



Using real-life examples of how to overcome the problems, what actually warrants an investigation, especially in bullying and harassment cases?

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Introduction

PROBLEMS..... WHAT PROBLEMS



Overview

What warrants an investigation?

Investigation Considerations

Rights to Legal Representation and Cross Examination

Practical Advice

A blurred photograph of several business professionals in a modern office hallway. The image has a strong blue and teal color cast. In the foreground, a person in a dark suit is walking towards the right, carrying a large folder. Behind them, a group of people in business attire are walking in the same direction. The hallway has large windows on the right side, letting in bright light. The overall atmosphere is one of a fast-paced, professional environment.

Part 1

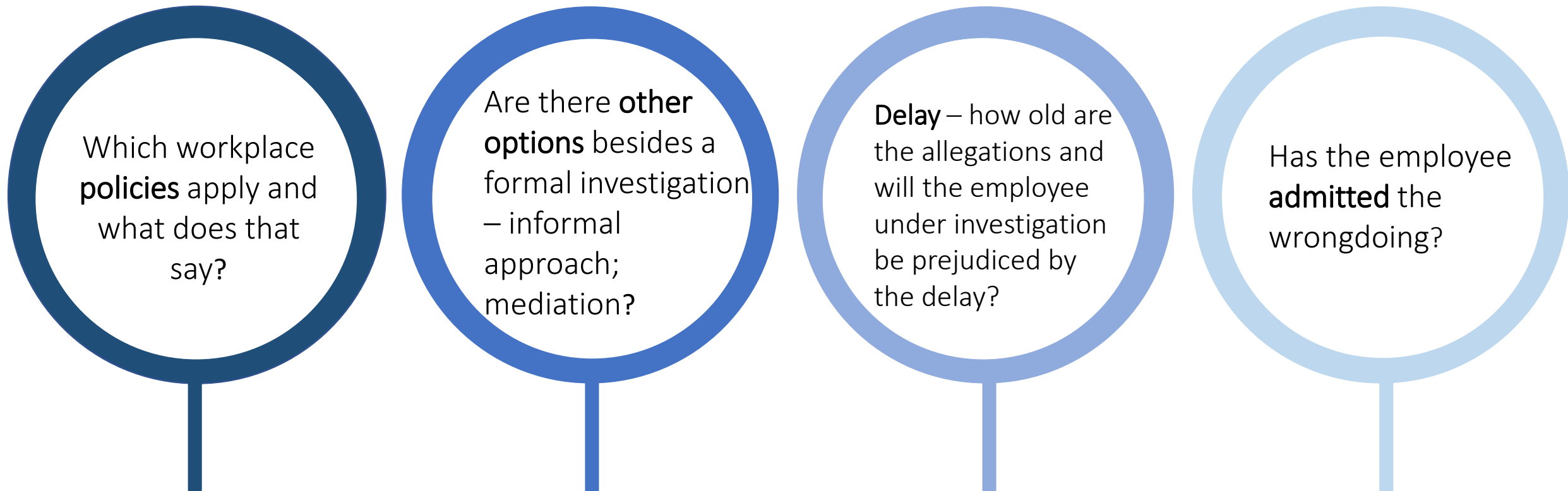
Investigation Warranted?



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What Warrants an Investigation?

An employer should ask themselves some **questions** before deciding to proceed with an investigation:



Which workplace **policies** apply and what does that say?

Are there **other options** besides a formal investigation – informal approach; mediation?

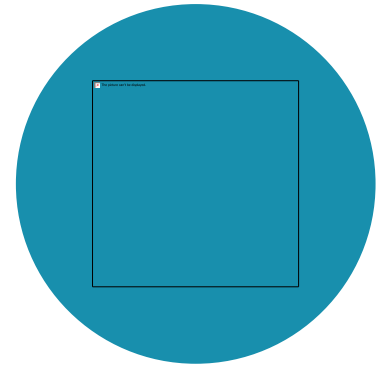
Delay – how old are the allegations and will the employee under investigation be prejudiced by the delay?

Has the employee **admitted** the wrongdoing?

