

# Tag! You're it!



## Basic workplace investigation skills for the yet-to-be-trained

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August 12, 2023

All we have to do is watch the news to see that the *Me Too* movement raised the awareness of workplace bullying and harassment (including sexual) around the world. There are daily accounts of people who, to earn a living, have had to tolerate poor behaviour from colleagues and supervisors. The toxicity, when not addressed effectively, and in a timely manner, has destroyed dreams and ended careers and lives. It's no wonder the movement led to an increase in training companies willing to teach the masses how to reduce liability, and increase productivity, by learning how to conduct a proper investigation. Sounds like I'm about to announce a happy ending, right? Well, as much as I'd love to, we haven't reached that point yet. You see, training is expensive (to people who haven't been sued for a matter that could have been prevented by it), and when it is offered, the courses and workshops are often given to a limited few, usually within an HR unit. Again, this is great, but what do the untrained majority do when HR deems a matter low risk, or too trivial for them to get involved, but believes it should still require some investigation? Here's an example:

Anita Break, is a supervisor at a hospital. One morning, a clerk named Aiden Goodman tells her that Isabella Temoin told him Vicky Tim is being "*bullied*" by two colleagues. Anita lets HR know, but is informed that it is her responsibility to look into the allegations. She has never received any investigative training, and is told to "*just talk to people*".

What should Anita do? To whom should she talk? In what order should she speak to these people? What does she need to know? How should she document what she learns? Whom should she believe? What if they don't want to talk to her? What questions should she ask? What legal warnings would she be required to give? What is an interview? What happens if the investigation doesn't meet the acceptable standard?

Poor Anita has been put in the unenviable position of having to stick her head into a hornets' nest, without the protection of a veiled hat. Since all the Anita's out there won't get any formal training, yet can't refuse to investigate these matters, I have chosen to provide some basic guidance, with the goal of alleviating some of the inevitable anxiety caused by being thrust into such a confusing position. This paper is not meant to replace formal training, but it may be better than having no training at all.

## **Prepare for the Investigation**

### **Notebook**

It may be wise to use a separate notebook for each investigation, as it would make it easier to follow, and could reduce the likelihood of inadvertent disclosure of irrelevant entries to someone from another investigation. Entries should only be made in ink, and should always document the date and time of each entry, and if relevant, the location. Errors should never be erased, as it could lead to an allegation of "doctoring" the notes, which might have a deleterious affect on credibility. To remain transparent, put a single line through an error, and add in the correct wording. Some investigators have found it valuable to document the time a notebook entry was started and completed, as a delay between the occurrence and the entry might be used to either bolster credibility, or conversely destroy it.

The following is a non-exhaustive list of what you might want to document:

#### Meetings:

- Location
- Date
- Start and end time
- People present
- Reason for the meeting
- Decisions arising from the meeting
- Articulate rationale for all decisions

#### Tasks (Investigative steps taken):

- Description of the task
- The reason for the task
- Whether it potentially affects anyone's privacy
- The lawful authority to perform the task
- Decisions arising from the task

The notes should not be everything in your memory, but they should be enough to help you recall what you knew, how you knew it, when you knew it, from whom or where you learned it, what you did, and what it meant to the investigation. These are all questions that might be posed at a subsequent hearing as the judicial process often focuses on the integrity of the investigation as opposed to just the truth. If you do something, write something. It will help your articulation both during and after the investigation.

23-08-09 Wednesday  
Occurrence # 2023-62 U

Entry start 0845 Hrs

0900 Audio on far interview of  
Aiden Goodman.  
location: my office.

0945 Done / Audio off.  
Interview notes on folscep  
folscep

0950 Uploaded audio to my laptop  
1000 Master audio file saved

saved to USB  
1010 Master USB sealed in  
envelope marked  
"23-08-09

1010  
BP-P "  
1015 Locked in my exhibit  
drawer with key code  
known only to me

Entry finished 1017 Hrs

DPF

Example of a notebook entry

### Confirm the investigative scope

Have a frank conversation with the person assigning the investigation to you, better yet get it in writing, so there is no confusion about what is required of you, what your role is, and any boundaries to which you should adhere. Establish what is expected of you, and whether you are being asked to decide if any wrongdoing occurred, or even to suggest a remedy or punishment. If there is potential for a parallel police investigation, such as common or sexual assault, it would rarely hurt to discuss this with HR and the police. Early coordination leads to better communication, which in turn leads to fewer misunderstandings and less disappointment.

