



New Zealand

ASSOCIATION OF
**WORKPLACE
INVESTIGATORS**



Guiding Principles for Conducting Workplace Investigations

Context and Intent

These Guiding Principles are aspirational statements of best practice for investigations undertaken in New Zealand. They have no binding force and their breach can have no disciplinary consequences within AWI New Zealand. Nevertheless, they represent a consensus of the views of AWI New Zealand's members at the time of their adoption and adherence to them will not only enhance the quality of investigations, but will reduce the risk of criticism or challenge in any litigation. Adherence to them will also enhance the standing of Investigators who are members of AWI New Zealand.

These Guiding Principles are unique to New Zealand law and practice and should not be interpreted as applying to members or the practice of workplace investigations in any other AWI jurisdiction.

1. Decision to Conduct an Investigation

Guiding Principle: A workplace investigation may be an appropriate way for an Employer to respond to an issue in the workplace.

A workplace investigation is a formal process which is undertaken in response to an issue arising in, or associated with, the workplace. The purpose of a workplace investigation is to allow an independent person to make findings of fact about alleged behaviour, and, if instructed to do so, to determine whether any of that behaviour is in breach of any relevant policies or laws.

Commentary

A workplace issue could arise in a number of different ways, including:

- An employee could complain to the Employer about the alleged actions of another employee;
- A complaint could be made collectively by a number of employees, or by a different person (such as a customer of the Employer);
- A workplace survey might suggest the possible existence of a culture of inappropriate behaviour involving one or more employees.

The Employer should determine the appropriate way to respond to the issue. Depending on the circumstances, a response could be:

- Low key – such as a one-on-one discussion with one or more employees, and/or providing training or coaching to employees;

- Informal – such as facilitation or mediation;
- Formal – a workplace investigation.

In determining the appropriate way to respond:

- The Employer may seek the assistance of a human resources professional or a lawyer;
- The Employer should consider a number of factors, including:
 - a. Legal framework – any relevant laws with which the Employer should comply, and legal risks to the Employer arising from the workplace issue.
 - b. Organisational framework – Employer rules, policies and procedures, enterprise agreement or collective agreement.
 - c. The nature and seriousness of the workplace issue.
 - d. Whether the key facts are agreed or in dispute.
 - e. Time constraints - for example, an employer may be required to make a decision within a particular time frame and/or the matters raised may be historical and either take considerable time, or be unable to be considered.
 - f. Barriers to resolution and the extent to which a particular process or other option may overcome such barriers.
 - g. Power balance/imbalance between Complainant and Respondent.

An investigator should not determine the action that will follow from their findings (unless expressly instructed to do so). In other words, any decision about required disciplinary action – or steps that might be taken to rebuild a workplace relationship – should ordinarily be left to the Employer, having received the Investigation Report. The Employer may appoint a person to be a Decision Maker for this purpose (i.e., a person who will receive and consider the Investigation Report, and make any decision about any action which should be taken as a consequence of it).



2. Choice Of Investigator

Guiding Principle: The Employer should select an Investigator who is:

- Appropriately experienced, skilled and qualified;
- Able to undertake the investigation in a timely way;
- Impartial, and independent of the matter being investigated.

The Employer should select an appropriate Investigator who has the necessary capacity, and any appropriate qualification or expertise, to undertake the investigation. The Investigator should be free from bias.

Commentary

Appropriately qualified

An Investigator should be appropriately qualified to undertake the investigation. This may include:

- Being able to demonstrate experience in undertaking investigations of a similar nature;
- Being a graduate of the Workplace Investigator Training Institute course offered by the Association of Workplace Investigators;
- Holding any qualification required by law in relation to a particular investigation.

An Investigator should have appropriate knowledge (or be able to acquire knowledge in a sufficient and timely way) of any:

- Legislation;
- Workplace policies;
- Government regulations or guidelines;
- Employment Agreements (including Enterprise Agreements); and/or
- Tikanga, or any other relevant cultural practices, or processes

which may regulate, or apply to, any part of the investigation process, or which may provide any rights to any person participating in it.

