Conducting Workplace Investigation

By Greg Romeo, Solicitor, Kelly Workplace Lawyers

It is one of the inevitable duties of managers that they will be called upon to determine whether an employee has breached a term of their employment either through their conduct or by failing to meet performance standards. For some managers all they are asked to do is answer the threshold question of whether it is a matter they should refer to their human resources department. For others, however, they are required to roll up their sleeves, gather all the facts, balance all competing interests and make a decision. This article sets out the necessary considerations for managers embarking on an internal workplace investigation.

When should a matter be investigated?

In the absence of an express contractual obligation to investigate instances of misconduct, the decision to conduct an internal investigation is ultimately a decision left in the discretion of the employer. However, employers ought to be cautious as to how best conduct the investigation in order to protect themselves from claims of

unfair dismissal, vicarious liability for employee conduct, breaches of contract (including those incorporated via company policy), breaches of duties implied by common law (specifically the duty of care) and the duty to provide a healthy and safe workplace. In deciding whether an incident, or prolonged conduct, should be 'investigated' a manager should assess the following:

- Whether the conduct creates a risk to the health and safety of other employees or other people who work or visit the workplace;
- Whether the conduct actually relates to the workplace: i.e. out of hours conduct may not be within the scope of employment.
- Whether an allegation is frivolous: An employer is not required to investigate all incidents.
- Whether an allegation is calculated to harm another without merit: This may not always be obvious until investigated.
- Whether the conduct is continuing or a single act.
- Whether there may be some requirement to report the conduct to authorities: i.e. criminal offences.

Where an investigation is warranted, an employer still has the choice of conducting one internally or externally. An internal investigation comes with the benefit of being cheaper and often with the benefit of speed; the employer having knowledge of its own policies and procedure. However, it may be more difficult in these cases to appear neutral as to performance of the investigation and, consequently, to persuade a court or tribunal as to its fairness and impartiality. It is essential then, as in all investigations, that the investigators remain neutral, have no associated interests with parties involved and have no bias, real or perceived. Where bias is implicated, an employer will have greater difficulty in warding off claims that a

dismissal resulting from the investigation was procedurally unfair under the Fair Work Act 2009 ("FWA").

What are some of the pitfalls?

In the case of vicarious liability, employers may face action where an employee has engaged in conduct that offends anti-discrimination law (Equal Opportunity Act 2004 (Vic)). This will often throw into question whether the employer had acted reasonable or had taken reasonable steps in preventing the occurrence of the offending conduct (s109). One way a 'reasonable prevention' defence can be established is via proof of adherence to an internal investigation procedure which incorporates appropriate company discrimination, harassment and bullying policies. Conversely, where a company policy does not expressly prohibit offending conduct, a court may be more ready to infer that no reasonable preventative measures had been in place. This was the case in Richardson v Oracle Corporation Australia Pty Ltd (2014) where an employer was found liable for the damage caused to an employee as a consequence of sexual harassment by another employee. The court did not criticize the employer for the way in which it conducted its investigations but imputed liability on the basis that the company policy did not overtly mention the fact that such conduct was unlawful. The case not only indicates the importance of being prudent in investigating claims by employees in illustrating an employer's 'reasonableness', but that company policy plays a significant role in preventing imputation of liability. Moreover, having adequate procedure but not following it will not be considered a reasonable measure of prevention under s109 (Styles v Murray, 2005).

Additionally, under the new amendments to the FWA it may be argued that an employer who fails to conduct an appropriate internal investigation into a bullying

claim may be engaging in the statutory definition of bullying itself. Under 789FD of the FWA, bullying is defined as 'repeated, unreasonable behavior directed towards a worker that creates a risk to health or safety'. Unreasonable behavior may then include not adequately conducting or responding to allegations of conduct in the workplace. An employer's liability will thus turn on the reasonableness of the investigation and the appropriateness of the response taken on those findings. For example in Ms SB [2014], the victim complained of staff bullying to her employer who consequently conducted an external review and formed the opinion that the conduct did not warrant a dismissal. As a result, she claimed that the employer was engaging in bullying in not following its own bullying response procedures. Commissioner Hampton was of the opinion that the mere fact that a complaint is found to be unsubstantiated does not necessarily mean the employer has acted unreasonably in conducting a review and that the response to engage an external investigator was appropriate in the circumstances.

