Harassment Investigators, Harassment Investigation Reports and other planning considerations

NOTE: This is an excerpt from the Explanation Guide for Part III of the NL Occupational Health and Safety Regulations, Part III – General Duties. (https://www.gov.nl.ca/dgsnl/files/ohs-guide-part-iii.pdf)

The Occupational Health and Safety (OHS) Regulations of Newfoundland and Labrador require every provincially regulated employer to develop, implement and maintain a documented Harassment Prevention Plan (HPP) (Section 24.1(1)). Employers are required (Section 24.1(4)) to investigate complaints of workplace harassment. Depending on the circumstances, an external investigator may be required to perform the investigation (Section 24.1(1)(e) and Section 24.1(5)). Otherwise, it is the choice of the employer, whether to proceed using an in-house or external investigator. The employer should make this decision based upon the training, attributes, competency and availability of employees within an organization, coupled with the complexity of the harassment complaint.

This document outlines the principles to be adhered to when choosing a harassment investigator, as well as when planning and setting expectations for a harassment investigation. It should be referenced when hiring or appointing an investigator and when making other harassment investigation related decisions. This document does not touch on how a harassment investigation is performed. For more information such as sample guidelines for investigations, see the "WorkplaceNL Harassment Prevention Guide". More information is also available from a number of other sources, some of which are included in the references at the end of this document.

This document discusses:

- experience, training and attributes which a harassment investigator should possess
- information which an investigator should be provided with (mandate)
- requirements of a harassment investigation (procedural fairness),
- information that should be included in a harassment investigation report

Definitions:

Balance of Probabilities:
The standard of proof that has to be reached, which is less than complete certainty and means that something is more likely than not to have happened.

Complainant:
A person who lodges a complaint. In this case, the complaint is of workplace harassment.

Credibility:
The quality of being convincing or believable. A harassment investigator must assess the credibility of evidence and parties involved.

Impartial:
Treating all disputants equally, making decisions based on objective criteria, rather than based on bias or prejudice.

In-house investigator:
An investigator that works for the same organization as the complainant.

External investigator:
An investigator that may work for the same organization as the complainant but who is so far removed from the work unit of the complainant that the investigator can be considered to be a third party and objective. Alternatively, an investigator who works for a completely external, third party organization outside of the complainant's employer.

Respondent:
A person who is called upon to issue a response to a communication made by another (in this case the complainant). In the case of harassment allegations, the respondent is the person(s) who is accused of having engaged in harassing behaviour.

1.0 Choosing between an in-house investigator and an external investigator

An investigator's role must be taken very seriously, as the investigator influences the credibility of the process. The investigator must not only be impartial, but must be seen by the parties (complainant and respondent) as being impartial. This is important, as the outcome of the investigation could be challenged legally, and impartiality on the part of the investigator may help to limit challenges. Some circumstances require the engagement of an external, impartial third party to perform the investigation.

Engage the services of an external investigator:

1. Where the complaint is against senior management (or anyone higher in the organizational hierarchy than the trained/experienced in-house investigator where there is one).

2. Where the in-house investigator has already been heavily involved in managing the conflict, e.g. in their HR or management capacity. They may find it difficult to be perceived as impartial if they also perform the investigation. This is not necessarily the same as the HR or management staff simply having awareness or involvement in the case, rather if they are very deeply involved in the situation.

3. Where a complaint is complex, such as when there are multiple complainants, and/or multiple respondents, or where there is a very deep distrust and traditionally poor

relationship between the parties even pre-complaint, or where the complaint will draw media attention or other similar situations. A complex case is not a good case to use as a learning case for an inexperienced in-house investigator, as the case can become very difficult to navigate, and the investigation may later be challenged legally. The more complex the matter is, the more prudent it becomes to use a competent, objective external investigator who is experienced specifically with harassment investigations.

4. Where in-house resources are not available due to a lack of personnel with the appropriate training or competence in the field of harassment investigation.

5. When an OHS Officer issues an Order to engage the services of an impartial third party investigator.

2.0 Investigator training, experience and attributes

Training and Education:

The training, knowledge and experience which a harassment investigator possesses must be addressed when appointing an in-house resource to be the harassment investigator for an organization. Similarly the qualifications and skill of the external investigator must also be considered when their services are engaged. If the appointed in-house investigator is not already trained and experienced in harassment investigations, training must be provided on how to perform harassment investigations (including appropriate procedures and how to respect procedural fairness principles) and how to write appropriate reports. Harassment investigation certification is an option, and it is offered by various sources both in person and online. The harassment investigator should possess certain personal attributes and hold a position in the organization as outlined later in this section.

