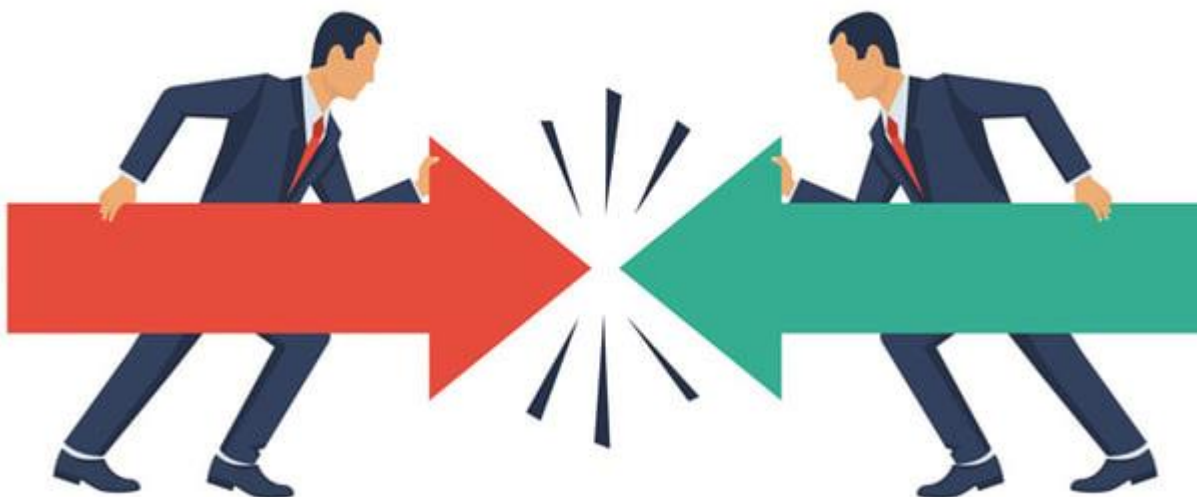


# POSH Committee - Dealing with bias and conflict of interest

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The POSH Act and the rules thereunder provide that during the inquiry into a complaint, both parties should be given an opportunity of being heard. However, the POSH Act does not provide clarity about the ways to handle situations of bias or conflict of interests, if they do arise. Here are some ways to deal with such situations.



Thanks to India's POSH Act and the #MeToo movement, India continues to see a rise in sexual harassment complaints being filed at workplaces. With that, there has also been an increase in cases brought to the courts.

Some cases have questioned the inquiry proceedings by the Internal Complaints Committee (IC) constituted by the employer. While there may be various reasons, it implies that the IC composition, the procedure followed and the inquiry report, may also be tested in the courts. The first principle of natural justice is that no one should be made judge in his own case, because it leads to a bias or conflict of interest.

## Bias of IC members

A bias is defined as a condition or state of mind which impairs the concept of impartiality in a decision-making process<sup>1</sup>. It may arise due to several existing prejudices which may either be conscious or unconscious in nature.

Unconscious bias occurs when a person is inherently prompted to take a decision, which is favoring a person because of certain reasons, for example having similar qualities or interests, having same cultural background or having been influenced by the majority's views. Such behavior by the members of the IC may lead to a conflict of interest and could be detrimental to the outcome of the proceedings and unfair to the aggrieved party, besides creating legal exposure for the employer.

## Employers should ensure that the IC members are adequately trained to spot any bias or conflict of interest prior to and during their investigations

### The law

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act (POSH Act) and the rules thereunder provide that during the inquiry into a complaint, both parties should be given an opportunity of being heard. However, the POSH Act does not provide clarity about the ways to handle situations of bias or conflict of interests, if they do arise.

If a person is made a judge in his own case or in situations where there is a conflict of interest, it is possible that the inquiry proceedings or its outcome or recommendations, may not be fair or impartial.

### Case laws on apprehension of bias

The Madras High Court in the case of *M. Rajendran v. M. Daisyrani and Ors*<sup>2</sup>. stated that the IC should be re-constituted if there is a reasonable apprehension that the enquiry may be vitiated on account of bias within the IC. In that case, majority of the IC members were sub-ordinates of the head of the institution against whom the allegations were made. It is necessary that the inquiry proceedings should be fair and impartial.

In the case of *Somaya Gupta v. Jawaharlal Nehru University and Ors*<sup>3</sup>, the petitioner challenged the constitution of the IC based on the allegation of bias among the IC members. The High Court of Delhi ruled that mere apprehension is not enough and the petitioner must establish that there must be real likelihood of bias. In that case, the Presiding Officer of the IC was a witness to the incident and therefore, was disqualified from acting as a member of the IC. Pursuant to this conflict situation, the IC member recused herself and further there was no suspicion that the remaining IC members had any personal interest that would conflict with their obligations under the law. Therefore, the court held that there was no need to re-constitute the IC.

### Need for clarity & training

The employer's policy or internal guidance note for its IC members should ensure that there is sufficient clarity on avoiding a situation that could lead to a conflict of interest. A bias may arise prior to the commencement of the inquiry (that is, when a complaint has been received) or during the investigation (based on any evidence produced by the parties or any witness statements). For example, at times, the existence of bias or conflict may not be known upfront and may come up subsequently, in which case the IC should be aware on how to deal with such a situation.

## Any allegation of bias or conflict received initiated by either party, should be immediately and thoroughly reviewed and the decision should be fully documented

As part of training, the IC members should be made aware of their responsibilities to immediately disclose the existence of a bias and ensure that they no longer participate in that inquiry. Certain organizations have begun focusing on specialized training to prevent/deal with unconscious bias among the IC members. Employers ensure that the training sessions include making IC members aware about the meaning of bias, various types of bias, triggering pointers for bias, possible consequences of bias, etc. Also, it is recommended that the training is not made like a one-time training but should be like a continuous long-term process with live examples and case studies. The external member of the IC can play a critical role in terms of sharing her experience being part of the IC of other organizations, subject to confidentiality considerations.

### ***Additional suggestions***

These are a few suggestions on helping employers prevent bias and conflict of interest situations:

- Given the case laws surrounding this topic, it is recommended that the IC be constituted strictly as per the requirements of the POSH Act including appointment of the external member on the IC.
- Employers should ensure that the IC members are adequately trained to spot any bias or conflict of interest prior to and during their investigations.
- Any allegation of bias or conflict received initiated by either party, should be immediately and thoroughly reviewed and the decision should be fully documented. The IC would do well to evaluate that the allegation of bias was considered and a view was taken before proceeding with their investigation.
- As a fallback option, employers may do well to have more than four members on their IC in order to avoid re-constituting the IC if one or more members are conflicted in any way. It must also be borne in mind that the rules to the POSH Act allow a minimum of three members of the IC (including the Presiding Officer) to be present while conducting the inquiry.

The Hon'ble Judge in Bellarmin Case said that bias is synonymous with prejudice. It may be pertinent to note that dealing with sexual harassment complaints may be a more sensitive matter than other legal proceedings since it involves the integrity and modesty of a woman.

## Author



### ***Vikram Shroff***

Vikram Shroff is the leader of the HR Law (Employment & Labour) team at Nishith Desai Associates.