FROM OBLIGATIONS TO REMEDIES:

10 IMPORTANT CASES ON WORKPLACE HARASSMENT & INVESTIGATIONS IN 2017-2018

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Introduction

There is no doubt that the environment in which allegations of harassment are investigated has shifted dramatically. This is as a result of statutory changes such as Ontario's Bill 132, which amended the *Occupational Health and Safety Act* ("OHSA") and has been in effect for over two years. It imposed a clear obligation for employers to conduct investigations into complaints and incidents of workplace harassment. It is also as a result of social events such as #metoo and greater media attention on sexual harassment and how employers (and other institutions) respond.

The case law is shifting too. Simply put, there is simply more of it, and cases which deal with investigations and allegations of harassment now arise across the country and in different legal venues. There is a quickly developing body of law that is providing guidance on (among other things) what is a fair and appropriate investigation, what triggers the conduct of one, the consequences of failing to conduct an investigation, and whether they are privileged. What follows is our own "curation" of ten cases that have arisen in 2017-2018 that we found noteworthy and think counsel to employers should know about.

1. The employer's obligation to address the risk of harassment

OHSA is typical of the occupational health and safety legislation throughout this country, in that it sets out an overarching requirement for employer to ensure the safety of their employees. Since section 25(2)(h) of the OHSA requires employers to "take every precaution reasonable in the circumstances for the protection of a worker", it was only a matter of time before this obligation extended to the protection of workers from actual or potential threats of harassment.

In *Cambridge Memorial Hospital v Ontario Public Service Employees Union, Local 239,* (2018 CanLII 9683 (ON LA)), Arbitrator William Marcotte shed light on how section 25(2)(h) incorporates an employer's duty to address and prevent workplace harassment. In this case, the union grieved a new policy that employees felt would enhance the risk of workplace harassment.

Cambridge Memorial Hospital ("CMH") was in the process of moving into a new building. This, combined with various consultation groups with patients that demonstrated a need for greater trust and accountability, encouraged CMH's management to institute a new policy to have all employees' name tags contain both their first and last names. Previously there had been no such policy and employees often had their first initial and last name or first name and last initial, depending on their preference. For many employees, this was an unwelcome unilateral imposition of a rule from management. They felt as though by having their first and last names on display, it would enhance the risk of harassment that they may face from clients and other members of the public and constituted an invasion of privacy. CMH's vice president of clinical care and chief nursing executive provided the following justification for this new rule, as well as a response to employees' concerns regarding the enhanced risk of harassment:

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> Many of you would agreed that trust is sacrosanct. You may also agree that trust erodes when information is withheld. By not fully disclosing who we are and the role we have within our great organization, I strongly believe we are diminishing this trust and our values of accountability, collaboration and caring. For these reasons I have requested that our current polices be enforced to ensure that anyone issued a CMH ID badge will have their full names on that badge.
>
> I have heard many arguments against this decision, including those of safety and privacy. **These are tenuous at best** since anyone who receives care at a hospital, can call to ask for the names of their care providers. I know there may be some people in special circumstances that will need to be accommodated. Rest assured, these will be reviewed on a case-by-case basis.
>
> In the end, I believe this standard will make us a better health care organization and stronger within our community (My emphasis).

Indeed, the union presented no evidence of an actual increase in incidents of workplace harassment as a result of staff wearing name tags featuring their first and last names. This lack of evidence, including the understanding that staff members from regulated health professions could be searched on various online databases for their respective regulatory college, led the employer to move ahead with this policy without seriously addressing this concern. This turned out to be the wrong approach according to the Arbitrator.

Arbitrator Marcotte had little trouble pointing out that CMH had violated s. 25(2)(h) of the OHSA by not addressing its employees' concerns about the risk of harassment they may face by having their full names on their name tags, regardless of the lack of evidence on this point. After citing a case involving a similar issue with border services officers in Canada Border Services Agency v. PSAC, 2014 OHSTC 11 (CanLII) [*Border Services*] He stated:

> As to whether or not the Hospital breached s. 25(2)(h) of OHSA, given that its name tag policy introduces a new safety risk, it is incumbent upon it to have taken 'every precaution reasonable in the circumstances." It is clear from the evidence; the Hospital did not turn its mind to consideration of the risk associated with its name tag policy. Consequently, I must find the Hospital breached s. 25(2)(h) of OHSA.

