

## International Employment Lawyer's Guide to Workplace Investigations - Ireland Chapter

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Bláthnaid Evans, Head of Employment and Corporate Immigration in Ireland and Mary Gavin, Managing Associate in Ireland, recently contributed to the International Employment Lawyer's Guide to Workplace Investigations, published in December 2023.

### IEL Workplace Investigations tool

Workplace investigations are growing in number, size and complexity. Employers are under greater scrutiny as a result of developments like the #metoo and Black Lives Matter movements, as well as the rise of ESG. The covid-19 pandemic has further increased focus on workplace culture, whether in person or remote. Regulated industries such as finance, healthcare and legal face additional hurdles, but public scrutiny of businesses and how they treat their people across the board has never been higher. Conducting a fair and thorough workplace investigation is therefore critical to the optimal operation, governance and legal exposure of every business.

Note: this resource focuses on workplace investigations into alleged employee misconduct, rather than investigations into other corporate matters. This resource notes some aspects of, but does not deal in detail with, the regulatory aspects of investigations.

### Starting an investigation

#### What legislation, guidance and/or policies govern a workplace investigation?

In Ireland, employees have a constitutional right and an implied contractual right to natural justice and fair procedures. If a workplace investigation is not conducted in accordance with these principles, an employee may allege that the investigation is fundamentally flawed. If such an allegation is made then an employee may seek recourse from the Workplace Relations Commission (WRC) or potentially the High Court. The WRC is the body in Ireland tasked with

dealing with employment law-related claims, including unfair dismissal.

The constitutional rights that employees enjoy were specified in the Supreme Court case of *Re Haughey* in 1971. That case held that where proceedings may harm the reputation of a person, public bodies must afford certain basic protections of constitutional justice to a witness appearing before it. It further stated that article 40.3 of the Irish Constitution is a guarantee to the citizen of basic fairness of procedures. These protections, known as “*Re Haughey* rights” are implied in each contract of employment.

A Code of Practice was introduced in 2000, namely S.I. No. 146/2000 - Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 (the Code). The Code set out the procedures for dealing with grievances or disciplinary matters, which must comply with the general principles of natural justice and fair procedures and include:

- that employee grievances are fairly examined and processed;
- that details of any allegations or complaints are put to the employee concerned;
- that the employee concerned is allowed to respond fully to any such allegations or complaints;
- that the employee concerned is given the opportunity to avail of the right to be represented during the procedure; and
- that the employee concerned has the right to a fair and impartial determination of the issues concerned, taking into account any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors or circumstances.

Further Codes of Practice on the prevention and resolution of bullying at work and on dealing with sexual harassment and harassment at work were published in 2021 and 2022, respectively. The provisions of these codes are admissible in evidence before a court, the WRC and the Labour Court.

In addition to the above, the Data Protection Commission published *Data Protection in the Workplace: Employer Guidance* in April 2023.

All employers should have specific and up-to-date policies dealing with how workplace investigations will be carried out that are suitable for their organisation. These policies may vary, depending on the subject of the investigation and the size and type of employer. However, all should adhere to the principles identified above to ensure that a robust policy is in place and can be utilised.

**How is a workplace investigation usually commenced?**

Investigations can start in multiple ways. They usually stem from an employee raising a grievance, a bullying complaint, or a possible protected disclosure. Investigations may also stem from the employer in a disciplinary context, or indeed can be commenced if an external complaint or issue is raised by a third party of the organisation.

The first thing the employer must consider is whether an investigation is necessary. It may be that the issue at hand can be resolved informally or is of such a nature that it cannot be investigated, either through a lack of detail or simply because the subject of the complaint is no longer an employee. Any such decision to investigate or not should be carefully documented.

