

# Ensuring Procedural Fairness For All In Workplace Investigations



Workplace investigations must ensure procedural fairness to avoid costly legal consequences. The Federal Court ruling in *Marentette v Canada (Attorney General)* highlights the importance of adhering to investigation procedures, providing opportunities for parties to respond to evidence, and maintaining transparency throughout the process. Employers should follow legislative guidelines and keep all parties informed to uphold fairness and prevent disputes.

Workplace investigations are complex and challenging, especially when dealing with sensitive issues such as harassment, discrimination, or violence. The Federal Court decision in [Marentette v Canada \(Attorney General\)](#) highlights the importance of procedural fairness in workplace investigations and the potential risks of hiring an unqualified or inexperienced investigator.

The Appellant, a Border Services Officer employed with the Canadian Border Services Agency (“CBSA”) since 1994, sought judicial review to obtain an order setting aside an investigation report adopted by his employer after a nearly two-year investigation, which concluded that none of the Appellant’s allegations over a twenty-five-year period met the definition of workplace harassment or violence.

## **Background**

Marentette filed a Notice of Occurrence (the “Notice”) in April 2021 alleging seven incidents of workplace harassment and violence that occurred between 1995 and 2020 involving six supervisors. The allegations involved a pattern of activity including hate crimes, sexual harassment, discrimination, physical violence, threats, and derogatory name calling.

In May 2021, Marentette met with the Harassment and Prevention Resolution Advisor assigned to the Notice and confirmed that he wanted an investigation undertaken. Marentette received a Notice of Investigation in June 2021. In November 2021, after a period of silence, he inquired about the status of the investigation and in January 2022 he filed a grievance because of the ongoing delay. It was not until April 2022 when the CBSA retained and appointed an Investigator to investigate the Notice. The Investigator interviewed Marentette on May 4, 2022, and he received a synopsis of his interview two days later.

As a part of the investigation, the Investigator interviewed four responding parties

and one witness. Marentette was neither provided with a synopsis of these interviews nor any information about what the responding parties told the Investigator, nor was he given a copy of the Investigator's Preliminary Report. Marentette was told that the CBSA had received a copy of the Investigator's Preliminary Report to review, but he himself was not provided with a copy.

Marentette received the Investigator's Final Report in January 2023 and was notified that the CBSA had adopted the Report finalizing the investigative process. In the Report, the Investigator determined that none of the occurrences alleged by Marentette constituted workplace harassment or violence and no preventative measures were recommended.

## **Judicial Review**

After filing a Notice of Application for judicial review in February 2023, Marentette received the full records of materials before the Investigator in March 2023. The record contained reports given to the Investigator by the responding parties and witness about Marentette and a checklist prepared by the CBSA in response to his Notice titled "Workplace Harassment and Violence Prevention Regulations Checklist" (the "Checklist"). The Checklist listed the following as a part of the investigation process:

- Provide a copy of the Investigator's Preliminary Report to the principal party.
- Provide a copy of the Investigator's Preliminary Report to the responding party.
- Obtain comments from the principal party and responding party and send to the Investigator.

Notably, none of these steps in the CBSA's checklist were completed.

Marentette argued that:

1. He was never shown or given any opportunity to respond to unfavourable, inaccurate, prejudicial, and contradictory statements reported to the Investigator by the responding parties and witness.
2. He was never shown or given any opportunity to respond to the Investigator's Preliminary Report.

The Court agreed with Marentette, emphasizing the high level of procedural fairness that workplace harassment and violence investigations are afforded considering the serious consequences a decision made in response to a complaint may have for all parties involved. In the circumstances, the investigation did not follow the requirements set out in applicable legislation. The Court concluded that Marentette should have received a "reasonable opportunity" to rebut the evidence that arose throughout the investigation process. Ultimately, the Court granted judicial review and ordered a new investigation to be completed by a different investigator.

## **Takeaways**

Employers have a legal duty to conduct fair and thorough investigations that respect the rights and interests of all parties involved. Failing to ensure procedural fairness for all parties can result in costly and damaging consequences. As a part of the investigation process, employers should ensure at a minimum that:

- The procedures set out in applicable legislation, regulations, or company policies are adhered to.
- The complainant is given a reasonable opportunity to respond to evidence that is gathered in their absence.

- The investigation is conducted in a timely manner, with a view to restoring harmony in the workplace.

While workplace investigations are confidential matters, they need not be conducted under a cone of silence. Transparency is often the key to a successful investigation. Many common pitfalls can be avoided if the employer outlines the investigative process for the parties at the outset, describing each step that will be taken along the way, and then abides strictly by that process, keeping the parties updated with regular status reports.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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