

Essential tips for the ICC while conducting a POSH Inquiry

Sexual harassment inquiry should be conducted on the principles of natural justice and not as a formality. The Internal Committee is vested with the powers of a Civil Court and comes with great responsibilities. A wrong decision can destroy the career, reputation and family life of a man/woman if wrongly disciplined.

What should the ICC keep in mind while conducting Inquiries?

1. ICC to complete the Inquiry process within 90 days.

The Act has made it mandatory for the ICC to complete the enquiry in 90 days. If for any reason the ICC is not able to complete it within the specified period of time, the ICC should justify its reason for delay in writing and document it for verification by concerned parties.

2. ICC cannot permit the legal counsel of parties to be present during the ICC hearings.

The inquiry process was proposed as a quasi-judicial proceeding, which was informal in nature and representation of legal counsel, for both the parties was ordinarily not envisaged. As such the act does not allow the complainant to be represented by the legal counsel during the proceedings of the ICC. On a case to case to basis, the ICC may permit a complainant to be accompanied by a person for emotional support, however such person must not be a legal practitioner and the ICC may state clearly that such accompanying person should not participate in or speak during the ICC proceedings.

3. Manner of Inquiry: Follow principles of natural justice

When the complaint is registered, the ICC must conduct the Inquiry proceedings following principles of natural justice. Both victim and the alleged harasser must be given equal opportunities to represent themselves.

4. Understand & determine “The sexual harassment”

It is important that ICC considers the below 3 points –

- Is the harassment “sexual” in nature?
- Is the behavior unwelcome and unwanted to the victim?
- Victim’s perception or interpretation

As a third party it is very difficult for the ICC to ascertain or understand whether any sexual harassment has taken place or not. We could go by what is “Reasonable woman standard” (conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment)

Compassionately listen to the victim to relieve the persons stress and to understand the cause of what has been perceived to be an act/behavior that is sexual in nature and unwanted.

In evaluating the severity and pervasiveness of the sexual harassment, it is important to focus on the perspective of the victim. A complete understanding of the victim’s view requires you to consider the different perspectives of men and women.

Conduct that many men may consider unobjectionable may offend many women. A male supervisor or manager might believe for example that it is “ok” or legitimate for him to tell a female subordinate or a colleague, that she has a “great figure,” or “nice legs”. The female colleagues or subordinate may find that offensive. Men tend to view some forms of sexual harassment as “harmless social interactions” to which sensitive women may object.

Therefore, in order to shield employers from having to accommodate to idiosyncratic concerns of the rare hyper sensitive employee, ICC should see that a female complainant states a prima facie case of sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.

5. ICC must consider the overall context for every claim of sexual harassment

In determining whether alleged conduct constitutes sexual harassment, the ICC must look in totality the circumstances, nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the validity of a particular conduct will be made from the facts, on a case by case basis.

6. ICC should keep in mind that a “Victim” may be reluctant to complain due to some of the reasons cited below and require compassionate listening and assistance.

- The victims most of the times are scared about what their father/brother/husband/boyfriend may think and react. Would they believe? Would they not say she invited it herself? Would she be labelled a troublemaker? Would her life be a hell on the job? What if she is fired? Where would she get another job? etc....
- They believed nothing will be done as it is not serious enough.
- The sexual harassment complaint would be treated lightly or ridiculed.
- They would be blamed or suffer repercussions.
- It is difficult to protect confidentiality of the complaint once the investigation of the charges has begun. This subjects women to embarrassment and harassment from co-workers.
- Sexual harassment often occurs when women are economically vulnerable. Many of them must work for a living and may feel that complaining may end up in them losing out their jobs
- Some women feel guilty about these advances. They believe that they must have done something to cause the incident and may be incriminated.
- The length of the time it takes to process a complaint is prohibitive, considering that the complainant must continue to work with the harasser and possibly be subject to reprisals.
- Others ignore the harassment, transfer out of their section or, in some cases, simply give in.
- Do not want to hurt the person who had bothered them
- Think that it would adversely affect her career
- Is too embarrassed
- Thinks that she would be blamed
- Supervisor would not be supportive and there would be retaliation
- Some women fear that the publicity a complaint may receive will not only hurt their job prospects but also their personal lives and marital relationships.
- In terms of money and time, the cost of sexual harassment litigation is also a prohibitive factor.
- The complainant may also fear retaliatory defamation suit by the harasser.

