

WORKPLACE INVESTIGATIONS: WHAT YOU SHOULD KNOW UP FRONT TO COVER YOUR BACK

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By

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AGENDA

- **Legal Obligations and Concepts**
- **Types of Situations giving rise to need to investigate**
- **Choosing the Right Process**
- **Planning the Investigation**
- **Gathering the Evidence**
- **Documenting the Investigation**
- **Next Steps**
- **Case Law Update**

LEGAL OBLIGATIONS & CONCEPTS

- **Overlapping Legal Obligations:**
 - *Occupational Health and Safety Act*
 - *Human Rights Code*
 - **Collective Agreement Language**
 - **Common Law**
 - **Contractual Terms**

OCCUPATIONAL HEALTH & SAFETY ACT

- **OHSA requires employers to keep workers safe**
- **Concept of worker safety is expanded under Bills 168 & 132**
- **Employees must not only be kept safe from dangerous machinery, caustic chemicals and falling objects, but also from violence and harassment in the workplace.**
- **Employers are required to have policies to prevent and address such hazards. These policies must contain a complaint investigation procedure.**

THE HUMAN RIGHTS CODE

Policies must exist to detail and prohibit workplace discrimination and harassment on “prohibited grounds”, and must set out an investigation procedure for complaints.

The Employer’s “duty to investigate” is triggered where there is reason to believe discrimination / harassment on a prohibited ground might be taking place

If an Employer does not have or use a reasonable “process” to receive complaints and investigate them, the Human Rights Tribunal can still award damages, even if the underlying complaint turns out to be unfounded.

THE DUTY TO INVESTIGATE

Will be met where:

- (1) The Policy sets out an objectively reasonable process which is communicated to all employees and which is followed;
- (2) The response is prompt;
- (3) The Employer communicates with the affected parties and explains the process and that the matter is taken seriously;
- (4) The Employer makes available both restorative and disciplinary options as the situation warrants;

CONTRACTS & COLLECTIVE AGREEMENTS

- Workplace violence / harassment policies will generally be viewed as implied terms of the employment contracts and collective agreement.
- Many collective agreements contain anti-harassment and anti-discrimination language.
- Failure to follow internal policies can have same consequences of breaching contract or collective agreement.
- Courts and arbitrators can also “read in” the provisions of the OHSA and the Code when hearing cases

COMMON LAW

Unfortunately, the jurisprudence has not yet caught up with Bill 168 when it comes to dealing with workplace trouble-makers. There are a number of cases where the courts have agreed that an employee was effectively “terminated” due to workplace bullying, but there are also cases where the courts have said that an employee’s “unpleasant” behaviour toward others in the workplace was not “cause” for termination.

The best protection for employers?
Have a good policy, and follow it.

WHEN TO INVESTIGATE?

TYPES OF SITUATIONS POTENTIALLY TRIGGERING NEED FOR INVESTIGATION

- Workplace accident
- Workplace “incident” (i.e., theft, destruction of property, other conduct which potentially is “cause” for termination)
- Direct complaint of workplace violence, harassment, discrimination
- Indirect complaint concerning any of the above
- Unpleasant or drastic changes in behaviour, performance, productivity, particularly where these changes may have an impact on someone’s livelihood or safety

PROCESS CONSIDERATIONS

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Investigations are never “one size fits all”

Consider:

- Nature and seriousness
- Manner in which the complaint was raised
- Potential implications
- Provisions of applicable policy
- Statutory requirements
- Wishes of the parties
- Resources available

CHOOSING THE RIGHT INVESTIGATOR

Before proceeding with an investigation:

- Consider reporting relationships, potential evidence based on what you know and who might be implicated
- Consider any other information concerning bias-
- Personal relationships;
- Prior poor judgment;
- The “optics”
- Knowledge of investigator
- re workplace practices and policies
- How serious is the issue?
- Can HR conduct? Or does it require a third party?

