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LAWYERS

# Effectively managing workplace harassment and bullying complaints

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## Background

It is a fundamental duty of an employer to provide a safe place of work for its employees, including one that is free from bullying and harassment. But there are many associated practical challenges for employers and the individuals who are directly responsible for the management of the employees, such as, HR professionals.

Employees now have recourse to numerous avenues by which they may seek to externally challenge their employer's management actions – these may potentially include (depending on the circumstances):

- (a) making one of the following applications to the Fair Work Commission:
  - (i) a general protections / adverse action claim;
  - (ii) a stop-bullying order; or
  - (iii) an unfair dismissal claim;
- (b) lodging a workers' compensation insurance claim against their employer's statutory insurance policy with its insurer;
- (c) making a regulatory complaint to the relevant state's workplace health and safety inspectorate;
- (d) making an human rights complaint to the federal Australian Human Rights Commission or the relevant state commission; and
- (e) issuing court proceedings alleging any of the following:
  - (i) a contravention of Part 3-1 of the *Fair Work Act 2009* (Cth);
  - (ii) a common law claim for breach of contract;
  - (iii) a common law claim for breach of duty of care (tort of negligence); and
  - (iv) a claim for misleading and deceptive conduct claim under the Australian Consumer Law.

It is a sad reality of modern times that employers are regularly called upon to conduct investigations in respect of complaints by employees of unacceptable workplace behaviour. It is also not unusual for parallel investigations to have to be undertaken in respect of counter-allegations of poor performance or misconduct on behalf of the employee complaining of being bullied or harassed.

To make things even more complicated, an external agency might become involved, at any stage of the employer's internal investigation, as a result of one of the participants becoming disgruntled and exercising one or more of their workplace rights as outlined above.

The standard of performance traditionally expected of employers and those individuals managing the investigation of workplace complaints has been reflected in the following statements:

*"Employers are not required to have the skills of police investigators or lawyers."*<sup>1</sup>

*"[The employer's] investigation does not need to be without flaw. It does not need to be forensic in detail."*<sup>2</sup>

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<sup>1</sup> *Re Bodo Schaale v Hoechst Australia Limited* [1993] FCA 125 at paragraph [26]

<sup>2</sup> *Dent v Halliburton Australia Pty Ltd* [2014] FWC 5692 at paragraph [49]



However, recent case law trends suggest that this important part of the industrial landscape is evolving, for a variety of reasons (including increased regulatory burdens imposed on employers by legislation), with the traditional standard essentially being replaced by a higher standard or expectation of performance for those individuals discharging their employer's managerial responsibilities, particularly in circumstances where the employer's own policies and procedures are not rigorously followed.<sup>3</sup>

In this paper, we will explore some important cases evidencing this trend and what it means for employers from both a front and back end perspective in terms of the preparation of flexible and non-binding employment documentation and for the conduct of effective workplace investigations.

## Case study #1 – common problems with employment documentation

The following case study relates to a dispute litigated before the Federal Court of Australia last year, at both a trial and appellate level, which is illustrative of common problem areas arising from ineffective employment documentation.

*Romero v Farstad Shipping (Indian Pacific) Pty Ltd*<sup>4</sup>

### Key documents

Farstad Shipping is a large global company employing over 2000 employees. The company's suite of local employment documents were closely scrutinised by the Full Court of the Federal Court of Australia which are in material respects outlined below.

#### Letter of Offer

Dear Lisa

We are pleased to confirm our offer of permanent employment with Farstad Shipping (Indian Pacific) Pty Ltd as a Deck officer on vessels owned or operated by Farstad Shipping in Australia and South East Asia and beyond.

This appointment is conditional upon you completing a Company medical and three months probationary seetime. As you have successfully completed both, your appointment is effective from your next swing.

Your wages and conditions will be governed by the Farstad Shipping (Indian Pacific) Pty Ltd and AMOU Oil and Gas 2010 Enterprise Agreement as amended or the relevant offshore contracts provided by Farstad Shipping (Indian Pacific) Pty Ltd affiliated companies for operations in the Indian Pacific region.

You will be expected, if required, to serve on any vessel owned or operated by Farstad Shipping and be flexible in regards to availability. Whilst every attempt is made to accommodate individual requests in allocation to vessels, the decision of the Ship Manager and HR department will be final. **In addition, all Farstad Shipping Policies are to be observed at all times.** [emphasis added in bold]

You are eligible to immediately join the Farstad Shipping Superannuation Plan within the Mercer Super Trust Corporate Superannuation Division, with all benefits outlined in the member booklet enclosed. If you wish to join this fund, please complete the membership application form and return to this office.

Upon proof of existing Private Health Insurance you will be provided with a fortnightly allowance for private health cover as per the Enterprise Agreement to contribute to this cost. Each year proof will need to be provided to maintain this allowance. ...

