

# Evidence Collection: Practical Tips for Workplace Investigations

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## Overview

Workplace investigations have become commonplace across Canada. Many Canadian jurisdictions require that employers implement workplace harassment and discrimination policies, which often include mandatory investigation provisions. Whether or not investigations are legally mandated, it is sound practice for an employer to conduct an investigation when there may be potential workplace harassment, human rights violations, breach of company policy, criminal activity, security breaches, legal action, or media scrutiny.

A fair and reasonable investigation can provide a defense for employers to assist in future litigation and/or human rights complaints.<sup>1</sup> Beyond legalities, investigations can also assist employers in identifying and resolving workplace issues, helping them to create a more productive and healthy working environment. For all of these reasons, workplace investigations provide an important function in today's workplace. However, an investigation will only be useful if it is conducted in a fair and reasonable way.

Collecting the evidence is a fundamental step in conducting a fair investigation. Evidence may include witness statements, video surveillance, supporting documents (emails, letters, phone records, time sheets, text messages, photographs) and any other useful information regarding the relevant issues. While many witnesses may participate in good faith, people's memories are not always reliable, and co-workers may share stories before an interview which could taint recollections. Further, not all witnesses will participate in good faith, resulting in dishonest and/or inaccurate witness statements on some occasions. Because of witness unreliability, workplace investigators should adequately instruct witnesses on confidentiality, while also making best efforts to collect and to preserve supporting documents when available. Following proper processes will assist investigators in ensuring that they have met the good faith standard as required to conduct and complete workplace investigations. This article will highlight important considerations in collecting and preserving evidence when conducting a workplace investigation.

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<sup>1</sup> See for instance: *Morgan v. University of Waterloo*, 2013 HRTO 1644 (CanLII) where the HRTO held that the university's response to the complaint was "reasonable" and that the university had met its duty to investigate the circumstances; therefore, the award for damages came from the individual respondent only (and not the university). In this regard, a reasonable response and proper investigation can vitiate liability even in a circumstance where there is a finding that workplace harassment occurred.

## Confidentiality

Confidentiality is important for all workplace investigations to maintain the privacy of the parties and to minimize workplace disruption. Beyond these sound policy reasons, confidentiality is required for the preservation and integrity of witness evidence. When witnesses collaborate or share stories immediately prior to investigation meetings, memories can become skewed or tainted. In fact, it could be a red flag when two witnesses share remarkably similar and specific details. In light of this, investigators should always remind all participants of confidentiality throughout the investigation process and may also consider asking witnesses if they have discussed the events in question with co-workers prior to the investigation meetings. This will help the investigator gauge the reliability of the evidence.

In order to best maintain privacy, investigators should consider adopting these procedural steps:

- **Confidential Location for Interviews:** Selecting a private and confidential location for interviews is of utmost importance. In some cases, there may be private boardrooms and/or human resource offices set apart from the regular office that can be used for interviews. If this is not the case, investigators should consider using offsite locations (like the third-party investigator's office, hotel board rooms or other private office rental spaces). Private interview space allows participants to feel fully comfortable to share and talk; it also ensures that others will not see who is participating and/or overhear details.
- **Advising Parties of Confidentiality from the Outset:** When contacting any party or witness, the investigator should always remind them of confidentiality, explaining that it is important to maintain the integrity of the process that the individuals do not discuss the investigation details with anyone.
- **Written Confirmation:** After scheduling an investigation meeting, the investigator should consider sending written confirmation (via email or mail) that sets out the meeting details, and provides a clear and specific reminder to keep the matter confidential (including advising the participant to not share with co-workers that they are participating in the investigation).

- **Reminder During Interview:** At the beginning and end of the investigation interview, the investigator should remind all witnesses/parties about the importance of confidentiality (including an explanation that it is required to maintain the integrity of the process and that the interview should not be discussed with any co-workers).

While it will be impossible for an investigator to control the conduct of all participants in every investigation process, the above steps should help minimize confidentiality breaches when possible.

## Documentary Evidence

Witness recollections can be inaccurate for various reasons. In light of this, when collecting evidence, the investigator should consider what other documents may exist to help build the chronology of events. In some cases, there may not be ancillary documents relating to the incidents in question; however, in other cases numerous documents may exist that can either corroborate or discredit witness statements.

