

HR Network

Thursday, 12 September 2024





Terence McCrann
Consultant, Employment Group



Donal Hamilton
Partner, Employment Group



Jack Larkin
Associate, Employment Group



Mary Brassil
Partner, Head of
Employment Group



Megan Hooper
Partner, Litigation and White Collar
Crime



Glen Rogers
Senior Associate, Litigation and
White Collar Crime



Rebecca Walsh
Senior Associate, Litigation and
White Collar Crime





Terence McCrann
Consultant, Employment Group



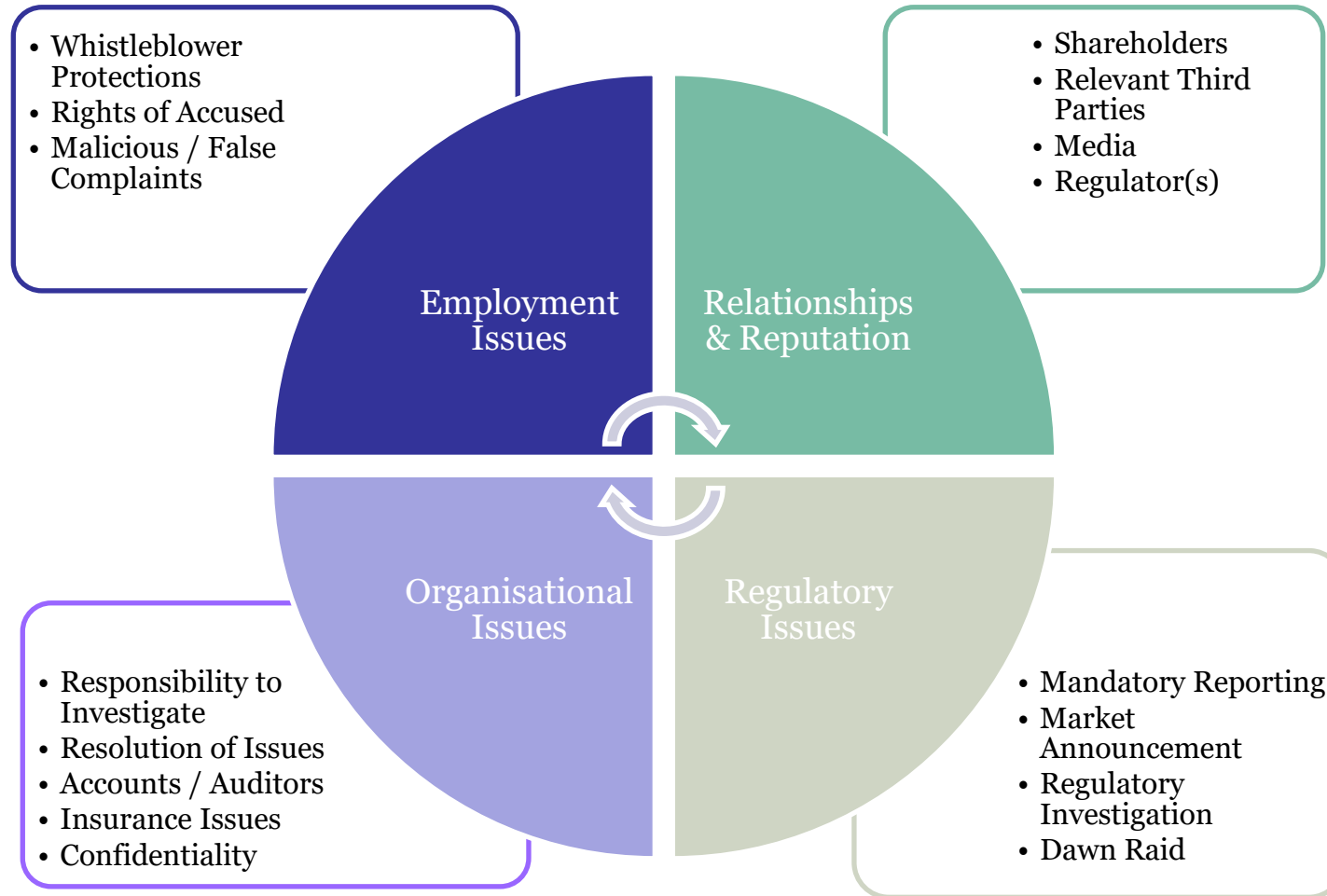
Jack Larkin
Associate, Employment Group

HR Network

Workplace Investigations Getting it Right



Investigations – The Big Picture



Workplace Investigations

- HR Policies and procedures
- Grievances
- Fact-Finding
- Bullying & Harassment
- Protected Disclosures
- “Hybrid”
- “Fair procedures” might be engaged in any of the above investigations, and the procedures will need to be tailored in each circumstance