<sup>3</sup> *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177

<sup>4</sup> [2014] FCAFC 177



## The Policy

Farstad Shipping seeks to establish a workplace culture where all employees are treated fairly and with respect and dignity. Behaviours that are harassing, discriminatory or bullying in nature are totally unacceptable, destroy workplace harmony and co-operation, and are distressing and harmful to the individuals on the receiving end of such behaviours. Workplace harassment, discrimination and bullying are against the law and will not be tolerated in Farstad Shipping.

**Managers and supervisors are accountable for monitoring the workplace and reinforcing the harassment and discrimination procedure with employees.**

Farstad Shipping will:

- **handle complaints promptly, with confidentiality, impartiality and with sensitivity to the complainant's needs;**
- meet all legal and statutory obligations; and
- **ensure employees making complaints of workplace harassment and discrimination are not disadvantaged in their employment conditions or opportunities.**

Farstad Shipping's harassment and discrimination procedure applies to all personnel, including part-time, full-time and casual employees, contractors and visitors. ...

### 2.5 Harassment and Discrimination Contact Officers

**The company will establish, train and maintain Harassment and Discrimination Contact Officers to provide employees throughout the business with access to people with whom they can discuss concerns about workplace harassment and discrimination and receive guidance on the options available to deal with their issues.**

The Contact Officer's primary role is to help staff members resolve their issues themselves. If that fails to manage the situation however, then the Contact Officers can help the staff member to explore other options including making a formal complaint. The Human Resources Department is responsible for maintain (sic) an up to date list of Contact Officers.

### 2.6 Harassment and Discrimination Complaints Procedure

#### 2.6.1 Raising Concerns and Identifying Options

Farstad strongly encourages and supports employees who believe they have been subjected to harassing, bullying or discriminating behaviour, to bring their complaint to the attention of a Contact Officer or their Manager or the HR Department at the earliest possible opportunity. Also, Farstad strongly supports employees who believe they have witnessed harassing or bullying or discriminating behaviour in the workplace to encourage victims to bring their complaint to the attention of a Contact Officer, their Manager or the HR Department at the earliest possible opportunity.

The Manager or HR Department may notify a Contact Officer, unless contact was made with a Contact Officer directly by the complainant. **The Contact Officer will listen to the concerned person's complaint, explain the options available and provide advice as necessary.** Ongoing support in the form of (sic) counselling may also be arranged utilising the Employee Assistance Program. All formal contacts regarding issues of a harassing, discriminatory or bullying nature are to be recorded by the person contacted and forwarded to the GM HR or Staff Administration Manager. The written record of contact should form a record of issue whether it be resolved, arise again at a later date, or escalate to a more formal investigation. All contacts will be handled in a strictly confidential manner.



### 2.6.2 Assessing Options

**The employee must decide what action they want to take in terms of resolving the problem in an effective and acceptable manner.** The options available include:

- taking informal action to resolve the complaint themselves, including talking to the alleged harasser, and if required, requesting that the Contact Officer or Manager be present;
- requesting the Manager discuss the concern with the alleged harasser to resolve the complaint informally;
- initiating a formal complaint and investigation under the Workplace Harassment and Discrimination procedure;
- initiating a general grievance/complaint through their line management where the employee believes they have been treated unfairly but not for any of the reasons contained in anti-discrimination legislation; and
- this procedure does not remove the employee's right to take their complaint directly to the relevant State Anti-Discrimination body or to the Human Rights and Equal Opportunity Commission.

**The person contacted by the complainant can facilitate the employee's assessment of these options, but the decision as to how to proceed must remain with the employee.**

### 2.6.3 Informal Action

This option emphasises resolution rather than factual proof or substantiation of a complaint. The informal option can be the first step in dealing with harassment or discrimination if the allegation is not of a 'serious' nature.

**The informal option may be used by the complainant where:**

- the allegations are of a less serious nature, but the complainant subjected to the behaviour wants it to cease nonetheless; or
- **the individual subjected to the behaviour wishes to pursue an informal resolution;** or
- the parties are likely to have ongoing contact with one another and the complainant wishes to pursue an informal resolution so that the working relationship can be sustained.

The complainant can initiate the informal option by asking the person (harasser) to stop the behaviour to which they object. The complainant may also approach their Manager or a Contact Officer for assistance and request that they:

- accompany the employee to discuss the issues with the alleged harasser; or
- privately convey the complainant's concerns and reiterate the Company's policies and procedures on the matter.

Managers and/or Contact Officers involved in the informal resolution of harassment and/or discrimination complaints are to complete and submit a confidential EEO, Harassment and Discrimination report to the GM HR.

The Contact Officer or Manager involved must also follow up within two weeks to determine the outcome of the meeting. If the issue has been resolved, the procedure will stop. If the issue has not been resolved, the option of a formal complaint may be pursued. Employees are not required to exhaust all informal options for resolution before formal action can commence.



