Critical Issues in Workplace Investigations

By Nancy Shapiro and Robin Nobleman[1]

Workplace investigations have gained importance in recent months following the coming into force of Bill 132, which amends the *Occupational Health and Safety Act*, RSO 1990, c O.1 (OHSA). This paper will consider the circumstances in which investigations are required, the practicalities of carrying out investigations, and considerations relating to privilege and disclosure of results.

I. When investigations are required

(1) New requirements under the OHSA

Bill 132, An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters ("Bill 132"), which came into effect on September 8, 2016, amends six statutes including the OHSA. Bill 132 modified definitions and expanded obligations in respect of sexual harassment and sexual violence policies, programs and investigations in the workplace.

An employer's program to implement its workplace harassment policy must now set out how complaints of workplace harassment will be investigated and dealt with. The OHSA now requires an investigation that is "appropriate in the circumstances" into "incidents and complaints of workplace harassment", including sexual harassment, which is newly defined under the amendments.[2] The duty to investigate is triggered by one of two events: (1) the employer becomes aware of an incident of workplace harassment through a worker, or (2) a written or verbal complaint alleging workplace harassment is made to the employer.[3] It is still unclear what types of events qualify as "incidents". This term is not defined in Bill 132 or the Code of Practice recently published by the Ministry of Labour to guide implementation of Bill1 132.

Notably, an OHSA inspector may now order an employer to hire an impartial third-party, at the employer's expense, to conduct an investigation and issue a report.[4] Penalties for non-compliance with investigation related requirements under the OHSA can also include compliance order, charges or fines under the OHSA. Although it is not yet clear when an order for a third-party investigation will be made, it

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[2] *Occupational Health and Safety Act*, RSO 1990, c O.1, s. 32.0.7(1) [*OHSA*].
[3] Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act (12 August 2016), Part III.
[4] *OHSA*, s. 55.3(1).

is reasonable to assume that an OHSA inspector will consider such an order when an employee asserts that he or she made a complaint that was not investigated at all or when a complainant alleges that an investigation was conducted but that it was significantly flawed. Indicators of flawed investigations may include failure to abide by the guiding principles detailed in Part II(2) below.

(2) Other triggers for investigations

In addition to investigations into workplace harassment mandated by Bill 132, investigations are often conducted following an allegation of a breach of the *Human Rights Code* (e.g. where the alleged harassment or discrimination is tied to a protected ground), and the Human Rights Tribunal of Ontario (the "Tribunal") has often awarded damages against employers for failure to investigate.

Outside of statutory obligations, an employer may choose to conduct an investigation where there are allegations of wrongdoing which the employer must investigate to determine if just cause exists to terminate. This type of investigation is often dealt with in civil employment cases.

II. Practicalities of investigations

(1) Who should conduct investigations?

Some employers have in-house teams with expertise in conducting investigations, such as human resources staff or in-house counsel with experience in the area. Employers may also retain external counsel or a professional investigator to conduct investigations.

Some factors an employer may wish to consider in deciding whether to keep a matter internal or retain an external investigator include:

- Risks associated with the matter
- Severity of the nature of the accusations
- Required expertise to review and analyze the matter
- Importance of objectivity to the organisation and its stakeholders
- Available time and resources
- Cost
- Potential escalating effects of retaining counsel

- Importance of privilege[5]

Considerations of privilege, discussed further in Part III below, may also be relevant in determining who conducts an investigation. In-house lawyers should be careful to separate legal and business advice in the conduct of investigations if they wish to have the investigation attract solicitor-client privilege. Notwithstanding the potential benefits of attracting solicitor-client privilege, lawyers tend to have the advantage of objectivity, expertise and the ability to assess the relative strength of evidence.

Non-legal internal investigators have the advantage of familiarity with the organisation, the context and individuals involved, and are less likely to be seen as threatening by employees. Conversely, they are less likely to be viewed as objective, may not be optimal for sensitive situations, and are not as likely to attract solicitor-client privilege even if they are retained only to gather information to pass on to counsel.[6]

The Ministry of Labour recommends training for persons designated by an employer to conduct investigations on how to do so appropriately.[7] The skill and competency of the investigator, and whether they have received training, may be one of the factors considered by an inspector in evaluating the appropriateness of an investigation.

(2) How investigations should be conducted

As the Ministry of Labour now has new oversight with respect to the quality of workplace investigations, and there may be costly consequences for poor quality investigations, employers should be aware of common shortcomings to avoid. It should also be noted that substantial damages have been awarded in the civil litigation and Tribunal context flowing from failure to conduct a proper investigation.

