Managers Guidance Notes
Discipline and Appeals
Investigations

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ABOUT THE AUTHOR

I am an experienced HR Manager with 25 years experience gained predominantly in stand-alone roles within a mixture of small localised businesses and large multi-site organisations. I am used to taking the lead on HR projects, ensuring that all HR policies and procedures are legally compliant and being the first point of contact for managers and employees in the full range of HR issues including disciplinary and grievance matters, absence management and performance management.

I have set HR departments up from nothing, have built up a wealth of expertise in company restructures and intensive recruitment programmes and I have closed businesses down. During those experiences I have seen things done well and have seen things done badly!

I've worked in large and small businesses but my preference is for small businesses and I formed Kea HR Solutions in 2006 so I could specifically use my experience and expertise in Human Resources to help owners of SMEs across South Yorkshire and the surrounding counties manage their people. I understand all aspects of human resources and am able to apply that knowledge to provide a solution for your business that firstly meets the legal requirements but also fits your needs, goals, and business style.

My professional and personal approach means I will work closely with you to come up with the ideal HR solution for your company's specific needs. I will slot into your business seamlessly, a natural people person, your staff will connect with me. I believe in giving my customers honest and straightforward advice, free from confusing legal jargon. I will clearly explain all your options with their risks and benefits so you can make an educated and informed decision that is right for your business.

I understand that all businesses are unique so I don't believe in offering my customers a one-size-fits-all solution to HR. All my services will be tailored to fit your company and its individual challenges and budget. Whether you want me to provide your company with long-term HR management or you simply want one-off advice with a situation that is happening in your business today, I am here to help you.

For more information about Kea HR Solutions visit www.kea-hr.co.uk

INTRODUCTION

When problems arise, it can be tempting to try and tackle them head on and resolve things internally and as quickly as possible. However, charging in can do more harm than good – as failure to conduct a thorough disciplinary investigation can result in claims of unfair dismissal.

Instead, it is crucial that a proper investigation is conducted to establish the facts and decide whether there is in fact a disciplinary case to answer, which should be then referred to a full disciplinary hearing.

So, what constitutes a proper investigation?

- Firstly – make a plan. Decide what evidence you will require to establish the facts and think about who you need to interview.
- Try to see people as quickly as reasonably possible before their recollection of events fade, and obtain signed witness statements.
- Interview the accused employee to understand their version of events. Give them advance warning of the allegations and give them time to prepare.
- You should ensure that interviews take place in a venue that provides appropriate privacy and allows them to take place without interruptions.
- Arrange for administrative support to take notes of any meetings to allow you to focus on conducting the interviews.
- If the investigator decides that there is a case to answer, they should prepare a written report with supporting evidence and statements to be made available to the accused employee to enable them to prepare for the disciplinary hearing.

It is vital to make sure that different people carry out the disciplinary investigation and disciplinary hearing, and that these individuals have not previously been involved in the case and do not have any conflicts of interest.

Throughout the process it is also important that the investigator keeps an open mind, and ensures impartiality, fairness and confidentially. They must stay focused on establishing the facts – this is not about making a disciplinary decision.

Of course, having clearly defined company rules and disciplinary procedures in place well before the need arises, and making them available to all employees, can help to make an unavoidably stressful time a little less complicated for all involved.

More importantly, they enable you, as an employer, to ensure that all breaches of the rules are dealt with fairly and consistently.

The aim of these Managers Guidance Notes and the supporting Resource Materials is to take some of the anxiety out of doing the investigation yourself, we will also offer to do them for you, and explain why that can make legal as well as practical sense.

A reasonable investigation is key, the foundation-stone on which all your later decisions rest.

There are a range of sub-folders that contain detailed guidance about each stage of the discipline and appeals process:

- Legal Requirements and Developing the Model Policy
- Suspension from Work
- The Disciplinary Meeting
- Appeals

Need Clarification?

If you require advice or support with this or on any other employment matter I would be happy to assist you. You can contact me on 0114 360 0626 alternatively you can email me at mailto:kathryn@kea-hr.co.uk.

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INVESTIGATIONS

This is typically how a case is managed. An incident or issue may arise, which will need to be investigated before being progressed any further. This starts by gathering evidence, and takes the structure of the above.

What Exactly Is An Investigation?

For something so important, there is a weird lack of definition to it – it has no technical description in employment law, takes no fixed form, is of no set length and requires no formal qualification. There are no hard-and-fast rules of evidence and you don't have to wear a deerstalker and a tweed cape. Unless you really want to, that is. Far be it from me, etc. An investigation is at its root just the process by which an employer develops an adequate understanding of the facts relevant to any decision it needs to make in relation to one or more of its employees. That is most often in confrontational circumstances such as performance management or disciplinary or grievance procedures, but it could equally be carried out in cooperation with the employee, such as following a whistleblowing disclosure where the employer wishes to understand and rectify the breach of legal obligation identified.

In employment-world as we know, the relevant burden of proof for these decisions is the balance of probabilities, effectively a 51% more-likely-than-not standard, and not the criminal beyond-all-reasonable-doubt 99% requirement. That 51% belief could be seen as a low bar, but it must be a belief held not just genuinely but also reasonably. It is from there that springs all the guidance around the conduct of workplace investigations. A materially defective investigation will mean that your belief may be found not to be reasonable, and that will lead to serious subsidence in the integrity of those later decisions.

Of course, investigations should be conducted as scrupulously as reasonably practicable – someone's career may be on the line here – but you can and should do so with the background knowledge that the relevant test is reasonableness of process and conclusions, not perfection. Put differently, a process and outcome which falls within the range of responses an employer might reasonably adopt to the situation is pretty robust at law, even if another employer or the ET itself would have done it differently or reached a different decision. And even where the process had more holes in it than a pound of Emmental, if the ultimate rightness of the outcome is found not tainted as a result, that will be of little benefit to the employee.

If your decision is challenged at an Employment Tribunal and you progressed to a disciplinary meeting without completing a thorough investigation you will struggle to back up your decision with evidence.

The Employment Tribunal would closely examine:

- That you genuinely believed that misconduct had occurred,
- How you reached particular decisions or recommended a course of action, and
- Whether or not you acted reasonably in accordance with your Disciplinary Policy.

While a thorough investigation may seem time consuming and a burden on resources, carrying out a proper investigation could save time and costs in the future, because you will have evidence to back up why you made certain decisions.

Relevant Case Law

British Home Stores Ltd v Burchell [1978] IRLR 379 EAT, the Employment Appeal Tribunal held that an employer must establish a genuine belief on reasonable grounds, after a reasonable investigation, that the employee was guilty of misconduct. This test was upheld by the Court of Appeal in Panama v London Borough of Hackney [2003] IRLR 278 CA, a case that concerned an inadequate disciplinary investigation.