### 2.6.3 (sic) Formal Complaint

The formal option focuses on proving whether a complaint can be substantiated.

**This formal option may be appropriate where:**

- informal attempts at resolution have failed;
- the complainant alleging harassment or discrimination has been victimised;
- the complaint involves serious allegations of misconduct and informal resolution could compromise the rights of the parties;
- the complaint is against a more senior member of staff. The formal option may help to ensure that the complainant is not victimised or disadvantaged;
- the allegations are denied and the complainant wishes to proceed with an investigation to substantiate the complaint; or
- **the complainant wishes to make a formal complaint from the outset.**

**If the employee chooses to go ahead with a formal complaint, they need to lodge the complaint in writing with their Manager. The complainant may request assistance from a Contact officer or their Manager if they require assistance in making a formal complaint.**

The Manager will inform the GM HR or Staff Administration Manager so that an investigation can begin, and so that the employee's manager can ensure that no victimisation takes place. If their Manager is the alleged harasser, the employee should lodge the complaint with their Manager's Manager, GM HR or Staff Administration Manager.

### 2.6.4 Formal Investigation

If an employee decides to make a formal complaint, the employee's Manager must investigate the complaint. In some circumstances this may not be considered appropriate, either because the Manager is the alleged harasser or because the Manager does not have the skills to conduct the investigation. In such cases, the Manager will need to appoint another manager to conduct the investigation. If no other Manager has the skills or experience to conduct this type of investigation, professional external assistance may be used.

**The investigator will interview:**

- **the complainant;**
- **the alleged harasser;**
- **other appropriate employees/witnesses.**

**The investigating Manager will take a record of interview with the complainant, the alleged harasser and any witnesses. The parties to a complaint and any witnesses should be given the opportunity to peruse, correct and sign their record of interview.** The investigation Manager should stress the importance of confidentiality with all people interviewed and should not discuss the investigation with anyone who does not have an express need to know. ...

If the allegation against a person is a criminal act the complaint becomes a police matter.



#### 4.0 Responsibilities

##### Contact officer

- **Arrange appointment with complainant to discuss complaint.**
- **Explain what options are available.**
- **Assist complainant to make a formal complaint if requested.**
- If appropriate complete EEO, Harassment and Discrimination Contact Form and forward to the GM HR or Staff Administration Manager. [emphasis added in bold]

## Summary of facts

### Background

In late 2011, Lisa Romero was employed as a second officer aboard the supply ship "Far Swan" on a 12 day voyage under the command of Captain Cameron Martin. Ms Romero had not previously worked aboard the Far Swan, but had worked on other ships in the Farstad fleet between June 2010 and August 2011, predominantly on the "Far Scandia" under the command of Captain Lorrae Burke.

### The Far Swan incident

During the voyage on the *Far Swan*, serious problems on the bridge of the ship occurred between Captain Martin and Ms Romero. Ms Romero complained of experiencing a crisis in confidence whilst piloting the ship under the supervision of Captain Martin on 1 December 2011. She complained to Captain Martin about his style of "Bridge Team Management". Captain Martin allegedly responded by saying to Ms Romero that "you are a liability".

A meeting was held the following day. Captain Martin told Ms Romero that he was unhappy about the criticisms of his management style and that he had emailed the HR department to complain about her incompetence. Ms Romero was directed to telephone Mr Barrow of the HR department to resolve the matter. Thereafter there occurred a number of telephone calls between each of Ms Romero, Captain Martin and various members of the HR department. Another heated conversation between Ms Romero and Captain Martin ensued.

A replacement was ultimately organised for Ms Romero and she disembarked from the *Far Swan* on 4 December 2011.

### The email

On 7 December 2011, Ms Romero forwarded the following email to the General Manager and members of the HR department, Mr Barrow and Ms Barker:

*I have been reflecting on my recent trip on board Far Swan and wanted to thank you for your support by assisting in an attempt to improve the situation. It is comforting to know that [Captain Martin's] management style is seen as needing to change. It has certainly taken a toll on me.*

***I am very concerned that [Captain Martin] has made inappropriate comments about me. He has told me that he emailed the Ship Manager and explained to him and Peter Barrow that I am incompetent. To me he also expressed this opinion as well as commenting that I have mental health issues. As Peter Barrow pointed out, I have a very good work history with Farstad as I also do with other companies.***

*Lucy asked [Captain Martin] to modify his management style to assist me to regain my confidence and to deliver my training in smaller blocks. He put the phone down after talking with Lucy, walked over to me and told me*



*that the only reason I was still on board was because he couldn't get rid of me. He explained Lucy's instructions with regard training and so ordered me off the bridge, even though it was the beginning of my four hour watch.*

