

ONTARIO LABOUR RELATIONS BOARD COMMENTS ON APPROPRIATE WORKPLACE INVESTIGATORS

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Employer discretion in managing the process through which workplace harassment and violence allegations are investigated can be crucial to ensuring that employers can manage costs and limit workplace interruption while adhering to legal obligations and ensuring that such incidents are addressed with appropriate severity.

The Ontario Labour Relations Board (“**Board**”) has now confirmed that employers have broad discretion in choosing workplace investigators to investigate complaints under the *Occupational Health and Safety Act* (“**OHSA**”). In *Erin MacKenzie v Orkestra SCS Inc.*, the applicant employee argued that the workplace investigators appointed by the employer to investigate her harassment complaint were not qualified for the job. The Board dismissed the application and found that the employee was required to let the investigation run its course before alleging the investigators were inadequate.

Background

Ms. MacKenzie was Orkestra SCS’ General Counsel and CFO. After the employer gave her six months’ notice of termination, she made a formal harassment complaint regarding conduct of the CEO.

In accordance with its obligation under the OHSA to “ensure that an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances”,^[1] the employer appointed an investigator to respond to the complaint. However, the employee complained that the first appointed investigator was not qualified and had a conflict of interest because the investigator had to contract with and report to the employer to provide services. In response, the employer appointed a different investigator. However, Ms. MacKenzie took issue with this second investigator as well, alleging that the second investigator was not qualified, particularly because they were a second-year lawyer who had no demonstrated experience as a workplace investigator. She refused to participate in the investigation on this basis.

In her application to the Board, Ms. MacKenzie argued that the employer demonstrated an inability to appoint an adequate investigator, in breach of its obligations under the OHSA. She asked the Board to appoint a new investigator with the appropriate training and experience.

Discussion

In refusing the employee's request, the Board found that an employee's allegation that their employer has failed to conduct an investigation that is "appropriate in the circumstances" usually cannot be made pre-emptively. An employee should let the investigation run its course and can then raise concrete examples of what rendered the investigation inappropriate once the investigation is complete.

The Board also confirmed that the OHSA does not require individuals who conduct workplace investigations to have any specific qualifications. While people with experience in human resources or law often conduct workplace investigations, such experience is not required. In this regard, Ms. MacKenzie's argument that a second-year lawyer was incapable of conducting an appropriate investigation was simply her opinion, with no evidence of support.

Finally, the Board noted that while not applicable in this case, employers should be aware that the mere fact that a worker is no longer present in the workplace after having raised a health and safety complaint does not necessarily mean that the issue the employee raised is moot. It may nonetheless be incumbent upon an employer to address the concern raised if it could affect the health and safety of those who remain in the workplace.

Key Takeaways for Employers

The Board's decision demonstrates that Ontario employers have broad discretion in how they choose workplace investigators. Employees are generally required participate in the investigation, even if they believe the investigator is inadequate.

However, employers should still follow best practices in choosing workplace investigators to reduce the risk of an employee raising a complaint after the investigation concludes. In this regard, while the OHSA does not require any particular qualifications, employers should ensure workplace investigators have the appropriate knowledge and experience to conduct a thorough investigation in the circumstances. Investigators should also be independent. Employers should consider whether any pre-existing relationships could affect the investigator's ability to conduct an impartial investigation. In some cases, a third party investigator may be most appropriate.

To learn more, contact a member of McMillan's [Employment and Labour Relations Group](#).

[1] [Occupational Health and Safety Act](#), RSO 1990, c O1, s 32.0.7(1)(a).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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