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# Workplace Investigations – How Easy It Is To Get It Wrong

This article looks at investigations in the workplace, risks involved and how they should be conducted.

The demand for investigations in the workplace is increasingly growing. The aim of a workplace investigation process can be to gather relevant evidence to determine whether or not an Employee has engaged in misconduct or whether a specific incident(s) has occurred or simply to establish facts.

An Organisation may choose to initiate an investigation when an incident(s) has occurred that the Organisation may deem potentially inappropriate or a potential breach of their policies such as;

- A complaint against an Employee in relation to performance or conduct;
- A complaint from an Employee / client / third party in respect of the Employee;
- A complaint of bullying, harassment or sexual harassment.

## Role of the Investigator

An Investigator should conduct the investigation with integrity, fairness, impartiality and respect and report their findings to the Organisation, in line with an agreed Terms of Reference.

## Risks Involved with Investigations

The risks associated with poor investigation practices are significant and mistakes can expose Organisations to significant financial, legal and reputational risks.

Key mistakes that Organisations often make during the course of an internal workplace investigation include:

- A lack of pre-investigation planning;
- A poorly drafted or the absence of a Terms of Reference;
- Combining the investigation and disciplinary steps;

- Relying on “untested” information and ignoring discrepancies;
- Failing to establish a process that is perceived as independent and non-biased;
- Delay in undertaking an investigation.

More often than not, these mistakes are the result of a lack of experience and skill on the part of the internal investigator appointed by the Organisation.

Where the conclusion is reached that the investigatory process itself was unfair, this is usually to the detriment of one or all the parties involved in the matter. Often, unfortunately, it will not be until the investigatory process comes under the microscope of the Workplace Relations Commission (WRC) or the Labour Court that the element(s) of unfairness are identified.

## How is an Investigation Conducted?

Workplace investigations need only satisfy the threshold of the ‘balance of probabilities’. An Employer must utilise fair procedures in the investigation otherwise they may be found to have acted unreasonably.

- The Organisation should appoint an Investigator, this may be an internal person from the Organisation, such as a Manager or a Director, to examine the evidence and conclude with a finding. The Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 states that an external investigator may be necessary to deal with complaints in some circumstances so as to ensure impartiality, objectivity and fairness in an investigation. With this, the Organisation would source an external investigator to conduct the investigation on their behalf.

- All Employees involved in an investigation must respect the need for confidentiality and a failure to do so may result in disciplinary action. Confidentiality is assured in so far as it is reasonably practicable.
- Both parties may be suspended with pay, without any negative inference, pending the outcome of an investigation, where deemed appropriate by Management. Careful consideration should be given to this action prior to making any decision to suspend. However, where this is not possible, the parties to the complaint will be expected to maintain a positive working relationship.
- The investigation will be conducted in accordance with the relevant policy and will be governed by terms of reference which will detail the likely time scale for its completion (an indicative timeframe will be outlined) and the scope of the investigation.
- The investigator should meet with the complainant in the first instance to learn more regarding the complaint and to put the alleged perpetrator's responses to the complainant.
- Next, the alleged perpetrator should be invited to a meeting to explore their responses to the complaint and to put any relevant evidence to them. Evidence should be provided in advance of the meetings in order to allow the Employee to prepare their response to that evidence.
- It may be deemed necessary to conduct more than one interview with either or both parties in order to ensure that the investigator is satisfied that all evidence has been collected and all parties have had a fair opportunity to state their case.
- Relevant witnesses may also be interviewed with a view to establishing the facts surrounding the allegation(s).
- All parties required to attend investigation meetings should be offered the right to be accompanied by a representative.
- The complainant and the alleged perpetrator(s) should be informed in writing of the findings of the investigation, i.e. whether the complaint is upheld or not upheld. Where a complaint is upheld, both parties should be informed of this outcome and the relevant level of Management will also be advised.

- Management should take appropriate action based on the outcome of the investigation. This may include formal disciplinary action in line with the Organisation's disciplinary procedure or training or another appropriate intervention deemed necessary to prevent a recurrence of the behaviour.

### Recent Case Law

A recent case has resulted in changes to how investigations should be undertaken should an Employee's employment be deemed 'at risk'.

This case (*Michael Lyons V Longford Westmeath Education and Training Board*) involved an application for judicial review. The applicant was notified in 2015 that a complaint of workplace bullying had been made against him by a colleague. An investigation into these complaints was accordingly launched as per the industrial relations procedure.

The investigation was carried out by an independent company of investigators. Following their investigation, the investigators upheld four specific instances of bullying. At no point in the investigation was the applicant permitted to cross-examine or challenge his accuser. However, he was given 15 working days to make a limited appeal to the decision but his appeal was rejected.

The applicant was required to attend a Stage 4 Disciplinary Meeting to determine the appropriate disciplinary action in his case. The applicant's solicitors subsequently wrote to the respondents objecting to this course of action.

The Court held that the failure to allow legal representation, on behalf of the client, at the meeting was a breach of his constitutional rights and the refusal to allow cross-examination was a breach of fair procedures. The Court held that the investigation required these as a matter of law and fair procedures as an individual whose job is at stake must be allowed challenge and cross-examine evidence.

### What does this mean for Organisations?

Employers who are considering completing an internal investigation should be cognisant of this case and should consider whether the outcome of that process could result in dismissal or have an adverse effect on the accused Employee's reputation. In instances where dismissal is a potential outcome or the alleged misconduct would adversely affect the Employees reputation, this case indicates that an Employee is entitled to be legally represented and to cross-examine the evidence presented at the preliminary, fact-finding stages of an investigation. Most notably, the Employee has the benefit of this right before any disciplinary procedure has formally started. This is an issue which needs to be taken into account when the terms of reference of an investigation are being considered.

### Conclusion

Key factors for the Investigator are to ensure that the Employee is made aware of the allegations made against him/her, is allowed to respond to any allegations being made against him/her, is allowed be represented and for there to be an impartial investigator conducting the process.

However, the absence of any or all these factors may have the opposite effect and in certain circumstances the WRC or Labour Court will have the final say in the matter when making an order in favour of the Employee who is deemed to have been treated unfairly.