***[Captain Martin's] behaviour was unrelenting and targeted bullying towards me from the first hour of the 12 day trip. Farstad clearly places a high level of importance on safety issues on its vessels and [Captain Martin] undoubtedly jeopardised safety for the sake of illustrating his belief that I am incompetent.***

*I have just put myself through the first of two blocks of study for an Advanced Diploma (Chief Officer/Master). Given that Farstad will sponsor the second block commencing in January, I propose for the time being I do not return to sea in order to recover from this difficult experience. **[Captain Martin's] inappropriate behaviour needs to change but this is a matter for Farstad management to address. My intention is to continue my professional development through study and return to sea to what has been up until now, a productive and happy working environment with Farstad.** ... [emphasis added in bold]*

### Workplace investigation

A brief email reply from Mr Barrow informed Ms Romero that "the matter is still to be properly investigated" and that both parties would be interviewed. No mention was made of the existence of the Policy or Ms Romero's options under it.

Ms Romero attended an anchor training course in Perth for a few days commencing on 12 December 2011.

Ms Romero then travelled overnight on the "red eye" flight from Perth to Melbourne for the purposes of an interview to discuss the incident on the *Far Swan* on 16 December 2011. She was advised that Ms Barker, Mr Barrow and Ms Sally Anderson would be in attendance. Ms Romero assumed that Ms Anderson would be her support person.

Ms Romero took detailed notes of the meeting and later described the line of questioning as aggressive and demeaning. She took extended personal leave following the interview. Ms Romero's notes evidenced that she was very much pressed into discussing concerns about her own competence and, in particular, temperament whilst working under stress. These were the very matters raised by Captain Martin with Farstad's HR department.

An extract from Ms Romero's notes which were admitted into evidence are set out below:

*Sally: How was Cam's training?*

*Lisa: There was nothing wrong with the method of Cam's training, the problem was the way he treated me. I've sailed with about 15 different masters, I've never experienced something like this before. His victimisation of me was so bad that I started to get anxious and to shake when he came to the bridge. He constantly criticised me and put me under unnecessary pressure. If I fumbled with a piece of equipment that was new to me, he would make comments like "a lot of things badly done" or curse.*

*Sally: Some people are just like that, more formal and less friendly.*

*Lisa: When you see a person treat you in a manner very differently to how they treat other crew members and they tell your colleagues that you were fucking around with and broke a piece of equipment that you haven't touched, you conclude that something is wrong.*

*Sally: You were anxious when you were on the bridge.*

*Lisa: No, I was anxious when Cam came to the bridge.*

*Sally: You were anxious on the bridge. Where was the ship when this fumbling occurred? Because if it's within 500m clearly this is serious.*

*Lisa: Well outside 500m.*

*Sally: Why did you hand the ship back to Cam.*





*Lisa: Cam kept calling me back to the chart table to look at a diagram. I was getting concerned because I was losing (sic) the time I needed for the approach. The distances and margins that I'm comfortable with would not be available if the conversation at the chart table continued. I explained to Cam that I was having a crisis of confidence and asked him to take the ship back. Cam took the ship alongside the platform and asked me where my confidence had gone. I said I was finding his bridge team management style difficult. And that was my crime.*  
...

*Lucy: Do you think your (sic) a good ship handler?*

*Lisa: Yes.*

*Lucy: These reports indicate otherwise.*

*Lucy: Cam says he didn't tell you you had mental health issues but he said he was concerned about your mental health. What did he say because there is a big difference?*

*Lisa: I can't remember but I don't think there is a big difference between the two statements.*

*Lisa: Cam bastardised me for the duration of the trip, he wasn't concerned for me.*

*Peter: That is a big allegation to make and I'm not just taking your word on that.*

*Lisa: It's the truth.*

*Peter: You need to go and learn how to behave on board.*

*Lisa: The company policies you plaster on the bulkheads about equal opportunities and bullying are bullshit.*

*Peter: Now hang on, if we didn't take these things seriously we wouldn't have flown Lucy to Karratha to interview Cam and we wouldn't have you here. We go to a lot of trouble to get these things right. ...*

*Sally: We would like to get you and Cam in to the office.*

*Lisa: Do you seriously want me to break down like this in front of Cam?*

*[I was crying and shivering from the combination of cold and the emotional drain, the meeting had been more than two and a half hours long at this stage]*

*Sally: Well maybe in time.*

*Lisa: I don't ever want to be in the same room as Cam. I don't want any more to do with this. I don't plan to take it any further. ...*

*Peter: This could become a union matter.*

*Sally: Are you a member?*

*Lisa: I'm not a member.*

*Peter: We'll get back to you between Christmas and the new year or early in the new year.*



## Investigation outcome

Ms Romero was advised of the outcome of the investigation on 14 February 2012. The investigation report titled "Investigation Report – Workplace Grievance of Lisa Romero" ultimately found the complaint to be unsubstantiated and that the incident was attributable to no more than "a clash of personalities and communication styles".

