

When to engage PEEL HR as External Investigators

It's great if your workplace investigation into misconduct, bullying or inappropriate behaviour can be managed internally. However, there are occasions when this is not possible or should not occur. Here are some ideas about when it is more appropriate to engage an external investigator.

When you lack the expertise

If you don't have the expertise in conducting investigations internally, don't risk it. Patricks Stevedores was criticised by the Fair Work Commission during an unfair dismissal hearing for exactly this reason (*Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775). The Fair Work Commission described the internal investigation related to an incident of assault as having 'serious and fundamental flaws' partly due to the inexperience of the HR Manager who managed the process. The result was the claim of unfair dismissal being upheld, with Deputy President Sams noting:

'Ms Green had never conducted a disciplinary investigation into allegations of physical assault at the workplace. Her inexperience and lack of forensic skills as to the assessment of witness evidence, was a major contributory factor to the weaknesses exposed in the respondent's evidentiary case.'

When the incident or issue is particularly complex

An external investigator can also be an appropriate option where the situation is highly complex and contested. *Farmer v KDR Victoria Pty Ltd T/A Yarra Trams* [2014] FWC 6539 centred on the actions of Mr Farmer, a driver whose employment was terminated after being accused of using a mobile phone whilst driving a tram across an intersection. The incident was witnessed and reported by two off duty managers and the allegations were put to the employee leading to various contested accounts of when, how and why certain actions happened. The investigation was conducted by Mr Farmer's depot manager. In upholding a claim of unfair dismissal, Commissioner Wilson stated that an external investigation may have been more appropriate:

'Although Yarra Trams had a right to be concerned about the report of [the off duty managers], an objective and potentially arm's-length investigation might have demonstrated to the company that their observations were not definitive and that, in the absence of other corroborative evidence or the admissions of Mr Farmer, the company risked relying upon "inexact proofs, indefinite testimony, or indirect inferences".'

When you need to manage bias

Even in large organisations, workplace investigations can be politically charged and require a significant investment of time and energy, especially to keep them progressing in a timely manner. An external investigator can minimise perceptions of bias and since their focus is solely on the investigation, the result can be a quicker and less disruptive process.

Additionally, it is important that there are separate people conducting the workplace investigation and making the decision about any punitive measures that may result. The role of the investigator is simply to gather evidence to determine the allegations and make recommendations on possible responses. In some organisations, there may not be the structure that allows two people to take on these roles. In that circumstance, you can't outsource the decision making responsibility (as much as you may want to!) so it is best to secure an external party to conduct the investigation.

Engaging an external investigator may cost more upfront but if the situation requires it, they can help you avoid unnecessary complications and save time, energy and money.

How to engage PEEL HR as External Investigators

Knowing how to partner with an external workplace investigator is essential in order to ensure a thorough process which is fair for all involved and doesn't result in breaches of law.

Recognise different roles

As external investigators we regard our professional integrity as precious. Our impartiality is paramount in managing our investigations. While ongoing communication with our client is an important part of our process, we think it is important that there is a clear separation between the organisation and the investigator.

The importance of this was emphasised in a case involving *Visy (Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Pty Ltd (No 3) [2013] FCA 525*). Visy decided to engage an external investigator, ostensibly to provide impartiality. However, the criticism of the Federal Court was that the investigation occurred under 'Visy's guiding hand'. Evidence related to the investigation showed that Visy managers helped to frame the questions that were asked, sat in on the interview with the respondent and may have sought to have the final report revised in order to strengthen it. The Federal Court did not consider the investigation or the decision maker to be 'independent and impartial'. The result was the overturning of the original dismissal and fines to the organisation and one of the managers involved.

The way we work will ensure that we have discretion over the investigation and conduct the process in an impartial manner.

Establish suitable terms of reference

When engaging with an external investigator it is also important to begin by establishing terms of reference that balance the need for a clear scope with flexibility to consider further, related allegations that may arise during the process. It is important that a single investigation does not snowball into a series of unrelated issues but sometimes an investigation will uncover further concerns that relate to the matter at hand. Appropriate terms of reference and investigative process will allow for these to be considered and pursued where relevant.

We also believe we have not done a complete job with our investigations if we haven't considered the bigger picture. That is, while our investigations deal directly with allegations and incidents, we like to consider broader factors such as workplace culture, apparent training needs and other underlying causes or possible remedies. We like to ensure our terms of reference permit us to do so.

These guidelines will ensure we can work together to achieve the outcome of a successful and rigorous investigation that is not only sustainable under challenge but considered fair by all those involved.