

HOW TO CONDUCT A 'FAIR' WORKPLACE INVESTIGATION OUT OF AN EMPLOYEE COMPLAINT

By **Chris Delaney***

OFTEN EMPLOYERS ARE FACED with having to investigate a complaint from one employee about the behaviour of another. It may be an allegation of bullying, harassment or discrimination. Whatever the allegation, employers need to deal with it properly and with due process. Failing to do so, or failing to be thorough and fair could have very serious ramifications for the employer if the matter ends up in proceedings before an industrial tribunal, Court of Anti Discrimination Board.

The following guide should assist employers to understand, in a general sense the process for dealing with such complaints and the record keeping necessary to prove that the investigation was fair and thorough.

Regardless of the complaint always seek professional advice before commencing any investigation.

1. ASSESS WHETHER A FORMAL INVESTIGATION NECESSARY

With any complaint, the first matter to be decided is whether the complaint warrants a formal investigation. Some problems can be resolved quickly and informally without an investigation, and it is usually in the best interest of both employer and employee to attempt a resolution as quickly and effectively as possible. The questions to be considered should include the following:

- Is the issues are simple or complex?
- Does the complaint involve just one employee, or many?
- Whether the complaint stems from a single incident, or a pattern of conduct.
- Is the alleged behaviour is minor, moderate or major in significance.
- Are all the facts necessary for resolution are known (e.g., where the sole basis of the complaint is a single offensive letter, voice-mail, e-mail or other document, the source

and authenticity of which is not in question, or where offensive conduct between co-workers has been directly observed).

- Whether special expertise may be necessary in order to reach a conclusion (e.g., medical or financial information).

2. PLAN THE INVESTIGATION

A poorly planned or ineffective investigation may be worse than no investigation at all.

Be Flexible

The employer needs to be prepared to conduct an objective, fair and thorough investigation. The investigation planning needs to be flexible. For example, the scope of the investigation may need to be expanded if the evidence leads to allegations that people other than the accused harasser are engaging in similar conduct, or that other employees have been subjected to harassment by the same individual.

Select the Investigative Team

Determining who should conduct the investigation is an essential part of any planning process. It is often valuable (but not often possible) to have two competent investigators conducting any investigation of substance. One might take the lead during investigative interviews, with the other taking careful notes. It is also important for the investigators to be unbiased and objective, and that the complaining party be comfortable with the investigators. Obviously, a female complaining of sexual harassment may be more comfortable talking with a female investigator, but regardless of the race or gender of the investigator, it is important to obtain confirmation from the complaining party that he or she is comfortable with the assigned investigators.

Collect all Relevant Documents

All relevant documents should be identified and reviewed promptly. Each person involved in the investigation should be asked whether they have any documentation that might be helpful in addressing the issues. Relevant documents will typically include the personnel file of the individual accused as well as relevant correspondence, e-mails, medical records, or even hand written notes.

Keep Comprehensive Files

Files should typically include copies of all relevant company policies; relevant documents from the personnel files of the complaining employee, the accused, and co-workers or other employees where appropriate; records of prior complaints made by the complaining employee; any prior complaints against the accused; a written plan identifying who will be interviewed and the sequence of those interviews; and a chronology of relevant events.

The written plan and a running chronology should be updated as necessary as the investigation progresses. During the investigation materials to be added to the investigative file will include notes of interviews with employees; signed statements from the complaining employee, the alleged offender, and any witnesses; any memoranda regarding the investigation prepared by the investigators; and the investigators' final report detailing the conclusions and recommendations.

Determine Any Other Resources Needed.

From the beginning clearly identify the issue or issues the employee is raising, identify the company's obligations (legal and organizational) with respect to the issue(s) presented, and determine what other resources may need to be brought to bear on the issue(s). Additional resources you may want to consider include:

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- Public relations, if there is a potential for adverse publicity about the situation.
- Legal obligations, if the allegations involve criminal conduct.
- Private investigators, if surveillance or investigations outside the workplace are needed, or if there is no one within the employer's organization well-suited to conduct the investigation.
- Legal help, for assistance in determining the employer's obligations, assistance in planning the investigation, protecting sensitive information, or the like.

