

Workplace Investigations: Quo Vadis



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Why Workplace Investigations Need Rethinking

In almost 48 years of practice, I have:

- Acted for employers conducting investigations
- Acted for employees under investigation
- Acted for employees terminated after investigations
- Sued investigators for negligent investigations
- Conducted investigations myself

From that vantage point, I've concluded that investigations:

- Are too numerous, too slow and too expensive
- Often proceed without recognizing the legal obligations owed to the target
- Can cause significant mental and physical stress for the person being investigated
- Can destroy a career if they lead to termination for just cause
- Create litigation instead of preventing it

Agenda

Where we are now	The current landscape of workplace investigations
What investigations are really for	The true purpose of a workplace investigation from a legal and business perspective
What employers must do	The common law and policy obligations when investigating
How to reduce litigation risk	Best practices for policy, investigator choice and mandates A practical triage model so not every complaint becomes a full investigation

The Current State:

“The Fastest Growing Indoor Sport in Canada”

- Over the past several years, the number of investigations has exploded.
- A mini-industry followed:
 - Law firms selling “how to investigate” training
 - Lawyers doing investigations full-time
- Investigations became the **default** response to workplace complaints
- The real question is not “can we investigate,” but:
“Do we need to investigate this?”



Legal and Contractual Triggers for Investigations



In Ontario, 1 statute actually **mandates** investigations
: **Occupational Health and Safety Act, s. 32.0.7**

Requires harassment investigations
“appropriate in the circumstances”

Requires written notice of results and
corrective action

This applies to every workplace in
Ontario.



The 2nd major driver is
the **proliferation of Codes of Conduct** that:

Promise a “professional, respectful,
inclusive and safe” workplace

Prohibit any “disrespectful” or “non-
inclusive” behaviour

State that a breach can lead to discipline
up to and including termination for cause



Employers have unintentionally
turned broad behavioural
expectations into **contractual
grounds for investigation and
cause.**

How Codes & Whistleblower Programs Expand Complaints

Typical Codes of Conduct:

- Treat any perceived lack of dignity, respect or inclusion as a breach
- Capture behaviour that is well below the just-cause threshold

Many employers also:

- Promise confidentiality to complainants
- Offer anonymity to whistleblowers

The result is that:

- Almost any unpleasant workplace incident can be turned into a **formal complaint**
- Almost any complaint can be framed as a **Code breach** and trigger a full investigation

My answer to “should all such complaints be investigated?” is very simple:

No.



The Real Purpose: “An Investigation Is a Business Tool”

- A workplace investigation is, first and foremost, a **business tool**.
- **Main purpose is to help the employer:**
 - Defend wrongful dismissal claims where **just cause** is alleged
 - Show that it acted **fairly** in response to serious complaints
- **When a complaint comes in, the employer should ask:**
 - If **true**, does it amount to just cause?
 - If **yes**, a formal investigation is required
- **If the complaint, even if proven, wouldn't justify termination for cause:**
 - A formal investigation is not necessary
 - A more limited fact-finding plus coaching, discipline, or mediation may be appropriate



Just Cause & “Capital Punishment”

Just cause is **extremely hard to prove** and carries the harshest consequences in employment law.

- In *McKinley v BC Tel*, the SCC held that:
 - The issue is not whether “**any dishonesty**” equals cause
 - The court must look at **context, seriousness and proportionality**
- Just cause exists only where misconduct:
 - Violates an **essential condition** of the contract
 - Breaches the **faith** inherent in the relationship
 - Is fundamentally **inconsistent** with the employee’s obligations
- Analysis is 2 step:
 1. Prove the misconduct on a balance of probabilities
 2. Decide whether dismissal is a proportionate response in the circumstances
- As Echlin J. put it in *Tong v Home Depot*:
 - Just cause is “the capital punishment of employment law.”



What is at stake for the Employee?

Consequences of a just cause termination include:

- no compensation.
- no ESA notice or severance where wilful misconduct is alleged.
- loss of EI benefits.
- serious reputational harm making comparable work hard to obtain.
- a career destroyed when the allegation is sexual assault, harassment or theft.



A wooden gavel with a dark handle and a light-colored head, resting on a dark brown book. The book has the words "EMPLOYMENT LAW" in gold, serif capital letters. The background is a blurred stack of books.

When investigations are not conducted properly they create litigation

The goal of an investigation is to **prevent** litigation.

Flawed investigations:

- Make cause harder to **prove**
- Allow the termination decision to be **attacked** and set aside.
- Expose the employer to bad faith **damages**.