In Polkey v AE Dayton Services Ltd (formerly Edmund Walker (Holdings) Ltd [1987] IRLR 503 HL, the House of Lords ruled that any procedural shortfall will make a dismissal unfair. In misconduct cases, fair procedures must at the very least include a full and fair investigation and an opportunity for the employee to have his or her case heard.

In the case of **Henshaw v Touch Tanning Ltd ET/2605284/09** the family-run business made the classic mistake of having one person act as “judge, jury and executioner” in a disciplinary procedure against an employee accused of misconduct.

The Court of Appeal held in **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA** that the more serious the consequences of dismissal for an employee, the more thorough the disciplinary investigation should be. The Court of Appeal also ruled that, where a case turns on one employee's word against another's, it can be legitimate for the employer to give the accused the benefit of the doubt and to find the accusations "not proven".

ACAS Code of Practice on Disciplinary and Grievance Procedures

The ACAS Code of Practice on Disciplinary and Grievance Procedures provides practical guidance on handling disciplinary and grievance situations in the workplace, and includes recommendations about disciplinary investigations.

The code is not legally binding, so employers are not liable to proceedings if they fail to follow its recommendations. However, employment tribunals take the code into account in considering relevant cases, and are able to adjust any award made by up to 25% for an unreasonable failure to comply with any of its provisions. This adjustment can be up or down, depending on which party is at fault.

See the Information tab for a copy of the ACAS Code of Practice.

Core Principles Of Conducting An Investigation

There are a number of core principles that should be taken into account to ensure that investigations are carried out in a fair and reasonable manner.

Independent
The Investigator should not be connected in any way to the facts giving rise to the matter to be investigated. The ACAS Code states that ‘where practicable different people should carry out the investigation and disciplinary meeting’.

Clarify the Issues
Before starting the investigation, the Investigator should be clear about the relevant issues they are investigating. If in doubt, they should seek clarification from the manager who asked for the investigation to be carried out.

Rules of Natural Justice
The rules of natural justice require that the employee should know the nature of the charge against them and should be given the opportunity to state their case. The evidence collected during the investigation will be put to the employee in the disciplinary meeting and will enable the employee to state their case in response.

Reasonable Time Frame
The ACAS Code states that it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. This is important to ensure that witnesses' recollections remain fresh and accurate, and to obtain useful documentation that might otherwise be destroyed. For example, you might need to review CCTV footage quickly because tapes are usually kept for a fixed period of time, and emails or any other computer-based evidence might be permanently deleted in a short space of time.

Follow Internal Procedures
At the outset of an investigation, the investigator should read through the Disciplinary Policy and ensure it is followed. A copy should also be given to the employee so they know what the next steps are. This helps to foster consistency, clarity and transparency.

If the procedure is contractual, failure to follow it could lead to a breach of contract complaint by the employee.

Establish the Facts
The purpose of the Investigation is to establish the essential facts of the matter and reach a conclusion of what did or did not happen.

Investigators should be fair and objective and should not be swayed by their own opinion or the opinions and views of any witnesses. It is also important that the Investigator does not prejudge the outcome of the investigation by assuming guilt or innocence.

Investigators should keep an open mind and look for evidence that contradicts the allegation as well as evidence that supports 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.

Confidentiality
The principle of confidentiality applies to everyone who is involved in the process: the Investigator, the manager who prompted the investigation, all witnesses and the employee who is the subject of the investigation.

In order to thoroughly investigate the matter and establish the facts it will be difficult to avoid divulging the name of the employee who is the subject of the investigation to witnesses. It would be best practice though for the Investigator to limit the number of people who are aware that an investigation is taking place. This helps to ensure that information gathered is accurate and that evidence is not destroyed.

Who Should Undertake The Investigation?

The Investigator should normally be of a level of seniority at least equal to the person or persons who are the subject of the investigation. In order to demonstrate impartiality, the Investigator should have had no material prior involvement in the events or allegations under investigation, and should declare any potential conflict of interest that may disqualify them from conducting the investigation. Neither should the person carrying out the investigation be the same person who will conduct any necessary disciplinary or grievance procedure following the investigation.

In smaller businesses it might not always be possible to designate the role of carrying out the investigation and that of any subsequent disciplinary procedure to different managers. In these circumstances thought should be given to outsourcing the investigation to an external party.

 If you are unsure how to proceed in these circumstances please contact Kea HR.

Questions to consider when choosing an investigator:

- are they personally involved in the matter being investigated?
- would the appointment raise any conflict of interest concerns?
- are they likely to be influenced by people involved in the matter?
- might they be involved in any subsequent decision making on the matter?
- do they have a good knowledge of the organisation and how it operates?
- what is their availability during the investigation's provisional time-frame?
- are they trained and/or experienced in how to conduct investigations?
- how confident are they at communicating in writing and/or orally?
- what training or support may they require?

Police Investigations

There may also be other, separate, investigations undertaken at the same time as the employment investigation, e.g. police investigations.

If your employee is accused of committing a work-related offence that necessitates police involvement, you do not have to wait until the police investigation has concluded before conducting your own disciplinary process.

How Long Will The Investigation Take?

There is no legal description of timescales that a investigation should take. A complicated matter may take several weeks to conduct properly. A relatively simple matter may only take a few hours for it to be reasonable.

Providing a provisional time-frame may be helpful but an Investigator should not be restricted by a set completion date. An investigator may find that the time-frame needs to be modified to enable them to investigate the matter properly. While an investigation should be completed as quickly as is practical, it also needs to be sufficiently thorough to be fair and reasonable. This is particularly

important if the matter could result in disciplinary action or legal proceedings. Any delay to the investigation's conclusion should be explained to those involved and included in the report.

Preparation

Before you start the investigation you need to identify:

- The precise issue(s) to be investigated;
- The scope of the investigation: is it literally just the bald facts of what happened, or should you go further into the shat happened and why;
- Is the issue limited to that particular employee or should you also be looking into the relative treatment of others too?

