



FACT SHEET

Do employees have a ‘right to remain silent’ in employment investigations?

This is a difficult question that often arises in misconduct investigations and was recently considered in the case of *Grant v BHP Coal Pty Ltd*¹ (Grant). Can an employee simply refuse to answer a question relating to alleged misconduct? Can employees claim a privilege against self-incrimination?

As with many legal questions, the answer is not a simple ‘yes’ or ‘no’ – it will depend on the circumstances.

According to the Full Bench in Grant, a privilege against self-incrimination is capable of applying when an employer is questioning an employee in a workplace interview. However, it is a privilege which only protects against self-exposure to a criminal prosecution, not to discipline or to civil penalties.

The privilege only applies if the employee claiming the privilege can show that they genuinely and reasonably apprehend a danger of self-incrimination from being compelled to answer the question/s.

It will therefore not apply if the employee has already made statements which expose him/her to a risk of prosecution.

Furthermore, it is up to the employee to make a claim of privilege and identify its precise basis – simply declining to answer questions will not invoke the privilege.

If there is no risk of criminal prosecution, employees have an obligation to participate and cooperate with workplace investigations. Generally, employees have a duty to be “open, frank and honest” with their employer about serious issues in the workplace.²

Refusing to answer questions in workplace investigations without criminal exposure, or even refusing to attend for an interview, can be seen as being uncooperative and disobeying a reasonable and lawful direction – and in certain circumstances, may be a valid reason for dismissal.

In the case of Mr Grant, declining to answer investigation questions in relation to his refusal to attend a medical appointment unless they were put in writing – when he did not actively claim a privilege against self-incrimination and it was questionable as to whether his answers could add to his possible jeopardy in any event – was held to be a valid reason for dismissal.³

1. [2017] FCAFC 42.

2. *Francis v Patrick Stevedores Holdings Pty Ltd* [2014] FWC 7775.

3. In the first instance of this case, Commissioner Spencer also noted that having all questions in writing is inconsistent with an investigation interview as issues often arise which require further or different questions and putting questions in writing can unreasonably restrict the purpose of the process.

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