

WORKPLACE INVESTIGATIONS FAQ TRANSCRIPT

Hi, I'm Catherine Gillespie, Managing Director of Workplace Harmony Solutions incorporating our specialist division, Workplace Conflict Resolution. Our services are aimed at improving the harmony between employees in terms of their communication and their practices, hopefully in the preventative space, if we are looking at improving harmony in the workplace, or in the reactive space if conflict already exists and we need to come in and help resolve that.

What is a workplace investigation?

A workplace investigation is supposed to be procedurally fair process to try to determine whether allegations that have been raised against another person in the workplace are substantiated or not substantiated. So it's a process of collecting facts and evidence to be able to make a determination on a balance of probabilities as to whether the alleged incidents did happen or not.

At what point does a complaint warrant an investigation?

So when we talk about investigations, there's both an informal process and a formal process. An informal process can be conducted perhaps by a manager or a supervisor who might speak to staff quietly on the side, try to ascertain what's happening. Usually that's around interpersonal conflict issues, or maybe smaller procedural issues. But when we start to talk about situations which could potentially be a breach of workplace policy in terms of inappropriate or unlawful behaviours like bullying, sexual harassment, victimisation, fraud, theft, those sorts of things, then really a formal investigation should be conducted.

What is an example of an incident that doesn't warrant a formal investigation?

An example of an incident that doesn't warrant a formal investigation would be something like a once-off remark or comment that could include swearing or belittling or hurtful, maybe sarcastic, that somebody feels aggrieved about, that has upset them, but that has not happened on a repeated basis. And usually both parties are working reasonably well with each other.

So in that particular instance, somebody might speak to their manager about being upset by something that somebody else has done, the manager would then go and speak to the person, work out what did happen, what was said. Perhaps have a conversation to both of them separately about what's expected of them in the workplace, make a note of it to make sure that it's recorded that that conversation was had. And then leave the parties to it to see if they can continue working well with each other, perhaps checking with them a couple of days or a week later, and check that everything's going okay. And then just monitor the situation.

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What is an example of a formal workplace investigation being instigated?

So, a formal investigation might be instigated because there's been one serious allegation made or could be because there's been repeated smaller inappropriate behaviour is being exhibited. And we would hope that the person who feels aggrieved has already spoken to the perpetrator and asked them to stop. And if that's been the case and the behaviour continues then yes, an investigation would be warranted.

If a staff member submits a formal workplace complaint, should that also be supplied to the respondent to that complaint?

When a complaint is lodged, sometimes it's done verbally and sometimes it's made in writing, and it doesn't have to be in writing for it to be recognised as a complaint. But usually part of the process will include that complaint being put in writing. In most cases that complaint letter's written for HR or for the senior manager. So it's written with that audience in mind and not with the respondent being the audience or the receiver of that complaint letter.

So the complaint letter is usually not appropriate to pass on to the respondent. It usually contains generalisations. It usually tries to involve other people to make it sound as though there is some weight to the complaint. So instead of just really being a complaint raised by one person, they're trying to also indicate that other people are having issues with this person as well. And that's not appropriate for the respondent to be receiving unless those people are also going to putting their own complaint about that as well.

The complaint letter is a process of notifying HR or senior manager that there is an issue that needs to be involved. But what the respondent really needs is a set of specific allegations that they are expected to respond to with enough information that they know these supporting incidents that are being questioned within the investigation and the complaint letter usually isn't that specific and detailed.

It has too much information in that the respondent shouldn't know and not enough information about what the respondent does need to know.

Does the complainant and or the respondent to a workplace investigation have to participate in the investigation?

No, they don't have to participate in the investigation that would be preferred that they did. But sometimes there are situations where they choose not to or they're not in a position to be able to

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participate as well. Usually a complainant will want an opportunity to elaborate on their complaint letter and give more information and really present their case as being quite strong.

But sometimes they may have put in a complaint and left employment with the employer. So they're not available to be interviewed and participate. Sometimes they are facing issues which don't allow them to be at work. So they may have a health issue, they may be on holidays. Sometimes people just will submit a complaint letter. And that's as far as I want to participate in the investigation, so the investigator can only go by that information and not interview them as well.

The respondent might choose to provide no response at all and not participate at all, which is unusual because they usually like to be able to have their say and be able to put forward an opposing point of view to what's being put against them. Sometimes they might just put in a response letter. And that's all that they are prepared to participate in investigation with or even the respondent might have left employment with that organisation and not be able to respond to the allegations either.