Ms Romero responded through her solicitors rejecting the investigation's findings and, amongst other things, pointing out that she had never made a formal complaint under the Policy.

## Litigation

Ms Romero thereafter lodged a sex discrimination complaint with the Australian Human Rights Commission which led to litigation and a hearing before the Federal Court of Australia. Ms Romero alleged in the court proceedings that, in addition to being subjected to unlawful discrimination, Farstad had failed to comply with the Policy and therefore materially breached the terms of its contract of employment with her.

Ms Romero was unsuccessful at trial in respect of both causes of action. She appealed to the Full Court of the Federal Court of Australia, but solely in respect of the common law breach of contract claim, ie the alleged failure to comply with the Policy.

## Decision on appeal

The Full Court of the Federal Court held that the Policy was contractually binding, relevantly observing:

*"The Policy in this instance was part of the employment contract. The wording of the Letter of Offer taken with the importance of the Policy terms, the education of employees to reinforce the terms of the Policy, are all factors leading to that conclusion. While some parts of the Policy may have been aspirational and some parts directive, Farstad's obligations in relation to dealing with serious complaints of sex discrimination and bullying, were contractual promises given in exchange for employees being obliged to comply with behavioural requirements imposed on employees by the Policy."*

The Full Court then went on to consider whether Farstad's investigation of the complaints made by Ms Romero had complied with its' contractual obligations and concluded that it had failed to do so in a number of material respects:

- no election had been made to pursue any action under the Policy – Ms Romero had not made a formal complaint in order to trigger such an investigation and no Contact Officer had ever met with her and explained the options under the Policy;
- there was a general failure to carefully and systematically investigate Ms Romero's complaints and her allegations were not properly put to Captain Martin for his response;
- the interview of 16 December was of serious concern, for a number of reasons:
  - a major complicating factor was that there were parallel investigations in play – this was not unusual – but the vice was in the merging of the two rather than treating them separately in accordance with the standards applicable to each;
  - Ms Romero was effectively ambushed with a series of assertions about her competency; and
  - with a focus on the competency matters raised by Captain Martin, Ms Romero's own complaints were not effectively examined and lost.

Accordingly, the Full Court upheld the appeal and remitted the proceedings back to the trial judge for hearing in respect of the amount of compensatory damages to be awarded to Ms Romero for breach of the terms of her employment contract by Farstad.



## Case study #2 – (more) common mistakes with workplace investigations

The following outlines another case example heard by the Fair Work Commission last year which is illustrative of some of the common types of mistakes made by employers and their individual managers when conducting an harassment and bullying investigation.

### *Susan Francis v Patrick Stevedores Holdings Pty Ltd*<sup>5</sup>

#### Key document

Patrick Stevedores is a significant employer operating in the maritime industry from over 40 locations across Australia and New Zealand.

The Fair Work Commission was highly critical of Patrick's workplace investigation in respect of a serious complaint of a breach of its code of conduct, particularly its' HR Manager's written findings on which the decision to dismiss the alleged perpetrator was entirely based (see extract below).

#### "Investigation Report"

##### *Incident*

In the early hours of November 27, approximately 3.00am, Susan Francis was heard to be communicating over the radios in a manner which has been described as abusive and inappropriate.

**This prompted a response Paul Nichol of "shut up"**. As Susan was not aware of who made the comment, she approached who she believed to have made the remark with word words to the effect of "don't you ever talk to me like that again". At this point, Susan was advised of who had actually made the comment and nothing more was said.

At approximately 5.00am, in the smoko room, Susan confronted Paul Nichol about his comment. **There are a number of statements that confirm Susan walked/stormed into the room and directly up to Paul. The version of events that has been provided by Susan in respect of her actions at this point has altered three times.**

Once Susan reached Paul, she grabbed him by his throat while continuing to yell words to the effect "don't you ever talk to me like that again" and "don't put your hands on my throat again". **These statements have been confirmed by a number of other employees.**

Susan states that Paul retaliated by punching her on the chin which ricocheted, hitting her shoulder. **There are no statements confirming such action, rather a gesture to flick/push away in response to Susan's actions. ...**

##### *Findings of the investigation*

Through the investigation, **the allegations that had been put by Paul Nichol have all been validated by numerous individuals.** In the show cause meeting that was held on Thursday 9 January 2014, **Susan again put forward a varied version of events from the morning in question.**

##### *Recommended outcome*

Termination of employment. [emphasis added in bold]

<sup>5</sup> [2014] FWCFB 7775



## Summary of facts

### Background

Susan Francis was employed as a wharfie in the role of Senior Tally Clerk by Patrick at its Newcastle wharf, for approximately 14 months when the incidents occurred.

