Managing Workplace Risks under the NDIS

JFMLAW
JOHN F MORRISSEY & COMPANY LAWYERS
www.jfmlaw.com.au

Contents

Introduction

Managers of disability services providers are thinking about how their organisation can meet the challenges set by a new era: client directed funding, increasingly vigilant regulators and the intense public focus on client abuse. As if that wasn't enough, low cost disability services providers like Hireup are radically disrupting the way in which staff are engaged services are provided to clients.

Organisations alive to the risks and opportunities created by the new environment will be well placed to serve their clients more efficiently and effectively than ever. Those that do not may struggle to survive.

This booklet gives you practical guidance on responding to some of the biggest risks and opportunities thrown up by the new regime. It:

- Highlights the opportunities offered by flexible workplaces, and helps you to put them in place.
- Explains the grounds on which you could lose your registration to provide supports under the NDIS, and gives you proactive and cost-effective mechanisms to ensure this does not happen.
- Identifies common pitfalls associated with workplace investigations, and gives you a pathway around them.

We trust that you will find this booklet useful. Please get in touch with us if you have any questions about it. We are always happy to help.

Louise O'Connor
Associate
louise.oconnor @ jfmlaw.com.au

John Morrissey
Principal
john.morrisey @ jfmlaw.com.au

Promoting workplace flexibility

The shift to client directed funding under the NDIS has made it important for disability services organisations to have flexible workplaces. Having a flexible workplace allows you to ensure that your workforce can adapt and respond to changes in demand. It means that, if there is an unforeseen peak period in which there is a lot of demand for your services, you are able to roster more staff to meet that demand. It also means that, in the event that there is an unforeseen drop in demand for your services, you are not required to pay your employees if there is no work for them to do. It means that you minimise your losses in lean periods and maximise your surplus in lush periods.

This section lets you know how to create a flexible workplace by recruiting new employees as casuals and making the most out of your existing part-time work arrangements.

Casual Workers

A casual employee is a person who has a contract of employment with an organisation which says that they are employed on a casual basis and who is paid a casual loading of 25% by the organisation.

Casual employees have different rights to full-time and part-time employees. They are entitled to receive an hourly rate that is 25% higher than the minimum hourly rate that would be paid to a part-time employee. However, their entitlemans have the limitations.

Casual employees:

- are not entitled to paid personal leave;
- are not entitled to annual leave;
- are not entitled to regular working hours

- are not entitled to notice on termination of their employment; and
- can only make unfair dismissal claims if they were employed on a regular and systematic basis.

It is best to employ someone as a casual if he or she is likely to have variable shifts, or if the number and length of his or her shifts is liable to change in accordance with shifts in demand.

It is less of a good idea to employ someone as a casual if they work in a senior position with regular and predicable hours which are not likely to change in accordance with shifts in demandet

KEY TIP

Casual employees need to be paid a casual loading of 25% on top of the minimum hourly rate payable to part-time employees.

Employing New Support Workers as Casuals

Employing front line disability support workers as causals has real benefits. It ensures that, in exchange for paying casual loading, you are not required to pay those employees leave or for rostered hours during which there may not be demand for their services. This is particularly important in a client-directed funding environment in which you cannot guarantee stable demand for your services.

For example, if a client cancels a session with one of your employees one day before it is scheduled to take place, you could direct the casual employee not to come to work that day and not pay him or her for the loss of his or her shift. If the employee was a part time employee, you would have to pay him or her for the shift as normal even if you could not find alternative work for them to do.

Similarly, if three new clients book sessions with you next week, you could ask a casual employee to work those shifts and pay him or her his or her ordinary hourly rate. If you asked an existing part-time employee to work those shifts, you may be required to pay that part-time employee an overtime penalty rate.

That being said, support workers who have worked for your organisation for a long time and who are used to the stability and predictability offered by part-time work may not wish to become casual employees. This is very understandable. Shifting these employees to casual employment can be risky and difficult, and is likely to create workplace disharmony.

