

Most Common Mistakes of the Workplace Investigation



An ethical and thorough investigation of any complaint in your workplace will be your biggest safeguard to current and future labour issues. While your intent may be well directed, you may not be aware of some common pitfalls.

“60% of workers have experienced harassment at the workplace. 30% sexual harassment and 21% experiencing workplace violence. 75% of workers who had experienced any of the above only reported the most recent incident but only 41% said no attempt was made to resolve the issue”¹.

When a complaint in your workplace has been brought to your attention, your first reaction may very well be to “look into” the complaint. What you may not realize however, is that “looking into it” is rarely enough. Your initial response, the actions you take, your conversations with coworkers, your reporting manner; and your mindset all determine whether your investigation has been conducted properly, ethically; and with the right goal in mind.

Many companies have done their due diligence and have created a well-written policy regarding both the complaint process and the investigation process. They may have even gone as far as having someone in HR take formal training on the subject. Assuming this has been done, it is still very common to make crucial mistakes in the process without even realizing it. These mistakes could result in large payouts to the plaintiff, deteriorating workplace culture and ongoing issues that caused the initial complaint in the first place.

Mistake #1: Not recognizing the complaint

Even though your workplace may have an official complaint procedure in place, it doesn't mean that your employees may be aware of it or feel comfortable following the procedure. The employee may decide to maneuver around the policy due to whom the complaint is about. Thus, you may find yourself with a verbal mention, unconfidently communicated to you at the end of a shift one day. The employee may very well feel that what they communicated was essentially a formal complaint. You may have very well passed it off as just an “end of the day rant”, only to find yourself being accused of not responding to a complaint. If you are in a position of authority and one of your employees comes to you with a concern you need to clarify and directly ask about the formality of the complaint. Have them understand that in your position, your due diligence is to formally follow up and investigate the complaint.

¹ Source 2017, Harassment and Sexual Violence in the Workplace – Public Consultation: What We Heard (Employment and Social Development Canada)

You must also recognize that an employee may feel threatened by making the complaint when a formal investigation is suggested and therefore their reaction may be to deny the formality of the complaint. Unfortunately, your judgement may need to be fine tuned in this event to determine whether the severity of the issue at hand deems an investigation be completed. Should you decide an investigation not be required, it is advisable that you document the conversation with the employee.

Mistake #2: Wrong choice of Investigator

Assuming your investigator is trained, there are still some recommended rules of thumb to follow when assigning someone to investigate a complaint. The obvious rule of ensuring there are no biases involved with the parties seems like common sense. However, you may need to look a little deeper. You need to ensure that the investigator has no stake in the outcome. Sometimes this requires a little investigating itself! Generally, internal investigators are acceptable if the issue at hand is not complex. Third-party investigators however should be obtained when the issue has legal accountability and/or the need for privilege is required. In the scenario where the investigation involves a member of the executive team, then an external investigator would obviously be well advised. Third-party investigators will also be able to present results with impartiality and provide professional reports that are viable should the issue become litigious.

Any employer can be held liable for an improperly conducted investigation and the complainant gainfully rewarded as a result.

Mistake #3: Failure to perform further investigative work

The investigator may look at a complaint and decide to just interview the complainant and the respondent, look at a relative policy and call it a day. That would be an injustice to both the employees and the employer. A good investigator looks at all angles and talks to everyone involved. They ask questions that will provide avenues of more info. For example, was there a witness? Is there proof of that accusation? Is the proof legitimate? Do I need to visit a secondary worksite? There is always more to look at and more to learn.

Mistake #4: Not keeping proper notes

Notes taken during interviews are not just for the investigator to make his formal report. They may be requested in a court of law to determine the validity of a report. The investigator may need to refer to them, if questioned, about when an interview occurred or other pertinent details. Specifically, it is recommended that the investigator's notes are kept and should include any material that any witnesses provided, any material gathered during searches of computers or file copies, any communication between involved parties and/or witnesses, and of course any other relative notes taken during process. Dispersing of notes would be considered unprofessional and could drastically reduce the credibility of the conclusive reports; not to mention make the Employer liable for not conducting a proper and thorough investigation.

Mistake #5: Not providing the respondent an opportunity to respond to accusations

Most investigators will begin an investigation by taking the statement of the plaintiff. Usually the statement will involve an accusation of some type towards another individual. Although it seems logical that the respondent would address those accusations, it is not always the case. You must ensure when interviewing the defending party that the accusation is communicated clearly, and they are given the opportunity to respond directly. If need be you also should ask

questions regarding the response such as asking for witnesses or other documented proof. This is essentially the entire premise of the investigation and cannot be overlooked.

Mistake #6: Failing to provide a detailed report.

So, you've done the interviews, collected evidence, reviewed policies; and feel quite confident that you know what happened. What you do next could undermine all your hard work. It is imperative that you complete a final report outlining your findings and documenting all paperwork and evidence gathered as well as interview reports. Any conclusions must be supported by evidence. Remember to include the process that was taken for the investigation as it will determine the credibility of the report and the investigation itself. If when completing the final report, you find something is missing, go back out and ask the questions or gather the missing evidence. Take into consideration also how the report will be distributed. If you are sending it electronically, ensure the report is done so in pdf format so it cannot be changed. Finally, remember you are just reporting the facts and findings to the accusations and how they relate to policies in place for each of them. The investigator should not be providing opinion on repercussions of the investigation's findings. Remember the report could be the justification if the resulting disciplinary action is severe and could be referred to in a hearing should the disciplined individual challenge the decisions made.

There are a plethora of tips and tricks to performing fair and thorough workplace investigations, however, when it comes down to ensuring an unbiased and legally credible investigation for complex or severe issues, it is highly recommended that you obtain external professional assistance. Every company, large or small, will encounter difficult situations at one time or another. When this occurs, experts are needed to determine the truth, gather and secure all the possible evidence, protect assets, and ensure the facts are presented with integrity and in a professional and credible manner.

Investigative Risk Management provides professional consulting and analysis, necessary for your organization to reach informed decisions. IRM's **Strategic Workplace Investigation and Forensic Technology team (S.W.I.F.T.)** ensures confidentiality of the entire process including, witness anonymity (where appropriate and possible) while assessing the motives and credibility of the participants and maintaining the integrity of the process. Further, our investigators maintain the confidentiality of the report including the results and stores confidential materials for the duration of the legally required timeframe.

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