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Capacity to undertake the investigation

The Investigator should have the capacity required to complete the investigation in a timely way:

- The Employer may, at the outset, prescribe a timeframe within which it is intended that the investigation will be completed;

- The Investigator should be able to demonstrate that they will be able to complete the investigation within this timeframe.

CF AWI New Zealand Best Practice Statement 3

Impartial

The Investigator should be independent of the matter that they are asked to investigate. This is referred to as “*freedom from bias*”, and is a requirement of natural justice. An employer should not appoint an investigator who is – or might reasonably appear to be – biased (or have any conflict of interest).

This requirement means that, at a minimum, the Investigator should not have a personal relationship with, or have any previous material dealings with, any of the people who may be required to participate in the investigation.

There is no prohibition upon an Employer appointing an Investigator who is also employed by the Employer – provided that the Investigator is appropriately qualified, and free from bias (and/or conflict of interest).

In order to ensure against an allegation of bias (or conflict of interest):

- The Employer should not instruct the Investigator about a desired outcome, or provide any information which is not relevant to the investigation;
- Unless asked to do so, the Investigator should not provide any advice to the Employer about the way in which it might respond to the issues which are the subject of the investigation;

The Investigator should, as a general rule, be able to disclose to the Complainant and Respondent any communications between them and the Employer.

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If, either before the investigation begins or after it has commenced, the Investigator apprehends that there is some reason they may be perceived as not being free from bias (or that there may be a conflict of interest), they should alert the Employer, the Complainant and the Respondent to this, and should only proceed with their consent.

As a general rule, if:

- The Investigator discloses any matter which might give rise to a suggestion of bias or conflict of interest (either before commencing, or immediately after an issue arises during the investigation); and

- The Employer, Complainant and Respondent consent to the Investigator nonetheless continuing;

Then the Investigator may continue in their role without allegation of bias (or conflict of interest) concerning the issue which has been disclosed.

3. Terms Of Reference

Guiding Principle: The Employer should provide a Terms of Reference document which prescribes the task(s) which the Investigator is required to perform.

Commentary

A Terms of Reference is a written document. Its primary purpose is to state, in express and neutral terms, the issues that are sought to be determined by way of the

A Terms of Reference is the Employer's instruction to the Investigator. It should define the scope of the investigation – by prescribing the precise task that the Investigator is asked to undertake. It should, as a general rule, also attach any document which initiated the matter to be investigated, and any workplace policy which may apply to the investigation.

A Terms of Reference document is also appropriate where the investigator is an employee of the Employer (e.g., a member of an in-house investigation team), and this Guiding Principle should be read accordingly.

investigation. This is often referred to as the “scope” of the Investigation. Defining the scope can be as simple as putting a question/questions to the Investigator for them to answer at the conclusion of the investigation (e.g., Has the Respondent acted in breach of any provision of the [Employer's] Code of Conduct?).

The Terms of Reference may also include (or attach) other things:

- Where the investigation has been initiated as a result of the receipt of a complaint, the complaint document (e.g., an email or letter) may be attached to the Terms of Reference. Alternatively, if the investigation has been initiated following the conclusion of a workplace survey, the survey information should be attached.
- Any workplace policies relevant either to the allegations made, or to the process required to be followed to investigate them, should also be attached. This could include a disciplinary investigation policy, a bullying/harassment policy and/or a code of conduct. Where the Investigator

is appointed under a particular authority (for example, a workplace or industrial agreement), any relevant provisions from that instrument/authority should be included in the Terms of Reference.