For this reason, we often advise our clients that all new disability support workers who are recruited by the organisation should be employed as casuals. In our experience, the younger employees who are likely to be your new recruits used to being employed as casuals and enjoy the flexibility and higher hourly rate that it brings. Existing part-time employees should be given the opportunity to convert to casual employment should they wish to do so, but should not be forced to.

Long Term Casuals with Regular Hours

The Full Bench of the Fair Work Commission recently recognised that there was nothing under the Fair Work Act or any Modern Award that prevent an employer from engaging a casual employee to work regular and systematically rostered shifts. Provided that the employees are engaged as casuals and paid casual loading, the fact that they work regularly rostered hours will not mean that they ought to be considered to be full time or part time employees for the purposes of the Modern Award.

Employing long term disability support workers with regular hours as casuals also has some benefits. It means that you can give your casual employees the regular hours they require but can change their hours at short notice in the event that there is a sudden downturn in demand for your services. This cannot easily be done with part time employees.

The Full Bench has decided that the vast majority of casual employees covered by Modern Awards will be entitled to convert to a full-time or part-time position if, and only if, they:

- have worked for an employer for a continuous period of twelve months; and
- worked a pattern of hours on an ongoing basis which, without significant adjustment, could continue to be performed in accordance with the full-time or part-time employment provisions of the relevant award.

This does give long term casual employees who have worked regular hours for you for a lengthy period of time some rights. However, it is important to note that you are entitled to refuse a request to convert to a part time position on reasonable grounds after consulting with the employee.

The Full Bench recognised that an employer will have such reasonable grounds if there is evidence that the employee's role will be abolished in the next twelve months, the employees hours will be reduced in the next twelve months, or the time at which the employee is required to perform work will be changed significantly in the next twelve months.

KEY TIP

Don't be scared about giving casual employees regular hours, but be mindful of their rights if you do so.

Flexibility for Part Time Employees

The Social, Community, Home Care and Disability Services Award 2010 (Cth) ('SCHCADS Award') requires you to agree with each part-time employee on an arrangement which contains a regular pattern of work. This creates problems for disability services organisations. It can have the effect of requiring disability services organisation to pay part time employees for rostered hours in circumstances in which there is a sudden downturn in demand and there is no need for their services.

That being said, the Full Bench recently explained that an agreed part-time work arrangement does not necessarily have to provide for the same guaranteed number of hours in each week. It noted that such an arrangement could provide for different hours to be worked in alternating weeks, and for more hours to be worked at peak times. It also said that such agreed arrangements could be changed by agreement in writing to meet either temporary changes in demand.

KEY TIP

Enter into part time work arrangements which give employees more rostered hours in peak periods and fewer rostered hours in slower periods

Protecting your registration as an NDIS service provider

The National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013 (Cth) ('NDIS Rules') governs the conditions of your organisation's registration to provide supports to clients under the NDIS. They outline the circumstances in which the NDIA can revoke that registration. This section helps you to understand the NDIS Rules and provides you with some practical advice on protecting your registration from revocation.

Your Obligations under the NDIS Rules

It is important for disability services organisations to get to grips with the requirements of the National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013 (Cth) ('Rules'). The NDIS Rules outline the obligations of organisations who provide supports to clients under the NDIS and the circumstances in which organisations can lose their registration.

Reporting Requirements

Disability services organisations are required to provide a report the NDIA if:

- A responsible body such as an Ombudsman takes action in relation to a complaint about the standard, effectiveness or safety of the services provided by the organisation.
- A responsible body such as ASIC, the ACCC or the Department of Fair Trading takes action against the organisation or one of its employees or officers.

- The organisation discovers that it, or one of its employees, has failed to comply with the Fair Work Act or a workplace health and safety law.
- The organisation becomes insolvent.
- An employee of the organisation commits a criminal offence against a law which regulates the way in which they provide services to clients.

Loss of Registration

Disability services organisations can lose their registration if any of the following things happen and cause an unreasonable risk to one of its clients:

- A responsible body such as an Ombudsman, ASIC, the ACCC or the Department of Fair Trading takes action against the organisation or one of its employees.
- The organisation becomes insolvent.
- The organisation breaches the Fair Work Act or a workplace health and safety law.
- The organisation fails to have proper mechanisms in place to ensure that its employees comply with the Fair Work Act and workplace health and safety laws.
- An employee of the organisation commits a criminal offence against a law which regulates the way in which they provide services to clients.

