

Top 10 Mistakes in Conducting Workplace Investigations

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The Price of Poor Investigations

Case	Commentary	Damages
<i>Boucher v. Wal-Mart</i> (2014-Ontario CA)	"Wal-Mart's actions and its inaction were reprehensible"	\$410,000 + 20 weeks salary
<i>City of Calgary and CUPE</i> (2013-Arbitrator)	"tragic case", "total failure on the part of those responsible"	\$869,022
<i>Pate Estate v. Galway-Cavendish and Harvey (Township)</i> (2013-Ontario CA)	"reprehensible conduct" mounted an investigation to build a case to justify termination after terminating Pate	\$734,095 (excluding 12 months wrongful dismissal damages agreed on by parties outside trial process)
<i>Elgert v. Home Hardware</i> (2011-Alberta CA)	"do not give it licence to conduct an inept or unfair investigation"	\$135,000 + 24 months pay in lieu of notice

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CBC and Ghomeshi A Case Study

CBC and Ghomeshi – Investigation Findings

Examples of problematic workplace conduct by Mr. Ghomeshi:

- was persistently late and consistently disrespectful of colleagues' time;
- was scheming and dismissive in dealing with colleagues;
- was moody, difficult and emotionally unpredictable;
- yelled and doled out harsh criticism;
- made requests of a personal nature of several colleagues that fell outside of their job duties
- diminished the role and contribution of colleagues by not attributing credit to them for their work
- made comments about the appearance of some colleagues which were demeaning, inappropriate and unwanted
- played pranks and cruel jokes that made colleagues feel embarrassed, anxious or upset
- gave colleagues back rubs and shoulder massages

CBC and Ghomeshi – Investigation Findings

Key findings:

- Mr. Ghomeshi's conduct in the workplace fell well below behavioural standard
- CBC's systems and processes were weak and in some cases inconsistently followed
- CBC management relied too heavily on formal complaints
 - Although no formal complaint was made against Mr. Ghomeshi, numerous managers were generally aware of his problematic behaviour
- CBC missed opportunities to investigate specific allegations
 - "failed to live up to its obligations to provide employees a workplace that is free from disrespectful and abusive behaviour"
- A specific allegation of sexual harassment was brought to the union's attention but was not pursued and never communicated to CBC management

Overview – Top 10 Mistakes

1. Failing to Conduct an Investigation Promptly
2. Disregarding Procedural Fairness
3. Selecting Investigators
4. Failing to Follow Own Policies and Procedures
5. Conducting a Biased Investigation
6. Failing to Gather all Relevant Information
7. Ignoring Confidentiality and Privacy
8. Failing to Properly Document Investigation and Findings
9. Retaliating Against the Complainant or Others
10. Failing to Advise of the Outcome/Take Remedial Steps

When Do We Investigate?

- What triggers the duty to investigate?
 - Alleged misconduct
 - Complaints
 - Employees
 - Customers
 - Members of the public
 - Required by law (occupation health and safety, human rights)
 - Breach of internal policy/breach of law
 - Threats of litigation

Mistake #1:
Failing to Conduct an Investigation
Promptly

Conducting Investigations Promptly

- All complaints should be taken seriously
- Conduct the investigation in a prompt manner
 - Delay may cause disruption in the workplace and also impact due diligence defence
 - Employers have been held liable for delay in investigating
 - Evidence may get lost or forgotten with the passage of time

OPSEU v. Ontario (Ministry of Community Safety and Correctional Services) (2013 – Leighton)

Error:

- Employee was a victim of ongoing sexual harassment and discrimination, of which management was aware
- The employer waited 18 months after employee left for sick leave before starting an investigation

Consequence:

- Management had duty to investigate in a timely manner
- “Inexcusable delay” led to improper investigation
- More than \$98,000 in damages awarded

Mistake #2: Disregarding Procedural Fairness

Procedural Fairness

- Underlying thread in all investigations
- Ensures that investigations are fair to both sides, findings unbiased
- All parties must be aware of the case against them and given a full opportunity to defend themselves
- No “gotcha” tactics
 - Parties must not be surprised by elements of the investigation
 - “Ambushing” a party will not result in a more honest response
 - Make full disclosure to the parties regarding the evidence against them

Procedural Fairness: How Does it Work in Practice?