Public Justice vs Workplace Investigations

Part 1 of 4



Public Justice System (courts/tribunals)

Typical Workplace Investigation

Right to Have a Lawyer

Is entitled to be represented by a lawyer at the beginning.
The lawyers is entitled to be present when questioned by the opposing lawyer

The employer doesn't agree to having a lawyer present at the target's interview

Knowing Who Accused You

Is entitled to know the name of his/her accuser.

The target isn't entitled to know the name of the accuser

Access to the Complaint

Is entitled to see the complaint (Statement of Claim or criminal charge)

The target isn't entitled to see the complaint but instead gets only a summary of the allegations

Particulars of the Allegation(s)

Is entitled to particulars of the allegations

The target usually is not given the particulars of the allegations

Public Justice vs Workplace Investigations

Part 2 of 4



Public Justice System (courts/tribunals)

Typical Workplace Investigation

Disclosure of Evidence

Is entitled to disclosure of the evidence against him or her before giving evidence

The target usually isn't given the evidence collected by the other side prior to being interviewed

Knowing the Rules / Protocol

Is entitled to know rules to be followed

The target is usually unaware of the Employer's investigation protocol *i.e.* the rules being followed by the Employer for its investigation and the Employer usually refuses to disclose it

Suspension & Ability to Work

Does not get suspended from work as a result of the claim or charge (unless in jail)

The target often is suspended during the investigation

Openness of the Process

The process is completely public

The process is secret. The investigation and the report are secret and confidential *i.e.* not public

Public Justice vs Workplace Investigations

Part 3 of 4



Public Justice System (courts/tribunals)

Typical Workplace Investigation

Cross-Examination Rights

Is entitled to have his/her lawyer cross-examine witnesses and the accuser

The target's lawyer (if allowed to participate) cannot cross-examine the accuser or any witness.

Impartial Decision Maker

Is entitled to be judged by an impartial party (judge or arbitrator)

Is being investigated by the Employer or someone chosen and paid by the Employer and therefore not impartial or unbiased

Who Chooses the Decision Maker

A court that is independent of the parties

The target has no say in who will investigate the allegation

Training and Legal Experience

The decision maker Is a person trained to be a judge and who knows the law.

The decision maker may not be a judge, lawyer or someone trained in the law

Public Justice vs Workplace Investigations

Part 4 of 4



Public Justice System (courts/tribunals)

Typical Workplace Investigation

Right of Appeal

Is entitled to appeal any adverse decision

There is no right of appeal i.e. the investigator is judge jury and executioner

Overall System

A formal system governed by rules of court and rules of evidence

The employer designs and runs the process, which may lack legal or procedural safeguards

Courts Have Recognized Targets have Rights and Employers have Obligations

- Courts have stressed that **particulars** matter because they define what must be answered.
- Courts have criticized investigations that ignore the **target's perspective**.
- Courts have warned against relying on **hostile witnesses** without critical assessment.
- Courts have required employers to provide to the target the **evidence** they have gathered.
- Courts have required employers to **follow their own procedures** when a procedure exists.



What a Proper Investigation Must Be

professional.

neutral.

prompt.

fair.

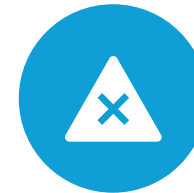
Is the Target Entitled to Legal Counsel?



Employers don't want the target's **lawyer present**.



I ask employers to identify the legal authority for denying counsel, and they cannot.



There is **no case** that says employees under investigation cannot have their lawyer present



Counsel's role is to ensure the questions are **related** the complaint.



Employers worry lawyers will be **disruptive**.



If counsel is **disruptive**, counsel can be removed.