- It may also be helpful for the Terms of Reference to provide some basic information about the people with whom the investigator may wish to meet. The Investigator may not know the names or roles of employees. An organisation chart may be useful in this context.
- If there are cultural considerations (such as Tikanga that should be followed, or other processes or protocols that may apply to the Investigator) these should also be noted, and any relevant information provided.
- It is usual for the Terms of Reference to provide that the Investigator may ask for any (additional) information held by the Employer – and that the Investigator may meet with any person whom they think may have information relevant to the investigation. Alternatively, if the Employer seeks to place limitations on the Investigator in the way that information is to be sourced, the Terms of Reference should record this (e.g., “Unless the Company's permission is provided, the Investigator will confine their inquiries to the [Employer's] employees”).
- The Terms of Reference may also indicate:
 - A timeframe for the Investigation (i.e., the period desired for it to be concluded); and
 - Whether, and when, the Employer would like to receive progress updates from the Investigator.

As a general rule, an Investigator is obliged to adhere to the “scope” provided in the Terms of Reference. This means that the Investigator should not investigate, or provide a view on, things that are outside the instruction provided in the Terms of Reference.

- If, through the course of the investigation, the Investigator identifies potential new issues which they believe may also appropriately be capable of investigation, they should seek the Employer's guidance – and an amendment to the Terms of Reference (if those new issues are to be considered). Any amendment to the Terms of Reference should be disclosed to each of the Complainants and Respondents.

The Investigator and the Employer may separately agree terms relating to the investigator's remuneration, reimbursements and invoicing (and these matters do not need to be recorded in the Terms of Reference).



4. First Steps In An Investigation

Guiding Principle: Following the Employer's decision to undertake an investigation a number of steps should be taken.

Each of the Employers and Investigators may take steps after the decision to undertake an investigation has been made, and (in ordinary circumstances) before the investigation commences.

Commentary

The Employer should notify each of the Complainants and Respondents about its decision to investigate (and, where relevant, should ensure that it has undertaken appropriate consultation prior to this decision). It should:

- Inform them about the identity of the Investigator (so that they will expect to be contacted by him/her), and
- Provide each with a copy of the Terms of Reference and any accompanying documentation (so that they have all information being provided to the Investigator).

It may be appropriate for the Employer to alert others in the workplace to the fact of the investigation. Depending on the circumstances, the Employer may send a communication to all staff who may be required to participate in the investigation as interviewees – alerting them to the fact of the upcoming investigation (and the identity of the Investigator). These employees should not ordinarily need to be provided with a copy of the Terms of Reference.

If thought necessary, the Employer may remind all potential interviewees to avoid discussion in the workplace about the fact of the investigation – or the matters being investigated.

The Investigator may, prior to undertaking interviews, wish to seek documentary information from the Employer.

The Investigator will be required to make arrangements to meet with (or to obtain information in a different way from) interviewees. Practically, these arrangements could be made in a number of ways, including:

- By the Investigator making direct contact with interviewees; or
- By the Employer making arrangements on behalf of the Investigator.

Where applicable, appropriate adherence to Tikanga (or any other relevant cultural norms) may be required in discharging these procedural steps.

Where the Employer assists the Investigator in this way it is generally sensible for a person other than the Decision Maker to help in making required arrangements (to avoid any prospect of it being alleged later that the Investigator engaged in inappropriate discussion with the Decision Maker prior to the receipt of the Investigation Report).

There are a number of obligations upon an Investigator in the way that they gather information through the investigation process, and the way in which they keep a record of that information.

5. The Investigator's Task To Gather Information

Guiding Principle: The Investigator should undertake a process to gather information which is “*full and fair*”, and should take reasonable steps to make a record of information gathered.

Commentary

The Investigator's ultimate obligation to produce findings on the matters contained in the Terms of Reference, having followed a process which is “*full and fair*”.

As a general statement, a “*full and fair*” process will involve the Investigator:

- Obtaining information sufficient to allow the Investigator to reach reasonable findings; and

- Adhering to the principles of natural justice in the way that information is obtained.

The Investigator should also:

- Follow any process prescribed in an employment agreement, or in a workplace policy;
- Abide by any directions about process in the Terms of Reference.