Then you will need to:

- Decide how best to conduct the investigation - In many cases this can be a very simple/quick process, however, this will depend on the specific circumstances of the case e.g. whether the facts are disputed or clear and the seriousness of the matter. An investigation can simply be the gathering of facts looking at existing documentation e.g. relating to the previous in/formal management processes undertaken to address an issue. In other instances, it may require the planned and systematic gathering of data, interviewing of relevant witnesses and analysing relevant documents, records, policies, etc. to determine next steps.
- Consider what information you need to gather, from whom and how this will be obtained.
- Consider the timescales of the investigation. Taking into consideration, where appropriate, the need to conduct interviews, collate witness statements, gathering information and write and submit the investigation report etc.
- Identify if there are any potential barriers to obtaining information and how these can be addressed.
- Identify any witnesses who could help with investigations, determining whether these should be interviewed or whether a written statement should be sought, (see template letters). Initial contact with a potential witness is often in the form of a telephone conversation to: explain the situation; check their potential relevance; seek their agreement to participate in the process etc.
- Consider other resources you may need during the investigations e.g. note taking, specialist advice/guidance.
- If appropriate, prepare interview plan(s) and consider the specific issues that need to be explored during these interviews.
- Prepare the questions you may wish to ask, ensuring that the questioning (open, closed and probing questions) is appropriate e.g. for obtaining information/facts, exploring feelings or opinions. Avoid using leading questions.
- Take appropriate steps to ensure the confidentiality of the investigation process.
- If appropriate, provide regular updates to those involved.
- PLEASE NOTE: It may be necessary to continually consider the need to amend your plan depending on the findings throughout the investigation.

Finally, you will need to know:

- How your report should be presented;
- Who the report should be provided to; and
- Who to contact for further direction if unexpected issues arise or advice is needed. This might be a HR professional or a similar experienced and informed source.

Let's Take A Bullying Grievance As An Example

The employee comes to you and complains that he is being "bullied and harassed" by his manager. There has been shouting, unfairness and micro-management, he says. His contribution in meetings is blanked by the manager and he hates coming into work. This has apparently been brought to a head by a recent adverse comment of some sort, perhaps a warning, a downbeat appraisal or some passing slight in the corridor, and he can put up with it no longer. Quite a handful, so what is your way in?

Clearly you are going to have to find out if the bare facts are true – has there been shouting, does the manager ignore the employee in meetings, was there micro-management, etc? By themselves, however, those facts only take you so far. They do not tell you anything about context or motivation, both key to deciding the appropriate way forwards with the employee's grievance. In particular, those facts do not tell you whether the manager has behaved that way (i) because of the employee's race or sex or some other protected characteristic (probably unlawful harassment); (ii) because he loathes the employee and wants him to leave (probably bullying); (iii) because he has been driven to it by the employee's continued inability to make a contribution in a meeting which is worthy of any acknowledgement (probably a coaching question); or (iv) because he was persecuted at school by the other little boys and now thinks this is how you treat people (probably not someone to invite to dinner).

That distinction may not be apparent to the person on the receiving end, but it makes a very substantial difference to the options available to the employer for addressing that employee's complaint. Remember that harassment occurs where the purpose or effect of the manager's behaviour is to cause upset or offence, so there is no need for it to be deliberate as a pre-condition of being harassment. For your purposes that is an important distinction – while deliberate harassment will probably amount to gross misconduct, inadvertent or unthinking behaviours may well not do so even if they are still unlawful.

And then you need to consider how your investigation is going to interpret the word "bullying". Unlike harassment, this has no legal definition at all, so check your internal policies to find out what test you are supposed to be applying. In default of that (or in addition to it) keep in mind that although pretty much every organisation from ACAS to Mumsnet has its own definition of bullying, the consistent thread through almost all of them is a requirement of intention or malice. A manager behaving maliciously to a subordinate is likely to face the proverbial long walk on a short pier, but someone behaving the same way because he knows no better is probably better dealt with by some lesser sanction and/or coaching/counselling. If you face push-back from your employee for not dismissing his alleged bully or harasser, you will need to be able to justify your decision, but without that analysis of the drivers behind his conduct as part of your investigation, you will not be able to do that. And if the employee is contributing

to the problem, while that is rarely a complete defence to inappropriate management behaviours, it can certainly be mitigation of them.

Therefore, your investigation here will need to look not just at the factual behaviours of the manager but also at his mindset. For insight into that, you may have to look at his conduct more broadly. If he is similarly ghastly to everyone else then it becomes much harder to conclude that the conduct relates to the individual complainant, whether through discrimination or ordinary malice. While that in no sense makes the conduct acceptable, it is then reasonable for you to conclude that it is a management style problem rather than targeted harassment or bullying, and that the upset which the employee can reasonably take from it must be correspondingly limited.

Therefore, before you start investigating off in all directions, sit down and map out on paper the avenues you are going to need to explore. That will be a useful guide but it does not bind you. As the matter progresses, you may find that some of those roads are dead-ends and can be abandoned, while others open up into new areas you will need to look at. So long as you can trace your thought-processes as you go along (like a math's exam, you can get credit for showing your workings, even if there are deficiencies found elsewhere), departures from your initial plan should not worry you.

Notifying The Employee About The Allegations

If an employee is under investigation, they should be informed in writing of the allegations against them, that an investigation will be carried out, the approximate timescales and notified of who to contact if they have any questions during the investigation. The letter should also specify the next steps, for example interviewing witnesses and collecting data and information.

The written notification should include any paperwork/information which will be needed to be seen or considered prior to the meeting such as copies of relevant internal procedures.

The first and most fundamental part of a fair "hearing" is knowing what you are accused of. Since the investigation may lead on to relatively public steps such as suspension or disciplinary procedures, that right should be treated as engaged from the start.

This does not mean just understanding the allegations in generic terms – harassment, bullying, failure to comply with a legal obligation, but very specifically. That means the detail that you would want to know if it were you under the microscope, granular enough to give you a reasonable opportunity to admit, deny or explain specific instances. The sort of detail which allows you a reasonable chance to recall particular incidents or to justify or mitigate particular words or decisions by reference to other circumstances at the time. The sort of detail you would be entitled to if the position had gone beyond investigation and was now a full-blown disciplinary.

Therefore, as the investigator you must start by considering whether you already have that level of detail in the allegations raised or the complaint made, and if not, by then seeking them from the person whose requested the investigation.

Therefore, it is important, as the investigator, to ask for those specifics.

Be Prepared For An Angry Response

If the allegations are false, those people will be very angry. If they are true, they will be angrier still. As a minimum they foresee hours they don't have being hoovered into an investigation they don't want into conduct they didn't commit with who knows what acrid taint of smoke without fire clinging to their reputation thereafter. At worst, it is career-threatening stuff, with their job, home, marriage, etc. all at stake.

People who are very angry do foolish things in response, whether it is an aggressive verbal attack on the deliverer of the message or their line manager, to his face or behind his back, withdrawing from all unnecessary communications with them into a sullen and resentful silence or what is usually the very least sensible way of reacting, i.e. some form of counter-grievance. Not letting such an allegation affect your workplace behaviour towards that individual in any way can feel like the hardest thing in the world.

