

CONDUCTING WORKPLACE INVESTIGATIONS

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

In this article, Employer Assist will provide employers with a short guide to conducting workplace investigations.

Workplace investigations

A workplace investigation is the process of gathering information and evidence in order to reach a decision regarding a workplace issue.

Every workplace should adopt a procedure for conducting a workplace investigation. Such a procedure will educate the workplace 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):

- Decide whether to investigate
- Take immediate action if necessary
- Assign investigation to an experienced, impartial and professional person (preferably external)
- Investigator to prepare and gather information and evidence
- Relevant parties to be interviewed
- 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 required)
- Make a finding and act on the findings

Employers have a duty to investigate when they become aware of a serious issue. A 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 whether there is a dispute and the seriousness of the alleged conduct.

Taking 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, the employer should consider suspending the employee with full pay pending an investigation.

The Investigation process

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.

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, CCTV footage and the organisational structure (reporting lines) and the employment contract so a holistic appreciation of the duties and obligations is established.

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.

Informing the employee and affording them the 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 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:

- Failing to investigate
- Nominating an investigator without the appropriate skills, experience and independence
- Delay in initiating and completing the investigation
- Failing to thoroughly investigate
- Failing to inform the employee of the details surrounding the alleged conduct
- Breaching confidentiality and invading the employee's privacy
- Inconsistent disciplinary action
- Not following the workplace investigation procedure
- Drawing conclusions from information with no substance
- Not identifying conflicted witnesses.

AAAA Member Benefits

Workplace investigations can be complex and if not conducted properly there may be adverse implications for your business. Employer Assist has independent investigators who can conduct or assist you with your workplace investigation.

Employer Assist provides all AAAA members with information and advice on all employment matters, including workplace investigations.

Contact us on 1300 735 306 or
aaaa@employerassist.com.au to discuss any employment issues that arise in your business.