In the usual course, the Investigator will be required to obtain information by interviewing interviewees:

- The Investigator may meet with interviewees in person. This is, however, not an absolute requirement, and alternatives may be preferred, or required by circumstances, including:
 - Meeting via videoconference,
 - Speaking by telephone, and
 - Receiving information in writing.
- The Investigator should hear from both sides to an allegation – on an informed basis. This includes:
 - If an adverse allegation is made against a person, that person generally should have an opportunity to know about that allegation, and to respond to it with complete knowledge of any information which has been gathered by the Investigator in relation to the allegation;
 - A person providing information to the Investigator should do so on an informed basis. As a general statement, each of the Complainants and Respondents should ordinarily be provided with all information obtained by the Investigator, and be given a chance to comment or respond to it.
 - The Investigator should not accept information without disclosing it in this way (i.e., on an “*off the record*” basis). Even if the Investigator does not consider information relevant to their investigation it should generally be disclosed to the Complainant and Respondent.
- The Investigator should receive any information with an open mind.

Prior to receiving any information from an interviewee (whether in a meeting, or in documentary form), the Investigator should:

- Provide the interviewee with information about the task that they have been asked to undertake in the Terms of Reference;
- Explain the reason why the Investigator wishes to seek information from the interviewee;
- explain that the interviewee is not compelled to provide any information (and may decline to

participate either entirely, or in relation to particular matters);

- Explain how the Investigator will make a record of the information provided by the interviewee;
- Allow the interviewee to access the record of their own information should they wish;
- Inform the interviewee about the individuals with whom their information will be shared as part of the investigation process;
- Tell the interviewee how the Investigator will share information with any others (who may have a need to know about it), and what will happen to the information at the conclusion of the investigation process;
- Where appropriate, obtain the consent of the interviewee to these various things as a prerequisite to gathering information from the interviewee.

The Investigator should keep a record of information gathered through the investigation process. At a minimum, prior to the presentation of the Investigation Report:

- The Investigator should retain any document provided to him/her;
- The Investigator should make a record of information provided in an interview.

There is no definitive method for an Investigator to keep a record of the information gathered through an interview. The following is a non-exclusive list of options:

- The Investigator make take handwritten notes (or contemporaneous typewritten notes) while meeting, or speaking, with an interviewee.
- The Investigator may make a subsequent, typewritten document, based on handwritten notes. In this event, the handwritten and typewritten notes both form the record of information gathered, and should be considered together.
- The Investigator may make an audio (or video) recording of an interview.
- The Investigator may make a subsequent, typewritten transcript of the audio recording.

In deciding how a record of information will be made an Investigator should give appropriate regard to:

- Any requirements contained in the Terms of Reference;
- Any requirements prescribed by a workplace policy;
- Considerations of cost and delay;
- Any applicable tikanga.

6. Communication By The Investigator, And Adherence To Confidentiality

Guiding Principle: The Investigator should take reasonable steps to ensure the confidentiality of the investigation process.

Commentary

As a general statement, an investigation is intended to be a confidential process – meaning that information about it will be confined to a limited number of people:

- Interviewees should be discouraged from speaking about the matters to be investigated to people

An investigation process should be a confidential process, such that information about it is confined to individuals who are affected by it, and need to know about it. The Investigator should take reasonable steps to ensure this, both in the way that they deal with interviewees, and in the way that they communicate with the Employer.

other than the Investigator. The purpose of this is to ensure, so far as is possible, that prospect of collusion is avoided, and the Investigator receives information from interviewees who have not been influenced by others.

- It is, however, acceptable for any individual to seek advice about their rights and obligations (usually from a lawyer, union or human resources specialist) – and doing so will not ordinarily place the interviewee in breach of any confidentiality (provided that the person providing advice does not share information about the investigation more widely).
- Where there is a meeting in person, a venue should be selected that offers appropriate venue neutrality, privacy, and allows for confidentiality.
- The Investigator may, in order to abide by natural justice, be required to share an interviewee's information with other participants in the investigation process (including, in particular, the Complainant and Respondent). The Investigator should commit to confidentiality any person receiving information in this way (i.e., advising them not to disclose it to anyone else);
- An Investigator may not, in the ordinary course, receive information from an interviewee on an "off the record basis" (i.e., an undertaking or guarantee by the Investigator not to share it with anyone else).

