

**WORKPLACE
BULLYING
INVESTIGATION KIT**

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ABOUT WORKPLACE BULLYING INVESTIGATIONS

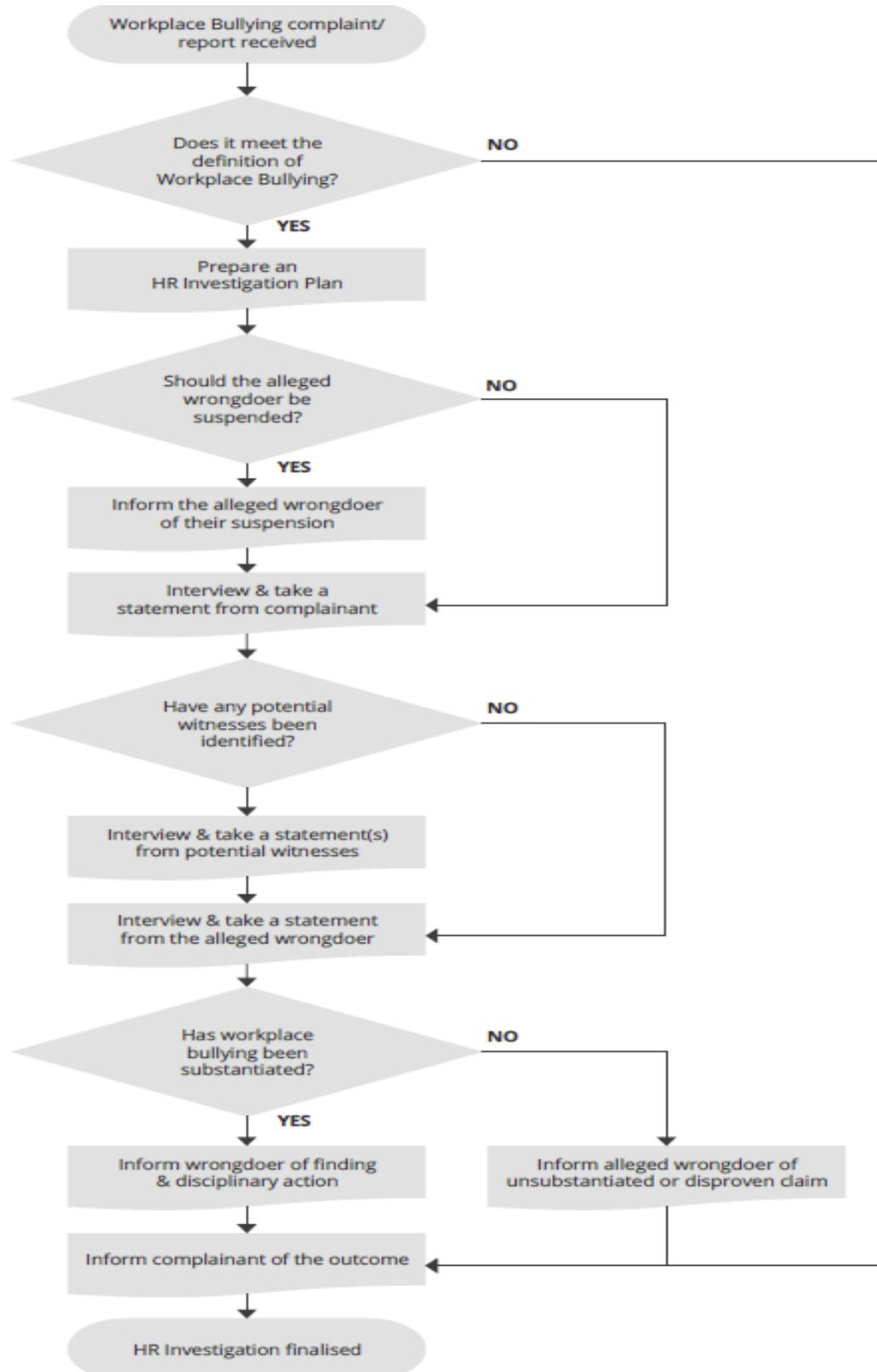
Workplaces necessarily involve interaction between employees. Workplace bullying should not be confused with the normal difficulties and tensions that may arise in modern workplaces.

Many employees do not understand the conduct that actually amounts to workplace bullying and are often too eager to categorise certain behaviour as bullying. As an industrial relations tribunal once recognised, it may be tempting for some in the contemporary environment to reach for such characterisations in an effort to validate an underlying grievance¹.

Many employees also have misconceptions about the law relating to workplace bullying and the rights and remedies available for aggrieved parties. As at the date of this publication, there is no legislative scheme specifically outlawing workplace bullying in Australia. However, given a recent Australian Government announcement, it appears that that position is about to change.

¹ See Wendy Bann and Sunshine Coast Newspaper Company Pty Ltd, AIRC - Richards C - PR935122, (30 July 2003)

THE BASIC PROCESS



PHASE 1

Receiving a Report or Complaint

The catalyst for a workplace bullying investigation is usually a complaint from an employee or sometimes a report from the affected employee's partner or family member.

Once a complaint is received, an initial assessment will need to be conducted. The assessment should involve a determination of the nature of the complaint. For example, does the complaint relate to one or more of the following?

- (a) alleged workplace bullying - as defined in the Code²;
- (b) an alleged breach (or breaches) of workplace policies and procedures;
- (c) alleged misconduct; or
- (d) a combination of the above.

A HR investigator will also need to identify particular instances of conduct which make up the broader bullying complaint. For example, a complaint may contain a small number of allegations (eg. two or three alleged workplace incidents) or it may allege a pattern of bullying behaviour over an extended period of time. In the case of the latter, the complainant employee may make an initial non-descript complaint (eg. "I've been bullied by my manager for the last 12 months"). The HR investigator would need to seek as much detail as possible of the separate instances of alleged bullying behaviour that make up the broader complaint so that the investigator may:

- (a) identify whether the complaint relates to workplace bullying (as defined in the Code); and
- (b) have sufficient detail of the offending instances so that the alleged wrongdoer may be provided with a realistic opportunity to respond.

² Safe Work Australia, *Draft Code of Practice – Preventing and Responding to Workplace Bullying* (September 2011). This draft model Code of Practice was released for public comment from 26 September 2011 to 16 December 2011. A revised draft of the Code, which reflected the comments received, was released by Safe Work Australia for public comment in June 2013. Public comment will close on 15 July 2013.

Repeated Behaviour

When considering whether the alleged conduct would satisfy the Code definition of workplace bullying, the HR investigator should be mindful of the fact that it must be “repeated, unreasonable behaviour” directed at the complainant. A single incident of unreasonable behaviour (although not coming within the Code definition of workplace bullying) may nevertheless breach an applicable workplace policy about appropriate workplace behaviour (eg. shouting, swearing or use of threatening language). Even if a workplace policy were not in place, one instance of intimidating and abusive behaviour would likely be considered unacceptable in any modern workplace, irrespective of whether training has been received. Aside from potentially breaching the employer’s duty of care, if a single instance were ignored it would send the wrong message to employees and may cause an escalation into repeated bullying.

Informal Resolution

Determining the nature of the complaint will also assist to identify whether the complaint is one which should be investigated or is possible to investigate (i.e. an investigable complaint). For example, some complaints may arise because of a simple breakdown in communication or a misunderstanding between the parties.

Alternatively, there may be only one instance of less serious unseemly conduct alleged which is assessed as relatively minor in gravity.

Further, a complaint may be misconceived. That is to say, the conduct complained of does not actually amount to workplace bullying (eg. reasonable management action). An obviously misconceived or vexatious complaint will be open to dismissal or non-acceptance at an early stage.

The issues underlying these types of complaints may be better resolved by supervised informal discussions rather than a formal investigation.

Responding to a Request for Anonymity

On occasion, the person complaining of workplace bullying (i.e. the complainant) may wish to remain anonymous. Without the complainant’s preparedness to cooperate with an HR investigation and carry through with a complaint, the investigation would usually falter.

If a vexatious complaint was made, the complainant’s identity may be very important to the person accused, particularly, if there were a history of a grievance held by the complainant. In practical terms, without knowing the complainant’s identity, the alleged wrongdoer would be denied an opportunity to put forward evidence demonstrating the complaint to be vexatious.

If a request for anonymity is made, it should be clearly explained to the complainant that a complaint may not be made on an anonymous basis.

Lapse of Time

Sometimes it may not be possible to investigate a complaint for other reasons. There may have been a significant elapse of time since the alleged concerning events and when the complaint is made; therefore, the recollections of witnesses may be affected. Nominated witnesses may not be identifiable or contactable. The alleged wrongdoer may no longer work for the employer. If a complaint is not capable of investigation, the complainant should be formally notified and provided with an explanation as to why the matter is not investigable.

Anonymous Report

Lastly, an HR investigator may receive an anonymous report of workplace bullying where a particular aggrieved person is not identified; i.e. a generalised accusation nominating an employee as a workplace bully but providing no further detail. An anonymous report should not be rejected purely because of the fact that it is anonymous. By conducting a careful analysis of the report, a HR investigator may be able to identify potential information sources (eg. witnesses) that would enable further enquiries to be made. Through contact with identifiable witnesses or information sources it may be possible to ascertain the author of the report, thus enabling the HR investigator to make contact with that person.

PHASE 2

Is it Workplace Bullying?

What is Workplace Bullying and how is it dealt with?

At present, workplace bullying is generally dealt with under occupational, health and safety (OHS) legislation. It may involve a breach of duties to prevent exposure to a risk of injury under OHS legislation; however, it is not expressly dealt with in OHS legislation as a stand-alone “offence”.

OHS legislation requires that employers provide employees with a safe workplace as far as reasonably practicable.

In 2011 Safe Work Australia released the draft *Code of Practice Preventing and Responding to Workplace Bullying* (the Code)³. The Code defines workplace bullying and provides examples of conduct considered to amount, and not to amount, to workplace bullying⁴.

The Code’s definition of workplace bullying is adopted for the purposes of this Guide.

“Workplace bullying” is defined as:

“Repeated and unreasonable behaviour directed towards a worker or a group of workers, that creates a risk to health and safety”.

The Code explains that:

- (a) “repeated behaviour” refers to the persistent nature of the behaviour and can refer to a range of behaviours over time;
- (b) “unreasonable behaviour” means behaviour that a reasonable person, having regard for the circumstances, would see as victimising, humiliating, undermining or threatening.

For the purposes of the Code definition, therefore, the alleged bullying behaviour must occur on more than one occasion and is dependent upon a “reasonable person” test (i.e. viewed through the eyes of a reasonable onlooker).

³ Safe Work Australia, *Draft Code of Practice – Preventing and Responding to Workplace Bullying* (September 2011). This draft model Code of Practice was released for public comment from 26 September 2011 to 16 December 2011. A revised draft of the Code, which reflected the comments received, was released by Safe Work Australia for public comment in June 2013. Public comment will close on 15 July 2013.

⁴ Some States have released a bullying code of practice pursuant to their respective State OHS legislation; eg. Queensland’s *Prevention of Workplace Harassment Code of Practice 2004* issued under the Work Health and Safety Act 2011 (Qld)

Although a single incident of unreasonable behaviour would not satisfy the Code definition of workplace bullying, an employer needs to be mindful of its duty to provide employees with a safe workplace. Therefore, a single instance of bullying type behaviour should not be ignored, as it may nevertheless amount to unacceptable workplace behaviour (eg. a sole instance of an employee shouting obscenities at another employee) therefore breaching an applicable workplace policy or employer standards about appropriate behaviour between employees.

If a single instance were ignored it would send the wrong message to employees and it could have the potential to escalate into actual workplace bullying

Examples of Workplace Bullying

The Code distinguishes “direct” and “indirect” workplace bullying and provides the following examples:

DIRECT BULLYING

- abusive, insulting or offensive language;
- spreading misinformation or malicious rumours;
- behaviour or language that frightens, humiliates, belittles or degrades, including criticism that is delivered with yelling or screaming;
- displaying offensive material;
- inappropriate comments about a person’s appearance, lifestyle, or their family;
- teasing or regularly making someone the brunt of pranks or practical jokes;
- interfering with a person’s personal property or work equipment; or
- harmful or offensive initiation practices.

INDIRECT BULLYING

- unreasonably overloading a person with work or not providing enough work;
- setting timelines that are difficult to achieve or constantly changing deadlines;
- setting tasks that are unreasonably below or beyond a person’s skill level;
- deliberately excluding, isolating or marginalising a person from normal work activities;
- withholding information that is vital for effective work performance;
- deliberately denying access to information, consultation or resources;
- deliberately changing work arrangements, such as rosters and leave, to inconvenience a particular worker or workers; or
- unfair treatment in relation to accessing workplace entitlements such as leave or training.

