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your workplace law experts



CCI Lawyers Work Place Law is a boutique workplace relations practice. We provide advice to a wide range of employers, from small business to multinational employers across a full range of work place matters.

Investigations Gone Wrong



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When the outcome of an investigation into poor conduct leaves an employee disgruntled, any flaws in that investigation process will come under close scrutiny of a Court/Tribunal when determining an unfair dismissal, wrongful termination or harassment/discrimination claim. An employer needs to steel itself for adverse comments that typically accompany an adverse result:

"I have concluded that the investigation approach... was seriously deficient ... and ultimately resulted in disparate and poorly informed actions being taken..."

"... [T]here were significant gaps and errors in the investigation process."

"... the Investigation... was flawed"

"Upon her complaint, a bungled investigation was conducted..."

For instance when before the FWC, it is not a matter of whether an employer believed that there were reasonable grounds for concluding that an employee was guilty of misconduct. The FWC must determine for itself whether the conduct investigated actually took place and what it involved. To avoid such criticism employers must pay careful attention to how investigations are conducted. While there is no 'one size fits all' approach to investigations, the following tips are relevant to all investigations.

Promptly Start an Investigation

Whilst in some cases it might be tempting to dismiss a serial complainer's allegations, HR Managers shouldn't forget of the boy who cried wolf. If on face value the allegations suggest a possibility of any threat to the wellbeing, health or safety of an employee an investigation should be immediately commenced. Failing to start an investigation or prematurely dismissing a complaint without sufficient grounds is a sure way to agitate matters and heighten litigation risk. An example of failing to properly investigate a complaint occurred in *Harley v Aristocrat Technologies* where the FWC was highly critical of a HR Manager's approach to a complaint:

"A proper investigation should also have been conducted. It was clear on the evidence... [that the HR Manager] was either uninterested in investigating the complaints properly or had no idea how to conduct such an investigation." That [HR Manager] notified senior management that the applicant's claims were unsubstantiated having interviewed no-one ... about those claims is beyond belief."

Tip 1. Have the complainant provide a statement of comprehensive and concise allegations. Ask yourself whether it appears

that there may have been poor conduct which has threatened the wellbeing, health or safety of an employee. Then a decision must be made to either investigate the matter or to engage an external investigator to do so. Keep in mind that an investigation organised by your lawyers can assist protect the content of an investigation report on the basis of legal professional privilege. At all times avoid making any comment that might be misconstrued by a complainant as evidencing any pre judgement or bias. You would not believe how bad seemingly innocuous comments can look when reduced to writing and repeated before a court!

Separating Complainant and Respondent

Structuring the approach to be taken to an investigation is important. This includes considering whether it is appropriate for a complainant and respondent to continue interacting with each other whilst an investigation is on foot.

Tip 2. For small businesses this may involve suspending one or more employees on pay though this will require first consideration of the circumstances in play. For larger businesses it may be possible to implement measures to ensure the parties do not interact with each other. Failing to take such action can result in claims of victimisation which, if made successful, could increase damages awarded in subsequent litigation.

Investigation Report

When you have engaged an external investigator it is important to cast a critical eye over the findings delivered and to decide whether they should be accepted and acted upon. Simply accepting an investigator's findings without turning one's own mind to whether they should be accepted will not assist in defending subsequent proceedings.

Tip 3. Ask yourself whether the report contains a complete and objective record of what is said to have occurred by all interviewed. Were clear and complete allegations put to the perpetrator so as to allow them to provide a comprehensive reply? Have all witnesses been interviewed? Do any findings of the investigator fly in the face of the evidence that has been collected? If there are any doubts, pause and seek advice before taking any action based on a report.

Opportunity to Respond

Many may believe an investigation process provides the only opportunity for a perpetrator to respond to allegations. However an opportunity must be given both during the investigation process and again in any subsequent disciplinary process.

Tip 4. When considering dismissal following an investigation the employer should provide an opportunity to the perpetrator to respond to the investigation findings and the reason(s) for any intended disciplinary action.

The FWC often expects employers to provide all relevant information to an employee when providing an opportunity to respond. Whilst each situation is different, it is best to provide this information in writing.

Unhappy Complainant

An agitated complainant unhappy with the outcome of an investigation and any disciplinary taken (or not taken) may, in subsequent proceedings, assert that they have been victimised by the Company for having made a complaint. An unhappy complainant is typically sensitive to the post investigation conduct and comments of colleagues.

Tip 5. Once an investigation is completed and any disciplinary action taken you should confirm the agreement of the parties, preferably in writing, that the matter is now closed. This should assist parties 'move on' and

make it clear that the employer considers the matter closed. However it should also be made clear that any concerns about the conduct of others in the workplace should be reported to the Company.

Get Help

Our final tip is to act early. If you feel an investigation is beyond your skills you should consider seeking advice about whether an external independent investigation should occur. Depending on the circumstances, it may also be appropriate to engage your lawyers to commission the investigation for the purposes of providing legal advice in order that you are placed in a position of being able to call upon your right of legal professional privilege over a report.

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