

# LAW5432 – WORKPLACE INVESTIGATIONS AND MISCONDUCT

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## SETTING UP THE INVESTIGATION

### DRAFTING ALLEGATIONS

Drafting allegations	
<b>Step 1 - Introduction</b>	<ul style="list-style-type: none"> <li>• <b>Definition:</b> “A claim or assertion that someone has done something illegal or wrong, typically one <b>made without proof</b>” (Oxford Language Dictionary)</li> </ul> <p><b>Importance of allegations</b></p> <ul style="list-style-type: none"> <li>• 1. Forms the scope/framework of the investigation, and enable the investigator to focus on the relevant evidence that should be obtained during the investigation</li> <li>• 2. They are the essence of the complaint – <b>if proven, the alleged conduct will breach the employer standard(s)</b></li> <li>• 3. They enable the respondent to understand and have a proper opportunity to respond to what has been alleged against them <ul style="list-style-type: none"> <li>▪ N/B: when drafting the allegations then, consider also the shoes of the respondent and is it fair/reasonable what has been put towards them + how will you deal with it at the end of the report</li> </ul> </li> </ul> <p><b>Potential consequences</b></p> <ul style="list-style-type: none"> <li>• constitute a denial of procedural fairness;</li> <li>• enable an unfair dismissal claim to be successful;</li> <li>• breach a term of an Enterprise Bargaining Agreement (<i>McAlee v The University of Western Australia</i> [2007] FCA 52) <ul style="list-style-type: none"> <li>◦ <i>McAlee v The University of Western Australia</i> [2007] FCA 52) – case involved economics professor, alleged to have engaged in sexual harassment towards a student, put allegations in letter but it was in a very general form (i.e. not precise). Employer found to have breached its own EA (particular provision that required the employer to notify the employee in writing, understand the precise nature of allegations; finding that allegations were general and failed to say whom, when it happened/where/what were the “personal intimate” questions)</li> </ul> </li> <li>• constitute a breach of the employer’s own policies / procedures; and</li> <li>• incur unnecessary time and cost in the investigative process.</li> </ul> <p><b>Sources for allegations</b></p> <p>Examples:</p> <ul style="list-style-type: none"> <li>• Written complaint → usually the most common</li> <li>• Interview (with Complainant and/or witnesses)</li> <li>• Incident report (eg. OHS incident report)</li> <li>• HR file note of discussion with complainant/witness</li> <li>• Referral from regulator</li> <li>• Anonymous complaint</li> <li>• Whistleblower disclosure</li> <li>• HR / financial audit</li> <li>• CCTV/record of interview</li> </ul>
<b>Step 2 – Identify the relevant policy and/or</b>	<ul style="list-style-type: none"> <li>• To determine the content of allegation(s) you must firstly identify the workplace policies and standards relevant to the allegation(s)</li> <li>• For example:</li> </ul>

<p>standard relevant to the allegations</p>	<ul style="list-style-type: none"> <li>○ Bullying</li> <li>○ Sexual harassment</li> <li>○ Discrimination</li> <li>○ OHS policy</li> <li>○ Code of Conduct</li> <li>○ Conflict of Interest</li> <li>○ Victimisation</li> </ul> <p><b>EXAMPLES OF REFERENCE TO WORKPLACE STANDARDS</b></p> <ul style="list-style-type: none"> <li>• “It is alleged that person A breached the University’s Sexual Harassment Policy and/or Sections... of the Staff Code of Conduct by engaging in unwelcome physical conduct of a sexual nature towards Person B on 30 May 2025, and in particular....”</li> <li>• “It is alleged that, during the period from 15 February to 30 May 2025, Person A breached the University’s Bullying Policy and/or Sections ... of the Staff Code of Conduct by repeatedly engaging in unreasonable conduct towards Person B, and in particular.....”</li> <li>• “It is alleged that person A breached the University’s Discrimination Policy and/or Sections... of the Staff Code of Conduct on 30 May 2025 by treating Person B less favourably due to her race, and in particular....”</li> <li>• N/B: <ul style="list-style-type: none"> <li>▪ If there are e.g. 10 instances but only 5 are proven, you can say the allegation is substantiated but on the basis of allegation 1, 2, 4 being proven. Allegation 6, 9, 10 etc. are not proven</li> <li>▪ Some investigators may say partially substantiated (but law firms / organisations tend to want to say substantiated or not)</li> </ul> </li> <li>• → there is no “right” or “wrong” way to draft allegations. Another method could be to flip the order <ul style="list-style-type: none"> <li>▪ 1. Name all the particular instances</li> <li>▪ 2. Then say, if the above are proven, X allegation will be substantiated</li> </ul> </li> </ul>
<p><b>Step 3 – Planning allegations</b></p>	<p>Questions:</p> <ul style="list-style-type: none"> <li>• Date and time</li> <li>• Relationships → ask for an org chart</li> <li>• Full name</li> <li>• Policies and/or standards that the business has</li> <li>• How long have they been at the firm for / how long have the parties been working together</li> </ul> <p>Key elements for consideration:</p> <ul style="list-style-type: none"> <li>• Words said</li> <li>• Date/time/place</li> <li>• Body language</li> <li>• People</li> <li>•</li> </ul>
<p><b>Step 4 – Drafting allegations</b></p>	<ul style="list-style-type: none"> <li>• Ensure the allegations are <b>factual, precise</b> and <b>relate to the respondent’s alleged conduct</b></li> </ul> <p><b>ASK:</b></p> <ul style="list-style-type: none"> <li>• <u>When</u> did the conduct occur?</li> <li>• <u>Where</u> did it occur?</li> <li>• <u>Who</u> was involved?</li> <li>• <u>What</u> occurred?</li> <li>• <u>How</u> did the conduct occur?</li> </ul>