“Fair Procedures”

- Applicable codes set out key principles
- Right to be made aware of the nature and extent of the issue/complaint
- Right to be accompanied by a colleague and/or trade union representative
- Right to be heard
- Some cases applicable principles of “national and constitutional justice”
- Right to legal representation?
- Extent of legal representation?
- Includes cross – examination?
- Not a court of law!
- Right to appeal



Workplace Investigations - practicalities

Issues

- Terms of reference
- Internal v External Investigators?
- RM v SHC [2023] IEHC 424 – External investigator – requirement for fair procedures
- Towerbrook Ltd. t/a Castle Durrow House Hotel v Young [2018] IEHC 425 Nemo Judex in Causa Sua – MD the subject of the complaint involved in investigation
- Information Gathering - Data Related
- Methodology and Approaches
- Practicalities

Terms of Reference

1. Who is the Investigator? What is the timeframe?
2. What is the scope of the investigation ?
3. Could the investigation lead to dismissal?
4. What procedural rights apply?
5. What policy is being relied on?
 - Disciplinary?
 - Dignity at Work (sometimes known as anti-bullying and harassment)?
 - Grievance Procedures?
6. Is a preliminary report required?
7. Provide for an appeal



Workplace Investigations

Grievances

- Policy & Procedures
- Informality and Mediation
- Formality
- Conclusions and Outcomes
- Appeals

Workplace Investigations

Bullying & Harassment

- Policies and Procedures
- Codes
- Industrial Relations Act 1990 (Code of Practice for Employers and Employees on Prevention and Resolution of Bullying at Work) Order 2020, SI No. 674 of 2020
 - What are harassment and bullying at work? Code observance
 - Management of bullying at work
 - Intervention in workplace bullying – formal process
 - Conclusion of Formal Process and follow-up
 - Appeals
- Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work – HSA – WRC, January 2021
- Irish Human Rights and Equality Commission Act 2014 (Code of Practice on Sexual Harassment at Work) 2022, SI No. 106 of 2022 – Employment Equality Acts (1998-2011) complaints procedure – sexual harassment
- Conclusions and Outcomes

Workplace Investigations

Fact-Find



Standalone but can be prelude to:

- Further action and investigation
- Follow-on procedures including disciplinary
- RM and SHC [2023] IEHC 424 – “Preliminary investigation conducted to ascertain whether there are issues that an employee should be required to answer in a formal disciplinary process and these are no immediate legal consequences that follow from such investigations” Mulcahy J
- Fair procedures – findings of fact which engage reputational rights – draft report to impacted individuals?

Workplace Investigations

Disciplinary Investigations

- Policies and Procedures
- Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000, SI No. 146/2000 – General principles
- Legal Representation and extent of same
 - McKelvey v Irish Rail [2020] IR 573 – Barr J

“while disciplinary investigations in an employment context must always adhere to the requirements of a fair hearing, they are not to be saddled with the rigorous requirements of a criminal trial”

 - H v Governor of a Prison and The Irish Prison Service [2023] IEHC 262

Workplace Investigations

Disciplinary Investigations (*continued*)

- Witnesses and interviews
- Conflicts of evidence
- Balance of probability
- Outcomes and Conclusions
- Appeals
- Flawed Dismissal Procedures
- BOC Gases Ireland Limited v Kinsella (UD2312)

“need not be perfect to meet test of fairness”

“An employer may be able to justify a procedural omission if it meets the onus of proving that, despite the omission, it acted reasonably in deciding to dismiss an employee”. Therefore, the Court has to consider, if there were procedural imperfections, whether there were or were not such as to render the dismissal unfair”

Workplace Investigations

Protected Disclosures

- Policies and Procedures
- Public Sector Guide November 2023
- S5 (5A) “inter personal grievance exclusively affecting a reporting person” – exclusion
- Confidentiality – S16 – obligation to protect identity of discloser.
- Anonymous reports – S5A(1) – not obliged to follow up
- Anonymity of the reporter must be protected – potential criminal liability
- Outcomes and Conclusions
- Barrett v The Commissioner for An Garda Siochana and Minister for Justice and Equality [2023] IECA 112
- Delay in seeking interlocutory relief - refuse injunction to prevent termination of employment.