The following case study will be used to provide examples below. Bob (the complainant) alleges that his manager Jane (the respondent) engaged in workplace harassment and sexual harassment against him. Bob specifically alleges that Jane made inappropriate flirtations at the company holiday party as well as a media event, and that she often calls him late at night to talk (and gets angry if he does not answer) and singles him out in the workplace. The following is a list of example documents that the investigator may request in this case:

- Bob (the complainant) alleges that Jane calls him late at night. The investigator might request that Bob provide his mobile records to help demonstrate the exact times and frequency of these alleged calls.
- Jane (the respondent) states that Bob (the complainant) engaged in a mutually flirtatious relationship, and that Bob often sent flirtatious text messages. The investigator should request a copy of the text messages to determine the nature of the messages and to have the opportunity to present them to Bob (the complainant) for comment.

- A witness provides evidence that he attended a lunch meeting with Bob and Jane a few months ago where Jane touched Bob’s shoulder inappropriately. The witness recalls paying for the lunch and leaving quickly as he felt flustered. The investigator may consider asking for the bill and/or redacted credit card statement to secure the date and location of the lunch meeting.
- A second witness provides evidence that she shared an Uber with Bob and Jane after the company holiday party, where Jane was intoxicated and Bob said he would help her home. The investigator should consider requesting the Uber receipt to determine the timing and locations of this Uber ride.
- A third witness provides evidence that Jane sent out a last minute meeting invitation for Bob’s birthday where she bought a large birthday cake for him and made a speech stating how “hot” Bob was. The witness noted that Jane had never bought anyone else on the team a birthday cake. The investigator might consider requesting a copy of the meeting invite.

As can be seen by this example, many types of documents which could help the investigator build a chronology of events based on various forms of evidence (not witness statements alone).

Below is a list of documentary evidence that investigators may consider collecting if relevant to the investigation:

- Office/computer calendars
- Meeting invitations
- Emails
- Group chat messages
- Text messages
- Letters
- Contracts
- Notes
- Phone records
- Work schedules
- Photographs
- Videos/video surveillance

- GPS trackers (on workplace vehicles)
- Receipts/bills/invoices
- Credit card statements (redacted if appropriate)
- Tickets
- Guest lists

The above list is meant to provide examples, and is not exhaustive. The investigator should determine which documents may be relevant and/or appropriate to request on a case-by-case basis. While some documents may be private (like credit card invoices or text messages), parties/witnesses may be forthcoming to disclose such documents when requested in order to support their story. On other occasions, the employer may have direct access to work-related documents (such as emails, calendars, work schedules, company phone records, etc.). Investigators should think critically to determine which secondary documents may provide insight into the events in question. Investigators should also consider balancing privacy rights with the importance and scope of the investigation. For example, a fraud or theft investigation may require far more significant efforts relating to forensic evidences than a harassment investigation with less serious allegations. A case-by-case determination should always be made on how far to pursue various forms of evidence.

As well as reviewing relevant documents, it is best practice for investigators to present contravening facts to the parties to hear context and/or consider alternate events. For example, if Jane (the respondent) states that she never called Bob (the complainant) late at night, and the investigator secures phone records that show otherwise, the investigator should provide Jane (the respondent) with the opportunity to respond to this contradictory evidence and provide her story/context (for instance: Jane may state she called him for a work crises and not romantic reasons, or she might state the number identified in the phone records is not her number).

In some cases, documents may not be available (if lost, stolen, deleted or tampered with). Sometimes, an investigator may make determinations on credibility of a witness statement if a participant is unable to produce a document that should exist. Also, although uncommon, documents can be tampered with and/or fabricated. It is the role of the

investigator to critically review and analyze the totality of the evidence available before them.