Essentially, as in *Border Services*, whenever a policy creates a new risk of something that might affect the safety of workers – including a risk of harassment – employers must do *something* to address this new risk before the policy that creates the risk is enforced.

2. Reprisal considerations

Despite the clarity of the sections of the OHSA that demand employers to investigate both complaints and incidents of workplace harassment, many employers are still unsure of how to initiate these investigations when employees come to them with very little information or do not wish to reveal a complaint or incident of workplace harassment. While it is always prudent to do as much as possible to investigate any incident for which one has even a minimal set of facts, or to follow-up with other individuals who may be able to provide additional information about a particular incident, there are cases when there simply is not enough hard evidence to do an investigation. If that is the case, employer counsel will need to address the liability that their client will face for not doing an investigation.

Technically, an employer could be charged for failing to conduct an investigation into a complaint or incident of workplace harassment. However, if an occupational health and safety inspector conducts a

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review of an employer, they may simply demand that the employer conduct an investigation based on information either it has received, or the employer should have known at the time of the incident. More often, however, an employer is found to have either failed to conduct such an investigation or used the investigation process to punish the complainant in a claim of reprisal under s. 50(1) of the OHSA. Many such cases have recently been reported after an employer terminates an employee soon after they have conducted an investigation into a complaint of harassment raised by that employee. While such investigations may reveal challenges with a particular employee, if there is any nexus between the investigation of a complaint of workplace harassment and any such discipline, that employee will have a prima facie claim of reprisal under s. 50(1) of the OHSA. But what happens when an employee brings a complaint of harassment to their employer's attention, but does not wish for an investigation to be conducted?

In *Taylor v. International Financial Data Services (Canada) Ltd.,* (2018 CanLII 40487 (ON LRB)), the Ontario Labour Relations Board revisited the test for reprisal under the OHSA. Although this case did not substantively change the test, it highlights how and when employees can use their 'rights' under OHSA to address workplace harassment and how that affects an employer's liability for conducting or failing to conduct workplace harassment investigations.

In 2013, Ms. Taylor was hired as Senior Assistant Manager for International Financial Data Services (IFDS) and reported to Mr. Carnduff, who was responsible for carrying out Ms. Taylor's semi-annual performance reviews. During her time at IFDS, Ms. Taylor's overall performance was good. However, in 2016 her overall performance ratings were lower which resulted in her termination in January 2017.

Ms. Taylor brought an application under section 50(1). In her application Ms. Taylor claimed she was dismissed because she had enforced her right to seek relief from workplace harassment under the OHSA. Ms. Taylor gave evidence of two incidents that she claimed were workplace harassment. After the first incident, Ms. Taylor spoke with human resources to get advice on what options were available to her and at that time determined she would not file a formal complaint. After the second incident Ms. Taylor filed a formal complaint, the employer completed an investigation and concluded no harassment had taken place.

Ms. Taylor argued that there was a connection between her complaints and the termination of her employment. IFDS argued that the two incidents did not meet the definition for workplace harassment, and even if they did, there was no connection between the two complaints and the employer's decision to terminate Ms. Taylor.

When reviewing reprisal applications, the OLRB does not assess the merits of the harassment complaint, but rather looks at whether a nexus can be established between the making of the harassment complaint by the employee and the subsequent termination by the employer.

The Board must first determine if a harassment complaint has been filed. In this case, the Board found that the first incident did not meet the requirement because Ms. Taylor did not "formally" file a complaint under the employer's policy. After determining whether a complaint has been filed, the Board will consider if the employer terminated or penalized the employee for filing the complaint; specifically, is there a connection between the filing of the complaint and the actions taken by the employer.

In reprisal cases the respondent bears the burden of proving that on a balance of probabilities, it did not act contrary to OHSA when terminating the employee. This will require the employer to prove why it took the steps it did when terminating the employee.

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The difficulty with the test is the disparity between what we know about the reluctance of employees to make complaints and what is required to prove reprisal.

