EXPERT INSIGHT

Your reputation on the line

Lisa Burrell outlines how a workplace investigation could make or break your reputation

THE FAIR WORK Commission (FWC) and higher courts are often critical of organisations and HR practitioners for their investigation and dismissal processes. Recent comments about company investigations include “appalling”, “scant” and “biased, incomplete and totally one-sided”.

A number of these criticisms are directed at large organisations, where detailed policies and dedicated HR teams exist. Obviously no practitioner wants their name and reputation associated with these kinds of descriptions, so where are they going wrong?

The key element appears to be a failure to follow a company’s own processes. Ironically, in some cases the organisation would likely have been better off having no detailed procedure at all with regards to conducting investigations and disciplinary matters. In light of this, and the FWC’s very procedural focus when considering dismissal matters generally, the current golden rule is ‘if it’s in your policy, ensure it’s done’.

Another factor in these matters appears to be a lack of procedural fairness and objectivity. In our experience, issues are always far easier to rectify within a ‘live’ process as opposed to trying to defend decisions before the FWC – and more often than not, the concerns are known or raised before the time of dismissal. So, if there is a question about procedural fairness, our experience is this can usually be rectified – or at least mitigated to some extent – at the time. An unwillingness to reschedule a final meeting or extend a process to address these issues can ultimately cost employers dearly.

Looking at the more general role of investigations in dismissing employees, VECCI recently analysed a 12-month period of unfair dismissal decisions to consider the relationship between the investigation process and final outcomes.

While there is obviously a myriad of different factors involved in each case, the outcomes did reveal some interesting considerations with respect to investigation processes. By way of context, the last full annual report of the FWC showed that 48% of arbitrated matters resulted in a finding that the dismissal was fair.

VECCI’s analysis showed that where an internal investigation was undertaken before dismissal, in 54% of cases employers successfully defended the claim. Where an external investigation occurred (taking into account that this applied to only a small proportion of cases), there was a 90% employer success rate. Not surprisingly, in instances where the Commission noted a lack of investigation prior to dismissal, an employer’s success rate was less than 20%.

Our view is that an investigation can ultimately assist a disciplinary process and the more independent it is, the higher the protection that may be delivered to your organisation. It is also worth employers carefully considering if their organisational policies and processes may be overly restrictive or detailed when it comes to implementing them. Something as simple as the use of terms such as ‘must’ or ‘will’ in your policy could prove detrimental if the true position is that you ‘may’ do something (such as putting all matters in writing or providing a certain amount of advance notice before interviewing an employee).

VECCI can help employers assess and manage risk in disciplinary and dismissal proceedings, including delivering independent workplace investigations.

Lisa Burrell is the general manager of the Victorian Employers’ Chamber of Commerce and Industry (VECCI). VECCI is Victoria’s most influential employer group, servicing over 15,000 Victorian businesses per annum.

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