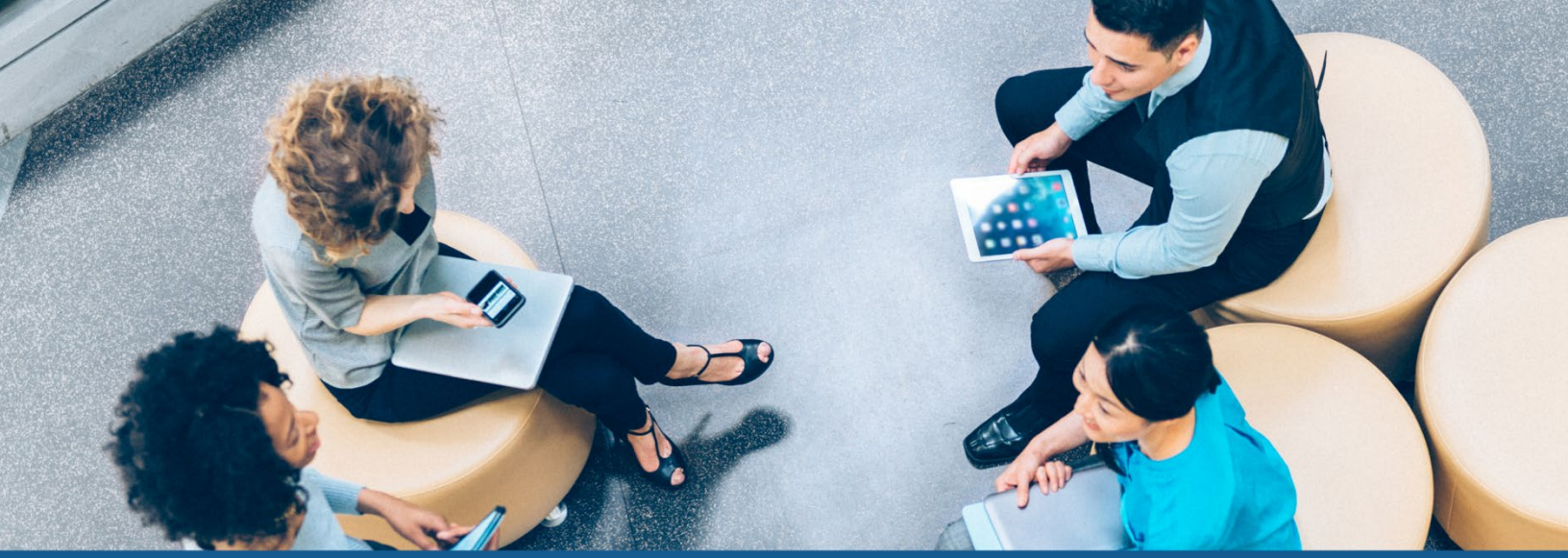

What's New in HR Law

Your Workplace, Your Investigator: Selecting the Person to Review a Harassment Complaint

April 18, 2023| By **Clifton Yiu**

Bottom Line

The *Occupational Health and Safety Act* (the "*OHSA*") requires employers to investigate incidents and complaints of workplace harassment in a manner that is "appropriate in the circumstances". While this broad language leaves employers with flexibility in the conduct of investigations, it provides little guidance about more nuanced aspects of investigations, such as how to select an appropriate investigator or address employee concerns regarding the investigator.

The Ontario Labour Relations Board (the "Board") clarifies some of these gaps in *Erin MacKenzie v Orkestra SCS Inc.*, 2023 CanLII 13891. The decision considers whether the Board will appoint a new investigator when an employee raises concerns that the employer's chosen investigator is unsuitable.

Background Facts

Erin MacKenzie was employed as the General Counsel and Chief Financial Officer of Orkestra SCS Inc. (the "Employer"). On July 8, 2021, the Employer notified Ms. MacKenzie that it was terminating her employment in six months. Approximately one month later, Ms. MacKenzie raised a formal complaint of workplace harassment against the company's CEO (the "Complaint").

The Employer appointed an investigator (the "First Investigator") to look into the Complaint. Ms. Mackenzie complained that the First Investigator was not qualified to conduct the investigation. She also alleged that the First Investigator had a conflict of interest because she had an existing contract to provide human resources services to the Employer and would therefore have a financial interest in "pleasing" the Employer.

Ms. MacKenzie filed a complaint with the Ministry of Labour (the "Ministry") regarding the First Investigator's appointment. A Ministry of Labour inspector was assigned to review Ms. MacKenzie's complaint.

In the meantime, the First Investigator was replaced with another investigator (the "Second Investigator"). However, Ms. MacKenzie claimed that the Second Investigator had a working relationship with the First Investigator and would not be impartial during the investigation. Further, Ms. MacKenzie took issue with the fact that the Second Investigator was a second-year lawyer with no demonstrated experienced as a workplace investigator. Ms. MacKenzie ultimately refused to participate in the investigation conducted by the Second Investigator, despite the Employer directing her to cooperate.

Following his review of the allegations against the First Investigator, the Inspector found that the First Investigator was properly qualified to investigate the Complaint. Ms. MacKenzie appealed the Inspector's findings to the Board, arguing that the Employer was incapable of performing an investigation that was appropriate in the circumstances. She asked the Board to appoint "an investigator who has the necessary training and experience to meet the minimum requirements of the statute."

The Board's Decision

The Vice-Chair dismissed the appeal on a preliminary basis, finding that Ms. MacKenzie's appeal of the Inspector's decision was moot and/or failed to raise a *prima facie* (or an arguable) case. Since the Employer had relented to Ms. MacKenzie's demands and replaced the First Investigator with the Second Investigator, there was no longer a tangible and concrete dispute between the parties.

The Vice-Chair also commented that, in most cases, employees cannot pre-emptively allege that an employer has failed to conduct an investigation that is "appropriate in the circumstances." Instead, employees should let an investigation run its course before alleging, with concrete supporting examples, that the investigation was inappropriate.

Moreover, the Vice-Chair found that Ms. MacKenzie's objections to the Second Investigator were unfounded and premature. Although the Employer had appointed an investigator who did not meet Ms. MacKenzie's perceived standards, the *OHSA* does not require workplace investigators to have any particular qualifications nor mandate the use of third-party investigators. Further, the Vice-Chair noted Ms. MacKenzie's allegations of a conflict of interest were speculative and there was no basis to impugn the Second Investigator based on some nebulous connection with the First Investigator.

For these reasons, the Vice-Chair declined to appoint its own investigator to look into the Complaint.

Check the Box

The Board's decision confirms that an employer has broad discretion in how workplace investigations are conducted. As part of this discretion, employers can choose who to retain to investigate complaints of workplace harassment. While the *OHSA* does not specify particular qualifications for workplace investigators, employers should ensure that the chosen investigator is capable of conducting an

impartial investigation. In doing so, employers should consider the parties under investigation and any pre-existing relationships between an investigator and the parties that may impact the investigator's impartiality. As a best practice, employers should also ensure to retain investigators whose knowledge and experience are commensurate with the complexity of the complaint under investigation.

Need More Information?

For more information or assistance with workplace investigations or other employment matters, contact Clifton Yiu at cyiu@filion.on.ca or your regular lawyer at the firm.

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