

Why Reply? Reflecting On The Significance Of Reply Interviews In A Workplace Investigation



As a workplace investigator and a team lead for a group of fellow RT investigators, I spend a fair amount of time thinking about reply interviews. Anyone who has conducted an investigation themselves or reviewed an investigator's report can probably appreciate why: the reply or follow-up interview is a place where the need to balance the fairness, neutrality, thoroughness, and confidentiality of the investigation really comes into focus. A recent Federal Court decision, *Marentette v. Canada (Attorney General)*, 2024 FC 676 ("*Marentette*"), underscores the significance of the reply interview and provides an opportunity to reflect on what these interviews should look like.

Before diving into the details of the case and a more in-depth look at reply interviews, a brief explainer for those who might be unfamiliar with such interviews. In a typical workplace investigation, once we have conducted initial interviews with the parties and interviewed witnesses (if any), we conduct a reply interview with the parties to ask them about any evidence we received from the other party and/or the witnesses that was different from, or additional to, their own initial evidence, and that we intend to rely on in making our factual findings.

Marentette explains the significance of this element of the investigation process. In this case, the applicant sought judicial review and an order setting aside the investigation report regarding a complaint that he filed with his employer, the Canada Border Services Agency ("CBSA"). He alleged that he was "subject to a pattern of workplace violence and harassment behaviour in the CBSA workplace culture."¹ After he made his complaint, the CBSA retained an investigator. The investigator interviewed the applicant, the respondents, and one witness and then prepared a report, concluding that the applicant's allegations did not amount to workplace harassment or violence.

The investigator did not ask the applicant about the evidence collected from the respondents and the witness or otherwise provide the applicant with any opportunity to respond to this evidence. This was contrary to an investigation checklist prepared by the CBSA. The judge in *Marentette* found that this was procedurally unfair, granted the application for judicial review, and ordered that the applicant's complaint be redetermined.

In reaching his decision, the judge noted that “workplace harassment and violence investigations are afforded a high level of procedural fairness.”² He explained that part of that procedural fairness is allowing an applicant to respond to evidence from respondents and witnesses. He noted that by failing to do so:

It seems [the applicant] was expected, by his [complaint] and in his single interview with the Investigator, to have comprehensively addressed not only all issues he raised, but also to have comprehensively anticipated and addressed all the responding parties and witness might tell the Investigator.³

We can appreciate how this would be an impossible task for the applicant, or indeed, for any party to an investigation. What this means is that if an investigator does not conduct a reply interview, they are missing out on relevant evidence. We don’t know what we don’t know, and if we don’t ask, we won’t know what the complainant has to say about the respondent’s evidence that she was not in the office on the day she was alleged to have yelled at the complainant, or what additional evidence the respondent might offer in response to a witness’ evidence that he overheard the respondent insult the complainant.

So, knowing how crucial reply interviews are to the fairness of a workplace investigation, how do we conduct them effectively? Below are some guidelines.

1. Review the evidence you have collected from the other party and the witnesses. Where does the other evidence you have collected differ from that of the complainant or respondent? This could include a completely different version of events or different or additional details to the events described by the complainant or respondent. Remember that this includes not just oral evidence from the interviews, but also other types of evidence, like video surveillance, text messages, and emails.
2. Where you find differences, are they significant? That is, will you need to rely on this evidence to reach a factual finding? This is an important consideration from a confidentiality and, where relevant, a trauma-informed perspective. We want to balance fairness to the parties by hearing their response to relevant evidence, with mindfulness that we are not, for example, unnecessarily disclosing identifiable witness evidence or having a party respond to evidence that might be difficult for them to hear, but that is not ultimately relevant to our findings.
3. Once you have identified the relevant evidence to ask the parties about, consider how you will approach the reply interview with the parties. Ideally, you will have explained to the parties the possibility of a reply interview in their initial interviews, and we suggest reiterating the purpose of these interviews in the reply interview itself. When you ask about the relevant evidence, consider framing the question so that the contrast between the evidence you need to ask about and the party’s initial evidence is clear, and in a non-accusatory manner. For example, “When we first met, you told me that the respondent yelled at you in the office on October 5. The respondent has shared with me that she was offsite, not in the office, on that day. Can you help me understand this discrepancy?”

Overall, the reply interview is the opportunity for investigators to hear both sides of the story and gather evidence that we might not otherwise have received. This serves not only to strengthen our factual findings but also to provide the parties with the fairness that they are entitled to in the investigation process.

Footnotes

1. *Marentette v. Canada (Attorney General)*, 2024 FC 676 (CanLII), at para. 6.

2. *Ibid.* at para. 40.

3. *Ibid.* at para. 16.

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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