

# A Workplace Complaint Has Been Made

## WHAT'S NEXT?

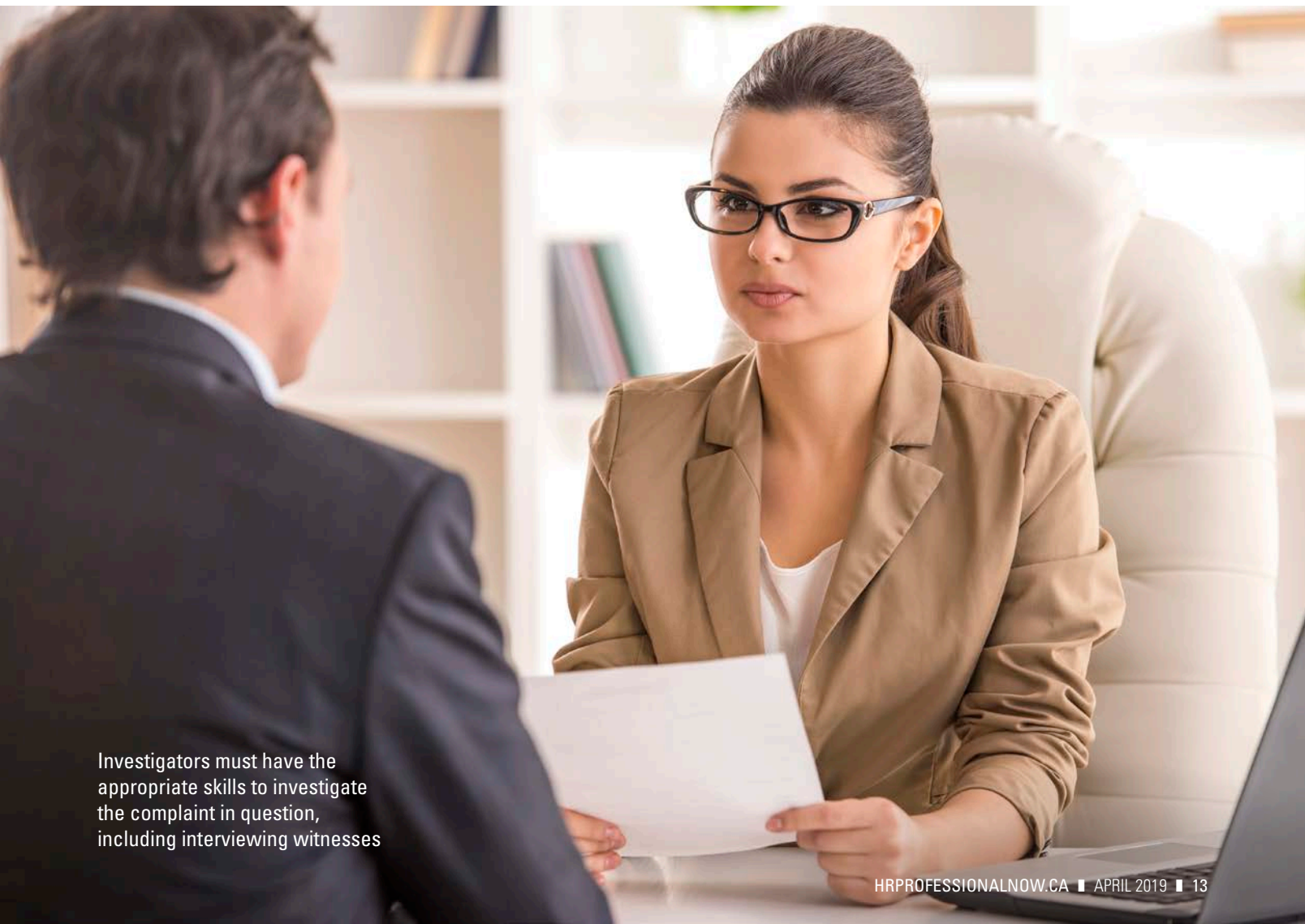
By Peter V. Matukas, BA, LLB, AWI-CH

**A**n employer has a legal obligation pursuant to section 32.0.7(1) of the *Occupational Health and Safety Act*, RSO 1990, c O.1 (OHSA) to investigate a complaint or issue once it becomes aware of one. How the employer becomes aware of the complaint, incident or issue is irrelevant as the obligation to investigate is triggered once the employer has knowledge and/or is aware of the complaint, incident or issue.

An anonymous complaint must be investigated with the same rigor as one brought forward by an individual making a complaint

through formal channels established by the employer. A person may bring forward to their employer or designated personnel (i.e. managers) an issue or incident which they witnessed and believe to be contrary to company policy, was discriminatory, was a form of harassment or some other issue; all of which will trigger the need for an investigation into such an issue or incident.

Once the employer is aware of the complaint, incident or issue, the next step is to appoint an investigator to investigate the issue. The company should *not* use their usual legal counsel to conduct



Investigators must have the appropriate skills to investigate the complaint in question, including interviewing witnesses

the investigation as this will result in the legal counsel being conflicted out of representing the company in any ensuing litigation due to their involvement in the investigation.

The selection of the investigator is critical to the legitimacy of the investigation and the findings made within it. It is necessary for the investigator to be thorough, neutral, impartial and free of bias. The investigator must have the appropriate skills to investigate the complaint in question, including interviewing witnesses and evaluating credibility in order to make factual determinations based upon the evidence collected.

Further, the investigator must be, at the very least, arms-length from the parties involved in order to avoid any real or perceived bias or favouritism, as allegations of such a nature can undermine, tarnish and erode the confidence in the findings of what may otherwise be a valid and thorough investigation. Selecting the right investigator may also provide the company with the ability to present an active defence from being obligated to conduct a further investigation – at the company's own expense – pursuant to a Ministry of Labour (MOL) Order under OHSa section 55.3(1). A MOL-required investigation can be imposed when an involved party complains to the MOL as a consequence of being dissatisfied with the results or outcome of the investigation.

Upon completion of the investigation, the investigator should prepare a report for the employer of the findings from the investigation so the employer can determine the appropriate action to

take based on the facts. The employer has a duty to inform the parties of the complaint – but not the witnesses – the results of the investigation in writing. Additionally, the employer must also inform the parties of any corrective action which has been or will be taken as a result of the investigation.

Using an appropriately trained third-party investigator can shield the company from allegations that the investigation was pre-determined, biased or that the investigation was ad-hoc, cursory, superficial or minimal, while providing legitimacy to the process and the results. Appointing a third-party investigator – who has the appropriate skills and accreditation to conduct an investigation – can protect the company from needing to conduct a further investigation – and the related expense – as a consequence of the initial investigation being insufficient in the eyes of the MOL. A proper investigation can also provide the company with a defence against allegations that it did not take appropriate steps or conduct a fair, impartial, thorough, neutral and timely investigation in any ensuing litigation and shield it from potentially greater liability. ■

*Peter V. Matukas is an experienced employment lawyer and a credentialed workplace investigator by the Association of Workplace Investigators (AWI-CH) practising in Ontario and leads the workplace investigations group at Harris + Harris LLP. Please feel free to contact Peter at 416-798-2722 or [petermatukas@harrisandharris.com](mailto:petermatukas@harrisandharris.com) with any questions or to discuss your needs.*

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