



Community
Management
Solutions

GUIDANCE • ADVICE • SUPPORT

Investigations Webinar

Kevin Prendergast CEO

Community Management Solutions

Community Management Solutions

- Welcome to our Investigations Webinar.
- There is a lot to discuss today in one of the most misunderstood and complex crafts within the HR/IR sphere, that being when to and how to properly conduct an Investigation.
- And further;
- How to incorporate best practice and to risk mitigate issues that can impact the validity of an investigation.

Background

- I have conducted investigations into criminal matters, civil matters, child protection, factual and surveillance, insurance and have prepared complete briefs of evidence and given evidence in most jurisdictions for over thirty years.
- Most importantly as far as this webinar is concerned, I have extensive experience in workplace investigations including matters such as sexual harassment, workplace bullying, discriminatory practices, breaches of code of conduct, policies and procedures, employee theft, assault, damage to property and many others.

What are we hoping to achieve today?

- At the conclusion of today you should be more familiar with how to properly conduct an investigation.
- You will become aware of the different types of investigations.
- You will understand the principles of procedural fairness and natural justice.
- Understand the consequences of running or participating in an unfair or not thorough investigation.

Focus of today Discussion Points

- Basic Principles
- Why do we conduct investigations?
- Purpose of an investigation
- Possible Outcomes
- Preconceived bias
- Option of internal/external investigation
- What can go wrong and how do we risk mitigate

Introduction

- Unfortunately, incidents pertaining to alleged incidents of sexual harassment, workplace bullying, theft, improper behavior, breaches of code of conduct and other similar unwanted behaviors are still prevalent in our workplaces.
- What is a worry is how workplaces often fail to recognise, fail to act and to respond in a timely manner to complaints which can leads to time consuming litigation

Deciding to Investigate

- Is this a matter which requires a formal investigation or is a matter that can be dealt with in another manner
- Matters for consideration, the wishes of the parties, the nature of the complaint, the seriousness of the complaint, if the complaint is obviously frivolous or vexatious, other methods to deal with the complaint.

Your policies and procedures

This is very important and often overlooked

- Do you have a policy in relation to Grievances, complaints and the investigative process?
- Are you familiar with it?
- What will happen if you contradict that policy?
- What other policies are relevant, code of conduct perhaps etc.?
- What is your investigation protocol- does this specify who can actually conduct an investigation, does it state that all complaints will be investigated, does it promise procedural fairness and natural justice, does it promise confidentiality or state specific timelines?

What skills are required?

A competent investigator required the following skills and or attributes:

- Patience and Perseverance
- The ability to remain calm under pressure
- To understand the investigative process
- To develop the skill of curiosity
- To have research and analytical skills
- To be able to problem solve and be flexible
- To understand the principles of continuity of evidence
- To understand contemporaneous note taking
- To be able to interview people
- To demonstrate honesty, integrity and empathy
- To develop observation skills
- To be courageous and self motivated
- To have excellent communication skills both oral and written.

Who can investigate

- Human Resource Professionals
- Licensed Investigators
- Line Managers
- Senior Managers
- Another person who has the knowledge and understanding required to conduct an investigation.
- Contractors or specialist investigators

Investigative Plan/Timeline

- The first thing is to over communicate your process, meet with all parties and discuss how the process will take place, any proposed timelines, details, expectation, remember procedural fairness is about process.
- Decide the scope of the investigation this is CRUTIAL – how wide and or specific will the investigation be.
- The scope is ultimately a decision that will be made by the organisation.
- Think about what is within the scope and what is outside the scope.
- What are the specific allegations that need to be investigated?

Plan the Investigation

- Draw up an investigation plan
- Gather and review the complaint and any other material.
- Contact the complainant
- Contact the witnesses
- Conduct interviews
- Contact the respondent
- Conduct interviews
- Gather evidence
- Conduct any follow up interviews
- Summarise the evidence
- Determine the findings
- Prepare the report

First actions to be taken

- Are the allegations so serious that a staff member needs to be stood down?
- Is the matter one that we can investigate or are there other parties involved or should there be?

This may be the time to seek legal advice or to contact CMSolutions for directions.

Select an Investigator

- Choose who will conduct the investigation, ensure that this person has the support from the governing body and is authorised to undertake the investigation.
- Decide if the matter will be investigated by an internal or external person.

