# Workplace Investigations – Will Yours Survive Tribunal Scrutiny?



Workplace investigations have been an increasingly important topic for HR Professionals in the past few years.  Employers have a duty to conduct workplace investigations in response to employee discrimination and harassment complaints. Failure to investigate or faulty investigations can expose employers to liability.  Ensuring that workplace investigations are conducted properly is key to avoiding such liability.

The case law from the Human Rights Tribunal of Ontario (the "Tribunal") sets out the criteria used by the Tribunal to assess the reasonableness of an investigation as follows:

**1. Awareness of issue of discrimination/harassment:** The Tribunal will first look to whether there was an awareness of issues of discrimination and harassment in the workplace at the time of the incident, whether there was a suitable anti-discrimination and harassment policy and complaint mechanism, and whether adequate training had been provided to management and employees;

**2. Post-complaint actions**:  The Tribunal will then look to what happened after the complaint was lodged. Specifically, whether the employer treated the complaint seriously, whether it dealt with it promptly and whether it reasonably investigated the allegations; and

**3. Resolution of complaint**: Finally, the Tribunal will assess whether the employer provided a reasonable resolution in the circumstances, and whether the employer communicated its findings and actions to the complainant.

Conducting proper workplace investigations can shield an employer from liability as illustrated in a recent Tribunal decision, **Zambito v. LIUNA Local 183 and Central Eastern Canadian Organizing Fund**. In that decision, the applicant alleged that the respondents discriminated against him by failing to properly investigate his internal complaint against his co-worker, who he alleged had made harassing comments about his nationality and family.

The applicant's internal complaint was investigated by the respondent's in-house counsel, who ultimately concluded that both the applicant and the co-worker had conducted themselves inappropriately.

The Tribunal held that the investigator had significant expertise, promptly investigated, interviewed all relevant witnesses, and submitted the completed report in a timely manner. The results of the investigation were communicated to the applicant as well as the co-worker, and both the applicant and the co-worker were provided with a verbal warning for their behaviour. The Tribunal found that these steps constituted a reasonable investigation as well as a reasonable resolution of the applicant's complaint.

This case highlights a few key aspects of proper workplace investigations:

**Choosing the investigator**: In this case the investigator was an experienced in-house lawyer. Investigations do not need to be conducted by lawyers in all cases. However, the investigator should have the necessary skills and experience to conduct the investigation. In some instances, an internal investigator will not be appropriate and the employer should seek to retain an external investigator.

**Prompt investigation**: Investigations should be conducted promptly, especially when serious allegations are raised. Not only could failing to promptly investigate lead to an inference that the employer is not taking the complaint seriously, ignoring an employee complaint or failing to take quick action could allow the situation to escalate.

**Communicate the outcome**:  The employer should ensure that the conclusions of the investigation are communicated to both the complainant and responding party, and that appropriate remedial action is taken in a timely manner. There is no automatic legal obligation to share the complete internal report, though production may be legally required during any ensuing litigation.

Although this blog was focused on workplace investigations in the human rights context, employers in most provinces are also required under health and safety legislation to implement policies that prohibit workplace violence and harassment (more broadly defined), workplace investigation procedures, and to train employees on these policies and procedures. Failure to do so may expose an employer to liability – even when the issues about which an employee complains prove unsubstantiated.

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