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# *Conducting an Effective Workplace Harassment Investigation*

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# *Agenda*

- Why Investigate?
  - Legislation
  - Consequences of an Improper Investigation
- Investigation Tips and Tricks
  - Conducting the Interviews
- Preparing the Report
  - What is Harassment?
  - Findings of Fact and Credibility
- Additional Considerations
  - Post-Report Issues
  - Internal or External Investigator?

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# WHY INVESTIGATE?

# *Legislation*

- Some provinces statutorily require the investigation of harassment complaints
  - Ontario *OHSA* - Employer must investigate a workplace harassment complaint in a manner “appropriate in the circumstances”
  - Alberta *OHS* – Employer must investigate any incident of harassment and retain the report for two years
- Other provinces require an employer to have a process to investigate complaints

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# *An “Appropriate Investigation”*

- Conducted by someone who is not the alleged harasser or under the direct control of the alleged harasser
- Must be able to be objective
- Generally, an investigation should be conducted within 90 days (absent extenuating circumstances)

# *An “Appropriate Investigation”*

## ■ Investigator must:

- Disclose identifying information only to the extent necessary to conduct the investigation and remind each participant of confidentiality obligations
- Thoroughly interview complainant and respondent
- Give the respondent an opportunity to respond to the specific allegations raised by the complainant

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# Consequences of an Improper Investigation

- Order to conduct another investigation at the employer's expense (Bill 132)
- MOL orders, charges, fines
- Claim by a dissatisfied complainant
  - Constructive dismissal
  - Human rights application
  - Grievance

# Consequences of an Improper Investigation

- If respondent's employment is terminated
  - Wrongful dismissal claim or grievance
  - May seek punitive and aggravated damages in addition to compensatory remedies
- Negative publicity and reputational harm
- Internal employee discontent
- Potential for repeated conduct (another accident, harassment incident, *etc.*)



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# *Boucher v. Wal-Mart*

- Assistant Manager of a Wal-Mart store claimed harassment by her supervisor
- Consistently belittled, demeaned and humiliated, often in front of co-workers
- Senior management found to have only paid lip-service to complaints and didn't conduct a proper investigation

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# *Boucher v. Wal-Mart*

- Employee quit and sued for constructive dismissal
- Jury found Wal-Mart failed to appropriately investigate or take steps necessary to end the harassment
- Also concluded employee was threatened with retaliation for making a complaint
- Jury awarded...

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# *Boucher v. Wal-Mart*

- **\$1.2 Million in aggravated and punitive damages against Wal-Mart**
- **\$250,000 in punitive damages and damages for mental distress against the supervisor personally**
- This was in addition to the 20 weeks of salary required to be paid on termination under the employee's contract

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# *Boucher v. Wal-Mart*

- On appeal, the Ontario Court of Appeal reduced the award
  - Wal-Mart liable for **\$300,000** (in addition to the 20 weeks of pay)
  - Supervisor liable for **\$110,000**
- Even the reduced award of **\$410,000** is still one of the highest for this type of employer misconduct

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# INVESTIGATION TIPS AND TRICKS

# Basic Investigation Steps

- Collect and review relevant documents
- Separately interview relevant witnesses
- Take appropriate notes/statements during the interviews



# Basic Investigation Steps

- Prepare a written report
  - Summarize steps of the investigation, the complaint, the response, and the evidence
  - Make findings of fact
  - Conclude whether harassment occurred
- Provide report to the employer to take action
- Provide results and action taken to complainant and respondent



# *An Investigator Should Be...*

- Unbiased
- Consistent with each interviewee
- Should listen more than talk
- Neutral in conduct and questions
  - Be conscious of personal quirks and ticks (*e.g.*, body language, eye rolling, raised eyebrows)
  - Avoid empathetic remarks, even if well-intentioned



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# *Meeting with the Complainant*

- Use very open-ended questioning
- Purpose of this meeting is to:
  - Get information from the complainant in their own words
  - Confirm information in written complaint
  - Clarify areas of uncertainty or vagueness
  - Determine which are the issues of central importance to the complaint
  - Get them to “cement” their story

# *Meeting with the Respondent*

- Purpose of meeting with respondent is to provide opportunity to provide response to allegations made against them
- Need as much detail as possible
- Very important to make sure you put each of the allegations to the respondent
  - Start with an open-ended question about the situation to see what the person says

# *Meeting with Witnesses*

- Starting presumption should be you want to disclose the nature and contents of the complaint as narrowly as possible, but still collect enough information to allow you to reach a conclusion
- Questions should be limited to:
  - Confirming general working relationship with each of the parties (*i.e.*, are they co-workers, is this a reporting relationship, *etc.*)
  - Asking questions related to the specific event they are said to have witnessed

