

Five Reasons to Retain External Legal Counsel to Conduct Workplace Investigations

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Uber Fires 20 Amid Investigation Into Workplace Culture - New York Times[1]

P.E.I. widow awarded benefits after husband's death linked to workplace bullying - CBC[2]

CBC inquiry concludes management mishandled Jian Ghomeshi - CBC[3]

Words such as harassment, bullying, and sexual harassment are fast becoming a staple of workplace vernacular and, with headlines like those above, it's really no surprise. The unfortunate reality is that inappropriate behaviours such as harassment and bullying do occur in the workplace, creating challenges for employers in even the most simple and straightforward cases.



But what's changed? Why the press?

In addition to an increasing comprehension of the impact that such toxic behaviours have on the parties involved and the workplace as a whole, provinces like Manitoba have legislation (such as *The Human Rights Code* and *The Workplace Safety and Health Act*) which specifically target those behaviours. As a result, not only does harassment and bullying impact the health of workplaces and therefore an employer's productivity, those behaviours expose employers to legal liability, which can be both embarrassing and expensive.

As a result, employers cannot ignore such behaviours in hopes that they will go away or work themselves out. As the headlines bear out, the negative impact of failing to deal with these behaviours in the correct manner is just too large to ignore.

So what's an employer to do?

There are many steps that an employer can take to minimize the risk associated with workplace bullying and harassment, such as the creation of anti-bullying, harassment and

discrimination policies. However, those policies are worth little more than the paper they are written on - unless an employer is willing to properly enforce them by conducting a thorough investigation into issues raised and, when appropriate, disciplinary and/or other remedial actions.

In fact, a thorough and proper investigation is really the foundation for the creation of a safe and healthy work environment. However, it also represents a legal minefield for employers, as employer action (or inaction) without proper foundation undoubtedly exposes employers to legal liability.

As a result, when faced with allegations of bullying or harassment in the workplace, the necessary starting point for any employer is to ensure that an unbiased, accurate, fair and reasonable investigation is conducted into any such allegations. Put another way, employers need to build a solid foundation from which to base their next step.

While many employers are able to perform such investigations internally, the reality is that even where an employer has the capacity to do so, there are still very real and significant disadvantages in doing so. In fact, given the increased legal and reputational exposure employers now face when confronted with allegations of bullying and harassment, it's becoming increasingly common and advantageous to retain external legal counsel to conduct such investigations in order to build that solid foundation for employers.

While these advantages are many, here are five reasons why employers ought to retain external legal counsel to conduct workplace investigations:

1. **Experience** - Lawyers (and particularly those who practice in the field of labour and employment) have extensive experience with weighing evidence, assessing credibility, and reaching defensible conclusions, all within the context of the current state of the law.
2. **Neutrality** - By retaining external legal counsel to investigate, employers avoid allegations of bias or bad faith, as the external legal counsel will be viewed as a neutral party without any pre-conceived notions about who's "right" or "wrong". As a corollary, by retaining external legal counsel, employers obtain a degree of separation from the conclusion(s) reached and as such, unions or employees should be less inclined to allege bias or bad faith.
3. **Avoiding Conflicts** - Employers often have pre-existing legal counsel they have grown to trust. However, should those individuals be retained as an investigator, they will be conflicted out of representing the employer further on the same matter, should it proceed to arbitration/litigation. As a result, by retaining *different* legal counsel to investigate the matter, employers ensure that their usual counsel may continue to represent them, who can then rely on a professional investigation completed by lawyers who have anticipated their needs.
4. **Resources** - When investigations are conducted internally by employers, the reality is that the investigation often represents an additional task or duty on top of what is likely an already heavy workload. The practical result is that employees tasked with the investigation are often not able to devote the necessary time to conduct a thorough investigation, which can easily take up to 25 hours for just a basic investigation.
5. **Cost Savings** - How can retaining a lawyer to conduct an investigation be a cost saving measure?

Given the specific training, experience and abilities of legal counsel to conduct an investigation, the reality is that lawyers should produce a thorough and accurate report. This, in turn, decreases not only the likelihood of any litigation arising, but the length of any such litigation. In other words, an ounce of prevention is worth a pound of cure.

The bottom line is that while no one wants to incur the cost of retaining a lawyer to conduct an investigation, and while not every situation warrants it, there are very real and distinct advantages to doing so.

Moreover, where the consequences of failing to properly investigate allegations of employee misconduct are becoming so large, including the possibility of damages being awarded against employers, employers may no longer be able to afford *not* to retain a lawyer.

Rob and Scott are TDS LLP Partners practising in labour and employment law, who also conduct workplace investigations. Rob and Scott are happy to assist with any needs you may have in these areas.

[1] *Uber Fires 20 Amid Investigation Into Workplace Culture*,
<https://www.nytimes.com/2017/06/06/technology/uber-fired.html>

[2] *P.E.I. widow awarded benefits after husband's death linked to workplace bullying*,
<http://www.cbc.ca/news/canada/prince-edward-island/pei-workplace-bullying-harassment-workers-compensation-board-lisa-eric-donovan-1.3959704>

[3] *CBC inquiry concludes management mishandled Jian Ghomeshi*,
<http://www.cbc.ca/news/cbc-inquiry-concludes-management-mishandled-jian-ghomeshi-1.3035574>

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