Workplace Investigations

Parallel Processes

- Regulatory Investigations
- Criminal Investigations
- Criminal Prosecutions
- Suspensions
- O’Sullivan v HSE [2023] IESC11 - Supreme Court – "Where it is clear that a decision to [suspend] is being contemplated, that person should be so informed and should be afforded the opportunity to make representations as to why this should not occur. That is no more than fairness requires. This does not mean the “full panoply” of fair procedures.... but it is a basic level of fairness that is required”. “in cases of extreme urgency, it may not be possible to take the sort of steps that occurred in this case. However, provided an opportunity is given to someone who has been placed on administrative leave, or suspended, to make representations at the earliest opportunity thereafter.... this will suffice”
- Brannock v The Commissioner of An Garda Siochana [2023] IEHC 300 – extent of fair procedures – considerations
 - Length of suspension; whether open-ended; with or without pay; taking place within defined investigative or disciplinary procedures; whether intended to be punitive.

Workplace Investigations

Decision:

- Whether person acting under compulsion
- Whether risk testimony provided may be relied on in criminal trial
- Employer must commence a process/carry out an assessment of the competing interests involved.
- “No hard and fast rule as to how contemporaneous criminal and civil proceedings arising out of the same matter should be progressed”, (Clarke J – Wicklow Co. Council v O’Reilly [2006] IR623
- Importance to employer of being able to pursue the matter in advance of the conclusion of Garda investigation
- Cannot rely on constitutional rights indefinitely

Workplace Investigations

Summary

- General Investigation Policy
- Project Plan
- Terms of Reference
- Investigator
- Hybrid
- Parallel processes
- Notification Requirements - Gardai, Regulator
- Discoverability
- Settlements
- Operational Issues

Common obstacles and issues

- Delay;
- Redactions, anonymity, and privilege
- Departures (i.e witness unavailable or complainant resigns);
- Sickness and absence;
- Splitting investigations;
- Information: preservation and sharing (what can an accused be shown vs. what should they be shown);
- How to preserve BAU during an investigation?
- Failure to cooperate: justified or unjustified?;
- **Errors:** How to correct and reverse course?

Delay

- A worker awarded €18,000 in compensation, after an investigation into bullying allegations made against him took over 4.5 years to conclude – the time delays being described as “inexplicable”. The employer did not provide essential information, misplaced investigation results, and ignored mandated review periods.
 - *A Worker v A Policing Organisation* [2024]
- ‘the extraordinary delay in bringing this matter to a conclusion. Mr. O'Suird was put on administrative leave in a summary manner in January 2012; he was kept on administrative leave from January 2012 until May 2013 when he was suspended with pay without being given proper reasons; thereafter he remained suspended until November 2015 when he was dismissed.’
 - *An Bord Banistíochta and Another v The Labour Court* [2023] IEHC 484

Redaction issues: anonymity and privilege

- If the investigation is related to a protected disclosure, then protection of the reporter's identity is paramount (may be necessary de-anonymise at certain points which can be a difficult judgment call);
- Underscores the need to decide whether a complaint (i.e. a normal grievance) is PD at the outset;
- Redaction may be necessary – not just of a name, but of any identifiable information;
- More generally, redaction of personal data may be necessary in order to preserve personal data and due to privilege concerns;
- Privileged material should also be considered early on: general consensus that communications between in-house counsel in Ireland and their employer can benefit from privilege.

Departures and Sickness

- What to do if witnesses are unavailable due to resignation?
- What to do if a complainant leaves during a live investigation? Can the investigation proceed?
- What to do if an accused resigns? Should the investigation proceed?
- Sickness – can the investigation proceed? **It depends.**
- Is the Complainant fit to take part in the investigation? Involvement by occupational health, whose report should be fulsome –criticism of employee by the Labour Court where “*the medical certificates provided to the employer [were] scant on detail, referring only to ‘stress/work related stress’, which is of no assistance to the Court.*”

Splitting Investigations

- Complex complaints may need to be split into a number of components with different investigation teams, for example:
 - Regulatory issues (e.g. IAF, disclosure to CCPC or HPRA);
 - Employee welfare issue;
 - Health and safety issue.
- Employee communication is key here, the employee needs to understand why there are 2, 3 or even 4 different investigation processes when they only have made 1 complaint.
- Hybrid investigations: where one investigation teams deals with a number of issues
 - for example, some issues might be a protected disclosure, others may be a general grievance, all belong to a single complaint.