Internal of External Investigator

- Who is best placed to conduct the investigation, be careful about making this decision purely on budgetary restraints.
- Internal investigator such as managers of HR professionals usually are familiar with the business and issues at hand and can start the investigation quickly and it may be more comfortable for a participant to talk to a colleague rather than an external consultant.
- Be careful however that there is no real or perceived conflict of interest.
- Impartiality is one factor in going for an external investigator.
- The external investigator with have no preconceived bias, is not familiar with the parties and does not have a conflict of interest real or perceived.

Workplace Investigation

The keys to an investigation are:

- Fact finding
- Logical reasoning
- Taking emotions out of the equation
- Procedural fairness and natural justice
- Empathy and sensitivity
- No preconceived opinions

Fact Finding

- The objective of any investigation is to proceed on a fact-finding mission.
- Separating actual factual evidence from gossip, innuendo, hearsay etc. is vital to enable the investigator to come to a reasonable conclusion which is fair to all involved in the process.
- What weight do you give to the evidence obtained throughout the process
- Is the evidence factual, is the evidence credible, has the evidence been corroborated, is the evidence reliable and if so, is the evidence relevant to the issues at hand, is the evidence hearsay, biased.

Logical Reasoning

- Logical reasoning is problem solving, in practice it involves using data compiled to determine or deduce other facts. To reason accurately you will need to draw accurate conclusions based on information available. This can include coming to a conclusion between two given premises, or an if then proposition.
- We employ logical reasoning in daily life making decisions and determine the best course of action, this is usually unconscious decision making.
- Effective logical reasoning involves the capacity to understand and analyse what is being presented or what is being said and to quickly identify what information is vital and relevant and what is irrelevant to the information being sought.

Taking emotion out of the equation

- An investigator must be neutral.
- You must try and be as detached as possible from any emotional connection.
- This can be very difficult depending on the nature of the complaint and the allegations involved.

Procedural Fairness and Natural Justice

This is the most important chapter that we will discuss today.

- Your investigation will be tested to see if you followed as much as practicable in all the circumstances the principles of procedural fairness and natural justice.
- You must ensure that you conduct a fair and transparent procedure.
- You must act in fairness, do so in a timely manner and be open with your communication to all parties.
- You must have an open mind in relation to the findings and evidence that come to your attention throughout the investigation process.
- You must consider and collect all relevant evidence.
- You must exhaust all avenues to obtain the relevant facts.
- Be unbiased with no forgone conclusions.
- Be flexible and not form an opinion as to outcome too early.
- Give appropriate notice of the allegations to the respondent in as much details as is available.
- Give reasonable opportunities to all to participate in a fair process
- Remember an allegation is an allegation until such time that it is proven based on the evidence obtained and conclusions made.
- There must not be any conflict of interest on behalf of the investigator.

Procedural Fair Investigation

- The respondent (the person suspected of the allegations) is informed about the allegations and given specific detail so that they clearly understand the complaint.
- They are then given a reasonable time to respond to the allegations and to provide a response.
- The investigation is not delayed, and the investigator attempts to conclude the investigation within a reasonable time frame.
- The investigator ensures that the investigation is confidential as much as is practical based on the nature of the investigation.
- All relevant witnesses are interviewed.
- Each party is given the opportunity to respond to contradictory evidence. (contradictory evidence is any evidence that contradicts or is inconsistent with what one of the participants has told you)
- The investigator must make all reasonable attempts to make inquiries before a conclusion is reached.
- Natural justice is part of the broader requirements for procedural fairness.
- To ensure that you comply with natural justice you must:
 - Ensure the respondent has the opportunity to respond and
 - The decision made is free from bias.

No preconceived opinion

- You must go into an investigation “clean”.
- This can be very difficult depending on the circumstances or on your previous dealings with the parties involved.
- The opinion may be influenced by other people's views and or directions.
- A common investigation error is to pre-judge the outcome of an investigation before all the witnesses have been interviewed and all the evidence compiled. Do not jump to conclusions, do not pre-empt the result, do not feel pressured or intimidated to come up with a particular conclusion. Until a final decision has been made after consideration of all the evidence there is no confirmation of wrongdoing.

