Workplace Investigations Fact Sheet

All business will at times be faced with issues in the workplace that warrant exploration by way of a formal investigation. In these cases, a person will be authorised to perform the role of investigator. The investigation should be conducted in line with any policies or guidelines your business has in place and pursuant to contemporary investigative methodologies, if no policies exist then follow the various guidelines available from Work Help Connect.

During such an investigation, your staff may be interviewed to determine what they know of the matters under investigation. The investigators will interview all relevant staff that may have evidence to contribute. The staff interviewed may also provide information about other staff/clients that may also need to be interviewed.

Participation in an Investigation

As an employer you have the legal right to direct an employee to participate in an investigation and to answer questions put to them by your investigator. A failure to cooperate in a workplace investigation can result in a further disciplinary process being initiated in relation to that staff member.

Remember however, it is always best to encourage participation if possible, as opposed to forcing it.

Evidence

Your investigator will seek out those staff that can provide direct evidence of what actually occurred. If they are provided with hearsay evidence, they will need to speak to those witnesses who actually saw or heard the incident. It is best not to rely on what someone else told them they saw or heard. Make sure that staff understand that it is their responsibility to ensure that the information provided to the investigator is accurate and honest.

The investigator should gather all the evidence regarding the allegation/issue and if allegations have been made about an employee, the investigators will normally interview that person last to ensure they can respond to all the information gathered about the alleged conduct. At times when faced with serious disciplinary outcomes, people will destroy or conceal evidence. To reduce or eliminate the chances of this occurring, the manager in charge of the investigation should determine at what point in the investigation process an individual under investigation should be advised that an investigation is being conducted.

Findings

When your investigator has gathered all the available evidence, he/she will analyse the evidence to determine, on the '**balance of probabilities**', whether the allegations can be substantiated or not. For the case to be proved on the '**balance of probabilities**', the evidence must establish that it is more probable than not the alleged conduct occurred. This is the civil standard of proof and must not be confused with the criminal standard of proof, beyond reasonable doubt.

Natural Justice

Natural Justice must be observed during an investigation by ensuring that a person who is the subject of allegations is provided with an opportunity to hear the substance of the allegations and respond to the allegations prior to any finding being made. Natural justice also requires that the investigator must be free from any bias that might affect their responsibility to make findings that are objective. Natural justice is not compromised if a person decides not to cooperate with an investigation and in so doing does not respond to the allegations made against them.

Adherence to the principals of natural justice does not mean that when it is demanded of you, that you provide all your materials to the staff member accused of the misconduct, before you conduct your interview with them. There is no requirement to do this at all before your investigation has been completed.

Support mechanisms

It is recommended that when an employee participates in an interview as the person accused of misconduct, or as a complainant or witnesses, they may at their discretion, invite a support person to accompany them to the interview.

An employee may, at their discretion, contact their union or legal representative for advice about their involvement in the process, who may then wish to act for them as their support person. Note however, that this is not a judicial process and a person does not have the same entitlement to remain silent as in criminal cases, nor is it appropriate that a support person continually interrupts the interview, suggests answers or speaks for your staff member.

It would be advisable to discuss these expectations with the support person before your interview starts, if they will not comply you may have to request their non attendance and proceed without them or request your staff member select another support person, without delay.

Confidentiality

Confidentiality is a duty to not disclose information that may be sensitive or damaging to the interests of another, whether or not the other person has specifically asked for the information to be kept in confidence.

It would be advisable to treat any information you collect during the investigative process very carefully and only use it for the purposes of your misconduct investigation. Every state and territory in Australia has information privacy laws, if in doubt do some research or seek expert advice.