



Background

ASU has been advised that there is currently a review of the Work Conduct Unit (WCU) with a view to overhauling the structure, processes and jurisdiction of the Unit. In light of this we have sought our members' views on their experience with this Unit and what changes they believe should be made.

As you will be aware the ASU has consistently challenged the way this Unit has operated over the last several years. Time after time, our members have had difficult experiences.

We believe that this Unit has operated in a way that is inconsistent with principles of procedural fairness, without common sense and in a way that has been detrimental to both the members and the credibility of RailCorp's disciplinary process.

Further we believe that the Unit has lost all credibility with employees and managers who perceive it to be draconian and to have seriously eroded the morale of RailCorp's workforce.

Of more concern, the operation of the WCU has worked against creating an environment of openness and improved productivity. For example, when incidents have occurred which have affected on time running, members have been very reluctant to be candid about what they believe has occurred or what could be improved when responding to those investigating the incident. This reluctance comes from a fear that whatever they say may be used against them by the WCU. Such a culture of fear has serious and wide reaching negative outcomes for RailCorp and the public.

We have compiled a report on the experiences and concerns of ASU members and make the following recommendations for changes we believe are needed to reconstruct RailCorp's disciplinary system.

RailCorp must engage best practice when it comes to performance management and the management of disciplinary investigations. This internal review, presents RailCorp with the opportunity to create a system which focuses on helping its employees achieve outcomes which reinforce the values and goals of the organisation in line with the Just Culture Policy as opposed to being punitive.

The ASU received 55 responses to our request for members' views on this report. Their primary concerns about the Unit that need to be rectified as part of the current review are listed below:

Length of time between alleged incident and investigation.

It is the experience of ASU members that there is often a great length of time between the alleged incident taking place and the allegations being put to them.

We currently have members who received allegations in late 2008 pertaining to their timekeeping in 2006 and 2007. It is unreasonable to expect people to be able to explain incidents that occurred so long in the past.

It places an unreasonable onus on the employee to recall specific situations, occurrences or interactions without having these fresh in their memory, and inhibits their ability to rely on witnesses who would suffer from the same problems with recollection.

Meanwhile RailCorp relies on statements taken closer to the time, phone records, timesheets and CCTV footage none of which the employee is allowed access to during the investigation.

If the organisation has concerns about an employee's performance or behavior then they have an obligation to express those concerns to members in a timely manner and enable opportunity for the employee to view all evidence in order to appropriately respond.

Because of the centralised model currently employed, inefficiency, and the level of bureaucracy involved in initiating investigations by the WCU, allegations are put to members long after the incident or incidents have taken place.

This results in concerns being left to fester and employees being put under unnecessary burdens and stress.

Length of time taken by investigations and communication.

Though timeframe guidelines are specified in the current Disciplinary Policies, one of the consistent concerns of the members is the length of time taken for an investigation.

One example of a protracted investigation involved an ASU member who is a Transit Officer who was bought into an office and stood down from operational duties in August of last year.

At the time, he received no information, general or specific, as to what the allegations were. Three months after being stood down he was finally advised of the details of the allegations.

For over three months, he was removed from his regular role, subjected to questions and speculation from his peers and was understandably extremely distressed and concerned as to the nature of the allegations.

This was an unacceptable length of time between RailCorp establishing that they were significantly concerned about the allegations to warrant standing down this employee and RailCorp feeling that they were in a position to explain to this employee what the nature of these allegations were.

Apparently during this time a preliminary investigation was conducted but the %accused+ received no updates of the investigation's progress or when he could expect to know what he was alleged to have done.

In November he received the allegations in writing. The member duly responded in writing.

Three months after receiving the original allegations, and six months after he had been stood down from operational duties the WCU investigator reissued the allegations with new allegations attached to them, and asked them to start the process again.

When the obvious failures of the process were pointed out to the WCU they transferred the investigation to a new investigator. At no point during this investigation was the member communicated in line with the obligations specified in the Disciplinary Policy.

Nine months after he was stood down from operational duties, and six months after the formal investigation commenced, this employee was completely exonerated of all charges, an admission was made about the mishandling of the investigation and the allegations were completely dismissed.

During the investigation the member heard nothing for months and there was no acknowledgement of his enquiries. When he was able to speak to their investigator he was rude and dismissive.

Any investigation obviously causes significant distress to the affected employee, but for it to go on for so long, for it to take so long before they even knew what the allegations were is completely unacceptable.

This is just one example of the inefficiency of the WCU and the lack of regard they showed the people they were investigating. The excessive length of time taken to conduct investigations effectively means that many innocent people are punished. Those under investigation are removed from their position for extraordinary lengths of time, inevitably suffer from the assumption of guilt perceived by their colleagues and places considerable stress on them and their family.

This case also raises another concern consistently raised by members.

A major issue with the culture of the WCU is a failure to communicate, not only on a regular basis but about significant developments in the investigation. Members reported that most of the time, phone calls to the Unit went directly to voicemail and responses were not forthcoming to both these and emails.

Often members go for months without receiving an update as to the status of their investigation. Apparently it is not a priority to keep those under investigation up to date, or to give them the courtesy of returning calls.