## Risk assessment

It is crucial that a risk assessment is conducted in conjunction with discussion on the investigative scope. Safety should always be the primary goal, and should not be sacrificed for convenience or expedience. There are few absolutes; however, as both content and circumstance would dictate the remedy to protect employees and the investigative integrity. Whereas, some issues could be resolved by conducting a speedy investigation, others may require more drastic means such as placing the respondent on administrative leave. There is also value to having all parties (witnesses and respondents) enter into a confidentiality agreement that clearly directs them not to discuss the investigation with others, as well as the consequences of failing to comply with the directive. It would also be wise to inform everyone of the consequences of retaliation. Prior to warning people of consequences; however, ensure that there are in fact enforcement clauses, or you may end up being all talk and no action.

## Review the elements of potential wrongdoing

The next step is to become familiar with what are known as the offence elements, or “*the ingredients*” of “*the recipe*” for contraventions of policy or legislation. In this way, we would be able to see if any wrongdoing had indeed occurred, and what information and evidence would be required to satisfy the burden of proof. Let’s look at bullying, since that is what was alleged in the case before us. We will refer to the policy from an anonymous health authority as an example of how the offence elements of bullying might appear. If the investigation satisfied the right elements, it would be concluded as “founded”. I have bolded some important points within the policy.

## Personal Harassment

Personal harassment is defined as **conduct or comment directed towards a specific individual**, that a reasonable person would know or ought to know **would be unwelcome**, which serves no legitimate work-related purpose and has the effect of **creating a demeaning, intimidating, hostile, or offensive work environment**. Personal harassment is **often referred to as “bullying.”**

Examples of personal harassment include, but are not limited to:

- psychological abuse (e.g., badgering, following, staring down),
- verbal abuse (e.g., yelling, swearing, ridicule),
- spreading malicious gossip or rumours,
- inappropriately interfering with or sabotaging another individual’s work,
- practical jokes which cause awkwardness or embarrassment,
- cyber-bullying, or targeting or demeaning someone through online activities such as email, text messaging, or social networking,
- verbal or perceived physical threats,
- physical assault.

**To constitute personal harassment there must be:**

- a) **a single, serious incident of conduct or comment** that has a **lasting, harmful impact** on an individual; or
- b) **repeated conduct or comments** that have a **lasting, harmful impact** on an individual.

Personal harassment can occur even where there is no intention to harass or offend.

It is apparent that much of the investigation would have to focus on being able to prove or refute whether specific actions or conversations occurred (*actus reus*). As defined by the policy, the intent to bully (*mens rea*) would not have to be proven.

The constituent parts of bullying do not have to be memorized, but the investigator should be familiar enough with them to recognize when they have been satisfied by either verbal or physical evidence, or a combination of both. These offence elements will be important to satisfying the objectives of your interviews. They will also be of incredible importance when preparing the final report, as rulings of guilt or innocence would rely almost exclusively on the facts as they related to the requirements of the policy.

### Proper mindset

Regardless of what you learn during the investigation, it is imperative that you remain impartial throughout. As none of us are immune to bias, we usually have to work hard to keep it from insinuating itself into the process. This often requires more than a passive acceptance of bias, meaning we have to actively try to keep it at bay. The following mantras may help you:

1. Follow the evidence, follow the evidence, follow the evidence
2. Beware the ME TRAP!
3. The ABCs: **A**ssume nothing, **B**elieve nobody, **C**heck and **C**larify everything

### Review the complaint and plan the objectives

Before investigating, review the available information to find out what you already have and what you might need to establish what, if anything, happened. Often, breaking the details into smaller, meaningful pieces helps to shed light on what is before you, allowing for a clear perspective of the complaint and what might be essential to fully understanding the nature of any wrongdoing. The mnemonic acronym APLOT may help you organize the topics as they relate to the offence elements.

**A**-ctions & conversations (actus reus & mens rea):      being “bullied”

**P**-eople:      Aiden Goodman  
Isabella Temoin  
Vicky Tim  
Respondent 1  
Respondent 2

**L**-ocations:      not known

**O**-bjects:      not known

**T**-imes:      not known

Now, compare this list with the offence elements for bullying presented earlier, and you should be able to get an idea of what you need to learn before believing bullying had indeed occurred. The action and conversation topics are currently limited to the word “*bullied*”, which would be too vague and ambiguous to satisfy the required elements. The next step should help you come up with ways to define the word “*bullied*”, as well as how to examine other relevant topics related to people, location, objects and times.

