

Fairness Fundamentals: Four Procedural Tips For Conducting Workplace Investigations



Bottom Line

Ontario's *Occupational Health and Safety Act* ("OHSA") requires employers to conduct an investigation into allegations of workplace harassment that is "appropriate in the circumstances". But with such complaints becoming seemingly more and more complex, what does this mean in practice?

To be legally defensible, a workplace investigation must follow a process that is fair to all parties involved. While the nature of the allegations will dictate how formal the investigation needs to be, fairness should be at the forefront of every investigator's mind throughout the process.

Here are four key tips that will assist you to ensure a fair investigative process.

1. Investigate the Allegations Promptly

Memories fade over time, and relevant evidence can be destroyed or lost. Therefore, it is important to investigate harassment allegations promptly in order to ensure that all relevant evidence is available for review. The Ministry of Labour [advises](#) that workplace harassment investigations should be completed "as soon as possible within 90 days or less, unless there are compelling reasons why a longer investigation is needed". In some circumstances, it may be prudent to retain an external investigator who has the capacity and resources to complete the investigation in a timely manner.

With that said, the thoroughness of the investigation should not be compromised by the desire to conclude the investigation quickly. A longer investigation may be appropriate where there are multiple witnesses, where a key witness is unavailable due to illness, or where there are delays in receiving relevant physical evidence.

2. Be Attentive to the Confidentiality of the Process – and its Limits

Workplace investigators should conduct a process that is as confidential as possible in the circumstances. This will assist in keeping the evidence of the employees interviewed free from influence. However, recent cases clearly demonstrate that

confidentiality cannot be absolute. For example, in a [recent case](#) the court ordered the employer to disclose the identities of complainants who had been promised anonymity by the employer. This case makes clear that an employer's internal policies assuring confidentiality to complainants may not be upheld by a court.

To maintain confidentiality to the extent possible, and depending on the circumstances, workplace investigators should consider the procedural recommendations below:

- The investigator should only discuss the investigation with individuals who are relevant for information gathering purposes, such as human resources personnel and relevant witnesses. Depending on the nature of the allegations, IT and legal may also be involved.
- The investigator should not reveal details about the nature of the complaint to witnesses unless necessary.
- All individuals interviewed as part of a workplace investigation should be advised verbally and in writing that they are not to discuss the investigation with others. Communicate this requirement before their interview, and repeat this expectation in the interview itself.
- The interviews should also be set up in a way that preserves confidentiality as much as possible. For example, if the investigator needs to interview a number of employees who work together in close proximity, they should consider conducting the interviews over Zoom or at a private, off-site location where the employees will not run into one another. Investigators should ensure calendar invites do not contain any information that would breach confidentiality.

3. Provide the Respondent with Sufficient Notice and Particulars of the Allegations

In most circumstances, the respondent should be provided with sufficient particulars in advance so they can meaningfully respond to harassment or discrimination allegations made against them. It is best practice to provide particulars in writing. This is a critical element of a procedurally fair investigation into workplace harassment complaints under the *OHSA*. Where the allegations are of a different nature than harassment, however, it may be important to take a different approach.

The investigator has an ongoing duty to provide the respondent with sufficient particulars of the allegations throughout the course of the investigation. This means that if contradictory information comes to light in the course of the investigation, the investigator must provide the respondent with an opportunity to provide their response to the contradictory information.

4. Keep An Open Mind

An investigator's role is to be "impartial, neutral, and objective." The investigator must keep an open mind about the outcome of the investigation. The investigator should remain unbiased and objective throughout the process so that all parties and witnesses feel that their side of the story is taken seriously. Further, an investigator should not conduct the investigation if their relationship with any of the parties could impact their ability to consider the evidence in an impartial and objective manner. Employers may wish to retain an external investigator for this reason (among other considerations).

Recent case law has suggested that investigators should also examine their implicit/unconscious bias to ensure that their findings are not based on subjective opinion, biases or speculation. For example, see our case law summary [here](#). For this reason, workplace investigators should consider participating in training on

implicit/unconscious bias.

Takeaway

Adhering to these principles will assist workplace investigators in ensuring that their investigative process meets the fundamental requirements for procedural fairness. A procedurally fair investigation is more likely to be upheld by adjudicators, if challenged. Employers may also wish to develop policies or protocols that set out the procedural essentials for any investigations conducted in their workplace.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Author: [Catherine Phelps](#)

Filion Wakely Thorup Angeletti LLP