See the Resources Material tab for a letter notifying an employee of the allegations and that an investigation will be carried out.

When is Suspension During the Investigation Appropriate?

An employee is usually suspended to avoid the risk of others involved in the investigation feeling intimidated while it is conducted, or where you feel important evidence might be destroyed if the employee remains at work.

Factors to take into account include the size of your business and whether the employee's role requires specialist skills.

A large business can have enough staff and skills to cover most roles if an employee is suspended, but in a small firm that may not be an option.

In a small firm, the employer will have to weigh suspension against the impact on their business of the absence of the employee if no-one else can cover the role.

But whether you suspend, or not, will also depend on the gravity of the allegation. Suspension for gross misconduct, such as violent behaviour, is much more likely.

See the Suspension From Work sub-folder for more detailed guidance and resource materials to support you when you feel suspension may be appropriate in the circumstances.

What Type Of Evidence Will Need To Be Collected?

Collating and reviewing documentation will make up the bulk of many investigations. The following are examples of documents that the Investigator may need to consider:

Attendance issues Absence records, clocking-on/off time cards or reports, absence management procedures and written appraisals.

Poor performance	Written appraisals, targets, sales figures, customer complaints, examples of work and training records.
Misconduct	Letters of complaint, previous warnings on file and police reports.
Dress	The organisation's dress code policy, previous decisions made and email reminders.

Computer And Telephone Records

The Investigator might need to examine and rely on computer records e.g. emails and website-browser history, and telephone records. This should be done in accordance with your policies and in compliance with the laws on data protection, which require employees to be informed of the reasons for monitoring. In exceptional cases, for example where you suspect the employee of leaking confidential information, covert monitoring may be acceptable, but this should be done only with extreme care. In all cases of monitoring, the Investigator should take advice from the Companies HR Advisor before proceeding.

CCTV

The Investigator should consider if CCTV footage may be of assistance. For example, it may have captured an act of violence or theft.

Refusing To Disclose Evidence

In some cases, an employee may refuse to disclose evidence, for example documents, letters or emails. Investigators should not compel employees to disclose personal documents, nor should they read private emails or diary entries. However, any work files or work-related emails and letters belong to the employer. Consequently, the Investigator can request that they are disclosed, and state that the employee could face disciplinary action for refusing to follow a reasonable request and retaining company property.

If the employee refusing to disclose evidence is at the centre of the investigation, the Investigator should point out in writing that a refusal to cooperate will limit the depth of the investigation, that they will have to take a decision on how to proceed on the evidence available, and that the employee's failure to assist with the investigation could be viewed negatively when determining the outcome.

Top Tips

As the investigation progresses, other possible sources of evidence may come to light or become relevant.

Remember to consider evidence which undermines the allegations as well as evidence that supports the allegations.

Once collected, objectively analyse each piece of evidence and consider:

- what does the evidence reveal?
- are there any doubts over the credibility and reliability of the evidence?
- is the evidence supported or contradicted by evidence already collected?
- does it suggest any further evidence should be collected?

Investigators should remember that they only have to conduct a reasonable investigation. They do not have to investigate every detail of the matter, only what is reasonably likely to be important and relevant.

Who Should Be Interviewed As Part Of The Investigation?

Normally the actual employee who is the subject of the alleged misconduct or complaint will be interviewed. Additionally, individuals identified as witnesses, may be interviewed as part of the investigation process. Witnesses may be employees or external to the business such as customers or suppliers.

You can find untold volumes of advice on this particular contact sport – just googling "*interviewing witnesses*" today pulls up over 6½ million results. I have not quite read all of those but there do seem to be some very consistent themes in those I have, almost all driven by common courtesy and common sense. Remember that there is no real law here, only good practice and the overriding objective of obtaining a tenable view of what happened and why, while limiting the scope for later challenge to the impartiality of your findings, their technical accuracy where appropriate, the inclusion of what is relevant and the exclusion of what is not. While on the subject of contact sports, the relevant ACAS Guidance contains the strangely (or at least hopefully) superfluous suggestion that you should not make physical contact with the person you are interviewing. This is well pre-Covid and no other explanation is provided for it, but it certainly should not be taken as precluding a professional shaking of hands in your investigation meeting.

Employee at the Centre of the Investigation

As part of the investigation, it may be necessary to interview the employee who is suspected of misconduct. This will help to establish core facts, and may also provide guidance about who else should be interviewed, and what other evidence should be gathered.

The Investigator should:

- give the employee advance warning of the meeting and time to prepare for it.
- prepare a list of relevant questions in advance of the interview;
- point out and question any discrepancies;
- not be afraid to challenge what the employee is saying; and
- make sure that the whole story is uncovered.

The employee under investigation should be provided with the opportunity to identify any potential witnesses in support of their explanations or any other documents or issues that may be relevant so that these can be followed up.

If the employee fails to attend an investigatory meeting, the Investigator should contact them and find out the reason for the non-attendance. There is no legal obligation to rearrange the meeting,

but you should be mindful of the need to carry out a reasonable investigation as part of a fair disciplinary process. It would therefore be good practice to rearrange the meeting, unless it is clear that the employee does not intend to cooperate with the investigation. The Investigator should consult the employee to ensure that the rearranged time is suitable for them. If the employee again fails to attend, without good reason, the Investigator can decide whether or not to proceed with disciplinary action on the information it has available.

The ACAS Code points out that, where the employer holds an investigatory meeting with an employee, this should not, of itself, result in any disciplinary action. The purpose of the investigatory meeting is to establish facts, not to judge the employee's conduct or to make any decision on a disciplinary sanction. Where the Investigator decides that there is a disciplinary case to answer, this should be dealt with at a formal disciplinary hearing.

Top Tips

The purpose of an investigatory interview is to establish what happened, while the purpose of a disciplinary interview is to decide what to do about it. The Investigator should be very careful to ensure that the interview is restricted to gathering facts and finding out what happened and does not turn into a disciplinary meeting.

With regards to the order of interviews, I recommend interviewing the employee at the centre of the investigation first, then follow on with the witnesses. Then at the end of the process you can go back to the employee at the centre of the investigation to clarify any points that have been raised by witnesses that do not correspond with what the employee has told you.

See the Resources Material tab for a letter inviting an employee to an 'Investigatory Interview', a checklist for conducting an investigatory interview and a form to record the employees statement.

Witnesses

Witness statements are often an essential part of the information collated during an investigation.

Where an employee has, or may have, relevant information about an act of misconduct committed by a colleague, notify the witness' manager of their involvement in the investigations, so that they can plan for their attendance at any relevant meetings.

