or anything at all in the guests' area of expertise, so long as they're not asking for legal advice. And we normally do a call out for these question about a week or so before the recording.

[40:38] So, if you want to learn more about how you can become a patron, and submit your own question and get other neat and affordable rewards, check out our crowd-funding website, which is www.lawyeredpodcast.com/patron, for more information. So, Christina, a bunch of interesting questions about both Employment Law and/or workplace investigation issues. The first question is, does an employee have a legal obligation to participate in a workplace investigation? I imagine employees often fear retaliation for participating in such a process.

[41:11] CHRISTINE: For sure they do. And we absolutely encounter that when we're doing our investigations frequently from witnesses. Occasionally we do investigations where the complainant hasn't complained somehow the organization's become aware of it through some other means. So, you might have a reluctant complainant. But a lot of complainants have complained. So that by that point, they're kind of committed to the process. But witnesses, this is not unusual.

[41:40] And a lot of times they technically have an obligation to participate. And the organization will often track that back to some language in a policy that makes that clear. And from time to time, if they get the sense that people are not participating or not making themselves available for an interview or not being forthcoming in the interview, they might ask us, "How do we do that? How do we enforce the policy?" Our view tends to be, you can get them in the room, but you can't force them to talk.

[42:17] HUSEIN: There's participation and there is 'participation'.

[42:21] CHRISTINE: Exactly. So, what we find is much more effective is persuading them, appealing to them to help support a culture of respect, or whatever type of misconduct, may be an issue that you're trying to cultivate within your organization. And that doesn't start usually, with the investigation that usually starts long before when you're communicating how important that culture is. And you're reinforcing those messages over and over and over again, and helping people recognize the role that they have to play, to help perpetuate that, maintain that within the organization reinforcing over and over why that's so important, and how it is that you get there.

[43:05] So it can be a lot of legwork. And then hopefully in the investigation itself, you're just reinforcing that message. You know, here's why. Here's why we're here. This is what we do. And you can trust us to make sure that you're protected, that there'll be no negative action taken against you, no reprisal you know that this is we're good for this. Because we take these things so seriously, and we act on them. And then of course you have to live up to that. Because if you breach that trust, then again, that system is going to fall apart.

[43:35] HUSEIN: The next question we have is how can companies balance the need for transparency with the need to protect sensitive information during an investigation?

[43:43] CHRISTINE: We have these four pillars that we talked about, and of course, one of them is confidentiality. So, there is a need to be transparent sometimes, in so far as communicating that an investigation is being done, perhaps, but sometimes not. Sometimes the nature of the investigation is such that we're going to we're going to look into it in confidence. It's very sensitive. And really, it's between two parties, or maybe it includes a number of witnesses and beyond that nobody else really does need to know, nor should they know, because it doesn't impact them in any way. And we have an obligation to keep it confidential for the people directly involved.

[44:30] So, there are many investigations that are that. But the transparency piece can sometimes come into play in cases where... this particular investigation involved everybody in our organization, and it was like the best kept secret because it was just a big thing and everybody was aware of it, because we interviewed everybody and everybody is going to be watching at the end of this investigation now to see if we take action based on what we learned.

[45:00] So, I think there is a balance sometimes to be struck where, in a case like that, where we say, well, we're not going to say anything at the end of this because we can't, it's all confidential, is to not be blind to the fact that there's also sometimes a cost to not saying

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

anything. So, it's not an easy line to draw. But there may be cases where there does need to be something said at the end so that people understand what they don't understand. We're not going to tell you exactly what we did.

[45:35] But what we can assure you is that we heard all of you in this investigation that you all know has taken place. And we have taken steps to address the situation, which may not be apparent to you because they are confidential. But we really do want to thank you for whether it's bringing this to our attention or participating in the investigation, because this is how we make the kinds of changes we need to in order to help this organization.

[46:02] HUSEIN: After the investigation, there is a very real possibility that all the employees who are participating will continue to be employed afterwards. So, I imagine that this felt like long term interest in preserving confidence about the process. So, I was wondering like, after an investigation, when everyone's emotions are high, and there's all this dirty laundry that's aired and whatever format, are there things that employers can do to help smooth things over?

