

The dos and don'ts of workplace investigations

Workplace investigations are essential in cases of alleged harassment, workplace violence, bullying, fraud or other types of egregious misconduct. However, employers often fail to conduct a thorough and legally sound investigation, costing the business time and money, and attracting significant exposure to liability. The Ontario Court of Appeal's decision in *Boucher v. Wal-Mart Canada Corp.*, clearly illustrates this risk. Boucher was awarded more than \$400,000 in damages as a result of Wal-Mart's failure to properly investigate her allegation of harassment.

Take this quiz to find out how prepared you are to handle a workplace investigation.



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- 1** Notwithstanding their direct reporting relationship, Donna and Frank enter into a consensual relationship for several months. Donna then decides to end the relationship. Following the break-up, Frank continues to text and call Donna, often sending angry and obscene comments to her. Donna attempts to deal with the situation by confronting Frank directly, but his behaviour continues. Donna approaches human resources and discloses that a “co-worker’s” obsessive and inappropriate behaviour toward her is causing her to feel extremely uncomfortable and unsafe in the workplace. She advises that she does not want to file a formal complaint, and is reluctant to name the co-worker’s identity unless HR can guarantee her 100-per-cent anonymity. Can HR guarantee confidentiality?

Yes
No
- 2** Donna ultimately identifies Frank; however, she refuses to proceed with a written complaint. Frank has been one of the directors of the company since its inception and has always played a key role within senior upper management. What are the company’s obligations?

(a) Wait until a written complaint is received.
(b) Discuss the potential complaint with Frank.
(c) Meet with Donna and explain to her why the company would prefer a complaint in writing.
(d) Fire Donna.
- 3** Shortly thereafter, a new hire in the department comes forward with a verbal complaint against Frank alleging he had asked her out on several occasions and leered at her in a creepy manner. During some additional fact gathering, it is discovered the new hire and Donna are very close friends and the alleged incident may have been exaggerated and perhaps even fabricated by the new hire, who thought Frank should be punished for his behaviour toward Donna. What additional measures should the company take in light of the new information?

(a) Ask the new hire if she is conspiring with Donna.
(b) Reprimand them both.
(c) Ensure appropriate questions are asked of both Donna and the new hire by the internal or external investigator.
(d) Speak to Frank about the possibility of a conspiracy and obtain his recommendations on next steps.
- 4** While the matter is under investigation, Frank is placed on a paid leave of absence and instructed that, during his leave, he is not to communicate in any manner with any other employee. During her interview, Donna produces an audio recording she states is a recording of a private discussion she had with Frank after his leave of absence had begun. Donna insists the recording will reveal Frank pleaded with her not to disclose to HR their previous intimate relationship. Donna acknowledges that she did not advise Frank she was recording the conversation and that the sound is very muffled. She is later unclear about who initiated the call. Can you consider the audio recording as evidence and what weight can be given to it?

(a) Yes, and treat it as critical evidence.
(c) Yes and assign it appropriate weight.
(d) Cannot consider it as it was prepared surreptitiously.
(e) Cannot consider it for privacy reasons.

1 (a) No, HR cannot guarantee Donna 100-per-cent anonymity or confidentiality. Due process is the hallmark of any proper investigation. Frank has a right to know what the allegations against him are and who is making them. Without that information, he would be hard-pressed to respond to the allegations as he would be speculating regarding their source and would thus only be able to respond on a hypothetical basis. The better approach is for HR to meet with Donna and explain to her the process involved and the protection from retaliation that exists within human rights legislation as well as applicable company policies. She should be informed that a directive to maintain confidentiality, to not retaliate or commence his own mini-investigation would be communicated to Frank in writing at the outset of the investigation process.

2 (c) The better approach would be to meet with Donna and explain to her why the company would prefer a complaint in writing. A written complaint would allow her to articulate allegations precisely and minimize ambiguity or any other lack of clarity that might result in a misunderstanding regarding the particulars of her complaint. This would also ensure fairness to Frank in allowing him to respond to specific concerns rather than generalized allegations. The fact that Frank is a director of the company and a key manager is largely irrelevant. The employer's obligation is to be fair to both parties without prejudging the complaint in any manner. Thus, while every attempt should be made to secure a written complaint in order to ensure fairness to both the complainant and the accused, a written complaint is not a prerequisite to the investigation. It would be possible for the employer to

commence the investigation and, in initial meetings or interviews with Donna, probe and elicit her specific complaints verbally.

3 (c) With the discovery of the additional facts, the employer should ensure the new hire is also interviewed as a witness with potentially relevant evidence. That being said, it would make sense for the employer to communicate to both Donna and the new hire separately and in writing the importance of confidentiality and of not discussing the subject of the investigation with fellow co-workers.

4 (b) The audio recording is clearly relevant and, therefore, must be considered by the investigator. However, when the evidence on the recording is heard and taken into account, the clarity of the recording will be relevant. If the sound is muffled, the voices are unclear and it is difficult to tell who is saying what to whom, that evidence may carry little or no weight at all. In any event, even if the recording is clear and establishes that Frank was trying to plead with Donna not to disclose their relationship to HR, the better response in those circumstances would be a written reprimand or letter of warning to Frank regarding his communications with Donna as opposed to a more drastic step such as dismissal for cause, which may not be sustainable.

YOUR RANKING?

- **One correct:** *might be time to brush up*
- **Two correct:** *not bad, but some further work needed*
- **Three correct:** *very well done, but not perfect*
- **Four correct:** *excellent*

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