When choosing an external provider, ensure that they have sufficient experience in harassment investigations (e.g. human resources or employment law). Any harassment investigator (in-house or external) must understand procedural fairness principles and be proficient in the following points outlined here.

Knowledge and Awareness

Any harassment investigator should either have, or be provided with/obtain knowledge and awareness about:

- harassment and violence in the workplace;
- provincial Occupational Health and Safety Regulations for harassment prevention;
- the organization's structure, practices and policies including the Harassment Prevention Plan;
- principles of procedural fairness required to be respected in workplace harassment investigations;
- interview techniques
- harassment investigation report requirements; and

- confidentiality practice requirements;

In-house harassment investigators should have the following **attributes and position/presence within the organization**:

- Able to manage conflict in a respectful and effective manner, demonstrating professionalism, tact and judgement;
- Able to identify relevant and irrelevant information;
- Able to collect pertinent information from witnesses and relevant documents;
- Be appropriately persistent, in order to pursue the truth;
- Able to analyze information, and draw logical conclusions regarding the presence of harassment;
- Demonstrate fairness and impartiality; and
- Demonstrate a high level of communication skills such as listening, posing questions

- Leads by example and does not harass or condone harassment of others;
- Available to parties throughout the process;
- Does not have a conflict of interest with either the complainant or the respondent;
- Does not have a close working relationship with either the complainant or the respondent; and
- Has not been the manager directly responsible for the discipline of any of the parties in the past (except as HR when providing guidance/support for discipline).

NOTE: Any person hired to perform a workplace harassment investigation should be familiar with workplace harassment investigation principles and have specific experience performing workplace harassment investigations. Some professions commonly involved in harassment investigations include legal services and human resources among others, however each individual in any profession may or may not be experienced in harassment investigations. An individual's qualifications and experience specifically with harassment investigations should be verified by the organization seeking these services.

3.0 The Investigator's mandate

An organization should determine if (assuming the allegations were true), the alleged behaviour constitutes "harassment" as defined by the Occupational Health and Safety Regulations (Section 22(2)). If it does, an investigation is required (Section 24.1(4)). Where an organization has not already made this determination, the investigator must do so as one of the initial steps in the investigation.

The purpose of the harassment investigation is to make a determination as to whether the allegation(s) of harassment as defined by the Newfoundland and Labrador OHS Regulations (Section 22(2)) are founded or unfounded. The investigation should not begin without the organization providing the investigator with a clear mandate for their work. This is to avoid misunderstandings regarding expectations and responsibilities.

A full mandate can include:

- the terms and conditions of the investigation (including the requirements for confidentiality);
- the scope of the investigation which identifies what should be included and what should not be included (e.g. new complaints that may arise, or the nature of the recommendations being requested if any);
- any requirements for how the investigation should be performed;
- limitations of the investigator's authority;
- direction for who receives the report; and
- time line requirements.

At a minimum, provide the investigator with a scope for the investigation. Organizations and investigations benefit from a very detailed scope and mandate, however. The sample scope below includes only a minimum amount of information.

Sample scope (minimum information required) to investigator:

"The investigator shall conduct the harassment investigation in accordance with the principles of procedural fairness. The investigation (and the subsequent report) must establish and indicate whether each allegation individually is founded or unfounded, as well as whether the allegations as a whole are founded or unfounded as a pattern of harassing behaviour. The investigation shall establish whether a breach of this company's Harassment Prevention Plan has taken place, and this shall be indicated in the investigation report."

4.0 Recommendations from the investigation

The investigator (in-house or external) should conclude whether or not harassment has taken place, and whether or not this is a breach of the organization's HPP.

In addition to the conclusion, different types of recommendations may be made in a harassment investigation report. Some are disciplinary in nature and are specific to individuals. Others may be corrective actions intended for the organization, to help prevent harassment from occurring again (e.g. training, mediation, team-building etc.).

In general, an external investigator should **not** make disciplinary recommendations to an organization, as it could compromise their independence. In addition, organizations should already have disciplinary procedures in place to follow in the case of policy breaches of any kind. Based on the findings of the investigation, an organization's in-house personnel would implement these procedures, including corrective or disciplinary procedures as required by the organization's HPP. Organizations should ensure that none of their disciplinary policies and procedures contradict each other.