### Plan investigative tasks

The danger here is that we tend to overcomplicate the process. When asked how many categories of evidence there are, I often hear anywhere from 10 to 20. Although there could be that many, I find it easier to limit it to only two; verbal and physical. Verbal would be the interviews, and physical would be

everything else (biological, documentary, OSINT, CCTV, etc,...). From our scenario, let's develop a list of all the verbal and physical evidence that might be available to use. This is a "wish list", so you, at this stage, do not need to be able to prove its existence, only that it might exist in a perfect world. It would be normal to cross some off as the investigation progresses. The following is a simple case management matrix to help organize and document investigative tasks. It documents your intent, as well as progress; thereby, affecting the speed, flow, and direction in a positive way.

<b>Case Management Task Log</b>				
<b>Investigative Tasks (what you want)</b>	<b>Relevance (why you need it)</b>	<b>Location (where it is)</b>	<b>Date Assigned</b>	<b>Date Completed</b>
Interview Complainant Aiden Goodman	Find out what he heard		23-08-09	23-08-09
Interview witness Isabella Temoin	Find out what she knows		23-08-09	23-08-10
Interview witness Vicky Tim	Find out what she knows ID respondents		23-08-09	23-08-10
CCTV	Corroborate allegation	IT Dept	23-08-09	23-08-09 NO CCTV
OSINT	Social media entries	Internet	23-08-09	23-08-16
Proxy card	Establish when in office	Security Dept	23-08-09	23-08-12
Respondent's cellphone	Emails/texts	Respondent	23-08-09	23-08-09
Respondent's laptop	Emails	Respondent	23-08-09	23-08-09
Respondent's work file	Discipline history Respectful workplace training	HR	23-08-09	23-08-09
Company policy and procedures	Offence elements	HR	23-08-09	23-08-09
Final Report			23-08-09	23-08-25

### **The Investigation**

Well, we've arrived at the actual investigation, where we try to gather all the information and evidence we planned for. Whereas I'd love to type out another 200 pages, I will stick to the intended scope, which was to provide an overview and not a full course. I must also recognize the inherent danger of brevity, in that it could lead some to believe this paper would give them expert status, or that the material would not be used with nuance and flexibility. For this reason, I will intentionally refrain from attempting to mention every possible consideration. The unfortunate reality is that this paper will give you an idea of what to do, but further training will be an essential component of your growth as an investigator.

## Interviews

An interview is a conversation where the goal is to obtain information that is complete and reliable, so that you better understand what happened. The following considerations may help you achieve that goal:

- Conduct it in a location that is private and free of distraction
- Electronically recording the entire process is a best practice, and ensuring the witness understands they are being recorded is important.
- Plan the topics that should be covered (relevant actions & conversations, people, locations, objects, and times)
- At the beginning of the interview, build rapport by having a meaningful conversation about you, your role, and the interview process. Take a few moments to explain what you expect of the interviewee, and explain the level of detail you would like, and what might help them recall it. For example, asking them to work hard and focus is rarely time wasted.
- Ask the interviewee for a free recall by giving an open instruction such as, *“Start at the beginning and tell me everything that you know about this”*. Then, listen intently, without interrupting at all. When the episodic narrative (free recall) has finished, pause for a few seconds to see if the interviewee had truly exhausted her memory. Take brief notes on the names provided for all the relevant actions & conversations, people, locations, objects, and times (these are topics that might require further probing).
- Starting with the action topics, ask questions to obtain detail that was not mentioned in the narrative. Work through each topic individually by posing predominantly **open questions** (often beginning with the words *“tell”, “explain”, “describe”, or “show”*), but using **probing questions** (that include the words *“who”, “what”, “when”, “where”, “why”, or “how”*), and **closed questions** (ones that often lead to short responses such as *“yes” or “no”*), when needed.
- Keep your questions simple by preceding them with terms such as *“You said”, or “You mentioned”*. For example, *“You mentioned that Mr. Hands patted your bum. What happened next?, or, “You said Vicky was embarrassed. Tell me more about that.”*. This technique allows you to pose questions by quoting what the interviewee had previously said; thereby, reducing the insertion of your language, along with the potential bias and suggestion that would accompany it, into the process.

## Exhibits

An exhibit would be any tangible item that you would use to support your investigative findings, and must; therefore, be retained until all potential legal challenges have been completed. Some items might require proof that they had not been tampered with, so you would be responsible for being able to explain where it had been secured at all times, as well as who had been able to have contact with it. This is referred to as exhibit continuity. Whereas, some exhibits, such as notes and documents, could be appropriately secured in a sealed envelope or plastic bag (the seal must be inaccessible without proof of damage, and labelled with identifying markings such as the date, time, and your initials), others, such as laptops and cell phones, would have to be locked in a compartment or room for which access was strictly tracked. As

cell phones could be accessed remotely to delete content, they should be retained in special, protective containers. If you use your desk drawer as a locker, ensure you are the only key holder, you never leave your key unattended, and you don't inadvertently leave the drawer open when you aren't there.

