Article Information

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Service: Employment & Labour, Workplace Investigations

The do's and dont's of workplace investigations

Workplace investigations involve several (and often complex) procedural and substantive requirements and considerations which are easy to get wrong. Consequently, an investigation can be a source of risk to an employer, particularly where they are not conducted properly, or in haste. Below we compare two decisions of the Fair Work Commission which highlight these issues, and provide some key observations to assist your business when undertaking or facilitating workplace investigations.

John Lupson v Australian Pacific Airports (Melbourne) Pty Ltd

In the case of *John Lupson v Australian Pacific Airports (Melbourne) Pty Ltd* [2020] FWC 6721, Mr Lupson was dismissed after his employer found he had engaged in a number of instances of alleged misconduct.

Consequently, Deputy President Mansini found that Mr Lupson had committed six of the alleged acts of serious misconduct, which constituted a valid reason for dismissal. The Deputy President held that the employer had properly notified Mr Lupson of (and provided adequate opportunity to respond to) the matters leading up to his dismissal, and that he had not been unreasonably refused a support person during meetings discussing his dismissal.

However, Deputy President Mansini also found Mr Lupson's employer took a 'retrospective "kitchen sink" approach' during its workplace investigation into the allegations of misconduct, and further held that this approach was a factor that weighed in favour of finding the employee's dismissal was unfair (along with other factors including Mr Lupson's age, his length of service, his specialist skills, and his career prospects).

More specifically, Deputy President Mansini criticised the way in which the employer had framed a total of twelve allegations of misconduct, some of which occurred over the course of the disciplinary process and only six of which were found to constitute a valid reason for dismissal. The Deputy President considered that in her view, it was an approach "aimed at justifying the termination of employment".

The Fair Work Commission subsequently ordered compensation in the amount of $8,384.67 plus applicable superannuation.

The case is illustrative of the significant weight given to an employers' approach in conducting a workplace investigation, regardless of the outcome of the investigation (that is, regardless of whether improper conduct is proven or not).

Although other factors – such as the absence of 'an established pattern of conduct' alleged by the employer, the applicant's age, and career prospects – also contributed to the finding that his dismissal was unfair (and the absence of such considerations may certainly have resulted in a different outcome in this case), the decision serves as a warning for employers to exercise caution in terms of what allegations are put to employees.

Ms Virginia Wills v The Government of New South Wales, Sydney Trains; Transport for NSW; Mr Grant Marley

On the other hand, in *Ms Virginia Wills v The Government of New South Wales, Sydney Trains; Transport for NSW; Mr Grant Marley* [2020] FWC 5890 (4 November 2020), Ms Wills alleged that 32 actions of her employer during the course of a workplace investigation (that was being conducted by an external third party) constituted bullying. Ms Wills made an application under the stop-bullying provisions of the *Fair Work Act*, seeking various orders against her employer and named persons of the organisation to stop the alleged bullying.

Deputy President Cross did not accept that any of the 32 allegedly "unreasonable actions" by the employer constituted bullying and instead found them to constitute *"reasonable management action carried out in a reasonable manner"*. Some of the actions conducted by the employer during the investigation (and which the Deputy President rejected as being bullying), included:

- suspending the applicant for 10 weeks without informing her of the allegations, in light of the seriousness and complexity of the allegations;
- requiring a response to the letter of allegations within 7 days, which was later extended four times upon the request of Ms Wills;
- denying requests by Ms Wills for copies of documents which would otherwise have interfered with the conduct of the investigation and which were denied on the grounds of confidentiality;
- continuing the investigation despite the applicant being unfit for work, as the employer was found to have accommodated the applicant's mental health condition, and also because it would have been unreasonable to indefinitely delay the investigations until the applicant was fit for work.

Whilst each case will be distinguished by its own particular factual circumstances, this decision demonstrates that:

- an employer should always expeditiously carry out any investigation. This decision doesn't given employers *carte blanche* to undertake an investigation in a leisurely manner, but does allow some flexibility in timing when the seriousness and complexity of a matter necessitates an extended timetable
- employers should be mindful in setting reasonable timeframes for employees to respond to allegations of misconduct or poor performance, and this time will differ depending on the nature and complexity of the allegations. Employers should also be receptive to requests to extend such timeframes in circumstances where reasonable requests are made
- employers ought to be very careful about what documents and other evidence an employee is refused during the course of the investigation (see for example the case of *Jennifer Walker v Salvation Army (NSW) Property Trust t/as the Salvation Army – Salvos Stores* [2017] FWC 32, in which the Commission was critical of the employer for having failed to give the employee a better opportunity to view CCTV footage that was considered by the employer to substantiate her dismissal). *However*, reasonable concerns surrounding issues of confidentiality can be considered by an employer when determining how certain evidence may be viewed and accessed by an employee subject to an investigation
- an employee's fitness for work may be a reason for an employer to hit pause on an investigation – *but not always*. At least in this case, and noting that the employee in question was not the only employee the subject of investigation, the seriousness and complexity of the matters were enough for the Commission to agree with the employer's position, that it was not reasonable to indefinitely delay an investigation on account of the employee being unable to respond due to illness.

It is crucial to ensure that all workplace investigations are conducted in a manner that is procedurally fair, in accordance with the *Fair Work Act 2009* (Cth), and also consistent with any other obligations arising under an employment contract and/or industrial instrument. Fundamentally, the way in which an investigation is conducted, is equally as important as its outcome.

Key Takeaways

Although there are a number of takeaways from the above cases, some important recommendations for your organisation, include:

- ensuring that only relevant allegations are put to an employee so as to minimise any perception of a "kitchen sink" approach having been taken
- carrying out investigations expeditiously, but with due regard to the circumstances of the particular case and what is required to effectively investigate the matters
- being reasonable with timeframes given to employees who are being asked to respond to allegations (including their access to particular evidence/documentation)
- ensuring, so far as is reasonably practicable, that employees can have access to material that will form part of the investigation. If an employee is to be refused access, reasonable grounds should be clear and concise, and communicated to the employee.

Do you need assistance with a workplace investigation or want to make sure you're prepared to conduct one in future? Contact a member of Piper Alderman's Employment Relations Team and stay tuned for the launch of our own Workplace Investigations Training module coming soon.