So, no, they don't have to participate in the investigation, it's very helpful if they do. But nevertheless an investigation will usually go ahead without them.

What is a manager's obligation when advising a respondent that a workplace complaint has been raised against them?

The manager's obligations when informing a respondent that complaint has been raised against them will extend to the level of experience that that manager and HR have in managing complaints. Their basic obligation is to inform that a complaint has been raised against them. And then most organisations will engage us as external consultants to take over the process from there, and it would be our job as the investigator to inform the respondent of exactly what the allegations are against them and allow them an opportunity to respond. It would also be our responsibility to inform them that they have those different levels of participation available to them.

Does management have to initiate a detailed workplace investigation for every formal complaint submitted?

For every formal complaint that's submitted if the preliminary work done by the management and HR reveal that a formal investigation is required, then yes they should do a formal investigation. Just because somebody submits a formal complaint doesn't mean that it has to be formally

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investigated. It could still be an informal process it's required. Sometimes we see allegations of bullying being put forward, that if some preliminary work was done would reveal that it's really only interpersonal conflict and perhaps a mediation would have been better suited between those two parties to resolve the issues between them. It still requires some form of investigation. Allegations of bullying can't be left unnoticed and must be investigated in some way.

How does management know the difference between needing a mediation as opposed to a workplace investigation?

The warning signs to know whether to conduct a mediation or a formal investigation would be the number of allegations that have been included in the complaint letter and the nature of the allegations. So sometimes when the word bullying is used people think automatically that it has to be a formal investigation because bullying is a very serious incident, if it is occurring. But many people are now using the words bullying and harassment without really understanding what they mean. And so if a complaint letter is submitted with those words in it, people can automatically think that a formal investigation is required.

I think that there would be more value in there being a preliminary investigation which means that the senior manager or HR might sit down with the complainant and ask them a few questions to elaborate on what their complaint is about and why they are raising the complaint, and also what outcomes are they looking for. Because sometimes the complainant will say I just want to be able to work well with this person, have a conversation with them. And if that's the case, if they're looking to restore workplace relationship, an investigation is not going to do that.

So where the allegations aren't serious in nature, they're not being repeatedly occurring in the workplace, very minor incidents, perhaps interpersonal conflict, differences of opinion, differences in work styles perhaps, then I would be looking to mediate between those two parties.

What should a manager do if a workplace complaint is submitted in confidence?

Very often I find that in workplaces staff will go and speak to their manager or HR, and say I don't want you to do anything about this, or I'd like to tell you something but you must be confidential about it. They're big warning signs to me, and I would recommend that anybody in a position of management or HR never accept a conversation on that basis because they themselves hold responsibilities with that information. So if the information is provided to them that is substantiated that would be a breach of policy, might be an example of unlawful behaviour then that manager or the person who's receiving the complaint is vicariously liable for those behaviours continuing in the workplace, which is a big legal responsibility to carry. And they should speak up

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at the very beginning, and say I cannot assure you that this conversation will be confidential.

I may have to raise it with a more senior manager or with HR, and it may have to be managed in some way.

If a complainant has a workplace investigation held against them what support can they call upon?

When a formal investigation is being conducted, anybody who is involved in that investigation process should be offered the right to have the support person present with them. So a complainant when they're being interviewed in investigation, the respondent, even the witnesses can have a support person present with them.

The role of the support person now is very often misunderstood. So it's not an advocate. You could choose to have an advocate for you, but that advocate role is specifically an advocate role. They do all the talking, they put forward all the information, and essentially the person who is using the advocate loses their right to speak and to put forward the case for themselves.

A support person, however, is somebody who really is just sitting there with them as a support. They are usually silent but they could ask questions to help clarify the process or help clarify the question that's being asked, but they can't answer the question for the person they are supporting. And they can't influence or dictate what is being said or any outcomes and how the process might go forward.

If the person and the support person want to have a private conversation, they can. If they want to talk in front of the investigator, they can. But the investigator needs to be very careful that they don't take any notice of what the support person is saying in terms of the conversations that are happening in front of them because the investigator really is only there to be able to talk to the complainant or respondent or witness and not the support person.

So they play a vital role if the person feels they need some type of emotional support, perhaps they want somebody there as a witness but they are certainly not an advocate in the process.

Can a support person also be used as a witness in a workplace investigation?

When people say they're going to have a support person present with them, in an interview, I will always ask do you intend for that person to be put forward as a potential witness in the investigation. If the answer is yes, I would like to nominate them as a witness, then I feel I have a responsibility to say to them by having that support person present in your interview, you may be

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potentially jeopardising the role that they play as an unbiased witness.

