

**AOMA PRESENTATION BY HON JUSTICE TUJILANE ROSE
CHIZUMILA, JUDGE OF THE AFRICAN COURT ON HUMAN AND
PEOPLES' RIGHTS, FORMER OMBUDSMAN, MALAWI**

EFFECTIVE INVESTIGATION TECHNIQUES

WEBINAR HELD ON TUESDAY 14 JUNE, 2022

WHAT ARE EFFECTIVE INVESTIGATION TECHNIQUES

These are requirements to get the evidence needed to make findings in relation to a matter. A good workplace investigation is at the core of conducting effective investigation. An effective investigation interview is one that gets good quality, detail rich, data from witnesses, maintain procedural fairness and to develop rapport. It is one where the investigator takes a back seat to the witness who is the expert on the evidence.

All Ombudsman offices have specific investigation processes to follow. E.g., there are several steps in the investigation process dictated by the Ombudsman Act of Malawi. However, there are some general principles to keep in mind when interviewing. Interviewing witnesses is an art that needs to be consistently practiced in order for you to get the best results from your interviews.

STEPS OF AN EFFECTIVE INVESTIGATION PROCESS

- The investigation process itself is characterized by a number of important processes that are designed to reduce the risk of negative perceptions and or potential legal pitfalls at a later date.
- Compliance with existing policies and procedures concerning investigations is crucial, to ensure procedural fairness throughout the process. Results from an investigation process should be reliable.
- A sound investigative process will also ensure the finality of outcomes, leaving no room for doubt. Complainants, witnesses and employers understandably desire a process where finality and clarity are achieved.

WHO IS INVOLVED AND THEIR ROLES?

Witness

- Ensure that you have explained the process of the investigation to the witness.
- You need to explain your role as investigator as well as the role of witness and any support person.
- Explain what will happen at the interview, how the interview will be recorded and how the witness will get a copy of the record of interview.

Investigator

- The investigator's job is to conduct the interview in a way that enables them to express their evidence in the best possible way.
- It is the witness and not the interviewer who is the expert. Witnesses know the evidence best.
- Our job as the investigator is to let the witness tell their story.
- It's important, therefore for the investigator to remember that it is never their job to give their opinion on the matter being investigated, nor to allow anyone else (a support person for example) to attempt to answer questions or otherwise get in the way of the complainant providing the evidence the matters that they are expert in.

Support person

- Ensure that you offer the opportunity of a support person to attend the interview and that you make it clear that the role of a support person is not to advocate or represent the witness in the interview.

Respondent

- If you are interviewing a respondent, ensure that they have access to the allegations against them prior to the interview.

Participants guide

- Have a Guide for Participants which sets out what a witness can expect from the interview process. This is invaluable.

THE STEPS:

1. Receiving a complaint

1. Employers should ensure that internal policies and procedures regarding the receipt of complaints are closely followed. For certain types of alleged misconduct, employers are legally required to report to prescribed external bodies e.g. Ombudsman.

2. When an employee makes an informal or formal complaint, the employer should take immediate steps to stop the alleged conflict, protect involved parties and begin investigations.
3. Under many laws employers are legally obligated to investigate complaints in a timely manner.
4. Any appropriate corrective action is required to be taken by the employer to ensure illegal actions and behaviors cease immediately.

Benefits

1. Investigations can help the organization identify and resolve internal problems before they become widespread.
2. Given that every complaint has the potential to become a lawsuit, employers should investigate every case in a manner in which it can be presented to a court of law.
3. As potentially disruptive as investigations can be, they must be prompt, thorough and effective to ensure everyone's protection.

2. Letters of notification and allegation

- Letters of notification need to be made to respondent, complainant and all relevant witnesses as soon as the employer receives a verbal or written complaint.
- This provides an important opportunity to communicate the nature of the investigation process, as well as the individual's involvement.
- The letter of notification describes what is being investigated; who the investigator is; the right to request an interview support person; as well as the need for all parties involved in the investigation to maintain confidentiality.
- The letter of allegations provides a clear description of the complaints that have been made against the respondent. It includes the particulars of allegations, any request for supporting documents, pending interview details, the option of having a support person present, as well as the importance of maintaining confidentiality at all times.
- All correspondence within the investigation should be clear, comprehensive and accessible by the relevant parties.

3. Ensure Confidentiality

- Conduct a prompt and an effective investigation
- Confidentiality of employee/complainant to be protected to the best of its ability.

