

Conducting Workplace Harassment Investigations:

Navigating Challenges

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Overview

- Why Investigate?
- 10 Steps to Conducting a Credible Workplace Investigation
- Navigating Challenges to Conducting Workplace Investigations
- Takeaways for Conducting Workplace Investigations

Why Investigate? Employer Obligations under Bill 132

- “Workplace harassment” definition was expanded to include “workplace sexual harassment.”
- Bill 132 imposed the following obligations on employers:
 - Ensuring an investigation is conducted into *incidents* and *complaints* of workplace harassment that is appropriate in the circumstances
 - Ensuring the worker who has alleged workplace harassment and the alleged harasser are informed in writing of the investigation results and any corrective action taken
 - Developing and implementing a workplace harassment policy and program:
 - Procedures for workers to report incidents of workplace harassment;
 - How incidents or complaints of workplace harassment will be investigated and dealt with;
 - How information obtained about a complaint of workplace harassment will not be disclosed; and
 - How the parties will be informed of the results of the investigation and of any corrective action taken.

Why Investigate? Duty to Respond under *Human Rights Code*

- Employer may be liable for acts of harassment committed by an employee if management knew or ought reasonably to have known of the harassment and failed to take appropriate steps to address it
- Test to determine whether an employer has appropriately addressed a complaint of discrimination/harassment:

1. Awareness of issues of discrimination/harassment, Policy Complaint Mechanism and Training:

- Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident?
- Was there a suitable anti-discrimination/harassment policy?
- Was there a proper complaint mechanism in place?
- Was adequate training given to management and employees?

Why Investigate? Duty to Respond under *Human Rights Code*

2. Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Act:

- Once an internal complaint was made, did the employer treat it seriously?
- Did it deal with the matter promptly and sensitively?
- Did it reasonably investigate and act?

3. Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication:

- Did the employer provide a reasonable resolution in the circumstances?
- If the complainant chose to return to work, could the employer provide him/her with a healthy, discrimination-free work environment?
- Did it communicate its findings and actions to the complainant?

No Tort of Sexual Harassment – *Merrifield v. Canada (Attorney General)* (ONCA, 2019)

- Mr. Merrifield alleged managerial bullying and harassment:
 - Advising Mr. Merrifield that he could not do political investigations because of a conflict of interest
 - Reminding Mr. Merrifield of his obligation to comply with RCMP policies on media appearances after appearing on radio shows as a “terrorism consultant”
 - Investigating Mr. Merrifield to determine if his credit card use contravened the Code of Conduct
- Findings:
 - Case law did not support the recognition of an independent tort of harassment
 - There are existing legal remedies available to address alleged conduct
 - No other basis to recognize an independent tort of harassment

Why Investigate? Employer Liability for Workplace Harassment

- Damages for intentional infliction of mental suffering
- Aggravated and/or punitive damages
- Redress under the *Occupational Health and Safety Act*
- Human rights damages
- Claim for chronic mental stress under the *Workplace Safety and Insurance Act*

Why Investigate? WSIB Chronic Mental Stress Policy

- Policy allows for entitlement to benefits for chronic mental stress caused by a substantial work-related stressor arising out of and in the course of the worker's employment
 - May include workplace harassment
 - Generally, not interpersonal conflicts, or actions or decisions that are part of employment function
- Requirement to report claims to WSIB within 3 days
- Need to investigate any reported cause(s) of the substantial work-related stressors

10 Steps to A Credible Workplace Investigation

1. Receive information about the incident or complaint
2. Consider whether an investigation is required in the circumstances
3. Decide what type of investigation should be undertaken
4. Consider whether there are external reporting obligations
5. Choose an appropriate investigator
6. Start the investigation – implement appropriate interim measures and notify parties involved
7. Determine the logistics of the investigation
8. Conduct interviews
9. Prepare the investigation report
10. Act on the investigation report

Is an Investigation Required? – *Horner v. 897469 Ontario Inc.* (ONSC, 2018)