Examples of when an Investigation is Warranted

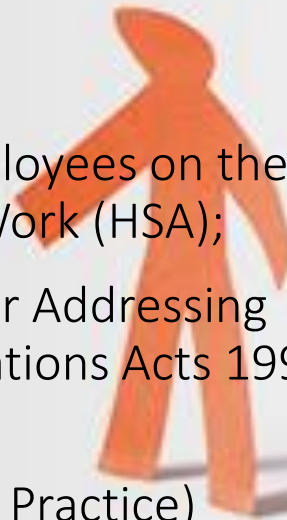
An employer may have to **consider** an investigation in a number of circumstances:

- when there is an allegation of **misconduct** against an employee – theft/fraud;
- when a **grievance** is received about an employee from another member of staff;
- Alleged **breaches of policies/procedures** in the workplace;
- when the basis for **performance** issues in the workplace is unclear, e.g., the pattern of absences,
- when issues relating to **bullying, harassment or sexual harassment** arise, and;
- Where there is a “protected disclosure”.



Bullying and Harassment Cases

- **Workplace Policy** and **Codes of Practice** are key.
- Complaint in writing does **not** mean automatic investigation.
- **Approach** by Complainant to alleged perpetrator.
- **Mediation.**
- **Formal Investigation** if no other option.
- Code of Practice for Employers and Employees on the Prevention & Resolution of Bullying at Work (HSA);
- Code of Practice Detailing Procedures for Addressing Bullying in the Workplace: Industrial Relations Acts 1990 (SI 17 of 2002) and
- Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI 208 of 2012)



A blurred photograph of several business professionals in a modern office hallway. The image has a blue color cast and a motion blur effect, suggesting a fast-paced environment. The people are walking towards the camera, and the background shows large windows and office architecture.

Part 2

Investigation Considerations



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Investigation Considerations

- Determine exactly the **issues** in dispute.
- Determine what **Policy** applies?
- Determine the **parties** to the investigation.
- **Internal or External** Investigator?
- **Terms of Reference** of the Investigation – fair procedures.
- **Confidentiality**.
- **Data Access Requests**.
- **Suspension with Pay?**
- **Medical issues** – sick leave – occupational health referrals?
- **Standard of proof** – on the balance of probabilities.

Limiting Investigation to a Fact-Gathering Exercise

The purpose of conducting an investigation should be gather the relevant evidence and determine whether or not there is merit to a complaint.

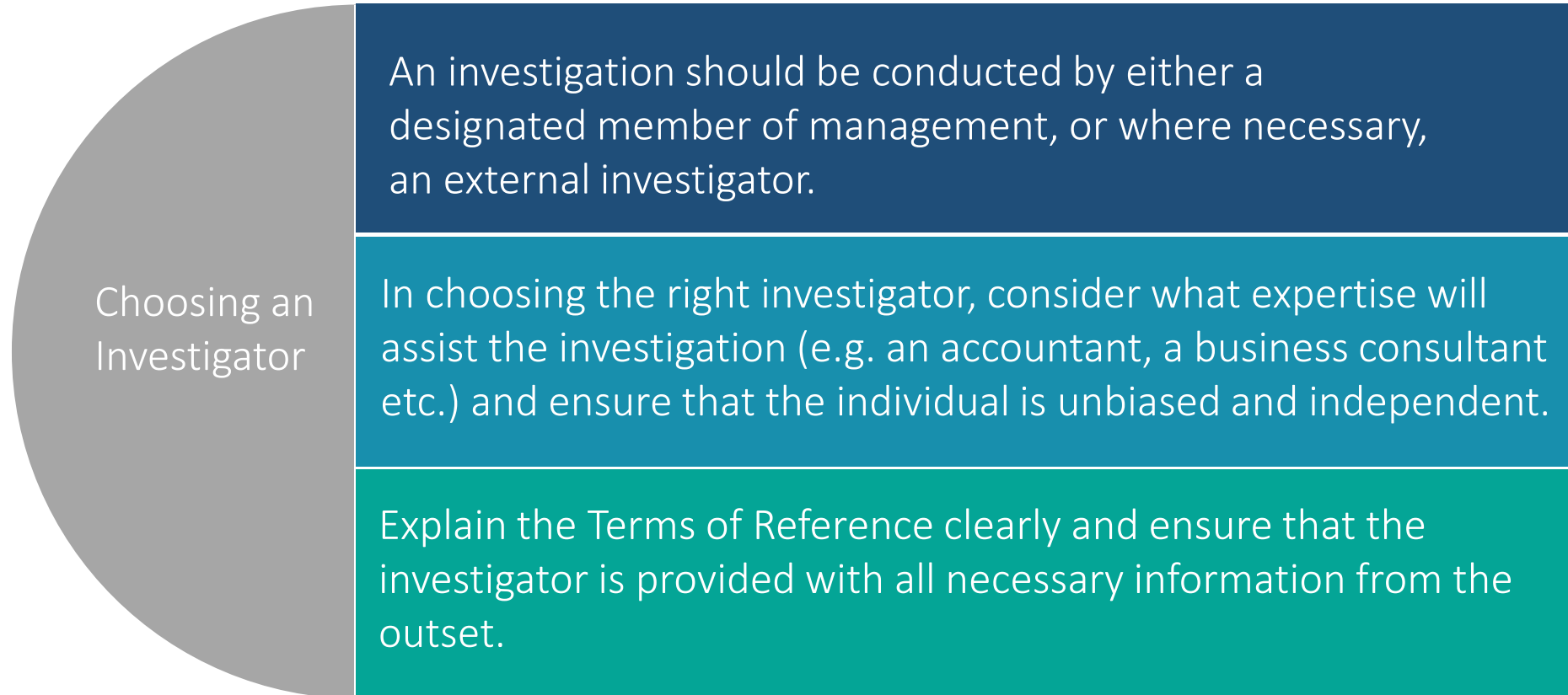
The use of clear Terms of Reference will ensure that the investigation is limited to a fact-finding exercise.