KEY TIP

Keep a copy of your obligations under the NDIS Rules handy to ensure that you know what sorts of breaches you need to report.

What is 'Adverse Action' by a 'Responsible Body'?

An adverse action will arise whenever a public authority imposes a detriment on the organisation in connection with the provision of supports to clients. It is clear that this would extend to an adverse finding or recommendation by the Ombudsman under the Disability Inclusion Act 2014 (NSW).

It may also extend to penalties sought or imposed by general regulatory authorities such as the Australian Securities and Investments Commission, the Australian Competition and Consumer Commission and the Department of Fair Trading which relate to the way in which you carry on your business of providing supports.

It is unlikely, however, that the mere fact that the Ombudsman or ASIC commences an investigation against your organisation will be considered to be an adverse action. An adverse action will only take place when an investigation is concluded and the relevant authority imposes a detriment on the organisation.

KEY TIP

ASIC, the ACCC and the Department of Fair Trading may be considered 'responsible bodies'.

What is a Breach of the Fair Work Act?

The Fair Work Act imposes numerous obligations on employers such as disability services organisations. An organisation could breach the Fair Work Act by any of the following::

- Underpaying an employee.
- Failing to give an employee pay slips.
- Taking adverse action against an employee for a prohibited or discriminatory reason.
- Failing to give an employee the required amount of notice or leave.
- Preventing or hindering a Fair Work Inspector or union representative holding an appropriate permit from entering the workplace.

There is also a reasonable argument that an organisation would breach the Fair Work Act by unfairly dismissing an employee.

KEY TIP

Most breaches of the Fair Work Act relate to underpayment and record keeping. Make sure all managers receive regular training on the requirements of the Fair Work Act. We have 'key risks' sections on both of those issues in the next chapter.

What Laws Regulate the Way in Which You Provide Services to Your Clients?

Laws which regulate the way in which you provide services to your clients may include the National Disability Insurance Scheme Act 2013 (Cth) or the Disability Inclusion Act 2014 (NSW). There are only a few criminal offences under this legislation. Most of them relate to disclosing or accessing protected information about a client that is held by the NDIA without authority.

However, there is a risk that the NDIA and courts may take the view that provision encompasses a broader range of laws, such as general criminal laws which prohibit things like assault, fraud and sexual assault. The safest approach that disability services organisations can take is to make sure that they have systems in place to monitor and prevent breaches of general criminal laws as well as specific disability services legislation.

KEY TIP

Don't ignore general criminal laws which may be relevant to the interaction between your employees and your clients.If a manager is not sure about breach of criminal laws, get advice

What Does Insolvency Mean?

An organisation becomes insolvent when it cannot pay all of its debts as and when they fall due. To determining whether your organisation is insolvent, you need to consider, amongst other things:

- What debts your organisation is liable to pay.
- When those debts fall due to be paid.
- Whether your likely cash flow will be able to cover the payment of those debts when they fall due to be paid.
- Whether you have any assets that you can sell or encumber for the purposes of paying those debts.
- Whether you have access to finance, whether in the form of loans, financial support from third parties or the like, for the purposes of paying those debts.

It is important to note that an organisation will not be insolvent

simply because the liabilities recorded on its balance sheet exceed the assets recorded on its balance sheet at a particular point in time.

KEY TIP

If you are unsure about whether your organisation is insolvent, it is vital to get advice from an external insolvency practitioner or accountant. Always invite the insolvency practitioner to the board meeting, and ensure that all Board members are informed of all the facts.

What are Proper Mechanisms?

