

Workplace Investigations – Quarterly Review – Edition 7

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Executive Summary

This quarter's developments share one message across jurisdictions: regulators and courts are continuing to turn best practice into minimum standards, and employers who have not kept pace are exposed. Three cross-border themes stand out.

Firstly, procedural fairness is now increasingly a hard requirement, not only best practice. Australia's Full Bench confirmed that employers must put all material witness evidence before investigators and decision-makers, even evidence that could help the employee's case. France's Aix-en-Provence Court of Appeal confirmed that a slow employer response to a report of bullying and harassment, not just a late investigation, can itself breach an employer's duty of care. In some circumstances, this can have a broader human rights angle, beyond the typical compliance culture focus.

Secondly, whistleblowing and reporting duties are expanding, in scope and in formality. The UK government is consulting on the introduction of a statutory duty to maintain whistleblowing reporting channels, expanding who is in scope and follow-up obligations, while the Czech Republic is proposing to extend its whistleblowing framework to platform workers and a wider range of conduct. Both would potentially broaden what employers must capture and act on.

In the UK, this expansion extends further: from 30 October 2026, the Employment Rights Act 2025 raises the duty to prevent sexual harassment to "all" reasonable steps. This may, for example, require investigation even without a formal grievance. The FCA's non-financial misconduct regime, in force from 1 September 2026, means firms should assess and potentially update how non-financial misconduct is scoped, investigated and resourced across HR, compliance and legal, including cross-border in some cases.

Thirdly, AI can support investigations, but only with human oversight and a proportionate approach. In the US, *Mobley v. Workday* and *Does v. Meta* show growing exposure around AI-assisted employment decisions,

underlining the need for human oversight and documented justification at every stage. In Italy, the Data Protection Authority's decisions show the same discipline is needed when investigating remote workers: investigations must rest on genuine suspicion of wrongdoing, stay proportionate and targeted, and not stray into routine monitoring.

Overall, employers must continue to review policies and procedures to ensure they continue to evolve with the changing landscape and meet the expected standard of legislators, courts and supervisory bodies.

APAC - Full Bench rejects “unmeetable burden” argument in workplace investigations

In [OS MCAP Pty Ltd v Mouat \[2026\] FWCFB 259](#), the Full Bench of the Fair Work Commission upheld a decision that an employee’s dismissal for alleged aggressive and intimidating behaviour was unfair and identified procedural failures in the associated investigation. In doing so, the Full Bench has emphasised an employers' obligations to take reasonable steps to investigate allegations and give employees a fair chance to answer them.

When considering the investigation, the Full Bench found that one eyewitness statement was not provided to the ultimate decision-maker, another eyewitness statement given to a supervisor did not reach the investigator or decision-maker and another eyewitness was never asked to provide a statement after speaking with an investigator about the incident. Given that the decision-maker was not provided with this information, material that could have assisted the employee's response was not considered or available. This denied the employee a genuine opportunity to respond to the dismissal.

On appeal, the employer argued that by requiring every potential witness’s evidence to be considered employers would be held to the standard of “police investigators or lawyers”. This could impose an “unmeetable burden”. The Full Bench rejected the argument. It held that the failures went to “core issues of fairness” as the omitted eyewitness accounts could have led to a different result. Employers are required to take reasonable steps to investigate allegations and give employees a fair chance to answer them.

Employers should take reasonable steps to ensure material evidence obtained during an investigation (such as witness statements) is provided to both investigators and decision-makers. Employers should also consider whether they have overlooked material evidence that could help an employee respond. In particular, employers should obtain and consider the relevant eyewitness accounts. They should not assume they can avoid interviewing potential witnesses.

Czech Republic - Draft Legislation expands Czech Whistleblowing Act to include platform workers

The Czech government has approved two draft bills: a draft Act on Platform Work, which would transpose EU Directive 2024/2831 on

improving working conditions in platform work (Platform Work Directive), and a related draft bill amending several other acts, including the Czech Whistleblowing Act. The proposed changes would require digital labour platforms to make internal reporting systems available to platform workers, not just employees, by adding digital labour platforms to the list of obliged entities under the Czech Whistleblowing Act. They would also extend the categories of reportable wrongdoing. This includes offences against civic co-existence, such as insult, threat and injury to health, connected to platform work. This could increase reporting.

Under the proposed changes, the Czech government would extend the supervisory competence of the Czech Labour Inspection authorities to include digital labour platforms' compliance with whistleblowing obligations. This would mirror existing oversight of traditional employers, reflecting the aims of the Platform Work Directive. The proposed changes are expected to enter into force on **1 January 2027**. While this remains at the parliamentary stage and subject to amendment, the current drafts would see digital labour platforms and platform workers fall within the scope of the Czech Whistleblowing Act, consequently increasing protections.

