



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

Jennifer Cashman
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Introduction

PROBLEMS..... WHAT PROBLEMS



Overview

What warrants an investigation?

Investigation Considerations

Rights to Legal Representation and Cross Examination

Practical Advice



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?

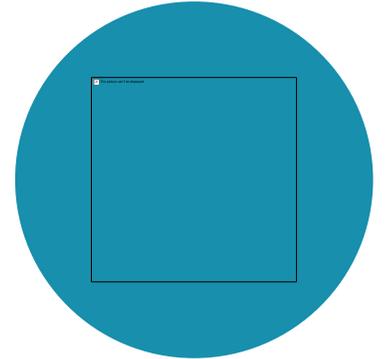
Delay – how old are the allegations and will the employee under investigation be prejudiced by the delay?

Has the employee **admitted** the wrongdoing?

Examples of when an Investigation is Warranted

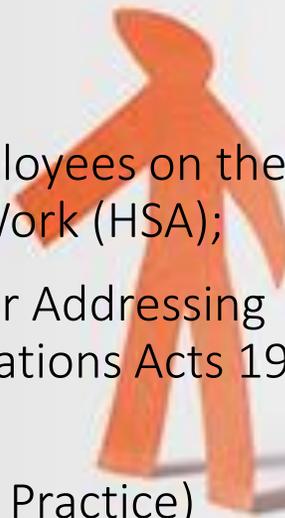
An employer may have to **consider** an investigation in a number of circumstances:

- 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)





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

Choosing an Investigator

An investigation should be conducted by either a designated member of management, or where necessary, an external investigator.

In choosing the right investigator, consider what expertise will assist the investigation (e.g. an accountant, a business consultant etc.) and ensure that the individual is unbiased and independent.

Explain the Terms of Reference clearly and ensure that the investigator is provided with all necessary information from the outset.

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.





Right To Legal Representation and Cross-examination

Part 3



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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.



Background

- Mr McKelvey was an inspector, he had been provided with fuel cards. An investigation was commenced into anomalies with the fuel card between 2014-2016.
- Mr McKelvey was suspended and advised that a formal disciplinary process was to commence into the “theft of fuel”.
- He then requested that he be represented at the disciplinary hearing by counsel and a solicitor due to the theft allegation. At the time he was also represented by his trade union.
- An application was made to the High Court for an injunction restraining his employer from proceeding with the disciplinary hearing unless he was allowed to have legal representation.

Supreme Court

- Given leave to appeal on the basis that the question as to whether an employee has the right to be legally represented at a workplace disciplinary hearing was one of general public importance.
- Clarke J state that legal representation should be allowed only where it is a “necessity” to ensure fair process rather than to bring a possible advantage to the employee.
- He found that the decision in the *Burns* case that legal representation will only be required in exceptional cases is the proper approach.
- Also stated that the Courts should not interfere in a disciplinary process unless something sufficiently serious has occurred that means that the conclusion will not be legally sustainable.

Real Life Examples - WRC Decisions

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



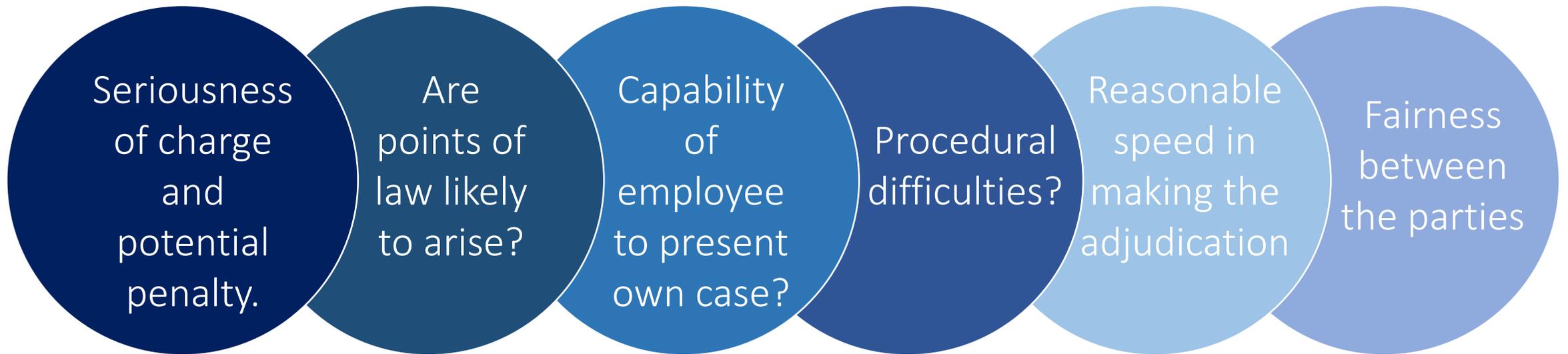
i) **ADJ-00017850 A Staff Accountant v. A Computer based Testing Provider (10th September 2019)**

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.