# *Investigation Meetings*

- Meetings generally end with the catch-all “is there anything else you’d like to tell me?”
- At conclusion of the meeting, should advise the individual
  - You will be meeting other parties
  - May need to meet with them again
  - They are expected to maintain confidentiality over what has been discussed
  - Remind of reprisal protections

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# *Investigation Notes*

- Notes should only capture the discussion
  - No editorial comments about interviewee
  - No comments about body language, *etc.*
- If you have concerns the employee is engaging in conduct that may be influencing the answers you may want to address with employee and note your comments in the notes as well so they form part of the “record”

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# PREPARING THE REPORT

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# WAS THE CONDUCT HARASSMENT?

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# *What is Harassment?*

- Provincial legislation may have specific definitions of what constitutes harassment in the workplace
- Workplace policies may have a broader definition of what constitutes harassment
- Common policies:
  - Workplace Violence and Harassment
  - Code of Conduct/Ethics
  - Conflict of Interest
  - Anti-Discrimination



# *The Elements of Harassment*

## ■ Course of conduct

- Generally, will need to have repeated acts before harassment is established
- In some circumstances, one significant act may alone constitute harassment

## ■ Vexatious behaviour

- Conduct that is annoying, distressing, agitating to the complainant

# *The Elements of Harassment*

- Known, or ought to have been known, to be unwelcome
  - Complainant does not have to directly advise respondent behaviour is unwelcome
  - Would a reasonable person in the complainant's position find such conduct unwelcome?
  - If so, would a reasonable person in the respondent's position know it was unwelcome?

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# *What is Not Harassment?*

- Work-related supervision and/or direction
- Reasonable imposition of discipline
- Performance evaluations
- Policy implementation
- Responding respectfully to questions/concerns from a Manager/co-worker
- Minor conflict / disagreements with peers

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# FINDINGS OF FACT AND CREDIBILITY

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# *Findings of Fact*

- If the version of events is consistent, making a finding of fact is straightforward
- Where there is a dispute or denial about what occurred, you need to make an assessment of what you believe occurred
- Standard is **balance of probabilities**
- Will be based on your assessment of credibility as between the complainant and respondent

# *Assessing Credibility*

- Test for credibility is that set out in *Faryna v. Chorny* (BCCA, 1952)
  - If there are conflicting versions of events, which is most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions?

# *Assessing Credibility*

## ■ Consider:

- ❑ Corroborating evidence
- ❑ Internal and external consistency/inconsistency of evidence
- ❑ Detail and clarity with which an interviewee described an event
- ❑ Timing of complaint in relation to any disciplinary action or other workplace issue

# *Assessing Credibility*

## ■ Consider:

- Interviewee's ability and/or capacity to apprehend and recollect
- Interviewee's opportunity or inclination to tailor or embellish evidence
- Motive of the interviewee and/or their relationship to the parties
- State of the witness (candour, evasiveness)- but tread carefully



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# *Assessing Credibility*

## ■ Consider:

- Inconsistency and contradictions in relation to other evidence
- Addition of significant allegations post-written complaint or later in the process

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# ADDITIONAL CONSIDERATIONS

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# POST-REPORT ISSUES

# *Dealing with the Outcome*

- Response will depend on the subject-matter and outcome of the investigation
- Think creatively about solutions that may restore workplace balance
- Desirable to at least consider employee's input
- Respect privacy interests



# *Dealing with the Outcome*

## ■ Non-Disciplinary Responses:

Mediation

Coaching / Training

Apology



# *Dealing with the Outcome*

- If discipline is warranted:
  - Investigation findings should be adequately explained; and
  - Discipline should be:
    - Proportionate
    - Responsive to complaint
    - Legally compliant
    - Communicated in writing



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# *Dealing with the Outcome*

## ■ Reprisals

- No employee may be disciplined for bringing a complaint forward in good faith

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# **INTERNAL OR EXTERNAL INVESTIGATOR?**



# Internal or External Investigator?

- Employer must decide at the outset whether to do investigation “in house” or hire an external investigator
- External investigator can be
  - Human resource consultant
  - Workplace investigator
  - Legal counsel who conduct investigations

# Internal or External Investigator?

- **Expertise-** do you have an experienced/qualified employee who can conduct investigation?

- Investigator needs to

- understand how to take proper notes and interview witnesses
- assess credibility and make findings of fact
- reach a conclusion as to whether what occurred constitutes harassment

## Complaint Handling



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# Internal or External Investigator?

- **Impartiality-** Is the investigator impartial?
  - Is the internal investigator friends with any of the parties or witnesses? Is there a reporting relationship to the complainant or respondent?
- **Resources-** Does your organization have the time and resources to complete the investigation quickly? How costly will an external investigation be?

