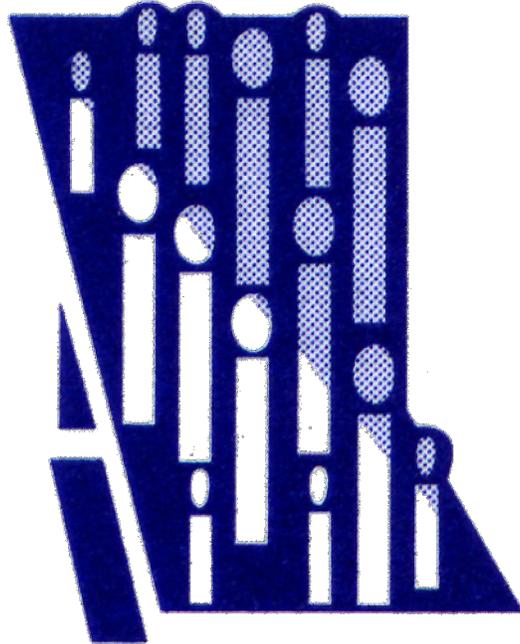


# Conducting Internal Investigations



BC Human Rights Coalition

## **Internal Investigations – Objectives**

At some point in time it is likely that an employer will need to conduct an internal investigation. There are many reasons why this may take place. The investigation may be related to:

- Employee Competence
- Performance levels
- Attitude
- Theft
- Misconduct
- Harassment / Bullying
- Drug/Alcohol use
- Safety concerns
- Harm to property, or
- Sexual harassment

The objective of an internal investigation is to discover facts on which to make a sensible decision. Done correctly, an internal investigation can resolve a problem, prevent it from re-occurring or expanding, and prevent the need for an external investigation. This can assist in retaining personnel, buoy morale, and prevent substantial legal and financial costs. A poorly done internal investigation can have the opposite effect by impacting employee morale, causing negative publicity, providing fodder for gossip, distracting employees from their work, and creating unnecessary costs. Another potential problem is that the investigation may create divisiveness when employees are asked to comment on activities of co-workers or supervisors.

Generally speaking, the objective should be to utilize the findings to successfully pursue a resolution of the issues. Resolution is defined as the parties to the complaint finding resolution and closure with respect to their issues within the internal investigation process.

An in-house investigator must respect the privacy rights of the employee, yet still reveal enough factual information to either support or dismiss the claim. Investigators must conduct a fast, yet thorough examination of the facts and circumstances, without violating the legal rights of any party involved.

### **Need for Objectivity**

It is fundamentally important that any internal investigation be conducted from an objective, independent, third party approach. The investigator must avoid any prejudice with respect to the investigation. For example, the fact that an employee has been warned in the past about similar conduct should not make them automatically guilty. All relevant facts should be investigated. This should include investigating all allegations, and

verifying any alibis or exculpatory evidence. If circumstantial evidence is uncovered from which only inferences can be drawn, the employer should proceed carefully.

At times the employer may need to engage in a variety of investigative techniques which may include:

- Conducting interviews,
- Searching offices and desks and lockers,
- Searching personal items such as purses, gym bags,
- Recording conversations,
- Taking photographs or videos,
- Taking handwriting samples,
- Accessing employee email,
- Calling for outside assistance from security guards or law enforcement.

Before engaging in any investigation, an employer should become aware of the applicable federal, provincial, and local laws which, either explicitly or implicitly, impose duties on employers with respect to conducting interviews. In addition, some collective agreements contain specific provisions regarding the manner in which an investigation is to be conducted when dealing with potential disciplinary matters.

### **Vicarious liability**

In *Smith v. Zenith Security & Investigation Ltd. (c.o.b. Zenith Security & Investigation Services Ltd.)*, [2002] B.C.H.R.T.D. No. 25. the Tribunal held:

“Employers are vicariously liable for discriminatory acts of their employees because only employers have the ability to provide a harassment-free working environment” (at para.32). If the individual is found to have contravened the Code, then the employer can also be found to have contravened the Code in failing to provide the Complainant with a harassment-free work environment (Smith at para.33).

An employer may reduce its liability if it can show that it had an appropriate harassment policy in place, that it provided education and training to its employees regarding acceptable and unacceptable conduct in the workplace, that when the complaint was made it conducted an immediate, thorough and impartial investigation, and that based on the factual findings of the investigation, it took corrective action to remedy the situation. An employer’s actions will certainly be considered by an administrative Tribunal or a court of law in determining, or even reducing an employer’s liability for one of its employee’s misconduct.

The leading case concerning the liability of employers for the discriminatory acts of their employees is *Robichaud v. Canada (Treasury Board)* (1987), 8 C.H.H.R. D/4326 (S.C.C.).

An employer who responds quickly and effectively to a complaint by implementing a scheme to remedy and prevent reoccurrence will not be liable to the same extent as an employer who does little or nothing. (*Robichaud*, supra)

Under the BC Human Rights Tribunal rules an employer can file an application to dismiss, ascertaining that the employer responded appropriately, and that it would not further the purposes of the Code to proceed. *Horner v. Concord Security Corporation*, 2003 BCHRT 86 and *Willkie v. ICBC*, 2005 BCHRT 318.

