Anatomy of a workplace investigation in Ireland: how to handle some of the practical issues

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Complex workplace investigations were the exception and not the norm until a few years ago. In the year 2000 a one page statutory code of practice was published in Ireland to guide employers through the humdrum of workplace disciplinary and grievance investigations containing only one sentence regarding the issue of employee representation in investigations. Fast forward a decade and a half or so and the tables have turned. This one issue has been the subject of two High Court judgments, a Court of Appeal and a Supreme Court judgment. For clarity, not all judgments relate to the same case.

This is a rich seam for acrimony. There are volumes of case law on the subject. Why is this? Partly because an employee's right to due process is rooted in statute and the Irish Constitution and partly because the Irish High Court has the power to restrain workplace investigations where an employee claims those rights have been eroded. Access to the High Court is not the preserve of the C suite. Much of the case law derives from disputes between ordinary workers and employers. It pays to get it right when it comes to workplace investigations.

Start as you mean to go on – the terms of reference

The investigation needs to be carefully mapped out. Be clear about the nature of the investigation. If the investigator is tasked with information gathering only then they should not stray outside the boundary lines. An information gathering investigation can proceed without triggering the rigorous requirements of natural justice although basic fairness should guide its conduct.

If the investigation will result in binding findings of fact however, that cannot subsequently be challenged, then this alters the nature of the process significantly. Employers need to take care to engage rigorous standards of fairness in such an investigation.

To stay on track, use the internal disciplinary and grievance procedures prepared for the Irish business. Employers must abide by the standards that they have set for themselves even where those standards have been gold plated. Check if a statutory code of practice applies to the subject matter of the investigation. Bullying, discrimination, disciplinary and grievance investigations are all the subject of several Irish statutory codes of practice.

In addition to this, for complex investigations, draft and agree with the employee bespoke terms of reference to define the following key issues:

- The case to answer.
- The cast and crew – who is involved? What is their role? Is it necessary to engage an external and independent investigator?
- Is it an information gathering investigation or will the investigation report contain binding findings of fact?
- Will a lawyer, a trade union representative or a co-worker represent the employee?
- What are the individual stages of the overall process?
- What witnesses will attend? Do protocols around witness statements and cross examination exist?
- Who will see the draft and final investigation reports? Who can make submissions?
- Is the range of consequences clear to the employee?

Lawyer up

Recent case law has settled the position that the bar remains very high in Ireland for an employee

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to assert that they should be represented by a lawyer in a workplace investigation.

In the 2018 Court of Appeal case of *Irish Rail v Barry McKelvey* [2018], the employee worked as an inspector. He was issued with a fuel card and irregularities were subsequently discovered regarding the use of the fuel card. Mr McKelvey was invited to a disciplinary hearing to answer to the charge of theft but applied successfully for a High Court injunction restraining the investigation until he was permitted to bring legal representation. The Court of Appeal overturned the High Court decision granting him an injunction. It relied on the Irish Supreme Court case of *Burns v Governor of Castlerea Prison* [2009] and *R v Home Secretary ex parte, Tarrant* [1985] to decide that legal representation should only be permitted in a workplace investigation where the employee would by reason of exceptional circumstances, not have a fair hearing.

The fact that an employee may face dismissal was not of itself an exceptional circumstance in this case. The Court decided that while the charge of theft was serious, it was not complex. McKelvey did not have a right to legal representation despite facing a possible dismissal and damage to reputation.

That said it is always important to carefully consider a request for legal representation. If the facts are complex, if there are doubts over the employee's ability to conduct his own defence and if points of law could arise then a Court may decide that legal representation is warranted.

'Alternative facts' – the right to cross-examine witnesses

An employee faced with a misconduct charge, potential dismissal and damage to reputation is entitled to challenge his accusers. This is settled in Irish caselaw, but is tricky in practice. Many witnesses are unwilling or unavailable to come forward. That unwillingness is common in #metoo style complaints or cases where customers allege serious wrongdoing. How is that resolved? With difficulty.

An employer cannot subpoena or coerce an employee to participate in an investigation. In practice employers have successfully worked around this by permitting questions to be put and responded to in writing or allowing the investigator to put the questions to the witnesses, asses the response and demeanour of the witness and share the response with the challenger. Neither of these options is ideal or legally bullet proof. But, the High Court will only intervene using equitable relief where it can usefully achieve something. That may not be possible if a witness remains steadfast in their refusal to participate and the employee and their legal team may recognise that.

Finally – in brief

- If a regulatory body or the police are also investigating the misconduct under their own powers, it can be difficult (but not impossible) to progress a workplace investigation. An employee who is being investigated for conduct which is also potentially criminal in nature does not have an automatic entitlement to legal representation nor is the right to remain silent always relevant or reasonable in a workplace investigation. The very fact of being engaged in conduct which leads to a police inquiry may be sufficient to trigger a workplace investigation and disciplinary action.

- Employers must also consider whether a statutory reporting duty arises when unlawful conduct comes to light such as fraud, public money misuse or corruption offences. Failure to comply with a statutory reporting obligation in time and in respect of defined wrongdoings is an offence.

- Take care where simultaneous Internal Audit (IA) investigations are ongoing at the same time as a HR workplace investigation. IA reports are often prepared with a different objective and methodology. Unless the IA report has been prepared with due consideration for the rights of the individual employees, it is unlikely to be a safe basis for a pre disciplinary investigation and a disciplinary hearing. The IA investigation and the workplace investigation should be separate and distinct.

- Take care when discussing an exit with the employee during the investigation. There is no corresponding concept in Ireland to the concept of the protected conversation in the UK. There is no truly off the record conversation unless it is conducted between legal advisers to the parties. The risk is that an off the record conversation winds up front and centre on the record which discloses bias towards termination of employment. This is impossible to reconcile with the observance of fair procedures.

What is the one take away? Take advice early. The path through workplace investigations is challenging and in places, the terrain is still under construction. ■

Burns v Governor of Castlerea Prison [2009] 3.I.R.682
Irish Rail v Barry McKelvey [2018] IECA 346
R v Home Secretary ex parte, Tarrant [1985] 1 QB 251