## Preserving Evidence

The preservation of evidence is legally required where there has been an accident and/or crime. In Canada, “spoliation” of evidence means intentionally destroying relevant evidence (generally related to criminal law and/or civil law cases). In today’s workplace this could include deleting documents, emails and/or text messages. While the rigorous legal standards relating to “spoliation” will not apply to most workplace investigations (unless litigation and/or criminal allegations are involved), employers should work to minimize the intentional and accidental destruction of relevant evidence. Employees should be reminded that deleting or tampering with documents that are owned by the employer and/or are subject to the investigation is not appropriate (and in some cases could warrant discipline).

Below are some considerations to keep in mind regarding when to preserve evidence for a workplace investigation; however, caution is to be given to ensure to balance privacy rights with the significance of the incidents being investigated:

- **Computers:** In cases where a company computer may contain significant information, the employer should complete a full back up of the computer hard drive, or alternatively, seize the computer and give the employee a different computer to work on.
- **Emails:** Often the IT department can readily upload a fully intact email box relating to company emails (and only company emails). In certain circumstances it could be useful to complete this full upload to ensure access to all emails. Although there can be some privacy concerns, emails from the employer’s email generally are property of the employer.
- **Phones:** Similar to computers, phones can also often contain significant information (like text messages, photographs, etc.). In circumstances where the employer believes important information is stored on the company phone (not a personal

phone), consideration should be made to saving a backup of phone data and/or seizing the phone for the investigation.

- **Video Surveillance:** Often video surveillance is only stored for a temporary short-term period (usually from several hours to a few weeks). In the event an employer learns of a potential incident that might have relevant surveillance, the video should be immediately uploaded and stored.
- **Dash Cameras:** Sometimes employer vehicles may have dash cameras (especially in transportation related jobs). In this case, in the event of any incident, such videos should be uploaded and stored to ensure video is preserved. This might be most relevant in the case of an accident or traffic incident.

The above measures to preserve evidence are extreme and may not always be appropriate or required; however, employers and investigators must consider when preserving the evidence may be necessary and required. In all cases, privacy interests should be balanced against the interests of the investigation.

## **Investigative Process & the Standard Applied**

Finally, it is useful to consider the standard that investigators are held to when conducting a workplace investigation, along with the general process investigators should follow. To ensure compliance with required investigative processes, the employer should first consider all relevant policies, collective agreements (if applicable) and other related documents that may inform the standard and process of the investigation. These documents may be very general or may instead provide specific process and timing required for the investigative process, either way, the provisions should be followed as they apply.

Next, the employer should consider the legislative framework in the applicable jurisdiction. For example, in Ontario, the *Occupational Health & Safety Act, R.S.O. 1990, c. O.1* (the “OHS”) provides legislative requirements in relation to workplace harassment investigations. Specifically, section 32.07(1) provides that an employer must: “ensure that an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances”. While the last four words appear to provide

employers a broad degree of latitude in determining “how” the duty to investigate is fulfilled, there appears to be no question that an “investigation” is required regarding “incidents and complaints of workplace harassment” in Ontario workplaces. From the outset of any given investigation, the employer and the investigator should review and consider all related policy documents and legislative requirements to ensure that the investigation mandate fits in all legal, contractual and policy requirements.

In considering process, it is useful to consider a recent arbitral decision that examined the adequacy of an investigation process and the standards that may apply. In *Humber River Regional Hospital v Ontario Nurses’ Association*,<sup>2</sup> the union filed a grievance, alleging the grievor (a nurse) had experienced workplace harassment in her role at the hospital. During the arbitration, the Union’s argument expanded to include allegations that the employer/hospital conducted a bias investigation into the grievor’s harassment complaint. In considering the Union’s argument, the Arbitrator found that the hospital’s obligation was to conduct a “good faith” investigation, as follows:

[I]n the absence of any more specific contractual language, and keeping in mind that the Hospital’s policies are not part of the collective agreement, the Hospital’s obligation was to conduct a *good faith* investigation into the grievor’s complaint *and* it did so.

The Arbitrator went on to highlight that an investigation is not held to the same standard as a judicial proceeding, in holding that:

Internal harassment investigations are not courts of law. Complaints and responses are not pleadings. The absence of a written response does not entitle the complainant to summary judgment; nor does it constitute a breach of the rules of natural justice. An employer’s investigation is not judicial or quasi-judicial and need not be conducted as such.