Who to Interview

Typical with harassment or discrimination investigation will often occur before any planning has taken place, and the employer will have little control over the initial interview of the complaining party, or who conducts the interview, as these matters often arise without warning.

Regardless of who first learns of the problem, there may be a need to conduct one or more follow-up interviews with the complaining party. Other persons to be interviewed will typically include:

- The alleged offender.
- Anyone who directly observed a relevant incident.
- Other witnesses with relevant information, whether identified by the complaining employee or the accused.
- Creators of relevant documents.
- The supervisor of the complaining employee and/or the alleged offender.
- People whom the complaining employee has asked you to interview.
- People whom the alleged offender has asked you to interview.

Avoid going on fishing expeditions, and limit the number of interviews to only those reasonably determined to have relevant information. Be prepared to conduct follow-up interviews as necessary.

3. PRELIMINARY/INTERIM ACTION

Once the basic allegations and issues have been identified, determine whether there is a need for interim action pending completion of the investigation, perhaps to protect the health and safety of any employee, or to protect the integrity of the company's policies or investigation. Such action may include:

- Suspension of the alleged offender.
- Temporary transfer of an employee (but be reluctant to suggest that the complaining employee be transferred, even temporarily, unless the complainant requests this, or agrees that a temporary transfer may be necessary).

4. INTERVIEWS

Thorough preparation is essential. It is best to carefully select where the interview will take

place, who will conduct the interview, what questions will be asked and what statements will be made at the start and close of the interview, and how you will document both the information obtained from and the instruction and assurances provided to the interviewee.

The Setting

In order to protect privacy and confidentiality, and to avoid embarrassing any party to the investigation, you may want to meet off site. You are also more likely to get candid disclosures if the setting is informal and comfortable. Avoid sitting behind an imposing desk, try sitting at a round table or in a less formal setting unless you want to develop a tone of seriousness and professionalism.

The Questions

Again, there is no substitute for preparation. It is too easy to overlook an important issue if interviews are conducted without careful focus on the issues to be addressed.

Identifying the Issues

It is usual for employees in an investigative interview to be nervous, and often tentative about what is taking place. It is preferable to provide a brief explanation at the start of the interview regarding what is going on and what is expected of the interviewee. The content of your opening statement should relate to the role of the person you are interviewing, whether it be the complainant, the accused, or witnesses, but in general should cover the following:

- Appreciate for their time and cooperation.
- A brief explanation of the nature of the matter you are investigating (e.g., a claim of race discrimination, an alleged theft, a verbal or physical altercation, etc.).
- Why the person has been included in the investigation (e.g., that they have been identified as someone with a complaint, have been accused of harassment or other misconduct, – or have been identified as someone who might have knowledge relevant to the allegations under investigation).
- That the matter is serious, and that the company has a commitment or obligation to investigate the claim.
- That the information provided by the person will be kept as confidential as possible, and disclosed on a need-to-know basis.
- The company has a firm policy prohibiting retaliation against any participant in the investigation, and that any perceived harassment will be reported to you (or some specific individual) immediately.
- That no conclusions will be made until all the facts have been gathered and analysed.
- That each employee is expected to cooperate fully in the investigation of any

complaint of inappropriate behaviour, and that cooperation includes maintaining the confidentiality of any information provided, refraining from discussing the complaint or the investigation with other employees or persons outside your organization.

- That any attempt to influence the outcome of the investigation by discussing it with others violates company policy and can be the basis for disciplinary action.
- That retaliation against a participant in the investigation is prohibited, and should be reported immediately to you or some specifically designated person.

Allow Sufficient Time for a Thorough Investigation

The employee being interviewed should never be given the impression that there is a time limit on the meeting. Employees with a significant stake in the outcome of the investigation, such as the complainant or the accused, will feel that the employer is not sufficiently concerned about their rights, and may use any haste in the investigative interview to portray the employer as callous or malicious.