Guidance from the Code of Practice

Although the Ministry of Labour's Code of Practice on implementing the changes to the OHSA does not provide any direction on when an inspector will order a third-party investigation, it does provide guidance as to components an inspector might be looking for when considering the appropriateness of an investigation:

- Objectivity – The investigator must not be directly involved in the incident or complaint and not be under the direct control of the alleged harasser;

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[5] Mark Crestohl, "Strategies for Preserving Legal Advice Privilege in Investigations" (2016) 14th Annual Current Issues in Employment Law.
[6] *General Accident Assurance Co. v. Chrusz*, 1999 CarswellOnt 2898, [1999] O.J. No. 3291 at para 122.
[7] Code of Practice, Part 4.

- Thoroughness – The worker and alleged harasser must be interviewed; relevant witnesses identified by the complainant and alleged harasser must be interviewed; the alleged harasser must be given an opportunity to respond to specific allegations; and all relevant documents must be reviewed;
- Timeliness – The investigation should be carried out with 90 days of the complaint/incident, barring extenuating circumstances;
- Confidentiality – The employer must ensure that the investigation, and any identifying information, is kept confidential and is not disclosed except as required by law;
- Documentation – The investigator must take appropriate notes during interviews and prepare a final written report which sets out findings of fact and a conclusion; and
- Proportionality - The level of thoroughness and length of an investigation should be commensurate with the complexity of the issues raised.

The Code of Practice also provides a basic investigation template that is publicly available online (See Appendix A).[8]

Guidance from the case law

While there are yet to be any cases decided in the context of Bill 132, fairness and reasonableness in investigations appear to be the guiding standards drawn from the existing case law and presumably those principles will continue to govern though likely in a stricter fashion as they will now be measured against statutory obligation.

Fairness may be compromised when employers act as overzealous prosecutors rather than unbiased fact-finders in their investigations. In *Elgert v. Home Hardware Stores Limited*, the Alberta Court of Appeal upheld a civil jury award of two years' pay in lieu of notice for wrongful termination as well as punitive damages by virtue of an investigation for sexual harassment which the Court of Appeal agreed was "inept and unfair" and conducted in a malicious, vindictive and outrageous manner.[9]

Elgert was terminated after he moved an employee under his supervision to another area of the store so that she would not spend time with her boyfriend. The employee's father, who also worked for Home Hardware, fired Elgert without informing him of the allegations against him or allowing him an opportunity to explain his side of the story. The Court specifically noted that the investigator was inexperienced and biased and the decision to terminate was a forgone conclusion.

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[8] Code of Practice, Schedule E: Investigation Template. Online: <https://www.labour.gov.on.ca/english/hs/pubs/harassment/schedulee.php> [Code of Practice].

[9] *Elgert v. Home Hardware Stores Ltd*., 2011 CarswellAlta 1263, 2011 ABCA 112

A clear example of unfairness is where an employer actively supresses a complaint or makes poor efforts to conduct an investigation. In *Disotell v. Kraft Canada*, an employee alleged harassment and discrimination at the hands of his co-workers, who repeatedly made derogatory sexual comments to him. The employee's supervisor refused to support a written complaint and warned the employee of the potential adverse consequences of complaining. The employer, in the person of the supervisor, knew the harassment was occurring, failed to report it to senior management, and misrepresented the seriousness and frequency of the complaints. The employer conducted only a minimal investigation into the complaints. The Court did not directly award damages for the manner of investigation, but the poor investigation as a factor in its decision to award damages for constructive dismissal equivalent to twelve months' notice ($36,000) to the sixteen year employee.[10]

Fairness in investigations may also include limited procedural fairness. In *Clarke v Syncrude Canada Ltd*., Clarke was terminated for cause after an internal workplace investigation found he had sexually harassed several women at a work event.[11] In his wrongful dismissal suit, Clarke claimed that the employer's failure to provide him with access to the full witness statements was a breach of procedural fairness and amounted to bad faith dealing. The trial judge held that although Clarke was entitled to know the case against him, there was no specific obligation to provide full copies of statements made against him. An outline of the allegations was sufficient.

Investigations need not meet a standard of perfection. Rather, they should be reasonable in light of all the circumstances. The Tribunal has provided three factors to consider in determining whether an investigation is reasonable and adequate.[12]

1. Pre-complaint: The employer's general awareness of issues of discrimination/harassment, existence of an anti-discrimination/harassment policy and complaint mechanism;

2. Post-complaint: Whether the employer took the complaint seriously and dealt with the matter promptly and sensitively; and

3. Post-investigation: Whether the employer provided a reasonable resolution in the circumstances and communicated its findings and actions to the complainant.