The interview should be held in private, and the aim is to establish what they know. The relevance and validity of the information obtained must then be considered.

When interviewing a witness, the Investigator should:

- reassure them that the purpose of the interview is to gather information;
- explain that their assistance is important;
- seek to uncover every aspect of the "story";
- focus on facts, not opinions; and
- refrain from drawing over-hasty conclusions.

The aim is to seek any relevant supporting information/evidence to substantiate information provided by the employee or other witnesses. Do not be afraid to ask if the employee is certain about what they claim to have seen or heard. Witnesses can be mistaken, and there are always "two sides to every story".

The Investigator should also take care to separate facts from assumptions and opinions. It is very easy for people to jump to conclusions based on what they have seen or heard, and then assume that these conclusions represent facts. For example, it may be a fact that a particular employee fell down a flight of steps, but only opinion that this was because they were under the influence of alcohol at the time.

As well as considering the possibility that a witness may have been mistaken about what they claim to have seen or heard, the Investigator should consider if the witness's version of events is likely to be accurate and reliable. The witness might, for example:

- be exaggerating;
- be basing the evidence on opinion or assumption, rather than on fact;
- have a personal grudge against the accused employee; or
- be allowing emotion to get in the way of rationality.

In some cases, a witness may refuse to be interviewed. If this occurs, the Investigator should try to reassure the witness about the process and address any concerns that they may have. It is important that the Investigator does not pressurise or intimidate the witness; instead explain the relevance of the witness's information to clarifying the matter at hand.

In some cases, the witness may be scared to give evidence against a colleague. The Investigator should treat the witness with sensitivity. While a manager can take steps to protect the witness's anonymity, it is not possible to give an absolute guarantee of confidentiality, see Confidentiality of witness statements below.

See the Resources Material tab for a letter inviting a witness to an 'Investigatory Interview', a checklist for conducting an investigatory interview and a form to record the employees statement.

Collecting Statements Without an Interview

On occasions it may be appropriate for a witness to provide a statement without the Investigator interviewing them. For instance:

- if a witness is not an employee, such as a customer or supplier of the business
- when the facts required from a witness are very simple
- where a witness is ill and unable to attend an investigation meeting

In this circumstance the Investigator should provide a reasonable deadline for completion and ask the witness to answer specific questions or to include in their statement:

- their name and, where applicable, job title
- the date, place and time of any relevant issues
- what they saw, heard or know
- the reason why they were able to see, hear or know about the issues
- the date and time of statement
- their signature

Further Information

Consider whether other documentation may be helpful for the investigation. For example: Work rotas, attendance records, medical reports, incident reports, minutes from meetings, appraisal, training, development records, emails, letters etc (permission of the employee may be required for some of these examples). Also consider any wider documentation that may feed into informing expectations e.g. departmental handbooks/local agreements, Concordat etc.

Relationships and Motives

When interviewing witnesses be mindful of possible motives. Make tactful enquiries into the relationship between the witness and any employee involved in the matter because this may add or detract from the validity of the witness's statement.

Usually, this can be done when interviewing the witness themselves and, where relevant, the person under investigation. However, in some circumstances an investigator may also decide it is necessary to ask other witnesses for their views on the impact a particular relationship might have.

An investigator should be careful about the tone and phrasing of their enquiries and remember that a witness is not under investigation.

Right to be Accompanied

There is no legal right for an employee to be accompanied at an investigatory interview, although the Company Policy may grant this right. Employees do, however, have the right to be accompanied at formal disciplinary hearings. Where you are conducting an investigation meeting with an employee who may be subject to future formal disciplinary proceedings, it is important that the meeting does not slide into deciding on disciplinary action.

Despite there been no legal right to be accompanied you may find it helpful to allow them to be accompanied by either a work colleague or recognised trade union officer or representative if they wish. It may also be required under the Equality Act 2010 as part of a reasonable access requirement for a disabled employee.

Allowing an employee to be accompanied is particularly useful where English is not the employees first language. It can also increase the confidence employees have in a credible process.

During an investigatory interview the role of the chosen representative is as 'silent support'. They should not take part in the interview other than to seek clarification of issues. They cannot answer questions on the employee's behalf and will be bound by the same confidentiality requirements as the employee.

Meeting Notes And Witness Statements

The integrity of your investigation will depend heavily upon your being able to show that the factual conclusions you reached were reasonable having regard to the evidence you heard. Decent notes of that evidence will be fundamental to that. They will show what the witnesses said (and sometimes as importantly, did not say), and will capture anything you may note as potentially relevant later. Decent notes do not have to be verbatim, but if a particular word or choice of phrase strikes you as telling, you should always highlight it in quotation marks to show that that is not your summary or assumption of the point being made, but the actual words used. As a common example, a sharp Employment Tribunal advocate can have a great deal of fun with the distinction between "I did not do that" on the one hand and "I don't recall doing that" or "I wouldn't have done that" on the other. One speaks of direct knowledge while the others put some distance between the witness and the denial. "I don't recall" strictly means that it could have happened, but the employee simply doesn't remember, while "I wouldn't" implies that the witness is answering the question based on his normal picture of himself and not on the specific events in question.

What Information Should Be Included?

Notes taken at the investigatory meeting will usually become an interviewee's witness statement. The notes should therefore record:

- the date and place of the interview
- names of all people present
- details of the key points discussed during the interview
- any refusal to answer a question
- the start and finish times, and details of any adjournments

If there are gaps in the notes mark them with pen to avoid the accusation that words have been added after the meeting.

The notes taken **do not need to record every word that is said** but they should accurately capture the key points of any discussion.

The notes will usually remain in handwritten format. If you choose you may type up the notes, but this will be time consuming, especially in a large complex investigation.

At the conclusion of each interview, it is best practice to invite the witness to read through the notes you have made and then sign them to agree they are a true record of the meeting. Any draft statements subsequently produced should be taken back to the witness for signature and the original notes on which the statement was based must be retained until the conclusion of the disciplinary hearing and any subsequent appeal.

Witnesses could also provide their own written statement, which can be prepared with their Trade Union Representative. In these cases, the statement should be checked by the Investigator and included in the Investigation Report alongside the notes from the investigation meeting for points of clarity.

Where an employee refuses to sign their interview notes the Investigator should try to find out why to resolve the issue. If a resolution cannot be reached, the Investigator should include the

statement in their report while acknowledging that the employee refused to confirm that it was an accurate reflection of the meeting.

See the Resources Material tab for a template form for recording the key points during the interview.