Maintain Professionalism

A good interviewer will remain calm and in control throughout the interview. In a harassment investigation, there is no place for joking, sarcasm, or threats, and the interviewer should avoid expressing any opinions about the information obtained. The goal is to obtain information, not to provide editorial comment.

Focus on the Facts

Be prepared to explore issues or complaints which come to light in the investigation, but guard against allowing the investigative interview to turn into a general discussion of grievances. The issues you will need to explore may also include the conduct of the complainant (in order to determine whether allegedly offensive conduct was welcomed), but your primary focus should be on whether the allegations against the accused individual are true. Undue preoccupation with the reputation or conduct of the complainant can be dangerous.

Make Accurate Notes

Take the time to write your notes legibly, and go over your notes before you complete the interview to make sure that you have accurately recorded all relevant information obtained, and have covered all issues. There are a variety of ways to document the information provided by the interviewee, including having the interviewee provide you with a written statement covering the issues discussed, but there is no substitute for good note taking. Your notes should be dated, and should clearly indicate the identity of the interviewer(s) and interviewee.

Keeping Records

There is probably no single best method for documenting the interviews, but the goal should be to have the complainant, the accused, and each key witness confirm, by their dated signatures

(1) the accuracy of the information they provide, and

(2) the receipt of any instructions given to them.

Some complainants or witnesses may be reluctant to provide a written statement or sign anything you might prepare, in which case documentation of the information obtained and instructions given will need to be in the form of statements signed by the interviewers. Regardless of method used,

there are two key components of the interview documentation:

Drafting Statements

A record of the issues raised, the employee's version of what happened, who was involved, witnesses, dates, the employee's suggestions as to the conduct of the investigation and the resolution of the issues, etc. This can be in the form of (1) a statement prepared by the witness at your request, (2) your own notes (perhaps typed shortly after the interview), or (3) as a component of the Confirmation/Instructions memo (see below), but in any event should be dated and signed by the interviewee (with adequate opportunity to make corrections or additions).

Confirmations/Instructions

A record, to be signed by the employee, of the confirmations obtained from the employee, and the instructions given. Components of the employer-generated confirmation memo should typically include some or all of the following acknowledgements, as appropriate to the type of investigation:

The identity of the investigators, and confirmation that the interviewee is comfortable with their impartiality.

- Confirmation of the issues.
- Confirmation by the employee that the information provided is true,
- correct and complete.
- A brief summary of the investigative plan, and that no decisions will
- be made until the investigation is completed.
- An outline of the employer's expectations of the employee as to
- confidentiality, cooperation, the prompt reporting of any developments
- or further problems.
- A review of the employer's prohibition of retaliation.

5. INTERVIEWING

Preparation is Important

Create a draft of your proposed opening

statement, a (flexible) list of questions you, and a checklist of instructions appropriate to the person being interviewed.

Adopt Accepted Methods

Let the employee talk freely, including 'venting' about feelings. Clarify: restate the problem or information to make sure you and the interviewee are in agreement about what was discussed. Simplify. If needed, break down a series of problems or statements into manageable parts. A good interviewer will also control the natural tendency to talk too much themselves, and will avoid hinting at the 'right' answer to a question. Avoid interrupting the employee, cutting off information or supplying a conclusion to a sentence. Use silence to advantage; remaining silent after the employee finishes a statement may cause the employee to volunteer more information because he or she feels compelled to fill in the gap caused by silence.

Identify the non verbal Signals

Observe 'body language' communicated through posture, arm position, eye contact or avoidance, and the like. Look for signs of nervousness such as sweating or restlessness. Are questions answered directly or evasively? A firm denial may be more credible than a 'why would I do that?' response.

Use Open Questions

Plan the order of your questions, stick to your plan, and be comprehensive. At the same time, be flexible, following up on any new issues raised.

