

Keeping Investigations on the Straight and Narrow

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LAWYERS

Agenda

- Implications of an internal investigation
- Employment issues
 - test for justification
 - substantive justification and procedural fairness
 - procedural fairness
 - conducting a fair and robust disciplinary investigation

Implications of an Internal Investigation

- Many reasons why companies/Boards might direct an internal investigation
- Good governance and risk management indicate investigations in situations of suspected misconduct
- Important to distinguish roles in an investigation
 - external parties provide independence
 - legal counsel should be engaged where there is a desire to obtain advice under legal privilege
 - lawyers are not investigators – forensic IT and accounting expertise, and specialist investigative/interviewing expertise should be utilised

Implications of an Internal Investigation (II)

- A key reason to conduct an investigation is to identify what employment consequences might arise
- However, other reasons include
 - identifying what liability the corporation itself might have arising from the misconduct
 - identify what steps the organisation should take to mitigate such liability
 - determine the scope of potential wrongdoing for the purposes of cooperation with authorities
 - generally determine the scope of wrongdoing/liability in order to be prepared to defend legal action
 - identify evidence/information for the purposes of plaintiff's legal action

Employment Matters - Test for Justification

- Under section 103A, the courts must determine on an objective basis, whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances
- What is fair and reasonable depends on the facts and circumstances of each case
- Involves an objective assessment of every decision
- All stages of the employer's process may be evaluated by the Authority/Court as well as the decision to implement a penalty

Substantive Justification and Procedural Fairness

- Justified decision to discipline or dismiss requires both
 - substantive justification
 - whether the employee's conduct justifies the action taken by the employer in response
 - is the particularly penalty imposed appropriate?
 - procedural fairness
 - whether the process followed by the employer in investigating the matter, and making a decision was fair and reasonable
 - this includes whether the principles of natural justice been complied with

Procedural Fairness (1)

- Procedural fairness
 - duty to carry out a full and fair investigation
 - not required to continue investigations indefinitely
 - employer must provide the employee with all information which it is seeking to rely on in the investigation
 - allegations must be sufficiently detailed
 - employer must provide the employee with an opportunity to explain their actions and be heard by the decision maker
 - employer must have an unbiased consideration of the employee's explanation
 - employee is entitled to representation
 - employer may need to make further inquiries (conduct further investigations, re-interview witnesses)

Procedural Fairness (2)

- two step decision making process – decide whether the employer’s concerns are proven, and then decide the appropriate penalty. Obtain employee’s responses on the proposed penalty before deciding whether to implement it
- minor procedural flaws are most likely curable
- record the steps undertaken in writing to provide a clear record of events
- employer must comply with their own disciplinary policies or procedures

Overview of a Fair and Robust Disciplinary Process (1)

- Step one - suspicion of misconduct/serious misconduct
- Step two - review relevant documents
- Step three - consider suspension
- Step four - conduct investigation
- Step five - advise the employee of the allegations

Overview of a Fair and Robust Disciplinary Process (2)

- Step six - meet with the employee
- Step seven - review allegations and consider explanation
- Step eight - convey decision on allegations and propose penalty
- Step nine - consider response and decide on penalty

Step One – Suspicion of Misconduct

- Employer becomes aware of alleged misconduct/
serious misconduct
- Decide whether the allegations warrant further
investigation
 - be careful if conduct is historical
- Act promptly

Step Two – Review Relevant Documents

- Employers are expected to comply with their own policies and procedures
- Also consider:
 - the employment agreement - in particular check for provisions defining misconduct and procedural requirements
 - any code of conduct or house rules, including definitions of serious misconduct or misconduct

Step Three - Consider Suspension

- Limited grounds for suspension (eg presence would hamper investigation; risk of repeated conduct)
- Procedural fairness rules apply:
 - advise employee that suspension is being considered
 - advise of right to representation
 - seek a response
 - consider the circumstances and whether suspension necessary
 - advise employee
- Suspension should be on full pay
- Risk is higher where there is no contractual right to suspend

Step Four – Conduct Investigation

- Act promptly to investigate the allegations, conduct interviews and collect relevant evidence
- Appoint decision maker and, if relevant, investigator
 - decision maker free to obtain advice and assistance
 - employee has right to be heard by the decision maker
 - ensure no appearance of predetermination or bias
- Gather as much relevant information as necessary
 - requirement to conduct fair and thorough investigation
 - an employer is not required to investigate indefinitely
 - some procedural flaws can later be cured
- After investigation, consider whether there is sufficient evidence to continue with the disciplinary process

***News Flash* - Practical Tips**

- As an investigator it is critical that you act with scrupulous fairness when interviewing target employees and witnesses
- You are responsible under the employers obligations to act toward any subjects in good faith
- ‘Good faith’ is an important concept in employment law, and includes not misleading or deceiving, and openly and proactively communicating with employees
- Always provide information to the target in advance as to the allegations you will address
- Do not “cross-examine” the target during interviews, or act in any way which could be seen to bully or intimidate
- Ensure they know of their right to representation

Step Five – Letter Detailing Allegations

- Key document in Authority or Court proceedings, so important to get this right
- Include the following
 - detail the allegations and the basis for them
 - detail the seriousness of the allegation
 - refer to any relevant policies or contractual terms
 - enclose any additional information (complaints, statements, or other evidence)
 - outline the process to be followed, including opportunity to respond
 - refer to right to seek advice or representation
 - outline the potential outcome if allegations are established
 - request meeting with employee (and provide sufficient time)
 - outline who will be at the meeting including any legal representation

Step Six - Meet with the Employee (1)

- Decision maker and note taker should attend the meeting
- If no representative present, reiterate that the employee is entitled to seek advice or representation
- Meeting must provide a real opportunity for the employee to explain or be heard about the allegations
- Employee might respond orally or in writing, or might not respond at all

Step Six - Meet with the Employee (2)

- Employee's representative can speak on employee's behalf and does not have to be a "mute observer"
- Employer should listen to and query employee's response to ascertain veracity – ask questions where it doesn't stack up
- Allow employee opportunity to gather any evidence in support, may need to adjourn or reschedule meeting
- Important not to appear predetermined

Step Seven – Review Allegations and Consider Explanation (1)

- Decide whether to uphold the allegations
 - evidence must be sufficiently clear for the employer to uphold the finding
 - demonstrate consideration of employee's explanation
- Then consider what, if any, disciplinary action to take
 - consider all of the information available and all the circumstances of the case

Step Seven – Review Allegations and Consider Explanation (2)

- consider what a fair and reasonable employer would do, including consideration of factors such as
 - employee's record and length of service
 - seniority of employee
 - mitigating factors
 - industry standards and practice
 - implications for the organisation as a whole
 - whether the policy was sufficiently clear
 - is lower level disciplinary action sufficient
- remember, like cases should be treated alike

Step Eight – Convey Decision on Allegations and Propose Penalty

- Write to employee outlining
 - the allegations, their responses and the employer's preliminary findings
 - the proposed penalty and the reasons why that penalty is proposed
- Schedule another meeting to discuss preliminary decision and proposed penalty

Step Nine – Make Final Decision

- Consider employee's responses to proposed penalty
- Carefully consider all the facts and take into account how similar situations have previously been addressed
- Ensure decision is free from bias
- Make a final decision and decide whether to implement penalty
- Write to employee with decision
 - letter should be sufficiently detailed summarising allegations and process followed

Questions/Contact Details



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