While the case illustrates that an employer will not be liable for bullying merely for coming to a conclusion based on thorough internal or external investigation, it also shows that employers who do not adequately respond to, and investigate, bullying claims may conversely be found to not have acted reasonably. The requirement of 'reasonableness' also strengthens the view that investigations must be conducted impartially and fairly.

Unfair dismissal

The way in which an employer conducts internal investigations is especially pertinent to potential claims of unfair dismissal if it results in dismissal of an employee. In this regard, internal investigations should be conducted to ensure that:

1. The matter is investigated as expeditiously and thoroughly as reasonably possible without unnecessary delay;
2. the employee is notified of the reasons for the investigation such that the employee understands exactly what conduct the employer asserts is misconduct and why;
3. the employee is given an opportunity to respond to the allegations of misconduct; and
4. a support person is allowed to be present if requested by the employee.

For example in Byrne & Frew v Australian Airlines (1995), the court found that the dismissal of two baggage handlers who had been dismissed on allegations of theft was 'unfair' pursuant to the FWA. The Airline had drawn out the investigation for 5 months, had not described the particular allegation to the employees implicated (only in very general terms), had failed to interview the Baggage team leader as to his opinion or suspicions and had given unreasonably short time periods for the employees to respond to allegations. Consequently, the 'procedure' of the dismissal was unfair because of the way the investigation was conducted.

Breach of trust

Recently the High Court had the opportunity to recognize the implied duty of good faith and mutual confidence and how this would impact on the employment relationship. This would have governed all employment contracts with the effect that methods of investigation said to 'destroy the element of trust and confidence' would be a breach of an implied term of contract. For example, in Bliss v South East Thames Regional Authority (1987) (U.K.), it was found that requiring a employee to undergo a psychiatric evaluation in response to allegations made towards her mental capacity completely destroyed the mutual trust between employer and

employee essential to the continuance of the relationship. The employer in that case had only other employee's allegations to go on and it was found that the victim had been undergoing emotional issues. The court found that the employer did not have a general power to require psychiatric assessment as part of an investigation. In Commonwealth Bank of Australia v Barker (2014), the High Court recently came down on the issue with the opinion that Australia does not have such a duty of 'good faith and confidence'. In its judgment, the High Court explained that such a duty would expand the employment relationship far too wide in essentially making liable an employer for the psychological state of its employees; something parliament and not the courts should decide.

What's the best approach?

One preemptive step to ensure an internal investigation is conducted legitimately is the establishment of a clear and all-encompassing company policy outlining the procedures to be taken in response to employee conduct. By doing so, the employer can conduct themselves according to the terms of policy and effectively be fulfilling what is required under contract. A company policy should outline a broad range of responses to certain employee conduct including the way in which technology and documents can be confiscated and duties imposed on employees to cooperate and assist the investigations. It should also outline the conduct not tolerated by the employer which will aid in avoiding potential unfair dismissal claims. Bearing in mind, the ability to rely on company policy depends on whether it is incorporated into the employment contract. In order to do this, express reference should be made within the contract of employment itself as to the jurisdiction of the policy, it should be explained to employee in clear and unambiguous terms and it should be openly available (Riverwood International Australia Pty Ltd v McCormick (2000)).

Conclusion

As with all matters involving the interaction between employees and managers, make sure there is clear and consistent communication. Let the employee being investigated know:

- What it is they are being investigated for - set out the conduct that you say has given rise to the allegation of misconduct. Be precise: where, when, who, what, how and when;
- How you intend to investigate the matter – who will be investigating, what the proposed time frames are, if you require information in writing, in person or over the telephone.
- What the potential outcomes are – if it is a matter that, if proven, may lead to termination of employment then let the employee know right from the start.
- How they are to proceed as part of the investigation – let them know if that they can bring a support person to meetings. Let them know that they cannot discuss the investigation with other staff. Let them know whether they are suspended or not. Let them know if they can access the companies computer system to investigate their response to the allegations. Let them know if there is an external support provider you can refer them to.

By making the process as clear and transparent as possible you minimize your risk of facing an unfair dismissal claim and mitigate the obvious distress that an investigation will have on the employee.

Further Information

If you wish to discuss the above further, then please contact Greg Romeo on (03) 9639 6003.

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