Distributing Copies of Notes

ACAS guidance suggests that witnesses in investigations should be sent copies of the notes subsequently. As a rule of thumb, this can generally be limited to the key protagonists only, but in any event, ACAS does not suggest any express attempt to agree the notes, as this inevitably invites an attempted retrospective revision of the record to say what the employee now wishes they had said, rather than what they actually did. If criticisms of your notes are received, you should of course consider them and pick them up with any note-taker you had present. However, ultimately you know what you heard, and if you do not agree with the criticisms, you do not have to accept them, nor do they render your notes or the process invalid.

That said, keep in mind the right of any witness to provide you with additional or corrected information after the investigation meeting and have you take it into proper account. The distinction is important because it may go to the credibility of the witness on the one hand or your own as investigator on the other. In an employee's response on receipt of your investigation meeting notes, this is the difference between "I didn't say X, I said Y" (a direct attack on the accuracy of your notes) and "I did say X but on reflection I meant Y" or "I did say X but I should also have added Z". You can form your own view of whether there not mentioning Y or Z at the meeting signifies anything for the credibility of those points, but you shouldn't reject those additional matters out of hand just because they come up later. Any written response or supplementary comment from the employee should be retained as part of the investigation record, ideally with a brief note of why you did or did not accept them.

Last, to keep your notes in the right order, be clear about who is doing the talking. For confidentiality reasons it is common for someone from HR, internal or external, to take the notes while a manager is formally doing the investigation. Nothing at all wrong with that but it is worth stressing to the witness at the outset that the HR representative will not be part of your decision-making process. If it is you as investigator who has also committed to make the notes as the meeting goes along, then two top tips: first, speaking, concentrating and writing all at the same time is multi-tasking of the worst sort, like knitting on a unicycle. Unless you take it really slowly, seek regular clarification and pauses while you scribble away in silence, something is bound to go wrong. Second, don't forget mid-meeting that you are also the note-taker – it is very easy to slip into ordinary meeting habits and then suddenly find that you have spent what could have been a very constructive hour talking with your witness if only you had remembered to write any of it down.

Confidentiality

Statements provided by witnesses should be treated as confidential documents. However, the Investigator should not give an absolute guarantee of confidentiality because:

- the employee who is the subject of the investigation will, in most cases, have the right to see the witness statement; and

- employment tribunals and courts may order the disclosure of documents, irrespective of whether or not they are confidential.

Employees have the right under the Data Protection Act 1998 to request access to information about them that is held on file. This includes witness statements of which they are the subject. An Investigator may refuse to disclose a witness statement if its disclosure would reveal the identity of a third party, especially if this might be a breach of confidence in relation to that third party.

However, in most cases, instead of refusing to disclose a statement, the Investigator should either request consent from the author of the statement to disclose it to the employee, or take steps to make the document anonymous before disclosing it. The latter might involve:

- blanking out the witness's name and any other distinguishing features before disclosing the document to the employee (through, for example, photocopying the document);
- editing the statement to conceal the identity of the witness; or
- preparing a summary of the information contained in the statement.

Ultimately, the Investigator should make a reasoned decision about whether or not to disclose a witness statement. This will involve balancing the witness's right to privacy against the employee's right to know what information is held about them (see Data Subject Access Requests on page 31).

Should You Record Your Investigatory Interviews?

Up to you, but you should always keep in mind that the witness may be doing it anyway, whether or not with your knowledge or consent. If you do record the meeting, then both the recording and any transcript you make from it will be disclosable if the matter goes to litigation. That makes it doubly important that the investigator is very circumspect around discussion of matters concerning one witness with another or arguably premature comments on the merits of the matter being investigated. There is no surer basis for an appeal than the discovery that the investigator went into the matter with mind already made up. If the employee records the meeting covertly or indeed in defiance of strict instructions not to do so, that recording will also still be admissible in evidence. If you are willing for the employee to record it, then agree to this but on the express condition that you are supplied with a copy as soon as possible afterwards.

Phoenix House Limited v Stockman

Ms Stockman was employed by Phoenix House, a charity which provides support to people with drug and alcohol problems, at various times as a financial accountant and as a payroll officer. During a restructuring process, she made a complaint about a colleague who she felt was treating her differently, and a complaint that the restructuring process was biased against her. A witness agreed that sometimes this colleague did not speak to Ms Stockman. Her manager held a meeting with the colleague about whom she had complained and the witness. Ms Stockman saw the meeting taking place, entered the room and demanded forcefully to know what was being discussed. Her manager told Ms Stockman that the meeting was private and asked her to leave. She refused to do so, and her manager had to repeat the request twice more before she left, in a distressed state.

Later that afternoon, a member of the HR department met with Ms Stockman, who covertly recorded that meeting. The employer was unaware of the recording until Ms Stockman

disclosed a transcript of it as part of her disclosure of relevant documents in her subsequent employment tribunal (ET) claim.

At the meeting Ms Stockman was told that she would face disciplinary action for interrupting a meeting and failing to leave as requested. She said that she would lodge a grievance. Following subsequent disciplinary proceedings, a grievance, a number of appeals and a mediation meeting, Ms Stockman was dismissed. The ET rejected claims for whistleblowing and discrimination but found that Ms Stockman's dismissal was unfair. Nonetheless, the ET considered that it was possible that, had the employer known about the covert recording, it might have considered the making of the recording to be a misconduct matter which could have led to a fair dismissal. However, the ET considered that in the circumstances there was a low percentage chance of this and reduced the unfair dismissal compensation awarded to Ms Stockman by (only) 10%. Both the employer and the employee appealed against the findings of the ET that went against them.

At the appeal stage the EAT considered whether the covert recording amounted to a breach by Ms Stockman of the implied term of trust and confidence between employer and employee, meaning that, had the employer known about the recording, it could have dismissed her for gross misconduct without notice or compensation. The EAT also reviewed the extent to which the compensation for unfair dismissal awarded to Ms Stockman should be reduced because she had made the covert recording.

The EAT noted that, before mobile phones, employees would have had to go to a great deal of trouble to record a meeting covertly, and it would have been relatively easy to conclude that the employee's motive for doing so was entrapment, or to gain an unfair advantage. It was acknowledged, however, that most people now carry a mobile phone at all times and making a recording of a conversation is easy. An employee may make such a recording for a variety of reasons; consequently in the EAT's view an ET should examine what those reasons were in order to assess whether in a particular case the implied term of trust and confidence has been breached, whether the employer would be justified in terminating the employee's employment, and whether there should be a corresponding reduction in the amount of any compensation awarded to reflect the employee's culpable conduct. In making that assessment, the EAT found that the following issues could be relevant depending on the circumstances:

- **The reasons for making the recording:** a covert recording may be made by a highly manipulative employee seeking to entrap the employer or, at the other extreme, by a confused and vulnerable employee seeking to keep a record or guard against misrepresentation. The reality is likely to fall somewhere between the two, and the ET should make an assessment of the circumstances of each particular case.
- **The extent to which an employee is to blame in relation to the making of the covert recording:** the situation may vary from an employee who has been specifically told that a recording must not be made, or has lied about making a recording, to an inexperienced or distressed employee who has not thought through the reasons for making the recording, or whether it is the right thing to do.
- **The subject matter of the recording:** it may be more acceptable for an employee to record a meeting concerning their own employment, of which a record would normally be kept and shared, as opposed to recording a meeting discussing confidential business or personal information relating to the employer or another employee. Such a recording may involve a serious breach of the rights of the employer or other employee, and is unlikely ever to be acceptable.