In *Morgan v University of Waterloo*, despite a finding by the Tribunal that the harassment complained of had in fact occurred, the Tribunal did not fault the University for its investigation which came to the

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[10] *Disotell v. Kraft Canada Inc.*, 2010 ONSC 3793.
[11] *Clarke v Syncrude Canada Ltd.*, 2014 ABQB 252, aff'd 2014 ABCA 362.
[12] See e.g. *Laskowska v. Marineland of Canada Inc*., 2005 HRTO 30 (CanLII) at para 59; *Sears v. Honda of Canada Mfg.*, 2014 HRTO 45 at para 170.

opposite conclusion.[13] The University had taken the complaint seriously and moved the alleged harasser to another location during the investigation. It engaged a qualified internal investigator with expertise in human rights who conducted 12 interviews and wrote and substantive report that included adverse credibility findings against the complainant. Notwithstanding that the Tribunal reached a different conclusion than the investigator, the latter's decision was found to be reasonable in light of the evidence and no damages for improper investigation were awarded.

III. Privilege, privacy and disclosure of investigation reports

Workplace investigations often collect information that is relevant and helpful to parties in future litigation. Privilege is a major exception to the general rule of evidence that everything relevant is admissible. Considerations of privilege may come into play in workplace investigations for both employers who seek to maintain privilege over investigations and employees, who will normally want to challenge employers' claims of privilege. Employers may be motivated to claim privilege over the results of an investigation if the results are unfavourable to them; however, their ability to do so may be greatly impacted by Bill 132. There will of necessity be changes in the way investigations are managed and counsel are utilized.

There are two mains types of privilege that may attach to workplace investigations: solicitor-client privilege and litigation privilege.

(1) Solicitor-client privilege

Solicitor-client privilege exists to facilitate the seeking and giving of legal advice, such that individual may freely disclose all relevant information to their counsel without fear that the information may be used against them. According to the Supreme Court of Canada in *Pritchard v Ontario (Human Rights Commission)*, for solicitor and client privilege to apply, the party asserting the privilege must establish that the communication (in this case, the investigation report and related documents) meets the following criteria:

(a) the communication was between a solicitor and client;
(b) it must entail the seeking of legal advice; and,
(c) the advice sought must be intended to be confidential by the parties.

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[13] *Morgan v University of Waterloo*, 2013 HRTO 1644.

In the context of workplace investigations, an investigation conducted by a lawyer may attract solicitor-client privilege. In that regard, the terms of the retainer may be important. This held true in *Howard v City of London*.[14] The plaintiff manager of a long-term care home was terminated for her role in an incident involving the death of a resident, based on the legal advice and recommendations contained in the report of a lawyer retained for the very purpose of carrying out the investigation. In a wrongful dismissal suit, she sought production of all documents related to the investigation. The Court held that terms of the retainer made it clear that solicitor-client privilege attached: the employer had retained the lawyer in a privileged and confidential letter; the employer asked the lawyer to act for it; it noted that the report would contain "privileged recommendations, opinions and advice"; and its request required the lawyer to perform legal analysis in the course of his investigation by determining compliance with applicable regulations and due diligence.

Despite the importance of the terms of the retainer above, in *Slansky v Canada (Attorney General)*, the majority of the Federal Court of Appeal held that "while a retainer is important evidence of whether a solicitor-client relationship has been established, the terms of the retainer are not necessarily conclusive, and must be construed in light of all the relevant circumstances".[15]

In *Slansky*, the lawyer's fact-finding mandate did not preclude a finding of solicitor-client privilege in an investigation of judicial misconduct. The majority found that despite the engagement letter's description of the lawyer's role as a gatherer of facts, the nature of the allegations made it necessary for the lawyer to use his legal skills and knowledge. Thus, solicitor-client privilege was engaged.[16]

Where an investigation is carried out by a non-lawyer, claims of privilege are less likely to succeed. The courts have generally held that a third party who gathers information for use of counsel is not central to the solicitor-client relationship. As a result, a report issued by a third party is not subject to solicitor-client privilege.[17]

(2) **Litigation Privilege**

Litigation privilege may be claimed over documents prepared for the dominant purpose of litigation and when litigation is a reasonable prospect at the time the document was prepared.