France - Aix-en-Provence Court of Appeal confirms that employers must respond to allegations in a timely manner and take appropriate measures to address the situation

The Aix-en-Provence Court of Appeal awarded damages of EUR 5,000 after finding that an employer had not responded promptly to an employee's reports of bullying and harassment. For example, 40 days had passed between the employee's initial report and the start of the internal investigation. This was in spite of the fact that the employee raised the matter on several occasions. This underscores the need for employers to respond promptly and decisively, taking necessary action swiftly to address any reports or claims by an employee.

While the court did not find that the investigation itself had been launched too late, it instead found that the employer had more broadly been too slow to respond to the employee's reports. The absence of an internal investigation does not, in itself, amount to a breach of the employer's obligations. Rather, the courts will look to the circumstances of the report. They will then assess whether the employer responded in a timely manner by taking sufficient and appropriate measures to protect the employee's health and safety.

Germany

A ruling dated 31 July 2026, from the Cologne Higher Labour Court (8 SLa 603/25), is a reminder that the consequences of a workplace fraud investigation do not end with the findings. Where an investigation substantiates employee wrongdoing, this decision has implications on the level of damages that may be recovered by the employer from the employee and how the employer's available remedy interacts with directors' and officers' insurance (D&O). While the ruling may be subject to

review by the Federal Labour Court, companies should evaluate their D&O cover.

Under German law, an employee's personal liability for damage caused at work generally depends on the degree of fault. In cases of gross negligence, the employee could be forced to bear the full loss, although a court may reduce the amount after considering the circumstances and relevant factors. The Cologne Higher Labour Court has now held that an employer-financed D&O policy may remove any possible reduction in the amount of liability. The court took the view that where such an employer-financed cover eliminates the employee's risk of existential financial ruin, the very justification for any exception to full liability in gross-negligence cases falls away. This is a liability-allocation question that typically arises only once an investigation has substantiated the underlying misconduct.

In the case assessed, the employee had made more than 50 wire transfers, totalling millions of euros, to fraudsters in a CEO-fraud / deepfake scam, the kind of conduct that would typically come to light through, or be substantiated by, an internal investigation into suspicious payment activity. The court found this grossly negligent. As a result, the court held that the employee must bear the full liability, despite the D&O cover's maximum of USD 150 million.

Employer-funded D&O cover for employees may therefore expose employees to full recourse for losses arising from gross negligence. This is a reversal of the usual protective assumption (although remains subject to confirmation by the Federal Labour Court). An impact on the pricing of D&O is to be expected.

Italy - Investigating remote workers without crossing the line

Hybrid and remote working are now a part of the modern workplace. Recent developments illustrate that Italian employers must balance data protection and privacy more carefully when launching investigations involving remote employees.

Under well-established Italian Supreme Court case law, employers may engage private investigators where there are specific and well-founded indications of fraud, misconduct or other unlawful conduct that could harm the employer's interests. This can include conduct occurring outside company premises and can apply to remote employees. However, employers must not use these investigations to monitor the ordinary performance of work duties or check whether employees are working diligently. Employers need genuine suspicions of fraud and misconduct, drawing a distinction between suspected misconduct and mere underperformance.

Enforcement activity by the Italian Data Protection Authority (DPA) has also highlighted the risks of technological monitoring tools, including where it sanctioned an employer that systematically geolocated remote workers as they clocked in and clocked out. The DPA found this to be unlawful as it breached data protection rules. This came to light as the employer relied on that data to initiate disciplinary proceedings against an employee. The DPA's decision is temporarily suspended, following a recent

court ruling upholding the challenge brought against it. The court held that the tool was more limited than the DPA assumed, falling within permissible employer controls for organisational needs. Under Article 4 of the Workers' Statute, this kind of control is permissible, subject to agreement with trade union representatives, which the company had secured. This illustrates the careful balancing act of privacy principles which employers must undertake when considering investigating remote employees.

Overall, employers should ensure that investigations into remote workers are based on genuine suspicion of fraud or misconduct. Investigative measures must be proportionate, targeted and strictly limited to their legitimate pre-existing purpose. They must not evolve into broader, routine or covert surveillance.

United Kingdom - The new non-financial misconduct (NFM) regime: scoping the investigation and territorial considerations

The FCA's updated conduct rules and guidance on non-financial misconduct (NFM) took effect on 1 September 2026, formalised under [Policy Statement PS25/23](#). Firms should now revisit their policies on reporting, investigating and sanctioning NFM, including its international reach.