- **The attitude of the employer to covert recordings:** the EAT noted that it is still relatively rare for covert recording to appear on a list of examples of gross misconduct in a disciplinary procedure.

The EAT took the view that it is good employment practice for an employee or employer to make clear if there is any intention to record a meeting, save in the most pressing of circumstances, and that it will generally amount to misconduct for an employee not to do so. This allows both sides to consider whether it is desirable to record the meeting, and if so how. The EAT acknowledged that it is not always desirable for a meeting to be recorded. Sometimes, recording might inhibit a frank exchange of views. It may be better to agree the outcome at the end of a meeting. If a meeting is long, a summary or note may be of more value than a recording, which may have to be transcribed. In summary, the EAT concluded that the ET was not bound to assume automatically in every case that a covert recording was a breach of trust and confidence. Instead, the ET should make an assessment of the employee's actions in the specific circumstances of the case.

In this case, the ET found that Ms Stockman had not recorded the meeting with the intention of entrapment. During the meeting she gave no indication that she was raising specific questions in order to obtain a favourable answer. Rather, she was flustered, and even uncertain as to whether the device would record. She had recorded a single meeting concerned with her own position. It did not concern the confidential information of the business or other individuals. She did not make any use of the recordings as part of the internal proceedings with the employer. She only created a transcript of the recording because of her legal obligations under the ET's disclosure process, and in one respect the transcript was detrimental to her case. The employer's disciplinary policy did not specifically provide that the making of a covert recording would amount to gross misconduct, and even after the incident, the employer did not amend its policy.

Taking into account all those factors, the EAT considered that the ET had correctly assessed that Ms Stockman's actions were not serious enough to have breached trust and confidence between her and her employer. The ET had been entitled to find that her dismissal was unfair and it had made a suitable reduction in the compensation awarded to Ms Stockman based on its assessment of the situation. The EAT therefore rejected both the employer's and the employee's appeals.

Admissibility Of Covertly Obtained Evidence In Employment Tribunal Proceedings

Whilst employers may seek to argue that to have made a covert recording justifies dismissal or an argument that the compensation to be awarded to an employee on a successful employment claim should be reduced, they may also be concerned about the substance of what has been recorded, particularly in circumstances where private deliberations in the absence of the employee have been recorded which cast their actions and decision-making process in a bad light. The question can then arise as to whether such covert recordings of meetings can be used as evidence in ET proceedings, perhaps to demonstrate bias or unfairness in the employer's dismissal process. The ET's rules on evidence give the ET a wide discretion to decide what is admissible. In practice, the ET will generally admit evidence which is relevant to an issue between the parties. Such evidence is only likely to be excluded if it is introduced late in the proceedings, would be in breach of the Human Rights Act or should be excluded as a matter of public policy.

However, the specific circumstances of the case will need to be taken into account by the ET. By way of contrasting examples, in *Chairman and Governors of Amwell View School v*

Dogherty, a recording of the parts of a disciplinary hearing at which the employee was present was found to be admissible in evidence, but not the recording of the private deliberations of the panel, the basis for this decision being public policy. The EAT did, however, note that the recording of those private deliberations might have been admissible if the issue had been one of discrimination and the recording had provided evidence of discrimination. Private comments made during disciplinary proceedings when the employee was not present were nonetheless found to be admissible in *Punjab National Bank (International) Ltd and others v Gosain* where those comments were not part of the panel's deliberations. In contrast, in *Williamson v Chief Constable of the Greater Manchester Police and another*, a covert recording was not admissible where the employee had ample other evidence to support the claim which had been brought. Covert recordings were not admissible in *Vaughan v London Borough of Lewisham and Others* where the claimant had some 39 hours of recordings of discussions with colleagues which had not previously been disclosed, and for which the claimant could not provide either a transcript or a precise explanation of why the recordings were relevant.

The ET will also not admit covert recording of discussions which amount to legal advice, and which are protected by legal professional privilege (demonstrated by the decision in *Fleming v East of England Ambulance Service NHS Trust*).

How should employers respond?
Whether recording formal meetings, such as disciplinary and grievance meetings, should be an employer's standard approach as a matter of course is a policy decision employers may wish to review, as there are arguments both ways. A recording reduces the scope for subsequent argument about what was or was not said at the meeting, and avoids the risk of time consuming and unhelpful disputes with the employee about the accuracy of the notes made by the employer of the discussions. Nevertheless, the participants in a meeting may find it distracting to be recorded, and it may impede discussion. There may be situations where the personal circumstances of the employee may make it appropriate for a meeting to be recorded - for example where this constitutes a reasonable adjustment in respect of an individual's disability for the purposes of the Equality Act 2010.

Issues for employers to bear in mind in the context of recording of meetings therefore include:

- reviewing whether the employer's policy should be to have a blanket ban on recording of meetings, to allow recording by agreement where appropriate, or to allow for recording either as standard practice or were requested by the participants. It may well be appropriate to update disciplinary and grievance policies to reflect specifically the employer's approach to this issue;
- considering whether to make it explicit in appropriate policies that any covert recording of conversations or meetings by the employee in the work environment is forbidden, and may be treated as gross misconduct;
- where the employer is not recording the meeting, making this clear at the start of a meeting and the expectation that no participant in the meeting is making a recording, in order to clarify the position to the employee and discourage covert recording; and
- if recording is not generally permitted but an employee requests it, ensuring that there is a sensible discussion as to the appropriateness and method of recording, and whether an alternative method of memorialising the meeting (e.g. by a written note, or written summary of the outcome of a discussion) might be more appropriate.

In What Order Should Interviews And Evidence Be Collected?

The order in which evidence should be collected will change depending on the matter being investigated.

In some circumstances it may be helpful to interview the employee or employees under investigation at an early stage as this would help to establish what facts are disputed and allow the Investigator to focus the rest of the investigation on these areas. Also, if they admit the allegations against them are correct it might remove the need to investigate the matter as fully as planned. However, their explanation of why the incident occurred may still need to be investigated.

