

# Conducting Workplace Investigations: Meeting the Legal Requirements



TEMPLEMAN • MENNINGA

BARRISTERS • SOLICITORS • TRADEMARK AGENTS

**Kristin A. Eliot B.A. (Hons.), LL.B., LL.M.**

**Lawyer, Mediator and Workplace  
Investigator**

**[keliot@tmlegal.ca](mailto:keliot@tmlegal.ca)**

**(613) 966-2620**

# TOPICS TO BE COVERED

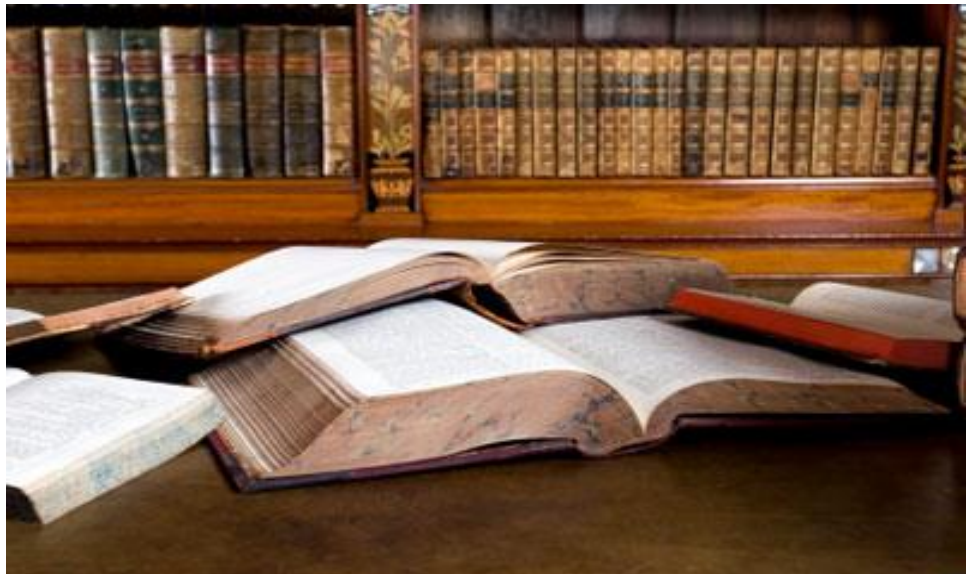
- **Legal Obligations and Concepts**
- **Types of Situations giving rise to need to investigate**
- **Choosing the Right Process**
- **Conducting the Investigation**
- **Documenting the Investigation**
- **Next Steps**
- **Specific Issues for Municipalities**
- **Case Law Update**



# Legal Obligations and Concepts

## Overlapping Legal Obligations:

- *Occupational Health and Safety Act*
- *Human Rights Code*
- **Collective Agreement Language**
- **Policy**
- **Contractual Terms**



