

# Workplace investigation void:

All parties must agree the investigator is impartial



By: Carolyn Savoury

In a recent decision (*Public Service Alliance of Canada vs. Canada (Attorney General)*, 2014 FC 1066) the federal court held a manager was not a “competent person” to conduct a workplace investigation under the Occupational Health and Safety Regulations of the Canada Labour Code (the regulations) because the employee who filed the complaint had not agreed that the manager was impartial. The federal court also expanded the interpretation of violence under the regulations to include harassment in some circumstances.

The decision has broad implications for federally-regulated employers as it creates obligations more onerous than the obligations for their provincial counterparts.

## Background

An employee of the Canadian Food Inspection Agency (CFIA) filed a complaint against his supervisor alleging favouritism, humiliation, unfair treatment and lack of respect. In response, the CFIA assigned its regional director to conduct a fact-finding review of the complaint. The director found there were communication issues and unresolved tensions between the complainant and supervisor, but no evidence of harassment. He concluded no further investigation was warranted.

The employee complained to a federal Health and Safety Officer (HSO) alleging the CFIA had not complied with the requirements under section 20.9 of the regulations, in that the director was not impartial and therefore not a competent person to conduct the investigation. Section 20.9 states:

1. In this section, “competent person” means a person who
  - (a) is impartial and is seen by the parties to be impartial;
  - (b) has knowledge, training and experience in issues relating to workplace violence; and
  - (c) has knowledge of relevant legislation.
2. If an employer becomes aware of workplace violence or alleged workplace violence, the employer shall try to resolve the matter with the employee as soon as possible.
3. If the matter is unresolved, the employer shall appoint a competent person to investigate the workplace violence.
4. The competent person shall investigate the workplace violence and at the completion of the investigation provide to the employer a written report with conclusions and recommendations.

The HSO agreed with the employee and directed the CFIA to appoint a competent person to investigate. This direction was successfully appealed to the Occupational Health and Safety Tribunal of Canada (the tribunal) on the grounds that the alleged harassment did not amount to workplace violence, as it is defined under the regulations as: “any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee.” The employee then asked the federal court to judicially review the tribunal’s decision.

## Federal court decision

Siding with the employee, the federal court made the following important findings:

1. The term workplace violence is broad enough to include harassment in certain circumstances. In the present case, the alleged harassment might constitute workplace violence if, after a proper investigation by a competent person, it is determined the harassment could reasonably be expected to cause harm or illness to the employee.
2. A person is competent to conduct a workplace violence investigation if he or she is “impartial and seen by the parties to be impartial” and has the necessary knowledge, training and experience.
3. Where the proposed investigator is a representative of the employer, the parties must agree that the representative is an impartial person. The employer cannot decide this on their own.
4. In the present case, while the director may have been competent to conduct an initial fact finding in an effort to resolve the matter (per section 20.9 (2) of the regulations), in the absence of agreement among the parties, he was not a competent person for the purposes of conducting an investigation.

## Tips for employers

The federal court’s decision raises the bar for federally-regulated employers, demonstrating the importance of strictly complying with the workplace violence and harassment procedures set out in the regulations. While there are currently no similar requirements for provincially regulated employers, the court’s decision should and will be watched closely lest it gain traction outside the federal sphere. Regardless, one thing is clear for every jurisdiction: the lynchpin of a proper investigation is an impartial investigator, with sufficient knowledge, training and experience.

For more information and for assistance conducting a workplace investigation, please contact the professionals at Sherrard Kuzz LLP. ☎

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