AAWI CONFERENCE 2021

FROM THE BENCH:

SOME DO'S AND DO NOTS FOR INVESTIGATORS

Judge Bruce Corkill[1]

What is a workplace investigator? The role of such a person is to be fair and objective, so they can establish the essential facts of an employment problem and, if required, reach a conclusion on what did or did not happen.

An "investigator" is often internal to the employing entity but can be external. I am aware of an opinion which says the appointment of an external investigator is "now considered best practice for employers in New Zealand".[2] For reasons I will come to, I do not agree. There are many instances where an employer needs to carry out the investigation itself.

This presentation focuses, however, on what "best practice" is where an employer properly decides to appoint an external investigator.

Such a role carries onerous responsibilities, requires expertise, and is not for the faint hearted.

Today I want to tease out some of the issues that arise.

Some of my remarks apply to any form of workplace investigation; some will focus on the requirements of an external investigation.

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[1] Judge of the Employment Court, New Zealand. I record my thanks to Yoav Zionov, Judges' Clerk, for his assistance in the preparation of this paper. Any mistakes are mine, not his.

[2] *Re: D, E & C Ltd* [2020] NZPSLA 007 at [9].

It befits a workplace investigator to understand very well the legal framework within which they may be required to operate. I propose therefore to begin with an overview of that landscape. Then I will turn to consider some particular do's and don'ts.

I appreciate that in many respects I may be preaching to the converted, and that you already know a great deal about these topics. A refresher, however, is never a bad thing.

I also understand there may be members of the audience from across the Tasman whose regime for such investigators is similar in some respects to ours.[3] There, the decision to conduct a misconduct investigation might be wholly discretionary; alternatively, the decision to do so might be determined by a term in an enterprise agreement, or a policy or procedure that binds the employer. The UK position is similar. The UK Advisory Conciliation and Arbitration Service provides helpful and prescriptive recommendations for workplace investigations.[4]

Most jurisdictions who we would look to for comparative purposes require, in essence, a full and fair process. That sounds simple enough, but how do you do it?

A) The legal framework

Employment Relations Act 2000

The starting point in New Zealand is obviously the Employment Relations Act 2000 (ERA).

I begin with good faith. It is of course a cornerstone concept of the Act, underpinning the "relational approach" that is to be maintained between employer and employee and other relevant parties.[5]

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3 See Adriana Orifici "Unsystematic and Unsettled: A Map of the Legal Dimensions of Workplace Investigations in Australia" (2019) 42 *UNSW Law Journal* 1075.

4 See Acas *Conducting workplace investigations* (June 2019); Acas *Code of Practice on disciplinary and grievance procedures* (11 March 2015).

5 *FMV v TZB* [2021] NZSC 102 at [47]; and for history of the concepts see footnote 47.

Section 3 sets out the objects of that Act. The first of these emphasises the importance of good faith in all aspects of the employment environment and of the employment relationship.

This is followed by the s 4 core obligations of good faith.

The section begins by stating that parties to an employment relationship "must deal with each other in good faith". As the Supreme Court has recently noted, this means parties are not to mislead or deceive one another, "but its effect is wider than that".[6]

The section also emphasises that employees must comply with procedural fairness requirements. So, in the context of disciplinary action, the duty requires an employer to:

- Be active and constructive in maintaining a productive employment relationship: s 4(1A)(b).
- Provide employees potentially affected by a decision that may have an adverse effect on the continuation of employment with access to relevant information: s 4(1A)(c)(i).
- Provide employees with an opportunity to comment on information before a decision is made: s 4(1A)(c)(ii).

It is clear that a high standard of good faith behaviour is required.[7] It is also a flexible concept.[8]

Part 9 of the Act deals with personal grievances. The concept is defined in s 103. Two of the eleven categories are relevant for present purposes – where the employee has been unjustifiably dismissed; and where the employee's employment, or one or more conditions of that employment, are affected to that person's disadvantage by some unjustifiable action on the part of the employer.[9]

When such a personal grievance is raised, the question will arise as to whether the action taken was justifiable when assessed on an objective basis.

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6 *FMV*, above n 5, at [50].

7 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533 (CA) at [83].

8 See Christina Inglis "Defining Good Faith (and Mona Lisa's Smile)" (paper presented to Law at Work Conference, Auckland, 30 July 2019)

9 Section 103(1)(a) and (b).

As you will know, the test is whether the employer's actions, or how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

This test requires a consideration of both substantive and procedural fairness.

Investigators need to have a very good understanding of the procedural requirements of the subsection, which reflect, to some extent, the good faith obligations to which I referred earlier. The following considerations *must* be considered by the Authority or Court when assessing the test of justification:

(a) Having regard to resources, did the employer *sufficiently* investigate the allegations? An investigation by or for a very small business may be less elaborate than one run by a large entity with, perhaps, an HR department, or which has the resources to instruct an investigator to undertake a comprehensive inquiry.