The reality is that most incidents of sexual harassment go underreported. In a recent Angus Reid survey of women who experienced sexual harassment in the workplace, only 23% said they did report.[1] The same survey completed three years later showed the same problem of underreporting. 72% of women surveyed said they did not report the harassment to their employer.[2] Underreporting is so widespread in society because complainants fear they will not be believed, will suffer negative consequences for enforcing their rights or fear no action will be taken.

Fear of reprisal is also a reality. In fact, a recent study by the US Equal Employment Opportunity Commission found that 75% of workplace harassment victims experienced retaliation after filing a complaint.[3] This fear only contributes to underreporting.

So, it comes as no surprise that in some situations employees may not proceed with a formal complaint, as was the issue in this decision. The Board questioned whether the complainant's conversation with human resources could be considered the filing of a formal complaint. The Board found that because the complainant expressly wished that no complaint be undertaken; the complainant did not seek to, nor file, a complaint with the express interest of enforcement under the Act.

In cases previously before the Board, it had found that when an employee makes a complaint under an employer's harassment policy; it will meet the requirement for enforcement under s. 50(1) of the OHSA. However, there is no discussion in this case about what "filing" a complaint means, yet a negative inference was drawn because the complainant did not formally file a complaint.

3. Insufficient detail to trigger and investigation

In *Gu v. Habitat for Humanity Greater Toronto Area Inc*. (2018 ONSC 2725), a wrongful dismissal claim, the plaintiff was a 15-year employee of the defendant non-profit organization. On summary judgment, she was awarded 18 months' notice. In addition to her civil claim of wrongful termination, she also claimed that the defendant employer's decision to terminate her and its failure to provide her with bonus payments during one year of employment, were both racially motivated. This claim was based on two separate incidents where a manager had made comments about both the plaintiff and another colleague being "non-local" and having non-English speaking backgrounds.

Under the Ontario *Human Rights Code*, there is a standalone duty for employers to investigate complaints of both harassment and discrimination. This means that even if a complaint of racism or harassment is not proven, an employer would still be liable if they failed to adequately address the complaint through an investigation.[4]

In this case, the plaintiff argued that the failure of the employer to investigate her complaint of racial discrimination was an act in furtherance of its racial discrimination. While this may have been addressed

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[1] "#Metoo: moment or movement?" Angus Reid Institute, 9 February 2018, http://angusreid.org/me-too/

[2] *Ibid.*

[3] C. Feldblum & V. Lipnic, "Select task force on the study of harassment in the workplace" *US Equal Opportunity Employment Commission,* June 2016.

[4] *Ananda v. Humber College Institute of Technology & Advanced Learning*, 2017 HRTO 611 at para 121.

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differently if the matter was before a human rights tribunal, the judge in this case determined that failing to conduct an investigation did not make out a *prima facie* case of discrimination. This is different from a finding that the employer did not fulfill its standalone duty to investigate such complaints, but the judge's reasoning is still instructive.

Essentially, the plaintiff did not provide the employer with sufficient information in order to conduct an investigation. The plaintiff simply emailed the defendant's CEO and said, "I'm writing you because I was discriminated against at [the employer] in the past weeks" and asked that the employer "open an independent investigation into this discrimination case immediately." When a Senior Human Resources director followed-up with the plaintiff to ask what she meant by 'discrimination', the plaintiff did not provide any additional particulars. In the hearing, the plaintiff intimated that it would be "too ugly" if, as a result of the investigation into her racial discrimination complaint, the defendant decided to keep her employed despite the fact that she had already received her notice of termination.

Given the lack of particulars, the judge found that the employer could not be liable for failing to investigate the plaintiff's discrimination complaint. The judge also provided some helpful language on what is required by an employer before it must conduct an investigation through the lens of a highly specific set of facts:

> Before an employer is expected to incur the time and expense of an investigation into discrimination it requires more than: (i) an unparticularized allegation that an employee was discriminated against; (ii) which allegation the employer would reasonably interpret as referring to the decision to terminate; (iii) when the termination occurred for objectively nondiscriminatory reasons.[5]

Since the claim of the defendant failing to investigate was tied to the plaintiff's termination, as opposed to the act of racial discrimination on its own, the helpfulness of this case is limited. What it does tell us is that attempts must be made to clarify a unparticularized allegation of either discrimination or harassment. If no further clarifications are provided, then there is nothing to investigate. While the judge did not appear to take notice of the employer's attempt to clarify the plaintiff's unparticularized complaint, if the employer had failed to make this attempt it would be far more likely that failing to investigate this complaint would constitute discrimination and render the employer liable for its standalone duty to investigate such complaints.