### Two-way radio incident

At the time of the relevant incidents, Ms Francis was rostered to work the “dog watch” shift between 8.00pm and 8.00am on 26-27 November 2013.

Early during the shift, Ms Francis used the two way radio in the course of her duties to enquire about the whereabouts of her co-worker by saying words to the effect: *“Are you going to bring that forklift into the shed or what Gorlicki?”*

Ms Francis said that there was a response from another employee, who she later learned was Mr Paul Nichol, to the effect of: *“Why don’t you shut the fuck up Susie?”*

Mr Nichol alleged that Ms Francis was shouting abuse for a number of minutes over the radio and called the co-worker *“an imbecile”*.

### Crib room incident

Another incident then occurred in the crib room, during a meal break, later in the shift.

Ms Francis said that she verbally confronted Mr Nichol about him making the comments, during the radio incident. They exchanged some banter and she touched him on the chin. Mr Nichol has then retaliated and punched her in the chin/throat.

Mr Nichols alleged that Ms Francis was the aggressor, that she had stormed into the room and grabbed him around the throat with one hand and was threatening to punch him with the other. He has repeatedly told her not to touch his throat again.

### Complaint and initial employer response

Mr Nichol subsequently made a workplace harassment complaint to management in the presence of his union delegate the following day at 7.15am on 28 November 2013. An incident report was provided by Mr Nichols later that evening, but this was not provided to Ms Francis.

Ms Francis was also interviewed in the presence of her support person that same evening. She related both incidents, including the allegation that she was punched in the crib room and had been subjected, on other occasions, to incidents of harassment by Mr Nichol including comments of an inappropriate sexual nature.

Notwithstanding that there were serious allegations of harassment, assaults and conflicting stories of provocation between the two employees, the Site Manager only suspended Ms Francis.

### Workplace investigation

As later observed by the Fair Work Commission, Patrick’s investigation was not assisted and was indeed positively hampered by the wharfies’ “code of silence” which was evidenced by a general reluctance on behalf of the witnesses to provide full and frank answers to the questions put to them by the investigators. As members of the union it was the practice of the wharfies that any disagreements or confrontations between them would ordinarily be dealt with internally within the union, ie without the involvement the employer’s management team. For example, neither Ms Francis nor any of the witnesses were initially prepared to inform management that, during the two-way radio incident, Mr Nichol had used profanity, simply describing his comments as *“Why don’t you shut up Suzie”*. This was later used to make an adverse finding of credit against Ms Francis.



Six witnesses were interviewed by the Site Manager the following day on 28 November 2013. None of the witnesses corroborated Mr Nichol's version of events, in material respects, and each gave confused and differing accounts, particularly about what occurred in the crib room. The very next day a fresh witness, Mr McIntyre volunteered new information corroborating, for the first time, Mr Nichol's account that he was assaulted by Ms Francis. All of the witnesses had been in the same small crib room, yet Mr McIntyre's version of events was the only one ultimately accepted by Patrick.

After the "first phase" interviews were completed, the Site Manager determined that Ms Francis should be asked to show cause as to why disciplinary action should not be taken against her. The HR manager, Ms Green thereafter became more actively involved in the "second phase" of the process. The HR manager re-interviewed all of the witnesses to confirm their original evidence in writing (essentially based on the Site Manager's earlier notes) on 9 and 10 December 2013.

Ms Francis was asked to show cause on 16 December and did so in writing on 19 December 2013. A disciplinary meeting was held to discuss Ms Francis' written response on 9 January 2014. The Investigation Report was completed by the HR manager and forwarded to the General Manager on 10 January 2014. Ms Francis was dismissed by the General Manager, as recommended, on 13 January 2014.

### Hearing

During the arbitration hearing, the Site Manager conceded in cross-examination that, in respect of the allegations made by Ms Francis against Mr Nichol, he had not:

- raised with the witnesses that Mr Nichol had allegedly punched Ms Francis in the face; or
- followed up with the witnesses the allegations of previous harassment of Ms Francis by Mr Nichol.

During the hearing, the HR manager also conceded in the course of cross-examination, that:

- she had never conducted a disciplinary investigation into allegations of physical assault at the workplace;
- a number of the allegations made against Ms Francis were not corroborated by the other witnesses;
- whilst there were some differences in the accounts given by Ms Francis, they were not significant in nature; and
- a number of the conclusions reached in the investigation report were incorrect.

Finally, the General Manager further conceded in cross-examination, that he had not reviewed any of the evidence and had relied solely on the Investigation Report when making his decision to dismiss.

### Decision

Notwithstanding the problems posed to the investigation by the wharfies' own conduct, Patrick and the managers involved were still strongly criticised by the Commission, and overall, the investigation was found to be biased and one-sided.

Importantly, Deputy President Sams found that:

- the allegations of bullying and harassment made by Ms Francis had been effectively ignored during the investigation; and
- the HR manager had provided an incorrect summary and analysis of the evidence in the Investigation Report and thereby misled the General Manager when he made the decision to dismiss Ms Francis.