- Ask open-ended questions, avoiding putting words into the person's mouth. Start with broad questions, and move to more narrow issues.
- Save unfriendly or embarrassing questions until the end of the interview. Beginning with the 'tough' questions may cause the interviewee to become defensive.
- Do ask the tough questions. Even if the situation is uncomfortable for you or the interviewee, make sure you are satisfied that you are getting all the information the witness has.
- Ask questions which are designed to give you relevant facts, avoiding questions which will elicit opinions, speculations or conclusions.
- Ask who, what, when, where, how and why type questions.
- Avoid offering opinions or conclusions yourself.
- Don't stop with the pre-planned questions; the employee's responses will typically lead to additional questions and issues not on your list.
- Ask the follow-up questions: 'anything

else?'

- Before concluding the interview, be sure you have everything the witness knows about the issues. Go over your notes, make sure they are comprehensive, and follow up on any items needing clarification.
- Ask the employee if there are any questions you have not asked which he or she feels you should have asked.
- Conclude the interview with your instructions regarding confidentiality, cooperation, non-retaliation, the reporting of further problems, and with a note of thanks for the employee's time and cooperation.

6. SUGGESTED QUESTIONS

Questions For the Complainant

Keeping in mind that you may need to conduct follow-up interviews, the primary focus of the initial interview should be to get the facts: who, what, where, when, why and how.

- What is the problem? What happened?
- Who was involved?
- When and where did the incident take place?
- Where were any witnesses? If so, who?
- Was the incident isolated, or part of a pattern?
- Has the employee talked to anyone else about the situation? If so, who?
- Has the employee spoken to anyone in management about the issue?
- If so, who, and what was their reaction?
- Is the employee aware of any documents or things relevant to the situation?
- Has the employee kept any notes, diaries or records relevant to the complaint?
- Is the interviewee aware of any other employees with the same or a similar concern?
- Did the employee participate, and to what degree? How?
- What was the employee's relationship with the alleged offender?
- Has the employee had any other problems, on or off the job, with the accused individual(s)?
- What does the employee think the accused might say about the allegations?
- How has the incident affected the employee (and what has the employee done about it)?
- Does the employee believe that he or she can work with or around the alleged offender? If so, is there anything the employer can do to assist in order to restore or maintain a positive working relationship? If not, why does the employee believe he or she could not work with the alleged offender?
- Does the employee have any suggestions or preferred resolutions?

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- Does the employee have any additional facts or information that would be helpful in an investigation, if one is warranted?
- Before concluding the interview, you should:
 - Thank the person for raising the complaint.
 - Summarize the non-retaliation policy, and instruct the complainant to report any further incidents or any perceived retaliation to you immediately. Make sure the employee knows how to contact you.
- Request a written summary of the complaint, if that is how you have decided to memorialize the employee's complaint. Consider, however, promptly providing the employee your own comprehensive summary of the information provided, together with written confirmation of your instructions.
- Ask the employee to come to you if they think of any additional information.
- Tell the employee that you will limit disclosure of information to those people having a need-to-know. Instruct the employee that he or she should also maintain confidentiality, and that the employee should consult you before discussing the complaint with anyone else.
- Provide the employee an estimate of how long you expect the investigation to take, and indicate that no decisions will be made until the investigation is complete.
- Tell the employee that you may need to meet again to follow-up, and that you will meet with him or her again once the investigation is complete to summarize the action taken.
- Thank the employee again for raising the complaint, and express your commitment to resolving the matter promptly.

Questions For the Accused

Generally, you should inform the accused individual's immediate supervisor of the complaint and your intention to interview the individual, requesting that the supervisor be vigilant for further problems, retaliation, or other reactions which may affect the situation. The alleged offender will often be nervous or apprehensive. At the outset, the investigator should explain his or her own impartiality, that the intent is to conduct a thorough and fair investigation, and to allow the alleged offender a full opportunity to present his or her side. Need-to-know confidentiality should be explained, and the alleged offender should be informed that, regardless of the merits of the complaint, the employer will not tolerate retaliation against the complainant or any witness.