## **Internal Investigations – Cautions**

### **Limitations on Search and Surveillance**

#### *Privacy*

The law requires that an employer's right to maintain a safe and efficient workplace be balanced against the employee's right to be free from unreasonable invasions of privacy. In most instances breaches of privacy will be defined by Personal Information Protection Act a ("PIPA") and Personal Information Protection and Electronics Document Act ("PIPEDA") and Freedom of Information and Protection of Privacy Act ("FOIPOP")

Considerations – when can the information be used, for what purpose was the information given.

#### *Defamation*

The term for words either spoken or written, communicated to a third party which tend to injure a person's reputation. Generally, a defamatory statement will not be actionable if it constitutes the truth, or is privileged. Consequently, an employer should be cautious when conducting investigations or terminating an employee's employment, that it does not inappropriately disclose information to a third party which could ultimately give rise to a defamation suit being brought by the employee.

For an employer to avail itself of the defense of qualified privilege it will have to demonstrate that it had a duty or interest in making the communication and that the persons receiving it had an interest in receiving it.

#### *False Imprisonment*

The tort of false imprisonment protects an individual's right to be free from restraint. The tort is committed when a person intentionally confines or restrains the physical liberty of another person. For instance barring exit from a doorway while an employee is attempting to leave the witness room may lead to an allegation of false imprisonment.

#### *Assault and Battery*

The tort of assault provides protection to individuals from the fear of being imminently physically interfered with. An assault is said to occur if an employer creates a reasonable, imminent fear in an employee that the employer is going to touch the employee in a

harmful or offensive way. No actual touching is necessary. For example a supervisor shaking a fist at an employee could constitute an assault.

#### *Malicious Prosecution*

Employers who involve the police in workplace investigations should be aware of the potential for claims of malicious prosecution and abuse of process. If an employer, institutes unsuccessful criminal or civil proceedings against an employee without reasonable and probable cause, and for an improper purpose, the employer may be charged with malicious prosecution. Conducting a thorough investigation with credible findings will assist in showing the reasonableness and purpose of the employer filing the civil or criminal complaint.

#### *Negligent Investigation*

In *Correia v Canac Kitchens* (OCA) the Ontario Court of Appeal held that employers cannot be held liable for negligently investigating workplace misconduct that lead to criminal charges. However, the Court allowed the complainant to continue with his lawsuit for emotional distress, against both the company and certain individuals that arose because of the negligence.

#### *Intentional Infliction of Emotional Distress*

In tort law, intentional infliction of emotional (or mental) distress is a mental reaction (such as anguish, grief, or fright) to another person's actions that entails recoverable damages. To successfully prove a claim for intentional infliction of emotional distress, a plaintiff must show three elements: 1) that the defendant acted intentionally or recklessly; 2) that the defendant's conduct was extreme or outrageous; 3) that the extreme or outrageous conduct caused severe emotional distress. One of the major hurdles in a intentional infliction of emotional distress lawsuit is proving that the defendant's conduct was extreme or outrageous; this is defined best as conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

#### *Negligent Infliction of Emotional Distress*

A tort of negligent infliction of emotional distress also exists where the defendant can be found to have committed the tort without proof of intention or recklessness, but merely negligence. (See *Canac* above)

### **Steps to prepare for the Investigation**

Internal investigations are essential when dealing with complaints or suspicions of misconduct. When an employer receives a complaint it must undertake an investigation promptly to protect both the company's legal and business interests. Where there is the opportunity for thoughtful decision making the employer should consider the implications in advance and devise a strategic plan.

The following are essential in preparing for an internal investigation:

- Identify the need for an investigation
- Assess the goals of the investigation
- Assess the potential disadvantages of the investigation
- Select the appropriate investigator
- Identify potential witnesses
- Identify documents to be reviewed
- Prepare strategy for the investigation
- Prepare an outline of the questions
- Establish special, secure files and records
- Review investigation plan periodically to ensure it is comprehensive.

### **Before Starting - Plan the Investigation**

#### *Identify the need for an investigation*

There may be many valid reasons for conducting an internal investigation. For our purposes we are going to focus on investigations arising out of conduct that could be in violation of the Human Rights Code. However, other reasons could arise from a complaint made under a grievance, arising from a lawsuit (i.e. wrongful termination), or suspicion of employee misconduct.

#### *Assess the goals of the investigation*

The Goals of an investigation should be as follows:

- Improve the factual basis for corporate decision making,
- Develop a thorough record on which to base a legal opinion,
- Identify employees who have violated corporate policy of the law,
- Identify or halt criminal activity,
- Preclude or minimize the likelihood of an external investigation being conducted by an administrative agency such as Employment Standards Branch, HRDC/Ministry of Labour, WorkSafe BC,
- Curtail adverse publicity,
- Avoid the costs of litigation and its disruptive effect on business operations,
- Limit corporate liability,
- Minimize officer or director liability for breach of fiduciary obligations,

#### *Assess the potential disadvantages of the investigation*

There are several potential disadvantages to conducting an investigation including:

- Cost,
- Uncertainty about what a thorough investigation will uncover,
- Inability to control the scope once the investigation starts,
- Adverse publicity,
- Internal divisiveness caused by employees being asked to discuss the activities of supervisors and co-workers,

- Potential of civil litigation by people who first learn of corporate wrongdoing during the investigation,
- Creation of evidence that may be used against the corporation in subsequent litigation,
- Admission by the company of a potential or current problem,

*Select the appropriate investigator*

Often there are a variety of options as to who should conduct the investigation. The options generally include:

- Member of management
- Member of Human Resources staff
- Private investigator – outside consultant
- Regular or special outside counsel.