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The Investigator should not, in the ordinary course, communicate with a Decision Maker prior to the issue of an Investigation Report. Doing so may expose the Investigator to a suggestion that they have been inappropriately influenced by the Decision Maker. Alternatively, if communication occurs between the Investigator and Decision Maker this should be disclosed to the Complainant and Respondent.

The Investigator may provide updates to an Employer about progress, and estimated time for completion of the investigation process. Generally, the Investigator should avoid providing conclusions about the substance of the matters being investigated. This is because it is usually appropriate for these things to be addressed in the Investigation Report, and not prior.

7. The Investigation Report

Guiding Principle: The Investigator should produce a written report at the conclusion of the investigation process.

The Investigator should produce a written investigation report which, at a minimum, records the steps taken in the investigation process and reasoned findings on the matters asked in the Terms of Reference.

Commentary

The Investigator should produce a written report at the conclusion of the investigation process. At a minimum, the report should include:

- A statement of the scope prescribed in the Terms of Reference;
- A summary of the steps taken by the Investigator to gather information (for example, a record of interviewees and documents received);
- Reasons for findings, including:
 - A summary of any relevant parts of policies or standards that the Investigator has been asked to apply;
 - An analysis of the information gathered which is relevant to those policies or standards; and
 - An assessment of the information applied to the policies or standards.
- A statement of the Investigator's findings and conclusions.

In reaching findings:

- The Investigator should confine themselves to information gathered through the investigation process (and which has been appropriately provided to each of the Complainant and Respondent as part of natural justice);
- In making factual findings, the Investigator may be presented with conflicting accounts. Acting reasonably, the Investigator will be entitled to accept some in preference to others. That does not call for the application of any standard of proof. Subsequently, however, the Employer may take action based on the Investigator's findings. If required to show that such action was justified the employer will need to show that both the course taken to ascertain the facts and the determination that those facts warranted action were reasonable. That should be shown on the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances. The Investigator should bear in mind that they are the Employer's agent and that the Employer may have to justify the Investigator's actions to the relevant statutory standard of what a fair and reasonable Employer could have done, and how such an Employer could have done that, in all the circumstances.

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There is no absolute requirement for an Investigator to provide a draft report to the Complainant and Respondent for their comment (prior to the presentation of a final report). That said, it is not unusual for provision of a draft report to be required either:

- In the Terms of Reference; or
- By a workplace policy (for example, a policy prescribing steps required in an investigation).

Unless expressly required to do so in the Terms of Reference, the Investigator should not determine, or make suggestions about, any action that the Employer should take as a consequence of their findings.

8. Steps Following Receipt Of The Investigation Report

Guiding Principle: The Employer should ensure that certain steps are taken following receipt of the final investigation report.

The Employer should ensure that the investigation report is provided to the Complainant and Respondent, and should reach a view as to whether it considers it "full and fair".

Commentary

As a general statement, a copy of the final report should be provided to each of the:

- Complainants;
- Respondents; and
- Employer

The Employer may take responsibility for distributing the final report in this way, or may instruct the Investigator to do so.

If the Employer does not consider the investigation report to be "full and fair" it may, if it thinks it appropriate, ask the Investigator to re-open the investigation process and to review their findings in light of any new information obtained. This may be appropriate where, for example:

- The Employer considers that more information can reasonably be gathered (and where that additional information might affect the findings); or
- Where the Employer is concerned that the Investigator has not adhered to the principles of natural justice.

Where an Investigator re-opens an investigation process they should adhere to all relevant principles relevant to the gathering and sharing of information (which are outlined above).

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