Further even when something significant has happened, such as a case being reallocated, the employee is not advised, so a member often does not know who is managing their case at any one time.

This lack of communication and the perceived lack of respect shown by the investigating body exacerbates the stress on an employee and is against all procedural fairness.

Enforcement of ICT Service Access and Usage Procedure

The ICT policy has been managed in a way that is punitive and arbitrary. RailCorp is obviously engaging in significant monitoring of email and internet usage as is its right.

However, employees with considerable service and unblemished records have been subject to investigation and disciplinary action as a result of sending one email, replying to emails with attachments which they have not opened and forwarding personal emails home also unopened.

The investment of enormous time and resources into punishing loyal and hardworking employees is counterproductive and damaging to morale.

Further it is yet another example of the way in which RailCorp has failed to apply the Just Culture Policy. The way in which this policy has been applied has been so narrow as to make it almost worthless.

The Just Culture Policy says that unintentional error will not usually attract disciplinary action, but an investigation may conclude that an employee requires coaching and performance development. Often this policy was flagrantly ignored in the investigation of incidents, particularly those in relation to ICT breaches.

Most of the time these breaches were identified by an email monitoring system picking up on keywords and an investigation being initiated. No consideration was given to the unintentional nature of the breach and significant penalties were handed down. Most often these members had made a one-off error of judgment or simply did not know what the email or attachment contained. Yet despite this lack of intent many were subject to investigation and severe disciplinary action.

This disciplinary action which has mostly been a suspension of five days or more results in an employee losing significant income. Effectively, an employee was losing pay in the order of one or two thousand dollars, a penalty significantly greater than the fine that would be imposed in court if they were convicted of serious driving offences.

For all first offence ICT breaches, there should be a standard email reply generated by the surveillance system explaining the ICT policy with an explanation of the nature of the breach and how to avoid further breaches and that further breaches will result in an email to their manager and possible disciplinary action.

The Interview

The current interview process is intimidating and counterproductive.

An interview should be an opportunity for the employee to provide a clearer explanation of the events or situation and it should provide them an opportunity to advocate their position. They should be able to provide their perspective and any mitigating factors which need to be considered.

Currently employees are questioned in an interrogation style demanding yes or no answers, often with more than one interviewer, which is taped.

Further if they exercise their right to bring an advocate that person is not allowed to ask even the most basic questions.

For example, an ASU member agreed to attend the interview as she believed that she needed clarification of the exact nature of the allegations and had been unable to get that clarification by any other means.

When her representative asked for the clarification, he was told that he was not allowed to ask questions of that nature, that the investigator was not obliged to answer that question and that his role was to sit and support the member.

This policy does not recognise the imbalance of power that is inherent in the relationship between the investigator and the subject of the investigation.

Further, the fact that interviews must be taped is unnecessary and intimidatory.

It makes employees feel that the purpose of the interview is to trap them or manipulate them rather than providing them an opportunity to state their case.

The employee should be able to decide whether or not to attend the interview and the interviewee's permission should be sought for taping to occur, compulsory taping should not be a precondition to a RailCorp employee being granted the opportunity to present their side of the story.

Review of evidence

It is completely unacceptable and contrary to the principles of natural justice that employees do not have access to the evidence being considered.

They need to have an opportunity to review the evidence in order to understand and respond to all of the factors which are being taken into consideration in making a decision as to disciplinary outcomes.

RailCorp employees currently respond to poorly written allegations. They do their best to identify the particular interaction, action or incident without reference to the letter of complaint, the CCTV footage and all the other evidence RailCorp considers. An employee is only ever in a position to provide a response to one part of the equation that RailCorp is considering. The employee needs to be aware of all of the evidence being considered in order to understand the picture as RailCorp sees it and explain the various nuances and textures of the case against them.

Employees are investigated on incidents which are captured by CCTV. However, because they are unable to view the CCTV, see the angle from which the incident is caught, they are unable to explain in detail to the interviewer all of the nuances of the incident.

If RailCorp intend to use CCTV footage as evidence then the defendant should be given the right to view the footage.

During the investigation an employee must be provided with access to all the evidence being considered so that they can respond in full to the allegations and the evidence which may or may not support those assertions.

Lack of managerial responsibility

Performance management is an inherent part of management, which can range from praising and supporting employees for their positive performance to putting in place mechanisms for identifying areas for improvement and assisting employees in improving. It can also lead to investigation of conduct which is consistently or seriously contrary to behavior that is acceptable to the organisation.

RailCorp managers have been completely disempowered from managing the performance of their employees. A culture has developed where everything is to be forwarded to this centralised unit, even issues which are minor and best dealt with at a local level.

This culture has developed to the extent that managers are scared to manage issues locally in case they are subject to a disciplinary investigation for not managing properly.

An ASU member had to manage an interpersonal conflict between two employees he managed. He sought his manager and HR's assistance in dealing with it. He believed that he was dealing with it appropriately and in line with the advice he was receiving from management and HR. He believed that there was an improvement in the relationship between the employees.