The Arbitrator concluded that the relevant policies in that case did not require a third-party independent investigator (contrary to the union’s assertion that the internal investigators were inappropriate). In considering all the above, the Arbitrator dismissed

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<sup>2</sup> 2017 CanLII 54356 (ON LA)

the grievance, noting that the hospital had met its obligations in conducting a good-faith investigation. This decision is useful for employers to consider and to understand when engaging in an investigative process. The takeaway from this decision is that investigators are not held to the standard of perfection, but instead must only act in good faith. Even if some deficiencies exist, this will not automatically result in a finding that an employer has not met its duty to investigate. Further, in certain situations it may be best practice to hire an independent third-party (i.e. highly sensitive situations, or where allegations are against human resources or senior management); however, absent specific policy or contractual language, an employer generally is not legally required to hire an independent third-party investigator.

The following is a list of best-practice steps to consider when conducting a workplace investigation. The steps below are generally in the order that they should take place, although fluidity and flexibility is always required because each circumstance will unfold differently:

<b>INVESTIGATION STEPS</b>	
<b>STEPS</b>	<b>EXPLANATION</b>
<b>Appoint Investigator</b>	Select an internal or external investigator based on the circumstances and policies.
<b>Complaint Document</b>	Complete the complaint document (may be authored by complainant or another appropriate individual).
<b>Establish Mandate</b>	Establish the specific scope/mandate of the investigation.
<b>Advising Parties of Investigation</b>	Advise the parties of the investigation, and highlight confidentiality.
<b>Work Environment during Investigation</b>	Consider what steps need to be taken to ensure a productive and safe working environment during the investigation.
<b>Provide Complaint Document to Respondent</b>	Provide the respondent with the complaint document or complaint details. The respondent is entitled to know details of the complaint in some form to provide a fair opportunity to present a defense
<b>Review Policy and Relevant Documentation</b>	Review and consider any relevant workplace policies and procedures and the complaint document.

<b>Conduct Interviews (and follow-up interviews as required)</b>	Conduct interviews in a private location. The investigator should meet with complainant, respondent and witnesses. Sometimes follow-up interviews will be required (especially with the Complainant and Respondent, if there are contradictions in evidence, etc.). Interview notes should be documented (ideally reviewed by the witnesses and signed off for in person meetings).
<b>Report on Findings</b>	Make findings after collecting all evidence and completing all follow ups as required. Often this occurs by way of a written report.

The above is a summary list of best practice steps in an investigation process. For a more in-depth summary of the investigative steps (and on workplace harassment generally), see previous Queen’s IRC article titled: “[Workplace Harassment After #MeToo](#)”<sup>3</sup>. A proper investigation will require time to ensure due process and fairness to all parties. An investigation should be completed in a timely manner, but it certainly should not be rushed. A fulsome exploration of the facts is far more important than a prompt determination which could result in unjust findings. To this end, it is always important for an investigator to engage in best practices to collect and to preserve the evidence.

## Conclusion

Workplace investigations should be completed in a fair and reasonable manner, which requires fair process. In order to provide fairness, workplace investigators should engage critical thinking and make reasonable inquiries and requests regarding relevant evidence. This means considering ancillary documents and evidence that can be requested or accessed to assist in determining the chronology and storyline. Further, thorough process and factual accuracy will best protect an employer in the event of potential litigation. In this way, it is most useful and productive for investigators to make their best efforts to secure all related evidence when completing a workplace investigation. This will allow for the most fair findings and process for all involved parties.

*Never trust to general impressions...but concentrate yourself upon details.*  
 – Sherlock Holmes

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<sup>3</sup> Hudson, Deborah, “[Workplace Harassment After #MeToo](https://irc.queensu.ca/sites/default/files/articles/workplace-harassment-after-metoo.pdf)” Retrieved from: <https://irc.queensu.ca/sites/default/files/articles/workplace-harassment-after-metoo.pdf>

## About the Author



Deborah is the founding lawyer at Hudson Law, where she represents both employers and employees in all aspects of labour and employment law. She was called to the Ontario Bar in 2008, and has practiced exclusively in the areas of labour and employment for her entire career. She spent the first eight years of her career at a prominent management-side firm, and then spent several years at another boutique workplace law firm where she broadened her practice experience (to include acting as employee side counsel and workplace investigator).