Information preservation and sharing

- Need to balance the need for fair procedures with the need not to make the situation even worse;
- For example, an employee makes a grievance and in that grievance uses very inflammatory language that could form the subject of a complaint if the accused is shown that language – accused must know the complaint against them but do they need to see the exact language?
- Preservation: legal hold should be used early and data protection officers should be kept fully abreast of the situation.
- Data protection processing agreements may be necessary where there is a lot of employee personal data involved.
- Prepare for DSAR and FOI (where it is a state body);

Preserving BAU during an investigation

- Possibility of suspending employee;
- Possibility of instructing employee to work from home;
- Moving an employee or giving them new role during investigation should be carefully considered – need to avoid a constructive dismissal complaint;
- Duty to provide a safe system of work can be a useful argument here.

Failure to cooperate: justified or unjustified?;

- Employee argues that they cannot cooperate due to risk of self-incrimination;
- Case law states that an employee is not entitled to sit back and say ‘prove it’ – duty on employee to cooperate;
- Where there is a live criminal investigation, employee is entitled to invoke privilege against self-incrimination;
- Employer then must balance the employee’s rights against its own interest in investigating the matter;
- This case law, *ESB v Sharkey*, is very new from the High Court and any issue such as this should be approached with extreme caution (one can think of a Court of Appeal judge taking issue with an employer being permitted to engage in a balancing exercise of the rights of an accused);
- Where there is no active investigation, the privilege against self-incrimination does not arise (this principle is more established).

Errors: How to reverse course and correct

- Procedural deficiency – for example, employee is sanctioned under the wrong policy or in circumstances where there is no policy or by a decision-maker who was biased;
- Course correction is possible if the issue is identified early and remedied; for example, a de novo investigation by an external decision maker;
- Blame and denial should be avoided – mistakes are inevitable in the long run and the aim should be to get the process back on track;
- Where the process has gone irremediably wrong, then the employee may seek an injunction in the courts to stop the process;
- Irremediably wrong - high standard

The Post-investigation universe

- The need to come to an outcome (particularly in the context of a PD);
- Reputation management;
- The investigation report as a piece of evidence (how will it be used in later processes?);

Questions?