- It may not be possible to keep all information gathered in the initial complaint, such as interviews and records, completely confidential. The employer should explain to the complaining party and all individuals involved in the investigation that all information gathered will remain confidential to the extent possible for a thorough investigation. That information will be shared only on a "need to know" basis.
- An employer should never promise absolute confidentiality to any party involved in the investigation.

4. Provide Interim Protection

- Immediate measures for the protection of the accuser or the alleged victim e.g. separating the alleged victim from the accused may be necessary to guard against continued harassment or retaliation vide transfer or leave of absence, a schedule change, etc., may be necessary; however, complainants should not be involuntarily transferred or burdened.
- The employer and the accuser must work together to arrive at an amenable solution.
- Employers are advised to seek legal advice prior to making any decisions. These types of actions could appear to be retaliatory and result in a retaliation claim.

5: Select the investigator

Qualities of an investigator

The appropriate investigator should possess all the following qualities:

- An ability to investigate objectively without bias.
- Skills that include prior investigative knowledge and working knowledge of employment laws.
- Should not have a personal relationship with the involved parties. The outcome should not directly affect the investigator's position within the organization: No stake in the outcome.
- Strong interpersonal skills to build a rapport with the parties involved and to be perceived as neutral and fair.
- Attention to detail.
- The right temperament to conduct interviews.
- Be able to maintain confidentiality
- Be respected within the organization

- Have the likelihood of continued employment with the company, if internal.
- Have the ability to act as a credible witness

Who can be selected as investigator?

Employers generally use the resources of experienced HR professionals, internal security, legal counsel (inside or outside) or a third-party investigator. There are distinct advantages and disadvantages to each type of investigator that can be selected:

HR staff.

- HR is the most common choice because of their specialized job training as well as prior experience in conducting workplace investigations.
- Main advantage is their superior interpersonal skills; employees typically feel comfortable with them and are willing to confide in them.
- Have the ability to remain impartial, are familiar with the employees, and have knowledge of the organization and of employment laws.
- The disadvantage is that employees may associate them too closely with the organizational management and therefore not perceive them as neutral in the investigation.
- Management may also object if the HR staff has a close personal connection with the involved employee(s).

Internal security.

- They typically have training in investigation methods that allow them to obtain information from sources that a lesser-trained investigator may overlook.
- However, this causes them to be viewed as intimidating by employees and therefore may become less productive.
- Employers should consider the specific security personnel's interpersonal skills, personal relationships with those involved and personality or approach to conflict.
- They may also have less of an employment law background, thus limiting their ability to conclude whether sources are reliable and potentially admissible in court.

Outside or nonlawyer, third-party investigators.

- They are more commonly used when an employer does not have an internal person who possesses the necessary qualifications or the time to conduct the investigation, or if the person accused is among the senior leaders in the organization.
- They can provide objectivity that an internal investigator may lack.
- An employer may use former senior-level employees to conduct investigations because of their knowledge of the organization and employees, or a human resource consultant or other independent investigator because of his or her knowledge specific to investigatory methods and techniques.

Legal counsel investigators, both in-house and outside.

- They have ethical and privileged considerations.
- They must disclose to the parties the attorney-employer relationship: that the organization, not the accused employee, is the client.
- Disadvantages Outside counsel brings objectivity to the investigation but lacks knowledge of the employer's culture and the employees.
- In-house counsel does have knowledge of company culture and its employees.
- Both in-house and outside counsel can be perceived as intimidating, thus could restrict the employees' willingness to be open and provide information.

Team approach.

- Teams provide a multitude of experience, resources and ideas.
- A good team, which is often an outside attorney working with HR, covers all internal and external gaps that would be associated with a single investigator such as experience, expertise in employment law, the ability to obtain witness information or knowledge of internal issues and culture.
- The team approach provides the ability to collaborate if the accuser, the accused or a witness alters his or her earlier statements.

6. Create an interview Framework/Plan for the Investigation

- When conducting an interview, the investigator must constantly consider how to maintain transparency and objectivity at all times.
- One useful tool for running the interview process appropriately is the adoption of an interview framework.

- An investigation must be planned to be effective and properly executed.
- The use of all available resources will assist the investigator in developing a proper plan.
- A complete plan should include an outline of the issue, the development of a witness list, sources for information and evidence, interview questions targeted to elicit crucial information and details, and a process for retention of documentation (e.g., interview notes and e-mails that could be treated as evidence).