Here is an example of an exhibit log to help you maintain continuity:

Item #	Item Description	Seized (date/time/location/person)	Markings	Secure location	Moved to	Moved to
1	John Smith's work laptop	23-08-09 1305 hrs / John Smith's office desk / Frank Prober	23-08-09 1305 FP	Frank Prober's exhibit drawer	Delivered to Jim Brown at IT for examination 23-08-10 1402 hrs	Frank Prober's exhibit drawer 23-08-21 1106 hrs
2	Master audio file of Aiden Goodman's interview 23-08-09	23-08-09 1008 hrs / Prober's audio recorder / Frank Prober	23-08-09 1008 FP	Sealed envelope marked 23-08-09 1008 FP	Removed to make copy for steno 23-09-15 1403 hrs	Resealed in envelope marked 23-09-15 1520 hrs FP

An alternative to an exhibit log, would be to make the same detailed entries in your notebook. For complex investigations that involve numerous exhibits, the log would make exhibit tracking easier to follow.

### Prepare report outlining investigative results and analysis

The final report should be easy to read and understand. In fact, it should be written so that a person with little investigative or legal background could understand the content and analyses. The following tips might help you achieve that goal:

#### Use headings

Start your document by adding short headings that split the investigation into topics. Then, add the content to satisfy each of the headings. This technique often forces you to stay on track, and also keeps the word count to a minimum.

The following are a list of common report topics:

Title page	occurrence #, investigation title, investigator name, date and time
Executive Summary	a concise outline of the investigation and findings
Table of Contents	a list of all headings and the associated page range



Allegations	a clearly-defined list of all allegations, including the people, locations, policy contravened, objects, and dates
Investigative History, Scope and Mandate	a brief explanation of preparatory decisions prior to the start of your investigation.
Investigator's Background	Who you are, and why you are qualified to conduct this investigation in a professional and impartial manner
Terminology	A list of all jargon, abbreviations, or acronyms used in the report
Methodology	A brief explanation of the investigative process used, as well as the burden of proof to be met
Investigative Findings and Analysis	A detailed narrative of investigative steps taken, and the decisions that flowed from them. This segment should include facts, and how those facts were used as evidence to either prove or disprove the allegations
Appendices	List and attach relevant reports, notes, policy, and photographs, that would assist the reader

### **Stick to the requested scope**

Pay attention to the scope you had planned for at the front end. If you think you might be about to divert from it, it would be wise to have a discussion with the person who assigned the investigation to you. For internal matters, this might be the HR unit.

### **Decisions**

If charged with making decisions on whether the allegation was founded, you must clearly articulate the rationale for your belief, meaning that you would have to explain, using evidence and, possibly information, why you believed the burden of proof had been met. For most workplace investigations, the burden of proof would be a balance of probabilities, which often requires that the investigator be courageous in situations often referred to as "*he-said-she-said*" cases where it would be easy to conclude the matter as "*unsubstantiated*". Keep in mind that, when all else is equal, the vast majority of cases tilt to one side of the scale when a professional credibility assessment of the opposing parties has been conducted. Rarely, would two people who have conflicting versions have the same credibility levels.

### **Use normal language**

When writing your report, please don't use big words when normal, conversational language would suffice, particularly when the big word is used incorrectly, or has a subtle, yet meaningful, difference from the word that could have been used. I will use an example to explain this.

Using big words:

*Viola Toogood **advised** me she **proceeded** down that street **in order to attend to** the store before it **concluded its daily business**.*

Using normal language:

*Viola Toogood **told** me she **walked** down that street **to get to** the store before it **closed**.*

### Conclusion

A person charged with conducting a workplace investigation should be well-trained and highly experienced; however, these important matters are often assigned to people who are neither. This is troubling for all parties involved (complainant, witnesses, and respondent), and stressful for the assigned investigator who would have gained both confidence and competence from formal training. I hope this paper will make a difference to those who have yet to be trained.

For those who wish to learn more about workplace investigations, I thoroughly encourage you to look into training from the following agencies:

Veritas Solutions      <https://veritassolutions.net/>

WorkPlace Institute      <https://investigationstraining.com/>