Role of lawyers in workplace investigations

Nick Ruskin *K&L GATES*

"The employer is not expected to conduct enquiries with the forensic thoroughness or skills of a policeman or lawyer" (*Schaale v Hoechst Australia Ltd* (1993) 47 IR 249; BC9304666).

This quote is from a 1993 Federal Court of Australia decision and remains the position of the courts today. See for example, the decisions in *Morton v The Transport Appeal Board*[1] and *Rogers v Millennium Inorganic Chemicals Ltd*.[2] However, as will be discussed in this article, the obligations imposed on employers in conducting workplace investigations remain onerous, and what was previously thought to be an effective discharge of an employer's obligations would be unlikely to meet the current standard.

In circumstances of employee misconduct or where an employer receives a complaint (eg bullying, sexual harassment or discrimination) from an employee, it is important that employers conduct effective workplace investigations that take into consideration the principles of procedural fairness and natural justice and other legislative requirements (eg unfair dismissal laws and surveillance laws).

The first step: what to do when a complaint is received

An effective complaint handling process would, in most cases, require a response to any complaint received. However, not all complaints need to be investigated. Whether or not the complaint is investigated will depend on the nature of the complaint.

If the matter is serious and urgent it may require immediate investigation. For example, in cases of bullying, harassment and work health and safety matters there would be a requirement for an investigation to be conducted in order to comply with legislative safety duties. In other cases, less formal processes may be available.

Why conduct workplace investigations?

The circumstances where it is now expected that workplace investigations will be conducted by an employer include:

- where an employee has engaged in misconduct which may result in the termination of their employment;
- where it is a term of the employee's contract that they will not be subject to disciplinary procedures, including dismissal, unless there has been an investigation into any alleged misconduct;
- where a complaint of discrimination or sexual harassment has been made; and
- where there has been conduct which may result in a breach of work health and safety laws.

However, there is no single or universal definition of what constitutes inappropriate workplace behaviour. This is because every place of employment has a different workplace culture. For example, a service station may agree that certain conduct is acceptable whereas an art gallery may find the same conduct is unacceptable.

Therefore, an organisation needs to clearly define what inappropriate behaviour in the workplace is. This may be achieved through consultation with employees.

Assessing the complaint

When a complaint is made, it should be assessed to ascertain:

- What should be done with the complaint?
- Who should deal with it?
- Who needs to be informed about it?
- What immediate response or action (if any) is required?

Where an organisation has a complaint handling procedure, the steps in that procedure should be followed.

Circumstances warranting an investigation

An investigation may be necessary in order to respond appropriately, or to comply with internal or external obligations.

There are two circumstances where an investigation may be required:

- where a complaint is made, usually by an employee about the behaviour of a co-worker (eg complaints of bullying, sexual harassment and discrimination); or
- where management becomes aware of a situation which requires investigation (eg breaches of policy, breaches of confidentiality and theft).

There is an important distinction between the two scenarios that will affect how investigations are prepared and carried out. Importantly, internal obligations in relation to commencing in these circumstances may be set out in complaint handling or disciplinary policies of the organisation and these must be complied with when making a decision to investigate.

Legal professional privilege

Regardless of whether the investigation is internal or external, a decision needs to be made about whether the investigation can and should be established under the protection of legal professional privilege. This, of course, should take place before any document is created, to ensure maximum protection. If inhouse counsel is engaged to carry out the investigation so as to obtain the protection of legal professional privilege, it will be necessary for him or her to demonstrate a necessary degree of independence from the organisation despite the employment relationship in carrying out the role of investigator. In the circumstances of an investigation, there may be a challenge to the notion that the inhouse counsel has the requisite level of independence. Where doubt exists, external legal advisors should be used.

However, is it necessary to protect an investigation through legal professional privilege, and for how long will that protection last? Often organisational policies that ground the rights and obligations for the handling of complaints (including an investigation) will specify that the outcomes of the investigation, or a summary of them, are to be provided to the parties. If an organisation is to comply with its policies at the end of the investigation process by revealing the findings of the investigation, legal professional privilege is undoubtedly lost because part of the investigation is revealed to third parties which breaks the necessary protection. If that is the case, privilege will apply during the investigation, and if the investigation remains incomplete (eg it stops because the employee has decided to take other steps) then the witness material collected as part of the investigation remains under legal professional privilege.

In the first arbitrated decision[3] made by the Fair Work Commission under the new anti-bullying provisions of the Fair Work Act 2009 (Cth) that took effect on 1 January 2014, an employee alleged that she had been subject to bullying by other employees making complaints about her and by the organisation conducting an investigation about those complaints. The organisation engaged a law firm to investigate the allegations using the protection of legal professional privilege. The results of the investigation were provided to the applicant and to the Fair Work Commission but the full report and evidence were not. The employer in this case relied upon legal professional privilege. It was not challenged because the Fair Work Commission considered that it was able to obtain direct evidence from the applicant and the organisation about the matters contained in the report and therefore the report did not need to be revealed. In the author's view, the results of the investigation were provided to those outside the wall of legal professional privilege and therefore the report lost its protection. It should also be noted that the Fair Work Commission considered the engagement of an external party to investigate the complaint by the other employees was not unreasonable.

Up to a point, there is much to be said for the benefit of engaging lawyers to carry out an investigation in order to obtain the benefits of legal provisional privilege. With the flurry of activity arising from the bullying jurisdiction now vested in the Fair Work Commission, there have been comments by plaintiff lawyers that the barrier provided by legal professional privilege will create unfairness and will be challenged because the investigation will not be entirely independent. It is said that within the walls of legal professional privilege the external investigators can chat happily with the organisation and get an insight into the true picture as painted by the organisation of the issues. The organisation can encourage the investigator as to the way in which the investigator might reach its conclusions, it can peruse a draft report and provide comment on recommendations that might flow from the report. Therefore, one can expect that in the future, complainants who are legally advised will not be content to allow the investigation to be carried out by an external party without an endeavour to obtain assurances about the true independence of the process.

The advantage of engaging lawyers to carry out the investigation is their ability to understand some fundamental investigation principles namely timeliness, confidentiality, rules of evidence and natural justice. This is so as the need for more sophisticated workplace investigations grows given the nature of employee relations and legislative change such as health and safety laws and the bullying jurisdiction of the Fair Work Commission. In this environment, costs are a factor. As indicated at the beginning of this article, not every complaint needs to be investigated and some can be conducted internally by human resources professionals who are suitably trained.

A serious complaint against the organisation or its officers can be damaging but should not be compounded by a poorly executed investigation that sinks the organisation deeper in the mire.

Nick Ruskin
Partner
K&L Gates
nick.ruskin@klgates.com
www.klgates.com

Footnotes

1. *Morton v Transport Appeal Board (No 1)* (2007) 168 IR 403; [2007] NSWSC 1454; BC200710965.
2. *Rogers v Millennium Inorganic Chemicals Ltd* (2009) 229 FLR 198; 178 IR 297; [2009] FMCA 1; BC200900017.
3. *Ms SB* [2014] FWC 2104.