(b) Did the employer raise concerns the employer had before dismissing or taking action? This, and the next two requirements, are all obvious examples of natural justice obligations, which have long been regarded as minimum requirements.[10]

(c) Did the employer give the employee a reasonable opportunity to respond to those concerns before taking a step?

(d) Did the employer genuinely consider the employee's explanation, if any?[11]

These considerations are not exhaustive. The Authority or Court *may* consider any other factors it thinks appropriate.

In the end, the key question is whether a full and fair investigation was conducted in the particular circumstances.[12]

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10 *NZ (with exceptions) Food Processing Etc IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582 at 597.

11 Section 103A(3)(d).

12 *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 (CA) at [32].

CEAs and IEAs

The next aspect of any framework within which an investigation may arise is the employment agreement which binds the employer and the employee.

The statutory requirements of procedural fairness apply whether the employee is engaged under a collective agreement or an individual employment agreement.

As I understand it, a uniform procedure for both classes of agreement does not apply in Australia.

The position in Australia is that, under the Fair Work Act 2009, an enterprise agreement must contain reference to a "procedure for settling disputes".[13] On that basis, terms that set out the process an employer will follow during a workplace investigation are often included in enterprise agreements.[14]

That is not the position in New Zealand. The ERA does include a mandatory requirement that there be "a plain language explanation of the services available for the resolution of employment relationship problems", for both collective and individual employment agreements.[15]

The Centre for Labour, Employment and Work at Victoria University, which surveys a large number of collective agreements annually, codes these mandatory provisions. In 2021, CLEW analysed a sample of 1,876 agreements.[16] It advises that the majority of them, 53 per cent, describe an internal process for dealing with disputes. That is, the employer and the union have actually agreed a bespoke process for that organisation. The remainder either simply defines what a dispute is (34 per cent) or refers only to the procedures of the ERA (11 per cent).

However, there is no mandatory requirement for employment agreements to contain a provision for disciplinary processes.

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13 Fair Work Act 2009, s 186(6).

14 Orifici, above n 3, at 1093.

15 Sections 54(3)(a)(iii) and 65(2)(a)(vi).

16 Employment Agreements: Bargaining Trends and Employment Law Update 2020/2021, S Blumenfeld, S Ryall, P Kiely, Centre for Labour, Employment at Work, Victoria University of Wellington.

No statistics are available for clauses of this kind, but CLEW has provided me with a sample of such provisions taken from collective agreements. Details are provided, either in the text of the employment agreement, or in appendices. Many distinguish between disciplinary process on the one hand, and performance processes on the other.

The former will usually set out a non-exhaustive list of misconduct or serious misconduct offences, sometimes with reference to a Code of Conduct which may be included in a schedule.

The evidence suggests that larger organisations, especially in the public sector, will include more comprehensive provisions. Some of these will refer expressly to the fact that the employee may seek union or other representation.

A similar range is evident in the variety of individual employment agreements which the Court sees.

I also mention the Business.govt.nz "Employment Agreement Builder", which offers mandatory, recommended or optional clauses.[17] The section relating to serious misconduct is "recommended" and stipulates only that there be a "fair process".

Long story short, provisions which may be relevant to a workplace investigation vary significantly.

An investigator, whether internal or external, needs to check the subject employment agreement and its schedules or appendices carefully to see what an employer may have agreed to in terms of process.

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[17] Ministry of Business, Innovation and Employment "Employment Agreement Builder" www.eab.business.govt.nz.

Policies

A related issue concerns any relevant policy which an employer may have established, whether as to the conduct of investigations, or as to particular types of workplace problems such as bullying, performance, health and safety, disclosure of confidential information; or as to conduct generally under a code of conduct. Although no accurate data is available, experience suggests that the contents of these also vary. Some employers have none; others have many; some have a broad policy covering all behaviours at work; and others have more specific policies.

The legal interaction between policies and procedures, and any employment agreement is potentially complex.

Terms of policies and procedures can be incorporated into an employment agreement, and, if so, will normally be regarded as having contractual force.[18]

Ironically, if the relevant provision is included in a policy and not in the employment agreement itself, a question may arise as to whether the obligations in the policy are lawful and reasonable; such an assessment is not required if the obligation is contained in the employment agreement. Thus, cases as to the reasonableness of drug and alcohol policies, health and safety policies, and so on, arise from time to time.[19]

Another question which can give rise to litigation is whether the employer should be bound by a policy, even if it is not contained in an employment agreement. On this point, some courts have concluded that a fair and reasonable employer can be expected to comply with its own promulgated policies and procedures, if fair and reasonable, even if there is no express requirement to do so under the employment agreement.[20] But there are nonetheless legal issues of some difficulty in enforcing, a policy as if it was a contractual term, despite this not having been agreed as such.

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18 Mark Irving *The Contract of Employment* (2nd, ed, LexisNexis, Chatswood, 2012) at ch 5.3; *Maritime Union of New Zealand Inc v TLNZ Ltd* (2007) 5 NZELR 87 (EmpC) at [125].

