



FACT SHEET

Investigating a Workplace Incident

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An incident that occurs in your workplace may require a formal investigation where the workplace incident potentially breaches a law or workplace policy. This is particularly so where the incident that is alleged to have occurred may result in disciplinary action against an employee or employees, for example, an instance of sexual harassment, theft or assault.

A fair and thorough investigation of workplace incidents will help reduce the risk of industrial claims made by employees, particularly unfair dismissal claims or adverse action claims before the Fair Work Commission (FWC), and complaints before the Anti-Discrimination Commission Queensland (ADCQ).

It is therefore important to remember that when an employee makes a complaint regarding a workplace incident, the employer has an obligation to fully investigate that complaint. This Fact Sheet provides guidance on how to investigate a workplace incident where a complaint has been made. This does not mean that an incident should only be investigated if a complaint is made – an investigation may be necessary simply by becoming aware that something has happened, for example, the hoppers have not been cleared properly for the past week and there are monetary discrepancies.

Employers should have a clear and concise policy and procedure that outlines their standpoint on complaints, for example:

- All complaints are taken seriously and investigated fairly and thoroughly
- Investigations are conducted internally by an appropriately trained person, or by an external investigator
- Confidentiality will be maintained
- A person will not be treated adversely for making a complaint.

The process that the employer will follow once a complaint has been made should also be stated. Some employers have included timeframes for each step of the investigation process, however this is not mandatory. Where timeframes are provided, these must be followed and unless stated otherwise, the timeframes must be met - there is no room for flexibility that may be required ie extra time as a person to be interviewed is on annual leave, therefore, where timeframes are used, these should allow for flexibility by stating that 'the timeframe may be extended due to unforeseen circumstances, however, where this occurs, the parties will be notified'.

CONSTRUCTING A COMPLAINTS INVESTIGATION POLICY

When constructing a Complaints Investigation Policy, employers should consider the following:

- The aim or purpose of the Policy;
- Who the Policy applies to;
- The legislation that may apply to the types of workplace incidents the Policy will be used for ie discrimination definition and legislation;
- Who should conduct the investigation. Note this must be an appropriately trained person who is at least aware of the investigation process and can follow it accordingly, and someone who is impartial in the situation. If no such person is available internal to the organisation, it may be advisable to appoint an independent external person to investigate the matter;
- Roles and responsibilities of persons party to an investigation process;

- Defining the fair and thorough process the employer will adhere to once a complaint is made, including provisions for all parties to the complaint to be heard and investigated by an unbiased decision maker;
- How the result of a complaint will be reached, including provisions to ensure that the decision making will be fair, reasonable, without prejudice and based on the evidence obtained; and
- The consequences of not complying with the Policy, for example unreasonably obstructing or failing to participate in an investigation process.

Policies must be well communicated and consistently enforced to be effective, and regular training must be conducted. These measures will protect the employer's interests and promote and foster understanding and compliance in your workplace.

REVIEWING A CURRENT POLICY

For an existing policy, employers should review it regularly to ensure it is current and in line with changes within the organisation and relevant governing legislation. Where policies are amended they should be re-issued to staff and the changes communicated through training to ensure it is understood.

Through informing staff of a) the existence of the Policy, and b) advising them of updates, employees become aware of the option to have complaints dealt with internally, thus reducing the likelihood of an employee lodging a formal complaint with an external third party.

SUGGESTED INVESTIGATION PROCEDURE

The following section of this Fact Sheet provides suggestions for an investigation procedure (that should be reflected within a Complaints Investigation Policy):

1. ESTABLISHING THE OBJECTIVE OF THE INVESTIGATION

The objective is to conduct a fair and thorough investigation. In order to achieve this the following issues may need to be determined:

- Whether or not the incident at the centre of the complaint actually happened, or
- The extent to which it happened, and
- Whether a law or workplace policy has been breached; and
- Whether there are any mitigating factors.

2. CONDUCTING THE INVESTIGATION

Interviewing employees and taking their statements is a sensitive area that all employers must handle carefully.

SET THE GROUND RULES

Ground rules for the investigation should be set and communicated to the parties involved. The ground rules should be regarding the appropriate conduct for the interviews. This will include that the interview is to be kept confidential and it is not to be discussed in the workplace. It is a good idea to obtain acknowledgment from the employee that they understand this and document it either in written form, or, in the absence of such a form, in the investigator's file notes. Employees not directly involved in the investigation, but who assist with collecting evidence, for example, IT and security/surveillance staff, must also be asked to ensure confidentiality.