# *Occupational Health and Safety Act*

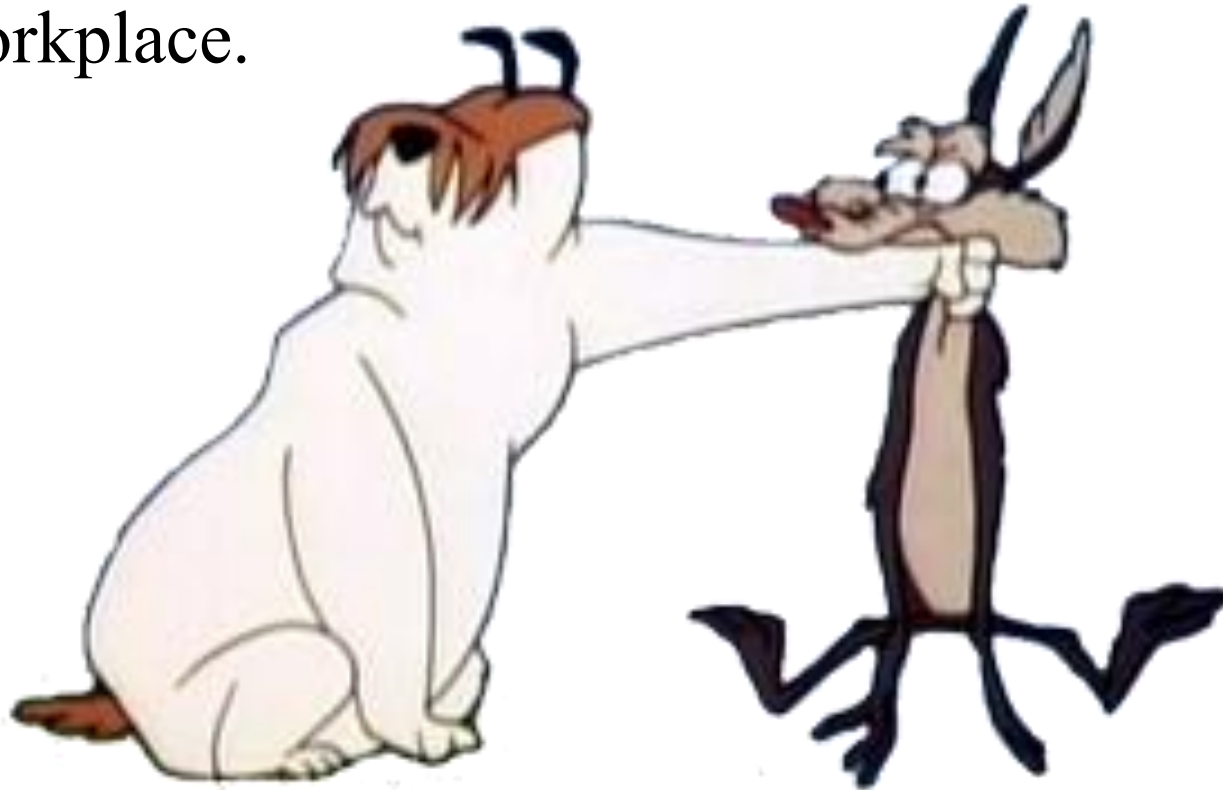
- OHSA requires employers to keep workers safe
- Concept of worker safety expanded under Bill 168 and 132



- 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 such hazards. These policies must contain a complaint investigation procedure.

# *“Appropriate” investigation*

*Under section 32.0.7 of the [Occupational Health and Safety Act](#) (OHSA), an employer must ensure that an investigation appropriate in the circumstances is conducted into incidents or complaints of workplace harassment or violence (including threats of violence).*

*The Ministry of Labour may issue an Order against a municipality if they are found to have failed to conduct an investigation “appropriate in the circumstances”*

## *A workplace harassment investigation appropriate in the circumstances under OHSA should:*

- *Be undertaken promptly.*
- *Be objective.*
- *Maintain confidentiality*
- *Be thorough.*
- *Adhere to internal policy requirements.*
- *Be conducted by an unbiased and qualified person.*
- *Communicate the findings to the complainant.*
- *Implement follow up steps as may be required.*



*An [investigation template](#) to help employers can be found in the Code of Practice to Address Workplace Harassment. Employers may also want to refer to [Part III \(Employer Duties\)](#) of the Code of Practice for more information.*



## *The Human Rights Code*

Workplace violence or harassment related to a “prohibited ground” of discrimination usually ends up an employer liability (i.e., the real “bad guy” usually does not pay, his employer does)

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

If an employer does not satisfy the “duty to investigate,” the Human Rights Tribunal can still award damages, even if the underlying complaint turns out to be unfounded.

# *The Duty to Investigate under the Code*

Will be deemed satisfied where:

- (1) The response is prompt;
- (2) The employer is aware that the conduct complained of is prohibited;
- (3) The matter is taken seriously;
- (4) There is a complaint mechanism in place;
- (5) The employer acts to provide a healthy environment;
- (6) The employer communicates its actions and findings to the complainant

The employer's actions must only be reasonable, and need not be



# Contracts and Collective Agreements

Workplace violence / harassment policies will generally be viewed as a term of the employment contract or collective agreement.



Some Collective Agreements contain specific anti-harassment language and detailed investigation protocols, as do some internal Policy documents.

Failure to follow policy can have same consequences of breaching contract or collective agreement.