4. When an investigation becomes an unfair labour practice

Although not every province requires employers to investigate complaints and incidents of workplace harassment, every province's labour relations scheme prohibits employers from committing unfair labour practices. Usually employers and unions can agree on the need to take action to address workplace harassment, but an unfair labour practice may arise when the employer's interest in taking such action unreasonably interferes with the union's operations.

Such a scenario is at the heart of the recently reported case *University of the Fraser Valley v University of the Fraser Valley Faculty & Staff Association* (2018 CanLII 5103 (BC LRB)). In that case, the University of the Fraser Valley (the "University") received complaints of harassment against the President, Vice-President and Secretary-Treasurer of the University's Faculty & Staff association (the "Association"). The complainants were two of the Association's staff members. In accordance with its harassment policy, it initiated investigations into these complaints. These members of the Association worked on University property and the complainants specifically brought their complaint to the University to have it investigated.

[5] *Gu v. Habitat for Humanity Greater Toronto Area Inc*., 2018 ONSC 2725 at para 101.

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The Association raised an unfair labour practice application and requested that there be an interim order to prevent the University from conducting these investigations. At the heart of the Association's concern was that the University would gain access to internal communications of the Association by conducting such an investigation. Indeed, the subject matter of the complaints being investigated related to such internal communications. The University assured the Association that it was not conducting the investigation as a way to gain access to internal communications; rather, the investigation was conducted pursuant to both its workplace harassment policy and occupational health and safety legislation.

Although the Vice-Chair in this case did not make a decision as to whether the University was required to conduct an investigation into these complaints given that the complainants were not employees of the University, in assuming that the University was required to conduct such an investigation, the Vice-Chair nevertheless found that the manner in which it was conducted constituted an unfair labour practice.

The Vice-Chair provided three reasons why the University had, perhaps unwittingly, committed an unfair labour practice in this scenario. First, the Association had a legitimate interest in protecting the confidentiality of the communications that were to be addressed through the investigation. The Vice-Chair indicated that the University had failed to address this interest and instead forged ahead with an investigation. Second, the University was unable to provide evidence of the conduct that led to the complaints being investigated spilling over into the University's workplace or impact the complainants' work performance. Finally, the University was unable to point to any legislation that required it to conduct a full and formal investigation into these complaints. In fact, the University had already engaged in a mediation process to address them, which had not been concluded before it decided to conduct a formal investigation. As a result, the Vice-Chair declared that the University committed an unfair labour practice by conducting its investigation and directed the parties to work together to see how they could address these complaints without undue interference into the Association's internal communications.[6]

It would be interesting to see this same case in Ontario where the duty to investigate such complaints would be easily identifiable and would include complaints against anyone who is in the workplace, even if they are not employees. However, even in Ontario, there is a legitimate and substantial interest in protecting the internal communications of a union regardless of whether those communications are the subject of a harassment complaint. What this case tells us is that an employer should consult with their union if they receive a complaint that will require it to muddle with internal union matters in order for it to be investigated. Otherwise, the union will not want to participate and, potentially, bring forward an unfair labour practice complaint.

5. No to litigation privilege over report

Employers often wish to maintain privilege over their workplace investigation reports. For a number of reasons, this is a very challenging thing to do and the case law is not consistent in terms of result. There are two types of privilege that are typically claimed – solicitor client and litigation. The scenarios in which a claim of either form of privilege over a workplace investigation report are highly fact-specific and therefore provide few key "tips" or "take-ways" that are convenient for employer counsel other than to play close attention. In this case, a claim of litigation privilege failed.

In *Jamal v. Aisling Discoveries Child & Family Centre*, (2018 HRTO 777), the applicant asked to amend their application to the Tribunal which alleged discrimination on the basis of disability to include

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6 *University of the Fraser Valley v University of the Fraser Valley Faculty & Staff Association*, 2018 CanLII 5103 at paras 128-134 & 144.

