



Workplace Investigations Update

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As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all territories and provinces of Canada.





Raquel Chisholm

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ABOUT

Raquel Chisholm advises employers at both the Ontario and Federal jurisdictions in all areas of labour and employment law, with a particular focus on human rights, disability management, and pay equity. Raquel articulated with Emond Harnden in 2003, joined the firm as an associate in 2004, and became a partner in 2014. She received a Bachelor of Arts degree from Bishop's University in 1992 and an LL.B from the University of Ottawa's Common Law Program in June 2003.

Raquel provides a wide variety of services including drafting employment contracts, management training, legal opinions, collective bargaining, and policy writing. She represents clients at labour arbitrations, as well as human rights hearings before the Human Rights Tribunal of Ontario ("HRTTO"). Raquel's experience before the HRTTO has led to her appointment on the HRTTO's Practice Advisory Committee. Raquel also advises clients during investigations by the Canadian Human Rights Commission. Raquel has a great wealth of experience in the area of pay equity. Knowledge and experience in both the provincial and federal sectors, she has aided clients with pay equity audits, conducted seminars for employers, negotiated pay equity plans, responded to and settled pay equity complaints, and assisted clients with addressing and managing their pay equity obligations both in achieving and maintaining pay equity.





Erica Bennett

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ABOUT

Erica graduated with a J.D. from Osgoode Hall Law School in 2014. She was the recipient of several scholarships and designations during her undergraduate and graduate career, including being named an Academic All-Canadian three years running while at Queen's University and was awarded the Robert Orr Entrance Scholarship from Osgoode Hall.

Erica joined Emond Harnden in 2011 as a summer student in the Research Department after she completed her undergraduate degree and returned to this role for a second and third summer in 2012 and 2013. After completing her articles with the firm, she joined Emond Harnden as an Associate. During her time with the firm she has been practicing in all areas of labour and employment law. Erica has been extensively involved in litigation preparation, in particular for human rights matters, termination actions and arbitration hearings. She is also experienced in the review and drafting of employee handbooks and policy manuals.

While at Queen's University, Erica played on the varsity women's ice hockey team, and continued to play recreationally at law school on the Osgoode men's team.

Erica is a member of the Canadian Bar Association, the Ontario Bar Association, and the County of Carleton Law Association.





Overview

- #MeToo movement puts sexual harassment and investigations in the public eye
- What triggers an investigation?
- Employers' legal obligation to investigate
- Consequences of a failure to investigate – employer liability
- How to avoid a flawed investigation



#MeToo Movement

#MeToo Movement: A Brief Background

- October 5, 2017: New York Times reports sexual harassment allegations against Hollywood producer Harvey Weinstein
- October 15, 2017: 10 days later, #MeToo takes off with tweet from Hollywood actress
- Most allegations of workplace sexual harassment do not garner the same media attention



#MeToo Movement: Impact on Employers Today

- Angus Reid Institute – “#Metoo: Moment or Movement?” February 9, 2018 Survey:
 - 52% of Canadian women said they had been **sexually harassed** at the workplace
 - 28% of Canadian women also experienced **sexual assault** at work
- Employers are required to be proactive; have proper policies and procedures in place to prevent sexual harassment and to address it, if and when it occurs
- Legal liability, but also potential irreparable harm to an organization's reputation





What Triggers an Investigation?

When must you Investigate?

- Investigate when there is:
 - Suspected employee misconduct
 - A complaint or report (formal or informal) of:
 - A breach of an internal policy
 - A breach of the law – e.g., occupational health and safety or human rights
 - Harassment or discrimination
 - A workplace policy (e.g., workplace violence and harassment policy) or legislation requires an investigation



Must you Investigate...

- Anonymous complaints?
- “Second hand” information or third party complaints?
- Harassment complaint from members of the public?
- Informal complaints?
- Where complainants are reluctant to participate in an investigation?
- Incidents for which no complaint has been filed?



Must you Investigate...