19 *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] ERNZ 614 (EmpC); *Makeham v New Plymouth District Council* [2005] ERNZ 49.

20 *Hayllar v The Goodtime Food Company Ltd* [2012] NZEmpC 153, [2012] ERNZ 333 at [71]; *Li v Vice Chancellor of Auckland University of Technology* (2006) 3 NZELR 66 (EmpC).

A related difficulty concerns unwritten policies and/or practices. It may be necessary to consider whether there is an accepted way of doing things – noting that a problem of disparity of treatment might arise if different practices are adopted on different occasions.

From time to time, the Authority or Court considers applications to restrain an employer from proceeding with a workplace investigation if, for instance, there is a concurrent police inquiry.[21] The issue then is whether there is a danger of injustice arising from:

- The risk of potential self-incrimination which may arise from answering questions in a disciplinary meeting where the same subject matter applies in both types of inquiry; and
- the injustice that may arise should the employee either refuse to attend the disciplinary meeting or answer specific questions so as to avoid the potential for self-incrimination.[22]

An example of such a case where there were health issues arose is in *BEO v Vice Chancellor of the University of Auckland*, where an application to restrain an investigation of an alleged false sexual complaint was made in circumstances where the employee was suffering severe health issues.[23] The Authority's determination noted that an investigation into the making of such an order would be delayed in part due to the employee's illness.[24]

That said, it is reasonably well established that an employer is entitled to conduct an investigation in the ordinary course of its business and that care must be taken before the Authority or Court forestalls an employer's disciplinary process.[25]

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21 *Russell v Wanganui City College* [1998] 3 ERNZ 1076 (EmpC); *Wackrow v Fonterra Co-operative Group Ltd* [2004] 1 ERNZ 350 (EmpC).

22 *Wackrow*, above n 21, at [67].

23 *BEO v Vice Chancellor of the University of Auckland* [2019] NZERA 616.

24 At [61].

25 *Wackrow*, above n 21, at [69].

Health and safety legislation

Workplace investigators need to be familiar with the legislative framework which govern health and safety issues in the workplace. The Authority or Court may need to consider whether a fair and reasonable employer could have taken steps under any of the several statutes that potentially apply.

One particularly significant topic is bullying. "Bullying" is not the subject of a discrete personal grievance definition, unlike, for example, sexual or racial harassment.[26] That is not to say a bullying problem cannot be considered as an aspect of a personal grievance. A fair and reasonable employer *can* be expected to meet its responsibilities under the Health and Safety at Work Act 2015.[27] An alleged failure to meet those obligations will require the employer to meet the test of justification under s 103A.[28]

Standards with regard to how employers should deal with bullying – and harassment – are prescribed for by the regulator, WorkSafe, under the HSW Act.[29] That is because bullying and harassment may be a "work-related hazard".

"Health" means both mental and physical health; the definition of "hazard" includes a person's behaviour where that has the potential to cause death, injury or illness to a person.

WorkSafe recommends options when dealing with reports or complaints about a worker's behaviour, from a low key approach, an informal approach, to a formal approach.

It emphasises that any formal complaint of bullying should be taken seriously and that an investigation, preferably an external one, should be instituted as soon as possible.

Its website sets out helpful guidance as to the elements of such an investigation.[30] WorkSafe emphasises that this is a specialist form of investigation. I agree. The topic is a substantial one requiring exceptional people skills and an in-depth knowledge of the topic.

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26 Employment Relations Act 2000, s 103(1)(d) and (e), s 108, s 109, s 117, and s 123(1)(d).
27 WorkSafe *Preventing and Responding to Bullying at Work* (March 2017)
28 See *FGH v RST* [2018] NZEmpC 60, [2018] 15 NZELR 944 at [191]–[278].
29 WorkSafe, above n 27.
30 WorkSafe "Bullying" <https://www.worksafe.govt.nz/topic-and-industry/bullying/>.

There are many useful discussions about the issues.[31] MBIE is of course undertaking a review as to how work-related regulatory regimes prevent and respond to bullying and harassment at work.[32] Should New Zealand have more specific rules as to how duty-holders must manage psychosocial risks, as is the case in some overseas jurisdictions? Should it have a stand-alone agency whose role it is to deal with bullying and harassment at work?

An interesting question arises as to whether a refusal to institute an investigation, or unreasonable delay in doing so, could constitute a breach of a PCBU duty, with consequences under that statute including prosecution.

I refer briefly to several other statutes that touch on particular types of bullying.

The Human Rights Act 1993 may be relevant where discrimination occurs as an aspect of bullying. The Human Rights Commission may deal with such a complaint.

Under the Harmful Digital Communications Act 2015, a complaint of cyberbullying may be made; this must initially be investigated by NetSafe.

The Harassment Act 1997 provides for a process of formal application to the District Court for restraining orders.

Notwithstanding action by NetSafe, or an application for a restraining order, an employer may also have to deal with the concerns raised, as a parallel employment relationship problem.