[46:25] CHRISTINE: There are. And this is increasingly becoming something that more organizations are looking into. So it's a practice that is referred to as workplace restoration. For many years, perhaps there was an idea that we'll do an investigation, and that will solve the problem. And what investigations really do is they just identify the problem. So, the problem, if it's really simple, can sometimes be simply resolved. Oh, we've got a real problem with these employee, let's exit them. So, that may be a simple solution.

[47:00] But many problems are not that simple. They're much more complex. So, we're not going to exit somebody after this, we now need to figure out a way to get these people working effectively after what has been a really kind of involved, stressful process. So, that's separate and apart, we got to bring in some expertise. And we've got some folks on our team who do this work really in a skillful way. And it's a different set of skills.

[47:23] HUSEIN: The next question we have is, can you discuss the potential impact of social media on workplace investigations?

[47:30] CHRISTINE: I would say that probably the most common is when we find evidence of employee misconduct on social media. So, however, that comes to our attention, it may be that the complainant has brought this to our attention, this is the way in which the respondent has misbehaved is by communicating some things on social media that can be connected to the workplace. So that's often the issue in those cases is, is the social media platform private? Does

Lawyered – Episode 90
Workplace Investigations Law ft. Christine Thomlinson

it have any connection to the workplace that kind of brings it within to the jurisdiction of the employment relationship?

[48:08] Sometimes it's a question of, well, how do we get it? Let's say SnapChat, like those sort of disappear immediately. How can we recover those? If it's WhatsApp messages, and somebody switched phones, can we actually manage to find the WhatsApp messages? So that can be an issue sometimes with social media is how do we get access to the evidence?

[48:35] HUSEIN: Does the investigator have a legal authority to demand employee to produce their Twitter, or their Instagram accounts, or whatever messages were sent there?

[48:47] CHRISTINE: We can't summons, because it's an internal proceeding. So, unlike some regulatory bodies that do investigations, where they could actually potentially get a court order to access that information, we can't do that. We can request it and say that it's required and kind of expect that people will provide it if they're going to participate fully in the investigation. And then their decision not to do that can have repercussions in the investigation. I asked you to produce this evidence, you didn't. I'm going to draw potentially an inference from the fact that you didn't provide me with that information.

[49:24] HUSEIN: So, the next question we have is, what are some differences between internal and external investigators, like being an in-house or external investigator, and when might one be preferred over the other?

[49:38] CHRISTINE: So, internal are I would say most commonly, folks in Human Resources who do investigations, that's probably the most common internal investigators we interact with. Although there are others for sure, it can sometimes be folks who work in corporate security, but then it can also be dedicated internal investigation teams in larger organization. So, if we take folks, for example, in a Human Rights office, in a large institution with really deep knowledge of Human Rights issues, doing investigations, they can be sometimes more skilled than external investigators who do a broad range of investigations and may have less experience with Human Rights one specifically. On the other hand, you might have an internal person who's done like two investigations ever. And so less experience there.

[50:34] On the external side, we have people all across the spectrum. So, people who've come from some of those HR roles, who've decided in their post corporate life to set up a consulting, business and do investigations. And then you've also got a number of lawyers in that same position. So, external investigators all across the map. And the biggest difference I would say is

that an organization chooses to source an investigation externally, when they have a reason to do so.

[51:04] The reason maybe we have nobody internally who can do it, so we're going to look external. But if we do have somebody internally, then it's a decision why that internal person really isn't suitable or appropriate, given the case at hand. And that could be because it's beyond their expertise, it could be because they're busy, which seemed more capacity. It could be because of the high-profile nature or the seriousness of the allegation, we just know, there's going to be a larger microscope on this investigation. And we want to take that pressure off of our internal resource. We often get asked to do investigations into people who are really highly placed in the organization. So, when it's the CEO, it's the Chair of our board, it's like the Executive VP, nobody wants to do that investigation internally. So, we're going to look to an external resource.

[51:59] HUSEIN: That's a great segue for our last question. And the question there is, what are some specific tactics or investigations that involve high level executives or top management?

[52:09] CHRISTINE: The first one would be, in all likelihood, you're considering an external investigator, because who's going to do it internally? Nobody wants to do it. And if they did do it, how confident would you be that they're going to really give you the outcome that you need? Are the investigation reports really going to be neutral, and they won't be motivated by what's going to happen to me if I find that the CEO did this?