A lawyer or private consultant is often the most prudent and impartial investigator. Solicitor –client privilege is one of the major benefits of having a lawyer involved. This privilege protects all communications between a client and the lawyer from disclosure demands from a third party. To be protected the communication must (1) be confidential and (2) occur when the lawyer is acting in their legal capacity. Privilege is to the client (potentially the corporation and not the individual).

However, because of cost, timing and other practicalities a lawyer may not always be an option. If the investigation team does not include a lawyer it should proceed cautiously remembering that all documents and evidence it generates may be used in other legal proceedings.

It is a good idea to have a number of people in the company trained to conduct investigations.

If an interviewee requests that their own legal counsel or union representative be allowed to attend the meeting, the employer may be advised to grant such a request.

When considering selecting an investigator certain factors should be considered. These include:

- Familiarity and knowledge of company policies procedures, practices, rules and relevant laws.
- Ability to understand the business purpose of the investigation and the potential issues it may raise
- Interviewing skills, and ability identify follow up questions when new facts or issues come to light
- Credibility, respect, and an ability to create trust and rapport with the witnesses
- Actual and perceived impartiality and independence
- Effectiveness as a potential witness in a subsequent legal proceeding
- Ability to take thorough, accurate notes which can be used as evidence
- Ability maintain confidentiality

### *Prepare strategy for the investigation*

It is important to establish a plan for the investigation. This should include a time line for the investigation, including each step that will be taken, and a completion date.

Remember that the chronology of witness interviews can contaminate or enhance the investigation.

### *Identify potential witnesses*

Before conducting interviews a potential list of witnesses should be identified. In addition to the complainant and respondent consider including co-workers of both employees who work in the area in which the alleged misconduct occurred. Other potential witnesses might include customers, suppliers, and others with relevant information.

### *Identify documents to be reviewed*

Documents to be reviewed may include:

- Company rules, policies and procedures, memoranda or notes
- Time cards, expense reports, logs receipts
- Communications, complaint forms, personnel files, managers notes.

### *Prepare an outline of the questions*

An outline of the questions should be prepared to ensure a thorough and consistent line of questioning. Asking the same questions will assist in evaluating the responses for consistency.

### *Establish special, secure files and records*

Special, secure files should be maintained for the investigator's/investigation records. Some documents may be privileged, while others may be need to be disclosed during legal proceedings.

### *Review your investigation plan periodically to ensure it is comprehensive.*

Look for oversights in your plan, paying special attention to the timing of the investigation and whether any delays might result in losing a key witness or physical evidence.

## **Internal Investigations – Objectively interviewing witnesses**

### *Before the interview*

Investigators should prepare in advance for the interviews and anticipate what could and should transpire. However, the preparation should not lead to delays. A lengthy delay may in fact prompt the complainant to consult a lawyer and/or pursue a formal complaint through an administrative tribunal or court.

### *The actual interview*

Appropriate disclosure of what the investigation is about should be made at the commencement of the interview. Be honest about the purpose of the interview. When

interviewing the accused tell them that the interview is designed to give them an opportunity to relate their version of events, to respond to the allegations, and to advise if there is any other information that should be considered during the investigation. It is also important to inform the accused of the allegations and the complainant's identity, so that they can fully respond to the allegations. If there are multiple complainants inform the accused of the identities of all the complainants. If other complainants come forward during the investigation the alleged harasser should be notified of their identities and their allegations (*Rojas v. Eagle Pitcher*). If the accused refuses to participate, the investigator should tell them that the employer will be forced to base its decision on the other information gathered in the investigation.

Ordinarily, if an employee is directed by management to attend an interview, they are required to attend and to provide any and all information within their knowledge. An employee refusing to attend may risk being disciplined for insubordination. On the other hand if the individual states that they wish to terminate the interview, or consult with someone, like a lawyer or union representative, the investigator should let them do so.

Do not promise confidentiality. If a lawsuit or grievance is filed it is possible that the information may be compelled by the disclosure process.

Be prepared to interview a witness more than once. Also remember to ask every witness if they can suggest any other witnesses. It is also advisable to obtain a signed statement from key witnesses outlining their recounting of the facts.

In investigations regarding specific events, inquire about all the events which occurred during the relevant time frame. For each block of time the investigator should cover:

- Exactly what happened?
- When did it happen?
- Where did it happen?
- Who was present?
- How did it happen?
- Who did or said what?
- In what order?
- Why did it happen? Could it have been avoided?
- Is there any documentary evidence?
- Who else may have relevant information?

#### *Note taking*

During the interview, take detailed notes, including the questions asked and the responses given. Review and finalize the notes immediately upon completion of the interview. Make sure the notes are free from any bias or subjectivity. Place the names of those present, the date, the time and place of the interview at the top, and sign and date the notes. Remember that it may be prudent at this time to also prepare a witness statement, and have the witness review and sign it.