And of course, the Crimes Act 1961 may be applicable. Acts of violence towards a person are crimes under that Act which could be verbal such as verbal abuse, threats, shouting, swearing; or physical, such as stalking, throwing objects, hitting, damage to property. Obviously, violence is illegal and should be referred to the police, who may choose to file criminal charges. I referred earlier to the problems of self-incrimination where Police action and an employment relations problem arise from the same set of circumstances.

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31 For example, Darby and Andrew Scott-Howman *Workplace Bullying* (Thomson Reuters, Wellington, 2016).

32 Ministry of Business, Innovation and Employment *Bullying and Harassment at Work – Issues Paper, An In-Depth Look* (2020).

Public sector employment law

The recently enacted Public Service Act 2020 is intended to provide a modern legislative framework for enabling a more collaborative, agile, adaptive, and unified public service.[33] That said, the "good employer" obligations of the State Sector Act 1988 continue to apply.[34]

A workplace investigator, tasked to consider employment-related issues in this sector, must however be familiar with the current regime.

The employment and workforce provisions of the new statute reflect the concept of a unified public service with a common culture and integrity in employment, across the public service.

The Public Service Commission is responsible for, amongst other things, promulgating minimum standards of values, integrity and conduct.

A Code of Conduct has been introduced which applies to Public Service departments and Crown entities. Staff in those organisations must, for example, comply with the "Standards of Integrity and Conduct" as set out in a Code of Conduct.

The Commissioner's publication, "Positive and Safe Workplaces" sets out model standards,[35] including as to the way in which complaints should be dealt with. The standard states that "once a concern is raised, organisations give consideration as to whether they have the skills required to respond appropriately or whether it is necessary to seek external specialist support...".[36]

A question to ponder is whether a workplace investigator may be called on to consider the adequacy of the standards adopted by a particular organisation which is part of the public service, in light of the minimum standards prescribed by the Commissioner.

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33 Rebecca Atkins (ed) *Employment Law* (online looseleaf ed, Thomson Reuters) at [PSIntro,01]

34 Public Service Act 2020, s 73.

35 Public Service Commission "Positive and Safe Workplaces" <https://www.publicservice.govt.nz/>.

36 At 4.

B) Investigation issues

Types of investigations

Workplace investigations may fulfil a range of purposes. At one end of the spectrum, an employer may wish to undertake a fact-finding investigation, where it is necessary to determine exactly what happened and whether there is a basis for further action.

Mid-range is the type of investigation which involves not only eliciting facts but also making findings and perhaps recommendations.

Finally, there may be investigations undertaken by an employer which are integral to a disciplinary process. This may follow an independent fact-finding investigation, or there may be enough evidence to commence a disciplinary process in any event. It would be unusual for such an investigation to be outsourced.

In some instances, an investigation is mandatory. So, in the instances of sexual or racial harassment, which are described in s 117 of the ERA, the employer or its representative "must" inquire into the facts and, as mentioned earlier, this may be a mandatory requirement of an employment agreement or policy.

Use of external workplace investigators

In *Goel v The Director General for Primary Industries*, the Court noted that employers are not necessarily required to appoint an outside party to act as investigators; it may satisfy its obligation of fairness by requiring the investigation to be undertaken by an employee from a different part of its business, with no prior knowledge or relationship to the facts under investigation.[37]

A larger organisation may be able to use their HR, audit and risk, or health and safety personnel to investigate. This may not be possible for a small organisation.

It is not necessarily the case that all workplace investigations should be outsourced. In some instances:

- An employer may need to consider whether bringing in an external person will in fact be damaging to an ongoing employment relationship.

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[37] *Goel v The Director-General for Primary Industries* [2015] NZEmpC 214.

- It may be important for an employer to demonstrate ownership of the dispute resolution process; or that the employer takes its responsibilities seriously.
- Bring in an external investigator may be a luxury that some businesses cannot afford.

In such cases, I do not think it is appropriate to conclude that "best practice" requires an employer to engage a third party to investigate, no matter how specialist.

However, the possibility of appointing an external investigator may indeed arise if the investigation involves:

- A complaint arising under a policy which requires an external investigation, for example bullying.
- A problem where independence of the investigator is essential.
- Difficult or complex issues – for example, a fraud or drugs allegation.
- There is a risk of a toxic work environment – for example, complex relationship issues.
- Sensitive allegations – for instance, sexual harassment. Often policies have time constraints on the follow-up process that will need to be met.
- Questions of credibility – for instance, when the allegation of inappropriate behaviour is made by an external person about a staff member – if an internal investigator were to be used, it may create a perception the investigation is biased.
- An organisation-wide issue, for instance where there is money going missing; or there are email irregularities across the entity. In this paper I do not address the special problems thrown up by major workplace reviews of culture, which require special expertise and considerable experience.[38]

[38] Independent Police Conduct Authority *Bullying, Culture and Related Issues in New Zealand Police* (March 2021); Maria Dew *MediaWorks Independent Review Workplace Culture* (30 July 2021).