Serious, work-related NFM, such as harassment, bullying or violence towards a colleague, may breach the Conduct Rules (COCON). The guidance also clarifies that NFM in an individual's private life is relevant to their fitness and propriety (F&P) assessment under the Senior Managers and Certification Regime, where it shows a material risk of a future breach of regulatory standards. In the past, firms may have handled such conduct purely as an HR matter, under disciplinary, grievance or speak-up processes. It may now also engage COCON and/or F&P.

Terms of reference for NFM investigations are increasingly significant. Firms should assess each case to decide whether disciplinary and regulatory aspects, including whistleblowing, need to be reflected. This determines who should investigate, what evidence is needed, and who is the decision maker in respect of F&P: HR, compliance, a manager from the business, legal, an external party, or a combination. Coordination may be required, depending on expertise or knowledge in this relevant function.

International considerations may also arise, such as local data protection constraints on cross-border evidence gathering or local employment procedures. This is because NFM changes are not limited to UK-based staff; they layer onto the existing COCON/F&P framework without changing its territorial scope. COCON applies to roles of senior conduct rules staff and certified material risk takers "wherever performed," catching those based outside the UK. It does not apply to other conduct rules staff absent a UK nexus. By contrast, F&P applies to Certified Persons based abroad regardless of COCON's territorial reach. Firms must still assess an F&P-relevant NFM issue involving a non-UK-based Certified Person for certification, even if COCON would not apply.

The enhanced statutory obligation to take all reasonable steps to prevent sexual harassment and the duty to prevent third party harassment: the investigative dimension

Employers in England, Wales and Scotland must already take reasonable steps to prevent sexual harassment. From 30 October 2026, the Employment Rights Act 2025 raises this to "all" reasonable steps. Employers must now show every reasonable step was taken, not merely some. Since April 2026, disclosures about sexual harassment also qualify as protected disclosures under the whistleblowing regime.

The Government is expected to publish regulations specifying qualifying "reasonable" steps. These are likely to cover risk assessments, published policies, reporting mechanisms and complaint-handling procedures, embedding investigation mechanics within the statutory test. Publication timing remains unclear, leaving an interim gap for employers.

This heightened duty is unlikely to be satisfied by policies alone. Tribunals will examine what employers actually did once they were on notice, or constructive notice, of a problem as the duty is preventative and freestanding. It requires no complaint, grievance or employee cooperation. On credible indications of harassment, such as a bystander report, exit interviews, worker engagement or exit survey patterns, or informal comment, declining to act because no grievance was raised is unlikely to be defensible. An investigation function triggered only by formal grievances, or one that treats complaints in isolation, may be insufficient.

This does not mandate investigating every rumour or overriding confidentiality wishes. But the decision not to investigate must itself be justifiable, through documented, proportionate triage of credibility, severity, pattern and risk, weighing the individual's wishes against wider risk. Generic, role-based assessments, such as lone working, alcohol, or power imbalances, may be insufficient. Assessments should also capture organisational data: repeat mentions of an individual across complaints, incident clusters by team or site, high turnover and patterns from exit interviews or surveys below formal complaint thresholds.

Treating reports as standalone events risks missing pattern evidence that tribunals expect diligent employers to capture. Firms should consider centralised case-recording, with triggers that escalate patterns to formal investigation even absent a single qualifying complaint.

Equally, from 30 October 2026, employers are also under a duty to take all reasonable steps to prevent third party harassment. Thus, employers may need to co-operate with third parties in investigations and build in rights of access for those in contractual arrangements.

UK Government Consults on Overhaul of Whistleblowing Framework

The UK government has launched a comprehensive Consultation reviewing whistleblowing law which, if implemented, would reshape how organisations run internal investigations; who can trigger one, how quickly it must be acknowledged and followed up, how disclosures must be

channelled and documented and what penalties follow if investigation processes fall short. Organisations with UK-exposed operations may need to revisit whistleblowing protocols on case triage, confidentiality and evidentiary record-keeping, while aligning with overlapping regulatory requirements.

On scope of protection, the government is asking whether protections should extend beyond workers, for example to non-executive directors and the self-employed. A wider pool of protected reporters would expand the range of disclosures triggering investigative obligations, including from people outside the traditional employment relationship, for example consultants.

It is also reviewing the public interest test and the categories of reportable wrongdoing, including AI-related and corruption risks, which would require updated triage criteria. On disclosure routes, the consultation considers removing the requirement for workers to reasonably believe a disclosure to a regulator is "substantially true" and creating a lower-threshold route for disclosures to trade unions. Such changes could increase the speed of external escalation and compress internal investigation timelines before regulators step in.

