

# Managing Harassment Investigations under the OHSA: Requirements and Pitfalls

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# OHSA Part III.0.1: Violence and Harassment

- Basic obligations:
  - Harassment policy + program
  - Violence policy + program
  - Post
  - Review at least annually
  - Provide “information and instruction”

# Harassment Program

- **Developed and maintained in consultation with joint health and safety committee**
- Must contain:
  - Reporting (to employer, and to person other than employer or supervisor)
  - Investigation process
  - Confidentiality
  - Communicating results

# Other Obligations - Harassment

- **Investigation** “appropriate in circumstances”
- Complainant and respondent are **informed** of results and any corrective action
- Program **reviewed** “as often as necessary, but at least annually”
- Employer provides “**information and instruction**”

# MOL Code of Practice - Harassment

- MOL “Code of practice to address workplace harassment”
- Compliance with Code of practice is compliance with OHSA obligations regarding harassment
- But: not required to comply with Code of practice

# Code of Practice

- Investigation:
  - Completed within 90 days unless extenuating circumstances (e.g. 5 or more witnesses, key witnesses unavailable due to illness)
  - Investigator is objective
  - Thoroughly interview complainant and respondent
  - Respondent must be given opportunity to respond to specific allegations
  - Separately interview relevant witnesses
  - Collect and review relevant documents
  - Take appropriate notes and statements
  - Prepare a written report: investigation steps, allegations, response, evidence

# Caselaw: Appropriate Investigation

- *OPSEU v. Ontario* (2019, Grievance Settlement Board)
  - Employer found to have **not** conducted “appropriate” investigation, even though complainant had been terminated for other reasons
  - Investigation may be “less extensive” where complainant not returning to workplace
  - But some investigation still required

# Caselaw: Appropriate Investigation

- *Horner v. 897469 Ontario Inc.* (2018, Ontario Superior Court)
  - Court finds plaintiff was harassed in workplace
  - Employer, rather than investigating, terminated the plaintiff
  - Judge finds employer's conduct malicious, oppressive and high-handed
  - \$10,000.00 in punitive damages



# Caselaw: Appropriate Investigation

- *Toronto District School Board v CUPE, Local 4400* (2018, Arbitrator)
  - OHSA does not dictate that an investigation has to be comprised of certain components; or that certain “rules” for the investigation have to be adhered to.”
  - Here: person experienced in workplace and labour relations matters was retained to conduct the investigation
  - Interviewed all the relevant witnesses
  - Gave complainant the opportunity to make future submissions/comments with respect to his draft report
  - Arguably most importantly, investigator’s analysis in reaching both the conclusion that the complainant was not harassed, and that the decision to discipline him was not a reprisal by employer was generally sound

# Caselaw: Third-Party Investigation

- *St. Joseph's Healthcare Hamilton v. Stoimenov and ONA* (2019, OLRB)
  - MOL inspector ordered hospital to engage third party investigator
  - Hospital already conducted internal investigation
  - Hospital explained in detail:
    - why it chose the particular internal investigator
    - why investigation parameters were narrower than complaints,
    - why it takes the view that that these decisions were “appropriate in the circumstances”
- OLRB: words “appropriate in the circumstances” must have some meaning
- Hospital has made out strong *prima facie* case for appropriate investigation
- MOL inspectors’ order for third-party investigator suspended on appeal

# Impartial Investigator

- MOL policy: “impartial person investigation” may be required if:
  - “The alleged harasser is the employer and a person internal to the workplace conducting the investigation would be unduly influenced by the alleged harasser’s high-ranking position.
  - The employer and/or organization has not effectively dealt with or addressed workplace harassment complaints in the past (e.g. multiple complaints about the same person or behaviour).
  - The employer can’t ensure that the investigation will be conducted objectively by someone internally.”

# Caselaw: Retaliation for Harassment Complaint

- *Ljuboja v Aim Group Inc.* (2013, OLRB)
  - Event though OHSA imposes no duty to prevent harassment, OLRB will hear case that employee fired in retaliation for complaining about harassment

# Privilege in Investigations

- Privilege if investigation required by statute?

# Questions?

# Thank you

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