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discrimination on the basis of family status, race, failure to accommodate their disability and a failure to investigate the applicant's past complaints of harassment and bullying in the workplace. As part of this request, the applicant also requested that the employer produce a workload report, which it conducted as part of its efforts to accommodate the applicant, as well as both an investigation reports and an external investigator's notes regarding the applicant's past harassment complaints. The employer claimed that it did not have access to the external investigator's notes and also claimed that both of these reports were protected by litigation privilege.

The decision provides little in the way of the employer's argument as to why these reports would be protected by litigation privilege. Instead, it points to key reasons as to why the reports would *not* be protected by litigation privilege according to information provided by the employer. For example, the employer admitted that the workload report was conducted as part of the applicant's accommodation program and preceded any litigation regarding their accommodation. The employer also noted that the workplace harassment investigation report was completed pursuant to its own internal policies, and under those policies the applicant had already been provided with the results of the investigation. As such, it would have conducted the investigation regardless of whether the matter was the subject of litigation. For these reasons, the adjudicator easily determined that these documents were not made for the dominant purpose of actual or anticipated litigation. The employer was ordered to produce the workload report and the full investigation report.

The adjudicator rightly pointed to the two fundamental flaws in the employer's claim for litigation privilege over its two workplace investigation reports. First, they had a policy, which required the employer to investigate a complaint of harassment. If such a policy requires this investigation, it will be difficult to prove that the investigation report was created for the dominant purpose of litigation – the dominant purpose in this case was following its internal policy. The second fundamental flaw was the timing of the workload report and its associated investigation. Although it was completed after the date of the applicant's human rights application, it was started before there was any threat of litigation. Therefore, the dominant purpose of that report was the employer's fulfillment of its duty to accommodate the applicant, not any actual or anticipated litigation.[7]

Given that most employers have internal policies to investigate complaints and incidents of harassment, and these investigations often occur before the threat of litigation rears itself, this case suggests that it will be extremely challenging to claim litigation privilege over workplace investigation reports regarding complaints of harassment.

6. Yes to solicitor-client privilege over report

Solicitor-client privilege provides a slightly more secure avenue for protecting a workplace investigation report from production. In *Hogan v. Brunswick News Inc.* (2017 NBQB 198), a wrongful dismissal claim, the plaintiff requested a copy of an investigation report that was completed by the defendant employer's in-house counsel. The defendant successfully claimed that the report was subject to solicitor-client privilege. The defendant substantiated this claim by noting that the report was created by in-house counsel, with the participation of a limited number of staff who assisted in conducting interviews or reviewed the report. Furthermore, the report was labeled as being privileged and strictly to be used for the provision of

[7] *Jamal v. Aisling Discoveries Child & Family Centre*, 2018 HRTO 777 at paras 22-26.

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legal advice. Most of this evidence came from the affidavit of the in-house counsel who completed the report.[8]

The judge easily determined that the investigation report was subject to solicitor-client privilege. First, the report was clearly between the client and their solicitor. Second, the report was made specifically for the provision of legal advice. Third, the report was kept confidential.[9]

Applying these factors can be complicated when the broad realities of workplace harassment investigations are considered. For example, some legal decision makers may say that by hiring an external investigator, the matter is outside the confines of this relationship, especially when the investigator is reporting on facts, not providing a legal opinion. Furthermore, if parts of the report are revealed to the parties, it may be more challenging to prove that confidentiality was maintained throughout the investigation. Lastly, one of the primary benefits of a workplace investigation conducted by an external party is that it is supposed to be viewed as independent and neutral. We query whether asserting privilege over it diminishes this aspect of it.

7. Complainants as Intervenors?

Here is a surprising case. The facts leading up to it are not unusual, but the result was. Here, a female employee made a complaint that was investigated and eventually led to the termination of the respondent He claimed to have been wrongfully dismissed and went to trial. Normally, the complainant in this scenario would be a witness in support of the employer's case. Using this complainant's evidence, the trial would recapture the elements of the complaint that were investigated and resulted in the plaintiff's termination. In other words, the complainant's interests are "folded into" the employer's case. But in *Render v. ThyssenKrupp Elevator* (2018 ONSC 3182), the complainant successfully moved for intervener status at the trial thus emphasizing her own individual interests.

