


## WORKPLACE INVESTIGATIONS

Where an employer receives a complaint or becomes aware of an incident, they may also receive a demand for it to be formally investigated. Under workplace laws, where an employer “has knowledge” of a risk to health and safety or possible breach of equal opportunity laws, it has an obligation to take “reasonable steps” to satisfy itself as to what has, or has not, happened. Reasonable steps may include informal enquiries, but in some cases a full and formal investigation will be appropriate.

Investigations are appropriate where there is uncertainty as to what occurred, and it is sufficiently serious. An investigation may not be warranted in situations where:


- > The employee has a grievance in the workplace which is unrelated to a right under a policy, law or some other standard, for example: “my manager should allow me to make my own decisions” or “I don’t agree with an organisational decision”.
- > There is interpersonal conflict, but the behaviour alleged, if substantiated, would not breach any workplace policy or law or result in disciplinary action. These issues would generally be best dealt with through mediation or coaching.
- > A manager has a problem with the performance or conduct of one of their staff, and there is certainty about events. These should be addressed by the manager as a performance/conduct issue, leading to a disciplinary process where appropriate.
- > There is a dispute over entitlements – these are generally dealt with via industrial dispute resolution processes in industry or occupational awards, or enterprise agreements.

 **Note:** It is also relevant to consider whether the issue has a “connection with the workplace” and the employment relationship. Links such as a “potential” of personal and private behavior to poorly reflect the workplace but have no connection with the requirements of the job should generally not be investigated as a workplace matter.

### Legal Principles

The legal principles for workplace investigations do not come directly from legislation or a regulatory body but require the investigator to have an understanding of common law principles (from authority decisions by Commissioners or Judges).

Workplace investigations are civil rather than criminal matters. “Proof beyond reasonable doubt” is not required to substantiate a finding. Instead, the Investigator must make fair and reasonable enquiries, and make a finding on the “balance of probability”. This means they weigh up the evidence and decide what is most likely to have occurred. Investigators must make findings based on what the evidence shows is most likely, rather than what they believe happened.

 **Note:** In the case of workplace laws, there may be multiple criteria to consider before making an adverse finding. For example, under the Fair Work Act 2009 (Cth) “bullying” means those the behaviour was: repeated, unreasonable (as against the reasonable person test); directed at a person or group; and created a risk to health and safety.

### The Investigator

A person appointed as the Investigator of a particular incident or complaint should be given a clear understanding of their role before they start. An Investigator is ideally instructed by a senior person in the business commissioning the investigation, with a clear scope for the investigation agreed between both. This helps ensure impartiality.

A skilled Investigator should contain and reduce drama associated with workplace Investigations rather than fuelling it. Their responsibilities could include maintaining professional boundaries during an investigation, managing participants’ expectations of the investigation process

## Procedural Fairness

Employers have an obligation to adopt a fair and flexible process when conducting a workplace investigation. This includes:

- > the Respondent knows what is alleged against them and has an opportunity to give their side of the story.
- > an absence of bias: parties are treated equally through the process; conclusions are based on evidence; and the investigator remains neutral, not making any prejudicial steps along the way.

## Suspension

Employers have a lawfully right to suspend an employee on full pay for as long as necessary whilst undertaking an investigation, even if the employment contract doesn't expressly give them permission to do so. A suspension allows a "freezing in time" of events, rather than continuing hostilities and behaviours during an investigation. Employers should assess options around stand down or suspension of parties. In the event that a substantiated behaviour leads to termination, the period where the employee remained in the workplace may be raised in an Unfair Dismissal claim, in an attempt to demonstrate that there were other viable options to termination. Employers should also have regard to any industrial instruments that contain restrictions or provisions regarding suspension.

## Evidence

There are some important considerations to take into account whilst evaluating evidence acquired through an investigation.

**Relevance:** Findings are based on relevant evidence. Assumptions and evidence improperly gained are excluded.

**Hearsay:** Information given by those who were not direct witnesses should be given very little weight, if any.

**Opinions:** Opinions given by interviewees are irrelevant, only what they say or heard is relevant. Opinions from witnesses, within their area of expertise, are acceptable.

**Prior Offences:** Prior offences are irrelevant. In the workplace this means any warnings or previous disciplinary matters are ignored. These should instead be considered as part of a disciplinary process and should inform an appropriate sanction.

**Tendency & Coincidence:** The reputation or character of an individual is not relevant, nor are statistical assessments about the likelihood of coincidences occurring.

Types of evidence available in an investigation might include: records of interview, social media screenshots, emails, CCTV surveillance, computer login details.

## The Standard

There are two aspects to be included in allegations and addressed in findings:

- > A finding as to facts – whether events occurred as alleged; and
- > A finding against a standard - which workplace standard the alleged behaviour breached.

A workplace standard includes: organisational policies; Code of Conduct; procedures; industry regulations; or laws.

## Frequently Asked Questions

### Does a complaint need to be in writing for it to be investigated?

It is a common misconception that a complaint must be given to an organisation in writing. A verbal complaint that gives an employer "knowledge" of a risk to health and safety or a possible breach of equal opportunity law, obligates the employer to take "reasonable steps" to enquire into the complaint. Insisting on putting the complaint in writing, may put an

organisation at risk of failing to fulfil their lawful obligation to identify and address risks to others.

### **Does social media use outside of work have a connection to the workplace?**

Yes, if the social media activity poses a risk to the health & safety of other employees in the workplace (which includes harassment and bullying) the Fair Work Commission<sup>1</sup> has determined that this will create an obligation for the employer to act. In addition, breaching company policy (such as disclosing confidential information via social media) will also obligate the employer to make reasonable enquiries, especially if the breach of policy has a connection with the requirements of the employee's job.

### **Who should we interview first?**

At the Victorian Chamber of Commerce and Industry, we recommend interviewing the Complainant first, then the Respondent, and then the witnesses. In many circumstances the Respondent will concede to some of the allegations, meaning a clear finding can be made without further investigation. This helps contain and minimise the time and emotional aspects of an investigation, with only the remaining contentious matters to be fully investigated.

### **Do I have to give participants a copy of the investigation report if they ask for it?**

No, participants do not receive a copy of the investigation report. To mitigate potential demands for a copy, make sure this is made clear to them early on in the process. Be aware investigation reports may be subpoenaed in legal proceedings. If this is a concern, engaging legal advice and "legal professional privilege" can reduce this risk.

## **Contacting the Victorian Chamber of Commerce and Industry**

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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