### *Tape recording*

There are some advantages and disadvantages to recording. People are sometimes uncomfortable and hence less forthcoming if they are being taped. Also if there is another legal proceeding the tape will likely be subject to disclosure. On the other hand the recording is a more accurate and a truer reflection of the actual interview. If you decide to record, check to see if there are any legislative, collective agreement or other bars to recording.

During the interview, place the tape recorder in plain sight. At the beginning of the interview record the date, and time, and the name of the witnesses consenting to the recording.

### *Concluding the interview*

At the conclusion of the interview the investigator should confirm that the information they have is accurate is what the interviewee intended to communicate. The investigator should repeat the significant points with the interviewee and ask them to confirm that the information is complete and accurate. If it is not, follow up with questions to clarify.

## **Internal Investigations – The double edged sword**

Despite the many benefits of conducting internal investigations, there are risks associated with them as well. The risk can be generated through one or more of the following:

- Action taken on the basis of a poor investigation,
- Action taken on the basis of poor evidence,
- Poor information control (privacy and defamation issues),
- Failure to take appropriate action,

Failure to understand and control such risks may increase the employer's exposure to grievances, lawsuits, and human rights and privacy complaints.

### *Be critical of the results of the investigation*

Once you have gathered information in an investigation, you need to apply very critical standards to the results to make sure you have factual proof that they represent the truth. If disciplinary action or termination is warranted make sure the discipline is appropriate, reflective of the seriousness of the offense, and is not reactionary. It is not mandatory to list each and every item that was discovered, nor is it mandatory to disclose how information was discovered.

Inform those individual who have a “need to know” of the resolution. This should include informing both the complainant and the respondent of the findings. Where there is a finding of culpability the employer should carefully determine the appropriate action.

### *Determine the appropriate action*

Once the investigation report is completed, an employer should determine what action to take. Remember that the complainant should not suffer any adverse consequences where the complaint is founded, and the complaint was not made in bad faith. Conversely, do not assume that a finding of misconduct will always be sufficient to establish “cause” for termination. Each incident should be reviewed based on the following factors.

- The severity of the misconduct
- The employee’s prior work history (progressive discipline)
- Are there mitigating circumstances (ask the employee)
- Are human rights defenses raised
- Is there a contravention of a separate policy or collective agreement.
- Assess the impact of the termination/ the impact of retaining employees
- The cost of termination

#### *Appeals process*

Some employers want to build in a process for appeal. This has some advantages such as demonstrating the employer’s commitment to fairness, and it can serve as a safety valve to release or dissipate the anger of targeted employees. However, there are also some significant disadvantages to incorporating an internal process, which might include;

- It will add another step to the process,
- It can result in further delay,
- It can take the decision making out of the hands of the appropriate decision makers,
- It can result in multiple “hearings”,
- It may be difficult for witnesses, especially the complainant, to testify twice,
- It can require double the resources,
- It may provide potential grounds for appeal,

#### *Post investigation measures*

Employers can minimize their liability for an improper investigation and reduce the risk of future mistakes by adopting these post investigation procedures:

- Subject to safety considerations, provide the respondent to the investigation with a copy of the results and give them a chance to respond – conduct further interviews as required.
- Do not take action against an employee if the results are not clear. Consider investigating further.
- Only communicate information on a need to know basis.
- Depending on the outcome and the nature of the alleged misconduct it may be important to maintain confidentiality by keeping records of investigations separate from employee personnel files.
- Take steps to ensure that the misconduct does not happen again. Consider training if appropriate.

- Take steps to ensure that no retaliation is taken against the complainant, or anyone else who participated in the investigation.
- If a material mistake in an investigation is discovered after the completion of the investigation, consider reopening the investigation. The purpose of the investigation is to determine the truth.

*Investigation can be a defence.*

If an employee's complaint does lead to other legal action, it will be of assistance to show that a thorough and fair internal investigation was conducted. If you have not investigated a matter that suddenly is the subject of legal action, initiate an investigation immediately – a late investigation is a better defence than no investigation.

*The Rights of the Accused*

Do not forget the accused has rights and is innocent till proven guilty. They have a right to due process, fair treatment, and access to process consistent with natural justice. Do not forfeit these rights while trying to quickly conclude an investigation. The facts of the complaint can change dramatically, even 180 degrees, upon higher scrutiny.

## **Internal Investigations – Drug and Alcohol use/abuse**

Courts and Tribunals have recognized substance abuse (alcohol and drugs) as a “disability” for the purposes of human rights legislation. Where an employee's substance abuse can be said to be at the level of an addiction, the employee is entitled to invoke the protection of human rights legislation, and the employer is required to accommodate the employee to the point of undue hardship.

An investigation into alleged drug and/or alcohol abuse must conform to human rights requirements, as well as respect employee privacy rights.

Two issues commonly arise: First, in what circumstances can an employer, “test” for drug and alcohol use. Second, what types of searches can an employer engage in if it suspects impairment or drug/alcohol use at work.