In that case, the plaintiff was a 30-year employee. He was terminated after the employer's investigation found that he slapped the complainant's buttocks and placed his face in the area of her breasts and pretended to "nuzzle into them."[10] In her affidavit, the complainant stated that a judgment in favour of the plaintiff would case her to fear for her physical integrity in the workplace.[11] The Court found that the complainant had an interest in the subject matter of the proceeding and that there was a question of fact shared between them that related to the proceeding.[12] Only one of these two criteria had to be met in order for the complainant to qualify as an intervenor. The Court also determined that here would be no undue prejudice or delay with her participation.

Although the complainant was provided with limited rights for her counsel participating in the trial – the right to cross-examine the plaintiff in relation to facts about her, the right to object to questions asked of her during cross-examination and the right to make brief opening statement and closing statements related

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[8] *Hogan v. Brunswick News Inc.,* 2017 NBQB 198 at para 4 [*Hogan*].

[9] *Hogan* at para 17.

[10] *Render v. ThyssenKrupp Elevator*, 2018 ONSC 3182 at paras 1-2 [*Render*].

[11] *Render* at para 26.

[12] *Ibid* at para 39.

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to the complainant's credibility[13] – this limited opening for the complainant's participation has potentially far-reaching implications for employers. It requires employers to work with the complainant's counsel and consider how a complainant's counsel may affect its litigation strategy.

If a complainant does not come with their own counsel, employers must still prepare for their employee-complainants to be put on trial. When the complainant's testimony is inconsistent with the findings of the report or the reason for termination, the judge may blame the way the investigation was conducted and impose damages on the employer.

8. Consequences of an inadequate investigation

In *Smith v Vauxhall Co-Op Petroleum Limited* (2017 ABQB 525), a wrongful dismissal case, the employer defended its decision to terminate Mr. Smith, the plaintiff-employee, by relying on the findings of an internal investigation that concluded he had committed sexual harassment and sexual assault against a subordinate. The Court found that this investigation was inadequate and its findings were incorrect. Consequently, the Court indicated that the employer may be liable for an adverse costs award because it relied on such an investigation to substantiate its decision to terminate Mr. Smith.

The events occurred at a workplace in the town of Vauxhall, Alberta. Mr. Smith was a manager. He hired a salesperson, and then promoted her to a managerial position. The two of them engaged in a romantic relationship from approximately 2003 to 2008. When the romantic relationship ended, their professional relationship soured.

In 2009, the manager advised a supervisor that Mr. Smith had sexually harassed her. She alleged that he committed three acts of sexual assault – two before their relationship started and one after it ended. She also reported multiple incidents of sexual harassment, which included such unwanted conduct as Mr. Smith complimenting her on her clothes and delivering unsolicited gifts to her and her children.

Mr. Smith was suspended during a three-day investigation conducted by his supervisor. The investigation found that Mr. Smith had personally and sexually harassed, and sexually assaulted the manager, and that he showed dishonesty by failing to report his relationship with the manager as required by the employer's anti-fraternization policy. Mr. Smith was terminated for cause. He then commenced a wrongful dismissal claim. In addition to claiming damages for pay in lieu of notice, Mr. Smith claimed punitive damages for the circumstances surrounding his termination, including his supervisors of the investigation that led to his termination.

After hearing the testimony of Mr. Smith and the manager, as well as one witness, and assessing their credibility, the judge determined that the allegations of sexual assault and sexual harassment were unfounded. Nevertheless, the other allegations of wrongdoing were sufficient for Mr. Smith to be terminated for cause.

The judge noted four main reasons why the employer's investigation into the complaints of sexual assault and sexual harassment was unreliable:

- The investigator did not interview any witnesses, despite the manager's assertion that there were witnesses to the incidents of sexual harassment and sexual assault.

[13] *Render* at para 53.

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- The investigator did not ask for specific details of the incidents of sexual assault, such as where the manager was touched, after she told the investigator that Mr. Smith was very "touchy-feely."
- It was not clear that the investigator had discussed the allegations of sexual assault or sexual harassment with Mr. Smith when he was informed of the investigation.
- The investigator admitted that his assessment of Mr. Smith's credibility with respect to the allegations of sexual assault and sexual harassment was affected by the sense of mistrust he felt when Mr. Smith admitted to other workplace policy violations.