Licensing

It was confirmed last year under the Private Security Personnel and Private Investigators Act 2010 that persons or entities holding themselves out to be workplace investigators are required to be licensed under that statute.[39]

In issuing its decision, the Private Security Personnel Licensing Authority noted that Parliament may not have specifically had employment investigations in mind when considering the work of private investigators at the time the statute was enacted. The Authority observed that this may have been because this type of work is a "relatively recent feature in the New Zealand market". It observed there is a widespread misconception that people in the business of employment investigations are not private investigators.[40] That all said, it is unclear what evidence the Authority relied on when reaching its opinion as to the practices and trends in workplace investigations.

The Authority went on to point out that there is an exemption under the statute for people who are licensed or permitted to carry out work that would otherwise fall under the Act under some other regime, where there is a requirement of a practicing certificate. Lawyers fall under this exemption. The Authority noted that other regulatory regimes would ensure that the work was carried out by qualified persons, and that there was a robust complaint process if the investigator acted contrary to the public interest.[41] By way of example it said that the training and ethical requirements for lawyers are more extensive than those under the Private Investigators Act; so too is the complaints process.

Also excluded from coverage are police employees and the Commissioner of Police, as one might expect, but also any employees of the Crown. That exclusion does not extend to an investigator who is an independent contractor retained by the Crown.

Obviously, a workplace investigator who is not a lawyer, such as an employment law advocate, or a person who comes from a completely different discipline, will need to consider their position. Non-compliance may have consequences. An aggrieved party to a workplace investigation could, for example, complain to the Complaints

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39 *Re: D, E & C Ltd*, above n 2.
40 At [22].
41 At [31].

Investigation and Prosecution Unit of the Department of Internal Affairs, which has the power to prosecute.

The use of a non-compliant workplace investigator may also feature in any subsequent personal grievance on the basis that a fair and reasonable employer could not be expected to retain an unlicensed person.

Other requirements

There is no doubt many other factors which might need to be looked at by a person who is considering taking on the role of external investigator.

You might ask yourself this self-reflective question: do I have the competence and necessary skill set?

Another issue for reflection may relate to cultural competence. We can expect this issue to become increasingly important. So, for example, an employer might be expected to appoint someone who has the requisite knowledge and understanding of tikanga.

An investigator should also recognise that they may have to give evidence and be subjected to cross-examination. Such a possibility might be unusual but could not be ruled out.

Independence

I touched earlier on the issue of independence. This is a very important issue. When appointing an external investigator, it is necessary to ensure that person is free from any bias or perception of bias. This is of course a core principle of natural justice. In *Campbell v The Commissioner of Salford School*, the Court found there was a perception of bias because of the investigator's dual role as investigator and counsel to the employer.[42]

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42 *Campbell v Commissioner of Salford School* [2015] NZEmpC 122, [2015] ERNZ 844 at [221].

Although the investigator was adamant he was not compromised, and maintained a conscientious approach, the Court concluded it was unfair on the employee that she was obliged to participate in a comprehensive investigation that suffered from such a flaw.

A related issue is the duty to disclose the true nature of the investigator. In *Fox v Hereford School Trust Board*, an employer was considered to have breached their obligation of good faith when the told an employee under investigation that an "independent consultant" would carry out the investigation, but not that the consultant was actually a member of the school board, and thus arguably not independent.[43]

In short, impartiality is critical.

Terms of reference

Terms of reference are obviously important when appointing an external investigator. These should clearly define the allegation or concern that is to be investigated. That statement should not be unduly broad lest there is a later assertion of fishing for fresh allegations rather than requiring the investigator to inquire into particular concerns.

It is often useful for a summary of background to be given and an indication of the expectations of the appointing employer. It is good practice to either append or refer expressly to relevant documents, including the employment agreement and relevant policies and/or process guidelines. In short, the intention should be for the investigator to obtain his or her starting point from the terms of reference, and not from any private conversation that person may have had with a representative of the instructing entity. This ensures transparency.

Depending on the circumstances, it may be appropriate for the terms of reference to describe the intended process, covering such factors as the investigator contacting and interviewing particular persons; how to request further information from the employing entity; expectations of confidentiality; the required timeframe for the investigation; and otherwise that the principles of natural justice should apply to the investigator's process.

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43 *Fox v Hereford School Trust Board* [2015] NZEmpC 206.

I have mentioned transparency. The intention of comprehensive and clear terms of reference is that the affected persons and intended witnesses can be shown the document, whether by the employer or the investigator, so that they have some understanding as to the context of the interview they are asked to attend.

It can also be appropriate for an employer to provide a draft of the terms of reference both to a complainant and a subject employee(s). The employer is not bound to accept any criticisms or other comments made, but those should be considered carefully and in good faith.

It is also wise for the proposed investigator to be offered an opportunity to review the proposed terms of reference to ensure the investigator can do his or her job fairly and effectively.

