

The Role of the Investigation Officer

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- » Why is an investigation process important?
- » How much investigation is needed?
- » Who should conduct the investigation?
- » Is there a right to be accompanied?
- » Obtaining the evidence
- » Reluctant witnesses
- » Sickness absence issues
- » Is further action required?
- » Is suspension appropriate?
- » What information should be given to the employee before any formal stage?
- » Any questions...



- » Applies to sickness absence, performance management, disciplinary, grievance.
- » Going to concentrate on disciplinary processes, but most of what I will talk about applies to all investigations.
- » The requirement for an investigation to take place is critical.
- » In all but the rarest of cases, failure to do so will fall foul of the ACAS Code or the principles of fairness established by case law. This is true even in cases of apparently "obvious guilt" or where guilt is admitted.
- » Example -



- » Investigations are not disciplinary hearings.
- » For example, if an employee admits guilt during an investigative interview this will not remove the need for a further disciplinary meeting.



- » The legal test is that an employer must hold such investigation as is "reasonable in all the circumstances", judged objectively by reference to the "band of reasonable responses".
- » So, the amount of investigation required will vary enormously depending on the individual circumstances of the case.
- » ACAS guide states that the more serious the allegation, the more thorough the level of investigation required.
- » If reputation or ability to work is at stake, it is even more important that the investigation is fair and even-handed. Likewise, Where criminal behaviour is alleged, must always be the subject of the most careful investigation.
- » If an employee has admitted misconduct, it may be reasonable for the employer to undertake less investigation.



- » In most cases, the employee's immediate line manager will be the appropriate person.
- » However, the employer's own procedure (which may be contractual) may stipulate who is to conduct an investigation.
- » You will need to consider who will conduct the disciplinary and appeal. Each stage should be undertaken by someone more senior.



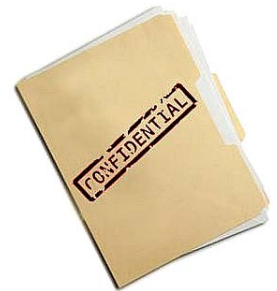
- » Employees have no statutory right to be accompanied at an investigatory meeting, although a contractual disciplinary procedure may give them such a right.
- » However, in the unusual case of *Stevens v University of Birmingham* [2015] EWHC 2300, the High Court found that, on the facts, a refusal to allow an employee to be accompanied at an investigatory meeting, where there was no contractual right to that effect, was a breach of the implied term of mutual trust and confidence.
- » Also, bear in mind any obligations under discrimination legislation.



- » Bear in mind the importance of keeping the investigation confidential.
- » This duty applies to both the person conducting the investigation and to any witnesses.

- » The ACAS investigation guide advises that keeping the matter confidential can:
 - » reduce any negative impact to a party involved in the matter
 - » help to ensure that staff morale is not unnecessarily affected
 - » reduce the risk of witnesses discussing or agreeing what their evidence should be.

- » In contrast, there is no set rule on whether an employer has a duty of confidentiality to witnesses providing information in disciplinary investigations.



- » Any investigation should be conducted as quickly as is reasonably possible. The ACAS Code "without unreasonable delay".
- » Witnesses should be spoken to and notes taken of their recollection of events before memories fade.
- » Consideration also needs to be given as to whether any physical evidence is required. Files, emails, CCTV, mobile phone records.
- » Is covert surveillance appropriate?
- » There is a clear balance to be struck between the employer's need to gather information for the investigation and the employee's right to be treated fairly and reasonably so that there is no breach of the implied term of mutual trust and confidence.
- » An employer should be careful therefore not to use the investigation as an excuse to undertake a "fishing expedition"



- » The evidence of witnesses is often crucial to the investigation, particularly in cases of misconduct.
- » Witnesses should be interviewed privately and the need for confidentiality should be emphasised.
- » Notes should be made of the statement or of the information provided by the witness and where possible the witness asked to sign the statement to confirm that the version of events taken down by the interviewer is correct.
- » A common problem faced by employers is that of the reluctant witness or the witness who will only provide information if anonymous.
 - » What is the reason for the reluctance?
 - » The reality is, however, no guarantee of complete anonymity to the witness can be given.



- » Sickness absence issues...
 - » I can't come to any meeting, I am stressed...
- » Union issues...
 - » I can't attend because my Union rep is too busy.
- » Matters involving the Police and criminal proceedings
 - » Should disciplinary action be put on hold pending the outcome of criminal proceedings?
 - » What level of investigation should take place into criminal allegations?
 - » When should you refer matters to the Police?



- » At the end of the investigation the person who made the decision to appoint the investigating officer should then decide what the next steps should be, in view of the investigation findings.
- » Generally, this will mean deciding whether the investigation findings warrant progressing to a disciplinary hearing or not.
- » This is likely to involve similar considerations to those that apply at the earlier stage of deciding whether to even initiate a formal investigation.



- » In instances of serious misconduct, an employer may wish to suspend the employee who is being investigated.
 - » This may be appropriate, for example, where there is a potential threat to the business or other employees, or where it is not possible to properly investigate the allegation if an employee remains at work (for example because they may destroy evidence or attempt to influence witnesses).
- » Common issues that arise in relation to suspension are:
 - » What is the correct process?
 - » Is the employer contractually permitted to suspend?
 - » Might suspending breach trust and confidence?
 - » Might suspending be discriminatory?
 - » Ensure full pay...



- » So, assuming there is a "potential case to answer" ...
- » Complete an investigation report for inclusion with the disciplinary invite letter.
- » Copies of any documents or evidence on which the employer intends to rely at the hearing should be provided.
- » *"It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case."* (Spink v Express Foods Ltd [1990] IRLR 320 (EAT)).





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