Explain that no conclusions will be drawn until the investigation is completed, and review the details of the incidents. Afford the accused an opportunity to explain the facts and identify any witnesses. In addition to the who, what,

where, when, how and why questions, the following additional questions might be helpful, depending on the situation:

- What positions has the alleged offender held? When?
- Name the employees whom the alleged offender has supervised or worked with?
- Did anyone witness the incidents in question?
- How did the complaining employee respond to the alleged conduct?
- Did the complaining employee communicate that the alleged conduct was unwelcome? Did the complaining employee engage in conduct of a similar nature toward the alleged offender?
- How does the alleged offender view the conduct of the complaining employee?
- Has the alleged offender used profanity (or, as applicable, racial or ethnic remarks) in conversations with other employees? What was said? To whom? When?
- Has any manager or other employee ever requested that the alleged offender refrain from using such language? Who? When?
- Has the alleged offender gone out with the employee socially, or asked employees to go out with him or her socially? Who? When? What happened?
- How did the complainant react to the conduct of the accused?
- Has the employee commented on the physical attributes of the complaining employee or others? What was said and when? Who was present?
- Has the alleged offender ever asked the complaining employee or others about his or her sexual relationships, or discussed sexual relationships with other employees?
- Has the alleged offender ever touched an employee in such a way that the employee found it offensive or inappropriate?
- Has the alleged offender ever implied or threatened a subordinate's job if he or she was not receptive to his or her advances?
- Have any of the alleged offender's supervisors ever spoken to him or her about the issues?
- Does the alleged offender have any documents concerning the complaining employee or the incidents which are the subject of the complaint?
- Does the alleged offender have any witnesses he or she wants you to interview as part of the investigation?
- If the alleged offender claims the allegations are false, ask of any reasons why the complainant would make up or embellish the allegations.
- Has anyone spoken to the alleged offender about this investigation?
- Who? When? What was said?
- Does the accused have any other information or documents that might be helpful in the investigation?

- At the conclusion of the interview, thank the employee for his or her time and cooperation, emphasize that no conclusions will be drawn until the investigation is complete, and cover your expectations as to non-retaliation, reporting of additional problems and confidentiality.

Questions For Witnesses

The involvement of third-party witnesses should typically be limited to only those individuals identified by the complainant or the accused, or otherwise known or believed to have knowledge of relevant events. Avoid fishing expeditions. Inform each witness of the general nature of the issues you are investigating, but emphasize that no conclusions will be drawn until the investigation is complete. Instruct the witness regarding your expectations as to non-retaliation, the reporting of retaliation or additional problems, and your expectations regarding confidentiality. The focus of the witness interview should be to determine whether he or she has observed the incidents in question, but do not limit your inquiry to only those incidents described by the complaining employee or the alleged offender.

Explore whether the witness has been subjected to similar conduct, and if so, follow up on the allegations. Witness interviews should be focused on getting the facts: who, what, where, when, and why. Do not fail, however, to find out how the witness has been affected by observation of the incidents, and what he or she has done about it.

At the conclusion of the witness interview, as with the complainant, thank the witness for their time and cooperation, and cover your expectations as to confidentiality, non-retaliation and reporting of any problems promptly. Document the witness interview, covering both the employee statement and your commitments and instructions.

7. ANALYSIS AND CONCLUSIONS

Quality Control

Once you have concluded the investigation, review your investigation plan and all information gathered for completeness and proper documentation. If possible, get a second opinion from someone you trust who is not involved in the investigation regarding the scope and completeness of the investigation, as well as any conclusions to be reached from the information gathered.

Assess Credibility

It is important that you reach conclusions, even when doing so is difficult, and this will often require credibility assessments.

Factors to be considered in assessing credibility might include the following:

- What was the 'body language' of the interviewee? Obvious nervousness? Sweating? Tone of voice?

- How did the interviewee react to the allegations? Argumentative? Defensive? Hostile?
- Does the person inspire confidence in the listener? Is his or her overall impression credible?
- Logic / consistency of story. Did the person's chronology of any events he or she related differ greatly from the chronology of other interviewees?
- Does this person's version make sense? Plausible or far-fetched?
- Was the person forthcoming, or did you have to 'pull information' from him or her?
- Corroborating evidence. Were there any admissions during the interview? For example, 'The only reason why I did it was to help her.'
- Did the person's version of the facts differ from anyone else's?
- Do witnesses corroborate the person's version?
- Circumstantial evidence. Are there things that the accused said or did in other situations that make it more likely than not that the facts in dispute actually happened?