INVESTIGATOR CHOOSES PARTNER

- Partner should be as free of bias as investigator
- Consider relationship between partner and matter to be investigated
- Consider personal and reporting relationships and impact on potential witnesses of having partner in the room
- Knowledge of partner re workplace, people involved
- Role of the partner- assist with planning, take notes during interviews, first review of draft report

PLANNING THE INVESTIGATION

BE PREPARED

The investigation team must:

- Educate themselves on the applicable policies and ensure they are followed in investigation;
- Develop an investigation protocol;
- Think process issues through in advance;
- Always maintain control over the process; and
- Stay organized.

APPROPRIATE SCOPE

- Only investigate what is relevant i.e.: any information that makes it more or less likely that the matter under investigation occurred

Before gathering evidence:

- Identify all relevant issues
- Consider what evidence may be available (physical evidence, documents, witnesses)
- Analyze who/what is likely to be your “best source”

STAYING FLEXIBLE, WITHIN LIMITS

What is relevant may change in the course of an investigation - keep an open mind, but do not allow unchecked expansion!

Only investigate the formal complaint

-If additional potential complaints are raised, these must be considered separately unless directly relevant!

- Be flexible! Adapt your gameplan!

GATHERING EVIDENCE

PREPARING TO GATHER EVIDENCE

- Identify witnesses and consider issues that may impact credibility;
- Review relevant documents;
- Review meeting location and timing issues (safety, confidentiality, comfort)
- Consider methods of documentation:
 - handwritten notes
 - typed notes
 - signed statements
 - audiotape
 - videotape

INTERVIEWING WITNESSES

- Start with the Complainant, or, if the complaint is “indirect” the employee who raised the initial concern
- Prepare an introductory statement that you will give to all interviewees, explaining the process and allowing time to address any questions or concerns
- Develop a general script for interviews - what information do you need or want to get from each witness?

INTERVIEWING THE RESPONDENT

- The Respondent should be interviewed after a proper factual foundation has been secured from the Complainant and any witnesses. This ensures the Respondent is made aware of and has an opportunity to respond to **all allegations**
- It may be necessary to interview the Complainant and Respondent more than once as new information arises
- Always “close the loop”

INTERVIEW TECHNIQUES

- Ask “Open Ended” questions (Who, what, where, when and why)
- Confirmatory responses, mirroring language
- Avoid leading questions (“Is this the first time you have harassed someone in the workplace?”)
- “Capping” questions at the end:
 - Is there anyone else who may have information about this?
 - Are there any documents we should be aware of?
 - Is there anything else you think we should know?

REMIND each witness not to discuss the matters at issue with anyone, and invite them to contact you if they think of anything more.

SAY THANK YOU.

DOCUMENTING THE EVIDENCE

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- Ensure each phase of the investigation is adequately documented and consider witness statement “sign-offs”;
- Detail interview questions, answers, and all factors that affect your credibility assessments;
- Every conclusion must have documented reasons – the “replication principle”;
- Keep all documents in a secure location, and “password protect” electronic documents;

And remember...

**IF YOU DON'T WRITE IT DOWN, IT DIDN'T
HAPPEN THE WAY YOU SAY IT DID.**

COMMON INTERVIEW ISSUES

- Complainant does not want you to “do” anything with the complaint
- Witnesses demand assurances of confidentiality
- Union or legal representatives impede the interview

REMEMBER:

- You have legal obligations.
- You are in control of the process.
- Caution representatives that any undue interference will interfere with your duty to investigate.

AFTER ALL THE EVIDENCE IS IN...

- Review one more time: all relevant documents, all interview notes, any physical evidence
- Consider areas of agreement/disagreement in the evidence
- Consider whether there are serious credibility issues **AND HOW TO RESOLVE**
- The gold standard is to provide an overview of the factual part of your report, in draft, **PRIOR** to drafting the conclusions to each “side” of the dispute or to the person or persons most likely to be impacted by the report, and provide an opportunity for comment, however...
- AFTER** receiving comment back, proceed to make any factual corrections warranted
- THEN** make your conclusions on the facts

ASSESSMENT AND ANALYSIS: CONCLUSIONS

For each issue investigated, 3 possible outcomes:

- 1) Founded on the evidence
- 2) Unfounded on the evidence
- 3) Not enough evidence to determine whether founded
 - Beware the use of #2
 - In serious cases, consider getting legal advice before drawing conclusions
 - Conclusions MUST be based on evidence
 - Draw the dots close together, no logical “leaps”

INVESTIGATION REPORT

Ensure it is:

Succinct

Defensible

Well-written

Conclusions must be clear and understandable to a lay-person, and must be based on the actual evidence received.

