

Evidentiary and Ethical Issues in Investigations CBA Workplace Investigations Section Meeting

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Issues in Publication, Including Defamation and Privacy



Case Scenario

You have been retained to investigate a claim of sexual assault in the workplace

The allegation is serious, with multiple witnesses, though no firsthand witnesses to the assault. There is a written complaint, and interviews are inconclusive as to the truth of the allegations, both parties credible. There is information in the community (because of the number of witnesses) that something is alleged to have happened in the workplace, but the parties are unknown.



Case Scenario cont.

Confidence about safety at the workplace is low. The Employer tells you (for accountability and culture reasons, they say) that they will be publishing the report on their website, but do not have a lawyer. You are not retained to provide a privileged report.



Questions

- How do you provide the report to the Employer.
- What steps can you take to prevent disclosure of private information. Should you?
- What obligations do you have, knowing the report will be published to the world at large?
- What about where the Employer just publishes it to certain employees?



Takeaways

- Public facing for some Employers intersects with confidential nature of investigation process
- An investigator's ability to defend themselves is limited after reports are delivered
- Limited immunity for workplace investigators for defamation



Resources

Safavi-Nani v. Rubin Thomlinson LLP 2023 ONCA 86

Elgert v. Home Hardware Stores Ltd., 2011 ABCA 112

Elliot v. Insurance Crime Prevention Bureau (2005 NSCA 115)

Teskey v. Toronto Transit Commission et al 2003 Canlii 35190 (ONSC)



Issues in Interviewing



Case Scenario

You have been retained to investigate a claim of discrimination in the workplace.

The allegation is serious and the complainant has alleged years of harassment and resulting emotional trauma. They have provided a written complaint but you interview them in person to obtain further particulars. The allegations are numerous and complex and the interview ultimately takes several sessions each many hours long.



Case Scenario cont.

During the interview you engage various TIP techniques. Notwithstanding this approach they tell you that coming forward with their complaint has negatively impacted their mental health and they question the value in participating any further.



Questions

After interviewing the respondent and witnesses you have obtained different and contradictory information. In order to ensure procedural fairness, you need to re-interview the complainant.

- Do you reinterview them despite the fact that they have told you their mental health has suffered?
- Are there other options instead of interviewing them?



Questions cont.

- How do you balance their emotional circumstance with ensuring that you have thoroughly reviewed and tested all the evidence?
- What ethical obligations do you have?



Takeaways

- Common and often expected or even mandated that interviews will be conducted Trauma-Informed Practice (TIP)
- Many ways to conduct an interview using TIP
- May intersect with other concerns such as cultural safety
- Can be a challenge to procedural fairness



Resources

Using Trauma-Informed Techniques in Workplace Investigations AWI Journal Vol 12, #3 September 2021

<https://www.ohchr.org/Documents/Publications/Chapter12-MHRM.pdf>

<https://thetraumainformedlawyer.simplecast.com/>

<https://www.cba.org/Truth-and-Reconciliation/Events/The-Trauma-Informed-Lawyer>

<https://www.goldeneaglerising.org/photos/trauma-informed-legal-practice-toolkit>

<https://instituteofworkplacebullyingresources.ca/the-importance-of-a-traumainformed-approach-to-workplace-investigations/>

<https://rubinthomlinson.com/the-prevalence-of-trauma-and-trauma-informedinterviewing/>



Similar Fact Evidence, Adverse Inferences



Case Scenario

You have been retained by a company to investigate a sexual harassment complaint.

The Complainant has accused the Respondent, who is her supervisor, of repeatedly showing her naked photos of women he met online. The Complainant estimated it occurred six to eight times over a series of months. The Complainant said she heard another employee, who resigned (the “Former Employee”), was shown similar photos when he reported to the Respondent.



Case Scenario cont.

The Respondent acknowledged one occasion, but said it occurred by mistake when scrolling through photos on his phone in search of another photo to show the Complainant. He adamantly denied it occurred on multiple occasions.