Tea Break



HR Network

Corporate Investigations & White-Collar Crime



Megan Hooper

Partner, Litigation and White Collar Crime



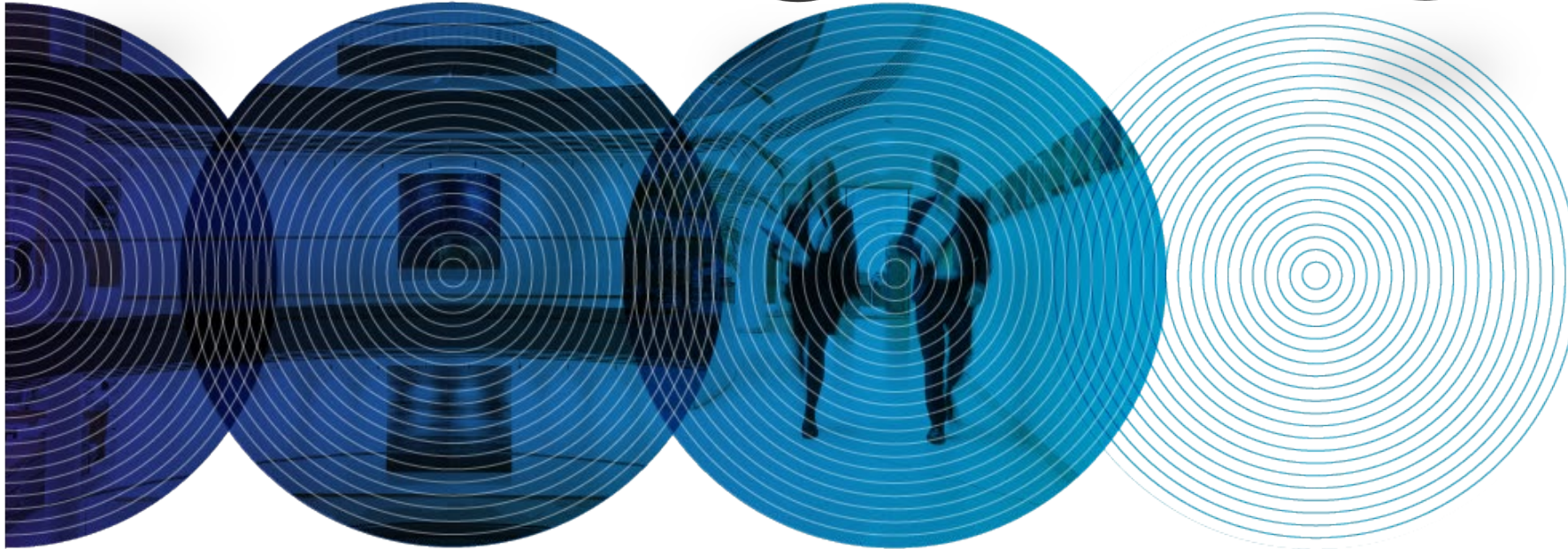
Glen Rogers

Senior Associate, Litigation and White Collar Crime



Rebecca Walsh

Senior Associate, Litigation and White Collar Crime



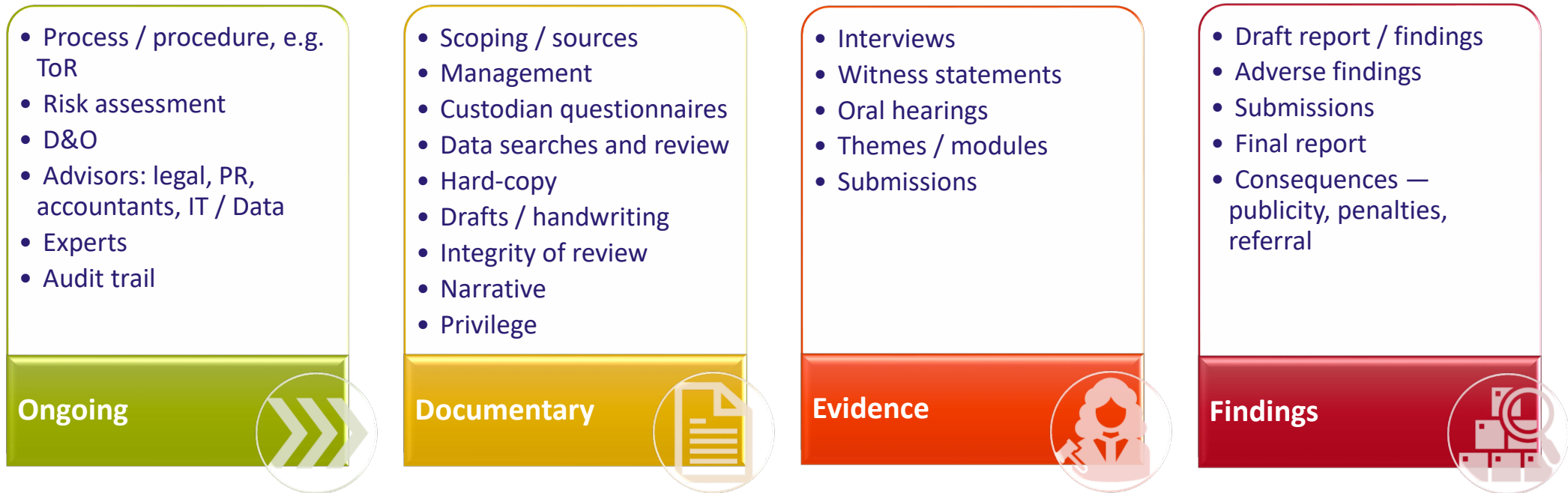
Introduction — lifecycle of investigations



Triage — immediate priorities



Process — typical issues



Peacetime — proactive steps



Questions?



Principal Office

Riverside One, Sir John Rogerson's Quay
Dublin 2 D02 X576
+353 1 829 0000

London

Tower 42, Level 38C, 25 Old Broad Street
London EC2N 1HQ
+44 20 7621 1000

New York

One Rockefeller Plaza, 30th Floor
New York, NY 10020
+1 646 952 6001

Brussels

40 Square de Meeûs, 1000 Brussels
+32 2 740 0370

This document has been prepared by McCann FitzGerald LLP for general guidance only and should not be regarded as a substitute for professional advice. Such advice should always be taken before acting on any of the matters discussed.