Over the past year, we have seen a steady stream of workplace investigation cases, many of which focus on mistakes organizations typically make when conducting investigations. While we have chosen a handful of cases to discuss common investigation flaws, we have also included two cases where the decision-makers found the investigation was fair and reasonable.

### Top 10 Workplace Investigation Cases of 2014

1. **Boucher v. Wal-Mart Canada Corp., 2014 ONCA 419**

   In this case, the Ontario Court of Appeal highlighted the significant damages that can be awarded when a complaint of harassment is not adequately investigated. Here, the Court of Appeal upheld a substantial jury award given to Meredith Boucher, a former Assistant Manager with Wal-Mart, for being subjected to a pattern of “abusive” harassment by her supervisor. The Court concluded that an aggravated damage award of $200,000 was justified because: Wal-Mart took no steps to bring to an end the supervisor’s misconduct; Wal-Mart did not take Ms. Boucher’s complaints seriously, finding them unsubstantiated despite considerable evidence from co-workers that they were well-founded; Wal-Mart seemingly did not meet with witnesses who observed many of the incidents; Wal-Mart failed to enforce its workplace policies, which were aimed at protecting employees from harassment; Wal-Mart threatened Ms. Boucher with retaliation and disciplinary action for making her complaints; and Wal-Mart refused to address Ms. Boucher’s concerns/fears with respect to returning to work and forced her to resign.

   **RT Takeaway**: Complaints must be taken seriously and without regard to pre-conceived views or opinions of the individuals involved. This can be particularly challenging for human resources personnel who may know or work closely with the parties or potential witnesses.

2. **Sears v. Honda of Canada Mfg., 2014 HRTO 45**

   In this case before the Ontario Human Rights Tribunal (the “Tribunal”), substantial damages were awarded to an employee as a result of, among other things, the employer’s inadequate probing of the employee’s harassment allegations. Finding that the investigator did not follow-up on leads on one set of allegations, and failed to initiate an investigation with respect to another set of allegations, the Tribunal held that the employer had missed an opportunity to determine what had occurred, and measure its staff’s understanding of their responsibilities. The Tribunal reminded employers that it is well-established in the Tribunal’s jurisprudence that
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The Human Rights Code (the “Code”) imposes a duty on organizations to investigate a complaint of discrimination, and that a failure to investigate can attract liability, even if the Tribunal ultimately dismisses the underlying allegations of discrimination.

RT Takeaway: In any investigation, it is important to be open to receiving information which may point to harassment or discrimination in the workplace. Even if this information seems outside of the mandate of the investigation, it is still of concern and should be pursued in some way.

3. Scaduto v. Insurance Search Bureau, 2014 HRTO 250

In a case that seems to be at odds with the message sent in Sears, the Tribunal did not find the employer’s lack of investigation to be a violation of the Code, as it had found that the allegations of discrimination and harassment were unsubstantiated. That said, the Tribunal in Scaduto also recognized that employers are “well-advised to investigate human rights complaints as the failure to do so can cause or exacerbate the harm of discrimination in the workplace.”

RT Takeaway: Despite the findings in this case, conducting a timely and thorough investigation can be a means of resolving workplace issues and can also serve as evidence of due diligence on the part of the employer in addressing workplace complaints.


Arbitrator Andrew Sims found flaws in an internal investigation into allegations of resident abuse to be of sufficient importance as to require comment. While Arbitrator Sims came to the same conclusion as the investigator, he was critical of the manner in which the investigator had gathered their evidence, and so his decision was made without relying on the investigation.

Specifically, he noted that the respondent to the allegations attended the investigation meeting without knowledge of the allegations, leading to a less than informative conversation that was unfairly used to assess the respondent’s credibility. Arbitrator Sims also cautioned against the use of prepared questions as it could (and did in this case) interfere with the information-gathering function of the investigator.

RT Takeaway: In order to conduct a fair investigation process, respondents must be provided with an opportunity to review and digest, and subsequently respond to the allegations against them. Investigators should also remain open-minded and resist assuming the evidence of parties.
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A recent case from the Nova Scotia Supreme Court (NSSC) ruled that the Nova Scotia Human Rights Commission (NSHRC) was required to rehear a gender and disability discrimination complaint that it had previously dismissed because of a lack of procedural fairness in the NSHRC’s initial investigation. In particular, the NSSC noted that the investigator’s failure to interview key witnesses meant that the NSHRC had breached the requirement for procedural fairness “sufficient to invalidate the investigation and render the [NSHRC] unable to make a proper screening determination on this case based on the sufficiency of the record before them.”

RT Takeaway: A fair investigation is one that is thorough and includes the evidence of those with knowledge of the allegations. If an investigator fails to meet with key witnesses, he or she should outline the reasons for this choice in the investigation report. Otherwise, this gap in the evidence will be even more glaring.


