

Navigating Complexities In Workplace Investigations Concerning Systemic Discrimination



Despite the ongoing political debate regarding DEI initiatives and the decision by some organizations to de-prioritize or even dismantle them, systemic discrimination continues to be a known pervasive issue within organizational structures in Canada. Therefore, the need for organizations to investigate concerns of systemic discrimination is ever present. Moreover, the purpose behind many of the established DEI initiatives was to address the systemic barriers that existed for marginalized groups. Thus, the dismantling or de-prioritization of those initiatives means the potential reinstatement of those barriers, which effectively contravenes the legal obligation to create a work environment free from discrimination. While employers can move with the political tide to justify the dismantling of DEI initiatives, political tidal waves do not change or affect employers' legal obligation in this regard.

Marginalized people are no longer sitting quietly and accepting the status quo; they are pushing back and doing so using the mechanisms available to them. The question is, are organizations equipped to investigate concerns of systemic discrimination? Do organizations know how to navigate some of the complexities that arise in systemic discrimination cases? The complexities are many, but in this blog, I share insights on four.

1. The nuance of intersectionality

Investigations into discrimination are highly complex. An element of that complexity is that they often involve more than one protected ground. For example, the concerns might pertain to racialized women or racialized women with a disability. Understanding the nuances associated with intersectionality is essential to effectively investigating systemic discrimination because, for example, the impact of the system on white women may be different from the impact of the system on racialized women. If you are unclear on what intersectionality means and how to navigate that issue in an investigation, it is necessary to acquire the relevant learning. Otherwise, there is a risk that the investigation may not be adequate.

2. Gathering evidence relevant to systemic issues

The evidence needed in investigations concerning systemic discrimination differs from the requisite evidence in investigations into individual or direct discrimination.

When I am training on [Investigating Race-based Cases](#), participants often share this as an area of challenge for them when conducting investigations, because it is not always clear where the dividing line is between the systemic issue and a direct discrimination issue and what evidence may be needed in relation to each. The distinction is important because, for systemic discrimination, the evidence cannot be isolated to a single event, statement, or process; the evidence needs to include particulars of historical practices, relevant policies, and attitudes—and that evidence has to be viewed comprehensively and in the aggregate. If that is not done, an investigator may get to the end of the investigation and realize that they do not have sufficient evidence to assess a *systemic* issue; rather, they may have evidence regarding isolated cases. For that reason, statistics and evidence of patterns are often relevant in investigations into systemic discrimination, whereas they may not be relevant in complaints of individual discrimination.

3. Navigating fairness considerations when making findings

Given that systemic discrimination is concerned with the impact of policies, procedures, and practices, such investigations do not usually involve an identified respondent against whom findings can be made. Ordinarily, the organization is the respondent. Therefore, it raises the question as to the capacity in which individuals are asked to participate in such investigations. For example, where allegations pertain to an organization's hiring process for a particular role, the investigation will invariably involve interviewing those responsible for the hiring process and the exercise of their function in that process. In these circumstances, they would not be respondents. Therefore, in fairness to these individuals, investigators have to (i) be mindful of the capacity in which they ask these individuals to participate and (ii) be careful not to craft their findings in a manner to suggest that they are making findings against them. Instead, it ought to be clear that the findings are made against the organization.

4. Dissecting neutral-presenting policies and practices

A known reality of systemic discrimination is that it often involves policies and practices that appear neutral. However, what we know is that equality, inasmuch as it is understood as treating all employees the "same," does not always mean *equity* – and that is the underlying issue with systemic discrimination. As such, investigators need to know what to look for in order to conduct a nuanced analysis to ascertain if there is systemic discrimination. This often requires investigators to dig deeper, but they have to know exactly where to dig to get the information that they actually need.

These are some complex challenges to navigate in investigations concerning systemic discrimination, but the ability to do so develops with practice and proper training. The need to investigate systemic discrimination is not decreasing. On the contrary, it is increasing. As such, it behoves employers to ensure that their investigators are equipped with the knowledge, skills, and experience to appropriately handle these matters.

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.

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