Reach a Conclusion

Very few issues are black and white, and often you will be dealing with various shades of gray. It is nevertheless important to reach a conclusion. Examine the objective facts, consider motivations, and determine what standards of proof should apply to your investigation?

Report Back to Stakeholders

At the conclusion of the investigation, it is generally appropriate to follow up with both the complainant and the accused. Perceptions are important, and no matter how appropriately you respond or what preventative action you take, the complainant may feel that nothing has been done if the general result of the investigation is not promptly communicated. It is typically not appropriate, in most instances, to inform employees other than the complainant and accused of the results of an investigation. Those witnesses who were interviewed may ask about the final results, and it is generally best to explain that the information is confidential, that their assistance was appreciated, but that the conclusions drawn and actions taken are confidential.

Document Your Follow-up with the Complainant

Consider a written communication to the employee who raised the complaint, specially

in more significant and serious cases. Such a memo needs to be tailored to the facts of a particular situation, but should generally be brief, and need not discuss specific findings. Rather, the complaining employee should be informed that the investigation has been completed, that each issue has been reviewed and considered carefully, and that appropriate action is being taken. Depending on the circumstances, it may or may not be appropriate to inform the employee of the specific actions taken. Such a memo should encourage the employee to supply management with any documentation or additional information that he or she might obtain in the future that could impact the decision made in the investigation.

Consider Policy, Practice and Circumstances

Once conclusions are drawn regarding what happened, the employer must formulate a course of action. Factors to be considered will typically include the following:

- Were any policies or instructions breached?
- What has been done in the past in response to similar breaches or incidents?
- Does any law require you to take a certain action?
- What is the service and history of the employee who breached policy?
- Are there mitigating or aggravating circumstances?

8. TAKE ACTION

Even in those situations in which firm conclusions cannot be drawn, there are typically valuable lessons to be learned and preventative actions which can be taken. The range of responses to consider might include the following:

- Warnings to carefully avoid offending conduct in the future, even if no firm conclusions can be reached as to what happened.
- Training or educational programs, individually, as a group, or company-wide
- Verbal counselling or warnings
- A corrective action plan or probationary period
- Demotion
- Transfer of the offending employee
- Termination
- Follow-up on additional complaints raised during the investigation

Investigation Reports and Files

Depending upon the seriousness of the issues involved, consider preparation of a final

investigative report summarizing the incident or issues under investigation, the application of company guidelines or policies, key factual and credibility findings, and the action taken. The following information should typically be included:

- The date of the complaint or incident leading to the investigation.
- The identity, position and department of the employee initiating the complaint, or the information that prompted the investigation.
- The identity, title and department of the target of the investigation.
- The names and titles of those who conducted the investigation.
- A summary of the complaint raised or information received leading to the complaint.
- When the investigation began, and when it was completed.
- Confirmation that both the complainant and the accused agreed that the person(s) conducting the investigation could, in their opinion, do so fairly and objectively.
- The identities of all persons interviewed, the dates of each interview, and a brief summary of the information obtained from each person.
- Final decisions made and dates of implementation.
- A copy of any employer policies or guidelines relevant to the situation.
- Summary of key facts relied upon in reaching the final decision, with reference to the source of each key fact.
- Brief discussion of any credibility assessments reached, including the objective observations from which such credibility assessments were made.
- A brief discussion of how the employer's guidelines or policies apply to the situation.
- The specific conclusion(s) reached on each key issue.
- Identification of any issues that could not be resolved in the investigation, and why.
- What action is to be taken, and when.
- Remember that each and every document gathered or prepared during the investigation may someday become an exhibit before an industrial tribunal. Keep it brief, factual and objective to the maximum extent possible.

The goal should be that an Industrial Tribunal or Anti Discrimination Board or similar body would conclude that the employer took the situation seriously, responded appropriately, and had a documented good faith basis for any actions taken during or on the basis of the investigation.

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