In light of the above, the Commission concluded there had been a substantial miscarriage of justice. Ms Francis was ordered to be reinstated to her former position within 14 days.



## Tips for effective employment documentation

There are important things that can be done by employers to minimise the risk of a policy having contractual force and thereby avoiding an adverse outcome like in Romero (see below).

### Offers of employment / employment agreements

Ensure that all contractual documents expressly state that HR policies do not form part of the employment contract and do not legally bind the employer.

### Policy documents

Likewise all policy documentation should contain a similar statement to the above, ie that they are not legally binding on the employer and are guidelines which it may choose not to follow according to its sole discretion.

Policy wording should be simplified and generalised, wherever possible, whilst still maintaining their integrity and effectiveness from a regulatory perspective.

Policies also should not be overly prescriptive and provide for flexibility in how the employer may choose to manage an individual complaint.

## Tips for effective workplace investigations

### Before commencing an investigation

#### To suspend or not to suspend

If there are reasonable grounds to suspend, the employer should do so as soon as is reasonably practicable.

Reasonable grounds would include:

- where the employer has significant concerns about an employee's alleged behaviour, such that it could possibly lead to a dismissal;
- where the employer is concerned that the employee would represent a danger to themselves or others if left in the workplace; and
- where there is a concern that the employee will tamper with or remove evidence relevant to the investigation if left in the workplace.

Employers need to be consistent in their messages – a suspension indicates that an employer has concerns that an employee's alleged conduct, if proven, may result in a loss of trust and confidence such that a dismissal is necessary.

If there are two employees involved in the alleged incident it may be necessary to suspend both employees during the investigation to ensure that there is no question of bias, for the reasons explained by Deputy Sams in *Francis*.

#### Who should investigate?

This usually depends on the complexity of the situation.

If a number of employees are involved, there is more than one incident, or a number of conflicting stories a formal investigation is essential to ensure reliable findings. Another consideration is the seriousness of the allegations. If the potential consequences are significant for the employee, for example dismissal, a higher degree of satisfaction is required to substantiate the allegations – that is, the strength of the evidence necessary to establish a fact on the balance of probabilities will vary according to the nature of the allegations.



Recent cases indicate two questions to ask in deciding who to choose:

*Who has the right level of experience?*

The person appointed to undertake the investigation must have the appropriate skills and experience to do so.

In *Francis* the HR Manager was ultimately given the task of investigating the incidents. Unfortunately, she did not have the experience or expertise to properly conduct a serious misconduct investigation. Her task was made particularly difficult by the “code of silence” amongst staff. It was found by the Fair Work Commission that the HR Manager’s “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.” Had the investigation been conducted properly in that case, it is likely that the employee would not have been dismissed.

*Internal or external investigator?*

There are benefits to both, and it will depend on the allegations and the circumstances as to which is the better choice.

If there are allegations against senior managers, or an internal investigation may reasonably be seen as biased, an external investigator is essential. An external investigator may also be the best choice if there is no one appropriately skilled to do the job (see above), or there is a lack of internal resources.

Alternatively, if there is a need to understand the workings of the business or of a particular occupation (for example, investigating a medical incident within a hospital), an appropriately skilled staff member may be better placed to investigate. While they may cost more initially, external investigators have potential to save employers money and stress in the long term. However, care should also be taken in deciding on an appropriately experienced external investigator. Ideally, you should not engage an investigator who will be involved in deciding what consequences will flow from the investigation, eg a disciplinary procedure. The investigating officer and the disciplining officer should be independent.

If an external investigator is appointed, it is important that “independent” investigations are not overly influenced by the employer. In *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Visy Pty Ltd*<sup>6</sup> the employer framed the questions for the investigation, required the HR Manager to sit in on the interview with the employee accused of misconduct, and generally appeared to “supervise” the investigation. It was subsequently found not to be an independent and impartial investigation.

However, reviewing a draft investigation report and requesting clarifications or additional information (or even checking grammar/wording) can result in a better quality investigation report – but employers need to walk the fine line between this and directing the investigation, or influencing findings.

**Does the employee need to know the allegations before being interviewed?**

Not necessarily. If there is a genuine need to put the allegations immediately to the employee without having any evidence disturbed, or to ascertain their initial reaction, then it may be unnecessary to provide details of the allegations beforehand.

In *Camilleri v IBM Australia Limited*<sup>7</sup> the employee was found to have made inaccurate expense claims for a period of three years. The employee was not provided with the allegations by the Internal Audit Investigators before the investigation, and in the circumstances, Senior Deputy President O’Callaghan said that this was understandable.