Information gathering by the investigator

In *Goel v The Director General for Primary Industries*, the Court was required to consider an internal investigatory process within a government organisation.[44] Of interest for present purposes is his summation of the investigation. First, Judge Ford observed that, until he was provided with his terms of reference, the investigator had no prior knowledge of the incident. Then he said:

> [42] In many ways the process followed ... was a textbook example of how a disciplinary investigation should be carried out. After receiving the terms of reference and finding out what was alleged, [the investigator] proceeded to work out what was required to be determined and who needed to be spoken to. He then constructed a series of open-ended investigation questions that would not bias the investigation. He used his manager to critique his questions and made sure they were fit for the purpose. He told the Court that after crafting the questions he then made contact with [the employee] and asked him who else he should talk to. He also ran over the process with [the employee] and arranged to meet with him ... in a neutral area. ... He confirmed the meeting arrangement with [the employee] in writing, reminding him he could bring a support person/representative with him and he recommended that [the employee] obtain support and assistance that was available to him through the EAP service.
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> [43] [The investigator] followed the same process for all interviews. He asked the open-ended questions that he had prepared and he recorded the responses "hopefully verbatim" as the interviewees answered. There was nothing said to him that was not recorded in his notes. At the end of each interview he spell-checked and then sent the transcript to each person interviewed, including [the employee] and he had each person verify that the interview was correctly recorded. He then proceeded to draft his investigation report. He attached all of the investigation notes to

[44] *Goel v The Director General for Primary Industries,* above n 37.

> the report and sent a copy of everything to [the employee] for his response. He had emailed [the employee] and spoken to him on the telephone informing him that he needed his comments on the draft report prior to it being sent to the decision-maker.
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> [44] [The employee] went through the draft report and added his comments to the document through "track changes" which were highlighted in red. [The investigator] said that he carefully considered all of [the employee's] comments but they did not lead him to change his conclusions or recommendations. He then proceeded to finalise his formal investigation report ... and sent it through. ... The document [the manager] received included [the employee's] marked-up comments highlighted in red. [The investigator] had no discussion with [the manager] about the nature of the disciplinary action (if any) to be taken against [the employee].

You will notice how thoroughly the Court analysed the process which had been adopted. Be warned!

There are several aspects of this process I wish to emphasise.

Obviously, it is essential to study the terms of reference and associated material very thoroughly.

A related issue is to then consider the order of interviews. This needs careful consideration. A disciplinary policy may require the investigator to meet first with the complainant. Or common sense may suggest this, since it will ensure the respondent can later be informed by the investigator as to the full details of the complaint.

Who the investigator should meet with may be specifically determined by the Terms of Reference, or left to the investigator's discretion, which may turn on the nature of the inquiry.

Your initial communication to an employee is very important. It needs to spell out the purpose of the interview, perhaps attaching the terms of reference as approved by the employer, which will assist in establishing your credibility. Consider whether you should attach key documents and, as I shall discuss shortly, make it clear the interviewee is entitled to support. Determine where you will meet the interviewees – preferably at a private and neutral location.

If the investigation is complex, set up a timetable or plan to work to, according to the expectations of the Terms of Reference.

Give careful thought to an introductory statement when you meet with each witness: who you are and how you will conduct your intended process.

Next, prepare your lines of inquiry carefully. This will ensure you have a good grip on the issues which may need exploring with any particular witness.

Some employees may be reluctant to provide evidence. Investigators should explore with that person why they are reluctant, providing reassurance, and seeking to resolve any concerns they may have.

Questions

I must emphasise the importance of putting what a complainant says to any affected employee.

The investigator must hear from both sides to an allegation on an informed basis. This includes:

- The natural justice requirement that a person providing information should do so on an informed basis. Interviewees should ordinarily be provided with all information obtained by the investigator and then given a chance to comment or respond.[45]
- An adverse allegation should be put – again, on an informed basis so that, for example, where there is a complainant and respondent situation, those parties are able to respond in light of the information the investigator has gathered.

When interviewing, it is important to ensure open questions are asked. Otherwise there can be difficulties afterwards because an aggrieved party will perceive the investigator came to the process with a predetermined view.[46] There is case law to the effect that it is not objectionable to form a tentative view during the course of an investigative process.[47] However, there is a risk that questions which appear to indicate a particular view will be misunderstood and may turn out to be risky.

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45 Association of Workplace Investigations *Guiding Principles for Conducting Workplace Investigations* (25 September 2012).

46 *Smithson v Wellington College Board of Trustees* [2021] NZEmpC 114 at [200].

47 *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198, [2015] ERNZ 361 at [59].

Other types of questioning may be useful, such as those which help focus an interviewee on what is important to them; whether there is anything else they wish to refer to; and providing an opportunity to check that correct information has been recorded, allowing the interviewee to reflect on what they have said and providing an opportunity to give further details where there are gaps.

By contrast, do not interrogate, confront, ask leading questions designed to take the interviewee to a particular conclusion; and avoid multiple questions which merely lead to confusion.