An organisation can put in place proper mechanisms to ensure that its employees comply with the Fair Work Act and workplace health and safety laws by:

- Delegating authority to manage and monitor payment rates, employee classifications, employee records, and work health and safety policies to an appropriately skilled manager who is required to provide regular reports on each of those matters to the directors.
- Having an external specialist audit its payment rates and employee classifications at least once every financial year.
- Ensuring that it has a dedicated contact person for employees to communicate concerns about work health and safety and employment matters to.
- Providing all managers who are involved in hiring and firing decisions with training about the organisation's obligations under the Fair Work Act.

- Implementing a comprehensive workplace health and safety policy.
- Ensuring that written records are kept of all decisions made by the directors and steps taken by managers with a view to doing anything for the purposes of complying with the Fair Work Act or work health and safety legislation.

KEY TIP

All organisations should have an experienced industrial lawyer who managers can consult about problematic industrial matters.

Key risks to your registration

Key Risk #1
Close and Systematic Employee Monitoring

The Need

The NDIS Rules make clear that an organisation can lose its registration if it fails to have proper mechanisms in place to ensure that its employees comply with the Fair Work Act and workplace health and safety laws. An organisation that fails to monitor its employees closely and systematically may risk losing its registration on that basis.

The NDIS Rules also make clear an organisation can lose its registration if one of its employees of the organisation commits a criminal offence against a law which regulates the way in which they provide services to clients. An organisation that fails to monitor its employees closely and systematically will not be able to detect and address dangerous practices that may give rise to breaches.

The NDIS Rules also require organisations to report certain breaches of laws by employees. It is difficult to comply with these reporting requirements without monitoring employees closely and systematically.

The Challenges

Many not for profit disability services organisations are pursuing the opportunities created by the NDIS by employing a large number of casuals who work remotely with clients and who may have little contact with managers. Disruptors such as Hireup are adopting the same strategy.

While such an operating model makes good commercial sense, it can make it very difficult to monitor employees. How can an organisation closely and systematically monitor employees who work irregular shifts at off site locations?

The Solutions

Strategies which disability services organisations could adopt to closely and systematically monitor casual employees working off site with clients include the things set out below.

- Asking for detailed and comprehensive reports from employees at the end of each shift. It is a good idea to develop a standard form shift report form that employees can easily complete and submit after a shift.
- Adopting a 'pools' based shift allocation process which rewards employees who fulfil their reporting requirements with more shifts and opportunities for progression. Under such a system, those employees who regularly comply with their obligations may be placed in a 'pool' of workers who are offered shifts in preference to another pool of employees who do not comply with their obligations as frequently.
- Asking all employees to meet with a manager on a monthly or fortnightly basis to discuss their performance and their shifts from the previous fortnight.
- Requesting that clients or their families provide weekly or fortnightly reports on the quality of the services provided by employees.
- Making clients and their families aware of the organisation's complaints policies.

KEY TIP

Adopt a pools based shift allocation system for casual employees who work irregular shifts in order to incentivise them to comply with their reporting obligations and to be involved in your organisation.

Key Risk #2: Preventing Underpayment

The Need

The NDIS Rules require disability services organisations are required to provide a report the NDIA if they discover that they have breached the Fair Work Act. They risk losing their registration if they breach the Fair Work Act.

Disability services organisations also risk losing their registration if they fail to have proper mechanisms in place to ensure that their employees comply with the Fair Work Act. This extends to having proper mechanisms in place to ensure that managerial and administrative employees such as human resources managers and accounts clerks do not become involved in the underpayment of staff.

Managers should also be mindful Fair Work Ombudsman is making increasingly frequent use of a provision of the Fair Work Act which allows it to hold directors, officers and employees of organisations personally liable to pay compensation or a fine for underpayments by that organisation. Though these provisions are unlikely to apply to an accidental underpayment, managers should be especially careful to ensure that they are not exposed to a risk of such a liability.

The Challenges

Though most organisations would never consciously underpay an employee, it is relatively easy for organisations who do not have comprehensive record keeping procedures or who do not regularly conduct workplace audits to underpay an employee without realising that they are doing so. Such accidental underpayment can have serious consequences under the NDIS Rules.