- Federal and Ontario law require employers to investigate **all** complaints and incidents
- The duty to investigate arises from occupational health and safety law, and is unrelated to the complainant's characterization of the seriousness of the incident, or their willingness to participate



No Investigation Required

- Even if complaints are legitimate, there is no need to investigate where:
 - There is no nexus between the behaviours complained of and the employment relationship (i.e., no impact on the workplace, as with some off duty misconduct)
 - Complaint on its face does not constitute a violation of workplace policies, rules, or directives (e.g., one incident of respectful disagreement between employees)





Employers' Legal Obligations

Statutory Obligations – Generally

- Occupational health and safety laws require employers to:
 - Promote a workplace environment where all persons are treated with dignity and respect
 - Not tolerate any harassment committed by or against an employee



Statutory Duties of Workplace Parties

Employer:

- Protect the health and safety of workers
 - Includes taking every precaution reasonable in the circumstances to prevent, and protect employees from, workplace harassment

Employee

- Work in compliance with OHS laws and regulations
- Report to their employer or supervisor any contravention of OHS legislation or regulations of which they are aware



Ontario – Occupational Health and Safety Act

- Bill 132 created a positive obligation on employers to have a policy surrounding workplace harassment investigations and to investigate **all** complaints of workplace harassment:
[...] an employer shall ensure that [...] an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances
- If the employer does not investigate (or does not investigate sufficiently), an inspector may order the employer to retain an investigator



Ontario – *Occupational Health and Safety Act*

- A workplace harassment policy and program must set out:
 - How to make a complaint
 - How the investigation will be conducted
 - How information will be protected against disclosure
 - How results of investigations and corrective action, if any, will be communicated



Federal – *Canada Labour Code*

- Bill C-65 received royal assent on October 25, 2018
- With respect to investigations, the Bill amended the *Code* to ensure employers:

*125(1)(c) [...] **investigate**, record and report, in accordance with the regulations, all accidents, **occurrences of harassment and violence**, occupational illnesses and other hazardous occurrences known to the employer;*



Federal – *Canada Labour Code*

- The Bill requires employers to:
 - Investigate, report and record all incidents of violence or harassment
 - Take steps to prevent and protect against violence and harassment
 - Respond to incidents of violence and harassment and provide support to affected employees
 - Inform employees of their rights and train them on violence and harassment prevention



Federal – *Canada Labour Code*

- The Bill requires employers to:
 - Prohibit workplace committees, policy committees, and health and safety committees from participating in violence and harassment investigations or receiving information likely to reveal the identify of a person involved in an investigation
 - Make available to employees in hard and soft copy the relevant part of the *Code*, the employer's general health and safety policy, and any other prescribed information





The Consequences of a Failure to Investigate

Potential Sources of Employer Liability

- Damages under occupational health and safety legislation
 - Under *OHSA*:
 - Max. fine for individuals: \$100,000 and/or imprisonment up to 12 months
 - Max. fine for corporations: \$1,500,000
 - Under the *Code*:
 - Max. fine on indictment: \$1,000,000 and/or imprisonment up to 2 years
 - Max fine on summary conviction: \$100,000



Potential Sources of Employer Liability

- Wrongful dismissal damages
 - Constructive dismissal
 - Mental distress
- Human rights damages
 - Lost wages
 - General damages – injury to dignity, feelings and self-respect
 - Reinstatement
 - Public interest remedies



Consequences of No Investigation

Horner v. 897469 Ontario Inc., 2018 ONSC 121

Facts

- December 2016:
 - Employee alleged co-worker elbowed her, and later angrily blocked her from opening a drawer
 - Employee reported incidents to supervisor
- December 22, 2016:
 - Employer advised it would respond in the new year
 - Sends letter terminating employee with cause for losing temper with co-worker who had blocked the drawer
- 2017:
 - Employee brings wrongful dismissal action



Consequences of No Investigation

Horner v. 897469 Ontario Inc., 2018 ONSC 121

Findings

- Employee wrongfully dismissed
- Awarded:
 - 3 months' notice
 - \$20,000 in moral damages (for manner of termination)
 - \$10,000 in punitive damages:

“I am satisfied on the evidence that the plaintiff was harassed in the workplace and that the employer, rather than investigating, terminated the plaintiff. [...]he employer’s conduct was malicious, oppressive and high-handed and must be deterred.”



