



Are you ready to run an investigation?

Consider this scenario:

One of your staff has just informed you they overheard two staff talking about a senior person in your organisation. Allegedly, this person has made unwelcome advances to a younger staff member and told them the allegations would be denied if ever confronted. You have heard similar rumours in the past. Recently, in a client meeting you also noticed overly familiar behaviour between the client and this senior staff member. Back at your office, you clear a voice message from a lawyer wanting to discuss a complaint she is raising on behalf of her client against this person



Would your investigation process cope in this scenario?

Investigation essentials

To withstand scrutiny, investigations and decisions must comply with a number of obligations including: principles of natural justice, the Employment Relations Act, internal policies and procedures, and employment agreements.

Every investigation needs to **identify the issue**, **investigate the issue**, and **decide on the outcome**. It may sound straight forward enough, but consider the following questions that often arise.



- How do you define the alleged misconduct?
- Can you unilaterally determine what constitutes serious misconduct?
- How serious is the issue?
- What if the conduct occurred outside of work?
- Can video or other surveillance be used?
- Can drug testing or compulsory searches occur?
- What about anonymous complaints?
- Should you draft a terms of reference for the investigation and should the employee have the opportunity to comment on the draft?
- What if someone makes a complaint as a protected disclosure?

- What does natural justice require?
- Do preliminary investigations have a place?
- How much proof is enough?
- How to proceed in the midst of a police investigation?
- The right to silence
- What if an employee refuses to respond?
- When and how to suspend
- How much information to provide to the employee
- Does the employee have a right to interview witnesses?
- Provision of interview notes
- Independent investigator
- New information or allegations discovered during the course of the investigation
- How in-depth does the investigation need to go?
- Use of forensics and how?
- Do external bodies need to be made aware (e.g. professional associations)?

- Who should the decision-maker be?
- Does the proposed decision-maker have a conflict?
- Should there be consultation on the decision before it is made?
- Is it appropriate to have a preliminary decision?
- Consistency of penalty compared to other incidents?
- Duration of warnings?
- What should you tell the complainant?
- Should the impact of the conduct influence the penalty?
- What if the employee resigns at the time of the decision?
- Is there a right to appeal?
- How is the decision documented, where is it kept and for how long?

Passing the test

If you investigate an allegation and then dismiss someone as an outcome, the Employment Relations Authority will test your decision. Section 103A of the Employment Relations Act 2000 says "*the test is whether the employer's actions, and 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.*"

In determining the fairness of the investigation, the test includes "*whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee*". In short, the better resourced your organisation is, the more vigilant you need to be.

Getting ready

Make sure the following is in place to ensure your organisation is ready for any investigation

- Code of conduct
- Disciplinary policy
- Policies addressing core areas including: harassment and bullying, health and safety, information technology, privacy, protected disclosures
- Procedures for managers on how to respond to complaints
- Identification of those who will be decision makers in relation to investigations
- Identification of those who can conduct investigations, including external investigators

Time for a check-up?

If you think improvements can be made, we can help with:

- Reviewing or drafting policies, procedures and employment agreements
- Training managers and HR professionals on how to conduct investigations or respond to complaints

Independent investigation services

Rees-Thomas Law also acts as independent investigators, particularly in the employment context, and liaises with other experts such as computer forensic specialists if required. Whether you are investigating fraud, harassment, bullying or any other allegation, we are equipped to provide the experience and independence required.