

Member's Quarterly

Summer 2020 Edition

Feature

Workplace Investigations: Avoid Costly Mistakes

What every employer should know

According to the 2017 publication 'Harassment and Sexual Violence in the Workplace — Public Consultation: What We Heard' (ESDC), 60% of workers have experienced harassment at the workplace, 30% sexual harassment and 21% experiencing workplace violence.

75% of workers who had experienced any of the above only reported the most recent incident and 41% said no attempt was made to resolve the issue. What's wrong with this picture?

Given the above statistics, it is safe to say that most organizations have had their share of issues and they are not alone in that regard. What will set you apart as an employer is how you choose to manage these problems when they arise. There are financial and reputational impacts on employers who do not take complaints seriously and /or investigate where appropriate.

Individuals (sole proprietor) can face a fine of no more than \$100,000.00, a prison term of not more than 12 months or both.

Corporations could face a maximum fine of \$1,500,000.00 upon conviction.

The consequences of not conducting an appropriate investigation are palpable.

Under the OHSA, if an employer becomes aware of an instance of harassment (or the potential for harassment), they are required to conduct an "appropriate" investigation into the allegation brought to their attention by either the supervisor or the Complainant employee. However, employers are also required to conduct investigations (or at minimum, preliminary inquiries into allegations) stemming from anonymous complaints.

Further, it is important for employers to appreciate that the OHSA provides authority to workplace inspectors under s. 55.3(1) to order employers to hire an impartial investigator to investigate at their own cost.

Prior to commencing an investigation, there are several considerations to contemplate before proceeding. Have allegations been raised that could amount to a prima facie case, if true? Should the Respondent remain in the workplace during the investigation, be relocated or placed on an administrative leave pending the investigation? What steps need to be taken to preserve the integrity of the investigation such as ensuring confidentiality is maintained throughout the process? Who is best qualified to investigate the complaint? Would a third-party investigator be the most effective option to investigate the complaint under the circumstances? Is there a need to maintain privilege?

At this point, you might consider bringing in a third-party investigator. These investigators have specific experience and understand the process required to satisfy an adjudicator or judge's higher standard of needs. Involving a third-party will also bring with it the degree of thoroughness required to keep the investigation defensible should it become a litigation action against the employer.

An internal investigator may not appear as impartial if he/she is a senior member of the organization being investigated. Also, your internal investigator must still work with the respondents in the future and this may cause greater tension in the workplace.



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Investigations should follow Natural Justice and Procedural Fairness. Procedural Fairness is a concept in law that is concerned with the process relied upon to come to a decision as opposed to the correctness of the decision. Procedural Fairness requires the decision-maker to follow a fair and proper process to arrive at their decision. The fundamental basis of natural justice is predicated on the underlying belief that the substance of a decision is more likely to be fair if the procedures through which that decision was made were just.

The relevant principles of Natural Justice include: the right to adequate notice, the right to be heard and the right to an impartial decision-maker free from bias.

Conducting a credible workplace investigation requires strict adherence to the processes outlined in the governing legislation (the OHS Act or the Human Rights Code). A thorough yet impartial investigation is the cornerstone of developing a credible and defensible investigation.

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