

Handling Discrimination Complaints

EMPLOYER'S GUIDE

The first step towards creating a discrimination-free workplace is the creation of an anti-discrimination policy. This policy should contain or be supported by procedures for handling complaints of discrimination in a fair, effective and timely manner. Even where organizations ultimately decide to bring in an outside mediator or investigator, their first steps can help restore workplace harmony and avoid costly or harmful mistakes.

These guidelines provide **general suggestions** on how to handle discrimination complaints internally. Please note, however, that **this is not legal advice**. The law is constantly evolving, and legal obligations will always depend on the facts of a particular situation. Please contact a lawyer for specific advice on specific situations.

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1. INTRODUCTION

There are many benefits to resolving discrimination complaints internally. For example, internal resolution

- helps preserve working relationships
- is relatively fast and inexpensive
- ensures greater confidentiality and privacy
- has many business advantages

At the same time, employers should be aware that their efforts to resolve a discrimination complaint could later become evidence at an arbitration or hearing. A flawed investigation or inadequate response could itself become the subject of a complaint. It is therefore important to proceed carefully, and to document all actions taken and all information gathered.

In addition, employers should never discourage employees from pursuing one of the other remedies available to them – whether that is a complaint to the Saskatchewan Human Rights Commission, the Labour Standards Branch or the Occupational Health & Safety Division; a claim to the Workers' Compensation Board; or a grievance under a collective agreement.

Some of the terms used in these guidelines are listed below.

Complainant	person who makes a complaint or brings a discrimination issue to your attention
Respondent	person whose behaviour is being complained about
Mediation	a voluntary and relatively informal process in which the employer and the parties share information, discuss options, and come to an agreement about how a problem can be resolved.
Investigation	a fair and impartial fact-finding process which leads to decision and action by the employer
Parties	the complainant and the respondent

2. MEDIATION OR INVESTIGATION?

Mediation is generally a faster, more informal process than investigation and the parties may prefer it. It must be noted, however, that employers operate within a legal framework that gives them certain legal obligations including the duty to prevent and redress discrimination in the workplace. For this reason, **the employer will usually have to investigate the facts** and determine whether discrimination has occurred. The employer must also be careful to determine whether the behaviour complained of was an isolated incident or part of a larger pattern of discrimination that needs addressing in a proactive and preventive manner. Have other employees experienced similar

discrimination, or is there a problem that could lead to future discrimination if left unresolved?

Nevertheless, mediation may be appropriate in some situations – for example, where there is no dispute about the facts, or where an investigation has confirmed discrimination occurred and the employer wishes to work with the parties to develop appropriate solutions.

3. GOOD PRACTICES IN MEDIATION OR INVESTIGATION

Mediation and investigation are different processes, but share many strategies and recommended practices. The strategies most relevant to investigations are discussed in Part 6.

Before you receive a complaint

- Develop and distribute an anti-discrimination policy setting out principles, procedures and consequences.
- Appoint a person to receive and handle complaints, tell your employees who that person is, and make the complaint process accessible and non-threatening. It is also helpful to name an alternate person, in case the designated official is unable to handle the complaint.

When you receive a complaint

- Treat all complaints seriously.
- Respond quickly and effectively.
- Be objective and neutral. Ensure that the mediator or investigator is impartial.
- Observe the principles of procedural fairness. (See Part 6B.)
- Ensure confidentiality to the greatest extent possible. (See Part 4.)
- Document all actions in writing. Sign and date all documents, indicate from whom they have been received, and keep them in a safe, secure location with limited access.
- If the complainant decides to withdraw a complaint, record the withdrawal in a document. Note that the employer may still have a duty to act. (See Part 4.)
- Keep tight timelines in mind.

4. CONFIDENTIALITY, PROCEDURAL FAIRNESS AND THE DUTY TO ACT

Everyone involved in an investigation or mediation should preserve the confidentiality of information they acquire during the process. This practice will protect individual privacy and ongoing working relationships, and prevent damage to reputation where a complaint cannot be substantiated.

Confidentiality will also preserve the integrity of an investigation. If witnesses discuss their evidence with others, this can undermine the independence and reliability of witness statements to the employer.

It should be noted, however, that there are a couple of significant limitations on an employer's ability to preserve confidentiality.