So I give them the opportunity to make a decision as to whether they will proceed with having that person as a support person. The decision to use them as a witness is up to the investigator. So just on that note, the complainant and respondent will put forward names of who they would like to be interviewed as witnesses. Doesn't necessarily mean they will be. The investigator does get to choose as well as perhaps HR. They sometimes have a say in who they will allow to be interviewed in an investigation.

So I think if somebody calls for a support person then they should be informed that if they would also think there's a possibility they might be a witness in the investigation, to think carefully about whether they still will use that person as a support person as well.

Does the respondent in a workplace investigation have access to any witness materials put forward?

In terms of the information that's put forward by witnesses, even knowing who the witnesses are in investigation, the complainant and the respondent should never know who those people are.

In fact the witnesses should not know who the other witnesses are either. So all of that should be kept confidential because there are examples where I've seen complainants or respondents try to influence the people who are being called as witnesses. And that would be a form of victimisation which is inappropriate in a workplace as well. And somebody could be disciplined for doing that as well as the other allegations that are being put against them.

Sometimes the information that the witnesses bring forward do require responses from the complainant and respondent. That information would be put to them. But who raised that information is not necessarily revealed either.

During a workplace investigation could either party be stood down in their roles?

In terms of standing people down during an investigation, there are cases for where that's appropriate, and other cases where it's not appropriate. If for example, there's an objectively assessed risk that there might be violence in the workplace or there could be damage to somebody's health or well-being because the parties are both still in the workplace then it might be appropriate to ask somebody to stand down on full pay and stay at home and not come to work.

Perhaps where they might be a risk that the information or evidence could be tampered with then it's appropriate to ask somebody to stay away from the workplace. We need to be careful that

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when that determination is made it's not being seen as being detrimental to one of the parties or biased against one of the parties or victimising one of the parties either, and there should be a clear set of boundaries around what their communication will be like with the workplace while they're being stood down from work. So who is their point of contact, what information can they access, can they come back onto the work site at any time and should they be escorted to do that? So the process does need to be well thought about and well managed.

It could be averted though if one of the parties was perhaps to report to a different manager. So if a staff member has put in a complaint against their manager or vice versa then maybe they can stay in the workplace and just have one person reporting to a different line manager, or maybe having one or both of the parties moved to different areas of building or a different building if they've got multiple sites within the one business.

So it does need to be thought through very carefully. It doesn't always have to happen though. There are a lot of investigations occur where people are still completing their work in the same workspace as they were in previously.

Can previous investigation findings be used to form character assessments on current workplace investigations?

Character assessments in an investigation, we need to be very wary about because an investigation should really only be about fact finding and not about the character of the person. So if we're going to refer back to previous investigations which might be relevant because there could be some facts that were uncovered in a previous investigation that may be useful in the current investigation, but certainly not the behaviour or the character assessment of the person in that situation, doesn't necessarily mean it applies to the current situation. So no, character assessments should be avoided, and perhaps only fact finding from previous investigations may be included.

Can counter allegations in a workplace investigation be investigated by the same investigator?

It's not unusual in an investigation for the respondent to then putting a claim against the complainant, which we term as a counter allegation. And it's quite appropriate, I believe, for an investigator to both, do the investigation for both the original complaint and the counter allegations or the counter complaint. Usually there's quite a lot of information that crosses over in both investigations. So it's both time and cost efficient for the one investigator to do that. So as long as there is no allegations made by any of the parties that they feel the investigator is being

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biased or showing a lack of impartiality during the investigation process.

What's the best way to notify a respondent that a workplace complaint has been made against them?

Being notified that a complaint has been made against you is quite a unsettling process to go through, and it creates a lot of anxiety. So I think that senior management or HR whoever is conducting the process should be very cognizant of that and think very carefully of how they are going to notify the respondent. I would suggest that the most appropriate way to do that is to already have a formal letter typed up about the fact that a complaint has been made against them, and that they are required to attend a formal meeting with a support person if they choose to, and then be able to present that person with that letter in an informal setting and indicating to them a complaint has been raised against them. They'll have an opportunity to know more about the complaint, who's made the complaint and what the complaint is about in a formal meeting where they are allowed to bring a support person.