These should include details of;

- i) how the facts may be gathered by the investigator and,
- ii) how these facts should be presented within the investigation report.



Choosing an Investigator



Real Life Example

Towerbrook Ltd t/a Castle Durrow House Hotel –v- Young [2018] – High Court

- Hotel failed to provide an independent, thorough, impartial/objective investigation.
- Investigative/disciplinary meeting was fundamentally flawed.
- Contrary to natural justice and Hotel's own policy.
- MD – conducted disciplinary process on his own complaint.
- Investigation and ultimate decision making was not independent/thorough/impartial/objective.
- *“...had a little common sense and humility been brought to bear on matters...”*

Witnesses

- The Investigator may identify other employees who were involved in the matter and may invite them to provide their comments or to give additional information to assist in the investigation.
- Individuals involved should be given the opportunity to provide their statement at interview or in writing.
- The question of whether an employee has a right to legal representation and to cross examine all witnesses has been the subject of much case law in recent years.



A blurred photograph of several business professionals in a modern office hallway. The image has a strong blue and teal color cast. In the foreground, a person in a dark suit is walking towards the right, carrying a large folder. Behind them, a group of people, including a woman in a light blue suit and a man in a dark suit, are walking in the same direction. The hallway has large windows on the right side, letting in bright light. The overall atmosphere is professional and dynamic.

Part 3

Right To Legal Representation and Cross-examination



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Real Life Example

Lyons v. Longford Westmeath ETB [2017]

- Refusal to allow legal representation.
- Refusal to hold appropriate hearing with solicitor/counsel and cross-examination.
- Bullying Investigation stands.
- Report adopted by CEO.
- Facts would not be re-considered.
- At odds with *Burns –v- Castlerea Prison [2009]*

The Court was of the view that the:

“exclusion of solicitors and counsel, and the refusal to allow cross-examination under such policies is a breach of the Constitutional right to fair procedure.”

“It is clear that as a matter of law and as a matter of fair procedures, an individual whose job is at stake and against whom allegations are made would be entitled to challenge and cross examine evidence.”

Real Life Examples

E.G. v The Society of Actuaries in Ireland, and N.M v Limerick and Clare ETB [2017]

- Fair procedures do not apply in full at investigative stage
- Provided that investigation is itself a fair process
- Investigation should be an **information gathering exercise** to determine if there is a case to answer
- Progress to separate disciplinary stage where full suite of fair procedures and natural justice principles will apply.



Real Life Example

Iarnród Éireann/Irish Rail v. Barry McKelvey [2018]

- A **disciplinary process is not rendered unfair** by refusal to allow legal representation in the conduct of the disciplinary hearing or investigation.
- Such a requirement could only arise in **exceptional cases** involving issues of factual or legal complexity which could not be adequately addressed without the assistance of a lawyer.