What is not Workplace Bullying by an Employer?

It is not unusual for employees to become frustrated at times with the decisions and actions of their employer. If investigating a workplace bullying complaint about the actions of a manager or supervisor, it is important that the HR investigator is mindful of permissible management actions when taken in a reasonable way.

Misconceived complaints about management actions may arise where the employee concerned disagrees with a particular decision (or series of decisions) of the employer simply because it is perceived as adverse to the employee's interests or personal circumstances.

Under the Code reasonable management action that is carried out in a fair way (i.e. reasonable way) is not workplace bullying. The Code makes it clear that:

“Managers have a right to direct the way work is carried out and to monitor and give feedback on performance, but the way that this is done is a risk factor in determining the likelihood of bullying occurring.”

The Code provides the following examples of reasonable management action:

- setting reasonable performance goals, standards and deadlines in consultation with workers and after considering their respective skills and experience;
- allocating work to a worker in a transparent way;
- fairly rostering and allocating working hours;
- transferring a worker for legitimate and explained operational reasons;
- deciding not to select a worker for promotion, following a fair and documented process;
- informing a worker about unsatisfactory work performance in a constructive way and in accordance with any workplace policies or agreements;
- informing a worker about inappropriate behaviour in an objective and confidential way;
- implementing organisational changes or restructuring; and
- performance management processes.

Workplace Bullying Laws are before Parliament

On 26 November 2012, the House of Representatives Standing Committee on Education and Employment tabled its report on its inquiry into workplace bullying entitled: “Workplace Bullying - We just want it to stop”.

On 12 February 2013 the Australian Government tabled its response to the House Standing Committee’s report. Workplace Relations Minister Bill Shorten announced the Government will amend the *Fair Work Act 2009* to enable an employee who has suffered bullying at work to bring an action with the Fair Work Commission.

Once the Bill becomes law, it will amend the FW Act and in so doing:

- Allow a “worker” who has been “bullied at work” in a “constitutionally-covered business” to apply to the Fair Work Commission (FWC) for an order to stop the bullying;
- Maintain a definition of ‘bullied at work’ which is consistent with the definition of ‘workplace bullying’ in the Safe Work Australia draft model Code of Practice: Preventing and Responding to Workplace Bullying;
- Require the FWC to start dealing with an application for an order to stop bullying within 14 days of the application being made; and
- Enable the FWC to make any order it considers appropriate (other than an order for payment of a pecuniary amount) to stop the bullying.

“Worker” is defined broadly. That is, a worker is an individual who performs work in any capacity, and includes an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a work experience student or a volunteer.

The new anti-bullying provisions are scheduled to commence on 1 January 2014.

Why Investigate?

The courts and tribunals are replete with cautionary advice to employers about the need to investigate workplace incidents and, when doing so, following an appropriate investigation procedure which includes providing procedural fairness to the alleged wrongdoer.

Employers have a legal duty to conduct an investigation where a serious allegation is made against an employee⁵. The risks of failing to investigate a report of workplace bullying are many.

The courts have recognised that where there is a complaint of improper behaviour (such as workplace bullying), and it is not taken seriously and investigated, the employer's inaction may be the basis for a finding that it is vicariously liable⁶ for the offending conduct of its employee where an injury (e.g. psychological) was caused to the complainant.

Employers who are found to responsible (i.e. vicariously liable) for the workplace bullying of an employee can be:

- (a) ordered to pay monetary compensation to the bullied employee; and
- (b) subjected to adverse publicity through the media.

Workplace bullying exposes employees to a health and safety risk. It can have a significant effect on an employee's health as well as their work and family life. Obviously, being subjected to workplace bullying or working in an atmosphere or a culture of bullying can cause psychological injuries. Physical injury may also occur; employees impacted upon by workplace bullying may be more likely to make mistakes at work causing injuries.

Workplace bullying can also have a significant impact on an organisation; e.g. increased staff turnover, decreased morale, reduced productivity, increased absenteeism and the general disruption caused by responding to bullying incidents. Any employer that does not take positive steps to prevent workplace bullying in its workplace will likely struggle to attract and retain good staff.

It is essential, therefore, that organisations maintain effective management systems, educational programs, and policies and procedures, to reduce the risk of workplace bullying.

⁵ See *Naidu v Group 4 Securitas Pty Ltd & Anor* [2005] NSWSC 618 / [2007] NSWCA 377

⁶ The employer (because of its inaction) could be considered to have authorised the employee's workplace bullying.

PHASE 3

Preparing an Investigation Plan

Once a complaint has been determined as warranting an investigation, the next step is to prepare an investigation plan.

An investigation plan is the guide for the HR investigator. It outlines how an HR investigator intends to carry out the investigation. It clarifies the purpose of the investigation and identifies the necessary tasks that need to be completed. In essence, an investigation plan is there to keep the investigation “on track” and to prevent it from deviating into irrelevant lines of enquiry.

If a HR investigation necessitates the involvement of more than one investigator, the preparation of an investigation plan would be the responsibility of the “Lead HR Investigator”; that is, the HR investigator with the overall responsibility for the investigation.

What to include in an Investigation Plan

An investigation plan should address:

- (a) What is being alleged by the complaint?
- (b) Does the complaint allege a breach of workplace legislation, a breach of workplace policy, and/or a breach of the employee’s common law obligations?
- (c) Is the complaint made up of a single allegation or multiple allegations?
- (d) What enquiries need to be conducted for each allegation/issue?
- (e) Will it be necessary to suspend the alleged wrongdoer to permit the investigation of the complaint without potential interference?
- (f) Who are the potential witnesses that need to be interviewed?

An investigation plan needs to be adaptable to new circumstances should they arise. The Lead HR investigator must be ready to revise and adapt the plan to suit changed circumstances.

If a complaint involves an allegation of criminal behaviour (eg. criminal assault as well as workplace bullying) an employer still has a right to investigate the matter insofar as it related to the alleged wrongdoer’s employment. For example, in the case of *Dobson v Qantas Airways Limited*⁷, Fair Work Australia held that an employer is not obliged to delay its own investigation in order to await the outcome of a police investigation or police charges.

⁷ *Dobson v Qantas Airways Limited* [2010] FWA 6431 (26 August 2010)

PHASE 4

Suspension of an Alleged Wrongdoer

After the receipt and analysis of a complaint, a HR investigator will need to consider whether the alleged wrongdoer should be removed from the workplace in order to enable enquiries to be made without the potential for interference by the alleged wrongdoer. Potential witnesses may be reluctant to speak to, or be open with, an HR investigator if the alleged wrongdoer is still in attendance at the relevant workplace.

An employer has a general right to direct an employee not to perform work for a period during the course of an investigation into allegations of misconduct, providing that the duty is exercised in good faith, and such a direction is not a breach of a contract of employment.

Before effecting a suspension, therefore, a HR investigator should check relevant industrial awards, industrial agreements, workplace policies and the alleged wrongdoer's employment contract to ensure that there are no particular restrictions on the employer's capacity to suspend.

Even if a bare report (rather than a comprehensive complaint) is received, it has been held that there is no general limitation that prevents an employee from being stood down until a complaint has, or allegations have, been made⁸.

When effecting a suspension, a HR investigator should ensure that an employer's witness is present to be able to corroborate that which is said at the time of suspension. By doing so, it will more easily enable the rebuttal of vexatious or incorrect allegations by the alleged wrongdoer about the manner of his/her suspension. It is recommended that a letter (confirming the suspension) be handed to the alleged wrongdoer at the time of the suspension.

A suspension should not be continued beyond the period necessary to give effect to the investigation. Certainly, a suspension should not be prolonged as a device simply to punish the alleged wrongdoer.

It is recommended that a suspension be made with full pay. If, in a particular case, an employer has a contractual right to suspend without pay it is recommended nevertheless that the employer consider its legal position carefully before moving to suspend the alleged wrongdoer without pay. Legal issues may arise if a suspension without pay, albeit authorised, became prolonged.

⁸ See *Eleanora Jalea v Sunstate Airlines (Queensland) Pty Ltd T/A Qantas Link* [2012] FWA 1360 (5 March 2012)

PHASE 5

Interviewing Relevant Parties & Taking Statements

How to take a Statement from a Complainant or Witness

A witness statement “paints a picture” of that person’s evidence about an event. The content must be relevant to the allegations or matters being investigated.

It is usual for an HR investigator to prepare a witness’s statement for the witness. Most witnesses will be laypeople and thus not experienced in preparing a statement of their evidence. It is preferable for a statement to be type-written rather than handwritten.

The HR investigator should take the statement of a witness in a private location. If a suitable location is not available within a workplace, arrangements should be made for a suitable alternative location (eg. employer’s head office, solicitor’s office, etc.).

A witness’s statement must not be taken in the presence of another witness. To do so risks undermining the credibility of that witness’s evidence and makes it open to attack (eg. that it was a ‘blended’ account) in a subsequent tribunal or court proceeding. A witness’s statement should be made up of only that witness’s recollection of an event, unsullied by the version of another witness.

Taking a witness’s statement (including that of the complainant) is usually a process of sitting down with the witness and extracting his/her knowledge. It involves:

- asking questions relevant to the matter being investigated;
- analysing responses to questions; and,
- if necessary – clarifying a response.

A statement is “moulded together” by this procedure.

If a statement is initially taken by hand-writing, it should be re-typed and signed by the witness at the earliest opportunity. The initial handwritten version should be retained in case litigation subsequently arises.

A witness statement should commence with an introduction of the witness. For an example of a complainant’s statement, see the document **Sample Complainant Statement**.

Events that are the subject of the witness’s evidence should appear in chronological order. Paragraphs and pages of the statement should be numbered. Headings should be utilised where the evidence deals with multiple events.

What to Avoid including in a Statement

- hearsay (only include evidence that is within the witness's direct knowledge);
- speculation or opinion; and
- words or a turn of phrase that are not the witness's own words.

Evidence of a relevant conversation should be included in a statement as direct speech; the following is an example of direct speech⁹:

Mike said "You are completely incompetent. I am going to make your job a living hell."

If the witness does not remember a conversation word for word, the HR investigator should attempt to record a conversation as accurately as possible by use of "words of the same effect" immediately following the piece of conversation. For example:

Mike said, "I made sure that you didn't get the promotion no matter how qualified you are" (or words of the same effect).

Once the draft of the witness's statement is complete, have the witness read over a paper copy of the draft. Attend to any mistakes or necessary amendments identified by the witness.

The witness should be reminded that the statement must be true and correct to the best of their knowledge and its contents must not be misleading or false.

Once the witness is satisfied that the draft is a true and accurate account of his/her evidence, the witness should be asked to adopt the correctness of the statement by signing it.

The statement should be signed by the witness at an appropriate place on the final page of the statement. It is also recommended that the witness be asked to initial each preceding page of the statement (either in the margin or at the bottom). Having the witness initialing preceding pages will protect against a later claim that pages of the statement were substituted or amended without the witness's permission.

⁹ "Direct speech" is sometimes referred to as "first person" speech."

Dealing with a Reluctant Witness

If a witness initially refuses to provide a statement, the HR investigator should explain the consequences of a refusal. In the case of the complainant, it should be explained that without a comprehensive statement containing his/her complaint, the employer may not be able to take any action against the alleged wrongdoer due to a lack of evidence. If the complainant persists with a refusal to cooperate, the HR investigator should seek to have that refusal recorded and acknowledged in writing by the complainant. Depending on the circumstances an employer may need to consider whether disciplinary action against the complainant is appropriate given the employer's overarching duty of care to all employees.

In the case of an employee witness (other than the complainant) who refuses to cooperate with an HR investigation by providing a statement, the witness should be reminded of his/her duty to cooperate with the employer's investigation and to obey reasonable and lawful instructions.

Before issuing a direction or warning to a witness about the consequences of a failure to cooperate, it is recommended that the HR investigator firstly ascertains the reason for the witness's reluctance or refusal to cooperate. It may be simply that the witness is concerned for his/her safety or fearful of retribution from the alleged wrongdoer or other employees. Reassurance by an HR investigator as to such issues will usually remove cooperation barriers.

If an employee witness persists with a refusal to cooperate, without a reasonable excuse, consideration may be given to taking disciplinary action against the witness.

Interviewing the Complainant

Interviewing the complainant and the taking of a detailed statement from him/her (sometimes referred to as “taking the complaint”) is a fundamental step in the investigation process. A complainant’s statement will set out in detail the allegations that will need to be investigated.

In order to take a complaint, the HR investigator should meet with the complainant and take comprehensive details of the complaint in the form of a written statement.