7. ICC must be very careful while gathering evidence from the witnesses.

In certain cases, the witnesses of sexual harassment may be intimidated, especially if the matter before ICC involves senior and influential persons. Hence ICC should take care that the witnesses are protected from intimidation. Furthermore, ICC should also keep in mind that sometimes, third parties who are neither connected nor indirectly involved in a matter of sexual harassment may need to be examined to find a conclusion.

8. Regarding unavailability of few documents/evidence

ICC should keep in mind that lack/unavailability of few documents need not necessarily vitiate ICC proceedings.

9. ICC to be unbiased and a neutral party

ICC should be broad and open minded and be a neutral party. It is important that ICC members deal with both victim and alleged harasser with equal respect and dignity since no one is yet proven guilty.

10. ICC to ensure there is no retaliation at workplace arising out of a complaint

Most of the times we have seen retaliation towards the respondent or the victim by the management/supervisors/colleagues. ICC to ensure there is no retaliation from any one towards victim or the alleged harasser.

11. Importance of Material Evidence

ICC needs to understand that procedure may be dispensed with in certain cases where there is enough material evidence found/submitted. If the charge against the perpetrator is found to have been brought based on material evidence, then any challenge made to the fact that inquiry was conducted without regard to form and procedure need not be addressed in detail.

12. Understanding nature of conduct

It would be wrong to conclude that the complainant's own past conduct (e.g. Use of foul language) showed that "she was the kind of person who could not be offended by such comments (foul Language) and, therefore, welcomed them generally". The proper enquiry in such cases should be whether the complainant welcomed the conduct in question from the alleged harasser.

It should be noted that the complainant's use of foul language or sexual innuendo in a consensual setting does not waive her legal protection against sexual harassment. Just because an employee is prepared to engage in banter, flirtation, or even sexual activity with one or more fellow employees does not mean that employee is required to accept the same conduct from everyone. Some comments or activity may be welcome from one person while entirely unwelcome from another and will recognize an employee's right to choose those with whom he or she is prepared to let down some of the defenses to which he or she is entitled.

13. In case of cross complaints filed against victim

If cross complaints are filed against the aggrieved woman, ICC must discern/distinguish whether cross complaints filed against complainant are genuine or retaliatory in nature.

14. Complaint must be heard by the ICC as a whole and not by individual members.

The investigation team member should not be directly or indirectly related to the victim/alleged harasser workwise or personally. For example, if the ICC member investigating into the complaint happens to be reporting to the alleged harasser, there could be bias in the way the proceedings are conducted. Hence when the ICC meets to decide on who will be conducting the ICC inquiry/investigation, only those members should be chosen who do not directly or indirectly share work/personal relationship with the victim/harasser

15. When the Complainant or Respondent fails to appear before the ICC

The Act has given civil court powers to the ICC of the workplace. During an inquiry, ICC can summon and enforce attendance of any person and examine him/her on oath. In case the Complainant or Respondent fail to appear, without adequate cause for 3 consecutive hearings, the ICC has the right to terminate the inquiry proceedings or to give ex-parte decision.

16. ICC has the powers to initiate cross examination

whenever required - Understand that cross-examination of the aggrieved may be dispensed with in certain cases. In case of grave circumstances, it is very hazardous to expose the women to tardy process of cross-examination. In such cases, denial of cross-examination is legal and not vitiated by violations of principles of natural justice.

17. ICC must ensure

- Notice sent to the parties for hearing should contain date, time and venue of hearing
- The ICC clearly needs to specify the charges against the respondent/alleged harasser
- ICC must ensure complete documentation during the ICC proceedings and get the signatures from all the concerned parties.
- ICC must prepare an inquiry report with complete details of the case, conclusion of the committee finding and the recommendation.