Real Life Examples - WRC Decisions

The *McKelvey* decision has been affirmed in two recent WRC cases:



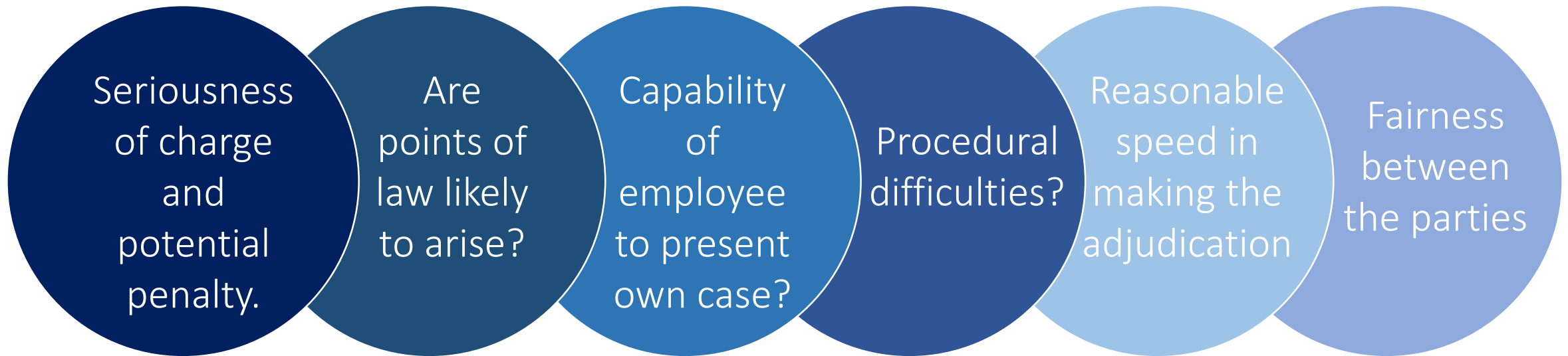
i) **ADJ-00017850 A Staff Accountant v. A Computer based Testing Provider (10th September 2019)**

AO expressly referenced the McKelvey decision and noted that he did not believe that exceptional circumstances existed that would necessitate the requirement for legal representation during the process.

ii) **ADJ-00014984 *Care Support Worker v. Residential Consulting* (18 February 2019)**

While the Complainant was only permitted to be represented by a Trade Union or fellow employee and not legal representation during the process, the AO found that the Respondent had conducted a thorough investigation and disciplinary process.

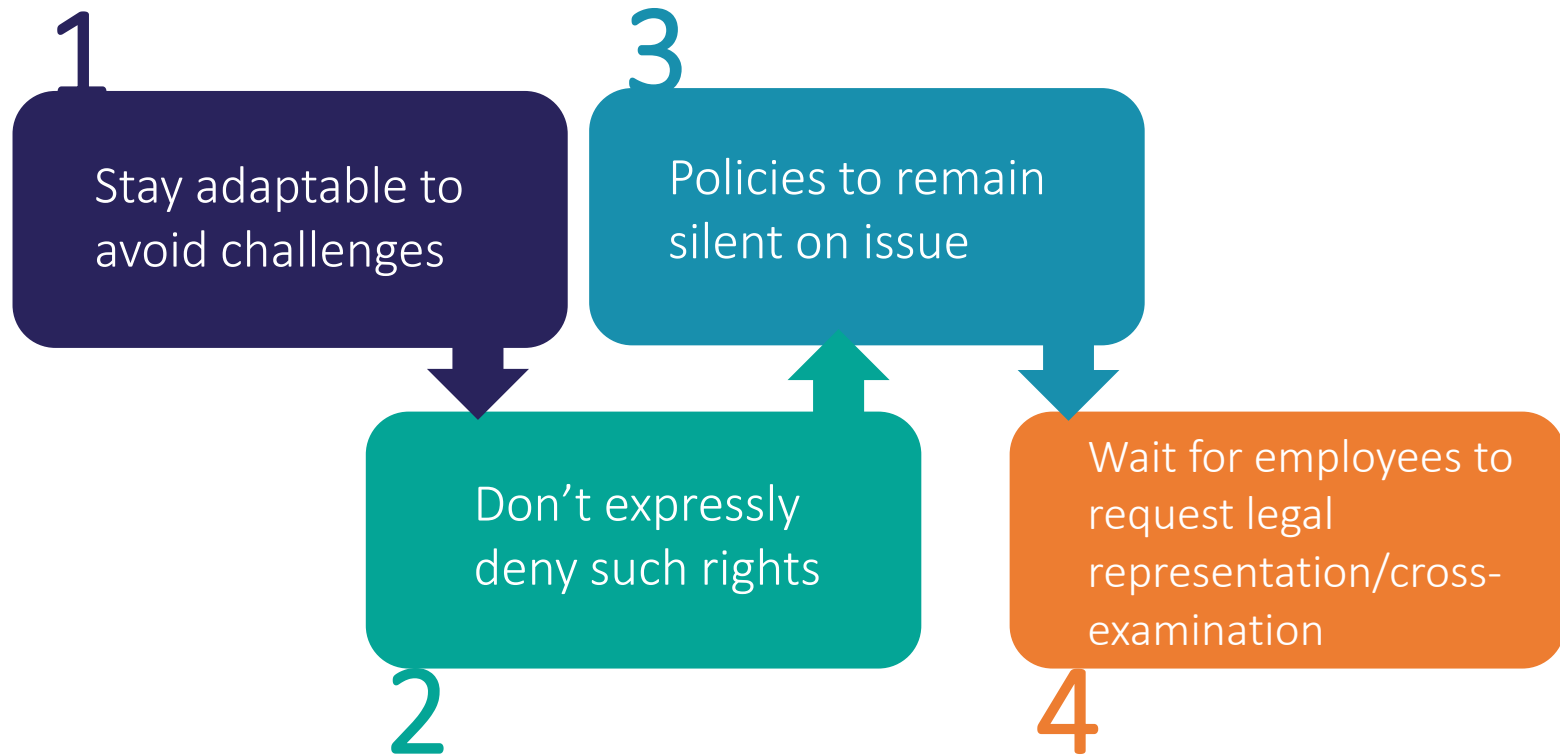
BURNS v GOVERNOR of Castlerea 2009 – supreme court