Usually the complainant will be a layperson and, therefore, not experienced in setting out his/her evidence in a written statement format. Even if a complainant has already provided his or her own written account (eg. in a note or letter), an HR investigator will nearly always need to take a more comprehensive statement from the person.

When eliciting relevant details from the complainant, the HR investigator should utilise questions commencing with the words “who”, “what”, “when”, “where”, “why”, and “how”. Focusing on questions with these words will efficiently extract information fundamental to the investigation of the complaint.

Examples of focused questions are:

- Who are you complaining about?
- What happened?
- When did it happen?
- Where did it occur?
- What did [alleged wrongdoer] do to you?
- What did [alleged wrongdoer] say?
- Was there anyone else present at the time? (if so) Who are they?
- What did you do then?
- Did you tell anyone about this?

The complainant’s responses should be taken down in writing and the statement is formulated through this process. The HR investigator should emphasise to the complainant that the statement is their evidence containing relevant matters within their direct knowledge.

If the particular conduct being complained of may also be breach of a particular workplace law, the HR investigator should pose questions to the complainant that address the elements (of that relevant workplace law) with a view to ascertaining whether it was breached by the alleged wrongdoer. In this instance, with a complaint of workplace bullying, a HR investigator should pose or frame questions that addressed the elements of the Code definition of workplace bullying.

Prudent employers will have written policies in place which inform employees about the unacceptability of workplace bullying, usually replicating the relevant legal definition of workplace bullying and explaining bullying behaviour in plain English. If a workplace bullying policy is in place, it may be simpler to pose or frame questions that address the relevant parts of the workplace bullying policy.

Taking a complainant's statement commits his/her version of the relevant event to writing. It "locks in" the witness to their version of events and also can help preserve their evidence. Not every witness (including a complainant) is happy to be "on the record". If a statement is not taken as early as possible from a witness, that person may have a change of mind about proceeding with a complaint and as a result attempt to deny, or withdraw, an earlier oral account.

Identifying & Interviewing Witnesses

It is normal practice to interview a complainant first before any other potential witness. Once the complainant's comprehensive account is taken (usually by means of a witness statement), if witnesses are identified, the next step would be to (separately) interview witnesses.

If a complainant fails to nominate any witnesses to the complained of event or conduct, consideration should be given as to whether enquiries could nevertheless be made within the relevant work area, in an effort to identify potential witnesses.

If witnesses are nominated by others or identified by the HR investigator's own enquiries, it is important for enquiries to be made with those witnesses before progressing to interview the alleged wrongdoer. A failure to do so would leave an HR investigator open to an accusation of bias by the alleged wrongdoer, in that the HR investigator avoided enquiries with particular witnesses because they may have provided favourable evidence for the alleged wrongdoer.

Once all relevant witnesses are interviewed and the evidence reviewed, the next step is to interview the alleged wrongdoer.

Interviewing the Alleged Wrongdoer

An employer needs to ensure that the investigative process adopted is robust and that it affords the alleged wrongdoer procedural fairness. This includes ensuring that the process complies with any policies or procedures the employer has in place.

A denial of procedural fairness is a common claim by aggrieved dismissed employees. Many unfair dismissal claims are successful because the employer in question failed to afford procedural fairness to the alleged wrongdoer (despite the presence of a valid reason), thus making the dismissal harsh, unjust or unreasonable. It is crucial, therefore, that a HR investigator is mindful of the requirements or principles of procedural fairness, when conducting an investigation.

Procedural fairness is sometimes referred to as 'natural justice'. It has been explained by courts and industrial tribunals in the following terms:

"The relevant principle is that a person should not exercise legal power over another, to that person's disadvantage and for a reason personal to him or her, without first affording the affected person an opportunity to present a case. ... The employee is to be given the opportunity to defend himself or herself "against the allegations made"; that is, the particular allegations of misconduct or poor performance that are putting the employee's job at risk¹⁰."

The industrial relations tribunals have held that procedural fairness will be satisfied if the manner or process of the dismissal and investigation leading up to the dismissal are just.

Putting the allegations to the alleged wrongdoer provides him/her with an opportunity:

- to deny the allegations;
- to put forward evidence which rebuts the allegations;
- to explain the allegations or put forward an innocent explanation; and
- to put forward mitigating circumstances.

Industrial tribunals have held that an opportunity to respond must be provided in a meaningful way; an employer must not merely 'go through the motions' with the outcome already pre-determined and the allegations must be of sufficient particularity to enable a proper opportunity to respond¹¹.

Allegations of wrongdoing are usually put to an accused person in one of two ways:

1. in a personal meeting in which the allegations are dealt with orally; or
2. in writing, with a written response sought.

If a personal meeting is to be held, the alleged wrongdoer should be instructed to attend a meeting by written direction (i.e. contained in a letter). The direction should give sufficient notice of the meeting (e.g. 24 – 48 hours) in order that the alleged wrongdoer can, if so desired, seek advice or arrange a support person. The letter should confirm the general nature of the allegations to be canvassed in the meeting.

Where a matter is serious and dismissal may result, it is recommended that the alleged wrongdoer be informed of his/her entitlement to have a 'support person' present.

¹⁰ See *Nicholson v. Heaven and Earth Gallery Pty Ltd* (1995) 126 ALR 233; see also *Shorten and ors v Australian Meat Holdings* (1996) 70 IR 360; [1996] AIRC 2023 (28 November 1996).

¹¹ For example, see *Fowler v The Australian Red Cross Print N7898* [1997] AIRC 8 (7 January 1997).

At the meeting, the employer should have two representatives – an interviewer and a note-taker/witness.

The interviewer's role is to lead the interview of the alleged wrongdoer and put the allegations to that person. The note-taker/witness is in essence the employer's witness. He/she should take accurate notes of the questions to the alleged wrongdoer and that person's responses. The note-taker/witness should be alert to relevant questions the interviewer may have needed to ask but through oversight failed to do so. The note taker/witness may note down such questions on paper and pass it to the interviewer at an appropriate moment. As an alternative, toward the end of an interview, an interviewer may ask the note-taker/witness if he/she has any questions of the alleged wrongdoer.

On occasion, an interviewee may elect not to answer a question or may provide an answer which in reality does not adequately respond to the actual question asked.

It is important for a HR investigator to recognise when an insufficient response to a question is received and how to manage the situation.

If the interviewee continues to be evasive and fails to provide a direct answer to a question, the interviewer should issue a warning that the interviewee is being provided with an opportunity to respond to the allegation(s) and if he/she chooses not take up that opportunity the employer will be entitled to consider whether the allegation is substantiated in the absence of a response.

On occasion an interviewee may raise an issue or provide an answer that necessitates further investigation (eg. nominating a previously unknown witness).

If the interviewee provides an answer necessitating further investigation:

- (a) the interviewer should consider whether interview should be suspended immediately pending investigation of the matters raised or whether other aspects of investigation, unrelated to the matters raised, could be put to the interviewee prior the interview being suspended;
- (b) the interviewee should be informed that once the enquiries are made, the interview process will be recommenced;
- (c) the relevant decision maker of the employer should consider whether the interviewee's employment should be suspended (or the suspension continued) to permit ongoing enquiries without potential interference.

Once the issue raised by the interviewee is investigated, the alleged wrongdoer should be advised of the outcome of the HR investigator's enquiries. If relevant, the alleged wrongdoer's response may need to be sought (eg. if the issue raised by that person was found to be false).

Care must be exercised when dealing with a union representative who has attended, or is seeking to attend, the meeting at the alleged wrongdoer's request. The *Fair Work Act 2009 (Cth)* (FW Act) through its stated objects recognises an employee's right to be represented at work and the right to freedom of association. Any attempt to confine a union representative's role in an interview to that of mere observer or support person could expose the employer to a claim under the general protections provisions of the FW Act. That does not mean that a union representative is free to engage in inappropriate behaviour (eg. table thumping, shouting or swearing). Reasonable behavioural ground rules should be applied to all participants in the meeting from the outset.

PHASE 6

Making a Decision

Once the interview process is completed, the employer must properly consider the alleged wrongdoer's response(s) together with the whole of the evidence gathered. The employer should make its decision based on all the evidence available to it at the time and determine whether the allegations have been substantiated.

If the HR investigator is not also assigned the responsibility of overall decision maker by the employer, he/she will need to prepare a report about the investigation to the relevant decision maker.

Findings will be necessary with respect to each allegation. Each finding will be one of the following.

- 1. The allegation is substantiated** – i.e. the alleged incident did occur
- 2. The allegation is unsubstantiated because of a lack of evidence** – i.e. The employer is not able to form a view about whether the incident occurred or did not occur
- 3. The allegation is disproven** – i.e. the evidence demonstrates that the incident did not occur or the evidence demonstrates that the allegation is false

An employee's contract of employment with his or her employer contains an implied duty not to commit misconduct. Under the common law, serious misconduct will justify the dismissal of an employee. Common law misconduct encompasses such behaviour as: insolence, abusive language, drunkenness, physical assault, sexual impropriety, disobedience, wilful disregard of reasonable and lawful instructions, and incompetence. It can also include a serious breach of a workplace policy.

The FW Act also defines "serious misconduct"¹². It states that "serious misconduct has its ordinary meaning" (i.e. common law meaning) and then goes on to provide a series of inclusive examples of serious misconduct for the purpose of the definition. Importantly for an investigation of workplace bullying, the FW Act definition includes "conduct that causes serious and imminent risk to the health or safety of a person". Depending on the circumstances of the matter being investigated, workplace bullying could satisfy that definition.

Issues of Proof

An employer will need to be mindful of the 'standard of proof' applicable to a determination of the evidence.

In order for a determination as to whether the offending (mis)conduct occurred, the applicable standard of proof is the balance of probabilities. In other words, the employer will need to ask itself, based on the evidence, whether it was "more probable than not" that the offending conduct occurred.

In the case of a breach of workplace policy, it is important to be able to prove that the employee was aware of the contents of the policy and the (disciplinary) consequences of non-compliance. This can be proved in a number of ways; eg. production of acknowledgment forms signed by the person following training about the policy, a statement from a manager who delivered training on the policy to the alleged wrongdoer, and/or direct admissions from the alleged wrongdoer in an interview.

Even if the alleged wrongdoer fails to respond to allegations put to him/her, the decisions of the industrial relations tribunals have made it clear that an employer is entitled to make a decision in the absence of a response providing that the employee had been provided with an opportunity to respond.

On occasion, a HR investigator may be faced with a dishonest response by an alleged wrongdoer. An employee owes a duty to his/her employer to be honest in his dealings with it. Dishonesty by an alleged wrongdoer during an investigation will destroy the relationship of trust and confidence which is an integral part of the employment relationship. The industrial relations tribunals have held that a failure to answer reasonable enquiries honestly will form a valid reason for a termination of itself, independent of the actual issue under investigation.

¹² It should be recognised that the statutory definition of serious misconduct sits alongside but does not replace the common law meaning.

PHASE 7

Outcomes of an HR Investigation

Taking Necessary Action

If an allegation subject of the workplace investigation is found to be substantiated, the employer will need to decide the disciplinary action that is appropriate in the circumstances.

In the case of misconduct or a breach of a workplace policy, the employer will need to take account of the gravity of the wrongdoer's actions and any mitigating circumstances (e.g. unblemished prior disciplinary record, length of service, proximity to retirement, etc.) before deciding the appropriate disciplinary action.

Disciplinary options open to an employer include:

- Informal counselling
- Formal warning
- Demotion
- Transfer
- Dismissal

If mitigating circumstances or relevant personal economic factors are present (eg. strong remorse or the employee being the sole breadwinner for a family unit), the employer should consider whether dismissal action (rather than another disciplinary option) would be harsh in the circumstances.

Unsubstantiated Allegations

If all allegations the subject of the workplace investigation are not substantiated, the employer will need to inform the complainant and the alleged wrongdoer of that outcome. Such notification should be confirmed in writing. To assist the complainant's understanding, it is recommended that it be emphasised that his/her complaint was not disbelieved but simply that the evidence was not sufficient to substantiate the complaint, thus the employer is not able to take any disciplinary action in the circumstances.

Both the complainant and the alleged wrongdoer should be reminded that discussions and communications pursuant to the investigation will remain confidential and must not be discussed with others.

If an allegation the subject of the HR investigation were found to be false, a separate workplace investigation / disciplinary process would need to occur.

PHASE 8

Post Investigation Matters

It is important that an employer properly manages its workforce to prevent “aftermath behaviour” following a workplace investigation. Employers should be mindful that one or more employees may become disenchanted with the outcome of the investigation.

A complainant may be dissatisfied with a finding of unsubstantiated allegations or the type of disciplinary action taken by the employer. Similarly, the employee subject to the investigation may be aggrieved with a finding of wrongdoing.