The most significant employer-facing proposal is a possible statutory duty to maintain whistleblowing policies, confidential reporting channels and follow-up obligations modelled partly on Ireland's Protected Disclosures Act 2014 (seven-day written acknowledgement, an impartial case handler, assessment of prima facie evidence, and periodic feedback to the whistleblower). This would convert current good practice into set requirements with a statutory minimum. This is likely to apply to private employers with 50+ staff and all public bodies and will be enforced by civil (not criminal) penalties.

The consultation also explores a central "Office of the Whistleblower" or an AI triage tool to route external reports, and a Serious Fraud Office reward scheme for economic crime whistleblowers, which could increase report volumes and introduce new credibility questions for investigators.

A formal Government response is promised in 2027, but there is no indicative legislative timetable or implementation date.

The relevance of business and human rights to workplace investigations

Businesses often use the framework in the UN Guiding Principles on Business and Human Rights (UNGPs) to manage adverse human rights impacts and meet their responsibility to respect the human rights of people affected by their operations. The UNGPs are also an important benchmark for responsible business conduct, including through their influence on mandatory human rights due diligence regimes. And they are increasingly relevant to areas of business conduct that are not normally viewed through a human rights lens.

Workplace investigations are a key example. They clearly engage employment law but, less obviously, these issues also overlap with human rights issues, including non-discrimination, sexual harassment and

violence, effective grievance mechanisms and remediation. Alongside fact-finding and testing the veracity of allegations, investigations can play an important role in identifying adverse human rights impacts, informing decisions on action and escalation, and supporting remedy.

It can therefore be appropriate to apply a UNGP lens to understand the human rights impacts of an investigation to inform recommendations for action afterwards, especially where allegations relate to serious or systemic abuses.

The UNGP lens may also be relevant to the way in which the investigation is conducted as well as to the outcomes of an investigation. Where allegations concern serious sexual harassment, sexual violence or other potentially traumatic experiences, it is important to consider the human rights impacts the investigation itself may create. Such investigations call for appropriate techniques, such as a victim-centred or trauma-informed approach, so the investigation can be conducted objectively and impartially while minimising the risk that the process causes further harm or re-traumatisation.

In practical terms, applying a human rights-focused approach can mean assessing risks and support needs before interviews; obtaining genuine, ongoing informed consent; carefully considering the choice of interviewer, setting and support available; using open questions and free recall before probing; and avoiding unnecessary repeat interviews. It also means understanding how trauma can affect memory, so gaps or inconsistencies are assessed appropriately rather than treated as unreliable. Practitioners are increasingly alive to these techniques, and specialist external training can strengthen the traditional investigations toolkit. We expect this to come into even greater relief based on: new employer duties to take all reasonable duties to prevent sexual harassment; the duty to prevent third party harassment; and the new Fair Work Agency (and ongoing focus on supply chain relationships).

United States - Recent California cases highlight the importance of human oversight when using AI in employment decisions

In *Mobley v. Workday, Inc.* (N.D. Cal.), 2023, it is alleged that Workday's algorithmic screening tools rejected applicants based on race, age and disability, violating federal and state anti-discrimination laws. The court allowed plaintiffs to sue Workday under a "vendor-as-agent" theory, meaning AI vendors may face direct liability for employment discrimination claims. In June 2026, the court denied Workday's motion to dismiss claims under the Americans with Disabilities Act (ADA), finding plaintiffs had adequately alleged that Workday's algorithmic tools relied on "proxy indicators of illness or health-related limitations" such as patterns consistent with medical leave, treatment and recovery. However, while AI vendors can be held liable for discrimination claims, this does not shield employers from liability. Instead, it exposes AI vendors to joint liability alongside the employers that deploy their tools.

Similarly, in *Does 1-26 v. Meta Platforms, Inc.* (N.D. Cal.), 26 current and former employees sued Meta over its use of AI in a recent 8,000-person reduction-in-force. The plaintiffs alleged that Meta's internal AI systems used activity monitoring data to score and rank employees, producing a disparate impact on employees with disabilities, those on protected medical or family leave and pregnant employees. Meta's primary defence is that the final decisions were made by humans, rather than AI. Nevertheless, this case reveals how certain metrics may become proxies for protected status. Employers should ensure that humans are involved in final employment-related decisions and that human involvement, as well as the employers' justification for those decisions, should be documented at every step.

Further, these cases highlight that disparate impact remains a viable theory of liability in private actions. Although the Trump administration has rolled back its enforcement of anti-discrimination laws based on disparate impact liability, federal and state laws continue to allow for such claims in private suits.

For an overview of employment law in a large range of key jurisdictions see our easy-to-use digital guide:

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