
Employment Law - The Need for Proper Workplace Investigations

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Employment Law - Background

Employment claims like bullying and unfair dismissal continually on the rise in employment law. Consequently, employers are increasingly required to take pro-active steps to investigate suspected workplace incidents and disputes before they lead to such claims.

A workplace investigation is a formal investigative process into an alleged workplace incident or dispute and it may be necessary to undertake same even if the complainant objects to it (ie, because they only wish to make an informal complaint).

Employment Law - Key Principles

When it comes to workplace investigations, the basics involve:

Inform

- communicate the allegations in writing with as much detail as possible
- advise the employee an investigation will be conducted. In addition, provide a summary of the process and meeting times

Suspend

- if the allegations are serious or there is a risk of victimisation or reprisal, the employee should be suspended with pay (although subject to consideration of industrial instrument, contractual and company policy provisions)

Police

- a report to Police may be required if the allegations relate to a possible criminal offence (though the workplace investigation should still continue)

Prepare

- establish the scope of the investigation and the issues for determination
- plan how the investigation will proceed, including what information will be required and who will need to be interviewed. Therefore, this will typically involve the accused, the complainant, and any relevant witnesses
- establish an approximate but prompt timeframe for the investigation process.

Furthermore, communicate this to all affected parties (and update them if there are delays)

- comply with any relevant industrial instrument, contractual and company policy provisions
- decide whether to appoint an external party as the investigator and whether to do so through a law firm in order to obtain legal privilege (which is subject to meeting relevant requirements) in any report

Interview

- conduct all interviews in accordance with procedural fairness principles – eg, give parties the opportunity to respond to/comment on all allegations/evidence

Findings

- consider all responses provided
- undertake further inquiries if appropriate
- apply an objective review of the evidence
- avoid relying on inferences, especially where the allegations are serious
- do not predetermine the outcome of the investigation
- take all steps to ensure the findings are free from bias (actual or perceived)
- document the findings and any recommendations in a report from the investigator

Responses

- consider the final report
- communicate the findings to the accused and the complainant (but do not provide the actual report)
- give the accused a chance to comment on any proposed remedial or disciplinary action
- after considering the accused's comments, implement appropriate remedial or disciplinary action

The Sting

A failure to investigate, undertaking an improper investigation or taking inappropriate

remedial/disciplinary action exposes the employer to such claims as:

- workers compensation claims
- WorkCover complaints about an unsafe workplace
- bullying claims/increased personal (sick) leave
- discrimination/adverse action claims (especially for sexual harassment complaints)
- unfair dismissal claims

Going Forward

Employers must ensure that all workplace investigations are conducted whenever appropriate, as soon as possible, and in a procedurally fair way.

Employment Law - More Information

Please call the leading employment lawyers in Parramatta, the Matthews Folbigg Workplace Solutions employment law team on 9635 7966 to speak with one of our employment lawyers.