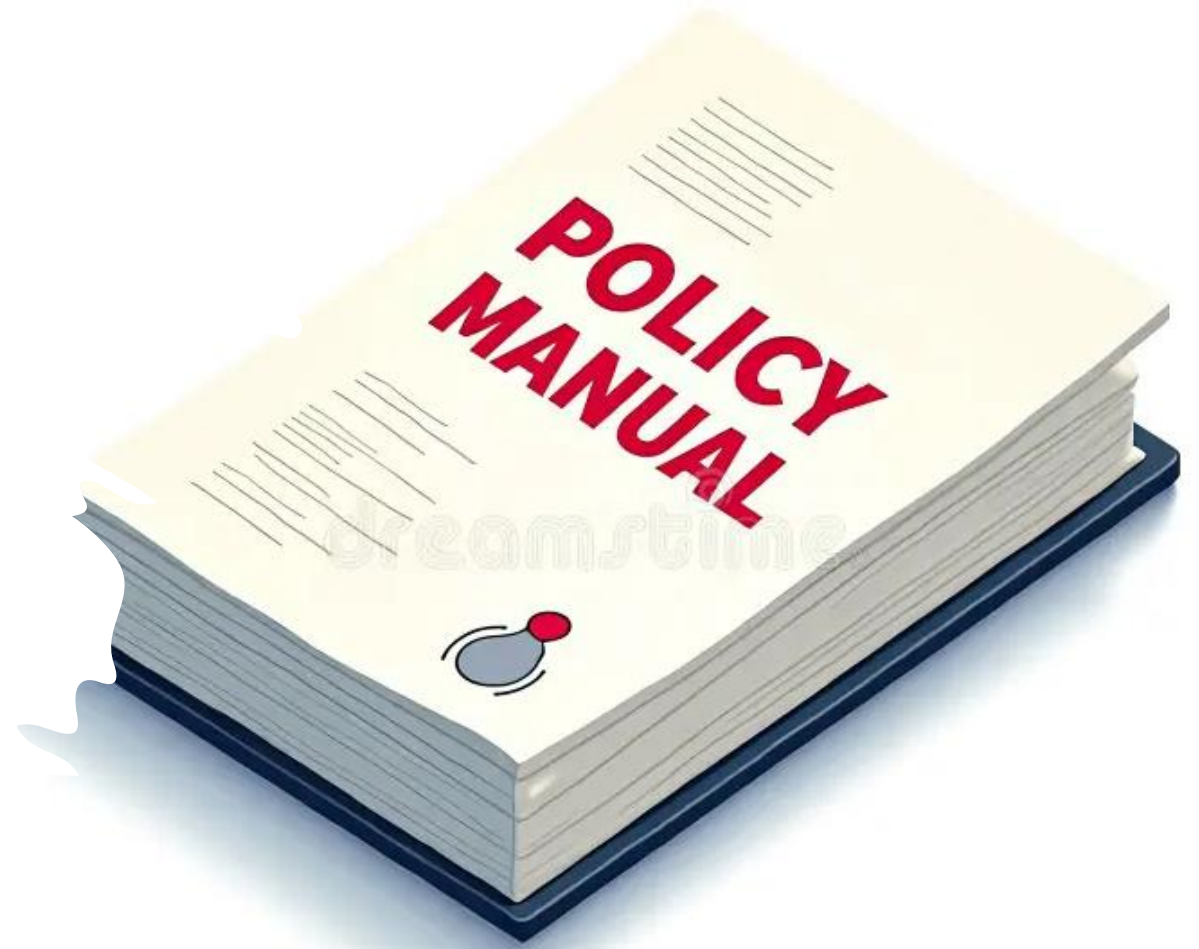


Employers who deny counsel are choosing **short-term control** at the cost of increasing **litigation risk**.