- Ms. Horner alleged the following:
 - Another employee deliberately elbowed her and when she confronted him, he denied elbowing and told her to “take a pill”
 - Ms. Horner asked to access a drawer being blocked by the same employee and that employee became angry and said, “Can you not wait?”
- No investigation was conducted
- Ms. Horner’s employment was terminated the week after she reported the allegations
- Finding:
 - Judge awarded Ms. Horner \$10,000 in punitive damages because the Employer chose to terminate Ms. Horner’s employment, rather than investigating her complaints

The Reluctant Complainant – *Fatima v. Biopharma Services Inc.* (HRTO, 2018)

- The Applicant alleged discrimination and harassment based on race:
 - Derogatory comments about people eating food with their hands
 - Comments about not being able to tolerate a religion that doesn't permit drinking alcohol
 - Comments about not wanting to live in areas with brown people
- Allegations raised after the Applicant's dismissal
- Employer conducted an investigation, in which the Applicant refused to participate
- Findings:
 - Employer conducted an investigation without the Applicant's evidence
 - Employer changed the investigator after the Applicant raised concerns

What is an “Appropriate” Investigation? – *Gordon v. Best Buy* (HRTO, 2018)

- Incidents of inappropriate comments said to the Applicant, who identified as Black and of Jamaican descent, by two employees:
 - “Aren’t all Black people afraid of dogs? Is it true?”
 - Saying a derogatory word in Somali to another employee in front of the Applicant, and then saying a different non-derogatory Somali word to the Applicant after the Applicant asked the person to stop
 - “Wow [...] you really do fit every stereotype...you know, that black people like fried chicken”
- Employer’s response to the allegations:
 - Spoke with individuals who made the comments
 - Two individuals were transferred to different schedules or locations to avoid interaction with the Applicant
 - Conducted workplace harassment training

What is an “Appropriate” Investigation? – *Gordon v. Best Buy* (HRTO, 2018)

- Findings:
 - Employer did not reasonably carry out its duty to investigate
 - After the Applicant told a supervisor about the first comment, the supervisor laughed and said that the person who made the comment was “just like that”
 - The Applicant was not formally interviewed about his complaint after he submitted it
 - There was no documentation for the meeting with one of the individuals who made these comments
 - Employer representative met with the Applicant 1.5 months after the Employer was informed of complaint
 - One of the individuals who made these comments was transferred to another location, and received a promotion as part of the transfer process

What is an “Appropriate” Investigation? – *Green v. Canada* (FC, 2017)

- Ms. Green alleged a subordinate harassed her with unwelcome comments
- Independent investigator delivered a report that found there was use of “exaggerated and inappropriate language” and recurring interpersonal conflict
- Findings:
 - Investigation was exhaustive in its factual findings and review of evidence
 - For each allegation, interviews conducted with numerous parties and witness statements obtained
 - Ms. Green given the opportunity to comment on the preliminary report
 - Investigator assessed contextual factors, objectively
 - Delay was reasonable because of complexity and magnitude of alleged harassment
 - Ms. Green simply disagreed with the investigation’s conclusion

He Said/She Said – *Health Sciences Association of Alberta v. Capital Care Group* (AB GAA, 2018)

- Investigator found Grievor’s allegations of harassment against her manager were false and brought in bad faith
- Legal test for credibility from *Faryna v. Chorney*:
 - ...the real test of credibility requires a decision-maker to put the witnesses’ story in context, subjecting it to an examination of its consistency with the existing conditions; it must be in harmony with the preponderance of the probabilities that a practical and reasonable person would recognize as reasonable in the circumstances”

He Said/She Said – *Health Sciences Association of Alberta v. Capital Care Group* (AB GAA, 2018)

- Findings:

- Grievor was not credible

- Story expanded on each retelling
- Independent witness supported the respondent's position
- Internal inconsistencies in the Grievor's evidence
- The Grievor failed to distinguish between something observed and something heard
- The Grievor's version of events was not objectively reasonable
- The Grievor's motivation

Key Takeaways for Workplace Investigations

- Ensure that investigation complies with any relevant policies/legal requirements
- Give parties opportunity to be heard
- Consider all relevant evidence
- Be impartial
- Determine the proper scope of the investigation
- Well-reasoned report and conclusions
- Respect confidentiality of investigation
- Good self-check: “What would a judge think if he or she scrutinized everything that I did?”

Thank you

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