Suddenly, out of the blue, he was subjected to an investigation, which has been ongoing for six months. The purpose of the investigation was to determine whether or not he was managing the situation appropriately. While this investigation is ongoing he is expected to continue managing these employees. It is completely unacceptable that this investigation was ever launched. His manager does not support the investigation. His confidence is completely fractured and his ability to manage his staff is undermined.

RailCorp should be empowering managers to manage, providing them with the skills and resources to identify potential issues, manage them at the lowest possible level and be able to recognise when they need to escalate them. Where issues are escalated and it's appropriate a manager should be involved in the ongoing process in order to provide them with learning opportunities and to provide local knowledge and context.

At the moment managers are only involved where the letter advising of disciplinary action is to be signed. Very often they express their concern to the employee as to the outcome of the investigation but describe themselves as hamstrung in altering it.

Managers don't feel that they can manage their employees. This limits their ability to take ownership of their division or area and effectively disempowers them.

Further it means that all issues are being dealt with by a centralised organisation which does not understand the dynamics or culture of the local area and is not invested in the relationships and productivity in that area.

It creates a huge amount of work for a centralised body which is intent on its own survival irrespective of the impact on employees, their managers and the organisation as a whole.

It is imperative to the efficiency and effectiveness of the organisation that managers are given the tools and skills to manage their employees and it is imperative to the employees that any issues are dealt with at the most immediate level, before being escalated if necessary.

Written Allegations – drafting, rewriting and confidentiality

Allegations which are drafted are often poorly written and confusing. The wording is often too broad to identify what is actually being alleged. An ASU member recently received allegations which said:

“You provided false and misleading information in your signed weekly time and attendance sheet dated [DATE] in that you failed to work the actual work hours claimed in that timesheet, between 0600hrs and 1630hrs on [DATE].”

These allegations refer to a date over twelve months ago and the member is required to guess as to what he§ alleged to have done.

What hours is he alleged to have worked? This is not sufficient as to allow the employee an opportunity to respond to the concern in specifics.

Frequently these allegations are framed in a way which exacerbates the lack of access to the evidence being considered and the time between incident and allegation.

There have also been incidents where an employee has received allegations, responded to them in writing and then received a second set of allegations, rewritten, shaped around the response, requesting a further response to these redrafted allegations.

The allegations had pertained to the same incident . the investigator§ concern obviously was that they were not going to be able to substantiate the allegations in the way they were originally written, so they felt the need to rewrite them so they could substantiate an employee in another matter.

Another issue with the standard letter of allegation is the emphasis on confidentiality.

While the ASU recognises that it may be important to limit discussion around a particular issue, the way in which the confidentiality is framed in the letter of allegation is unnecessarily onerous and creates anxiety among staff. The letter states:

“I wish to emphasise that confidentiality is an important part of the investigation process. You are therefore advised that you are not permitted to discuss this matter with any other staff members. Failure to comply with this requirement of confidentiality may be a breach of the RailCorp Code of Conduct and may result in disciplinary action.”

Members have described this prohibition on discussing the issue with anyone as a very frustrating as it cultivates a sense of shame and anxiety when there may be no substance to the charges at the centre of the investigation.

Often many colleagues of the worker under investigation know about the investigation but the accused could not counter claims made by fellow employees, address gossip or defend themselves against rumour because of the strict requirements of confidentiality.

Further they felt it limited their ability to discuss the situation with potential support people or union delegates for fear of retribution.

It is unacceptable that the need for confidentiality is framed in such a punitive way. It isolates and denigrates those being investigated unnecessarily.

Key Recommendations

The ASU believes the following recommendations should be considered when reviewing the investigative function of RailCorp.

These recommendations are matters of extending basic principles of procedural fairness and natural justice to our members and all RailCorp employees:

- Matters should be dealt at a local level with local management.
- Managers should be empowered to deal with performance management and minor disciplinary issues at a local level with their knowledge of the dynamics of the workplace and the circumstances of the employee.
- The employee must have the right to have a union representative or support person present during these performance management discussions to ensure the accurate, achievable and reasonable goals are set for the employee.
- If line management is expected to deal with performance and disciplinary issues they are given appropriate training.
- The investigative process should be transparent and the investigative body, whether local or centralised should be communicative and accessible.
- Investigations, whether conducted locally or by a centralised unit, should be conducted timely and thoroughly. No investigation should take longer than a month.
- The purpose of policy should be in the forefront of the minds of the people enforcing it.
- Allegations should be put to employees within a short specified period of time to allow the employee to present as comprehensive a defence as possible.
- Allegations should be carefully and clearly drafted and explained.
- All evidence being considered by the employer should be available to the employee.
- Interviews should be an opportunity for an employee to explain in their own words what happened.
- Should questions need to be put to an employee, they should have access to these questions in writing before an interview so it does not become a test based on their level of anxiety or ability to recall on the spot.
- The employee should be able to chose whether or not to attend the interview and choose whether or not it is taped.
- Where the employee requests it, advocacy should be an inherent part of the process and that advocate must be able to advise and represent the employee on equal terms.
- Communication should be improved and priority given to updating all people involved in a case.
- The importance of confidentiality should be articulated in a way that allows an employee the right to seek support.