Other employees may empathise with either the complainant or the person subject of the allegation, and through a misguided sense of loyalty attempt to create a hostile work environment in retaliation for a perceived injustice.

The circumstances may call for a written memo to be issued to all or particular employees reminding them of their workplace obligations and the consequences of particular unacceptable conduct. Refresher training in particular workplace policies about workplace bullying may be warranted.

As a matter of best practice, a review process should be undertaken at the conclusion of a workplace investigation. If the workplace investigation revealed flaws in employment contracts or workplace policies, revision of those documents should occur.

If a claim is commenced by an aggrieved employee all relevant material pursuant to the workplace investigation and decision-making process should be collated. If the employer has an appointed legal advisor, such person should be notified of the claim as soon as possible to enable availability for relevant court or tribunal appearances to be confirmed.

SAMPLE INVESTIGATION PLAN

WORKPLACE BULLYING

ALLEGATION/CONDUCT

Allegations/ conduct to be investigated	Issues for investigation	Relevant or potential breach pertaining to each allegation (eg. breach of workplace legislation, a breach of the employee's common law obligations)	Proofs/ facts in issue (eg. necessary elements making up definition of workplace bullying that need to be addressed in the witness's evidence)	Tasks
<p>Allegation 1: That from on or about the [Date of issue of new concrete truck to Nigel Smithson], Alan Walker engaged in a pattern of adverse treatment of Nigel Smithson which often included disparaging comments in front of other Acme truck drivers.</p> <p>The comments were to the effect that Nigel was a sycophant who was issued a new concrete truck because he grovelled to management.</p> <p>Comments such as "brown noser" and allegations of "sleeping with the boss" were commonly made by Alan Walker.</p>	<p>Ascertain whether other employees witnessed the conduct.</p> <p>Ascertain whether witnesses support the allegation.</p> <p>Ascertain whether Alan admits to the conduct.</p>	<ul style="list-style-type: none"> • The Safe Work Australia draft Code of Practice Preventing and Responding to Workplace Bullying • Acme Trucking Workplace Bullying Policy • Common law misconduct 	<p>That Alan said the words and/or behaved in the way complained of.</p> <p>That the conduct complained of:</p> <ul style="list-style-type: none"> • Constituted repeated, unreasonable (bullying) behaviour directed towards a worker or a group of workers, that created a risk to health and safety, to Nigel; or • Breached the Acme Workplace Bullying Policy 	<p>Prepare a list of truck drivers employed by Acme since [Date of issue of new concrete truck to Nigel Smithson].</p> <p>Interview Nigel and take a comprehensive statement from him. (initial step)</p> <p>Consider whether Alan should be suspended pending completion of the investigation.</p> <p>Interview other relevant witnesses nominated by Nigel or identified through other means.</p> <p>Put the allegation to Alan in an interview, together with all relevant evidence (eg. corroborating statements of other witnesses).</p>

Allegations/ conduct to be investigated	Issues for investigation	Relevant or potential breach pertaining to each allegation (eg. breach of workplace legislation, a breach of the employee's common law obligations)	Proofs/ facts in issue (eg. necessary elements making up definition of workplace bullying that need to be addressed in the witness's evidence)	Tasks
<p><u>Allegation 2:</u> That from on or about the [Date of issue of new work Ute], Alan Walker engaged in a pattern of adverse treatment of Nigel Smithson which often included disparaging comments in front of other Acme truck drivers. The comments were to the effect that Nigel was a sycophant who was issued the new work ute because he grovelled to management.</p>	<p>Ascertain whether other employees witnessed the conduct.</p> <p>Ascertain whether witnesses support the allegation.</p> <p>Ascertain whether Alan admits to the conduct.</p>	<ul style="list-style-type: none"> • The Safe Work Australia draft Code of Practice Preventing and Responding to Workplace Bullying • Acme Trucking Workplace Bullying Policy • Common law misconduct 	<p>That Alan said the words and/or behaved in the way complained of.</p> <p>That the conduct complained of:</p> <ul style="list-style-type: none"> • Constituted repeated, unreasonable (bullying) behaviour directed towards a worker or a group of workers, that created a risk to health and safety, to the Nigel; or • Breached the Acme Workplace Bullying Policy 	<p>Prepare a list of truck drivers employed by Acme since [Date of issue of new Ute to Nigel Smithson].</p> <p>Take details from Nigel about this allegation when taking an initial statement from him.</p> <p>Consider whether Alan should be suspended pending completion of the investigation.</p> <p>Interview other relevant witnesses nominated by Nigel or identified through other means.</p> <p>Put the allegation to Alan in an interview, together with all relevant evidence (eg. corroborating statements of other witnesses).</p>

Allegations/ conduct to be investigated	Issues for investigation	Relevant or potential breach pertaining to each allegation (eg. breach of workplace legislation, a breach of the employee's common law obligations)	Proofs/ facts in issue (eg. necessary elements making up definition of workplace bullying that need to be addressed in the witness's evidence)	Tasks
<p>Allegation 3: In the afternoon of 4.00PM on Friday [date] when Nigel Smithson was washing his concrete truck at the Brigadoon plant, he was approached by Alan Walker in an abusive manner. It is alleged that Alan:</p> <ul style="list-style-type: none"> Used abusive terms such as "brown noser", "bastard" and accused Nigel of being given rostered overtime on Saturdays because in essence he grovelled to management. 	<p>Ascertain whether other employees witnessed the conduct.</p> <p>Ascertain whether witnesses support the allegation.</p> <p>Ascertain whether Alan admits to the conduct.</p>	<ul style="list-style-type: none"> The Safe Work Australia draft Code of Practice Preventing and Responding to Workplace Bullying Acme Trucking Workplace Bullying Policy Common law misconduct 	<p>That Alan said the words and/or behaved in the way complained of.</p> <p>That the conduct complained of:</p> <ul style="list-style-type: none"> Constituted repeated, unreasonable (bullying) behaviour directed towards a worker or a group of workers, that created a risk to health and safety, to the Nigel; or Breached the Acme Workplace Bullying Policy 	<p>Prepare a list of truck drivers employed by Acme since [Date of issue of new Ute to Nigel Smithson].</p> <p>Take details from Nigel about this allegation when taking an initial statement from him.</p> <p>Consider whether Alan should be suspended pending completion of the investigation.</p> <p>Interview other relevant witnesses nominated by Nigel or identified through other means.</p> <p>Put the allegation to Alan in an interview, together with all relevant evidence (eg. corroborating statements of other witnesses).</p>

- Verbally threatened violence to Nigel Smithson by use of threats such as “knock your block off”.
- Assaulted Nigel by grabbing him forcefully to the front of his shirt and forcefully shoving him backwards into the side of his truck.
- Further assaulted Nigel by forcefully shoving him to the chest immediately prior to walking away.

SAMPLE RUNNING SHEET

WORKPLACE BULLYING

The Running Sheet

This document is intended as a generic guide for HR professionals and managers. It is provided as a sample of what an investigation running sheet may contain during an HR investigation. This document is not intended to take the place of specific legal advice and should not be relied upon as such.

For HR investigations of a wider scale a “running sheet” will be a useful tool for the day-to-day management of the investigation. A running sheet will show who did what and when. It will be particularly useful where:

- there are a number of tasks to be performed by more than one HR investigator or a team of HR investigators;
- there are interviews or inquiries required of multiple witnesses;
- there are inquiries to be conducted about a number of allegations;
- there is a change in the HR investigator with the overall responsibility for the investigation;
- there is a turnover of HR investigators assisting the overall investigation;
- the HR investigation is protracted.

A running sheet may be divided into a number of columns that deal with:

1. The date a task is assigned
2. A description of the task
3. The event related to the task
4. The HR investigator who is assigned the task
5. The expected timeframe for the completion of the task
6. The date of completion of the task
7. Notes pertaining to the completed task

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Date	Task	Event	Responsible Investigator	Time Frame	Completed	Notes
[date]	Interview Nigel Smithson Take statement from Nigel Smithson outlining the details of his complaint	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Manager Melanie Wilson	Within 24 hours	[date]	Comprehensive statement taken containing allegations of three instances of workplace bullying. The initial two instances of bullying were systemic over a period of time. The third instance occurred on a particular date. Nominates Rex Jorgensen & Norm McQueen as potential witnesses of 3 rd incident. Nominates Tom Peters as having called out to Alan Walker that his wife was on the phone, causing Walker to interrupt his confrontation with Smithson.
[date]	Interview truck driver Rex Jorgensen about alleged incident of [date] involving Nigel Smithson being threatened & pushed by Alan Walker Ascertain Rex Jorgensen's general knowledge of alleged workplace bullying over a prolonged period.	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Officer Steve	1 day	[date]	Comprehensive statement taken. Witness corroborates that Alan Walker confronted Nigel Smithson. Evidence of shouting by Walker at Smithson. Evidence that Walker forcibly took hold of Smithson's shirt & shoved him backwards.

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Date	Task	Event	Responsible Investigator	Time Frame	Completed	Notes
[date]	Interview Nigel Smithson Take statement from Nigel Smithson outlining the details of his complaint	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Manager Melanie Wilson	Within 24 hours	[date]	Comprehensive statement taken containing allegations of three instances of workplace bullying. The initial two instances of bullying were systemic over a period of time. The third instance occurred on a particular date. Nominates Rex Jorgensen & Norm McQueen as potential witnesses of 3 rd incident. Nominates Tom Peters as having called out to Alan Walker that his wife was on the phone, causing Walker to interrupt his confrontation with Smithson.
[date]	Interview truck driver Norm McQueen about alleged incident of [date] involving Nigel Smithson being threatened & pushed by Alan Walker Ascertain Norm McQueen's general knowledge of alleged workplace bullying by Alan Walker against Nigel Smithson over a prolonged period.	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Officer Steve	1 day	[date]	Comprehensive statement taken. Witness corroborates that Alan Walker confronted Nigel Smithson. Evidence of shouting by Walker at Smithson. Evidence that Walker forcibly took hold of Smithson's shirt & shoved him backwards. Norm McQueen nominates Tom Peters as having called out to Alan Walker that his wife was on the telephone.

Date	Task	Event	Responsible Investigator	Time Frame	Completed	Notes
[date]	<p>Interview truck driver Tom Peters (mentioned by Rex Jorgenson as potential witness to 3rd bullying incident)</p> <p>Ascertain Tom Peters' knowledge about alleged 3rd bullying incident.</p> <p>Ascertain Tom Peters' general knowledge of alleged workplace bullying by Alan Walker against Nigel Smithson over a prolonged period.</p>	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Officer Felicity	1 day	[date]	[notes]
[date]	<p>Prepare letter of suspension for Alan Walker</p> <p>Suspend Alan Walker on full pay pending outcome of investigation of Smithson complaint.</p>	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Manager Melanie Wilson	Immediate	[date]	<p>Alan Walker suspended at completion of shift.</p> <p>Letter of suspension handed to Walker.</p> <p>HR Officer Mike was present at time.</p>

Date	Task	Event	Responsible Investigator	Time Frame	Completed	Notes
[date]	Prepare a list of truck drivers employed by Acme since [Date of issue of new concrete truck to Nigel Smithson].	Interview the drivers separately to ascertain whether they can corroborate the complaint of Nigel Smithson. Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Officers Steve and Mike	3 days	[date]	Statements taken from: [name] [name]
[date]	Arrange meeting with Alan Walker for interview about allegations of Smithson Prepare and forward letter to Alan Walker at his residence.	Investigation of complaint of workplace bullying by Nigel Smithson against Alan Walker	HR Manager Melanie Wilson	Within 48 hours	[date]	Letter directs Walker to attend meeting at HR at [time] on [date] about allegations. Letter invites Walker to bring support person.

SAMPLE COMPLAINANT'S STATEMENT WORKPLACE BULLYING

STATEMENT

Nigel Smithson states:

1. I am 35 years of age. I have been employed by Acme Trucking Pty Ltd (Acme) from July 2010 as Truck Driver. Acme is a concrete truck business and is owned by Adam Jones and Eve Jones.
2. I am based at the Brigadoon concrete plant. My job involves driving Acme's concrete trucks from the plant and depositing concrete at various construction sites that have ordered concrete from Acme. There are about 5 truck drivers from Acme that are based at the Brigadoon plant.
3. I know Alan Walker. He is the senior Truck Driver for Acme at the Brigadoon plant. He was working for Acme when I was first employed by the company. I would describe Alan as having a strong personality and very outspoken.

Comments about assignment of new truck

4. About 12 months ago I was assigned a new concrete truck by Adam Jones.
5. About this time Alan Walker started making comments to me such as:

"Guess who's got a new truck."