Where an in-house investigator is someone who is also normally involved in implementing disciplinary procedures (such as HR or a senior manager), recommendations on corrective and disciplinary action could be made in that case. (This would be done in their HR or management capacity rather than their investigator capacity).

External investigators are often able to provide very helpful and appropriate recommendations, pertaining to the prevention of future harassment, for example:

- possible improvements in the wording of the Harassment Prevention Plan;

- how to prevent retaliation amongst workers;
- how to rebuild a workplace following a harassment allegation and investigation;
- relevant and beneficial current and future training; or
- organizational activities to rebuild trust.

5.0 What is procedural fairness?

All workplace harassment investigations must incorporate procedural fairness. It respects and provides for the rights of parties involved in the harassment investigation process.

Rights respected in procedural fairness:

The right to an impartial investigator;

The right of the respondent to be informed of the allegation(s);

The right to receive notice of the steps involved in the investigation process (provided to all harassment complaint parties i.e. complainant, respondent, witnesses);

The right to be heard and to present evidence in "live" communication before the investigator (e.g. by telephone or virtual meetings or face-to-face);

The right to be accompanied by a support person if requested, for example a union rep, coworker or family member (with limitations on their involvement and only if they are not in conflict with the proceedings, e.g. not a potential witness);

The right to be informed of the results of the investigation;

The right to confidentiality; and

The right to a speedy resolution.

The investigation process must incorporate procedural fairness in order to be acceptable.

6.0 The Investigation Report

The headings and layout of workplace harassment investigation reports vary, however they should all contain the same minimum information. The following is one suggested layout for an investigation report, with the minimum information that should be included in any report. Detailed information such as copies of the allegations or other documents should be included in Annexes, and referenced in the report itself.

Begin with the following information:

Investigation date (could be a range, e.g. Dec 1, 2020 to Dec 18, 2020)

Name of the investigator(s) (Whether in-house or external, include the investigator's organization, and their position held in the organization)

Name of the Organization initiating or requesting the investigation.

Name of the Complainant(s)

Name of the Respondent(s)

Nature of the allegations (very brief description including date or range of dates, location etc).

In the body of the report, the following information should be included:

Introduction (describe what prompted the investigation)

A detailed description of the allegations.

The full mandate as provided by the organization (or whatever mandate/scope was provided).

An outline of the investigation process including information such as:

- name of the complainant(s), location and date of the interview(s) and (where applicable) the name title and organization of the person accompanying the complainant;
- name of the respondent(s), location and date of the interview(s) and (where applicable) the name title and organization of the person accompanying the respondent;
- names titles and organizations of the witnesses if any; and
- the definition of harassment being referenced (e.g. Newfoundland and Labrador Occupational Health and Safety Regulation definition).

This section clearly and succinctly outlines what steps were taken by the investigator to obtain information, what types of evidence was obtained and reviewed (e.g. company policies, training records, photographs), and timelines for actions taken throughout the investigation.

A "Finding of Facts" including comments on credibility and information that substantiates the investigator's findings.

An analysis, which brings together all of the relevant evidence and facts identified for analysis. It should describe how the analysis was made. Each allegation must be identified and analyzed separately, and they must then also be considered as a whole, to establish whether there is a pattern of repetitive harassing behaviour over time.

The conclusion is based upon the analysis in the preceding section. "Inconclusive" is not an acceptable result. This section, at a minimum, should clearly state whether:

a) The alleged behaviour does or does not constitute "harassment"
b) On the balance of probabilities, the evidence does (or does not) support the allegation(s) that the behaviour took place; and
c) a breach of the organization's Harassment Prevention Plan has, or has not, taken place.

Recommendations (as per the mandate provided to the investigator, there may or may not be recommendations provided in the report).

Investigator's printed name and signature, date of the report.

7.0 Confidentiality

Organizations must ensure that confidentiality requirements are respected throughout the investigation, and upon conclusion when a report is completed and the conclusions are shared.

References:

Code of Practice to address workplace harassment (Ontario government); https://www.ontario.ca/page/code-practice-address-workplace-harassment

Harassment and Workplace Violence Investigations; a practical guide, D. REbbitt, 2020

Human Resources Guide to Workplace Investigations 2nd Ed, Janice Rubin and Christine Thomlinson, 2018

Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process, Government of Canada. https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/harassment-conflict-resolution/investigation-guide-policy-harassment-prevention-resolution-directive-harassment-complaint-process.html

Preventing and Investigating Harassment and Violence in the Workplace, Bernardi Human Resource Law LLP, 2020