An employer may be required to accommodate an employee that has a drug and or alcohol addiction. For the purposes of B.C.'s human rights legislation, drug and alcohol dependencies, whether perceived or real, fall within the meaning of disability under the *Code*. As such, employers have a legal obligation to accommodate those dependencies up to the point of undue hardship.

*Testing for Drug and Alcohol Use*

The Supreme Court of Canada has determined that in most cases, **mandatory** testing of drug and alcohol use of any kind, constitutes discrimination as it involves a preconceived perception that a disability exists. With the exception of cases where safety or risk is a serious issue and testing may be permissible, all other testing must be tied to an impairment that can be observed while at work. Some areas where requirements have been upheld are in the situations with airline pilots, bus drivers, and those employees who

drive or operate heavy-duty equipment, especially in underground mines. The courts deal with *drug* and *alcohol* testing very differently. This is in part because the testing for drug use is not scientifically accurate and therefore cannot be heavily relied upon to establish and impairment.

#### *Impaired at Work Situation*

If an employee is clearly impaired at work, management has both the right and the responsibility to manage, but bear in mind that alcohol and drug addiction should be treated as a disability. In other words, you have the right to engage in the rule of discipline for misconduct and inappropriate behaviour, but if you have information or evidence to suggest an addiction, assistance should be offered in the form of medical treatment, participation in recovery programs should be encouraged, and the employee should be given the appropriate time to recover. If there is an Employee Assistance Programme (“EAP”) the employee should be referred to it. With regards to alcoholism, denial of the alcoholism/disability and relapses are considered to be symptoms of the illness and therefore should not be subject to discipline. The question of how much time an employer must spend in assisting the addicted employee goes to the question of undue hardship for the employer.

#### *Duty to inquire*

It is a well established tenet of human rights law that, once an employer is on notice of a disability or anything that may lead to a reasonable understanding of a medical condition, they have a duty to inquire when any issue that may be related to the disability arises in the performance of job duties. An employer’s failure to make inquiries regarding the health of an employee before taking steps that adversely affect the employee’s employment situation, where the employer has a reason to suspect that a medical condition may be impacting the employee’s ability to work, has been found to be discriminatory in certain circumstances. Where an employer suspects that a disability (such as addiction) is impacting the employees performance the employer has a duty to inquire before taking steps that adversely affect the employees employment.

#### *Last chance agreements*

A last chance agreement is an agreement between an employee and the employer, (and possibly a union) wherein the employee agrees to certain terms and conditions with respect to workplace conduct – as a last chance to keeping their employment.

An issue that frequently arises in addiction cases is whether a “last chance agreement” which the employee entered into as a result of previous drug or alcohol related infractions is consistent with human rights legislation. In such cases, the adjudicator is generally required to assess whether the employer’s actions, including the opportunity afforded the employee in the last chance agreement itself, constituted accommodation to the point of undue hardship. The Tribunal has considered "last chance agreements" that allow for immediate termination if an employee fails an alcohol or drug test after having gone through a rehabilitation program. It was the Tribunal's opinion that these agreements are unenforceable because each case needs to be analyzed separately to determine whether it is impossible for the employer to accommodate the needs of the employee to the point of

undue hardship. A last chance agreement cannot serve to nullify the duty of accommodation established under human rights legislation

## Internal Investigations – Sexual Harassment Complaints

As a subject of an internal investigation, sexual harassment has some special characteristics:

- The enhanced need for confidentiality,
- The need to safeguard against retaliation, and
- Training and policy issues.

Decisive employer action against sexual harassment has three components:

- Preventative action,
- Investigative action, and
- Remedial action.

### *Preventing Sexual Harassment*

Under the BC Human Rights Code, sexual harassment is protected under the ground of sex.

Prevention of sexual harassment in the workplace begins with:

- Development and dissemination of a written policy against sexual harassment,
- Effective communication of this policy to all employees, including managerial employees,
- Formal training of all employees on the various forms of sexual harassment, to the can reasonably be expected to comply with policies,

Prevention also includes visible management enforcement of policies including:

- Development of a confidential, widely publicized means of reporting sexual harassment,
- Prompt, thorough and discreet investigation of sexual harassment complaints,
- Prompt, appropriate corrective when it is determined that sexual harassment has occurred.

### *Development and Dissemination of a Written Policy*

The importance of a written sexual harassment policy cannot be overemphasized. An employer should provide any training necessary to ensure the employees understand what constitutes sexual harassment and that sexual harassment will not be tolerated in the workplace. In addition, the employer should ensure that the steps that need to be followed to file a complaint under the policy are clear, simple and understood by the employees.

The existence of a policy, as well as the education of employees not only reduces the occurrence of sexual harassment complaints, but also assists employers in mitigating any liability against sexual harassment allegations brought by one of its employees.

#### *Effective Communication of Policy*

To be effective, the policy must be communicated to all members of the workforce. This may be done by posting the policy around the workplace, distributing the policy, or including it with other types of employee information, such as the employee orientation handbook. Some employers require employees to sign acknowledgments that they have read and understood the policy. These acknowledgments are then placed in the personnel files and can be used as evidence that an alleged harasser was aware of the policy and the consequences for violation. This can also be used to prove the Complainant was aware of the employer's complaint and investigation procedures, and becomes useful as a defence in situations where the employer is not informed of the sexual harassment until it is formally served with legal papers.

