

## When investigations fail: Recent cases highlight risks for employers

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**Canadian lawyer warns that unqualified investigators and weak processes can drive liability**



*Priya Sarin*

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Canada's top military police watchdog has issued a blunt warning to employers about how badly an investigation can go wrong when basic investigative principles aren't followed.

In a report released in December, the Military Police Complaints Commission of Canada found "serious deficiencies" in how military police handled a sexual assault allegation against retired major general Dany Fortin.

The themes flagged by the watchdog – including incomplete witness interviews, poor documentation and weak oversight – are echoed in a recent high-profile verdict in the U.S. where a jury found the Society for Human Resource Management (SHRM) guilty of racial discrimination and retaliation against an employee.

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### SHRM found liable for racial discrimination

SHRM, known as the largest HR group in the world with around 300,000 employees globally, was ordered by the Colorado jury to pay the employee, a former instructional designer, \$11.5 million in damages.

In response, SHRM leadership issued a statement stating they "strongly disagree" with the verdict and plan to appeal.

“All employers should follow a simple, principled approach to the law: If you’re wrong, make it right. If you’re right, stand firm,” [the statement read](#).

“In this case, we are right — and we will continue to advocate with integrity for the correct outcome.”

## **Common missteps: incomplete evidence and thin reports**

CBC reported how the investigation into Fortin found that investigators made mistakes such as failing to record phone interviews and using the same tool to interview witnesses as are used to interview criminal suspects. It was also found investigators didn’t interview all available witnesses.

Employment lawyer Priya Sarin of Sherrard Kuzz LLP in Toronto says she sees similar mistakes in workplaces, as well as failing to give complainants and respondents the chance to respond to new information that comes up during the course of an investigation.

She also cites insufficient analysis and explanation of decisions as a common employer mistake.

“Procedural gaps in the investigation process often lead to a claim by an employee for bad faith damages because they don’t believe the investigation was done fairly,” says Sarin.

“This becomes particularly important if you have terminated an employee for just cause based on the investigation report.”

## **Dual roles and neutrality: how far can internal HR go?**

One of the questions raised in the SHRM case was whether the same individual could credibly act as both a neutral fact-finder and an adviser to management on [discipline and termination](#).

From a Canadian perspective, that overlap is not uncommon – and not automatically improper, according to Sarin.

“When an employer conducts an internal investigation [for example] through their human resources team, the investigator is more likely to be involved with making decisions on discipline or termination,” says Sarin.

“From a legal perspective, there is nothing precluding them from doing so and I would not say that it is a mistake for the internal investigator to make recommendations or provide advice to the management team.”

She does, however, warn employers that legal counsel should be consulted before decisions are made based on internal investigations.

This step, says Sarin, will help to root out any internal bias or other issues that might otherwise be left for litigators to discover.

“The SHRM case highlights the importance of ensuring that the internal investigator selected at the outset is truly neutral and able to conduct an impartial investigation,” she says.

## Qualifications and competence: ‘years to become a skilled investigator’

In her review, Commission chair Tammy Tremblay said the military investigation was “compromised by tunnel vision, a lack of supervisory oversight and a failure to adhere to fundamental investigative principles.”

These issues highlight a common question for employers: who is qualified to investigate serious workplace complaints such as harassment, sexual misconduct or racial discrimination?

Sarin notes that, in Canada, there is no legislated minimum certification for workplace investigators, but that does not mean any HR generalist is capable or appropriate to lead a complex file.

“It can take years to become a skilled investigator and, if the subject matter is complex [such as] sexual assault or racial discrimination, or involves allegations against a senior-level employee or manager, the more experience, the better.”

At the very least, she clarifies, all investigators must be up-to-date and knowledgeable about Canadian human rights, occupational health and [workplace safety laws](#) applicable to the case: “They should also have experience with investigating similar subject matter.”

## Legal risk when ‘unqualified’ investigators lead the process

Adding to the risk is the “highly problematic” practice of employers using untrained or inexperienced employees to conduct investigations, Sarin says.

“An inexperienced investigator might not ask the right questions, obtain all relevant information, follow a fair process, take appropriate notes, or properly apply the facts to the law,” she says.

“Many jurisdictions in Canada have legislation that requires workplace investigators to be competent. If they are not, an employee can file a complaint.”

Sarin points to specific statutory consequences in Ontario, where employees have the right to take complaints to the Ministry of Labour, Immigration, Training and Skills Development if they think their employer mishandled an investigation