Interview Framework/Plan example

The number of days and amount of time it takes to complete a thorough investigation will vary depending on the circumstances. The following strategies are helpful in how an investigator may organize and complete an investigation:

- Arrange a secluded conference room in advance.
- Allow time between interviews to read over interview notes and type up notes and fill in details while fresh, and adjust to new information, evidence or witnesses.
- Keeping the investigation flowing as efficiently as possible.
- Additional time may be necessary depending on the number of witnesses and amount of information provided.
- Interview accuser (to clarify details and gather evidence and witnesses)
- Determine who should be interviewed next: the accused or some of the witnesses.
- Review notes for entire day, and make plan for second day.
- Finish any additional witness interviews
- Handle any follow-up interviews with accused, accuser or witnesses as needed to clarify information previously discussed or to ask new questions about evidence or information disclosed after the initial interview.
- Review interview notes, evidence and credibility assessment. Establish proposed recommendation for action to present to upper management.
- Discuss proposed resolution with upper management, and decide on final resolution.
- Create any relevant disciplinary actions, warnings or memos.

- Hold closure meeting with accused and accuser separately.
- Write investigation report/summary.

7. Develop Interview Questions

- Questions should be developed ahead of time in the planning stage.
- Additional questions will be added throughout the investigation as more evidence and information are shared.
- Good questions are relevant and designed to draw out facts without leading the interviewee; they should be open-ended to elicit as much information as possible.

8. Conduct Interviews

- This comes after an appropriate investigator has been selected, an investigation plan has been developed and interview questions have been created.
- The investigator should inform all parties involved of the need for an investigation and explain the investigation process.
- Caution should be used when stressing confidentiality of the investigation process.
- The investigator should focus on being impartial and objective to gather and consider relevant facts.
- The investigator should never offer any opinion or say anything to interviewees that will discredit his or her impartiality.
- Prevention from pushing the investigation in any particular direction is imperative
- Objectivity must be maintained with every interview.
- Taking notes, looking for inconsistencies, and seeking opportunities for more evidence and names of other potential witnesses should be a consideration as well.
- Asking the employee to write down what happened may help find inconsistencies. There may be a disparity between what the employee is willing to write and what he or she told you in the interview.
- Investigators must determine employees' credibility.
- Interviews provide differing accounts and even conflicting versions of the events.
- Be aware that the issue is very personal to employees involved.

- Because of the personal and emotional nature of the issue, their individual perceptions of what happened may be clouded by personal interests, or if their jobs are on the line, they may even lie.
- Investigators must consider the credibility of the individuals being questioned during an investigation and use techniques in assessing credibility such as inherent plausibility, ability, demeanor, motive, motive to falsify, corroboration, past behavior and past accusations.
- Investigators should be cautious when conducting interviews to avoid any harsh interrogation tactics that could result in charges such as coerced false confessions and false imprisonment.

Use of Questions

By using a judicious mix of questions you'll be able to get rich quality data that is needed from the investigation. This will include a mix of:

1. Encouraging Narrative: This is where an interviewer asks the witness to narrate the evidence in an uninterrupted way. This enables the witness to get into the flow of the evidence and encourages them to recall the events without being interrupted.
 2. Open Ended Questions: The power of open ended questions should not be underestimated. Open ended questions are much more likely to get you more richly detailed and more accurate evidence than if you start with closed questions.
 3. Closed questions: You may still need to use closed questions 'Who, what, where, when, how' when you are gathering evidence. These questions are useful when you are clarifying the evidence you've collected in the narrative.
 4. Directed question: You may ask questions directed at the evidence you have before you e.g., emails.
 5. Maintaining Neutrality: One of the keys to conducting an effective workplace investigation is to ensure that you follow the rules of procedural fairness, including the No Bias rule. As an investigator you need to treat all witnesses with the same polite neutrality. You should not get emotionally involved in the stories of witnesses or sympathize with them. You must conduct the interview in a procedurally fair way.
- Listen! Remember is to listen closely to the answer the witness gives to your question.
 - By listening carefully to the answer given by the witness you are more likely to wait until they have finished answering, you're better able to assess what the next question should be and most importantly you can

tell if the witness has in fact answered the question that you have asked.

Rapport Building

Building rapport is a vital element in any investigation interview. It enables for the interviewee to feel comfortable in the space around them and more relaxed in answering questions. Several ways to build rapport include:

- A telephone call to the witness prior to the interview where you introduce yourself and explain the process
- Normal hospitality, explain where the bathrooms are, offer tea/coffee/water and ensure that the interviewee knows that they can ask for a break at any time.
- Offer a support person;
- Don't launch straight into your questions, a little small talk or some friendly questions about how the witness got to the interview for example will help to put them at ease and give you a sense of their style of answering questions.
- Keep an open posture and body language. Maintain occasional (but not invasive!) eye contact, and give non-verbal cues such as nods to show you are listening.