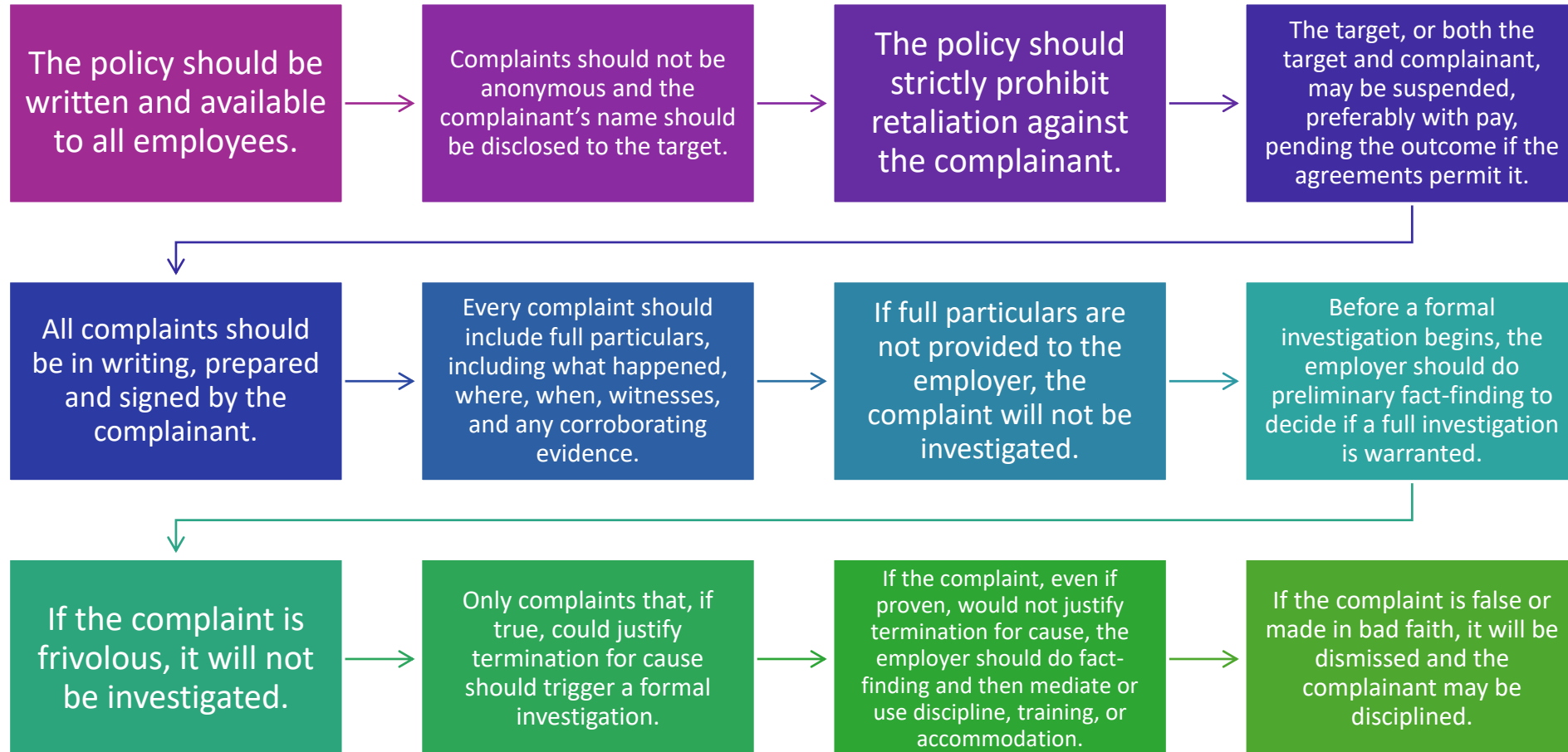
A Policy on Investigations

I generally favour policies for an employer, but they must make sense and be practical.

1. The first objective is to only do an investigation when it is **genuinely needed**.
2. The second objective is to conduct a **fair** and **competent** investigation so the target cannot say the investigation or report are invalid.
3. The third objective is to avoid the **expense** and **risk** of wrongful dismissal litigation.



What Should an Investigation Policy Contain?



What Should an Investigation Policy Contain?



Mandate First, Investigator Second

Employer must decide whether the mandate is to determine **facts**, to determine **credibility**, or to determine **legal liability**:

- If the mandate is **fact-finding**, a competent non-lawyer investigator can be appropriate
- If the mandate is to determine **legal liability**, the investigator must understand and apply the correct legal tests
- If the mandate is **credibility**, judges have the most experience assessing it

The more the mandate looks like a **legal determination**, the more the investigator should be legally trained or a retired judge.



Harassment Requires Legal Analysis, Not Just HR Instinct

- Harassment has a legal definition and requires a legal test
- The definition includes a subjective component and an objective component
 - If conduct is not obviously unwelcome, the subjective branch requires conduct be communicated as unwelcome
 - If no one objects, it may not meet the legal threshold under the subjective branch
- Some investigations wrongly treat unpleasantness or offensive comments as harassment
- Misapplying the legal definition can lead to unjust cause terminations and serious litigation risk



Liability Exposure: the Employer & the Investigator

If the employer conducts the investigation, the employer cannot be sued for a negligent investigation but can be sued for wrongful dismissal

A third-party investigator can be sued for negligent investigation

A bad investigation can create liability for multiple actors and magnify damages exposure

This makes the mandate and choice of investigator important





Closing: Where Are We Going

- Employers should do fewer investigations by **screening complaints** properly and only investigate the serious ones.
- Employers should run necessary investigations in a way that is **defensible in court**.
- Employers should recognize and comply with **fairness obligations** owed to the target.
- Employers should adopt a **practical policy** and follow it.
- Employers should choose an **unbiased and credible investigator** based on the mandate.

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