

An Employer's Guide to Workplace Investigations

Workplace investigations play an important role in the dispute resolution process in Irish Organisations. Typically, an investigation will be required as part of workplace procedures to resolve Employee disputes, manage grievances, or examine alleged misconduct. To ensure that the running of a workplace investigation does not infringe Employee rights, it is vital that Employers are aware of their obligations around how to investigate work-related allegations in compliance with a range of statutory, contractual and constitutional rights.

Natural Justice and Fair Procedures

Fundamentally, workplace investigations must be conducted in accordance with the principles of natural justice and fair procedures. Employees who are denied fair procedures may allege that their constitutional and contractual rights have been breached.

The WRC's Code of Practice on Grievance and Disciplinary Procedures sets out a useful guide on what procedures to follow in managing a grievance or disciplinary matter in compliance with the principles of natural justice and fair procedures. Key principles include:

- that Employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the Employee concerned;
- that the Employee concerned is allowed to respond fully to any such allegations or complaints;
- that the Employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
- that the Employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the Employee and any other relevant or appropriate evidence, factors or circumstances.

As a cornerstone of managing investigations, Employers should have specific written policies demonstrating how workplace investigations will operate and how they adhere to the principles of natural justice and fair procedures as well as those set out in the Code of Practice on Grievance and Disciplinary Procedures.

What Triggers a Workplace Investigation?

A workplace investigation may become necessary for a number of reasons. Typically, investigations are carried out when an Employee raises a grievance, a disciplinary issue arises, a bullying or harassment complaint is made, and in specific circumstances, an Employee makes a protected disclosure. The Employer may also initiate an investigation in response to an allegation made by a third party from outside the Organisation.

The Parameters of the Investigation: Finding Facts or Assessing Evidence

A crucial decision before starting the investigation process involves determining the nature of the investigation.

If the investigation is an information gathering exercise, it is important that the investigator makes no assessment of the evidence. Investigators who are confined to gathering information do not have to comply with the strict principles of natural justice.

If the investigator is asked to assess the evidence and make findings that cannot be contested however, Employers must ensure to apply rigorous standards of fairness to the investigation. To ensure that the investigation does not stray outside the boundaries that have been set, Terms of Reference are typically provided to Employees who are in the scope of the investigation. While the Employees do not have a right to decide the Terms of Reference, their feedback should be sought to ensure that all necessary evidence is captured. Clear Terms of Reference will guide the investigator and keep the investigation process on track.

Employers should also consider if there are compliance considerations under a statutory code of practice or specific legislation. Investigations dealing with bullying or harassment must adhere to the Codes of Practice on the prevention and resolution of bullying at work and on dealing with sexual harassment and harassment at work respectively. Failure to comply with the codes will be admissible in evidence before a court, the WRC and the Labour Court.

The Data Protection Commission has also published guidance for Employers who need to manage a whistleblowing process.

Risks of Mismanaging Investigations

From the Organisation's perspective, it is important to ensure that a difficult situation is not made worse by failing to apply basic standards of fairness. A mismanaged investigation may lead to legal claims ranging from unfair dismissal to discrimination. There are also wider reputational risks and Employee relations issues to consider. A poorly conducted investigation may lead to Employee unrest, reduced morale, higher Employee turnover, and lower productivity.

Role of External Investigators and Legal Advisors

In most cases, an Employee's manager or HR manager will be responsible for carrying out the investigation. The person who conducts the investigation must have no connection to the complaint and must have the skills and experience to complete an investigation.

If the investigation leads to a disciplinary process, it is vital that the investigator is not involved in making decisions in the subsequent disciplinary procedure. In small Organisations, there may not be enough neutral internal Employees to manage each stage of the investigation and disciplinary process, and external support may be necessary.

External investigators or legal advisors may also be required in sensitive cases involving senior Employees or in highly regulated industries where the investigation requires sector specific experience and expertise.

Transparent Investigations Build a Workplace Culture of Trust

As well as ensuring compliance with a range of Employee and statutory rights, a thorough and transparent approach to concluding workplace investigations helps to build a culture of fairness, trust, and accountability. A heavy-handed or biased approach not only exposes an Organisation to the risk of legal claims, it will also jeopardise Employee morale and Organisational integrity.

By adopting a best practice approach to investigations that adheres to the principles of natural justice and fair procedures, Employers can avoid making a difficult situation worse and reach a conclusion that minimises the risks to the wider work environment.

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