The Solutions

Disability services organisations can do a number of things to prevent inadvertent or accidental underpayment. They include:

- Keeping comprehensive records about the wages paid to employees and the Modern Awards under which they are employed.
- Auditing all of their employment contracts on an ongoing basis to determine whether their existing employees are classified and paid at the right level under the relevant Modern Award.
- Monitoring changes in minimum wage rates by signing up to the Fair Work Ombudsman alert service.
- Conducting proper training with managers and accounts staff to ensure that they can monitor payment rates and award classifications.
- Conducting proper training with managers and accounts staff to ensure that they know how to deal with the Fair Work Ombudsman.

KEY TIP

Audit your pay structures and classifications at least once every financial year to ensure that you are classifying your employees correctly and paying them accordingly. The audit should be done by an outside body such as an industrial law firm. Promptly fix an issue that arises in the audit.

Key Risk #3: Complete and Accurate Record Keeping

The Need

A failure to comply with the obligations that the NDIS Rules imposes on disability services organisations can have drastic consequences. Organisations that do not have the records to prove their compliance with those obligations may be treated as if they have not complied with the obligations at all.

The need is particularly important in the employment field. The Federal Court of Australia ordered a company which was alleged to have underpaid its employees to have breached the Fair Work Act by failing to keep records of the hours that its employees had worked, the penalty and overtime rates paid to its employees, and the annual leave taken and accrued by its employees. It ordered the company to pay a pecuniary penalty of $15,000 and its sole director pay a pecuniary penalty of $2,500. This order was made despite the fact that the company had identified all of the employees that it had underpaid and had taken steps to reimburse them.

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 is soon to be passed by Parliament. When it comes into

operation, employers and their directors and managers will be exposed to significant penalties if they knowingly or recklessly keep false or misleading records such as pay slips, or give false or misleading information to the FWO.

This provision has the potential to have significant implications for disability services organisations and their managers. For example, if a human resources manager of an organisation knows that there was a risk that the pay slips kept by the organisation were incomplete or omitted important information, and gives those pay slips to the Fair Work Ombudsman pursuant to a request, it is likely that both the human resources manager and the employer will have breached the provision. This has consequences under the NDIS Rules, and may expose both the organisation and the manager to a pecuniary penalty.

The Challenges

It is easy for organisations to fall behind in record keeping, particularly if they view record keeping as an administrative inconvenience rather than an essential part of the operation of their service. The Federal Court takes a different view. As Barker J said in a recent case, a failure to keep records “truly strikes at the very foundation of the regulatory scheme which is designed to ensure that employees are paid their legal entitlements”

Gaps in record keeping can also develop if organisations do not clearly determine which managers are responsible for overseeing the various records that need to be kept.

The Solutions

Disability services organisations can do a number of things to ensure that proper and accurate records are kept. They include:the items liste on the next page.

- Developing a record keeping policy which clearly prescribes which records each manager has responsibility for keeping and ensuring the accuracy of.
- Ensuring that managers have a policy of regularly following up employees who have not submitted reports and records on time.
- Having different managers conducting regular audits of the records kept by other managers to ensure that they are accurate and complete.
- Making record keeping an agenda item at each staff meeting.

KEY TIP

Delegate responsibility for managing particular sets of records to various managers.

Conducting effective investigations

Workplace Investigations

Disability services organisations need to ensure that their employees conduct themselves in an exemplary manner. They must respond quickly to any behaviour by employees that puts clients and colleagues at risk. They must also make sure to investigate any incident which could engage their responsibility to make a report to the NDIA. A workplace investigation is often the first step to achieveing each of these outcomes.

This section outlines what a workplace investigation is, and guides you through each of the steps associated with carrying one out.

What are Workplace Investigations?

Workplace investigations are formal processes by which employers investigate allegations of serious misconduct by their employees. Typically, they are started because of a complaint about the alleged misconduct made by an employee or a client. They involve an investigator, who is often but not always an external person, gathering evidence of the misconduct and advising the employer as to whether the misconduct occurred.

If a workplace investigation concludes that misconduct did occur, an organisation is ordinarily able to dismiss or take disciplinary action against the employee. An employer who dismisses an employee for misconduct without a workplace investigation opens itself up to general protections claims, unfair dismissal claims and actions for breach of contract.