Although the judge found that neither the harm suffered by Mr. Smith from the false allegations of sexual assault and harassment nor the supervisor's mishandling of the investigation warranted punitive damages, she did leave the door open for an adverse costs award because of the employer's insistence that Mr. Smith had committed these acts, despite its inadequate investigation. She stated:

> To be clear, Mr. Smith committed serious misconduct that constituted just cause for summary dismissal […] Unfounded allegations of both sexual harassment and sexual assault, however, are also a serious matter that cannot be taken lightly. Left unchallenged, such allegations could have had far-reaching consequences for Mr. Smiths personal and professional reputation.
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> In maintaining that Mr. S sexually harassed and sexually assaulted the manager, the Defendant has perpetuated an unfounded attack on Mr. Smith's reputation. Based on the evidence before this Court, it should have become apparent to the Defendant that there was little basis for continuing to rely on these allegations, particularly in light of the nature and extent of [the investigator's] investigation…
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> […]
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> Accordingly, when awarding costs, I am inclined to consider the unfounded allegations of sexual harassment and sexual assault against Mr. Smith. While these allegations were initially levelled by the manager, the Defendant continued to rely on them throughout trial. Such conduct, while not warranting a damages award, is still worthy of denunciation given the facts of this case.[14]

Despite this opportunity for an adverse costs award, the parties chose not to make submissions for costs. Even so, this case demonstrates that a poorly done investigation that gets placed in the spotlight of a wrongful dismissal claim raises the risk of harming the reputations of both the employer and the employee, as well as a potential risk for cost consequences.

9. Failure to conduct an investigation at all

In the last year, at least one judge has made an order for punitive damages against an employer in a wrongful dismissal trial for failing to conduct a workplace investigation at all.

In *Horner v. 897469 Ontario Inc,* (2018 ONSC 121), an undefended wrongful dismissal claim, the Court awarded punitive damages because the employer terminated the plaintiff without investigating her harassment complaint. What's particularly surprising about this case is that punitive damages were awarded even though the incidents of workplace harassment, as described by the plaintiff without any contradiction from an opposing party witness, were relatively minor.

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[14] *Smith v Vauxhall Co-Op Petroleum Limited*, 2017 ABQB 525 at paras 175-177.

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In December 2016, Ms. Horner said that a fellow employee deliberately elbowed her. When she confronted him, he denied elbowing her and told her to "take a pill." She reported this incident to her direct supervisor. Two days later, Ms. Horner was trying to access a drawer that was being blocked by the same employee. After asking to access it, the employee became angry and said, "Can you not wait?" She reported this to her supervisor. She then spoke to the employer/owner and explained that she needed "time away" to deal with what happened. The owner told her that she could take the next day off, which was the last day of the year, and that they would "figure this out in the new year." She also asked the owner if she could be laid off. The owner then asked if she would come back from her layoff if the employee who was allegedly harassing her was no longer there. She said "yes." That was on December 22, 2016.

On December 28, 2016, Ms. Horner received a termination letter dated December 22, 2016. The letter said:

> On December 22, 2016, you were at the retail counter and wanted access to a drawer that your fellow employee… was standing in front of. You lost your temper and angrily ranted against… while he was serving the customer. You have reacted in this unprofessional manner on other occasions and have been reprimanded for it. I cannot and will not condone this type of behaviour.[15]

Ms. Horner successfully claimed for wrongful dismissal in a trial that lasted less than three hours. In addition to receiving 3 months' notice ($10,000) Ms. Horner received $20,000 in Wallace damages for the manner in which she was dismissed.

The judge also awarded her $10,000 in punitive damages specifically because the employer chose to terminate Ms. Horner, rather than investigating her complaints:

> I am satisfied on the evidence that the plaintiff was harassed in the workplace and that the employer, rather than investigating, terminated the plaintiff. As such, I find that the employer's conduct was malicious, oppressive and high-handed and must be deterred.[16]

There was no discussion of the nature of the workplace harassment committed against Ms. Horner. The judge simply found that it had occurred.