[52:35] The second major thing I would say, often when those individuals are the subject of an investigation, it has or can become public. So, that brings a whole other layer of attention to this. And we've seen this, we've seen this in the media, where these investigations become public, and the public, and the media are paying very close attention to the investigation. So, we talked about this, in our practice as something that comes up very early on in the investigation almost as soon as the organization becomes aware that there is a complaint, that we triage it and one of the aspects of triage is could this potentially become public, if it's not already?

[53:19] Because if so, we got to get somebody on that. Because we want to be in front of that, we want to be able to make sure that we can speak publicly about this in a way that is appropriate and that requires some communication. And we got to be careful about that communication, because of course, these are still confidential, even if they're public, the details have to stay as confidential as possible subject to what's gone public. So, we have to be really careful what we're communicating both internally and externally.

[53:48] HUSEIN: I imagine there's often concerns about the top management maybe unduly influencing the investigation, by kind of telling people what to say or what not to say. Are there specific things that you would do if there's a threat of that?

[54:03] CHRISTINE: Yeah, for sure if that happens, it's particularly a concern in cases where the allegations are exactly that, the senior person is a bully. And so all indicators are that people are going to be scared to be bullied during the investigation. But even in the absence of that, there's a risk. And so organizations and often we might be part of these discussions, not in the sense of giving legal advice, but just what are the options, is if there's any sense that the integrity of the investigation might be compromised, because the respondent might be interacting with or influencing witnesses, then maybe we look at getting them out of the workplace and putting them on some form of the investigative leave in the interim.

[54:49] HUSEIN: Christine, I want to thank you so much for joining us on the show to talk to us about these very fascinating issues. Most people listening to this show, participate in some sort of a workplace and although these issues are upsetting to speak about, its helpful to know that there is a line of cases of experts who are suited to address them in a speedy manner. So, we appreciate you taking time to walk us through these important issues and we look forward to staying in touch in the future.

[55:11] CHRISTINE: Well, thank you so much for having me and thank you in particular to the patrons for those terrific questions.

[Music Break]

[55:23] HUSEIN: And that's going to be a wrap on this episode, and for Season 9. Thank you so much for listening. On today's episode, our guest was Christine Thomlinson. And you can learn more about her and her work at her firm's website, which is at www.rubinthomlinson.com. And for more about today's show and a list of all the cases that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com.

[55:45] And to make sure you never miss an episode of Lawyered, if you haven't already subscribed to this podcast, it's free on iTunes, or pretty much anywhere else to get your podcasts. And you can also follow our show on LinkedIn, Facebook or Twitter. Our Twitter handle is @lawyeredpodcast. As Christine mentioned, I want to give a big shout out and thanks to all of our patrons, who have been so helpful over the years to make this show happen, both past and present.

Lawyered – Episode 90

Workplace Investigations Law ft. Christine Thomlinson

[56:10] They include, Abbas Kassam, Aman Kalra, Andrew Monkhouse, Brian Osler, Candace Cooper, Carolyn Poutiainen, Conner Coles, Donald Bourgeois, Ethan Marx, Flynn Paquin, Hasan Panju, Jeff Lang-Weir, Keren Gottfried, Lisa DeMarco, Muhammad Abbas Amarshi, Mark Asfar, Michael Rusek, Michelle Koerssen, Mohamed Moledina, Mohan Pandit, Munawer Chattoo, Peter Chiykowski, Rebecca Finley-Schidlowsky, Riyaz and Batul Panju, Saad Baig, Sajjad & Farhana Kassamali, Samantha Chen, Stacy Hushion, Stephen Lockwood, Sujoy Chatterjee, Trevin David , Urooj Zaman, Vasileios Tsianos and Yovanka McBean.

[56:55] And at the bottom of my heart, I want to say thanks to all of you for everything that you've done and are continuing to do to make this show more accessible to more people. Solomon Krause-Imlach for helping with sound editing. Ben Swirsky provide us with our theme song, and Steve DeMello has been helping to maintain our website.

[57:13] And of course, please be advised that while the show is aimed to be helpful and informative that it is not legal advice. However, if you do want legal advice, please reach out to a lawyer directly to help you through your particular situation. And with that, we'll see you back here for Season 10. Until then, keep it legal.