	<ul style="list-style-type: none"> <li>○ If it is a communication?</li> <li>○ What was said?</li> <li>○ What words were used?</li> <li>○ How was it said?</li> <li>● <u>Why</u> did the conduct occur?</li> </ul> <p><b>Tips:</b></p> <ul style="list-style-type: none"> <li>● Use specifics <ul style="list-style-type: none"> <li>○ For example:</li> <li>○ ‘Regularly’ → Dates, times and/or specific frequency</li> <li>○ ‘In the office’ → Where in the office eg. in meeting room 101</li> <li>○ ‘Spoke in an intimidating way’ → How was it intimidating? What was said?</li> <li>○ ‘He exhibits controlling behaviours towards her’ → What are the controlling behaviours, and how do they manifest themselves?</li> </ul> </li> <li>● Separate allegations into individual incidents</li> <li>● Avoid using <b>subjective descriptors</b> such as ‘offensive’, ‘derogatory’, ‘aggressive’, ‘harassed’, ‘bullied’, and ‘passive aggressive’</li> <li>● Avoid detailing impacts of alleged conduct.</li> <li>● Finalise the particulars of the allegations after meeting the complainant (and relevant witnesses if needs be) and confirming accuracy of the factual allegations with the complainant</li> </ul> <p><b>EXAMPLES</b></p> <p><b>POOR ALLEGATIONS</b></p> <ul style="list-style-type: none"> <li>● “You frequently spoke in an offensive and derogatory way to team members which has made them feel uncomfortable.” → <b>too subjective, what is offensive? What is derogatory?</b></li> <li>● “James has bullied Emma because he has recently performance managed her outside of the University’s performance management framework, which has made her feel that she has been unfairly treated in the workplace.”</li> <li>● “You have been graphically discussing a range of sexual practices.” → <b>too subjective, what is graphically?</b></li> </ul> <p><b>GOOD ALLEGATIONS</b></p> <ul style="list-style-type: none"> <li>● “On or around 9am on 30 May 2025, in James’ office on level 1 of the University’s offices located at 555 Lonsdale Steet, Melbourne (<b>Office</b>), James stood leaning over Emma, while she was sitting in the Office, and yelled loudly at her, stating words to Emma to the following effect: “If you don’t pick up your performance, you will be out of here before you know it.”</li> </ul>
<p><b>Step 5 – Analogue / distinguish cases</b></p>	<p><b>EXAMPLES</b></p> <p><b>POOR ALLEGATIONS</b></p> <ul style="list-style-type: none"> <li>● <i>Karen Harris v WorkPac Pty Ltd [2013] FWC 4111</i> <ul style="list-style-type: none"> <li>○ FWC found that the employer’s allegations of bullying were not sufficiently detailed. The Commission emphasized the need for employers to provide clear and specific allegations to allow employees a fair opportunity to respond. This case underscores the importance of precise allegation drafting in workplace investigations</li> </ul> </li> <li>● <i>Ramlan Abdul Samad v Christmas Island Phosphates</i> <ul style="list-style-type: none"> <li>○ FWC found that while the employee’s conduct was inappropriate, the allegations were not clearly articulated in the dismissal process. The Commission noted that the lack of</li> </ul> </li> </ul>

	<p>detailed allegations affected the fairness of the dismissal, <b><u>even though the conduct itself was serious.</u></b></p> <p><b>GOOD ALLEGATIONS</b></p> <ul style="list-style-type: none"> <li>• <i>Reece Goodsell v Sydney Trains [2023] FWC 3209</i> <ul style="list-style-type: none"> <li>○ case involved a dismissal based on a positive drug test result. The FWC examined the clarity of the allegations and the employer's communication of the reasons for dismissal</li> <li>○ FWC highlighted that vague or generalised allegations could undermine the fairness of the dismissal process.</li> <li>○ N/B: allegations ultimately found to be precised enough</li> </ul> </li> </ul>
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