#### *Prompt, Thorough, and Discreet Investigation of Sexual Harassment Complaints*

The employer's policy prohibiting should have an effective complaint procedure which encourages use. A number of people should be named as people that the harassment can be reported to. This is in case the person that the report is to be made to is the harasser. A specific department, position or person should be designated to handle complaints. An alternate should also be available in case the complainant does not feel safe" with the first option. The complaint procedure should include a clear message that exercising the right to complain will not result in retaliation against an employee.

Once a human rights complaint has been filed with the Tribunal, the BC Human Rights Code (Section 43) makes it a separate offense for a person to threaten, intimidate or discriminate against an individual because that individual made a complaint, or gave evidence, or assisted in any way with the initiation or prosecution of the complaint.

An employer's duty to investigate a complaint of sexual harassment is an affirmative duty which arises whether the complaint is made formally or informally and whether or not the complainant has agreed to the investigation. Further, even if no complaint is actually received, an employer has a duty to take action where it either knows, or ought reasonably to have known about the harassment.

If a complaint is received, the employer has a duty to investigate the complaint promptly, thoroughly and in a discreet and fair manner.

#### *Goals of the Investigation*

If the investigations are conducted thoroughly and carefully, favourable results include:

- Factual determination as to whether sexual harassment in fact occurred,
- Set the stage for related employment decisions,
- Reduce damages and other related consequences to the Complainant,

- Protect others from potential sexual harassment,
- Set the stage for defence to litigation.

If investigations are not conducted carefully, negative consequences could result, such as:

- Failure to identify a meritorious claim,
- Failure to take prompt, corrective action,
- Failure to identify false complaints which could lead to employer liability for wrongful discipline of the alleged harasser,
- Failure to protect others from potential sexual harassment,
- Failure to set up a successful defence in the event of future litigation,
- Open the door to possible litigation based on intentional or negligent investigation leading to infliction of emotional distress.

During the investigation the employer should take interim corrective action to prevent continuing harassment while the investigation proceeds. Such interim corrective action might include non-disciplinary leaves of absence for either or both the Complainant and the alleged harasser, or temporary transfers aimed at separating the parties until the investigation is complete. The interim action should not appear to punish the Complainant. The Complainant should not be transferred against their will. To do so might be seen as punishing the complainant for having filed a complaint.

It is critical that the investigator approach the matter objectively, without bias or perceived bias. The test for the existence or non-existence of a reasonable apprehension of bias has been defined by the Supreme Court of Canada as: [w]hether an informed person viewing the matter realistically and practically and having thought the matter through would conclude that the decision maker had not intention of considering the submission/information put before [them].” *Save Richmond Farmland Society v. Richmond (Township)* (20 December, 1990), Vancouver Registry CA011049 (B.C.C.A.)

*Questions that a sexual harassment investigation should answer include:*

- What happened?
- Who was the alleged harasser?
- Where did the incident occur?
- When did the incident occur?
- How were the complainant and the complainant’s work affected?
- Can any witnesses be identified?
- Was the incident limited to one instance or was it continuing in nature?
- How did the complainant react?
- Did the complaint discuss or report the incident to anyone else?

*Interviewing the Complainant*

During the initial interview with the complainant, the goal is to determine the details of the incident. In the event that the complainant is reluctant or unwilling to divulge names or details of the alleged harassment, the investigator should work with available information to the extent possible. The investigator should note complainant's failure to cooperate since it may help define the reasonableness of the employer's response.

#### *Interviewing the Alleged Harasser*

During the initial interview with the alleged harasser, the goal is either to corroborate as much of the complainant's information as possible or to obtain as much differing information as possible. If the alleged harasser alleges that the conduct was welcomed, or that the complaint was made for an improper motive or in bad faith, those assertions should be investigated.

#### *Interviewing Witnesses*

If the alleged harasser denies the allegations, the importance of the information from witnesses increases.

#### *Making a Determination*

In attempting to make a determination of the facts, the investigator should consider not only the facts as they've been presented. Are they based on first hand knowledge, or rumor and gossip? The credibility and motives of the parties should also be weighed.

The investigator should organize the record of the investigation, summarize it and draw conclusions based on the record. Whether or not sexual harassment was in fact found to have occurred, the record should demonstrate the efforts the investigator made, and reflect that the employer's response was well founded.

In order to avoid claims of retaliation in the future, it may be wise to keep copies of the results of investigation apart from the regular personnel file and in a separately secure file.

#### *Prompt, Corrective Action*

Once the investigation is concluded, the employer should decide upon a course of action. The first step is to inform the principal parties of the results. If the employer determines that sexual harassment has occurred, corrective action may be warranted. Discipline may include oral and written warnings, suspensions, terminations, or demotions. The employer's duty is to make sure the sexual harassment has stopped.

If the employer determines the allegations were made for improper purposes or in bad faith, the employer must determine whether and what type of discipline would be appropriate for the complainant.

#### *Inconclusive Investigations*

Sometimes the employer is unable to determine whether or not sexual harassment occurred. Where no clear determination can be made the principal parties should be so advised. This should be done in a neutral manner. Both parties should be advised that

sexual harassment, retaliation and reprisals are unlawful and that the employer will protect the complainant, as well as others, from such conduct.