In the interests of ensuring a thorough investigation, it may be necessary to allow the employee to present evidence to support their case (or conduct a further interview) if the employee is not provided with the allegations before the initial interview. In most cases, however, it will be advisable in the interest of natural justice to allow the employee time to prepare and gather supporting evidence before an interview, and they should be provided with the allegations prior to their interview.

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<sup>6</sup> (No 3) [2013] FCA 525

<sup>7</sup> [2014] FWC 5894

## During the investigation

### Who should be interviewed?

Anyone who has information that is relevant or material to the matter being investigated should be interviewed. If the employee subject to the misconduct allegations mentions someone as a witness to a particular incident, or asks for a particular person to be interviewed, interviewing that person should be seriously considered.

### Should I offer the employee a support person?

One of the considerations for the FWC in deciding whether a dismissal was “harsh, unjust or unreasonable” is whether there was an unreasonable refusal by the employer to allow the employee to have a support person present to assist at any discussions relating to dismissal.<sup>8</sup> If the interview does not “relate to a dismissal”, there is strictly speaking no obligation to allow for a support person unless the employer’s policy expressly provide for this. Overall, it is best practice to offer an employee a support person wherever practicable, particularly where the allegations are serious and may ultimately result in a dismissal.

### What if the employee witnesses won’t cooperate?

The investigation in *Francis* was severely hampered by uncooperative employees – the “wharfies” who witnessed the incidents had a “code of silence” which was unofficially endorsed by the union. Deputy President Sams relevantly observed that employees have a duty to be “open, frank and honest” with their employer about serious issues in the workplace. Should an uncooperative employee, properly warned, continue to fail to comply with their duty to cooperate then they will expose themselves to disciplinary action – and there have been cases in the past where a dismissal has been upheld where employees were uncooperative and dishonest in investigations (for example, *Telstra v Streeter*<sup>9</sup>).

### What if additional allegations are raised during the investigation?

If they are related to the initial allegations, they must be included in the investigation – particularly if they are raised by the alleged perpetrator of the harassment.

In *Francis*, during the investigation interview, the employee raised that she had been punched and harassed by the complainant; however, the investigators did not pursue the allegations. This was found to be grossly unfair and ultimately supported a finding by the Fair Work Commission that the investigation was biased and incomplete.

## After the investigation

### What are the decision maker’s responsibilities?

The decision-maker has a responsibility to independently assess the investigator’s findings and recommendations before making a decision. It is entirely open to the decision-maker to disagree, on a reasonable basis, with the investigation findings.

In *Francis* of serious concern to Deputy President Sams was that the decision-maker only relied upon a relatively brief email from the HR Manager in deciding to dismiss the employee. This resulted in the decision-maker being unaware of serious flaws, bias, and conflicting evidence in the investigation – and significant criticism of senior management.

A second independent opinion or legal advice is invaluable in such situations.

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<sup>8</sup> s387(d) of the *Fair Work Act*

<sup>9</sup> [2008] AIRCFB 15





## Do I have to give the employee the investigation report in the show cause process?

It depends on all of the circumstances of the alleged conduct under review and whether providing a copy of the investigation material is necessary to afford the employee with natural justice. In unfair dismissal proceedings, the criteria for considering whether a dismissal was harsh, unjust or unreasonable, includes whether the employee was given an opportunity to respond to any allegations made against them.<sup>10</sup>

To ensure that an employee can adequately respond to all of the reasons for their potential dismissal, the person may need to be given whatever information the employer is relying upon in making its decision, unless the content of all of the allegations being put to them can be properly articulated in the show cause letter. For example, in *Cannan and Fuller v Nyrstar Hobart Pty Ltd*<sup>11</sup> the dismissed employees were not provided with 12 witness statements outlining systemic bullying allegations against their supervisor over a number of years, even though the employer specifically relied upon them and did not particularise the substance of those reasons in the show cause process. As a result, the processes and dismissals were found to be unfair.<sup>12</sup>

It is therefore essential that an employee is provided with all of the reasons that are being relied upon by the employer, which may require copies of the investigation report and/or supporting witness statements to be provided to the employee and his/her representatives. However, to ensure the safety of witnesses, it may be necessary to also warn the employee that any attempt to contact witnesses without management approval may result in further disciplinary action. Furthermore, parts of the investigation report or witness statements which contain irrelevant information not relied upon may be able to be removed or redacted.

## Further information

Investigating and managing harassment and bullying in the workplace can be complicated and a second opinion and expert advice can be invaluable. Likewise, policy wording can be critical in terms of risk management and should be carefully reviewed from both the perspective of achieving regulatory compliance, whilst avoiding, as far as possible, any binding contractual effect.

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<sup>10</sup> s387(c) of the *Fair Work Act*

<sup>11</sup> *Cannan and Fuller v Nyrstar Hobart Pty Ltd* [2014] FWC 5072

<sup>12</sup> *Ibid* at paragraphs [242] and [23]



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