

USING AN INQUISITORIAL PROCESS IN SEXUAL HARASSMENT CASES

Definition/explanation of inquisitorial vs adversarial processes

“An inquisitorial system is a legal system in which the court, or a part of the court, is actively involved in investigating the facts of the case. This is distinct from an adversarial system, in which the role of the court is primarily that of an impartial referee between the prosecution and the defense.”
(Wikipedia)

Our normal processes of disciplinary hearings in the workplace follow the ‘adversarial’ method, aligned with the South African legal system.

The critical features of an adversarial process are that:

- the chair determines the case on the basis of evidence introduced by the parties (the ‘prosecutor’ and the ‘defendant’), each of whom gathers and presents the evidence in support of its case (subject to limiting rules as to relevance and admissibility);
- the investigation for the ‘prosecution’ is conducted by the organisation, or an outsourced agent.
- the hearing itself does not have any investigative function, and determines the issue of guilt or innocence solely on the basis of the evidence presented by the ‘prosecution’ and ‘defence’.

By contrast, in the inquisitorial model used by some countries’ legal systems (for example, France and Italy), investigation is done by a ‘judicial authority’ whose role it is to act in the wider public interest. Representing the interests neither of the ‘prosecution’ or the ‘defence’, the judicial investigator is charged with investigating evidence which exculpates, as well as incriminates, the suspect in the wider search for the truth. The judicial investigator then proceeds to conduct the hearing based on the assembled evidence and make a finding. The use of this model is limited. The majority of cases in France, for example, are investigated in the normal way by the police under the guidance of the national prosecuting authority, but the inquisitorial model is used to investigate complex cases. The ‘judicial authority’ makes the decision as to whether to commit the case for trial in the normal adversarial model.

It is argued by many activists in sexual or domestic violence cases that a version or adaptation of an inquisitorial approach is more appropriate than an adversarial approach as it has better safeguards for protection of the complainant.¹

In this adaptation of an inquisitorial approach for harassment cases, the investigation of the complaint is done by an independent person whose role is to determine whether there is prima facie evidence of wrongdoing as a preliminary step, and if there is, then the matter is taken further in an appropriate

¹ INQUISITORIAL TRIALS FOR SEXUAL OFFENCES AND ‘FAIR TRIAL’ RIGHTS Jeremy Finn
<http://www.nzlii.org/nz/journals/CanterLawRw/2009/11.pdf>

way, which might be an informal process such as mediation, or a formal process such as a disciplinary inquiry. It is also possible to set this up as an expedited process in which the independent person is given the power to make findings. Thereafter, either the same independent person or another

independent person may be tasked, after hearing the parties, with determining an appropriate sanction.

The Labour Relations Act sets out requirements for procedural fairness, based on the principles of natural justice, and these are normally met through the adversarial approach. However, these requirements can also be met using this modified inquisitorial approach, as outlined below.

Critical issues to ensure if using a modified inquisitorial process

a. Ensure the independence and lack of bias of the person undertaking the investigation.

The inquisitorial process will not have the necessary credibility for the parties if the person engaged to carry out the process is not completely trusted by all involved.

It is often the case that external chairs of disciplinary hearings in the adversarial method are challenged as being partial to the employer because he/she has been identified, engaged and paid by the employer. This is mitigated to a large extent by the evolution of organisations such as Tokiso Dispute Settlement, Conflict Dynamics and by other qualified persons who carefully position themselves to be independent of the employer and thus more likely to be trusted.

b. Clarify the role of the employee representative

We are accustomed to the role of an employee representative (whether for the complainant or for the alleged perpetrator) within an adversarial system, but it is not so clear in an inquisitorial system in which the investigator decides what evidence to pursue and what witnesses to call. It is suggested that the most constructive role for the 'complainant's representative' to play would be to: clarify information provided by the complainant; ensure that all the relevant evidence and witnesses favourable to the complainant's version is placed before the investigator; and in appropriate circumstances provide the investigator with the complainant's submissions. The alleged perpetrator's representative would have a similar role focused of course on their version of events. Their combined role would be to assist the investigator to make a finding, prima facie or final, whichever applies in the circumstances.

The right to cross-examine the complainant and any witnesses

In an inquisitorial process, this right can be protected by the investigator ensuring that evidence as it emerges during the investigation is made available to the alleged perpetrator

who may then put forward questions for the investigator to pursue with the complainant or the witness.

This deals with the problem of complainants fearing to face their perpetrator and be cross-examined in an open process.

Conclusion

The conclusion of this New Zealand article quoted earlier is: "The rights of the accused may be modified where other interests are properly afforded priority in a free and democratic society. I suggest ample justification for change can be found in the need to remedy the unnecessary and unfair distress caused to the victims of sexual and violent offending in the current adversarial system, and in the societal need to ensure the conviction of offenders where the evidence which can fairly be adduced – and adduced fairly to all parties – justifies a guilty verdict."

Clearly, in order to use such a process in an organisation, the disciplinary policy and procedure (or collective agreement) must allow scope for this and it can only be presented as one alternative for both the complainant and the alleged perpetrator who would have to both agree that this process can be followed. Choice of this option does not, in any event, prevent either of the parties from following their rights in an internal appeal process or referring the dispute to the CCMA or the appropriate Bargaining Council and any other court or forum that may have jurisdiction, for example the Equality Court or the Labour Court.

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