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Justice and fairness for all

How to ensure your investigation process does not reflect the powerbase of your organisation and perpetuate inequality

Katherine Graham

Managing Director

The disadvantages of perpetuating inequality

1. Financial costs at Tribunal or Appeal
2. Higher levels of Appeal citing bias as cause for appeal
3. Poor employee morale/relations
4. “There’s no point complaining” viewpoint drives inequality underground and tacitly endorses bullying, harassment and discrimination
5. Research indicates employees are more likely to consider litigation if they believe that organizational decision-makers are neither neutral nor trustworthy (Bies and Tyler, 1993)
6. Damage to HR reputation and scepticism about their objectivity
7. *Flawed or unequal investigations exacerbate, rather than alleviate, an employer's legal problems*

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1 Key moments for inequality

- Employment legislation
- Corporate policies and procedures
- Access to grievance and disciplinaries
- Process management
- Principles, values and competencies
- Positioning of investigator
- Evaluation and judgement
- Decision-making process
- Outcome and penalty
- Monitoring and evaluation against 6 equality strands

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2 Corporate policies and procedures

1. Clear, fair and balanced procedures available in advance followed to the letter (agreed by trade union if appropriate)
2. The rights of all parties are the same – in other words, if the employer uses a lawyer, then the complainant has the same right (and the employer might have to consider funding a lawyer for the employee etc)
3. There is a separation of power between the investigator and the adjudicator
4. Clear rights of appeal and representation
5. Regularly updated, reviewed, and monitored

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3 Access to processes

- All employees must be aware of how to access processes
- Must be ‘unencumbered’ in their access
- Available in all formats
- Support available and reasonable adjustment

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4 Process management

Guiding the process by Human Rights legislation

PLAN

- **P = Proportionate.** Is the proposed and continuing investigation proportionate to the allegation(s) and agreed ToR/Investigation Plan, thus preventing any accusations of going on a 'fishing trip' for evidence.
- **L = Legal.** Does the investigation support appropriate and transparent policies and procedures set out clearly to all employees, with avenues for appeal of outcome?
- **A = Accountability.** Is the investigator and investigation accountable to a sponsoring manager or client with the appropriate levels of responsibility for relevant decision making within the organisation.
- **N = Necessary.** Is an investigation or continued investigation a necessary process in order to achieve an outcome to resolve conflict or deal with discipline/grievance.

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5 Principles, values and competencies

(linked to the Judicial Studies Board competencies)

Principles and values

- IMPARTIALITY AND FAIRNESS
- CONFIDENTIALITY AND TRANSPARENCY
- INTEGRITY AND RESPECT
- THOROUGHNESS AND TIMELINESS

Competencies

- KNOWLEDGE AND VALUES
- COMMUNICATION
- CONDUCT OF CASES
- EVIDENCE
- DECISION-MAKING

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6 Positioning of the investigator

- 92 percent of HR respondents believed management-conducted investigations are *perceived* as biased by employees.
- 75 percent of HR saw no danger of increased liability resulting from a management-conducted/internal investigation.
- But 100 percent of employment lawyers saw *a danger of increased liability* resulting from a management-conducted investigation.
- Employees perceive management—and its investigators—as biased and not objective meaning:
  - they fight or disbelieve the findings
  - resist internal resolution attempts
  - and file counter charges

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Case study of the drawbacks of one internal investigation

- Popular, longstanding male manager was accused by a female report of sexual harassment.
- Three employee factions developed
- First faction – neutral, not invested in any point of view.
- Second faction - believed complainant. Demanded the firing of the respondent regardless of the facts or the investigative findings. Did not really believe HR would come down hard on a management-level employee, suspicious of HR conducting the investigation, believed HR would give in to pressure
- Third faction - believed respondent. Wanted HR manager to fire respondent and confirm their belief in no justice, no fairness in the company. Sceptical of management; viewed HR as a police force not a service to all employees
- Result will damage the employer - the process not seen as credible by employees
- Credibility of management damaged despite investigation being aboveboard and honest.
- Two out of three employee factions perceived significant employee relations problems and question the fairness of the process, the credibility of management, and their own willingness to remain as employees

Judgement and decision making

- We are not neutral
- Men and women hold significantly different beliefs about the nature and severity of sexual harassment in organisations (Baugh and Page, 1998; Rotundo et al., 2001)
- Nearly 2/3 of USA females questioned upheld the complaint: 3/4 of males did not uphold
- In every combination of diversity, men are more likely than women not to uphold a complaint (Uni of Mississippi 2004)
- Research indicates sexual harassment occurs more often in male-dominated than in female-dominated occupations (Terpstra and Baker, 1986; LaFontaine and Tredeau, 1986; O'Connell and Korabik, 2000).

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Outcome and penalty

- Decision makers must accept their part
- Investigation upholds complaint – does not dismiss the respondent
- Investigation upholds complaint – dismisses respondent
- Investigation does not uphold – counter claim
- Investigation does not uphold – continued working together

- Goal: not be to have all parties involved happy but to have all parties willing to accept the decision

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Recommendations

- Recruit widely – test competencies
- Train well – only use those with ability
- Promote policy and include harassment advisors, mediators
- Use mixed-gender/ethnicity panel for investigative review.
- Establish investigatory teams rather than a single investigator
- Ensure the coordinator or client is not a witness
- Avoid and ignore 'informal briefings'
- Use independent investigators

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