1. Employers have a duty of fairness towards respondents. People who are accused of discrimination have the right to know the nature of the complaint being made against them in sufficient detail that they can respond to the allegations.
2. Employers have a duty to prevent discrimination from occurring. For example, employee A may complain to her manager that employee B is harassing her, but ask the manager to keep the matter confidential because she does not want any action taken. The manager cannot keep the matter totally confidential because of the risk that employee B will harass other employees in the same way. The employer must explore the complaint and, if it seems to be well founded, take preventive action.

5. MEDIATION *

A. What is Mediation?

Mediation is a voluntary process in which the parties communicate with each other in an effort to develop a negotiated agreement (settlement) which is acceptable to both of them and which addresses the issues raised in the complaint. The communication process can take different forms. For example:

- face-to-face meetings facilitated by the employer or an outside mediator
- "shuttle negotiation" (the facilitator conveys information, viewpoints and proposals back and forth between the parties until agreement is reached)

Mediation can be the most effective and satisfying way of resolving complaints. It gives parties an opportunity to voice their concerns and helps the parties understand each other's perspectives. Mediation also gives the parties input into developing appropriate remedies. At the same time, the settlement must be workable from the employer's perspective and consistent with the employer's duty to prevent discrimination from re-occurring.

B. The Mediation Process

Mediation can take a variety of forms, and employers may wish to hire a trained mediator in complex cases. For employers who decide to conduct mediation themselves, a suggested process is outlined below.

1. Take complete written statements from the complainant and respondent. This step is the same in both mediation and investigation.

* Mediation is sometimes referred to as an early resolution, conflict resolution, or settlement process.

2. Mediation should be a consensual process. If the facts are clear (because there has been an investigation or because the parties agree on what happened), ask the parties if they wish to try mediation in order to develop an appropriate solution they can both agree on.
3. If their answer is yes, ask how they wish mediation to proceed (e.g. face-to-face meetings or shuttle negotiation).
4. Clarify the process and what can be expected from it. The focus will likely be on reaching a settlement acceptable to the parties and on preventing future discrimination.
5. Set ground rules for the discussion: for example, courtesy, commitment to the process, and no interruptions.
6. Facilitate the discussion. Document all meetings and actions.
7. Enable parties to develop a solution that is satisfactory to them and workable from your perspective. A few possibilities: apology; change in working conditions; adoption of a policy; staff training. You may wish to open the discussion by outlining a range of possible options.
8. Put the agreement in writing and have it signed and dated by all parties.

6. INVESTIGATION

Both sides are entitled to a prompt but thorough investigation.

A. What is an Investigation?

Investigation is a fair, impartial and unbiased process of fact-finding and analysis. Its purpose is to determine what actually happened, on a balance of probabilities. This is accomplished by gathering relevant evidence to support or disprove allegations. Ignore irrelevant information. Do not rely on hearsay (second-hand information) or opinions. Always obtain the best evidence possible: for example, an original document rather than a copy.

To avoid perceptions of bias at the investigative stage:

- be consistent in the treatment of everybody involved in the investigation
- avoid editorial comments or personal remarks
- ensure the investigation stays within the parameters of the allegations

Typically, an investigation will have **five steps**.

1. **Interview** the complainant and respondent.

Get a complete statement of concerns from the complainant. Include details of allegations and desired remedies. Record the complainant's state of mind (relevant to credibility and appropriate remedies). Obtain a full response in writing to each allegation.

2. **Plan** the investigation.

Establish what you need to find out. List the allegations and defences. What evidence do you need to prove or disprove them? Who do you need to talk to? In what order? Write out the questions you want to ask witnesses.

List the documents you need to examine, and why.

Develop a written plan with time frames for each stage.

3. **Collect witness statements and other information.** Re-interview the parties if necessary.

4. **Analyze** the information.

5. Prepare a **report**.

B. Procedural Fairness

An investigation must meet the legal requirements of procedural fairness. Some principles of procedural fairness are listed below.

- Complainants have a right to a full airing of their concerns.
- Respondents have a right to notice of an investigation.
- Respondents have a right to know what they are accused of (in enough detail to be able to respond adequately) and a right to respond to those allegations.
- Parties must be given an opportunity to respond to counter-allegations.
- Parties have a right to an objective and neutral information gatherer.
- Parties have a right to an unbiased decision-maker.
- Parties have a right to open-mindedness at the investigation stage.

