



Conducting a workplace investigation

Despite an employee's unacceptable conduct, failure to implement a systematic approach to investigating alleged misconduct prior to termination may lead to a finding of unfair dismissal and an award of compensation.

A recent case before the Fair Work Commission has reaffirmed the importance of a systematic approach when it comes to conducting workplace investigations. In *David Cowan v Sargeant Transport Pty Ltd* [2014] FWC 5330 (**Sargeant**), Commissioner Bissett found that an employee had been unfairly dismissed as a result of an unsatisfactory workplace investigation. The Commissioner awarded the employee compensation despite acknowledging that the employee's conduct was such that the employer had a valid reason to terminate his employment.

This decision is a timely reminder for AAAA members as workplace theft, fraud, drug use, sexual harassment, bullying and other unacceptable workplace conduct are issues regularly raised by callers to the **AAAA Employer Assist** hotline. Employers should always seek advice and ensure that the proper processes for conducting a workplace investigation are followed before a decision regarding disciplinary action is made.

Workplace investigations

A workplace investigation is the process of gathering information and evidence in order to reach a decision regarding a workplace issue. Generally, workplace investigations occur as a result of a grievance, complaint or allegation regarding an employee's conduct in the workplace. However, it is not necessary for a complaint to be made before an investigation can occur.

Procedure to follow

Every workplace should adopt a procedure for conducting a workplace investigation. Such a procedure will educate managers on the steps to be taken during an investigation. It is extremely important not to depart from this procedure without seeking advice.

Any procedure should include the following stages (at a minimum):

1. Decide whether to investigate (i.e. is there a serious issue or has a complaint been made)
2. Take immediate action if necessary
3. Assign the investigation to an experienced, impartial and professional person (preferably external so that their findings can be relied upon if the outcome is challenged by the employee and the Fair Work Commission becomes involved. Contact us for contact details of Workplace Investigators in each state)
4. Investigator to prepare and gather information and evidence

5. The employee may be stood down pending the outcome of the investigation
6. Relevant parties to be interviewed
7. Inform the employee of the allegations and afford them an opportunity to respond (the employee must be allowed to have a support person present if requested)
8. Make a finding and act on the findings

Decide whether to investigate

Employers have a duty to investigate when they become aware of a serious issue. An employer may discover a workplace issue because of a complaint about an employee's workplace conduct, a report being made or through personal observation.

In deciding whether to proceed to an investigation, employers should consider the seriousness of the alleged conduct.

Take immediate action

Employers should also consider whether the alleged conduct warrants immediate action. For example, if an employee is alleged to have engaged in serious misconduct, or is a risk to the health and safety of other employees, or to your business, the employer should consider suspending the employee with full pay pending the outcome of an investigation.

The investigator

It is important that the investigation is conducted by an experienced and impartial person who does not have a conflict of interest with the parties or the potential outcome.

In order to achieve this, it is preferable if an external investigator is engaged.

Prepare and gather information and evidence

The investigation should be initiated and conducted without delay.

The investigator should first identify the category and nature of the complaint. If the complaint relates to health and safety, bullying and harassment or sexual harassment, the investigator will need to review the relevant legislation to understand all parties' statutory obligations. Further, the investigator must become familiar with the relevant workplace policies and procedures, codes of conduct, human resources records, the organisational structure (reporting lines) and the employment contract so a holistic appreciation of the duties and obligations is established.

The investigator should also ascertain whether there is any evidence such as CCTV footage, cash transaction records which may assist with the investigation.

Interviews

The investigator should establish the events and circumstances leading up to the alleged conduct, the facts of the alleged conduct and any other relevant facts. Usually this information is obtained from witnesses.

Interviews should be conducted individually and as soon as reasonably possible with people who were directly involved or can provide information.

A good investigator will ask open questions limited to facts and avoid leading or influencing the interviewee.

Informing the employee and affording them an opportunity to respond

The employee must be afforded the opportunity to respond to the allegations and allowed an opportunity to bring a support person along to any meeting. It is recommended that the allegations and evidence be put in writing to the employee prior to meeting.

Meetings should be conducted in person. In the Sergeant case, the Commissioner found it disturbing that the HR manager did not meet with the employee in person to explain the allegation, evidence and potential consequences of the allegation if proven.

It is not sufficient for an employee to only be informed of the reasons they are being dismissed immediately prior to their dismissal. An employee must be given an opportunity to respond before the decision to dismiss has been made.

Making a finding

Interviews and evidence should be accurately documented. Comprehensive investigation notes should be recorded as evidence of procedural fairness.

The investigator must weigh the evidence on the balance of probabilities. That is, the investigator must decide whether it is more probable than not that the alleged conduct did or did not occur. To do this the interviewer will need to consider what is consistent, reliable and creditable when assessing the evidence. The investigation must be thorough and no issue left unaddressed.

The outcome of an investigation will depend on the circumstances. Examples of potential actions may include but are not limited to mediation, counselling, a formal apology, training, disciplinary action, or dismissal.

Pitfalls to avoid

There are some pitfalls to avoid when carrying out a workplace investigation, they are:

1. Failing to investigate
2. Nominating an investigator without the appropriate skills, experience and independence
3. Delay in initiating and completing the investigation
4. Failing to thoroughly investigate the matter
5. Failing to inform the employee of the details surrounding the alleged conduct
6. Breaching confidentiality
7. Losing objectivity
8. Invading employee's privacy
9. Inconsistent disciplinary action
10. Not following the workplace investigation procedure

The above pitfalls can be costly. In another recent case, *Mr Michael Duncan v Bluescope Steel Ltd T/A Bluescope Steel* [2013] FWC 8142 (**Bluescope**), the Fair Work Commission reinstated an employee after finding the employee has not been afforded a "fair go" during the workplace investigation which led to his dismissal.

Some of the issues identified in Bluescope include:

1. The investigation was left too late
2. The investigator was inexperienced
3. The investigation was not thorough and obvious questions were not raised
4. Conclusions were drawn from information with no substance
5. Some of the witnesses interviewed should have been identified as conflicted
6. The disciplinary action was inconsistent with that previously applied

Need assistance?

Workplace investigations can be complex and if not conducted properly there may be adverse implications for your business. **AAAA Employer Assist** has independent investigators who can conduct or assist you with your workplace investigation. We can also assist you with preparing policies and procedures for all workplace issues including tailored procedures for conducting investigations.

AAAA Employer Assist provides all AAAA members with information and advice on all employment matters, including workplace investigations. Contact us on **1300 735 306** to discuss any employment issues that arise in your business.

Gwen McIlroy and the AAAA Employer Assist team.