Today we start a new series of posts tackling the vexed area of workplace investigations. We will look at the background law, of which there is very little, and at best practice guidance, of which there is more than can possibly all be useful. We will offer some examples of investigations done badly and consider when and how it may be sensible to use someone outside the business. While we will hopefully take some of the anxiety out of doing these things yourself, we will also offer to do them for you, and explain why that can make legal as well as practical sense. Just for variety, we will – probably — not talk about vaccinations.

So here we go, starting with a demystification of the word itself – what exactly is an investigation? For something so important, there is a weird lack of definition to it –
it has no technical description in employment law, takes no fixed form, is of no set length and requires no formal qualification. There are no hard-and-fast rules of evidence and you don’t have to wear a deerstalker and a tweed cape. Unless you really want to, that is. Far be it from me, etc. An investigation is at its root just the process by which an employer develops an adequate understanding of the facts relevant to any decision it needs to make in relation to one or more of its employees. That is most often in confrontational circumstances such as performance management or disciplinary or grievance procedures, but it could equally be carried out in cooperation with the employee, such as following a whistleblowing disclosure where the employer wishes to understand and rectify the breach of legal obligation identified.

However, though the concept is quite hard to nail down, the investigation is still integral to many HR processes. Credibility, reputation and perceived good faith, let alone money, are all at risk for employers and individual managers making those decisions without a proper picture of what happened and why. A reasonable investigation is key, the foundation-stone on which all your later decisions rest.

In the employment world as we know, the relevant burden of proof for these decisions is the balance of probabilities, effectively a 51% more-likely-than-not standard, and not the criminal beyond-all-reasonable-doubt 99% requirement. That 51% belief could be seen as a low bar, but it must be a belief held not just genuinely but also reasonably. It is from there that springs all the guidance around the conduct of workplace investigations. A materially defective investigation will mean that your belief may be found not to be reasonable, and that will lead to serious subsidence in the integrity of those later decisions.

Of course, investigations should be conducted as scrupulously as reasonably practicable - someone’s career may be on the line here - but you can and should do so with the background knowledge that the relevant test is the reasonableness of process and conclusions, not perfection. Put differently, a process and outcome which falls within the range of responses an employer might reasonably adopt to the situation is pretty robust at law, even if another employer or the ET itself would have done it differently or reached a different decision. And even where the process had more holes in it than a pound of Emmental, if the ultimate rightness of the outcome is found not tainted as a result, that will be of little benefit to the employee. Come on, you can do this.

Next post – identifying the issues to be investigated.

© Copyright 2021 Squire Patton Boggs (US) LLP

National Law Review, Volume XI, Number 342