"Nigel's sleeping with the boss to get ahead."

"Nigel's the number one brown noser around here."

"Be careful guys, there's no telling what Nigel's prepared to do to get ahead."
6. Sometimes Alan's comments were said in front of other Acme drivers in the muster room each morning before driving jobs were assigned. A lot of times the other drivers laughed at me when Alan was making his comments. At the time I would feel very embarrassed and uncomfortable. I found Alan's comments hurtful. I tried to make out that his comments did not affect me by laughing along with the others at times.
7. Because Alan was the senior Truck Driver at the plant and a bit of a ring leader of the other drivers, I did not know what I could do to get him to stop making hurtful comments.

Comments about assignment of new Ute

8. About 6 months ago Adam Jones issued me with a new HILUX work Ute that I could keep at home and drive to and from work each day.
9. I remember Alan did not appear to like me getting the ute because he started making insulting comments to me in front of the other drivers. I remember one morning in the muster room, Alan said, "We can't all kiss the boss's backside to get a new work Ute".
10. I recall the other truck drivers started to distance themselves from me then. I was no longer invited to have a beer with them after work on a Friday afternoon. I had no issue with any of the other truck drivers. I put my treatment by them down to Alan's insulting comments in front of them in the muster room.

Incident where pushed against truck

11. At about 4:00PM on last Friday [date] I was at the Brigadoon plant. I had completed my jobs for the day and I was washing my truck as I always do on a Friday afternoon.
12. I saw Alan walking to me from the muster room. He was walking quickly and looked angry. He shouted out, "Hey brown noser, you've done it this time."
13. He walked up close and was face to face with me. He looked extremely angry and was scowling. He was probably about 30 centimetres from me. I said, "What's wrong?"
14. He said, "You've been brown nosing to Adam again, haven't you?"
15. I said, "I don't know what you're talking about."
16. He said, "Adam just phoned me and said that you're to be given rostered Saturday overtime from now on."
17. He then said, "You bastard. You've gone to the boss and stole my Saturday overtime."
18. I said, "I don't know what you're talking about. I haven't gone to Adam at all."
19. Then Alan grabbed my shirt with both hands to the chest area and pushed me hard against the truck. Alan put his face about a couple of centimetres from my face and said, "I oughta knock your block off here and now."
20. I said, "Leave me alone. I haven't done anything."
21. I then heard someone call out from the direction of the muster room, "Hey Alan, phone call. Your wife's on the phone." I recognised the voice as belonging to Tom Peters.
22. Alan stared into my eyes for a few seconds and then said, "You're lucky my missus called, otherwise you'd be lying flat on your back right now."
23. Alan then gave me a hard shove to the chest with both hands and walked off to the muster room.
24. I could see that truck drivers, Rex Jorgensen and Norm McQueen were standing outside the muster room at the time. They were looking in my direction and appeared to have been watching what had happened.
25. I was upset and shaking because of what had just happened to me. I decided to leave the worksite straight away.
26. Over the weekend, I thought a lot about what had happened. I felt sick in the stomach and did not feel like going back to work on Monday.
27. On Monday morning [date] I called Adam Jones whilst I was on my way to work. We met at the Brigadoon McDonalds restaurant and I told him everything that had happened to me. Adam asked me make a statement about everything that Alan had done to me.

28. I have made this statement of my own free will. I have read this statement before signing it. The contents of this statement are true and correct to the best of my knowledge.

Nigel Smithson
[date]

SAMPLE SUSPENSION LETTER WORKPLACE BULLYING

COMPANY LETTERHEAD

Confidential

[Date]

[Employee's full name]

[Employee's address]

[Employee's Suburb, State & Postcode]

Dear [Employee's first name],

SUSPENSION OF YOUR EMPLOYMENT

The purpose of this letter is to confirm the suspension of your employment on full pay effective immediately. The basis for the suspension is alleged misconduct.

The alleged misconduct is particularised as follows:

1. That from on or about the [date of issue of new concrete truck to Nigel Smithson], you engaged in a pattern of adverse treatment of Nigel Smithson which often included disparaging comments in front of other Acme truck drivers. Many of the comments were to the effect that Nigel Smithson was a sycophant and was issued a new concrete truck because he grovelled to management.
2. That from on or about the [date of issue of new work ute to Nigel Smithson], you engaged in a pattern of adverse treatment of Nigel Smithson which often included disparaging comments in front of other Acme truck drivers. Many of the comments were to the effect that Nigel Smithson was a sycophant and was issued a new work ute because he grovelled to management.
3. That about 4.00PM on Friday [date] when Nigel Smithson was washing his concrete truck at the Brigadoon plant, you approached Nigel Smithson in an abusive manner. It is alleged that you:
 - used abusive terms such as "brown noser", "bastard" and accused Nigel of being given rostered overtime on Saturdays because in essence he grovelled to management;
 - verbally threatened violence to Nigel Smithson by use of threats such as "knock your block off";
 - assaulted Nigel by taking hold of him forcefully to the front of his shirt and pushing him backwards into the side of his truck;
 - further assaulted Nigel by forcefully shoving him to the chest immediately prior to walking away.

These are serious allegations, which if substantiated would amount to a serious breach of your employment obligations, in particular:

- a breach of our [workplace bullying] policy; and
- Misconduct.

We intend to investigate the allegations thoroughly. To enable the conduct of a proper investigation we consider it necessary to suspend your employment pending the completion of the investigation. Accordingly, we advise that you are stood down (suspended) from your normal duties until otherwise advised.

While under suspension:

1. You are not to attend the workplace except as directed.
2. You must not contact any other employee (either directly or indirectly), except me, or if I am not available, another member of the HR department;
3. You must remain contactable, and be available to attend a meeting with us, during working hours;
4. You must notify us immediately of a change of your contact details (including your residential address) during the suspension period.

At an appropriate point in our investigation, we will arrange a meeting with you for the purpose of seeking your response to the allegations. You will be entitled to bring a support person with you to such a meeting.

At the conclusion of the investigation, if the allegations are found to be substantiated it is only fair to inform you that disciplinary action will likely result. Disciplinary action could include the termination of your employment.

We assure you that you will be afforded every fairness throughout this investigation and at this point in time no view has been formed about the outcome of the investigation.

If you have any questions about this process, please contact [insert details of contact person] on [telephone number].

Yours sincerely
ACME PTY LTD

[Name]
[Job Title]

SAMPLE

WITNESS INTERVIEW GUIDE

WORKPLACE BULLYING

Why Interview a Witness?

If an employee is nominated or identified as a witness to workplace bullying, it is important for enquiries to be made with that person before seeking to interview the alleged wrongdoer. A failure to do so will leave a HR investigator open to an accusation (by the alleged wrongdoer) of bias or tardiness by the HR investigator; eg. an allegation that the HR investigator avoided enquiries with particular witnesses because they may have provided favourable evidence for the alleged wrongdoer.

If a complainant fails to nominate any witnesses to the complained of event or conduct, depending on the circumstances of the matter, consideration should be given as to whether enquiries should be made nevertheless within the relevant work area, in an effort to identify potential witnesses.

Arranging an Initial Meeting

Once an employee is nominated or identified as a person who may be able to provide information relevant to the investigation of the complaint (i.e. a witness) the HR investigator will need to arrange a meeting with that person.

In order to ensure the integrity of the HR investigation is maintained and that it is not compromised by an unwitting or deliberate leak of information, a witness should not be informed of anything more about the investigation than is necessary to obtain the relevant information from him/her.

A meeting can be arranged by any method of communication (eg. telephone contact, email, letter etc.). Prior to making contact with the witness, it is recommended that the employee's manager is contacted as a courtesy and informed that HR will be contacting the employee as part of an HR investigation.

Initial Contact by Telephone

The following is an example of initial contact with the witness by telephone:

"Hello [witness name], it is Melanie Wilson of the HR department here. I am conducting an investigation into a complaint of workplace bullying by an employee and you have been nominated as a potential witness. I have been informed that you may have particular knowledge which is relevant to aspects of the complaint.

What that means is that I will need to meet with you privately as soon as practicable and ask you a few questions about what I have been told by the person making the complaint. Could you please attend my office at the HR department at [time] today? Everything will be explained then. I have already spoken with your manager and he knows you will be coming to a meeting with me. To allay any concerns you may have, I want to be clear that you have not been nominated as having done anything wrong.

I need to also be clear that you must not discuss this matter with anyone else. If you have any questions, you should direct them to me or your manager."

Meeting with a Witness

The meeting should take place at an appropriate private location for the interviewing of witnesses; eg. HR department office, head office or other suitable location.

The HR Investigator will need to introduce him/herself to the witness and explain the reason for the meeting. For example:

“Thank you for attending [witness name]. As I explained earlier, I am investigating a complaint of workplace bullying. The complaint is by [name] against [name].

Workplace bullying is a serious matter. As an employer we are obliged to investigate all complaints of workplace bullying.

Before I start, I need to ask you whether you have you spoken with anyone else about this matter.”

Discussing the detail of a workplace bullying complaint may prove distressing to some. A HR investigator will need to be mindful of the employer’s duty not to expose employees to a risk of injury (including psychological injury). If a witness becomes emotionally upset during the giving of the statement, it may be necessary to take one or more short breaks in order for the witness to compose him or herself.

If an employee has been nominated as having witnessed serious physical contact by the alleged wrongdoer (eg. a serious workplace ‘initiation’ prank upon an apprentice) the HR investigator should let the witness know at the start that the complaint involves allegations of graphic physical contact. The HR investigator should then ascertain whether the witness has any objection to discussing the allegations.

For example:

“Because you have been nominated as a witness, it will be necessary for me to advise you of the allegations in order to ascertain whether you are in fact a witness, and if so, ascertain what you actually know about the circumstances of the allegations. The allegations may be considered by some to be graphic in nature and include an allegation that the [complainant] was stripped naked before being tarred and feathered. Before I go any further, I need to ascertain firstly whether you are okay for me to discuss the allegations with you.”

It should be borne in mind that such a preliminary enquiry of the witness normally would be made only for allegations of a graphic and potentially distressing nature. Such an enquiry would not normally be necessary for alleged physical contact of a less graphic nature.

If a witness indicates that he/she is not prepared to discuss the allegations, the HR investigator should ask the witness the reason for their non-preparedness. It is important that the investigator understands whether the refusal relates to a duty of care issue (eg. fear of retribution) or the witness is simply being uncooperative. In the latter circumstance, the HR investigator may need to consider whether a direction should be issued of the basis of the employee’s duty of cooperation. The employee’s response will guide the HR investigator.

Informing the Witness of the Allegations

The following is an example of informing a witness of a workplace bullying allegation.

“Company truck driver, Nigel Smithson has complained that another company truck driver, Alan Walker has bullied him at work over a 12 month period from on or about [date] culminating in an incident last Friday.

Nigel has said that Alan Walker has regularly made disparaging comments about him in front of other truck drivers such as:

- “Guess who’s got a new truck?”
- “Nigel’s sleeping with the boss to get ahead.”
- “Nigel’s the number one brown noser around here.”
- “Be careful guys, there’s no telling what Nigel’s prepared to do to get ahead.”

Nigel has also provided details of an incident last Friday that he alleges occurred about 4:00PM. Nigel said the incident occurred when he was confronted by Alan Walker when washing his truck. Nigel said that he saw you and fellow truck driver Norm McQueen standing outside the muster room at the time apparently watching what was happening.

Obtaining the Witness's Version

The HR investigator should use a process of “question and answer” to test the witness’s knowledge and to elicit details. Often questions commenced by the words “who”, “what”, “when”, “where”, “why”, and “how” are useful. Focusing questions with such words can assist to efficiently extract information fundamental to the investigation of the complaint. The HR investigator should make notes of the witness’s responses to questions.

The following are focussed questions that could be asked in the above example:

How would you describe Alan Walker’s relationship with Nigel Smithson in the workplace?

How would you describe Alan Walker’s treatment of Nigel Smithson in the workplace?

Have you ever witnessed Alan Walker making disparaging comments about Nigel Smithson?

What were those comments? When were those comments made?

Who was present at the time?

Was Nigel Smithson present?

Did Nigel say anything in response?

At about 4:00PM on last Friday [date] did you witness Alan Walker confront Nigel Smithson whilst Nigel was washing his truck?

Where were you at the time?

Was anyone else watching the confrontation?

What did you see happen?

Was Alan shouting at Nigel?

What was he shouting?

Did Alan grab hold of Nigel?

Please describe how Alan grabbed hold of Nigel?

Did it look like Nigel was in fear of his safety?

Of those looking on, did anyone say or do anything?

Did Nigel look upset?

What happened next?”