- Failure to adhere to procedural fairness will undermine the investigation
 - The complainant may not have their complaint heard in its entirety
 - The respondent may not be able to give a full and complete defence
 - The parties may perceive the investigation as biased, worthless, or events not taken seriously
 - Lack of procedural fairness will result in the investigation and disciplinary action taken overturned upon review by an arbitrator, court or tribunal

Roe v. Schneider National Carriers (2006 – Ontario SC)

Error:

- Management received allegations of misconduct by two complainants
- Management invited employee to an interview without being advised of reason for meeting and was confronted and not provided complete information

Consequence:

- Employee not given sufficient particulars to enable an appropriate response to the allegations
- Employer failed to conduct a thorough investigation
- Court awarded 3 months notice to employee with 3 years service

Mistake #3: Selecting Investigators

Issues in Selecting Investigators

- Using internal over external investigators where external is more appropriate
- Using untrained investigators

Internal v. External Investigators Considerations

- Timeliness, degree of urgency
- Real or perceived objectivity, neutrality
- Transparency
- Potential conflict of interest
- Whether special expertise is required
- Nature of allegations
- Predicted length of investigation
- Degree of sensitivity of the matter
- Identity of the parties
- Potential for legal challenge, litigation

Choosing Untrained Investigators

- Whether choosing an internal or external investigator, the key is to review skills and experience of individual
- Investigator must be viewed as credible and unbiased by all parties
- Investigator must be knowledgeable of the law and understand the requirements of due process
- Trained investigators approach psychologically complex matters such as workplace harassment complaints with compassion and empathy

Elgert v. Home Hardware Stores Ltd. (2011 – Alberta CA)

Error:

- Investigator for allegations of sexual harassment had no training, only limited experience and had never conducted an investigation
- Investigator had personal relationship with parties of investigation

Consequence:

- 24 months' pay in lieu of notice
- \$200,000 for aggravated damages (set aside on appeal)
- \$300,000 for punitive damages (reduced to \$75,000 on appeal)
- \$60,000 for defamation damages
- Damages flowed directly from flawed investigation

Federally-Regulated Employers *Canada Labour Code*

- Canada OHS Regulation requires federally-regulated employers to appoint a “competent person” to investigate workplace violence
- “Competent person” defined as:
 - Impartial and is seen by parties to be impartial
 - Knowledge, training and experience in issues relating to work place violence
 - Knowledge of relevant legislation

Federally-Regulated Employers *Canada Labour Code*

- *PSAC v. Canada (Attorney General)* (November 2014 – Federal Court)
- Employer appointed regional director to investigate
- Court found director was not a “competent person” to conduct investigation because employee who filed the complaint had not agreed that director was an impartial party

Mistake #4: Failing to Follow Own Policies and Procedures

Failing to Follow Own Policies and Procedures

- Courts and decision makers scrutinize policies and investigations stemming from the policies
- Ensure investigators (external/internal) are versed in the organization's policies, rules, and practices
- Ensure that investigation procedures within policies are followed
- Ensure employees are aware of what is acceptable/expectations

Boucher v. Wal-Mart Canada (2014 – Ontario CA)

Error:

- Boucher, assistant manager, expressed concerns about manager through Wal-Mart's "Open Door Communication Policy"
- In breach of that policy, manager was made aware of meeting and threatened reprisal and subjected Boucher to an "increasing torrent of abuse"
- Boucher met with senior management as nothing had been done to address her complaints
- Wal-Mart found complaints unsubstantiated and threatened to discipline Boucher

Consequence:

- Jury determined Boucher had been constructively dismissed and awarded 20 weeks' salary, as well as \$1.45 million in aggravated and punitive damages

Boucher v. Wal-Mart Canada (2014 – Ontario CA)

- Court of Appeal upheld jury’s findings, and condemned Wal-Mart’s lack of response as “reprehensible”
- Wal-Mart failed to enforce its workplace policies
- But reduced punitive damages
 - \$10,000 (from \$150,000) against manager
 - \$100,000 (from \$1 million) against Wal-Mart
- Total price tag to Wal-Mart: \$410,000 plus 20 weeks’ salary
- Employers must adhere to their policies and not just pay “lip service”

Mistake #5: Conducting a Biased Investigation

Conducting a Biased Investigation

- Investigator must begin the process objectively
- Investigator must not have any personal or other connection to complaint or the parties
- Neutrality is imperative
- Define the mandate to help dictate the direction of the investigation and the role of the investigator

Disotell v. Kraft Canada Inc. (2010 – Ontario SC)

Error:

- Employee claimed being harassed and employer advised not to file a complaint
- Employer investigated complaints after employee went on sick leave
- Did not interview 4 alleged harassers or potential witnesses

Consequence:

- Court held that investigation procedure was inadequate and biased
- Employee was awarded 12 months in lieu of notice

Mistake #6: Failing to Gather All Relevant Information

Gather all Relevant Information

- Written witness statements
- 5 Ws
- Interviews of all important witnesses
- A critical inquiry about the general working/learning relationship of the complainant and respondent in order to assist in the assessment of credibility
 - A thoughtful consideration of the respondent's and complainant's versions of the events
 - The actual decision-maker should have sufficiently detailed summaries to enable a fair decision

Assessing Credibility

- Most difficult task – who does the investigator believe?
- Art, not science
- Does the witness have:
 - Any self-interest or interest in the outcome of the investigation?
 - A relationship to any party?
- Is witness consistent? Consistency between witnesses?