Courts and arbitrators also have the ability to “read in” the provisions of the OHSA and the Code when hearing cases, meaning that even if there are no express terms in the contract or CA on this issue, the duty to protect workers from harm and the duty to investigate will be deemed as contractual obligations

# Common Law

Unfortunately, the jurisprudence on termination has not yet caught up with Bill 168 and Bill 132 and other requirements upon employers when it comes to punishing workplace harassers.

**EMPLOYERS DUTY TO PROTECT IS OFTEN GREATER THAN THEIR LEGAL ABILITY TO DISCIPLINE OR TERMINATE THE OFFENDERS**

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



# **Types of Situations Potentially Triggering Need for Harassment/Discrimination/Violence Investigation**

- Direct complaint re workplace violence, harassment, discrimination
- Indirect complaint re 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

Investigations are never “one size fits all”



Consider:

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



# *The Most Common Mistakes Municipalities Make in Conducting Workplace Investigations:*

1. *Failing to Conduct an Investigation Promptly*
2. *Disregarding Procedural Fairness*
3. *Selecting Investigators*
4. *Failing to Follow Own Policies and Procedures*
5. *Conducting a Biased Investigation*
6. *Failing to Gather all Relevant Information*
7. *Ignoring Confidentiality and Privacy*
8. *Failing to Properly Document Investigation and Findings*
9. *Retaliating Against the Complainant or Others*
10. *Failing to Advise of the Outcome/Take Remedial Steps*
11. *Failing to Consider if it is an Integrity Commissioner issue*

# **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?
- Do you want to be able to claim solicitor client privilege over the final report?

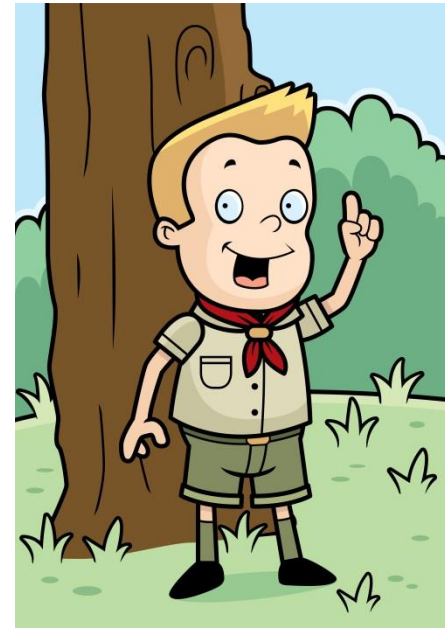


# Planning the Investigation

*Be Prepared.*

The investigator needs to:

- Ensure the allegations to be investigated are clearly articulated
- 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.



## **Planning- Considering Appropriate Scope**

Only investigate what is relevant. What is “relevant”?

--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”

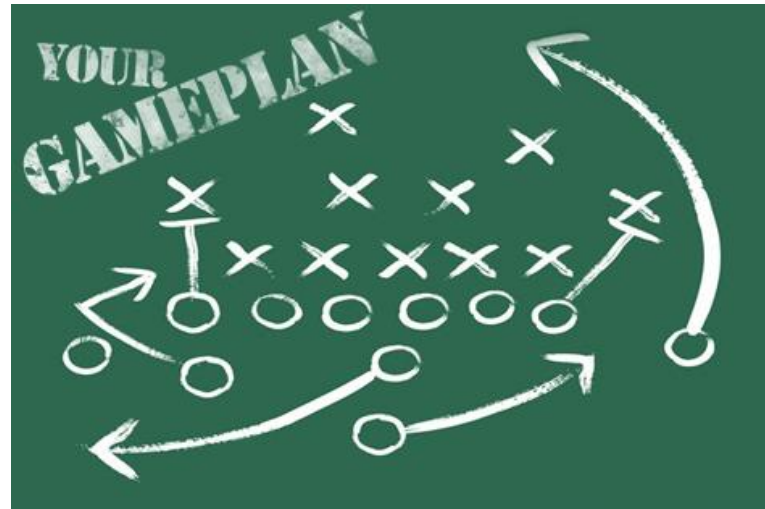
This will help keep you on track.