In another case from Nova Scotia, the NSHRC found that it “cannot reasonably conclude that an investigation conducted by a manager who has been in a romantic relationship with the Complainant is reasonable or appropriate in these circumstances.” NSHRC found that the investigator was in a clear conflict of interest wherein he had been involved in a relationship with the complainant, about which he told no one, and proceeded to investigate her complaint of racial discrimination. This conflict of interest, amongst other flaws (i.e. failing to communicate the results of the investigation to the complainant) undermined the reasonableness of the investigation and called into question the bona fides of the Report findings.

RT Takeaway: An impartial investigation process starts with choosing an investigator carefully. Otherwise the bias (or perception of bias) of the investigator may cloud the findings of the investigation. For this reason, take time and vet for any potential conflicts of interest before selecting an investigator.


In this case from the British Columbia Supreme Court (“B.C.S.C.”) the employer bank was described as “cavalier, insensitive, and reckless [when it] forged ahead with a termination for cause based on inaccurate and incomplete information despite knowing they had a heightened


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responsibility to get it right.” The employee in this case was terminated for cause based on a suspicious wire transfer. Noting a laundry list of flaws in the investigation, including not providing an opportunity for the employee to respond to allegations and failing to inquire about relevant information, the BCSC found that the employer bank was not interested in using their investigation as a fact-finding mission but rather as a means of building a case against the employee.

**RT Takeaway:** A workplace investigation is inherently a fact-finding process. As such, the investigation process ought to be focused on extracting relevant facts to come to a fair determination, rather than building a case against an employee to justify a pre-determined disciplinary action.


In 2007, two female employees complained that a fellow male employee sexually harassed and assaulted them. The company investigated the complaints and concluded that there was not enough evidence to support the complaints, but the police did not agree and charged the male employee with criminal harassment in 2009. By that time, both complainants had been terminated due to restructuring, and had signed a release. Nevertheless, both complainants commenced an action against the company seeking damages for willful infliction of mental distress, stemming from the harassment and assault. The employer brought a summary judgment motion on the basis that the release clearly precluded the commencement of the action. The judge, however, refused to dismiss the case partly because there was evidence that relevant information (a video of the harassment) had been disregarded in the investigation process, and the termination of the complainants was conducted by a friend of the employee alleged to have harassed them.

**RT Takeaway:** The refusal to dismiss this case can be a suggestion that a problematic investigation may nullify a release in some circumstances, which is a new twist on the legal consequences of a flawed workplace investigation.

**9. Diamantopoulos v. KPMG LLP, 2014 ONSC 1038**

In this case, the court refused to award punitive damages to an employee following a termination due to KPMG’s “humane” manner of managing the employee’s behaviour and her complaints. In this case, the employee had interpersonal conflicts with colleagues. KPMG’s human resources department intervened on a number of occasions to assess the situation and ultimately reminded the employee that her behaviour was inappropriate. The human resources department also immediately investigated the employee’s allegations of workplace violence and accommodated her security needs. When the employee was dismissed, and
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commenced an action against KPMG, alleging that she was mistreated, the court held that KPMG showed “courtesy, respect, fairness and sympathy” throughout the employee’s employment, which did not warrant damages.

**RT Takeaway**: A fair and reasonable investigation process that takes a complaint (or a series of allegations) seriously can serve as a defense when a complainant or a respondent takes issue with the consequent actions of the employer.

10. **Morgan v. University of Waterloo, 2013 HRTO 1644**

In another case of an organization “getting it right”, the University of Waterloo (the “University”) was tasked with defending its investigation of a sexual harassment complaint lodged by one of the University’s counsellors. The Tribunal first confirmed that the standard for assessing an employer’s response to an allegation of discrimination is reasonableness, and not perfection or correctness. Although the Tribunal came to a different conclusion than the University with respect to the sexual harassment complaint, it held that the University’s investigation was reasonable and met the duty to investigate under the Code. The University took the complaints seriously, as evidenced by them removing the respondent from the workplace, meeting with several witnesses, and producing a substantive report which included a summary of the investigator’s findings, a chart with facts, and a section on the credibility of witnesses. The Tribunal was further convinced that the University met its duty to investigate because it had a well-established and structured complaints mechanism which utilized persons with specialized investigative skills and human rights knowledge.

**RT Takeaway**: Even in a case where an ultimate decision-maker does not agree with the conclusions of the workplace investigator, employers may be shielded from a significant amount of liability if the investigative process was fair.

Over the past year, we have observed courts, tribunals and arbitrators taking a closer and more scrutinizing look at investigation practices. Given the rise of workplace investigation cases in 2014, we recommend organizations set up and follow a harassment/violence policy, use knowledgeable and experienced investigators, and ensure that parties are afforded the opportunity to meaningfully engage in the investigation process.