The next step to determine is the nature of the investigation. It should be clear at the outset whether the investigation is simply a fact-gathering exercise or if the investigator will be tasked with making findings on the evidence. The distinction is significant as a fact-gathering investigation can proceed without prompting the full panoply of rights, but the basic principles of fairness should still be applied. A fact-gathering investigation should determine whether there is or is not, a case to answer. If a disciplinary hearing follows then the rights outlined in question 1 will apply at that stage. If it is a fact-finding investigation, the rights apply from the outset of the process. The employee who is required to respond to the issues (the respondent) should be fully aware of the extent of the investigation. The investigator appointed to do the investigation should be clear about what is expected of them.

If the employer believes an investigation is necessary, it should be acknowledged and started without delay. In particular, according to the Protected Disclosures legislation, a report should be acknowledged within seven days.

An employer should consider and identify the scope of the investigation and establish who will investigate the matter. Terms of reference under which the investigation will be carried out should be established by the employer and shared with the employee raising the issue (the complainant). An employer should not seek agreement on the terms, but invite commentary to ensure that the full scope of the investigation is captured within the terms of reference. Robust terms of reference that lay down the clear parameters of the investigation will assist the investigator and all parties involved in the process.

### **Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)**

Workplace suspensions in Ireland are a contentious issue and can result in an employer defending injunction proceedings in the High Court before an investigation has started.

In the case of *Governor and Company of the Bank of Ireland v Reilly*, the judge stated: "The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing."

In the 2023 case of *O'Sullivan v HSE*, the Supreme Court held that the Health Service Executive acted fairly and reasonably as an employer in suspending a consultant doctor after he had performed experiments on patients without their consent. This ruling overturned the Court of Appeal's earlier decision that previously found the suspension to be unlawful, as the consultant did not represent an immediate threat to the health of patients.

The Supreme Court considered whether the employer's decision to place the consultant on administrative leave met the test set out in the English case of *Braganza v BP Shipping Limited & Anor*. In that case, the court held that the decisionmaker's discretion would be limited "by concepts of good faith, honesty and genuineness and the need for absence of arbitrariness, capriciousness, perversity and irrationality."

In relying on the principles set out in the *Braganza* case, the Irish courts have reinforced the right of a decision-maker in an employment context to have discretionary power when implementing a suspension and that any decision to do so must be made honestly and in good faith. Employers should obtain legal advice when considering whether to suspend an employee in any circumstance.

### **Who should conduct a workplace investigation, are there minimum qualifications or criteria that need to be met?**

An investigator does not have to hold any minimum qualifications. More often than not it is an employee's manager or HR manager who is carrying out the investigation. Crucially, the person carrying out the investigation must not be involved in the complaint, as an argument of bias could be made before the investigation begins. The investigator should also be of suitable seniority to the respondent and have the necessary skills and experience to carry out an investigation. If a recommendation by the investigator is made to progress the matter to a disciplinary process, which may in turn be the subject of the appeal, there should be adequate, neutral personnel within the organisation to deal with each stage. Again if the investigator and the disciplinary decisionmaker are the same person, an argument of bias will be made that will usually lead to a breach of fair procedures and any decision being unsustainable. Frequently, employers outsource the investigation to an external third party as there may simply not be adequate personnel within the organisation to carry out the process. Employers should ensure that within their policies the right to appoint an internal or external investigator is reserved.

### **Can the employee under investigation bring legal action to stop the investigation?**

Arguably yes, but it is the exception rather than the rule and it will depend upon the circumstances of the case. Generally, courts would be slow to intervene in ongoing workplace investigations. However, an employee may seek injunctive relief to prevent an investigation if they can show that the investigation is being conducted in breach of a policy or breach of fair procedures to such an extent that there is no reasonable prospect that the investigation's

outcome(s) could be sustainable.

## **Evidence gathering**

### **Can co-workers be compelled to act as witnesses? What legal protections do employees have when acting as witnesses in an investigation?**

Yes, but a qualified yes. To deny an employee who is the respondent to the complaint the right to cross-examine the complainant during a workplace investigation may amount to a breach of fair procedures. This does not mean in practice that a complainant or witness will have to physically or virtually attend a meeting to be subjected to cross-examination. What usually happens, in practice, is that specific questions of the respondent are put to the witness by the investigator for them to respond. On occasion and depending on the circumstances, the witnesses may respond in writing.