Deborah provides her clients with practical, timely and highly specialized legal advice. She regularly advises both employers and employees in relation to matters occurring at all stages of the employment relationship. She values the importance of early and productive resolution discussions when beneficial and appropriate. In circumstances where resolution is not achievable or advantageous, Deborah advocates on behalf of her clients in all legal forums. Deborah also conducts workplace investigations as an external, independent investigator relating to various workplace circumstances and allegations including: harassment/bullying, human rights matters, privacy breaches and fraud.

Deborah has authored and contributed to a number of publications touching on workplace issues. Most recently, Deborah was a contributing author of: [Startup Law 101: A Practical Guide](#) (2017)<sup>4</sup>; [Ontario Human Rights Code: Quick Reference](#) (2015)<sup>5</sup>; and [Accommodation Issues in the Workplace](#) (2014).<sup>6</sup> Deborah has also published numerous articles, including five other articles for Queen's University IRC:

- [Fireable Offences without Defences](#)
- [Workplace Harassment After #MeToo](#)
- [The Golden Years: The Aging Workforce and Human Rights Matters](#)
- [Invisible Barriers: Accommodating Mental Illness in the Workplace](#)
- [Workplace Bullying and Harassment: Costly Conduct](#)

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<sup>4</sup> Lovrics, Catherine et al, *Startup Law 101: A Practical Guide* (Toronto: LexisNexis Canada, 2017)

<sup>5</sup> Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).

<sup>6</sup> Jamie Knight et al, *Accommodation Issues in the Workplace*, (Toronto: Wolters Kluwer Limited, 2014).

## Reference List

- Hudson, Deborah, "[Fireable Offences without Defences](https://irc.queensu.ca/sites/default/files/articles/fireable-offences-without-defences.pdf)". Retrieved from:  
<https://irc.queensu.ca/sites/default/files/articles/fireable-offences-without-defences.pdf>
- Hudson, Deborah, "[Invisible Barriers: Accommodating Mental Illness in the Workplace](https://irc.queensu.ca/sites/default/files/articles/invisible-barriers-accommodating-mental-illness-in-the-workplace-by-deborah-hudson.pdf)".  
Retrieved from: <https://irc.queensu.ca/sites/default/files/articles/invisible-barriers-accommodating-mental-illness-in-the-workplace-by-deborah-hudson.pdf>
- Hudson, Deborah, "[Workplace Harassment After #MeToo](https://irc.queensu.ca/sites/default/files/articles/workplace-harassment-after-metoo.pdf)" Retrieved from:  
<https://irc.queensu.ca/sites/default/files/articles/workplace-harassment-after-metoo.pdf>
- Hudson, Deborah, "[The Golden Years: The Aging Workforce and Human Rights Matters](http://irc.queensu.ca/sites/request/articles/the-golden-years-the-agingworkforce-and-human-rights-matters.pdf)".  
Retrieved from: <http://irc.queensu.ca/sites/request/articles/the-golden-years-the-agingworkforce-and-human-rights-matters.pdf>
- Hudson, Deborah, "[Workplace Bullying and Harassment: Costly Conduct](http://irc.queensu.ca/sites/default/files/articles/workplace-bullying-and-harassment-costlyconduct-by-deborah-hudson.pdf)". Retrieved from:  
<http://irc.queensu.ca/sites/default/files/articles/workplace-bullying-and-harassment-costlyconduct-by-deborah-hudson.pdf>
- [\*Humber River Regional Hospital v Ontario Nurses' Association, 2017 CanLII 54356 \(ON LA\)\*](#)
- Jamie Knight et al, *Accommodation Issues in the Workplace*, (Toronto: Wolters Kluwer Limited, 2014).
- Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).
- [\*Lovrics, Catherine et al, Startup Law 101: A Practical Guide \(Toronto: LexisNexis Canada, 2017\)\*](#)
- [\*Morgan v. University of Waterloo, 2013 HRTO 1644 \(CanLII\)\*](#)



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