Taking a Statement

Once a version is taken from the witness, it should be put into a written statement format so that the witness's evidence (i.e. knowledge about the relevant facts) is preserved.

The options available to the HR investigator are to either:

1. Prepare a written statement then and there for the witness to sign; or
2. After the meeting, prepare a written statement based on what the witness has said and have the witness return later to read and sign the statement.

Generally, neither option is better than the other. Whichever option is chosen will mostly come down to personal preference or particular factors present at the time. For example, the witness may have resigned from his/her employment and may not be available to return on another day to sign a statement or there may be concerns about a particular witness's later cooperation.

A sample witness's statement is [available from this website](#).

How to take a Witness Statement

For guidance about how to take a witness statement, see the publication Investigation Manual - Workplace Bullying

Completing the Statement

Once the witness is satisfied that the draft is a true and accurate account of his/her evidence, the witness should be asked to adopt the correctness of the statement by signing it.

The statement should be signed by the witness at the allotted place underneath the final paragraph of the final page of the statement. It is also recommended that the witness be asked to initial each preceding page of the statement (either in the margin or at the bottom). By the witness initialling preceding pages, it will protect against a later claim that pages of the statement were substituted or amended without the witness's permission.

It is recommended that a copy of the statement not be provided to the witness at this stage. The statement is taken as a necessary component of the HR investigation. It is for the employer's benefit; i.e. an action in compliance with the employer's obligation to investigate serious workplace misconduct to ascertain what occurred and to take necessary remedial action if substantiated. If a copy of the statement were provided to the witness (who gave the statement) prior to the investigation's completion, the witness could make an unauthorised disclosure of the statement to other employees or even the alleged wrongdoer. An unauthorised disclosure of the statement could very well compromise the integrity of the investigation.

The witness should be advised not to discuss the matter with other witnesses or other persons inside or outside of the employer's organisation. The witness should be also advised to direct any question about the process directly with human resources or his/her manager.

For example:

“Thank you for your cooperation and assistance today. For operational reasons, I am not able to provide you with a copy of the statement.

You are not to discuss what you have told me about the complaint with anyone else inside or outside of the organisation except with a member of the HR department or your manager. That includes [complainant] or [alleged wrongdoer]. You cannot tell them of our meeting or what we have discussed.

If you are approached or asked about any matter related to the complaint of [complainant] you should advise the person to contact the HR department with their query.

Do you understand that?

If you have any questions about your involvement in this investigation, please direct your enquiry to me.”

Next Step

Once the statement is taken from the witness it should be reviewed and the next step in the investigation plan commenced.

Related Publications

Publication - Investigation Kit - Workplace Bullying

- Investigation Manual - Workplace Bullying
- Alleged Wrongdoer Interview Script - Workplace Bullying
- Sample Complainant's Statement - Workplace Bullying
- Sample Witness Statement - Workplace Bullying
- Sample Investigation Plan - Workplace Bullying
- Sample Running Sheet - Workplace Bullying
- Sample Suspension Letter - Workplace Bullying

SAMPLE WITNESS STATEMENT WORKPLACE BULLYING

STATEMENT

Norman McQueen states:

1. I am 29 years of age. I have been employed by Acme Trucking Pty Ltd (Acme) since May 2010 as a Truck Driver.
2. I am based at the Brigadoon concrete plant. I work Monday to Friday. My job involves driving Acme's concrete trucks from the plant and pouring concrete at various construction sites in the Brigadoon region. There are about 4 or 5 Acme truck drivers based at the Brigadoon plant.
3. I know Alan Walker. Alan works for Acme as a Senior Truck Driver and is also based at the Brigadoon plant.
4. I know Nigel Smithson. Nigel works as a Truck Driver at the Brigadoon plant also.

Attitude of Alan Walker to Nigel Smithson

5. I noticed that Alan's opinion of Nigel appeared to go downhill around about the time that Nigel was issued with a new cement truck to drive. I think it was about 12 months or so ago.
6. I recall Alan started making comments on some mornings in the muster room in front of other truck drivers. Up to that point I had not noticed any ill feeling from Alan to Nigel. The comments were words to the effect of:

"Hey boys, watch out for your jobs. Smithson scored the new truck."

"We've got a brown noser amongst us. Smithson loves kissing the boss's butt."

"Smithson's been sucking up to the boss again."

7. I recall that Nigel was in the room a lot of the time when those comments were being made. A lot of the drivers would burst into laughter when Alan was giving it to Nigel. I did not take it as a joke. It was clear to me that Alan was trying to belittle Nigel.
8. I also recall a time when Nigel was issued with a new Hilux work Ute. I cannot remember exactly what was said but I recall Alan making comments to the effect that Nigel's brown nosing was working because he got the new work Ute. I recall that the comments were often said in the muster room in front of other drivers. I recall that sometimes Nigel was present.

Incident Last Friday [date]

9. I recall an incident that occurred at the Brigadoon plant late last Friday afternoon [date]. It occurred about [time]. I had made myself a cup of coffee in the muster room and was standing outside with Rex Jorgensen who is another truck driver.
10. I could hear Alan Walker talking on the phone inside the muster room. I could not hear what he was saying during the conversation but when he finished, I heard a loud crashing sound like the handset being slammed down. I then heard Alan say loudly, "The bastard. Where is he? I'm gonna kill him."

11. Suddenly, Alan came out of the muster room and said to me, "Where's Smithson? The bastard's stolen our overtime." Alan looked very angry.
12. I assumed that Alan was referring to Nigel Smithson but I did not know what he was talking about, so I just shrugged my shoulders.
13. Alan then said loudly, "There he is."
14. I looked up and saw that Nigel Smithson was hosing down his truck about 50 metres away in the truck washing area.
15. Alan then walked off quickly towards Nigel. I heard him call out something in the direction of Nigel but I could only make out the word "brown noser."
16. I saw Alan walk up to Nigel and stand very close to his face. Alan was shouting at Nigel. I could not make out exactly what was being said but I heard Alan call Nigel a "bastard."
17. Nigel was not doing anything. It looked like he was trying to calm Alan down. I then saw Alan grab Nigel by his shirt front with both hands and push him forcefully against his truck. I was concerned that Alan might hit Nigel.
18. I then heard Tom Peters call out to Alan from the doorway of the muster room that his wife was on the phone.
19. I saw Alan push Nigel hard with both hands to the chest and walk back to muster room.
20. As Alan walked past Rex and I he said, "The brown noser's days are numbered here."
21. I did not say anything to Alan. I was pretty shocked by what I had seen, so rather than hang around and have a beer with the other drivers, I just packed up and left for the day.
22. I have made this statement of my own free will. I have read this statement before signing it. The contents of this statement are true and correct to the best of my knowledge.

.....
Norman McQueen
[date]

ALLEGED WRONGDOER INTERVIEW SCRIPT

About this Script

This document contemplates a meeting being held with the accused employee. It contains a suggested introduction, sample questions and a suggested conclusion.

This document is intended as a guide for HR professionals and managers. It contains suggested wording for a misconduct meeting with an employee accused of workplace bullying.

At the completion of an investigation of alleged workplace bullying, in order to afford procedural fairness to the alleged wrongdoer, the employer should provide that person with an opportunity to respond to the allegations.

Procedural fairness is sometimes referred to as 'natural justice'. A denial of procedural fairness is a common claim by aggrieved dismissed employees.

Allegations of wrongdoing are usually put to an accused person in one of two ways:

- a. In a personal meeting in which the allegations are dealt with orally; or
- b. In writing, with a written response sought.

This document contemplates a meeting being held with the accused employee. It contains a suggested introduction, sample questions and a suggested conclusion. This document is not intended to take the place of specific legal advice and should not be relied upon as such.

THE INTERVIEW

The Introduction

"Good morning. As you are aware, I am Melanie Wilson of the HR Department. Also present is Michelle Johnson of the HR Department.

The purpose for this meeting is to provide you with an opportunity to respond to the complaint of Nigel Smithson that you have bullied him at work over a 12 month period from on or about [date] culminating in an incident last Friday.

This is a potentially serious matter - if the complaint (or allegation) is substantiated it could lead to disciplinary action against you.

You will be provided an opportunity to respond to the allegation(s) against you. Your explanation will be taken into consideration before any decision is made.

If support person is nominated:

Your nominated support person, Ted Stevens, is present with you. Immediately prior to this meeting, I clarified with Ted that his role today is as your support person only. Ted is not here to act as your advocate or to provide answers to allegations on your behalf.

[Question to interviewee] Do you understand that?

If no support person requested:

You have the option of having a support person here with you for this interview. However, you have elected not to have a support person present.

Introduction continues...

Today's meeting is not a court proceeding. It is a meeting between an employer and its employee and it is a step in the investigation process.

I propose to conduct our meeting in a question and answer format. By that I mean, I will put the detail of each allegation to you verbally and invite your response. Depending on what you say in response, I may need to ask you questions that clarify aspects of your answers.

[Question to interviewee] Do you understand that process?

If you need a break or need to go to the toilet at any stage, please let me know so that I can suspend the interview for that purpose.

If the questions and answers are being recorded by writing:

As I have just said, Michelle Johnson is from the HR Department. Michelle's role here today is that of a note-taker and employer's witness. Michelle will write down the questions that I ask and your answers to the questions. Toward the end of the meeting, Michelle may ask some questions about further issues that have arisen because of answers you have provided.

You are welcome to make your own notes during the meeting.

If the questions and answers are being recorded by audio device:

I propose to record our conversation including the questions that I ask and your answers to those questions by means of the audio recording device that you can see on the desk in front of you.

The audio recording device is being used to make an accurate record of the discussions during this meeting. In essence, it is a tool in the HR investigation process.

[Question to interviewee] Are you agreeable to the interview being recorded in this manner?

I now request that all persons present identify themselves in turn for the purpose of the recording. As I have said I am Melanie Wilson of the HR Department. [Next the employer's witness Michelle Johnson would identify herself by name and position, then the interviewee would be asked to identify herself. If a support person were present, he/ she would also be asked to identify him/herself and confirm his/her role in the interview]

[Question to interviewee] Is there anyone in this room who has not identified themselves?

IMPORTANT NOTE about overt audio recording of the interview

Any audio recording of the interview should be made with the interviewee's knowledge and consent.

The use of a hidden (covert) tape recorder to record a conversation is illegal in some Australian jurisdictions. Therefore, it is strongly recommended that a covert recording is never made of an interview with an alleged wrongdoer.

Even if a covert tape recording was permissible in the relevant legal jurisdiction, in a contested unfair dismissal hearing an industrial relations tribunal (eg. the Fair Work Commission) may consider the party making the covert recording to have breached the relationship of trust and confidence that exists in the employment relationship by having covertly recorded the meeting. For example see *Eleanora Jalea v Sunstate Airlines (Queensland) Pty Ltd T/A Qantas Link* [2012] FWA 1360

Michelle may also make some handwritten notes. You are welcome to make your own notes also. Toward the end of the meeting, Michelle may ask some questions based on answers you have provided.

[Question to interviewee] Do you agree that the date today is and the time is ?

Introduction continues...

If you wish to answer a question or if you wish to ask a question to clarify something, please wait until the person speaking is finished. That is so we can avoid people speaking over each other.

At the conclusion of the meeting, I will give you an opportunity to read the notes Michelle has taken and if you agree that they are a true and accurate record of our questions and your answers you will be invited to indicate your agreement by signing the notes.

[Question to interviewee] Do you understand that?

[Question to interviewee] Before we commence, do you have any questions about the process today?

Putting forward the Allegations

As I have said, Nigel Smithson has made a complaint that you have engaged in a pattern of adverse behaviour against him since approximately [date]. I will provide a breakdown of Nigel's allegations shortly.

[Question to interviewee] In your own words can you tell me about your working relationship with Nigel?

[Question to interviewee] Has there ever been what you would describe as conflict between the both of you?

I will now go through the allegations one at a time.

Allegation 1

The first allegation relates to adverse treatment of Nigel Smithson allegedly by you from on or about the [date of issue of new concrete truck to Nigel Smithson] when he was issued with a new company concrete truck. Nigel has alleged that from about that date period, your attitude to him changed and you commenced making disparaging comments about him to other company truck drivers in his presence. Nigel said that those comments were made in front of other Acme drivers in the muster room before driving jobs were assigned.

Nigel said that a lot of times the other drivers laughed at him when you were making those comments. Nigel said that he felt very embarrassed and uncomfortable. He said he found your comments hurtful.

[Question to interviewee] Can you remember when Nigel was issued with the new concrete truck?

[If the answer is yes] What did you think upon learning that Nigel had been issued with the new truck?

In his statement Nigel said that you have made the following comments in his and other employees' presence:

"Guess who's got a new truck."