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[14] *Howard v City of London*, 2015 ONSC 3698.
[15] *Slansky v Canada (Attorney General)*, 2013 FCA 199, 2013 CarswellNat 3338 at paras 89, 94.
[16] *Slansky v Canada (Attorney General)*, 2013 FCA 199, 2013 CarswellNat 3338 at para 105.
[17] *Liquor Control Board of Ontario v Lifford Wines Agencies Ltd*, (2005) 76 OR (3d) 401 (ONCA) at paras 69-76; *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras 29-51.

The timing of an investigation may therefore be relevant to claims of litigation privilege. In *Central Park Lodge and Service Employees International Union*, an arbitrator found that witness interviews conducted prior to the discharge of an employee were not protected by litigation privilege because they could not have been done for the purpose of litigation or in reasonable expectation of litigation as no decision to dismiss had yet been made. Had the result of the investigation been that there was no cause for dismissal, no litigation could have resulted.[18] Similarly, in *Weetabix Canada Ltd. and UFCW Union* the Arbitrator held that witness statements gathered before a final decision to terminate had been made were not privileged and must be disclosed.[19]

The "dominant purpose" requirement raises questions about the impact of Bill 132 on claims of privilege. If an investigation was carried out as a requirement of the employer's workplace harassment program, or pursuant to an OHSA inspector's order, it would not be carried out for the dominant purpose of anticipated litigation and thus would not enjoy the protection of litigation privilege.

Although there have been no cases as yet dealing with Bill 132's changes, *Talisman Energy Inc. v Flo-Dynamics Systems Inc.* provides an analogous scenario. In *Talisman Energy*, the plaintiff company launched an investigation in response to a whistleblower's tip about employee misconduct. The company claimed litigation and solicitor-client privilege over the investigation report. The Court held that the company had not met the onus of demonstrating that the dominant purpose of the investigation was to assist in anticipated litigation; rather, there was a legitimate question as to whether the investigation was carried out as a requirement of the company's whistleblower program. However, as one of the purposes of the investigation was to ascertain facts to get legal advice, the investigative file was subject to solicitor-client privilege.

(3) **Sharing investigation findings**

Bill 132 requires a written investigation report which must set out, at minimum, the steps taken during the investigation; the complaint or allegations of harassment; the alleged harasser's response; and the evidence obtained. The report must also set out findings of fact, come to a conclusion about whether workplace harassment was found or not, and include recommendations for next steps.[20]

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[18] *Central Park Lodge and Service Employees International Union*, (2001) 965 LAC (4th) 192 at para 13; See also *Sasso and Bank of Montreal, Re*, 2013 FC 584, 2013 CarswellNat 1738 at paras 24-25 where the Federal Court found that an adjudicator erred in confusing "reasonable expectation" of litigation with "reasonable prospect", with the latter being the correct standard.

[19] *Weetabix Canada Ltd. v UFCW Union*, 2012 CanLII 51969 at p. 3-4.

[20] Code of Practice, Part III(A).

Under Bill 132, the results of an investigation must be shared with the complainant and alleged harasser (if also an employee) in writing. Results must be communicated to the complainant within ten calendar days of the investigation being concluded. This means that at least the results of the investigation are *de facto* not privileged, or that the privilege may be waived to some extent by this disclosure. However, the results are not equivalent to the investigation report itself, but rather a summary of findings. The corrective action to be taken must also be communicated to the complainant and harasser (if an employee) within ten calendar days.[21]

Outside of those requirements, the results of the investigation need not be disclosed unless disclosure is necessary for the purpose of investigating or taking corrective action, or otherwise required by law.[22] This requirement is in place to protect the privacy of the parties. The importance of privacy throughout the process must be impressed upon all witnesses and participants.

Discovery obligations may constitute a legal requirement to disclose. In light of this requirement, the only protected aspect of investigations done for the purpose of compliance with the *OHSA* may be legal advice stemming from the results of an investigation and not the report or findings. This may make the division between the investigation and the legal advice strategically important to avoid the overlapping of those two roles of counsel.

IV. Conclusion

Bill 132 is likely to make employers sit up and take notice of the importance of investigations and make efforts to conduct them appropriately. Both external and in-house counsel can be instrumental in ensuring employers meet the requirements of Bill 132 and avoid an order to hire a third party to rectify a sub-standard or non-existent investigation. Lawyers should be prepared to provide guidance on when investigations must be carried out, how to conduct an appropriate investigation, and issues of privilege and disclosure surrounding investigation results and reports. The standard expected in relation to investigations is on the rise and employers will need to be increasingly diligent in how they deal with workplace harassment complaints as a result.

[21] Code of Practice, Part III(B).
[22] *OHSA*, s. 32.0.6 (2)(c) - (e).