Consequences of No Investigation

Horner v. 897469 Ontario Inc., 2018 ONSC 121

Takeaways

- Occupational health and safety legislation requires an investigation into **all** complaints of workplace harassment, no matter how trivial
- That said, the investigation procedure can be adjusted so it is “appropriate in the circumstances”
 - e.g., consider a brief internal investigation for shorter, more simple, less serious complaints



Consequences of Inadequate Investigation

Doyle v. Zochem Inc., 2017 ONCA 130

Facts

- Female plant supervisor the only woman in the plant
- 9 years of service
- She complained of sexual harassment by fellow manager, including staring at her breasts and repeatedly making offensive “locker room” comments
- Instead of investigating, employer:
 - Told complainant to be “tougher” and have “thicker skin”
 - Terminated her five days after her complaint
- No reason given for termination
- Wrongful dismissal action brought



Consequences of Inadequate Investigation

Doyle v. Zochem Inc., 2017 ONCA 130

Findings

- Employer conducted only “cursory” investigation into supervisor’s allegations: the complainant was not given an opportunity to respond to the respondent’s version of events, and was not told the outcome of the “investigation”
- Trial judge found termination discriminatory and a reprisal
- Decision upheld by the Ontario Court of Appeal
- Damages:
 - 10 months in lieu of notice
 - \$25,000 in damages under *Human Rights Code*
 - \$60,000 in moral damages – breach of duty of good faith; manner of dismissal
 - Cost award = \$465,192.72



Consequences of Inadequate Investigation

Doyle v. Zochem Inc., 2017 ONCA 130

Takeaways

- It is not enough to “go through the motions” of an investigation and draw a conclusion
- An investigation must be sufficiently thorough and procedurally fair
 - Both parties must have an opportunity to respond to the other’s version of events
 - Both parties must be advised of the outcome



Consequences of Inadequate Investigation

Smith v. Vauxhall Co-Op Petroleum Limited, 2017 ABQB 525

Facts

- Following the end of their romantic relationship, one manager alleged that the other, Mr. Smith, had sexually harassed and sexually assaulted her
- Employer conducted a 3-day investigation and concluded that the allegations were founded
- Mr. Smith was terminated for cause



Consequences of Inadequate Investigation

Smith v. Vauxhall Co-Op Petroleum Limited, 2017 ABQB 525

Findings

- While other wrongdoing constituted just cause for dismissal, the sexual assault and harassment were unfounded
- The employer's investigation was insufficient because:
 - The investigator did not interview any relevant witnesses;
 - The investigator did not ask the complainant for details of the sexual assaults; and
 - The investigator was biased by a sense of mistrust arising from the respondent having admitted to other workplace policy violations



Consequences of Inadequate Investigation

Smith v. Vauxhall Co-Op Petroleum Limited, 2017 ABQB 525

Takeaways

- An investigation must be robust, especially if you want to rely on it to support discipline, and especially termination
- An inadequate investigation can open the door to reputational damage, and adverse cost consequences:
 - Unfounded allegations of sexual assault and harassment are “a serious matter that cannot be taken lightly” and “could have far-reaching consequences for [the employee’s] personal and professional reputation”. As such, the employer’s conduct is “worthy of denunciation”





Avoiding Common Investigation Mistakes

Top 10 Investigation Mistakes and How to Avoid Them

1. Failing to conduct a prompt investigation

- Don't delay; investigate immediately
- Delay may cause disruption in the workplace and also impact a due diligence defence
- Employers have been held liable for delay in investigating
- Evidence may get lost or forgotten with the passage of time



Top 10 Investigation Mistakes and How to Avoid Them

2. Disregarding procedural fairness

- Procedural fairness is the underlying thread in all investigations
- Ensures investigations are fair to both sides; findings unbiased
- All parties must be aware of the case against them and given a full opportunity to respond and defend themselves - no “gotcha” tactics
- Failure to adhere to procedural fairness will undermine the investigation
 - The complainant may not have their complaint heard in its entirety
 - The respondent may not be able to give a full and complete defence
 - The parties may perceive the investigation as biased, worthless, or events not taken seriously
 - Lack of procedural fairness will result in the investigation and disciplinary action taken overturned upon review by an arbitrator, court or tribunal