KEY TIP

Never dismiss an employee for misconduct without first conducting a workplace investigation.

When should a workplace investigation be commenced?

An employer should commence a workplace investigation if an employee is alleged to have engaged in serious misconduct. Examples of serious misconduct include:

- Illegal behaviour.
- Behaviour that creates a serious risk to the health and safety of colleagues and clients.
- Bullying or harassment of colleagues and clients.
- Out of hours conduct which poses a serious risk to the reputation of the business.
- Breaches of confidential information or intellectual property provisions of an employment contract.

Workplace investigations are not appropriate for performance issues. If you are concerned about an employee's productivity, work quality or work ethic as distinct from their behaviour or conduct, you should start a performance management process.

It is important that you act quickly to establish a workplace investigation. Investigations and allegations of misconduct are disruptive, and should be dealt with promptly so as to minimise that disruption. A failure to act soon could also communicate to

your employees that you do not take misconduct or complaints about misconduct seriously.

KEY TIP

Do not use workplace investigations for performance issues. .

How do you define the boundaries of a workplace investigation?

You must figure out what the parameters or boundaries of the investigation are going to be. Employers should ask the following questions:

- Which employee is being investigated?
- What incidents in which that employee is involved are being investigated?
- What questions about those incidents and that employee need to be answered?
- Who will need to be interviewed in order to get an answer to those questions?

For example, an employer who wishes to conduct a workplace investigation into a workplace bullying incident may draft the following terms of reference:

An investigation which has clearly defined and carefully considered terms of reference will be easier to be managed and will be conduct more efficiently than one which has vague or unclear parameters.

KEY TIP

Be as clear and precise as possible in setting the parameters of an investigation issues. .

Who should the investigator be?

Generally, employers are faced with a choice between an internal and an external investigator. An external investigator is a specialist who is not an employee of your organisation. An internal investigator is a person who is employed by your organisation in a senior position. Such an investigator must not be a person who was involved in the circumstances giving rise to the issue being investigated. It is preferable for an internal investigator to be a person from a different department or section of the organisation to the person whose conduct is being investigated.

External investigators are generally preferable to internal investigators, particularly in small organisations, as they are less likely to be perceived to be biased or personally interested in the outcome of the investigation. They should be used for all investigations into senior employees and for all investigations involving apparently serious misconduct.

In small organisations, internal investigators should only be used for minor investigations concerning junior employees which involve less serious misconduct issues. In larger organisations with dedicated human resources teams or a wide variety of departments, internal investigators can be appointed more frequently.

One golden rule that all organisations must observe is that the

investigator cannot be the person who makes the final decision.

KEY TIP

Small organisations should almost always use external investigators.

What happens to the employee who is being investigated?

It is best to have the employee who is being investigated away from the workplace while the investigation is taking place. This has three benefits. First, it ensures that the workplace is not disrupted by the investigation any more than it needs to be. Secondly, it helps to preserve the confidentiality of the investigation. Thirdly, it gives the employee being investigated an opportunity to prepare for the interview.

Generally, an employee who has been stood down must be paid his or her usual wages. Irrespective of how bad the alleged misconduct may be, employers have no right to stand down employees without pay.

KEY TIP

Employees should not be stood down without pay unless their contract explicitly allows you to do so.

Communicate with the employees concerned

It is important to let the employee whose actions are being investigated know about the complaint and the fact that they are being investigated.

You should draft a letter to the employee you are investigating which contains the following information:

- A detailed summary of the complaints that have been made against him or her.
- The identity of the investigator.
- The process and time frame of the investigation.
- The date of his or her interview.
- An outline of his or her rights to be told about and to comment on any information that is adverse to him or her.
- The identity of the final decision maker.
- Whether or not he or she is being stood down.

KEY TIP

Make sure the employee knows what is going on and what has been said against him or her..

How should evidence be gathered?

The investigator should be instructed to interview all people who could provide relevant information about the incidents. Every person who is being interviewed should be told to keep the investigation and the things that they discuss with the investigator confidential. They should also be ensured that everything they say to the investigator will be only be used for the purposes of the investigation.