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# Internal or External Investigator?

- **Seriousness and Complexity of the Allegations-** How complicated is the investigation and what are the consequences if not investigated properly?
- **Privilege-** Is this an investigation being conducted in contemplation of litigation or for the purpose of obtaining legal advice?

# Considerations- External Investigators

- **Retainer-** Ensure you have a clear retainer letter setting out exactly the scope of the investigation (what you are - and are not - asking the investigator to investigate)
  - This avoids having the investigator provide a report with findings or information you don't want or need
  - If this is a privileged investigation, this should be identified in the retainer letter as well

# Considerations- External Investigators

- **Timing-** When will the investigation begin?  
How long it will take to complete the interviews? When will the report be completed?
- **Material-** Ensure investigator is provided with all relevant policies and documents (including the written complaint) from the outset

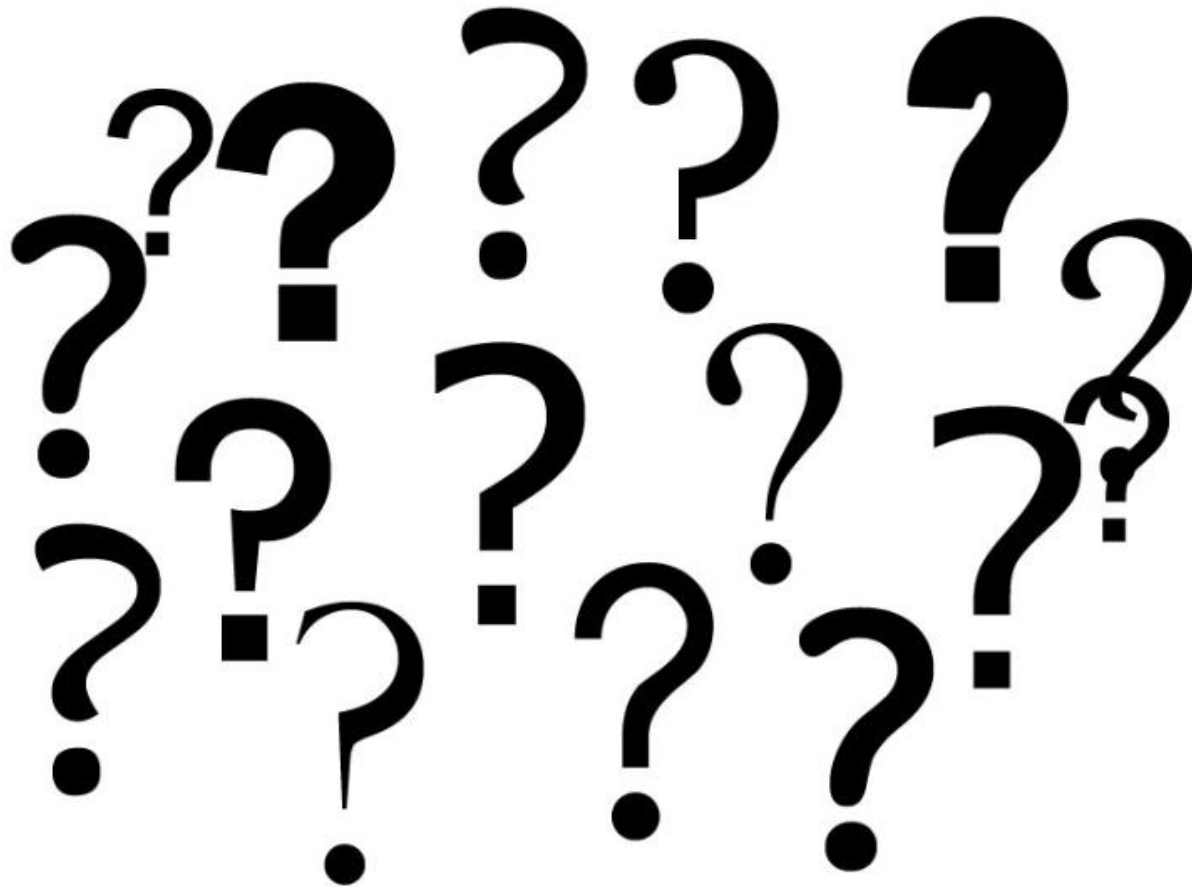


# Considerations - External Investigators

- **Logistics-** Who will arrange interviews? What will interviewees be told in advance? Where will meetings be held?
- **Report-** Ensure the investigator will prepare a written report
  - Will preliminary verbal findings be provided?
  - Executive Summary?

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# Questions?







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