Assessing Credibility

- Look for internal plausibility
 - Explanation seems implausible – reject explanation
- What are the perceptual abilities of the witness?
 - Capacity for observation/remembering what they have observed
- Be careful of cultural biases – fluency of language
- Assess body language – hesitation, tone of voice
- Are there any motives for false complaints, possible motive for fabrication of a complaint?

Assessing Credibility

- Was the individual consistent with his/her accounts of the events?
- Was the flow of the information logical?
- Is there a reason that this person may be biased in any way?
- Lack of co-operation, usually adverse inference can be drawn

Mistake #7: Ignoring Confidentiality and Privacy

Confidentiality and Privacy

- Confidentiality does not mean secrecy and/or anonymity
- Everyone involved must respect the sensitivity and confidentiality of the situation
- All information and documentation concerning a complainant's case will be kept as confidential material except where disclosure is necessary for the purposes of investigating the complaint; taking disciplinary measures; if required by law to disclose
- "Need to know basis"

Cavaliere v. Corvex Manufacturing (2009 – Ontario SC)

Error:

- During an investigation of allegations of sexual harassment senior employee was advised to have no contact with other parties
- Employee contacted complainant to convince to withdraw complaint

Consequence:

- Court found contact was a breach of a legitimate necessary direction and an attempt to obstruct the investigation
- Court upheld termination for cause

Mistake #8: Failing to Properly Document Investigations and Findings

Proper Documentation

- Proper documentation is essential to ensure the evidence is accurate in order to support findings
- Maintain a proper record of the investigation
 - Notes
 - Statements
 - Copies of important documents
 - Investigation report
- Take notes to document the interviews of parties and crucial witnesses
- Promptly prepare a summary of the interviews and have individuals review and sign

Document Findings and Conclusions

- Assess what evidence supports
 - Complainant? Respondent?
- Possible conclusions:
 - The allegations are substantially true and constitute a form of workplace misconduct...
 - The allegations are substantially true, but do not constitute a form of workplace misconduct...
 - The allegations were made in good faith, but are not true
 - The allegations are false and were deliberately fabricated
 - The investigator is unable to come to a conclusion

Mistake #9: Retaliating Against the Complainant or Others

No Retaliation

- Employer has an obligation to ensure no retaliation against complainants or others who cooperate with the investigation
- No reprisal language in policies
- Legislative requirements

de los Santos Sands v. Moneta Marketing Solutions Inc. (2014 – OLRB)

Error:

- Ms. de los Santos Sands' concerns about feeling threatened in the workplace and suggestion to develop a workplace violence and harassment complaints process were ignored
- Contacted MOL but refused to have inspector attend workplace over concerns for her job
- MOL visited workplace when another employee contacted them with same complaint. Inspector issued compliance order for employer to develop a violence and harassment policy
- Day after investigation, Ms. de los Santos Sands' employment was terminated

Consequence:

- Termination was a reprisal
- Remedy is typically reinstatement and lost wages but applicant did not wish to return
- Applicant mitigated her damages by finding alternate employment
- Awarded 4 weeks wages

Mistake #10: Failing to Advise of the Outcome/Take Remedial Steps

Post-Investigation

- Send letter to the complainant and respondent
 - Advise that the complaint investigation is complete and either the allegations are substantiated or not
 - Warn employees about retaliation and implications of retaliation
- Where the complaint is substantiated:
 - Complainant should be given assurances that steps will/have been taken to ensure the behaviour will not happen again
 - Remind complainant that if reprisals are suffered from filing the complaint, advise immediately

City of Hamilton and ATU (2013 – Waddingham)

Error:

- Multiple errors in this case including:
 - City failed to communicate outcome of investigation, provide written summary of findings as required by City's complaint resolution protocol
 - City failed to communicate remedial action

Consequence:

- \$25,000 general damages for violation of human rights
- City to retain human rights specialist to evaluate its program and provide training, including principles of a good investigation
- City to post human rights information, policies in workplace

Some Other Common Mistakes

- Applying the wrong standard of proof
 - Balance of probabilities
- Not taking appropriate interim measures
 - Transfers, change reporting relationship
- Not properly securing the evidence (computer, mobiles, etc.)

Checklist

Top 10 Steps for a Proper Investigation

- Draft or redistribute relevant policies
- Investigate complaints in a timely manner
- Provide notice and an opportunity to respond
- Train and vet investigators
- Remain objective and keep an open mind

Checklist

Top 10 Steps for a Proper Investigation

- Obtain a full picture of the complaint
- Respect privacy and confidentiality
- Document all findings
- Educate instead of retaliate
- Take action

Questions?