Lets begin

- Who, what, why, when, how
- Why are these principles important?
- Simplicity
- Who
- What
- When
- How
- Why

Obligations of Participants

- Everyone is a participant, the complainant, the respondent, witnesses or any other person who can provide relevant information.
- You may have to make reasonable adjustments to those people who may have special needs, please accommodate them if possible.
- Are the participants medically able to participate at this time in your investigation?
- Does the person have any language/cultural limitations that may be a disadvantage? If so, accommodate as required.
- The right to have a support person present.
- The right to legal or union representation.
- The right to have support in place. (employee assistance)
- The duty to maintain confidentiality.
- The duty to participate in an investigation
- The duty to not put forward untruthful, malicious, vexatious or frivolous complaints

Confidentiality

- It is imperative that all participants comply with confidentiality throughout the process.
- Of course, each party that is involved in the process will be aware of certain information as a result of the normal carriage of the investigation, but the investigator must control as much as possible the confidential nature of the investigative process.
- There may be severe consequences if you fail to maintain confidentiality including:
 - Loss of a faith in your ability to investigate the matter.
 - Loss of credibility to you as the investigator.
 - Damage to the reputation of one or more of the participants.
 - Your organisation could face legal liability or loss due to negative publicity.
 - Come under criticism from a third party such as the Fair Work Commission.

Evidence

- Is the information that you are gathering relevant to the investigation? This is referred to as relevant evidence in the “scope” of the investigation. (Does it have a bearing on the case?)
- Is the evidence reliable and is it admissible?
- Does the evidence come from a credible source? (eg: direct eyewitness).
- Is the evidence corroborated by other evidence?
- Is the evidence supported by documentary findings?
- How much weight should you place on a particular piece of evidence? (poor recollection for example).
- Does the evidence make sense based on the overall findings?
- Is the evidence tainted?
- Has there been a break in the principle of “continuity of evidence”?
- What evidence do I not have?
- Is the evidence speculative?
- Is the evidence hearsay?

Remember evidence can be in many forms including but not limited to verbal, written, observation, witness, documentary, digital or electronic.

Interviews – Location & Time

- Generally speaking, you will first wish to interview the complainant first, then any witnesses and finally the respondent.
- Where the interview takes place is important especially from a confidentiality perspective.
- Part of your planning process will include obtaining the most appropriate location for the interview (quite private location where other people cannot pass by- perhaps an independent location to your office, somewhere where other staff cannot see people entering or leaving, a room free from distractions, soundproof from outside noise).
- Preferably interviews should be done, if possible, face to face this allows one to build rapport with the person, fully engage with the person being interviewed and determine credibility.
- Sometimes an electronic option may be the only practical solution depending on the circumstances.
- Any person that attends an interview should be able to simply stand up and leave any time they wish to or terminate the interview any time they wish to, a closed door may infer that the person cannot leave the interview.
- Interviews can be back-to-back in arrangement but always allow a sufficient “buffer zone” between interviews.
- Remember you may have to account for the attendance also of a support person, legal representative or union representation.
- Thoroughly prepare your documentation, plan prior to the interview.
- Never set a time limit on your interview “sorry we only have one hour” this is a huge mistake and can be counter productive to evidence gathering and may also be a breach of procedural fairness.

Interviews – Types of Interviews

- Make a decision on if you will interview face to face, by electronic means or by way of telephone.
- Make a decision if you intend to record the interview, take statements or make notes during the interview.
- If you intend to audio record the interview, ensure that you advise the parties that this will take place.
- If the party or their advisor opposes this, then utilize another method.
- Audio recording has advantage including that you as the investigator can concentrate on what is being said rather than taking notes, it is more accurate and less time consuming, the recording catches tone, pauses and is a complete record.
- It can also protect the investigator from unsubstantiated allegations of what was asked and what took place during the interview.
- Admissions will be recorded and then are difficult to withdraw or deny at a later time.
- You will have to provide a copy of the recording to the person being interviewed.
- Electronic interviews can also be recorded.
- Disadvantages can include technology malfunction, people being less open and more guarded once they realise that it is being recorded.
- Cost of preparing transcripts of lengthy interviews.
- Any mistakes you make as an Investigator are recorded.

Interviews – Reason for the Interview

What are we seeking when we begin the interview process?

- We are seeking information which is relevant to the matter that we are investigating try to stay on topic and within the scope.
- We are trying to obtain useful information which may be able to lead to decisions.
- We are looking for evidence which either support or disproves allegations.
- Prior to the interviews we must have a full and encyclopaedic knowledge of the complaint and the allegations this is very important, take the time to read and fully comprehend/understand the context of the allegations, the timeline and full history, do not proceed until this process has been undertaken.
- Develop some idea of the types of questions you intend to ask and try to put those into a chronological timeline bearing in mind that all investigations must be fluid in nature, and you may find yourself going on different tangents as new or perhaps unexpected information comes to hand.

