



Human Rights and Equity: Frequently Asked Questions

Human Rights Investigations: Nothing but the Truth?

This FAQ document is intended to provide an overview of human rights investigations in the workplace. Please contact your Bargaining Unit Human Rights and Equity Representative, Bargaining Unit President or Labour Relations Officer for specific information, guidance and support.

What is a human rights investigation?

These investigations are initiated by employers where there has been a complaint alleging harassment based on a prohibited ground of discrimination under the Ontario *Human Rights Code* such as sex, age, race, creed, disability or sexual orientation. Most employers have an internal discrimination and harassment policy which governs how the claims will be handled including the investigation itself. The policy will outline the investigation process setting out the steps of the procedure as well as who will be conducting the investigation. Some policies allow for the use of external investigators in certain circumstances.

What is the purpose of a human rights investigation?

The investigation is intended to provide the employer with a basis to take managerial action, to resolve internal matters in a cost effective manner and to limit liability. It is an established principle in human rights case law that the employer must actively turn its mind to the human rights issues. The employer has to show it took active steps to address discrimination or harassment that they knew or ought to have known about.

It is most often the case that a grievance has been filed and is held in abeyance pending the result of the employer's investigation.

Stepping inside the investigation

The investigator's first impression will be shaped by the following documents – the written complaint, the written response, the documentary evidence such as patient files as well as background information such as employment files and employer policies.

Investigator's assessment of credibility

It is often the case in harassment complaints that there are no witnesses or objective evidence. This can be a "he said, she said" situation. The investigator will have to make an assessment of credibility in order to move past this impasse. The investigator should be looking to see if the story is internally consistent, whether there are memory gaps and if the person is forthright in their answers.

Union priorities in the investigation

Provide separate union representation in the case where the complainant and the respondent are both ONA members. This will ensure that each member will have full opportunity to tell their story and to be given union advice and support during the investigation process.

If the complainant and respondent work in the same unit, note whether the Unit Manager has assigned them to work on different shifts. If they have not been separated, approach HR or the Manager and ask that this be done.

Watch for procedural fairness. Become very familiar with the employer's internal discrimination and harassment policy. The protocol for the investigation should be coming from this policy and those protocols should be followed. Careful monitoring of the process by the Union representatives will put the Union in a position to evaluate the findings of the investigation and to challenge the process if necessary.

The Union representative attending the interviews with the complainant or respondent has a critical role to play in monitoring the process and supporting the member. He or she will be monitoring whether the investigator is allowing the member to fully tell their story, if the respondent has been given written particulars, and if the investigator is attentive, taking notes and asking appropriate questions.

The written record

As the Union representative, do not rely on the investigator's notes. Record both questions and answers. Ask questions at the end of the interview. Take note of any missteps made by the investigator. All of this may be presented as evidence if the grievance proceeds to arbitration.

A caution about respondents

Respondents are often upset and angry. Remember that anger and frustration are not equivalent to guilt. Defending against false allegations can produce strong emotions in an individual. Findings of harassment or discrimination must be made on an assessment of all of the facts.

Is the Union entitled to the investigator's report?

This will depend on the employer's policy. Most employers will offer executive summaries. If the conclusion of the investigation is unacceptable to the Union the matter may proceed to arbitration. If the employer is relying on the report to defend its actions the Union will obtain an order from the arbitrator to access the report.

How will the Union evaluate the report?

Was the investigation process fair and complete? In the Union's view, if the investigation lacked due process it will question the conclusions reached. The Union's next step will be to assess the case on its merits and decide to whether it should proceed to arbitration.

Part of the Union's assessment will be to question whether the investigator made findings of credibility. It is quite often the case, unfortunately, that the investigator has not been willing or experienced enough as an investigator to move past the impasse of the "he said, she said" fact situation.

Even where the Union believes the conclusion is reasonable, it will assess whether the recommendations are consistent with the evidence.

What should I do if I want to file a complaint or a complaint is made against me?

The most important thing is to keep detailed records and to contact your Bargaining Unit Human Rights and Equity Representative or Bargaining Unit President for specific information, guidance and support.

As the complainant or respondent, record detailed notes of each incident with the date, time, what happened, the names of witnesses and how it made you feel. Keep copies of any relevant notes, memos and emails. It is easy to forget details after the event and such a record will help you when seeking advice on whether to make a complaint, in formulating the complaint and in giving your account during the investigation and any subsequent arbitration hearing.

What happens if I am not satisfied with the outcome of the investigation?

You should discuss this with your Bargaining Unit Human Rights and Equity Representative, Bargaining Unit President or, if you are the Union representative, contact your Labour Relations Officer.

Where can I get more information and resources that can help?

- *Workplace Violence and Harassment: A Guide for ONA Members*, found at www.ona.org.
- *Human Rights and Equity: A Guide for ONA Members*.
- ONA presentation, "Human Rights Investigations: Nothing but the Truth?" (at www.ona.org under "Human Rights and Equity/Teleconnects").
- ONA presentation, "Personal Harassment and the Law" (at www.ona.org under "Human Rights and Equity/Teleconnects").
- ONA presentation, "Bullying in the Nursing Workplace" (at www.ona.org under "Human Rights and Equity/Teleconnects").
- Ontario *Human Rights Code*, Sections 5, 7 and 10.
- ONA collective agreement, anti-discrimination and harassment provisions.
- *Occupational Health and Safety Act*, Section 32.
- Employer's Workplace Harassment Policy and Procedures; Human Rights Policy and Procedures.