Be a good listener. Follow your pre-planned questions, but do not allow them to preclude an effective dialogue. Listen for points the interviewee avoids covering or giving details about. Do not interrupt. Use silence to encourage the interviewee to elaborate on points.

Be aware of your body language. Remain calm. Maintain eye contact.

Credibility issues

Considerable care is necessary when assessing credibility. An evaluation based on apparent sincerity or truthfulness on the day is not necessarily reliable. In evaluating any information, it is necessary to consider factors such as surrounding documentation, consistencies within documents, and/or consistency between documents and what the investigator is being told; and any apparent issues as to observation, memory and judgement.[48] The logic of the events under review may be another consideration.

Standard of proof

Lawyers are familiar with the concept of "standard of proof". However, that is not a helpful concept with regard to an employer's investigation. As the Court of Appeal recently confirmed in *Cowan v Idea Services Ltd*, a distinction must be drawn between the inquiry a court makes and the inquiry of an employer.[49] The ascertainment of facts on which an employer forms a belief that an employee has, for instance, engaged in

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[48] See for example *O'Boyle v McCue* [2020] NZEmpC 175 at [188]–[192].

[49] *Cowan v Idea Services Ltd* [2020] NZCA 239, [2020] ERNZ 252.

serious misconduct is not the same as proving to a court that a dismissal was justified. The first does not involve a standard of proof; the second does.[50] The obligation of the employer is to show that, after a full and fair inquiry, the conclusion was one which a fair and reasonable employer could have reached.

Recording

The practice of the recording of questions and answers varies. It is possible for investigations to become flawed because of insufficient notetaking – in *Harris v The Warehouse Ltd*, incomplete and brief "rough handwritten notes" not signed by interviewees as being accurate, caused the Court concern.[51]

So, while some investigators handwrite their notes, that can be clumsy and lead to omissions. Some use laptops, which again is fine if the user is an adept keyboard user.

The best option is to record the conversation with a dictaphone or otherwise, making it crystal clear to the interviewee that this is being done at the start of the interview. Indeed, it is always a good practice to check that the machine is actually working before commencing!

That recording can, if necessary, be transcribed. This practice may depend on the availability of resources, but it has the advantage of the investigator being able to concentrate on the question and answer process during the interview, look at documents, as well as engage with the witness more directly than may be the case if other forms of recording are adopted.

Depending on the nature of the investigation, forwarding a copy of the transcript to the interviewee to check for accuracy may be desirable; or, if not transcribed, presented on a USB stick for checking or reference. But beware of the problem of post-interview remorse driving alterations, or procrastination. That said, genuine further points should, of course, be considered.

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50 At [18].

51 *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480 at [104]–[110].

Generally speaking, it is preferable to meet interviewees in person. However, circumstances in these tricky times may require other options, such as Zoom or telephone. That said, if the case involves credibility assessments, these options may be less satisfactory.

Confidentiality

Usually, terms of reference will state that the process is to be confidential, particularly where sensitive allegations are involved. This is particularly important when no final decisions have been made. It is a point which an investigator may need to reinforce with interviewees so as to avoid collusion.

A further justification for strict adherence to confidentiality arises from the fact there may be disciplinary consequences for a respondent – which could be challenged by way of a personal grievance. The employee is entitled to have the cloak of confidentiality continue in most cases.

It will often be desirable to ensure that the people are interviewed at a venue which is not only neutral, but which offers privacy and maintains confidentiality.

There are several particular scenarios, however, which may need consideration. An interviewee may need advice in the course of the process. If the circumstances require it, that should be offered. There could be no objection to that fundamental right being exercised by an affected party. Indeed, it is good practice for an interviewee to be offered EAP; and that a support person, union official, lawyer or otherwise, attend the interview.

Another issue concerns disclosure of possibly confidential information obtained in the process. It is generally the position that an investigator, although independent of an employer, is nonetheless that entity's agent. The investigator is thereby bound by the duties of good faith to which I referred earlier. As I said, the duty requires employers to provide employees with access to relevant information and an opportunity to comment on it before any decision is made. An employee facing an allegation is entitled to know who was raising concerns and to what those concerns relate.

If those concerns arise from what an earlier witness said, disclosure of these facts may be particularly important.

Information on an "off-the-record basis" should never be accepted by an investigator, since that would normally cut across these basic principles of natural justice.

The issue of maintaining confidentiality and information from "secret witnesses" was considered by the Court in *Campbell v The Commissioner of Salford School.* During an investigation, a small number of former and current staff members requested that the information they provided be kept confidential.[52] They had a number of serious concerns about a principal and feared she would retaliate. This was accepted by the investigator, and the information remained confidential. The investigator subsequently admitted he had been unable to avoid being influenced by the information provided by such witnesses. That is, information that had been persuasive for the investigator was not provided to the principal for comment.[53]

Privilege

Workplace investigations may give rise to issues as to legal professional privilege.

