



Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

November 2022

This "Investigation Cheat Sheet" has been developed by CAUT to assist associations in representing their members when involved in employer-led investigations. This is an interactive form designed with the user in mind – please feel free to use this checklist for each investigation and check off items as you go.

Please contact your association's CAUT Collective Bargaining Officer should you have any questions or concerns about an investigation. The CAUT Legal Services and Labour Relations section can be reached at legal-assistant@caut.ca.

When a Member Advises the Association of a Complaint

- Determine whether the member is the complainant or the respondent.
- Assign a representative to the member who is seeking assistance.
- Have a separate representative who is not involved in the case on stand-by in the event the opposing member comes to the association as well. Create a "cone of silence" around each representative.
- Recall that the union owes a duty of fair representation to all its members, even where their interests conflict. Uncertified associations should also follow this guidance.
- Determine the collective agreement provisions, policy or rubric under which the investigation is being led. Different policies may have different protocols.

Procedural Entitlements

Basics

- Academic staff involved in an employer-led investigation are entitled to a fair, thorough and timely investigation.
- Elements of the investigation will often be laid out in the collective agreement, the employer's policies, and/or legislation (e.g., health and safety legislation in most provinces will cover harassment and violence, and human rights legislation will cover discrimination).
- Employees are entitled to know the allegations against them with a level of detail sufficient to allow them to meaningfully respond and participate in the process.
- Employees have the right to respond to allegations and evidence against them.
- Employees often have the right to representation or accompaniment. Most collective agreements provide that an employee has the right to association representation or assistance if an investigatory meeting can result in discipline. Although they may be permitted under policies or the collective agreement, duplicate and simultaneous investigations may result in unfairness. It may be appropriate to have one process stayed and/or the findings of fact in one process applied to the other.

Investigator Requirements

Investigators should be:

- Qualified
- Impartial
- Free of conflicts of interest
- Approved by the association (where possible)

The Collective Agreement

- Review the collective agreement for the following provisions, and keep them in mind as the members move through the process:
 - Harassment and Bullying:** Many collective agreements include provisions that members are entitled to a workplace free from harassment and bullying.
 - Occupational Health and Safety:** Collective agreements incorporate occupational health and safety legislation by explicit or implicit reference.
 - Human Rights:** Collective agreements incorporate human rights legislation explicitly or implicitly.
 - Harassment and Discrimination (Employer Policy):** Some collective agreements incorporate an employer's harassment and/or discrimination policy.
 - Association Representation:** Some collective agreements explicitly provide that a member is entitled to association representation in any employer-driven investigation and/or describe the extent to which an association may participate in the investigation process. Where a collective agreement is silent on this issue, a member may still be entitled to association or legal representation, because providing representation in circumstances that could lead to discipline is considered a fundamental function of a union.
 - Timelines:** Some collective agreements include timelines for the completion of employer investigations. In the absence of explicit timelines, investigations should still be conducted promptly.

The Employer's Policy

Review the employer's policy for procedural expectations and timelines.

- Take note of any defects in the policy which may undermine the fairness of an investigation.
- All occupational health and safety legislation requires that employers draft and implement harassment, discrimination and/or violence prevention policies. A failure to follow its own procedures may indicate that an employer's investigation was unfair or unreasonable.
- Take note of the timelines and where deadlines are missed, since that may affect the fairness or reasonableness of the employer's investigation.

Role of the Association Representative, Legal Representative or Support Person

Support during the investigatory process can include:

1. Practical Assistance

- Avoid simultaneous investigations relating to the same underlying set of facts where possible. In some cases, it may be appropriate to try to have one process stayed and/or the findings of facts in one process applied to the other.

- Take notes during meetings.
- Advocate for the member during meetings with the investigator and/or the employer.
- Note whether the investigator is respectful and impartial.
- Note the accuracy and reliability of the complaint.
- Ensure the process is fair and timely – remain in contact with the employer and investigator to ensure a schedule is set and followed.
- Help the member respond to allegations:
 - Explain the policy and procedure that the employer has engaged.
 - Ensure the employee understands the allegations.
 - Help select an investigator (where possible).
 - Understand the investigator’s mandate.
 - Note deadlines and ensure they are met.
 - Identify facts which require a response.
 - Identify key witnesses.
 - Review documents.
 - Gather evidence.
 - Identify mitigating factors.
 - Encourage concise, specific responses.
 - Emphasize facts over judgments or conclusions.
- Obtain and review interim or draft reports.
- Obtain and review final reports.
- Track timelines for filing a grievance.
- Ensure everyone, including the employer, maintains confidentiality, as necessary.

2. Appropriate Communication

- Evince both compassion and impartiality.
- Adopt a trauma-informed approach to working with members.
- Communicate diligently with members.
- Explain procedures and consequences, including disciplinary consequences.
- Iterate important points verbally and in writing.
- Establish strategies with the member—both short and medium term.
- Diligently follow up with the member, the investigator and the employer.
- Maintain confidentiality.

3. Accommodation

- The association owes its members who are protected by human rights legislation a duty to accommodate. Typically, accommodation is required on the basis of disability, religion or family status. The association shares a duty with the employer and the member to facilitate accommodation in the workplace, including during employer-led investigations.
- The duty to accommodate can include the duty to inquire. This is the obligation that employers and unions have to investigate whether an employee has a limitation or restriction because their conduct falls outside the employee’s norm or there are other “red flags”.

Accommodation must be provided by the employer and the association to the point of undue hardship.

4. Assistance in Accessing Health Services

- Employer-led investigations can be stressful and isolating. Consider directing or connecting members to mental health services where appropriate.

5. Raising Objections

- Association representatives should raise objections, verbally and in writing, as the need arises (do not delay until there is a grievance meeting). The association may be considered to have waived its objection if it is not brought to light in a timely way. Common objections include:
 - Delay in bringing the complaint
 - Delay in investigating
 - Failure to follow timelines
 - Effect of delay on fairness of the procedure
 - Bias, partiality or conflict of interest with the decision-maker
 - Lack of representation
 - Lack of opportunity to respond
 - Failure to interview important witnesses
 - Breach of confidentiality

Limits of Support

- The support person (association representative) is entitled to personal boundaries and may place limits on topics of conversation, level of participation, and volume of contact.
- The support person is not typically a medical professional and cannot provide that type of support.
- The support person and others involved in the workplace are entitled to be safe from psychological and physical harm.

Filing Grievances

Associations should consider filing a grievance where:

- The employer's investigation has been deficient or unfair.
- The employer's investigation has come to inappropriate conclusions.
- Disproportionate discipline is imposed.
- The employer has not addressed objections raised by the association.

Timelines

- On the one hand, preserving the timelines for filing under the collective agreement is of the utmost importance. Delays in filing and referral are considered substantive and often incurable flaws in a grievance.
- On the other hand, the best point at which to file a grievance is when the investigation has concluded, and a result has been produced. Filing earlier can lead an arbitrator to find that the grievance was premature. Filing early may also limit the remedies available or require that a series of grievances be filed that can then be difficult to consolidate.
- To avoid this dilemma, try to secure an agreement in writing from the employer, suspending timelines, and preserving the member's right to grieve at the conclusion of the investigation.
- If this cannot be accomplished, then it will be necessary to file the grievance within the collective agreement's timelines, even if the investigation has not concluded or multiple grievances will need to be filed.
- Where there has been significant delay or the investigation appears to have been abandoned, it may also be necessary to grieve before any conclusions are released.