If that meeting to be presented with that information is too far off into the distance, that's going to leave the respondent in an agitated state perhaps for some time. So planning when that formal meeting will be is very important, and maybe the respondent is going to be ready to have that formal meeting straight away. I think that HR or senior management should be ready to go straight into that formal meeting if the respondent is ready for it. But it definitely shouldn't be any longer than perhaps 24 hours after getting that informal notice.

How much time should be given for a respondent to respond to allegations of a workplace complaint?

Typically, a respondent would have 5 to 10 business days to prepare a response. Most often though in an investigation process, the respondent will be informed that a complaint has been made against them and then it will actually be some time before they know of the specific allegations raised against them because firstly the complainant needs to be interviewed, these specific allegations need to be determined, and then that needs to be presented to the respondent.

So they can sit for some period of time in limbo, perhaps before they actually know the full allegations against them, and then they've got 5 to 10 business days depending on what the organisation's policies will allow for them to prepare a response. Most people do that fairly quickly because they tend to have the process continue quite promptly. Some people require more time. And if that's the case, we ask them to put in a submission for more time and reasons why. Sometimes it's a case of them just being allowed to stand down from their duties for a day and

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actually be given some time during work to prepare a response. Or they may be needed to give a day of paid leave to work from home and prepare a response.

What sort of policies should an organisation have to ensure a smooth workplace investigation process?

An organisation should have policies in place which outline what an investigation process does look like, so that there's a level of certainty for the complainant, respondent and for the investigator to know the process that they should be following. So we don't want the policy to be too prescriptive because there are many different things that can happen in an organisation which will affect timeframes and sometimes processes.

So a rough estimate of perhaps what an investigation process would look like, what are the major steps involved in an investigation process, the ability for them to have support people, and most definitely the need for confidentiality and what that means should be included in the policy.

Can a workplace investigation still be conducted if the complainant or respondent have resigned or left their employment?

If one of the parties of the investigation has resigned or being dismissed and no longer in the workplace, an investigation, if the allegations are serious enough, should still be investigated. So the investigator would have to look for other other ways to be able to find as much evidence and information as possible, and an investigation should still be conducted.

You could imagine a situation where an employee has alleged bullying by a particular manager, the employee's now left the organisation. Well if that manager has been showing bullying behaviours then that does need to be determined and appropriate disciplinary action taken because there still is a risk perhaps that that manager might display the same behaviours to other staff members as well. So even though people have left the organisation investigations should still occur if the allegations are serious enough.

Under what situations would it be appropriate for an organisation to conduct their own workplace investigation without bringing in a third party?

Organisations can conduct their own investigations if the investigators are suitably trained, and know the process well enough to be able to follow that. It's so important to be able to offer procedural fairness, but there can be quite a few twists and turns in an investigation which could

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expose the investigator and therefore the company to quite large liabilities. So even in the process of interviewing the types of questions that can be asked, what can and can't be said, requires quite a highly skilled investigator.

Most times an organisation will bring in an external investigator where the allegations are very serious, including perhaps potential unlawful behaviour, where senior managers are involved in the complaint process. And HR perhaps don't feel that they're suitably qualified or experienced to be able to conduct the investigation themselves.

What are the consequences of an internal workplace investigation that has not been conducted correctly?

Where an external investigation has not been conducted correctly, this exposes the organisation to quite large liabilities, so it's not just the investigation process, but it could be the outcomes that determined from that. So if an organisation doesn't conduct the investigation properly, the party who feels aggrieved by that process could lodge a court claim against the organisation, if perhaps the investigation leads to some disciplinary action that's not appropriate, perhaps dismissal, they might be facing an unfair dismissal claim.

It may evoke somebody to feel that they've been treated unfairly and they are now suffering a psychological injury from that, and they put in a worker's compensation claim. So at every point the process needs to be procedurally fair, it needs to be a thorough, highly experienced investigation because at any point somebody could put in a claim against that process or against the person conducting that.

What kind of involvement can a union have in a workplace investigation process?

If one of the complainants or respondents chooses to have the union involved then that is their right to do so, and usually they have them involved in the process as a support person. So the support person will come along to the interview, and that's all right if that happens. Sometimes we have union representatives who can be quite vocal and might confuse their role in terms of wanting to be an advocate. But in the main most union representatives know the role of the support person and that's the role that they do play.

I think the main benefit that a complainant or respondent might get from having a union person involved is just being able to talk with them outside of the investigation process or outside of the interview to know what their rights are, perhaps get some advice on what they should be saying. But usually the union representatives don't overstep their mark. They do play their role as support

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person well.

Who has access to the final report of a workplace investigation?