All conclusions must be explained with reference to the evidence.

Remember – the full final report may be evidence in a later proceeding. While the standard is not perfection, it must withstand a “probing scrutiny” -- even if you do not plan to circulate the full report

NEXT STEPS

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- Who decides what is done following the investigation?
- Will the investigator make a final recommendation on a course of action in a report?
- What if legal advice is required?
- Consider the loss of solicitor/client privilege with the distribution of the Report (i.e., what was the foundation of the decision regarding action?)

Gold Standard

- The Report and Findings should stand on their own.
- Recommendations should be made following legal advice in serious matters and action taken separately to protect privilege.

CASE LAW UPDATE

ONGOING HARASSMENT, LEADING TO CUMULATIVE MENTAL STRESS, CAN NOW LEAD TO A SUCCESSFUL WSIB CLAIM!

In April, 2014, the Workplace Safety and Insurance Appeals Tribunal found the limitations on mental stress claims in the *Workplace Safety and Insurance Act* **Unconstitutional**

Provision of the WSIA regarding mental stress:

13 (4) Except as provided in subsection (5), a worker is not entitled to benefits under the insurance plan for mental stress.

(5) A worker is entitled to benefits for mental stress that is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment. However, the worker is not entitled to benefits for mental stress caused by his or her employer's decisions or actions relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the employment.

What does this mean for employers?

Nothing... yet.

WSIB is not required to follow the jurisprudence of the WSIAT in deciding claims, and WSIAT is not even obligated to follow its own precedents. As no changes have yet been made to the *Act* to deal with the decision, it is likely that all subsequent claims of this type will be denied at the first two stages.

Will there be legislative changes? Perhaps. This case follows a similar trajectory as the jurisprudence in British Columbia, where there is now new legislation.

Boucher v Wal-Mart Canada, **2014 ONCA 419**

Court of Appeal decision reducing the largest punitive damages award in an employment claim in Canadian history from \$1,000,000.00 to \$100,000.00 as against Wal-Mart and the harassing employee (Pinnock) from \$100,000.00 to \$10,000.00.

At trial level the jury awarded the plaintiff the following:

1) against Pinnock **personally**, \$100,000 for Pinnock's intentional infliction of mental suffering and another \$150,000 for punitive damages, for a total of **\$250,000**.

2) against Wal-Mart **separately**, \$200,000 for aggravated damages and \$1,000,000 in punitive damages, for a total of **\$1,200,000**.

Costs of \$140,000 were also assessed against the defendants. The total award was therefore in the range of **\$1,450,000**.

Dennis v. Ontario Lottery and Gaming Corporation, 2014 ONSC 3882

- The plaintiff was an OLG employee for 13 years.
- At the time of her termination she was a security manager, supervising 55 employees.
- In October 2012, she was offered a termination “without cause” package.
- Before she received her settlement funds OLG determined that she had been stealing money from the social committee.
- She was criminally charged in December 2012 (though the charges were subsequently withdrawn).
- OLG argued it should not have to pay out her severance package because there was cause for termination
- The Court disagreed and ordered them to pay up.

Take aways:

- If you think you have a case for cause, make sure that it is explored fully before acting on it;
- Make sure that investigation conclusions are fully supported on the evidence



facebook fail

Employers need not be perfect in their investigations; the trick is being good enough

- Grievor and co-worker had altercation about safety issues on a night shift; grievor asked the supervisor to speak to his co-worker about it, and the supervisor did.
- Within the next few hours, the grievor posted offensive and threatening comments of a sexual nature about his co-worker on his public Facebook page.
- Co-worker complained about the comments
- Employer's harassment policy was locked behind glass and did not reference social media
- Employer did not obtain written statement from grievor, or enquire about what prompted his posts before terminating him
- Grievance dismissed nonetheless



QUESTIONS?

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