Top 10 Investigation Mistakes and How to Avoid Them

3. Selecting an inappropriate investigator

- Internal or external? Consider:
 - Timeliness; degree of urgency
 - Real or perceived objectivity; neutrality
 - Transparency
 - Potential conflict of interest
 - Whether special expertise is required
 - Nature of allegations
 - Predicted length of investigation
 - Sensitivity of the matter
 - Identity of the parties
 - Potential for legal challenge/litigation



Top 10 Investigation Mistakes and How to Avoid Them

3. Selecting an inappropriate investigator

- The key is to review skills and experience of the individual
- The investigator must be:
 - Viewed as credible and unbiased by all parties
 - Knowledgeable of the law and understand the requirements of due process; and
 - Compassionate and empathetic



Top 10 Investigation Mistakes and How to Avoid Them

4. Failing to follow your own policies and procedures

- Having a policy isn't enough; you have to apply it, consistently
- Courts and decision-makers scrutinize policies and investigations stemming from the policies
- Ensure investigators (external or internal) are versed in the organization's policies, rules, and practices
- Ensure that investigation procedures within policies are followed
- Ensure employees are aware of what is acceptable/expectations



Top 10 Investigation Mistakes and How to Avoid Them

5. Conducting a biased investigation

- Investigator must begin the process objectively
- Investigator must not have any personal or other connection to complaint or the parties
- Neutrality is imperative
- Define the mandate to help dictate the direction of the investigation and the role of the investigator



Top 10 Investigation Mistakes and How to Avoid Them

6. Failing to gather all the relevant information

- Interview all relevant witnesses
- Ask the 5 Ws
- Get written witness statements
- Engage in a critical inquiry about the general relationship of the complainant and respondent in order to assist in the **assessment of credibility**:
 - A thoughtful consideration of the respondent's and complainant's versions of events
 - The decision-maker should have sufficiently detailed summaries to enable a fair decision



Top 10 Investigation Mistakes and How to Avoid Them

7. Ignoring confidentiality and privacy

- Confidentiality does not mean secrecy and/or anonymity
- Everyone involved must respect the sensitivity and confidentiality of the situation
- All information and documentation concerning a case will be kept as confidential, except where disclosure is necessary for the purposes of investigating the complaint, taking disciplinary measures, or if required by law to disclose
- “Need to know basis”



Top 10 Investigation Mistakes and How to Avoid Them

8. Failing to document properly

- Proper documentation is essential to ensure the evidence is accurate in order to support findings
- Maintain a proper record of the investigation:
 - Notes of all interview
 - Statements
 - Copies of important documents
 - Investigation report
- Promptly prepare a summary of the interviews and have individuals review and sign



Top 10 Investigation Mistakes and How to Avoid Them

9. Permitting retaliation against the complainant or others

- Employer has an obligation to ensure no retaliation against complainants or others who cooperate with the investigation
- Include “no reprisal” language in policies



Top 10 Investigation Mistakes and How to Avoid Them

10. Failing to advise the parties of the outcome and take remedial steps

- The parties have a legislative right to know the investigation is complete and what the outcome is
- Send letter to complainant and respondent
 - Advise that the investigation is complete and either the allegations are substantiated or not
 - Warn employees about retaliation and implications of retaliation
 - Remind complainant that if reprisals are suffered from filing the complaint, advise immediately
 - Where the complaint is substantiated, complainant should be given assurances that steps will/have been taken to ensure the behaviour will not happen again



Top 10 Steps for a Proper Investigation

1. Draft or redistribute relevant policies
2. Investigate complaints in a timely manner
3. Provide notice and an opportunity to respond
4. Train and vet investigators
5. Remain objective and keep an open mind
6. Obtain a full picture of the complaint
7. Respect privacy and confidentiality
8. Document all findings
9. Educate instead of retaliate
10. Take action



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