Interview – During the Interview

- Keep the introduction brief and always remember the “golden rule” is that you are interviewing that person they are not interviewing you, your input should be as a guide in the process, if you do your duty well then, the person should be speaking for 80% of the time and you for 20% of the time, this is not a hard rule but if you can find the balance this is going to provide you with the best result.
- Some people due to nerves or inexperience want to impress the person with their knowledge, station or experience and forget the reason for the interview.
- Use informed, direct questions, free from ambiguity where each question has a direct purpose.
- Now this is the hard part we need to ask “simple questions” this can go against the grain sometimes, but we must consciously force ourselves to ask “simple questions”
- I repeat Who, What, Where, When, Why and How.

Interview - Questions

- When you prepare your questions do not try and anticipate the answer you may receive as an answer to one question may quickly defeat the purpose of the following question.
- Rather than questions make a list of topics that you would like to cover the questions will then flow from that particular topic.
- True “active listening” is the key, actually listen to the information being returned to you and if you don’t understand then paraphrase so that there is no misunderstanding.
- Use whenever possible open questions rather than closed questions.
- Closed questions tend to illicit a one answer response and sometimes this is unavoidable, but we must limit closed questions and concentrate on asking open questions.
- When a person responds to a question do not dismiss the importance of silence.

Interview - Challenges

- Unavailable due to sickness.
- Uncooperative.
- Unwilling to comply with or make an appointment/cancelling appointments.
- Highly emotional respondents.
- Aggression.

Final Report

- At the conclusion of the investigation, you will normally be required to prepare a final report for perusal and consideration.
- A part of that report will be an Executive Summary.
- The summary will detail the allegations you were provided to investigate, if any policies, legislation etc. was breached and how you reached that conclusion.
- This is the culmination of all your work and it is imperative that care is taken with the preparation and drafting of this report as your skill and expertise will be evaluated by the quality and relevance of this report.
- The report will cover the scope of the investigation.
- The investigation procedure that was undertaken.
- The report should be able to be read by anyone who is not familiar with the case and should be written in a clear and concise language free from jargon, innuendo and inappropriate comments or conclusions.
- The final report will include but not limited to:

Contents of the final report

- A summary of the facts which have been discovered throughout the investigation.
- Any evidence that you have relied on and what analysis was undertaken on that evidence
- If the findings are unsubstantiated, substantiated or inconclusive and the reasoning behind that finding.
- Any employment or relevant issues that take place during the investigation for example an employee resigns, or a witness leaves the organisation etc.
- The people interviewed and any statements obtained.
- Any documentary or physical evidence obtained.
- Any and all additional documentation that was considered to reach the conclusion.

After the investigation

- A major common error for the investigator is to provide the report and end involvement at that stage.
- At the conclusion of the investigation there is a wide range of follow up events which may be required
- Errors that can occur at this stage can include:
 - Failing to respond to the complainant in a timely manner.
 - Failing or delaying the response of the findings.
 - Communicating the outcome to stakeholders.

Case Law

- Case Precedent Law.
- Breach of own policy
- Unprofessional investigation
- Confidentiality support person
- Unfair dismissal

Giving evidence

Please remember that you may be required to provide evidence of your participation in a matter as the investigator including being subject to cross examination.

Questions from members

Please discuss the “Balance of Probabilities” what does this mean and what impact does this have and how does this equate to the legal principle of “Beyond Reasonable doubt”?

In order to make a decision or finding, you need to be satisfied after due process and due consideration of all the evidence that it is more likely than not that the alleged behavior occurred.

Questions from members

What happens if a person refuses to participate in an investigation?

Proceeding on information/evidence that is available.

Questions from members

What is your understanding of contemporaneous note taking?

Documentary evidence of direct oral contact pertaining to the facts of a conversation, noted as soon as practicable after a conversation has taken place.

Investigations Training

Can you provide Investigations Training for members?

Face to Face training, mentoring, interest from participants, value of such training.

Questions from members

How do you deal with the pressure of an investigation?

Self help, recognise the signs, always remember that you are in control of the process, never fear asking for help, and sometimes pause for thought.

Conclusion and Summary

How can we help?

“ The result of the investigation will be the result of the investigation” It will not be valued by success or failure rather than the following of due process.

“your credibility”

Thank you and the next steps?

Questions will be answered in the next newsletter or privately depending on the nature of the question.