The process that we use, we'll present a final report from the investigation and that will go to the authorised representative who engaged our business to conduct that investigation. The final report isn't suitable for the parties to have access to. And so we do provide a report to the organisation to then pass on to the parties involved. Really the parties are entitled to know any of the allegations, were they substantiated or not substantiated. That's the only information that the parties need to know.

What are some examples of recommendations that might be made in a workplace investigation?

For all of the investigations we conduct, a final report is submitted to the authorised representative, and that report will outline each allegation, the evidence that we've collected surrounding that allegation, and then a determination on that allegation, was it substantiated or not. We also then include recommendations of how to proceed in terms of addressing the allegations that were substantiated.

So if the behaviour by the respondent has breached workplace policy then according to the workplaces policies what disciplinary processes should occur from there, and how should that process be conducted. It might also include recommendations around things that we've noticed. For example, the policies need to be more detailed and more robust, should reporting lines be changed, should roles and responsibilities be clarified, would parties benefit from training or coaching.

So often our clients find that that is a very helpful part of our investigations because we're prepared to make robust recommendations, and put forward how we think organisations should proceed without fear of any repercussions of putting that information forward.

Can incidents outside the workplace be investigated by an employer?

When investigations are conducted, they may include incidents that have happened in the workplace or outside of the workplace depending on what impact those incidents have had on the workplace. So usually incidents outside of the workplace that are considered private wouldn't be investigated. But sometimes there are activities that occur outside of the workplace between

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employees which may have a link to their employment or their workplace, or just the outcomes of that incident have now impacted on workflow processes or relationships in the workplace as well. So it can happen that incidents outside of workplace are investigated by an organisation.

Do social events outside of the workplace fall within the scope of a workplace investigation?

Social events outside of the workplace can be investigated, but it would need to be clearly determined is that social event linked to the workplace, so was it actually a workplace event, even though it's been called a social event, and there would be a number of factors which might actually link a so-called private social event without actually being a workplace event. So that would first be investigated to know what is that link between a social event and the workplace.

Sometimes that link's not so clear but it would be around what are the ramifications of that incident on the workplace that's more important, not the actual social event itself. And then we've got aspects like social media too. People who are posting social media posts outside of work hours, using their own technology, but what they're posting, what impact does that have on the workplace or their colleagues in the workplace. Those sorts of things may be investigated as well.

If I'm a manager what kind of training could I do to upskill myself in relation to workplace investigations?

I think that one of the most important things managers can be up skilled around is how to receive a complaint, and what they should do when they hear somebody make a complaint. Because most often managers either dismiss the complaint or they say something which is inappropriate in terms of maybe agreeing with the complainant. So how they handle and receive that complaint is firstly the most important thing, then what they do with that complaint, do they actually investigate that informally to themselves, or do they escalate it to HR, so that would need to be determined.

And if it's escalated to HR, what is then the manager's role within that complaint process, do they sit back or do they still have a role to play. To be upskilled in terms of conducting investigations, we offer training in that process, if HR or managers would like to become more skilled in the steps involved in a formal investigation to ensure that it's procedurally fair and carried out in a thorough manner.

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How many managers are sufficiently skilled to handle a workplace investigation process when a complaint has been made?

In my experience, I don't believe many managers are experienced or capable of managing even an informal investigation process. Most managers are promoted on their technical skill and ability and their experience within that particular industry, and not for their people management skills, or their HR management skills. And so I think this is an area which requires a lot of training to be provided to managers, to make sure that they're receiving the complaints well, managing them well, conducting informal investigations, knowing when to escalate them to HR for a formal approach.

In those first few incidents of interaction with the employee, who is aggrieved, if the manager doesn't handle that situation well, it's only going to escalate the grievance for that person who's raised the complaint. These are very unnecessary both in the emotional well-being and health of that staff member who's made the complaint. But also in how that might actually escalate the complaint as well.

Sometimes we see situations where the complainant has had a complaint against one of their work colleagues, taken it to a manager, it's either been ignored or handled poorly, and now we have a second complaint being put in against the manager for the way they've handled that situation. We've even seen some court cases, say for example, a David Jones case where a staff member raised allegations of sexual harassment, and it wasn't managed, it wasn't dealt with. And the complainant took their case to court.

One of the interesting facts that came out of that court case was that the staff member raised the allegations with the appropriate people, and the fact that it wasn't dealt with has led to now even further liability for the organisation. So we can see how important it is for managers to know how to handle a complaint properly when it's first forwarded to them.