



## HR Broadcast – Investigations

### How to carry out an investigation into a serious event at work

Employers may face difficult and overlapping problems when faced with what appears to be clear evidence of, say, fraudulent activity by a member of staff. If the evidence is on a computer used by the employee there will be issues of data protection and confidentiality.

On the other hand the employer may need to secure evidence in digital form. The particular problem for employers is that if they act too hastily in rushing to disciplinary proceedings, then even if they would be entirely justified in dismissing the employee for dishonesty, the failure to carry out a proper investigation at an early stage might render the dismissal unfair at an employment tribunal because of an unfair procedure.

A proper and thorough investigation is the critical initial step and it is only after an investigation to establish sufficient facts that a careful employer will move to the next step, disciplinary proceedings.

It is vital that the employer deals with such matters strictly according to their own policies in respect of investigations and disciplinary proceedings and also consistent with the employee's contract of employment. There is excellent guidance in the form of the ACAS guide in conducting workplace investigations, and the failure to consider this appropriately might also cause the employer to come to

grief. So, let's start with two extracts from this guide:

What is an investigation?

An investigation is a fact-finding exercise to collect all the relevant information on a matter. A properly conducted investigation can enable an employer to fully consider the matter and then make an informed decision on it. Making a decision without completing a reasonable investigation can make any subsequent decisions or actions unfair, and leave an employer vulnerable to legal action.

The role of an investigator

The role of an investigator is to be fair and objective so that they can establish the essential facts of the matter and reach a conclusion on what did or did not happen. An investigator should do this by looking for evidence that supports the allegation and evidence that contradicts it. In potential disciplinary matters, it is not an investigator's role to prove the guilt of any party but to investigate if there is a case to answer.

The ACAS guide has an excellent "at a glance" chart covering six steps for a fair investigation. Thorough preparation is the key. It is perfectly possible that investigation would reveal nothing further than the employer already knows but that will be a rare situation where dishonesty is suspected.

The starting point is that a senior person within the organisation must take command. That person must consider at a very early stage who might carry out the investigation, who might subsequently deal with the disciplinary hearing and then any appeal. Ideally they



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should be separate people with those allocated to the disciplinary hearing and appeal being as distant as possible from the investigation. It is extremely important for there to be no suggestion of pre-judgement.

Once the decision is made that an investigation is required then the investigator should be provided with a clear brief from the senior person as to the matters to be investigated, the nature of a formal written report and the extent of the investigator's decision-making. For example, will the investigator just consider the facts and make no further comment? Should the investigator consider the facts and advise the senior manager if the employee has a case to answer?

Confidentiality and speed are important. It might be unfair if an investigation is rambling and protracted. If it is necessary to seize and check the employee's computer then there must be good grounds for believing that there is material which is likely to be relevant to the investigation. Randomly checking a computer could be a breach of the employee's right to privacy. This raises another important point which is that the employer should have the clearest possible written policies dealing with monitoring employee activities on work computers and strict rules about what can and cannot be done by the employee on the computer.

The investigator should set out a clear plan deciding what information is needed, who might provide it and what documentary and

other physical evidence needs to be obtained. Most commonly it is a question of obtaining statements from individuals.

ACAS has a template letter to be provided to individuals who will be the subject of obtaining a statement. This will set out the reason for the meeting; that it is merely to establish facts, that it is not a disciplinary hearing and that the contents must be kept confidential. If an employee refuses to attend then the employer might regard that as the rejection of a reasonable requirement and this could itself trigger disciplinary action.

Statements should be obtained with great care; where possible questions should be determined in advance and the statement should be signed and dated by the individual. These actions will be critical not only for the purpose of determining the next step but, should the employee ultimately go to an employment tribunal, they are likely to be evidential of a fair procedure. Although most disciplinary policies do not permit a witness to be accompanied when giving a statement, in my view this should not be opposed if requested, and in some circumstances should be positively encouraged. Ultimately the objective is fairness.

ACAS has a template which might help investigators and the guidance also gives some help to investigators with such matters as listening skills and body language.



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A question which frequently arises is whether the taking of a statement should be part of an audio recording either by the employee or the employer or both. There is no reason in principle why this should not happen but either party should make it clear to the other that that is what is being proposed so that there is no doubt about what is being said. The only problem with an audio recording is that this tends to lead to the production of lengthy transcripts rather than a summary of what has been said.

It is common for other matters to arise during the course of an investigation. My view is that these should be raised separately from the required report or issues may be mixed. While there is no legal obligation to reveal the details of the report to a member of staff I think that where possible employers should have this in mind when providing the instructions to the investigator. Anything not strictly according to the brief should be dealt with in a separate document.

A significant problem for employers is what to do with the employee whilst there is an investigation going on. Should they be suspended?

Suspension will almost certainly be with pay and should be a last resort. If the employer reasonably believes that having the employee on site would hamper the investigation or that evidence might be lost, then suspension should be for the minimum period possible and should be reviewed very regularly, say weekly,

and the employee written to each week confirming the decision to extend the suspension. Excessive suspension for no good reason could be a ground for the employee resigning and claiming constructive unfair dismissal. All the more reason for the investigation and any subsequent disciplinary hearing to proceed with urgency and strictly according to the timetable stated in the company disciplinary procedure.

A particular complication can arise where the investigation reveals, for example, fraud or theft which the employer concludes should be referred to a third party, such as the police. The employer must then be very careful not to take any steps which could affect a criminal investigation. Having said that, there is nothing in law to prevent an employer continuing with possible disciplinary action even before the outcome of the criminal process.

The standard of proof is entirely different; employers are dealing with the balance of probabilities, the civil standard, and not the criminal standard of beyond reasonable doubt. Needless to say each situation needs to be reviewed very carefully on its own merits.

Once the investigator's report has been received the senior manager must decide whether any further action is called for, including setting up a disciplinary hearing. If so, the senior manager must also not be seen to be prejudging in advance of the disciplinary hearing. The investigator's report should not have strayed into going any further than



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advising whether or not disciplinary action might be called for. It is vital to remember that ultimately the decision on whether the employee is 'guilty' of any misbehaviour is a matter for the chair of the disciplinary hearing having taken into account all of the evidence and, critically, having allowed the employee to have his say at a disciplinary hearing and raising issues with the nature and content of the report, if it is disclosed.

These are difficult areas but following a fair procedure will protect the employer against the risk of a tribunal action. If in doubt ask for help either from your own adviser or to Andy Tomlinson or Danny Miller.