Generally, if witnesses do not wish to participate in workplace investigations and they are not the witnesses from whom the complaint originated, there is little that can be done. An employee may not want to be seen as going against a colleague, which impacts the wider issue of staff morale. An employer cannot force them to participate. Also an employee who is the respondent should be careful about seeking to compel witnesses to attend. While the respondent may request support from a colleague to act as a witness, that colleague may view things differently, which can lead to further issues.

In any event, employees cannot be victimised or suffer any adverse treatment for having acted as a witness.

### **What data protection or other regulations apply when gathering physical evidence?**

Under the GDPR (General Data Protection Regulation), personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject. The Data Protection Commission published *Data Protection in the Workplace: Employer Guidance* in April 2023, which is a useful guide.

Employers should exercise caution when gathering physical evidence that may involve the use of CCTV or other surveillance practices. The Irish Court of Appeal in the case of *Doolin v DPC* examined the use by an employer of CCTV footage for disciplinary purposes and found such use constituted unlawful further processing. The original reason for processing the CCTV footage was to establish who was responsible for terrorist-related graffiti that was carved into a table in the staff tearoom. It subsequently transpired Mr Doolin, who was in no way connected to the graffiti incident, had accessed the tearoom for unauthorised breaks and a workplace investigation followed. The original reason for viewing the CCTV related to security, but further use of the CCTV footage in the disciplinary investigation was not related to the original reason.

This case confirms that employers must have clear policies in place in compliance with both GDPR and the Data Protection Act 2018 specifying the purpose for which CCTV or any other monitoring system is being used. Not only that, but these policies must be communicated to employees specifying the use of such practices.

It is not only data about the investigation that must be processed fairly, but any retention of the data, which can only be further processed with good reason. It is a legitimate business reason to retain data to deal with any subsequent requests or appeals under various internal or statutory processes, provided employees have been advised of the relevant retention period.

### **Can the employer search employees' possessions or files as part of an investigation?**

The first consideration here is what constitutes "employees' possessions". More often than not, employees will be using employer property and there should be clear policies in place that specify company property.

The difficulty arises if an employee is using personal equipment such as a mobile phone for work purposes. While there may be specific applications dealing with work-related matters that are accessible by the employer remotely, some applications may be device-specific and that is where issues may arise. In such instances, it is not unreasonable to ask the employee to provide such information or consent to a search of their personal property. However, this is the exception rather than the rule and all other legitimate avenues of obtaining such information should be explored first. Further, such requests for information should not be a fishing expedition as an employee has a reasonable expectation of privacy at work, which must be balanced against the rights of the employer to run their business and protect the interests of their organisation.

A search of physical items such as a desk or drawers should only be conducted in exceptional circumstances, even where there is a clear, legitimate justification to search and the employee should be present at the search.

### **What additional considerations apply when the investigation involves whistleblowing?**

Most whistleblowing policies will include a section that provides for an initial assessment of the complaint as to whether it meets the definition of a protected disclosure. This assessment, which ought to be carried out by a designated person who has been appointed to deal with disclosures, is a useful tool as some matters which may be labelled as whistleblowing may fall under the grievance procedure.

Where there are grounds, an investigation will be commenced. Under the Protected Disclosures (Amendment) Act 2022, whistleblowers are protected from penalisation for having made a protected disclosure, under the Act.

Penalisation may include; suspension, lay-off or dismissal; demotion, loss of opportunity for promotion or withholding of promotion; transfer of duties, change of location or place of work; reduction in wages or change in working hours; the imposition or administering of any discipline, reprimand or other penalty (including a financial penalty); coercion, intimidation, harassment or ostracism; or discrimination, disadvantage or unfair treatment.