"Nigel's sleeping with the boss to get ahead."

"Nigel's the number one brown noser around here."

"Be careful guys, there's no telling what Nigel's prepared to do to get ahead."

[Question to interviewee] Is that correct?

[Question to interviewee] Do you agree generally with Nigel's version?

If the interviewee does not agree with the complainant's version

[Question to interviewee] What do you say occurred?

[Question to interviewee] Was something similar said by you?

[Question to interviewee] Have you ever made disparaging comments of Nigel to other company truck drivers?

If yes or if the interviewee agrees with the complainant's version.

[Question to interviewee] What were those comments?

[Question to interviewee] To whom did you make those comments?

[Question to interviewee] Who else was present?

[Question to interviewee] Why did you make those comments?

[Question to interviewee] When were those comments made?

[Question to interviewee] Do you consider those comments could have been construed by Nigel as offensive?

[Question to interviewee] Do you think those comments could have been upsetting to Nigel?

[Question to interviewee] Do you think other truck drivers who heard those comments could have thought less of Nigel because of your comments?

[Question to interviewee] Do you think it is possible that truck drivers present could have told other truck drivers who were not present about those comments?

If the interviewee denies the conversation but a witness statement was taken which corroborates the complaint, it should be referred to...

I have a witness statement from [name], who is considered a witness in the current HR investigation. I propose to read out aloud [name]'s statement and provide you with an opportunity to comment about what he said.

[Allegations then read out from Jenny Peterson's statement]

[Question to interviewee] Do you agree with [name]'s statement?

[Question to interviewee] Do you have any comment in response to [name] statement?

[Question to interviewee] After hearing [name] comments, do you continue to deny what Nigel has alleged?

[Question to interviewee] Is there anyone that you can nominate as witness who could support what you have said?

If denial continues:

[Question to interviewee] Can you give any explanation as to why two employees would make those allegations against you?

Allegation 2

Turning now to the second allegation.

The 2nd allegation relates to adverse treatment of Nigel Smithson allegedly by you from on or about the [date of issue of new work ute to Nigel Smithson] when he was issued with a new company Hilux work ute.

[Question to interviewee] Can you remember when Nigel was issued with the new work ute?

If so

[Question to interviewee] What did you think upon learning that Nigel had been issued with the new ute?

Nigel said that based on your comments it did not appear that you liked him being issued the new work ute.

[Question to interviewee] Is that correct?

Nigel said you started making disparaging comments to the other drivers about the ute whilst he was present. For example, Nigel said that one morning in the muster room, you said aloud in front of other truck drivers, "We can't all kiss the boss's backside to get a new work ute".

[Question to interviewee] Did you say that?

[Question to interviewee] Do you agree with Nigel's version of what occurred including the conversation? [Alternatively] Did you say other comments similar to that?

If the interviewee agrees with the complainant's version or admits to having made the comment(s):

[Question to interviewee] What were those comments?

[Question to interviewee] To whom did you make those comments?

[Question to interviewee] Who else was present?

[Question to interviewee] Why did you make those comments?

[Question to interviewee] When were those comments made?

[Question to interviewee] Do you agree that what you did and said could have been upsetting or offensive to Nigel?

[Question to interviewee] Do you think other truck drivers who heard those comments could have thought less of Nigel because of your comments?

[Question to interviewee] Do you agree it is possible that truck drivers present could have told other truck drivers who were not present about those comments?

If the interviewee does not agree with the complainant's version:

[Question to interviewee] What part of the statement/version do you not agree with?

[Question to interviewee] What do you say occurred?

[Question to interviewee] Was something similar said by you?

[Question to interviewee] Have you ever made disparaging comments of Nigel to other company truck drivers?

If the interviewee denies the conversation but a witness statement was taken which corroborates the complaint, it should be referred to...

I have a witness statement from [name and job title]. [Name] is considered a witness in the current HR investigation. I propose to read aloud [name's] statement and provide you with an opportunity to comment about what they said.

[Question to interviewee] Do you agree with [name's] statement?

[Question to interviewee] Do you have any comment in response to [name's] statement?

[Question to interviewee] After hearing [name's] comments, do you continue to deny what Nigel has alleged?

[Question to interviewee] Is there anyone that you can nominate as witness who could support what you have said?

If denial continues:

[Question to interviewee] Can you give any explanation as to why two employees would make those allegations against you?

Allegation 3

Turning now to the third allegation.

The 3rd allegation relates to an incident that Nigel said occurred at about 4.00PM on Friday [date]. Nigel has alleged that you confronted him in an aggressive manner and verbally abused him and physically assaulted him.

In his statement Nigel said the following:

“I had completed my jobs for the day and I was washing my truck as I always do on a Friday afternoon.

I saw Alan walking to me from the muster room. He was walking quickly and looked angry. He shouted out, “Hey brown noser, you’ve done it this time.”

He walked up close and was face to face with me. He looked extremely angry and was scowling. He was probably about 30 centimetres from me. I said, “What’s wrong?”

He said, “You’ve been brown nosing to Adam again, haven’t you?”

I said, “I don’t know what you’re talking about.”

He said, “Adam just phoned me and said that you’re to be given rostered Saturday overtime from now on.”

He then said, “You bastard. You’ve gone to the boss and stolen my Saturday overtime.”

I said, “I don’t know what you’re talking about. I haven’t gone to Adam at all.”

Then Alan grabbed my shirt with both hands to the chest area and pushed me hard against the truck. Alan put his face about a couple of centimetres from my face and said, “I oughta knock your block off here and now.”

I said, “Leave me alone. I haven’t done anything.”

I then heard someone call out from the direction of the muster room, “Hey Alan, phone call. Your wife’s on the phone.”

Alan stared into my eyes for a few seconds and then said, “You’re lucky my missus called, otherwise you’d be lying flat on your back right now.”

Alan then gave me a hard shove to the chest with both hands and walked off to the muster room. I was upset and shaking because of what had just happened to me. I decided to leave the worksite straight away.”

[Question to interviewee] Is that correct? Do you agree generally with Nigel’s version?

If the interviewee does not agree with the complainant’s version:

[Question to interviewee] What do you say occurred?

[Question to interviewee] Was something similar said by you?

If the interviewee agrees with the complainant's version:

[Question to interviewee] Why did you make those comments to Nigel?

[Question to interviewee] Why did you grab hold of Nigel?

[Question to interviewee] Why did you push Nigel?

[Question to interviewee] Do you consider those comments could have been construed by Nigel as threatening?

[Question to interviewee] Do you agree that what you said could have been upsetting to Nigel?

[Question to interviewee] Do you agree that Nigel could have been in fear of his safety at the time?

[Question to interviewee] Did you realise at the time you were doing the wrong thing?

[Question to interviewee] Do you agree that the incident could have been witnessed by other employees of Acme?

[Question to interviewee] Do you agree that the incident could have been upsetting to any employee who witnessed it?

[Question to interviewee] Do you agree that the Brigadoon plant is also a worksite for employees of XYZ Corporation?

[Question to interviewee] Do you agree that it is possible that employees of XYZ Corporation may have witnessed the incident?

[Question to interviewee] Do you agree that if the incident was witnessed by employees of XYZ Corporation, that it could reflect poorly on Acme Trucking?

If the interviewee denies the conversation but a witness statement was taken which corroborates the complaint, it should be referred to...

I have a witness statement from Rex Jorgensen. Rex is considered a witness in the current HR investigation. His statement corroborates Nigel's version that a confrontation occurred which involved shouting at and pushing Nigel.

I propose to read aloud [name's] statement and provide you with an opportunity to comment about what he said.

[Allegations then read out from Rex Jorgenson's statement]

[Question to interviewee] Do you agree with Rex Jorgensen's statement?

[Question to interviewee] Do you have any comment in response to Rex's statement?

[Question to interviewee] After hearing Rex's comments, do you continue to deny what Nigel has alleged?

[Question to interviewee] Is there anyone that you can nominate as witness who could support your version?

If denial continues:

[Question to interviewee] Can you give any explanation as to why two employees would make those allegations against you?

[Question to interviewee] Have you ever been involved in any conflict with Rex Jorgenson?

IMPORTANT NOTE

If the employee agrees with the allegations or if the evidence is sufficient to outweigh a denial of the allegations by the interviewee, at some point in the interview the interviewee should be questioned about the employer's policies about workplace bullying.

Even if there is insufficient evidence to substantiate the complainant's allegation(s), it is recommended that the interviewee is questioned about his/her knowledge of the employer's policy about workplace bullying. It may become clear from such questioning whether refresher training about the policy is warranted.

Ascertaining that the interviewee is aware of / understands the relevant WORKPLACE BULLYING policy

[Question to interviewee] Are you aware of the organisation's [workplace bullying] policy?

[Question to interviewee] What is your understanding of that policy?

On the [date] you attended [training, induction, etc.] in that policy. I have an acknowledgement form here that was signed by you as a record of your attendance.

[Question to interviewee] Do you recall that training?

I would like to show you paragraph [detail] of the policy. It sets out examples of the type of conduct that could constitute workplace bullying.

[Question to interviewee] Do you see the examples, "abusive, insulting or offensive language", "deliberately excluding, isolating or marginalising a person", "inappropriate comments about a person", "behaviour or language that frightens, humiliates, belittles or degrades, including criticism that is delivered with yelling or screaming?"

[Question to interviewee] Do you agree that the ["conduct complained of by Nigel"/"your conduct toward Nigel"] could fit within those examples?

I would also like to take you to paragraph [detail] on page [detail] of the policy.

[Question to interviewee] Do you see the part that states that a breach of the policy will result in disciplinary action?

[Question to interviewee] Do you see the part that states that disciplinary action could involve termination of employment?

IMPORTANT NOTE - Suspending the interview for further investigation

On occasion the alleged wrongdoer may put forward information or make a counter claim during an interview about an issue that was up to that point unknown (eg. the alleged wrongdoer nominating a previously unknown witness or asserting an alibi). Depending on the circumstances, such information put forward by the alleged wrongdoer during the interview may require the meeting to be suspended and further inquiries be made by the HR investigator. Where such a course of action is necessary, no decision about the outcome of the complaint against the alleged wrongdoer should be made in the meantime.

A failure to investigate relevant information put forward by the alleged wrongdoer (eg. the identity of a previously unknown witness) could be viewed by a court or tribunal as a denial of procedural fairness.

Suspending the Interview, if further inquiries are necessary

You have raised an issue necessitating separate investigation. I am now suspending this interview in order to investigate the issue(s) you have raised.

At the completion of the investigation of issues you have raised, you will be informed of the outcome. It may be necessary to recommence today's interview and at that time put to you any outstanding issues not canvassed with you today and seek your response. It may also be necessary to put to you issues arising from our inquiries into the matters you have raised and seek your response.

IMPORTANT NOTE

At the time of the interview, the alleged wrongdoer may or may not be under suspension, depending on the circumstances.

If the alleged wrongdoer is already under suspension, consideration should be given to extending the suspension for the duration of further inquiries.

If the alleged wrongdoer is not under suspension, consideration should be given to his/her suspension in order to permit the further inquiries to be made without potential interference.

If suspension to be continued:

I confirm that you remain under suspension and the directions issued when you were initially suspended continue to apply including the direction about not communicating with employees or witnesses whilst this investigation is on foot.

[Question to interviewee] Do you understand that?

Concluding the Interview, if no suspension of interview necessary

I have no further questions that I wish to ask you about the allegation(s). I propose to conclude the interview shortly. However, before I conclude the interview...

[Question to employer's witness] Michelle, is there anything that you wish to ask?

[Question to interviewee] Is there anything you wish to ask?

IMPORTANT NOTE - Giving the notetaker an opportunity to read over the notes

Depending on the speed of the note taker, it will likely be necessary for the interview to be briefly suspended in order for the note taker to complete the notes to have them in a state for presentation to the interviewee. In any event, it is always good practice for the note taker (corroborating HR investigator) and the interviewer (lead HR investigator) to read through the notes to ensure that any mistakes are rectified before providing them for the interviewee's perusal.

If interview recorded in written notes format:

If time at end of interview permits the notes to be completed] As you have observed, Michelle has been taking notes throughout the interview. We are just going to have a short break while the notes are finalised. After the break you will be provided an opportunity to read through the notes of our meeting.

[Question to interviewee] Do you understand that?

Handing over the notes for the interviewee's perusal

Michelle will now hand over a copy of the notes she has taken. You are welcome to read through the notes and if you agree that they are a true record of the interview today, I will ask you to sign them at the end of the final page and initial in the margin of each preceding page.

[Question to interviewee] Do you wish to read the notes?

