



The rights of employees under workplace investigation

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If you are being investigated for alleged misconduct in the workplace, you have various rights that have to be met by your employer, and any investigator retained by your employer.

These rights can vary depending on the nature of the workplace and allegations, but there are some general entitlements which employees can expect in the course of such an investigation.

1. A fair process

Workplace investigations must be fair. In essence, they should reflect the requirements of natural justice, sometimes called “*procedural fairness*”.

That entails two central concepts:

- The right to be heard – for your side of the story to be listened to and considered before a final decision is made.
- The right to an unbiased decision-maker. This doesn’t mean that the decision-maker has to be completely removed and totally independent from the whole process, but they have to be able to bring a fair and impartial mind to deciding the allegations.

2. The presumption of innocence

Workplace investigations must not commence with the position that a worker is presumed to be guilty and required to prove themselves innocent.

Although the quality of the evidence and the standard of proof required to take action against someone in the workplace is lower than in the criminal courts, it is still the case that an employee is not presumed to be guilty before the investigation commences and

the decision is made.

3. Reasonable particulars about the allegations

An employee under investigation is entitled to know what it is alleged they have done. That is the only way that they can be given a fair opportunity to provide a meaningful response/defence to the allegations.

Whilst an employer doesn't necessarily have to give an employee advance notice of every particular detail chapter and verse, before asking for their response, it is unfair for them to rely on information which hasn't been put to the employee for comment and response.

4. Appropriate support

Where a workplace has an employee welfare program in place, any employee under investigation should be advised of their ability to access that program. If no such program is in place, employers should nonetheless ensure their suspect staff member is appropriately supported.

Similarly, when being interviewed, an employee should be given the opportunity to have a support person or representative with them to assist them through that process.

5. A prompt resolution

Employees are entitled to have the allegations against them decided without undue delay. Complex investigations can take time (often many months), but they should not drag on or be put in the too hard basket by the employer.

At Gilshenan &Luton, we've assisted clients in many workplace investigations. Our lawyers are highly skilled and experienced in providing the necessary advice, guidance and assistance with all aspects of such an investigation. We act on behalf of government agencies, employers, and employees the subject of workplace allegations.

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