If an employee (which includes trainees, volunteers, and job applicants) alleges that they have suffered penalisation as a result of making a protected disclosure, they may apply to the Circuit Court for interim relief within 21 days of the date of the last act of penalisation by the employer.

A claim for penalisation may also be brought before the WRC within six months of the alleged act of penalisation. If an employee alleges that they were dismissed for having made a protected disclosure, the potential award that the WRC can make increases from the usual unfair dismissal cap of two years' pay to up to five years' gross pay, based on actual loss.

Where a complaint of whistleblowing is made, employers should ensure that they appoint investigators with the appropriate knowledge and expertise to deal with such a matter and comply with the time limits set by legislation.

## **Confidentiality and privilege**

### **What confidentiality obligations apply during an investigation?**

This will depend on the nature of the investigation but, generally, investigations should be conducted on a confidential basis. All who participate in the investigation should be informed and reminded that confidentiality is a paramount consideration taken very seriously. However, it should be borne in mind that confidentiality cannot be guaranteed by an employer as the respondent in an investigation is entitled to know who has made complaints against them. Furthermore, the respondent is entitled to cross-examine the complainant and any witnesses, although in practice this right is rarely invoked strictly and is facilitated by the investigator, with questions from the respondent being put to the complainant and other witnesses.

On occasion, a breach of confidentiality may warrant disciplinary action, but this will depend on the circumstances. Exceptions to the requirement to keep matters confidential will of course apply where employees seek support and advice from others such as companions, trade union representatives or legal advisors. It may also not be possible to maintain confidentiality where regulators or the authorities are informed of the investigation.

Also, confidentiality may not be maintained if it is in the interests of the employer to communicate the complaint and any subsequent investigation, for example on a health and safety basis.

### **What information must the employee under investigation be given about the allegations**



## **against them?**

Under the fair procedures outlined above, details of the allegations or complaints against the employee should be put to them to enable them to fully respond to the allegations raised. The employee should also be provided with any relevant policies pertaining to the allegations against them, along with all documentary evidence of the allegations and the specific terms of reference that define the scope of the investigation. The employee should also be informed of their right to be represented, see question 15.

## **Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?**

Failure by an employer to provide the identity of the complainant, witnesses or sources of information seriously impinges upon the employee's right to fair procedure and could result in a flawed investigation.

## **Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?**

There is no legislation regarding NDAs, but there is a Bill before the legislature proposing to "restrict the use of non-disclosure agreements as they relate to incidents of workplace sexual harassment and discrimination". It is currently at the report stage. Whether it passes remains to be seen, but there has in recent times been strong criticism of the use of NDAs to cover up matters that ought to be fully investigated and dealt with in an organisation.

Settlement agreements, however they arise, may include confidentiality clauses which may, depending on the terms of the agreement, extend to the fact and substance of an investigation, but as in the UK an employee's right to make a protected disclosure or report a criminal offence cannot be waived by signing an NDA.

## **When does privilege attach to investigation materials?**

It would be difficult to assert privilege over materials that relate to the investigation itself.

Privilege may arise before the instigation of an investigation where an employer may seek legal advice from their legal advisors over the initial complaint and appropriate next steps. Subject to the relevant tests being met, Legal Advice Privilege arises in respect of a confidential communication that takes place between a professionally qualified lawyer and a client. Who the client is will be of significant importance as they must be capable of giving instructions to their lawyer, on behalf of the employer. Caution should be exercised by employers if advice to "the client" is disseminated further within the business to other members of management. If such a scenario arises, then there is a risk that privilege may be waived and such material could be disclosable under a data subject access request. Litigation privilege arises with respect to



confidential communications that take place between a lawyer or a client and a third party for the dominant purpose of preparing for litigation, whether existing or reasonably contemplated.

It is also prudent to consider whether an external investigator should have access to their own independent legal advisor, and the funding arrangements for such advice would have to be considered by the employer.