9. Closure of Investigation

- Once a decision is made, the employer should notify both the complaining employee and the accused of the outcome.
- It is important to let the complainant know that the organization took the complaint seriously and took appropriate action.
- The organization must ensure the complainant agrees that he or she has been properly heard and understood, even if he or she is not in agreement with the results.
- The investigator should set a time frame to follow up with the complainant to ensure there are no other issues and that he or she is settling back into the work environment.
- The employer should encourage communication and follow-up until the complainant is comfortable again.
- Finally, the investigator should remind all parties to preserve confidentiality as appropriate.

- When necessary, employers must take corrective action that is appropriate to the situation, such as discipline or even termination. The employer should:
 - Look at any damages incurred by the victim and discuss with legal counsel how to remedy those damages.
 - Determine if education, such as sexual harassment training or anger management training, would be beneficial to the individual or all employees.
 - Consider if the need exists to review, modify or redistribute workplace policies.
 - Determine whether a review of the investigation and complaint resolution processes is necessary.

10. Making Findings

- One of the last and most crucial tasks for the investigator is making findings.
- Findings should tie back to the analysis and should define which allegations have or have not been substantiated and whether or not one or more policies have been breached.
- The investigator must be careful not to jump to any conclusions before all the facts are available.
- Once the interviews are conducted, other necessary procedures, such as evidence collection, should be completed.
- Once any credibility issues have been resolved, the investigator will evaluate all the information for a formal recommendation.
- The investigator or member of management, as well as legal counsel, should make the final determination of any employment actions that are warranted based on the investigative report.
- The employer must consider all the parties involved as well as organizational processes, not just whether the accused is guilty, in the final determination.

11. Develop Written Summary Investigation Results

- One of the most important aspects of a workplace investigation is the final written report.
- It is relied upon for ensuring compliance with recommendations, detailing any disciplinary actions and can form a defence against future claims.

- A final investigative report is crucial since every investigation of a serious nature could potentially be heard and reviewed by a court. Findings made with objectivity and upon the evidence available, are more likely to meet the evidentiary threshold in serious matters.
- Investigators should clearly determine if allegations are substantiated, unsubstantiated or if evidence is lacking.
- Being concise, following a logical sequence and ensuring that 'findings follow the evidence' are all important ways of creating a professional, sound final report.
- The investigator should have a clear record of everything done including evidence and any findings as well as other steps taken during the investigation.
- Employers should also document interviews with the accused, the accuser and witnesses.
- Investigators should ensure their notes from interviews are as factual as possible, contain as much relevant information as possible, are dated and indicate the duration and time of the interviews.
- The final report should summarize the following:
 - The incident or issues investigated, including dates.
 - Parties involved.
 - Key factual and credibility findings, including sources referenced.
 - Employer policies or guidelines and their applicability to the investigation.
 - Specific conclusions.
 - Party (or parties) responsible for making the final determination.
 - Issues that could not be resolved and reasons for lack of resolution.
 - Employer actions taken.
- The goal of the document is to ensure that if a court, jury or government agency were to review it, the reviewers would conclude that the employer took the situation seriously, responded immediately and appropriately, and had a documented good-faith basis for any actions taken during or as a result of the investigation.

12. Document Control. Related to all the above crucial steps Document Control is also very important.

- All records of investigation should be kept under lock and key control in a limited access area.

- Do not leave documents accessible or in plain view.
- Losing control over evidence, documents, or notes of interviews can cause a potential liability.
- **Avoid Using Original Documents.** All original documents that are evidentiary to the case should be tagged, logged, and placed in a secure file. All interviews where such documents are relevant to the process should be with copies, not original documents.
- **Control and Track All Cases.** All hotline reports from complainants or otherwise should be date-stamped, logged, and numbered as part of the Compliance Office's records management policy.

Conclusion

Lack of proper conduct of investigations may lead to avoidable mistakes that may compromise the investigation and, in some, instances aggravate circumstances. It is therefore crucial to have guidelines for investigative strategies and in addition consider having a training program on the proper methods of conducting an investigation for the Compliance Officers, Human Resources, Security, Internal Audit, Legal Counsel, etc.

THANK YOU FOR LISTENING