The complainant should be reminded that future incidents of sexual harassment must be reported and that the employer will treat each complaint with the same seriousness as it treated the first complaint.

Employers should provide employees with a refresher session on sexual harassment, whereby the employer reviews the policy and reiterates that sexual harassment will not be tolerated in the workplace. It is not advisable to communicate the specifics of any particular harassment complaint because there is no way to control how that information will be communicated.

#### *Conclusive Investigations – When Sexual Harassment Has Not Occurred*

When it is determined that sexual harassment has not occurred, it is best to take a neutral approach with both employees and to discuss why the conclusion was drawn. Emphasize that the investigation results are based on the evidence as presented.

#### *Conclusive Investigations – When Sexual Harassment Has Occurred*

When it is determined that sexual harassment has occurred, the employer has a duty take prompt and corrective action. Whether the incident was minor or egregious, the alleged the harasser must be disciplined. Discipline can range from a warning to dismissal. The complainant should be told of the results of the investigation, that appropriate action is being taken against the harasser, and the importance of reporting future incidents of sexual harassment or retaliation.

#### *Discipline*

While it is imperative to discipline an employee who was found to have engaged in sexual harassment, the severity of the discipline must be appropriate to the violation. Several factors should be considered including:

- The seriousness of the conduct, including what occurred, the length of time over which it occurred, and the complainant's response,
- The harasser's employment record,
- Whether or not the harasser was aware of the employer's sexual harassment policy,
- Whether or not the victim told the harasser to stop,
- Whether or not discipline was imposed on any previous sexual harassment cases,
- Whether or not there are any policies or procedures or agreements (collective agreement) relating to progressive discipline,
- The impact of any decision on other employees.

The discipline should be documented, to aid consistency and for defence to potential litigation.

If discipline does not include termination, the employer should monitor the situation to be certain that no further harassment occurs and that the complainant is not subjected to reprisals or retaliation.

### **Sexual Harassment Defined**

It is settled law that sexual harassment is sex discrimination: *Janzen v. Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.). In *Janzen*, the Supreme Court of Canada provided a non-exhaustive definition of sexual harassment:

Sexual harassment is a form of sexual discrimination: *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] S.C.J. No. 41 (Q.L.). Sexual harassment has been broadly defined by the Supreme Court of Canada: ...as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment. It is...an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it.... (*Janzen* at para. 56).

...Sexual harassment is any sexually-oriented practice that endangers an individual's continued employment, negatively affects his/her work performance, or undermines his/her sense of personal dignity...

...Harassment behaviour may manifest itself blatantly in forms such as leering, grabbing, and even sexual assault. More subtle forms of sexual harassment may include innuendos, and propositions for dates or sexual favours.... (*Janzen* at para. 49)

The Supreme Court of Canada went on to say:

...Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee fail to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity. This form of harassment, in which the victim suffers concrete economic loss for failing to submit to sexual demands, is simply one manifestation of sexual harassment, albeit a particularly blatant and ugly one. Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour (*Janzen* at para. 52).

Harassment may be blatant or may be more subtle, taking the form of sexual innuendos (*Janzen* at para. 49). The Court went on to say that "[s]exual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure ... inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour (*Janzen* at para. 52).

As stated in *Willis v. Blencoe*, 2001 BCHRT 12 (para. 58), a complainant is not required to establish that she expressly objected to the conduct.

To constitute sexual harassment, the conduct must be unwelcome. The burden rests with the Complainant to establish the conduct was unwelcome. In *Mahmoodi v. University of British Columbia*, [1999] B.C.H.R.T.D. No. 52 (Q.L.), the Tribunal held that the test for establishing whether the alleged conduct was unwelcome is an objective one. (para. 141) In *Dupuis v. British Columbia (Minister of Forests)*, [1993] B.C.C.H.R.D. No. 43 (Q.L.), the Council held that “[h]uman rights legislation does not prohibit social or sexual contact between management and employees”. (at para. 40)

In *Wollstonecroft v. Crellin* [2000] BCHRTD No. 37 2000 BCHRT 37 it was noted that,

In my opinion, discussions of sexual topics is sexual conduct within the meaning of the Code.

From *Huhn v. Joey’s Only Seafood Restaurant*, 2002 BCHRT 18

There is no absolute prohibition against sexual bantering in the workplace; what must be determined is whether or not the bantering is unwelcome: *Bell v. Ladas and the Flaming Steer Steakhouse* (1980), 1 C.H.R.R. D/155 (Ont. Bd. (Inq.) at D/156: One must be cautious that the law not inhibit normal social contact between management and employees. It is not abnormal, nor should it be prohibited, activity for a supervisor to become socially involved with an employee...The danger or the evil that is to be avoided is coerced or compelled social contact.

An overt expression of objection is not necessary to establish that certain conduct was unwelcome: *Bates v. City Copy Centre Ltd.* (16 March 1995, unreported decision, B.C.C.H.R.). While the objection may be explicit or implicit, verbal or non-verbal, there must be evidence from which it is reasonable to conclude that a reasonable person would have recognized that the conduct was unwelcome in the circumstances: *Shouldice v. Stevens* (20 May 1999, unreported decision, B.C.H.R.T.).