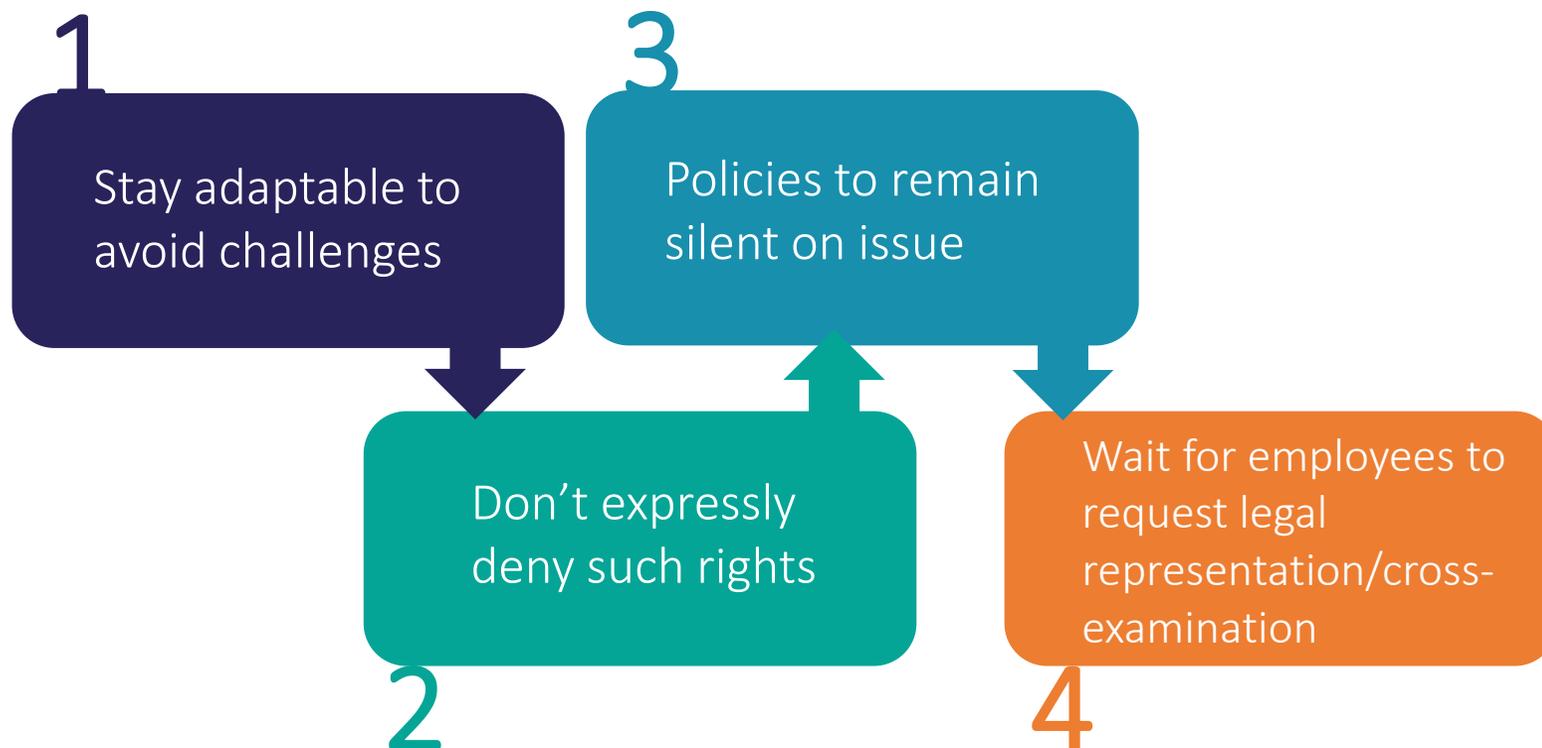
BURNS v GOVERNOR of Castlerea 2009 – supreme court



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"





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.



Part 5
Practical Advice



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

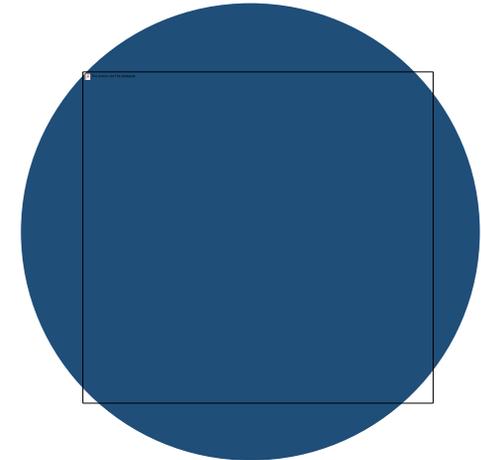
Investigations – Practical Steps

- 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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