Although this case was undefended, it highlights a frequent issue confronted by employers once they realize that an investigation is required. The OHSA dictates that all complaints and incidents of workplace harassment to be investigated in a manner that is "appropriate in the circumstances." This does not mean employers should have a one-size-fits-all approach. It also does not mean that an external investigator should do *every* investigation. Rather, this standard means that the investigation process may reflect the complexity and severity of the incidents detailed in the harassment complaint. In this case, a short and efficient process could have been used. The employer could have simply spoken to the other employee after hearing Ms. Horner's complaint, interviewed any witnesses, decided what happened and then informed Ms. Horner of those findings. Had this been done in this case, it is possible that the employer could have avoided some or all of the $40,000 in damages awarded to the plaintiff.

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15 *Horner v. 897469 Ontario Inc,* 2018 ONSC 121 at para 8 [*Horner*].

16 *Horner* at para 30.

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10. When your workplace investigation leads to a public interest remedy

When a workplace investigation reveals a discriminatory or inadequate method for addressing harassment and discrimination in the workplace, a human rights tribunal may provide a remedy to an applicant in the form that is not in the form of monetary damages. The tribunal may require individuals to undergo sensitivity training or training on harassment in the workplace. When the complaint before the tribunal relates to the way in which a workplace investigation was conducted, the tribunal may also require the employer.

In *McDonald v. CAA South Central Ontario* (2018 HRTO 163), the applicant self-identified as a bi-racial woman or, more specifically, an Afro-Caribbean Canadian woman. She alleged that she was subject to harassment and a poisoned work environment based on various comments by colleagues. These comments included:

1. Telling the applicant "you people are so sensitive" when she and the applicant spoke about her son's soccer coach being "very Jamaican"
2. Telling the applicant that her name was "not Canadian"
3. Making a comment about Christmas being a Canadian holiday and how she did not agree with immigrants coming to Canada and making people say "happy holidays"
4. Making a comment to another co-worker, overheard by the applicant, about how Muslims should return to their countries
5. Making a comment about not wanting to sound prejudiced but that she was nervous after seeing a new security guard who wore a turban when she was working after hours alone

The adjudicator found that these comments constituted harassment, however, the employer's internal investigation came to the conclusion that these comments did not constitute harassment. In her final one page report for the investigation into these comments, which neglected to include an investigation of the first two comments noted above, the investigator found the work environment to be friendly but that employees found conversations with the applicant difficult due to her positioning of cultural differences and due to fear that she would turn what they were saying into a racial comment; that inappropriate words may have been used on the brokerage floor but with no malice intentions; and the allegation of racism/targeting was not founded.

The adjudicator also found that the investigation was inadequate by failing to investigate some of her main allegations, concluding that intent or motivation were necessary to make a finding of harassment, by apparently prejudging certain issues about which the applicant had complained, by relying upon certain accusations the applicant's co-workers made against her without, at the very least, giving her a chance to respond to them; and by relying upon the fact that the applicant responded to, and challenged, the comments as a reason for finding that they did not amount to harassment.

In addition to awarding the applicant $5,000 for injury to dignity, feelings and self-respect, the adjudicator mandated the employer to hire an independent third-party consultant with expertise in anti-black discrimination and harassment to provide training to members of the employer's human resources department on how to carry out investigations into complaints of harassment and discrimination. The training had to focus not only on the definitions of harassment and discrimination, but also the "potential effects of vexatious comments and conduct of members of racialized groups."[17]

[17] *McDonald v. CAA South Central Ontario*, 2018 HRTO 163 at paras 218-219.

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This public interest remedy, though highly specific, is incredibly important. Too often, remedies for such conduct are individualized and ad-hoc and do not address the systemic issues that foster a sense of tolerance for conduct that is clearly not condoned, such as racial discrimination and harassment.

Concluding observations

Although workplace harassment is not a new concept, the attention it has received compels counsel to employers to bring a renewed focus on how it can affect every aspect of their clients' day-to-day operation as well as their litigation. This is particularly true when there is an obligation to conduct a workplace investigation.

These cases illustrate the degree to which workplace harassment, and investigations into complaints of workplace harassment, have impacted the substance and practice of employment law. These ten cases are illustrative of the disparate legal issue that workplace investigations touch upon.

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