TALK TO THE COMPLAINANT

Upon receipt of a complaint, an investigator should discuss the details with the complainant. If the complaint is not documented, ask the complainant to do so, or document the details as part of the discussion. This is important for gathering the necessary information as the employer needs to fully understand the nature of the complaint. This will involve initially speaking to the complainant about the complaint, determining the legislative aspects of the complaint (if any), and confirming whether there are other parties to the complaint. For example, in the instance of a sexual harassment complaint, what happened and when and where, what legislation covers sexual harassment, were there witnesses to the instances complained about, and was it in the area of the workplace that has CCTV coverage?

After this discussion, an investigator will have a clearer idea of the matter/s to be investigated and the parties to speak to as part of the investigation. A timeframe, or plan for conducting the investigation can then be developed and implemented.

TALK TO THE PERSON WHO IS THE SUBJECT OF THE COMPLAINT

If the investigator has determined there is sufficient evidence to warrant putting forward allegations, the investigator should advise the person (known as 'the respondent') who is alleged to have engaged in, or caused the matter that is the subject of the investigation.

The investigation process should then be outlined to the respondent with clear instructions that the complaint and investigation will be confidential, and that the respondent will have the opportunity to consider and respond to the particulars of the complaint.

At this time the employer may decide to suspend the respondent on full pay. This should be communicated to the respondent at the time the investigator (if different from the employer) advises the respondent of the complaint.

Please note that suspension should only be considered if it is necessary to remove the respondent from the workplace in order to conduct a proper and thorough investigation. For example, money has gone missing and the respondent (if guilty) has the ability to destroy evidence. However, suspension is not an indication of guilt in the matter, and should not be used as a form of punishment.

GATHER INFORMATION RELATING TO THE COMPLAINT

The investigator should then talk to any witnesses or other persons to the incident for the purposes of gathering statements and information to enable the investigator to make an informed decision on whether the complaint is substantiated or otherwise.

The complainant, the respondent, and any other relevant persons may need to be interviewed more than once so that statements can be confirmed and clarified.

A statement is a witness's version of events and it should be documented with details of the particulars including the who, what, when, where, why and how of the alleged workplace incident. Where a witness advises that they are unsure, do not know or do not recall details relating to the alleged matter/s, this should also be clearly documented.

Other sources of information to gather may include CCTV footage, payroll data, till balances, computer login times or emails or internet usage history, timesheets etc.

RESPONSE FROM ACCUSED

Full details of the allegations must be provided to the respondent so that an adequate opportunity to respond is provided. However, there is no automatic entitlement for the respondent to either access and/or receive copies of materials associated with the investigation.

Where the respondent requests that the particulars of the allegation/s be put in writing, it is generally wise to do so in most cases, along with a reasonable timeframe for the respondent to respond either in person or in writing.

SUPPORT PERSON

An employee being interviewed should be allowed the option to have a support person and/or representative present to provide support, assistance and comfort. Where an employee seeks to have such a person present, ground rules for their role during interviews should be established at the outset of the interview. In addition to the investigator (interviewer), it is also recommended that a company representative be present.

TIMING

There should not be undue delay investigating a complaint. If the workplace incident is serious an employer shouldn't put the investigation aside merely because it's inconvenient – the question that can reasonably arise is if the matter wasn't dealt with immediately was it really that serious?

A delay can also have a negative impact on the person who made the complaint – remembering that it is better for a complaint to be resolved internally, rather than referred externally to an authority that must follow a process to resolve it (whether you like it or not) – if the complainant feels that the employer is not taking their complaint seriously.

It is also important to conduct the investigation early because the investigator can obtain the version of events from the involved parties when it's clear in their mind.

WHEN AN EMPLOYER SHOULDN'T INTERVIEW

There will be circumstances when it is not appropriate to conduct an interview as it may conflict with the employer's Workplace Health and Safety ('WHS') obligations. For example, if an employee has reported a bullying incident, but before there is an opportunity to speak with that employee the employee proceeds on personal leave due to stress or psychological reasons related to the complaint. In this circumstance no steps should be taken to interview the employee until the employee is cleared to return to work from personal leave.