## **Rights to representation**

### **Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?**

This depends on the nature of the investigation. If the complaint originates from an employee as a grievance, then the employee would have the right to representation during the investigation. Representation in this context is more akin to the right to be accompanied, as in the UK by either a colleague or trade union representative.

If the investigation is a fact-gathering investigation originating from the employer, then the employee would not have the right to be represented during the investigation. That right would apply only at any subsequent disciplinary hearing.

If the investigation is a fact-finding investigation as part of a disciplinary process originating from the employer, then the employee ought to be given the right to be represented at that investigation stage. Again the right is akin to the right to be accompanied. There was concern from employers that the right had been expanded to legal representation in disciplinary matters with the case of *McKelvey v Irish Rail*. However, the Supreme Court in that case clarified that the right to legal representation in disciplinary processes is only in exceptional circumstances.

### **If there is a works council or trade union, does it have any right to be informed or involved in the investigation?**

This will depend on the agreement with the works council or trade union. The employee who is the respondent to the investigation may have views on their trade union being informed, aside from any agreement, which should be taken into account under GDPR provisions.

### **What other support can employees involved in the investigation be given?**

If an employee assistance programme is in place, an employee irrespective of their role in the investigation should be directed to the programme and encouraged to avail of the services. Investigations can become protracted and employees should be kept informed as to progress and what is required of them regarding participation. Regular checks of the health and well-being of employees should also be made. Even if such a programme is not in place, occasionally and depending on the issues giving rise to the investigation, it may be appropriate for the

employer to cover the cost of counselling to a certain extent.

## **Issues during the investigation**

### **What if unrelated matters are revealed as a result of the investigation?**

If an investigator finds other issues that are outside the scope of the terms of reference, these should not be ignored but equally should not be included as part of the investigation, as they are beyond the remit of the investigation that was established at the beginning. An investigator should identify the other matters that may require further action and report these to the employer separately so as not to conflate issues.

### **What if the employee under investigation raises a grievance during the investigation?**

If the subject of the grievance relates to the subject of the investigation, the employee should be reassured that all the matters that they wish to raise concerning the matter under investigation will be dealt with in full as part of the investigation.

If the employee raises a grievance that is unrelated to the matter under investigation, then that can be dealt with concurrently, albeit by a separate investigator.

The initial investigation does not automatically need to be halted upon receipt of a grievance. Frequently, grievances are submitted in the hope that they derail or delay the original investigation. Careful consideration should be given as to the nature of the grievance and the appropriate course of action adopted.

### **What if the employee under investigation goes off sick during the investigation?**

If an employee goes off sick during the investigation, it is reasonable to adjourn the investigation until the employee is fit to return to work. Difficulties arise if it is a prolonged absence. The absence may necessitate a referral to an occupational health expert and it may be necessary to seek medical advice as to whether the employee can continue to participate in the investigation. It may be that reasonable accommodations should be considered to ensure that the employee can continue to participate. Such situations may impinge on the investigator's ability to conclude the investigation. In that instance, it would be prudent for the investigator to document all attempts to involve the employee in the investigation and to assess whether it can be concluded without the further involvement of the employee.

### **How do you handle a parallel criminal and/or regulatory investigation? (Should the workplace investigation be stayed so the other takes precedence? Can the police/regulator compel the employer to share evidence or take any other steps?)**

Workplace investigations can originate from criminal investigations or proceedings. It may be

that an employer only becomes aware of a matter through the involvement of the police (An Garda Síochána) or regulatory bodies.

If a criminal investigation is pending it can complicate a workplace investigation, but it will be specific to the nature of the complaint. Likewise, where a regulatory investigation is in scope, an employee may argue that any internal investigation should be put on hold, on the basis that it will harm any regulatory investigation. Such matters will be dealt with on a case-by-case basis as it may be some time before any regulatory investigation commences, by which time the workplace investigation and any subsequent process may have been concluded.