## Planning- 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!



# **Planning- 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
  - emails and texts





# **Interviewing the Parties and Witnesses**

- Start with whoever is likely to have the most/best information, usually Complainant
- Prepare an introductory statement that you will give to all interviewees, explaining the process and allow time to address any concerns
- have them sign a confidentiality agreement
- 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 achieved through the Complainant and any witnesses so that the Respondent may respond to **all allegations** with proper information
- Expect to interview the Complainant and Respondent more than once as new information arises
- Always “close the loop”

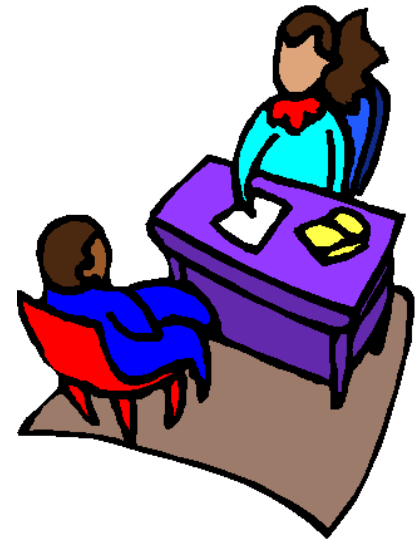


# Interview Techniques

- 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 know 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.

REMIND them of reprisal.



# **Documenting the Evidence**

*Courts hold employers to a high standard!*

Ensure each phase of the investigation is adequately documented;

Capture interview questions, answers, and credibility assessments;

Every conclusion as to facts/credibility must have reasons documented;

Always keep a second set of each document created or considered in the investigation;

Keep all documents in a secure location, password protect electronic documents

# Common Interview “Issues”

- Complainant does not want you to “do” anything with the complaint
- Employees are reluctant or refuse to participate
- 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 interference may adversely impact your assessment of credibility or factual findings.



## **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/making recommendations
  - 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 third party scrutiny” -- even if you do not plan to circulate the full report**



## **Next Steps**

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?

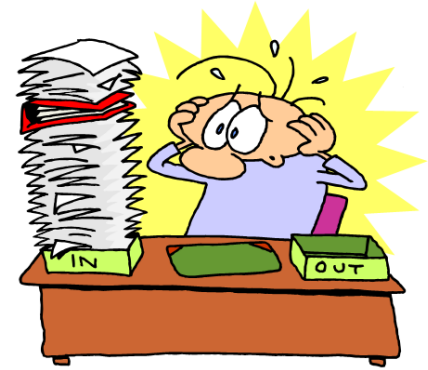
Consider the loss of solicitor/client privilege with the distribution of the Report or part of the Report

## **Gold Standard**

The Report and Findings should stand on their own. Consider the use of an Executive Summary Report for Council.

Recommendations should be made following legal advice in serious matters and action taken separately to protect privilege.

# CASE LAW UPDATE



## The Price of Poor Investigations



Case	Commentary	Damages
<i>Boucher v. Wal-Mart</i> (2014-Ontario CA)	"Wal-Mart's actions and its inaction were reprehensible"	\$410,000 + 20 weeks salary
<i>City of Calgary and CUPE</i> (2013-Arbitrator)	"tragic case", "total failure on the part of those responsible"	\$869,022
<i>Pate Estate v. GalwayCavendish and Harvey</i> (Township) (2013-Ontario CA)	"reprehensible conduct" mounted an investigation to build a case to justify termination after terminating Pate	\$734,095 (excluding 12 months wrongful dismissal damages agreed on by parties outside trial process)
<i>Elgert v. Home Hardware</i> (2011-Alberta CA)	"do not give it licence to conduct an inept or unfair investigation"	\$135,000 + 24 months pay in lieu of notice

## Big damages awarded against employee for failure to investigate properly, even where good policies in place

WAL★MART®



*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**.



*Ontario Court of Appeal—Rainy  
River (Town) v. Olsen 2017*



- Limits on requirement to investigate harassment under OHSA where the alleged harasser is a third party—in this case a resident?
- The Court agreed with the finding of the application judge that the harassment occurred outside the workplace and, since the respondent was neither a worker nor co-worker as defined by the Occupational Health and Safety Act, the workplace harassment policy did not apply to him

## Discussion