Employers have WHS obligations not to expose employees to a risk of injury (this also includes risk of further injury). If an employer interviews an employee who is medically unfit, the employer may face a workers' compensation claim and possibly any statement taken subsequently ruled inadmissible by a court or tribunal

3. UPHOLDING OR REJECTING THE WORKPLACE INCIDENT OR COMPLAINT

After all of the involved parties have been interviewed and all relevant information has been obtained, the investigator will need to present the material to the employer (ie where the investigator is external to the organization) with their findings about the complaint. The decision maker (the employer) will need to make a decision to either uphold or reject the complaint.

This decision should be based on:

- All the evidence that has been gathered during the investigation;
- The balance of probabilities - did what was alleged to have happened, actually happen; (Please note that the more serious the alleged offence (eg. stealing), the stronger the evidence needs to be, however, it is still decided on the balance of probabilities (case of *Briginshaw v Briginshaw*)
- The reasonable person test - in cases of workplace or sexual harassment, for example, would a reasonable person consider the behaviour to be offensive, humiliating, intimidating or threatening?

Where the complaint is upheld, disciplinary action should be considered against the respondent in accordance with the relevant workplace policy. Please note that the disciplinary action must be dependent upon the individual case specifics taking into account all of the relevant circumstances.

4. COMMUNICATE THE RESULT OF THE COMPLAINT

The outcome of the investigation should be well documented and communicated in writing to the complainant and the respondent. The communication to the complainant should be limited to whether the investigation has found the complaint to be substantiated or not. The complainant should not be informed of any disciplinary action that is proposed against the respondent – it is not relevant to them to know what has happened other than the complaint was investigated, the findings (including why the particular finding was made in the event the complaint was not substantiated), and resulting necessities such as a policy change, or operational change impacting them.

THE DO'S AND DON'TS OF INVESTIGATING WORKPLACE COMPLAINTS AND INCIDENTS

DO:

- Respond promptly to a complaint or incident
- Ensure the investigator is properly trained or knowledgeable to investigate the complaint
- Maintain a paper trail
- Ensure confidentiality and act on confidentiality breaches
- Comply with company policies and procedures
- Ensure procedural fairness throughout the entire process
- Act only on findings of fact arising from the investigation.

DON'T:

- Delay in responding or not respond to the complaint or incident
- Breach confidentiality
- Pre-determine an outcome prior to the completion of an investigation
- Determine the outcome of the investigation based on stereotypes, bias, irrelevant facts or anything other than the evidence collected during the investigation

A PRECEDENT CASE ILLUSTRATES THE IMPORTANCE OF PROCEDURAL FAIRNESS:

A company operating in the hospitality industry was ordered to pay a sales executive the maximum penalty of six months' compensation in an unfair dismissal case. This case illustrates the importance of best practice complaints handling and what not to do - that is dismissing an employee's claim of workplace harassment and not conducting a proper investigation.

The executive resigned the day after he received a letter requiring him to show cause as to why he should not be dismissed. This letter raised performance issues including his level of sales and customer relationships. Prior to receiving this letter, the employee had claimed he was being unfairly targeted by his supervisor.

With regard to the complaint, the HR Manager for the company failed to conduct an investigation into the executive's bullying and harassment complaint (made before the show cause was given) and notified her superiors that there was no basis to his claim. This has been described as 'beyond belief' by Fair Work Australia ('FWA') Commissioner Deagon - that a HR Manager could draw such a conclusion without even conducting an investigation.

As a result of the show cause letter the employee resigned. FWA found the resignation was a constructive dismissal (ie due to the conduct of the employer leaving the employee with no option but to resign).

It was found that there was no valid reason for the termination and the executive was therefore unfairly dismissed. The ex-employee was awarded six months wages in compensation. This is the maximum compensation possible under the Fair Work Act 2009 and is rarely awarded, however, in this case the Commissioner was scathing of the HR Manager and her lack of process when dealing with the complaint – when, as a HR Manager, the expectation of knowing what to do, and the fair way of doing so, is high. The outcome of this case demonstrates that significant costs can be awarded in cases where employers do not have a valid reason or don't follow a fair process.

For more detailed information on this case – please see: [Adam James Harley v Aristocrat Technologies Australia Pty Ltd \[2010\] FWA 62 \(7 January 2010\)](#)

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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