Employers will also have to consider their reporting obligations to An Garda Síochána. If the matter relates to fraud, misuse of public money, bribery, corruption or money laundering, for example, reporting obligations arise under section 19 of the Criminal Justice Act 2011. A failure to report information that an employer knows or believes might be of material assistance in preventing the commission of an offence, or assisting in the apprehension, prosecution or conviction of another person may be guilty of an offence.

Also, the Irish Central Bank's (Individual Accountability Framework) Act 2023 (the Act) was signed into law on 9 March 2023 but has not yet been enacted. The framework provides scope for a senior executive accountability regime, which will initially only apply to banks, insurers and certain MiFID firms. However, its application may be extended soon. The Act forces employers to engage in disciplinary action against those who may have breached specific "Conduct Standards".

## Outcome of investigation

### **What must the employee under investigation be told about the outcome of an investigation?**

The employee whose actions are the subject of the investigation must be advised of the outcome of the investigation. They are usually provided with a copy of the investigator's report.

### **Should the investigation report be shared in full, or just the findings?**

The investigation report should be shared in full, unless there is some specific reason for not doing so. One example is where there is a possibility of a criminal investigation; in that instance, it may be appropriate not to share the full report. Occasionally, there may be several respondents involved in the complaint, and each respondent may only be entitled to the report that relates to them.

### **What next steps are available to the employer?**

The investigator will usually set out recommendations within their report. It will then be up to

the employer to act on those recommendations and to accept or reject the findings (if it were a fact-finding investigation). If, for example, a recommendation is made that the matter should proceed to a disciplinary hearing, the employer should then arrange such a hearing and nominate an impartial member of management to carry out the disciplinary hearing. In some instances, recommendations are made by investigators to provide training or update policies and such recommendations should be acted upon without delay. It may also be appropriate to notify a specific regulator of the outcome of the investigation.

**Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?**

Depending on the nature of the subject matter of the investigation, it may be appropriate to notify the Garda Síochána or a specific government body such as Revenue. Also, if the employee occupies a regulated position, it may be necessary to inform the relevant regulator. Again, compliance with GDPR obligations should be borne in mind.

**How long should the outcome of the investigation remain on the employee's record?**

Irrespective of the outcome of the investigation, the fact that an employee was subject to an investigation is not the key issue. The key concern is whether any further action was taken as a result of the investigation. If a disciplinary process ensued, then it is the outcome of that disciplinary record and any subsequent appeal that would or would not be noted on an employee's record. If a disciplinary sanction were imposed then the length of time the sanction remains on the employee's record would depend on what is specified in the disciplinary policy.

**What legal exposure could the employer face for errors during the investigation?**

A failure to follow fair procedures in the investigation can have significant consequences.

Although the exception rather than the rule, an employee could challenge the investigation through injunctive proceedings if there is a breach of fair procedures. Such action would be taken before the High Court. Injunction proceedings may be brought while the investigation is ongoing, or just before its conclusion to prevent publication of a report making specific findings against an employee. A successful injunction may curtail any subsequent attempt to investigate the matter as allegations of penalisation, prejudice and delay may arise.

Errors during the investigation can also give rise to a complaint of constructive dismissal, with allegations that flaws in the procedure have fundamentally breached the implied term of mutual trust and confidence.

A flawed investigation can also undermine any disciplinary process and sanction that is imposed as a result. This commonly occurs when an employee has been dismissed following a disciplinary

process launched on foot of the investigation. While dismissal may be an appropriate sanction, the dismissal can still be found to be unfair if there is a failure to follow fair procedures. An employee may challenge their dismissal before the WRC and the employer should be alive to not only an unfair dismissal complaint, but allegations of discrimination and penalisation.

Overall, to carry out a successful workplace investigation, an employer should consider taking advice at the earliest opportunity to ensure that the investigation can withstand challenges.

For further information or for assistance on workplace investigations please contact our team via via their contact details below.

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