In *Stewart v. Samuels et al.*, 2001 BCHRT 18, the Tribunal quoted with approval the following statement:

...Several factors are relevant in evaluating the limits of “reasonable” social interaction, including the nature of the conduct at issue, the workplace environment, the pattern and type of prior personal interaction between the parties, and whether an objection or complaint has been made (para. 51).

It was stated in *Algor v. Alcan and others (No. 2)*, 2006 BCHRT 200

In *Broadfield [v. De Havilland/Boeing of Canada Ltd. (1993) 19 C.H.R. R. D/347 (B.C.)]* the Board said that an employer must take effective action to address the harassment, including communicating what steps were taken to the victim of the harassment. Although, Ms. Algor met with Ms. Henriksen and Ms. Prett and they advised her of the findings in the report, they had no authority to take action pursuant the report and there is no evidence that they told Ms. Algor about the steps taken by Mr. Thomson. [Algor para 262]

In *Broadfield [v. De Havilland/Boeing of Canada Ltd. (1993) 19 C.H.R. R. D/347 (B.C.)]* the Board of Inquiry found the employer liable who failed to take prompt

and effective action to address the problems in the workplace and failed to stand by the complainant and “give the clear indication that harassment of her would not be tolerated” (para. 49). An employer may be liable if it fails to take appropriate and effective steps to address the harassment and that failure results in a worsening of the workplace environment: *Burton v. Chalifour Bros. Construction Ltd.* (1994), 21 C.H.R.R. D/501 (B.C.C.H.R.) at para. 36. [Algor 189]

### *Sexual Assault*

Sexual assault is not distinct from sexual harassment, but is more appropriately seen as a form of sexual harassment. *Stefureak v. Teligence Communications and Kilgour*, 2005 BCHRT 273

What is sexual assault? In Canada, sexual assault is the legal term used to refer to any form of sexual contact without voluntary consent. Consent obtained by force through pressure, coercion, force, or threats of force is not voluntary consent.

What is consent? Under §273.1 of Canada's Criminal Code and in reference to sexual assaults, "consent" refers to:

- the voluntary agreement of the complainant to engage in the sexual activity in question.

Consent is not given if:

- It is given by someone else;
  - The person is unconscious, drunk, stoned, or sleeping;
  - It is an abuse of power, trust, or authority;
  - The person does not say yes, says no, or through words or behavior implies no; or
  - The person changes her or his mind.
- AGE MAY INVALIDTE CONSENT (16)

## **Tribunal Remedies**

Section 37(2)(d)(iii) authorizes the Tribunal to award compensation for injury to dignity, feelings and/or self-respect resulting from the discrimination. Tribunals consider a number of factors in determining an appropriate award when sexual harassment has been proven, including the nature of the harassment, the degree of aggressiveness involved, its frequency and duration, the age and vulnerability of the victim, and the psychological impact on the victim: *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 (Ont. Trib.). Also relevant are the steps taken by the Respondent once it became aware of the harassment.

The Tribunal has adopted the following factors from *Torres v. Royalty Kitchenware Ltd.* (1982), 3 C.H.R.R. D/858 at D/873 (Ont. Trib.) when awarding damages for injury to dignity, feelings and self respect in cases of sexual harassment:

- (i) The nature of the harassment; i.e. is it physical as well as verbal;
- (ii) The degree of aggressiveness and physical contact in the harassment;
- (iii) The ongoing nature, or time period of the harassment;
- (iv) The frequency of the harassment;
- (v) The age of the victim;
- (vi) The vulnerability of the victim; and
- (vii) The psychological impact of harassment upon the victim. (at para. 7758, see also *Tannis v. Calvary Publishing Corp.* 2000, BCHRT 47).

Specific cases,

*Gill v. Grammy's Place Restaurant and Bakery Ltd.*, 2003 BCHRT 88

Ongoing sexual harassment (touching)

Physical "attack" and proposition

Sexual comments/conversations

Failure to prevent customers grabbing

Fired for not acquiescing, and rumours spread re affair with co-worker

\$10,000 I2D Lost wages Expenses. (2004 Dollars – Award likely \$20k today)

*Harrison v. Nixon Safety Consulting and others (No. 3)*, 2008 BCHRT 462 Mr. Ford sexually harassed her in the course of her employment at the Lofts. Con-Forte's representative failed to deal with the harassment when he learned of it. NSC, at the indirect urging of Navigator, terminated her employment soon after she complained about the harassment. All the respondents, therefore discriminated against her and share joint and severable liability for that discrimination.

12D \$15k, \$3k costs for late R disclosure, \$14k loss of wages, Joint and Several Liability.

*Behm v. 6-4-1 Holdings and others*, 2008 BCHRT 286 Three incidents of sexual harassment as ... touched buttocks, hugging. \$5000.00 I2D - C&D - Wages.

*Kwan v. Marzara and another*, 2007 BCHRT 387 C started at new job and boss hugged and kissed her to welcome her, made several comments re wanting relationship despite having boyfriend. Complainant told Respondent repeatedly she felt uncomfortable with his conduct. \$5000.00 I2D - C&D - Wages.