The investigator should prepare a written report containing the contents of the interviews. The people who were interviewed

should be asked to read and sign their report once it has been prepared in order to ensure that it is correct.

KEY TIP

Make sure that the content of interviews is kept confidential.

How Should Evidence Be Gathered From the Employee Being Investigated?

The person whose conduct is being investigated should be interviewed last. It is important that he or she is interviewed last for two reasons, both of which help to ensure that he or she is accorded procedural fairness. First, it will allow the investigator to put to that person all of the adverse information which the investigator has collected during the investigation. Secondly, it gives the person a reasonably lengthy period of time in which to prepare for the interview.

KEY TIP

Make sure the employee being investigated is interviewed last..

What should you do with the evidence gathered?

The investigator will prepare a final report. This report, along with the interview records, should be sent to the final decision maker. The final decision maker should be someone in a senior position who has had no involvement in the investigation at all. Often, the decision maker is the Chief Executive Officer or, for investigations concerning executive employees, the board of directors.

The first thing that the decision maker must do is make findings of fact. Put simply, this means that the decision maker must weigh up all of the information in the reports and determine what actually happened. These findings should be made 'on the balance of probabilities'. This means that the decision maker must be satisfied that the information is strong enough to say that it is more probable than not that the things that the investigator was looking into happened.

KEY TIP

Make sure the decision maker is comfortably satisfied on the basis of all the evidence that it is more probable than not that the misconduct occurred.. The decision maker should get advice before the decision is made and acted upon.

What should the outcome of a workplace investigation be?

After the findings of fact have been made, the decision maker must make a decision as to what the outcome of the investigation should be. Outcomes could include:

- Ending the investigation without further action.
- Giving the employee a warning and disciplinary counselling.
- Giving the employee a notice to show cause as to why his or her employment should not be terminated with or without notice.

The first outcome should be used if there is not enough evidence to justify a finding that a person has engaged in misconduct. The second outcome is suitable in cases in which there is enough evidence to find that the person has engaged in minor misconduct.

The third outcome should only be considered in serious cases in which there is strong and compelling evidence that the person has engaged in serious misconduct.

If the decision maker thinks that the person being investigated should be dismissed, it is preferable to issue a notice to show cause. These can help to protect an employer if an unfair dismissal claim is made. A notice to show cause should:

- Outline all of the findings of fact that the decision maker has made.
- State that the decision maker has not made a final decision but considers that there may be grounds to terminate the person's employment contract.
- Outline all of the reasons why the decision maker thinks that there may be such grounds.
- Ask the person to provide a written statement outlining why he or she believes that his or her employment should not be terminated.
- Inform the person of the date on which that written statement should be provided.
- Tell the person that the contents of that statement will be taken into account by the final decision maker.
- Explain that the person is still stood down with pay and should not attend the workplace.

The decision maker should then consider what the person has said in his or her written statement before deciding whether or not to terminate his or her employment. If the decision maker does decide to proceed to termination, the letter informing the person of his or her termination should say why the matters outlined in the written statement were not sufficient to convince him or her that the employee should not be dismissed, his or her employment should be terminated.

KEY TIP

Never dismiss an employee without first giving him or her a notice to show cause.

What Should You Tell a Complainant?

If the investigation commenced with a complaint being made by an employee, that employee should be informed in writing as to the outcome of the investigation. This is a good way of ensuring that employees feel that their complaints are taken seriously by a responsive management team.

KEY TIP

Make sure that employees who make complaints feel that you have taken their complaints seriously.

What Should You Do After an Investigation?

Every workplace investigation provides an opportunity for organisational learning. A good employer should consider what worked well, what could be improved, and how things could be done better next time.

KEY TIP

Prepare an investigation report that outlines what went well, what did not, and what could be improved next time. If the report writer is not sureabout any aspect of the investigation, they should get advice

JFMLAW

JOHN F MORRISSEY & COMPANY LAWYERS

Suite 1.04 “The Post”
46a Macleay Street
Potts Point NSW 2011