Investigations – Practical Steps

For Your Procedures:

The Workplace Relations Commissions' Code of Practice on Grievance and Disciplinary Procedures - representative "includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise"



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Part 4

Right To Appeal



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When do you allow an appeal?

The employee who is subject to the investigation should have an opportunity to appeal to someone who hasn't been involved in the process previously.

Employee should be provided with details of how to appeal the decision and a specific timeframe should be provided

Real Life Examples

- Labour Court decision - *Dunnes Stores v. A Worker 2019* highlights the importance of providing an employee with the opportunity to appeal how a complaint has been investigated.
- In this case, the Complainant alleged that he had been bullied by his store manager. The complaint was not investigated at the time because the store manager in question was absent from the workplace.



Real Life Examples

- When the investigation was concluded, the Complainant was informed that there was no evidence of bullying and he was informed that the Company's Dignity at Work Policy did not provide for an appeal stage.
- The Court held that the Company's procedures fell short of best practice by failing to provide for an appeal of the outcome of an investigation into allegations of bullying and harassment.

A blurred photograph of several business professionals in a modern office hallway. The people are walking in the same direction, creating a sense of motion. The hallway has large windows on the right side, letting in bright light. The overall color palette is dominated by blues and greys.

Part 5

Practical Advice



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Investigations – Practical Steps

For Your Investigation

Be sure
what it's
doing

Select an
appropriate
investigator
carefully

Best
approach -
limit what
investigator
can do

Ensure clear
Terms of
Reference are
set out

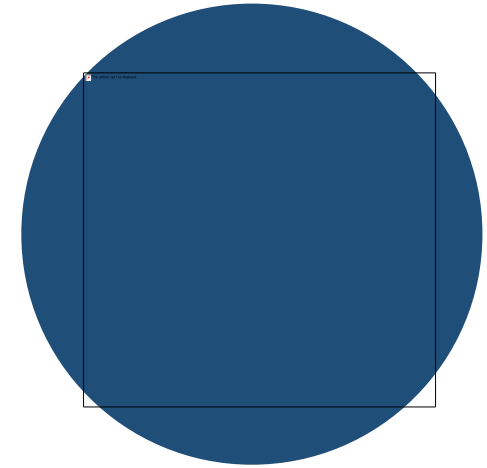
Investigations – Practical Steps

- Avoid triggering the right to cross examine:
 - ✓ No findings of fact impacting on reputation
 - ✓ Bullying, theft, sexual assault – Reputation & character of employee impacted
 - ✓ Gathering of Facts Only
 - ✓ Addressing only if Prima Facie Evidence exists to give rise to a Disciplinary Hearing
- Make it clear what investigation cannot do
- Make it clear to the accused, to the investigator and the commissioning party

Investigations – Practical Steps

If all else fails....

- Extend the rights legal representation
- Offer rights to cross examination
- Make it clear who bears the costs
- Consider appointing solicitor to advise
Chair on fair procedures and keep order



Investigations – Practical Steps

- Once findings are made – further action?
- Any formal regulatory report required?
- Report to the Gardaí?
- Internal and external communications.
- Mediation?

Questions?





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