C. Kinds of Evidence

There are several kinds of evidence the employer can collect during an investigation.

1. Direct (witness) evidence
 - from the complainant, respondent and witnesses
 - what they can report from their own experience
 - preferred in the form of signed statements
2. Documentary evidence
 - e.g. payroll records, time sheets, correspondence, notes, file contents, calendars, electronic records, and e-mails relevant to the complaint.
3. Physical evidence
 - concrete, physical evidence relevant to the complaint, e.g. graffiti, cartoons, letters, gifts, drawings, photographs
4. Evidence of pattern or practice
 - evidence of others being treated in the same way by the respondent

5. Evidence of credibility
 - evidence that is consistent with that of either the complainant or respondent, e.g. evidence that the complainant spoke about the problem to others, or appeared upset, soon after the behaviour complained about

How much evidence is enough? Be thorough but timely.

D. Witnesses and Statement Taking

Witnesses may include:

- people who directly experienced or observed an action, including the parties
- people to whom something similar happened (“similar fact” witnesses)
- witnesses of credibility, including people to whom the complainant spoke

Interview witnesses separately, and ask witnesses to keep their evidence and their information about the complaint confidential.

1. Draft statement as you interview.
2. Ensure the statement is logical, legible and complete.
3. Ensure the statement reflects the witness’s views, not your own.
4. Write in the witness’s own words. Avoid jargon.
5. Don’t lead witnesses. Ask general questions, then seek more detail on relevant points.
6. Be thorough. Ask for more details where appropriate, and explore inconsistencies.
7. Conclude by asking if the witness has anything to add to the statement.
8. Have the witness review the statement and initial any changes he or she makes.
9. Have the witness date and sign the statement, then witness (sign and date) the statement yourself.
10. Provide the witness with a copy of the statement. Store the original.

E. The Investigation Report

It is important to have a clear and accurate summary of the investigation and its findings. This report provides a basis for the employer’s subsequent decisions. The report may also become evidence at a future proceeding, if the investigation or its outcomes are challenged.

1. Outline the complainant’s allegations.
2. Outline the respondent’s version of events.
3. List witnesses and outline their evidence.
4. Outline all other evidence (e.g. documents). List exhibits.
5. Analyze the evidence. Who does it support, on a balance of probabilities?
6. Outline conclusions, based on the information already summarized.
7. Recommend a course of action and specific remedies.
8. Attach statements and exhibits.

F. Taking Action

If an investigation supports the complaint, the employer must decide on actions to remedy the complainant's concerns and prevent discrimination from re-occurring.

Remedial measures will depend on the facts of the case and the damage done. Their purpose should be to provide the complainant with a safe, discrimination-free working environment and to redress whatever harm has been suffered. If the employer decides to discipline the respondent, that discipline must be consistent with general principles of employment law and with the collective agreement.

Preventive measures can include the development and enforcement of an anti-discrimination policy, staff training and education, and other activities that promote an inclusive and respectful workplace.

G. Follow-up and Feedback

Though confidentiality should be a high priority when handling complaints, it is important to give complainants enough feedback to let them know their complaint was taken seriously and acted upon. This does not necessarily mean giving complainants details of disciplinary action, for example, but it might mean talking to them about outcomes in general terms, and explaining the limits imposed on information-sharing by the duty of confidentiality.

7. AVOIDING HUMAN RIGHTS COMPLAINTS

Process and timeliness are important. People sometimes file human rights complaints because they believe the employer failed to address discrimination complaints appropriately or adequately. Examples:

- failure to take action on a complaint for several months because certain staff members were on vacation
- failure to inform a complainant that the employer accepted her allegation of sexual harassment by a supervisor and had disciplined the supervisor
- transfer of the complainant, rather than the respondent, to a less desirable working environment in order to separate the parties after a discrimination complaint was found to be valid
- failure to address all of the complainant's allegations
- discipline of an employee for her reaction to racial harassment by a customer
- dismissive or trivializing response to the complaint

Avoiding such pitfalls can decrease the likelihood of complaints to an outside agency.

For more information, see the SHRC Web site: www.shrc.gov.sk.ca.

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