The relationship between the employer and instructed investigator, even if the investigator is a lawyer, is not one which would necessarily be regarded as a relationship between a solicitor and client.

A further complicating factor may arise where the employer instructs a firm of solicitors to brief the investigator, with the intention that legal professional privilege will operate to preclude the subsequent release of documents.

Such cases have arisen in Australia but have received short shrift. In one instance, the Judge concluded that the work involved in conducting a workplace investigation was not work for which being a lawyer was a necessary prerequisite, so engaging a lawyer for that purpose would not automatically invoke legal professional privilege.[54]

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52 *Campbell,* above n 42.

53 At [292].

54 *Bartolo v Doutta Galla Aged Services Ltd* [2014] FCCA 1517 at [77].

In another, the court held that the report of a workplace investigation was not, in reality, for the purposes of obtaining legal advice, at least as a primary or substantial purpose.[55]

Such a practice would of course in New Zealand fall for consideration under s 103A(2): could such a step be taken by a fair and reasonable employer? Such a practice would cut across the fundamental obligation to disclose relevant information under s 4.

The report

The final stage of the process involves the preparation of a written report, which is obviously a crucial document.

It should be written with some care and should cover all aspects of the investigation. It should describe the tasks required under the terms of reference; a summary of the steps taken; a description of the information obtained; a basis for findings by reference to relevant polices, and guidelines, including any Code of Ethics; if required, an assessment of the information which has been obtained should be measured against those standards. Then any findings and conclusions should be carefully set out in light of the facts and any relevant standards.

An investigator should not step outside the bounds of the Terms of Reference. To do so may well lead to a subsequent challenge.

There is no absolute requirement to provide a draft to the complainant and respondent for comment unless this is specifically referred to in the terms of reference or a relevant employment agreement or policy. That said, it is a yet further mechanism by which the integrity of the process can be reinforced. Best practice would suggest it is appropriate.

Any comments received from an affected person about the draft should be very carefully evaluated. It is conceivable that the process may have to be reopened if important new information comes to light at that point.

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[55] *Re King* [2018] FWC 6 006 at [8]–[13]. See also *Yu v Zespri International Ltd* [2017] NZEmpC 146 for a discussion of this privilege in the New Zealand context; at [52]–[77].

It may be tempting for an investigator to pay lip-service to the final stage of submitting a draft report for comment, but it must be taken seriously. Recognising that there may well be pushback by one or more parties, it is the investigator's job to weigh these points up with care and decide whether any disputed content can withstand logical scrutiny.

Finally, the report should be submitted to the employer. It is the employer's duty to take the next steps, including how the report is to be conveyed to the persons such as the complainant and respondent.

The Authority or Court's assessment

I draw some of these themes together by referring to the type of questions which may fall for consideration by the Authority or Court where the services of an external investigator are to be utilised – usually for the purposes of a personal grievance.[56] Various stages of the process may have to be analysed.

In considering whether the steps taken when setting up an investigation were those of a fair and reasonable employer, these questions may arise. What was the reason for the external appointment? If an external appointment was made, why? Were the terms of reference appropriate? Was guidance contained in relevant policies and was the investigator informed of these? Was the appointee suitable?

Then the Authority or Court may need to consider the investigation itself. Did the investigator act according to the terms of reference, and according to any guidance contained in an applicable policy? Was the process in fact fair?

Once the investigation has been concluded, the actions of the employer might again fall for consideration. Were the steps taken at that point justified? Did the employer deal with the report and its contents fairly? An important issue might be whether the employer, following receipt of a report, acted independently or simply rubber-stamped its contents. If flaws indeed arose in the course of the investigation, or the employee does not accept the reasoning or recommendations, the employer may need to consider and address those issues constructively, after consulting with the employee.

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56 *Smithson v Wellington College Board of Trustees,* above n 46.

Final thoughts

At an AAWI Annual Conference held in New South Wales just over three years ago, the topic was:

Workplace Investigations:

Maximum Impact, Minimum Harm

Conducting Effective Investigations with Care

This was a good summary of the onerous responsibilities which fall on an investigator.

From the perspective of the Court, what is of interest is whether the investigator showed independence, professionalism and competence.

The responsibilities are significant, and can lead to unforeseen consequences – for instance, in the case of a lawyer, a complaint to the New Zealand Law Society by an aggrieved party.

I am sure you are all well aware of the importance of thinking about these issues, which may lead an investigator needing to carry Professional Indemnity Insurance, and/or to obtain an indemnity from an employing party for any costs – and perhaps damages – that may arise from the investigative process.

To some extent, these problems go with the territory, but can be mitigated by undertaking a full and fair transparent process.

AAWI has developed a Code of Ethics, and comprehensive commentary of expectations. I understand it summarises what is expected of members.

A requirement to adhere to the standards of such a document by a regulatory organisation to which a professional such as a workplace investigator chooses to belong to, is a sign of commitment to best practice and high standards. So too is attendance at a conference like this.