The Respondent said he heard the Complainant had a reputation for filing complaints against supervisors when her performance was under scrutiny, using the complaint process “as a sword not a shield.” He said he recently gave her some performance feedback she did not like.



Case Scenario cont.

The Complainant said there was a vendor (the “Vendor”) who was present on one occasion when the Respondent intentionally showed her a naked photo. She said she could not recall the name of the Vendor, as many Vendors came to site, but she knew he was the Respondent’s friend.

The Respondent acknowledged he had a friend who was the Vendor, but refused to provide his name.



Questions

- Would you interview the Former Employee?
- Would you seek out information related to previous claims advanced by the Complainant?
- How would you treat the Respondent's refusal to provide information?
- If you were investigating a systemic discrimination file how would this impact your assessment of similar fact evidence?



Takeaways

- **Similar Fact Evidence**

- Similar fact evidence may be introduced where the probative value outweighs the prejudicial factor. Caution should be exercised.
- The degree of similarity of the conduct increases the probative value.

- **Adverse Inferences**

- An unfavourable or adverse inference may be drawn when a party fails to adduce evidence it would be expected to bring. The inference is that the party has omitted evidence that would be injurious, or at least not supportive, of their position.
- The party may provide an explanation for the omission, that is satisfactory, that will not result in an adverse inference.



Resources

Similar Fact Evidence:

- *Teeluck v Canada (Treasury Board)*, [1999] FCJ No 1544 (attached) at para 27; *Espinoza v Coldmatic Refr. Ltd.*, 95 CLLC para 230-026 at paras 24-28
- *United Brotherhood of Carpenters and Joiners of America (CJA), Local 579 v Bradco Construction Ltd.*, [1993] 1 SCR 941 at 343-344
- *Ontario Public Service Employees Union v Ontario (Ministry of Environment)(Madan Grievance)*, [2012] OGSBA No 188

Adverse Inference:

- *William Osler Health System v Canadian Union of Public Employees, Local 145 (Asare Grievance)*, [2019] OLAA No 254
- *Tolko Industries Ltd (Lakeview Lumber Division) v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-425 (Lipke Grievance)*, [2017] BCCAAA No 108



Using and Assessing Circumstantial Evidence



Case Scenario

You have been retained by a public sector employer to investigate allegations of bullying and harassment.

The Respondent and Complainant both work in the same department, and the Complainant is the coordinator of that department. The Respondent and Complainant have had a long history of low level conflict. The respondent has complained about the Complainant to the Complainant's superiors about a number of specific issues on a number of occasions, most often by email.



Case Scenario cont.

The Employer has also started receiving emails from anonymized email accounts targeting the Complainant, raising these same specific issues. These emails are being sent to an increasingly wide range of recipients, most recently a local news agency, and the Ministry responsible for the Employer.



Case Scenario cont.

In your interviews with the Respondent, he acknowledges the concerns that he has with the Complainant but repeatedly denies sending the emails. He notes that he has raised his complaints with the Complainant's superiors, so there would be no reason for him to send the emails. There is no direct evidence that the Respondent sent the emails.



Questions

- What steps could you take to obtain additional information?
- Without more, would you make a finding that the Respondent sent the emails?
- What additional information might assist?



Questions cont.

- What if the timing of the sending of the emails coincides with the timeline in which the Respondent raised his complaints with the employer?
- What if there is a specific turn of phrase that is used in the emails in question that is also used by the Respondent in emails that he admittedly did send?



Takeaways

- Circumstantial Evidence can be used and relied on just like any other evidence
- The basis on which the determination is to be made in most investigations is the civil test of balance of probabilities (clear, convincing and cogent, as described by the SCC in R.F.H. v. McDougall)
- In some instances, there may be an evidentiary onus on a participant to explain the circumstances



Resources

First Canada ULC v. Amalgamated Transit Union, Local 1722 (Clark Grievance), [2015] B.C.C.A.A.A. No. 146

<https://rubinthomlinson.com/circumstantial-evidence-enough-lessons-re-sun-regina-quappelle-regional-health-authority/>



Thank You