IMPORTANT NOTE - Giving the interviewee an opportunity to read over the notes

The notes taken by the corroborating HR investigator in the interview are the employer's record of the questions asked and the answers given. An election by the alleged wrongdoer not to read and/or sign the notes, does not of itself impact on the truth or accuracy of the notes. It will be an issue of fact decided by the relevant court or tribunal if the employer's decision were subsequently legally challenged by the alleged wrongdoer.

[After the interviewee has read the notes]

[Question to interviewee] Do you agree that the notes are a true and accurate record of our questions and your answers about the allegation(s)?

If interviewee agrees:

If you agree that the notes are true and correct, please sign at the end of the final page and initial in the margin of each preceding page.

If interviewee does not agree with content of notes:

Which part do you not agree with? Why? What are the words that you say should have been recorded in writing?

IMPORTANT NOTE - Overt audio recording of the interview

There is no legal requirement that the alleged wrongdoer be provided with a copy of the audio tape. The audio recording is the employer's property. It is usually made as the employer's complete record of the discussions that occurred in the interview.

If litigation is commenced against an employer following an employee's dismissal, the person will generally be able to obtain a copy of the audio tape recording through the discovery process.

If the employer has a written policy about providing a copy to the alleged wrongdoer, it should be complied with.

If the alleged wrongdoer is provided a copy of the audio recording and/or transcript, a signed receipt should be obtained to verify that it was provided.

The employer should always retain the original audio recording and have it transcribed in order that it may be later reviewed and provided to a legal advisor if necessary. The original copy should be stored in a secure location.

If interview is recorded by overt audio device:

[Question to interviewee] Do you wish to say anything before I conclude the interview?

Okay, I am now concluding the interview.

[Question to interviewee] Do you agree that the time is ?

IMPORTANT NOTE - Making a Decision

Once the interview process is completed, the employer must properly consider the alleged wrongdoer's response(s) together with the whole of the evidence gathered. If the HR investigator is not also assigned the responsibility of overall decision maker by the employer, he/she will need to prepare a report about the investigation to the relevant decision maker.

Related Publications

Publication

Investigation Kit - Workplace Bullying

- Investigation Manual - Workplace Bullying
- Witness Interview Guide - Workplace Bullying
- Sample Complainant's Statement - Workplace Bullying
- Sample Witness Statement - Workplace Bullying
- Sample Investigation Plan - Workplace Bullying
- Sample Running Sheet - Workplace Bullying
- Sample Suspension Letter - Workplace Bullying

CHECKLIST – RECEIVING A COMPLAINT

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Checklist - Receiving a Complaint

The following checklist is intended to assist a HR investigator following the receipt of a complaint or report about a workplace incident.

Initial Evaluation

- What is being alleged? (eg. sexual harassment, workplace bullying, theft etc.)
- Is a formal investigation necessary? (eg. does the 'complaint' indicate a misunderstanding between employees where mediation or discussion may be more appropriate)
- Who is the complainant? (i.e. the aggrieved person making the complaint)
- If there is no complaint received, who is the informant? (eg. a person who witnessed or "heard about" an incident and then reported it)
- Who is the alleged wrongdoer?
- Is there a single allegation or are there multiple allegations?
- Is an investigation running sheet needed to manage the HR investigation? (eg. where a team of HR investigators is involved)
- Are there any workplace policies that apply to this situation? If so, which ones?
- Are expectations needed to be managed about the outcome?
- Is there a need for further internal personnel to assist with the HR investigation?
- Who is the most suitable person to conduct the HR investigation?
- Will the HR investigator also be the decision-maker about disciplinary outcomes? (i.e. the person who will be making any disciplinary decisions)
- If not, who should be the decision-maker?
- Who else needs to be informed of the complaint/incident? Business Manager/Line Manager?
- Is there any evidence that is needed to be preserved?
- If the parties involved work together in the same team or group, can they continue to do so while the HR investigation is conducted?
- Is it necessary to stand down the alleged wrongdoer with pay pending the outcome of the HR investigation, or relocate the alleged wrongdoer to another team or location within the organisation?
- Have directions been issued to the complainant/witnesses/alleged wrongdoer about the requirement for confidentiality during the investigation process?
- Do any of the parties involved need to be offered access to an Employee Assistance Program (if available)?
- Do the allegations raise any special legal issues, (eg. criminal conduct, police, OH&S, WorkCover)?
- Is there an obligation to make a report to a government authority?
- Is there a need for legal advice before commencing the investigation? Should legal professional privilege apply to the investigation?

The Next Phase

- Is any more information required from the complainant/informant before the HR investigation can commence?
- Preparing an investigation plan.
- Include a breakdown of the allegations or conduct to be investigated.
- Identify any related issues for the HR investigator to be aware of.
- Identify applicable workplace policies or workplace legislation.
- Set out proofs/facts in issue.
- Specify tasks and timeframes.
- Prepare a witness list.
- Prepare questions to ask witnesses.
- Understand how to manage representatives/support persons.
- Who will the HR investigator need to speak to first?

CHECKLIST – TAKING A WITNESS STATEMENT GENERAL INVESTIGATION

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Checklist - Taking a Witness Statement

The following checklist is intended to assist HR investigators with their preparation for interviewing a complainant and/or witness.

- Venue for witness interview determined?
 - Appropriate privacy?
 - Instructions to switch/receptionist for non-interruption from telephone calls?
- Explanation provided as to your role as the HR investigator?
- Explanation of the investigation process?
 - Explanation of how the information obtained will be used?
- If support person present role of the support person explained & understood?
- If complainant explanation of potential outcomes if complaint substantiated or not substantiated?
- Witness's expectations managed?
 - What they say will be kept as confidential as the law permits?
 - The employer has legal obligations to all employees and the options open to it are not without limitation? (e.g. compliance with unfair dismissal laws)
- Explanation of process for taking witness's version/statement?
 - Handwritten notes?
 - Audio recording?
- Obtained the witness's details?
 - Name, address, role in the organisation?
- The HR investigator has recorded:
 - Date and time of interview with witness?
 - Place of interview?
 - Who was present?
 - Role of those present?
- Complete version taken from witness?
 - Focused questions utilised?
 - Who are you complaining about?
 - What happened?
 - When did it happen?
 - Where did it occur?
 - What did [alleged wrongdoer] do to you?
 - What did [alleged wrongdoer] say?
 - Was there anyone else present at the time? (if so) Who are they?
 - What did you do then?
 - Did you tell anyone about this?
 - Inclusion of relevant conversation – if possible in 'first person'?
 - Avoidance of hearsay?
- Managing uncooperative witness
 - If complainant - explained consequences of failure to co-operate may mean that no action able to be taken against alleged wrongdoer?
 - If other witness – considered whether simple reassurance or more formal direction necessary to ensure their cooperation?
- Upon completion – witness signed the statement?

CHECKLIST – INTERVIEWING THE ALLEDGED WRONGDOER GENERAL INVESTIGATION

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Checklist - Interviewing the Alleged Wrongdoer

The following checklist is intended to assist HR investigators with their preparation for interviewing an alleged wrongdoer.

- Venue for interview determined?
 - Appropriate privacy?
 - Instructions to switch/receptionist for non-interruption from telephone calls?
- Place for interviewee and support person to wait prior to commencement of interview?
- Introduction script for the interview prepared?
- Understanding of who will perform primary interview role?
- Understanding of who will perform the corroborator / employer's witness role?
- Understanding of method of recording interview? (eg. in writing or audio recording)
- Breakdown of allegation(s) prepared?
- Understanding of those parts of witness statements relevant to the allegation(s)?
- Relevant parts of complainant & witness evidence extracted into questions to be put to the alleged wrongdoer?
- Understanding of relevant provisions of applicable employment documents? (eg. applicable employment contract, workplace policy(s), enterprise agreement)
- Role of the support person (if in attendance) explained & understood by all attendees?
- Explanation to alleged wrongdoer of the purpose of the interview? (eg. opportunity to respond to allegation(s))
- Warning to be provided to alleged wrongdoer at commencement of interview of possibility for disciplinary action if allegation(s) substantiated?
- Procedure for requesting a break explained?
- Interviewer understands appropriate strategy & approach for dealing with:
 - Refusal to answer questions?
 - Deflective answers?
 - Interviewee becoming emotionally upset?
 - Interviewee claiming "right to silence"?
 - Angry response?
 - Interrupting response?
 - Interjecting support person?
 - Interjecting union representative?
 - Information provided by interviewee necessitating separate verification?
- Understanding of how to suspend interview, if necessary?
- Understanding of how to properly conclude the interview?
- Review of written notes taken by corroborator / employer's witness?
 - Offer to interviewee of opportunity to read notes & sign them?
- Understanding of advice about the next steps in the process to be given to interviewee at conclusion of interview?
 1. If interviewer also decision maker – whether allegation(s) substantiated or not
 - If substantiated – disciplinary outcomes
 - If not substantiated – other outcomes (eg. refresher training in Policies)
 2. If interviewer not decision maker – the process for the making of a decision
 - Eg. forwarding of investigation report to decision maker
- Appropriate person to whom employee queries should be directed about outcome

CHECKLIST – FINALISING THE INVESTIGATION

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FINALISING THE INVESTIGATION

Depending on the circumstances of an HR investigation, an HR investigator may perform either:

1. The dual roles of HR investigator and decision maker, or
2. The role of mere investigator, with decision making as to whether the complaint is substantiated deferred to another person within the employer's organisation.

Whichever the role(s) performed, the following checklist is intended to assist HR investigators with the finalisation of their investigation and, if necessary, their preparation of an investigation report.

Checklist - Finalising the Investigation

Preliminary

- Have all issues in the Investigation Plan been addressed?
- Have all relevant witnesses been interviewed?
- Have all witnesses interviewed signed their witness statements?
- Have copies of all known relevant evidence been obtained? (eg. emails, photographs, computer logs etc.)
- Where necessary, has any relevant evidence been put to witnesses?
- Has the alleged wrongdoer been informed of each relevant allegation and been provided an opportunity to respond to each allegation?

Analysis of the evidence

- Reference to
 - Allegation(s)?
 - Response(s) by alleged wrongdoer?
- Witness evidence consistent with complaint?
- Conflicting evidence?
 - Weight of evidence favours substantiation of allegation(s) on balance of probabilities?
- Conflict in evidence is sufficient to cause “unsubstantiated complaint” determination?
- Allegation(s) substantiated?
 - Yes?
 - No?

Recommendations

- No action (other than correspondence to relevant parties)?
- Improvement to organisational controls (with explanation) as a preventative measure?
 - Recommendation explained?
 - If relevant - Who is to be responsible?
- Informal counselling?
 - Who to be counselled?
 - By whom?
 - About what?
- Disciplinary action?
 - Who to be disciplined?
 - For what?
 - Breach of relevant legislation (eg. Sex Discrimination Act, Fair Work Act 2009, OHS legislation etc.)
 - Misconduct:
 - Disobedience of reasonable and lawful direction
 - Breach of workplace policy(s) (eg. sexual harassment, bullying etc.)
 - Insolence to supervisor or manager
 - Assault or threatened violence
 - Workplace theft or wilful damage to property
 - Prohibited use of alcohol or drugs at work
 - Serious safety breach (including workplace bullying)
 - Intoxication or being under the influence of a drug at work

- Being absent from work without authorisation or reasonable excuse
- Conduct likely to bring the employer in disrepute or conduct adverse to the employer's interests
- Gross incompetence
- Breach of obligation in employment contract
- Other
- Other action?
 - Referral to police?
 - Counselling?
 - Mediation?
 - Memorandum to complainant and/or alleged wrongdoer about behavioural expectations?
 - Refresher training in policies?
 - Voluntary restitution by employee for property damage caused by wilful act or gross incompetence?

WITNESS INTERVIEW FORM

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Witness Interview Form

Before commencing the interview:

- Explain obligations related to confidentiality and how the information taken down may be used.
- Ensure any support person understands he/she is not to speak on behalf of the witness & agrees to confidentiality requirements
- Record details of the formal complaint/witness's version in his/her own words (including relevant conversation)

Complainant/Witness:	Position:
Witness's Manager:	Position:
Interviewing HR Investigator:	Position:
Support Person (if present):	Position:
Location of Interview:	Date:

Version of Witness:

If relevant, documentation provided by complainant/witness
(attach to this document)

If relevant, complainant/witness unable to provide documentation
(list where copies can be obtained from)

I understand this matter is private and confidential and as such should not be openly discussed. I have been advised of the appropriate person to whom I should direct any queries about this matter.

Witness' Name	Witness Signature	Date
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Support Person Name	Support Person Signature	Date
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Lead HR Investigator Name	Lead HR Investigator Signature	Date
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Assisting HR Investigator Name	Assisting HR Investigator Signature	Date
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