Where there is considerable physical or written evidence, or the matter is very complex, the Investigator may prefer to collect other evidence before interviewing the employee or employees under investigation as this would help them to fully understand the matter and help them to ask the appropriate questions at the investigation meeting.

Preparing An Investigation Report

Your investigation is only as good as the parties to it or the Employment Tribunal can be persuaded it is. For that you need supporting evidence in the form of a report which is detailed on the points it covers, comprehensive of all the points it ought to cover, and above all, reasoned.

It is not for an Employment Tribunal or an opposing lawyer to seek to unravel your investigation simply because they would have done it differently or asked some further questions or approached different witnesses or included something else in the report. The only burden on you is to act within that first of the two 3 Rs of a robust investigation, the Range of Reasonable Responses. If your investigation reports shows that you considered a point and rejected it for a half-way sustainable reason, neither the ET nor that lawyer will find it easy to argue your conclusion to be outside that range. However, if instead of a reasoned conclusion on a point in your report there is just tumbleweed and static, there immediately is a vacuum into which either could imply something fatal to the legal integrity of your report – lack of reasonable care, perhaps, a failure to look at a key point or active bias or predetermination.

Therefore, detail is good, detail is your friend. Rehearsing it all in writing is potentially a long and tedious job, but it will be worth it if ever your investigation is challenged. That means explaining your thought-process by express reference to the evidence you heard.

> **Example**
> This employee alleged X, and although that one said Y, I believed X because it is consistent with this document or that other witness or the other identified circumstance.

Keep in mind that while ACAS says that an investigation report should be completed as soon as reasonably practicable, what is reasonably practicable depends on how much there is in the report. As a rule, it is far better that a report is a week or so later than ideal but clearly a quality product than something knocked out quickly but ultimately half-baked.

Though detail is good, it is also important to be clear in the report if there are parts of the matter which you did not investigate, and if not, why not. Making no mention of certain arguments or allegations will look like bias, negligence, or predetermination unless you set out why you

disregarded them. Bring on the other 3 Rs of a good workplace investigation: Recent, Relevant and Resolvable. If you reasonably considered a particular allegation to be past meaningful remedy because of its age, irrelevance or screaming triviality, it is entirely appropriate for your report to say so and then move on to those parts which have real practical significance.

There is no need for the report to be in consciously formal or "legal" language. That said, neutral language is obviously critical if your impartiality is to be maintained. If you reject a particular point, fine, but do resist the temptation to kick it when it is down or make gratuitous comment on exactly how witless one would have to be to believe it in the first place, etc.

Ultimately you want your report to be persuasive as a story so that a potentially sceptical reader will at least respect the thinking behind it, despite their best efforts not to. A convincing narrative flow needs to set and follow some sort of order, whether a timeline or the sequence in which points were made in the original disclosure or grievance. Then it should be topped-and-tailed with some context.
Then having written it all out, read it again as a single piece for a final check. If you can do so within the bounds of confidentiality, get someone external to the process to do so too. Are there any obvious inconsistencies or non-sequiturs? Can the reader see how I got from evidence A to conclusion B in each case? Are there any signs implying that I enjoyed rejecting some particular propositions more than I should have done and so fell off the tightrope of independence and defaulted to prosecutor or defence counsel? Have I referred to any evidence that one party didn't see? And in particular, if I am under heavy fire in a boardroom or Employment Tribunal, is there anything at all in this that I can't explain?

Evaluating The Evidence

All of the relevant evidence gathered during the investigation should be reviewed and collated for use within the Investigation Report. This may include witness statements, notes from investigation interviews, relevant policies & procedures, evidence of custom and practice etc. This evidence should be evaluated, particularly where there are contradictions or conflicts which the Investigator must consider.

In evaluating evidence, each case should be judged on its merits; however, the following points should be considered:

- direct witness evidence will usually be stronger than indirect information relating to the incident / allegation;
- evidence which is inconsistent with documents produced at the time is questionable;
- evidence which is vague, is unsubstantiated opinion or hearsay, omits significant details or contains inherent contradictions is questionable;
- anonymous evidence should be reviewed with caution as it is often difficult to substantiate;
- consideration should be given to any bias, motivation or influence individual witnesses may have;
- where possible the factual accuracy of points raised in witness statements should be verified by the panel if they are material to the allegations.

It is important to remember that in reviewing the evidence and recommending appropriate courses of action, the Investigator only has to show they have a reasonable belief of what happened based on their assessment of the evidence. Unlike a legal case there is no requirement to prove a case 'beyond reasonable doubt'.

Investigation Report Structure

A logical structure for the investigation report is as follows:

Introduction	A brief introduction to the report clarifying the allegations / incidents which have been investigated, details of the person against whom the allegation has been made, including whether they are currently suspended from duty and the name of the Investigator.
Methodology	This section should detail the process of the investigation including a list of the people interviewed specifying whether witness statements / notes from meetings have been taken, details of the Policies and Procedures reviewed, and details of any other activities undertaken as part of the investigation (watching video's etc).
Findings / Analysis	This will be the largest section of the report and will detail the findings from the investigation, including the facts and evidence presented, any inconsistencies found with explanations where applicable, any mitigating circumstances and any risks identified. Where information from particular witnesses is cited, note must be made of the relevant appendices where the notes / witness statements can be found. The tests of standards against which the evidence was assessed, whether statutory or regulatory definitions, contract or policy terms, industry practices etc. The findings of fact made in relation to each salient point, plus how you got there.
Conclusion	Where appropriate, a final section could include the conclusions drawn by the Investigator following the evaluation of the evidence. Recommendations are not mandatory, but may indicate recommended next steps or the initiation of any other procedure, following issues highlighted during the investigation.
Appendices	All witness statements / notes from meetings, copies of correspondence, or policies cited during the report should be included.

Tips and Techniques

When writing an investigation report an investigator should remember who will read the report once it is completed and that this will often include the employee under investigation. The report should therefore:

- be written in an objective style
- avoid nicknames and jargon
- use same form of address for all people referenced
- use appropriate language and keep simple wherever possible

- stick to the facts of the matter
- keep it concise
- explain any acronyms used
- take into account the employee's explanation and version of events
- include all evidence that was collected
- distinguish between fact and opinion, and weigh accordingly

Reporting What Is Likely To Have Happened

While reporting with absolute certainty on a matter is desirable it will often not be possible. An investigator should arrange their evidence into:

- **Uncontested facts**
  Where the facts are not in dispute, they can simply be reported as factual

- **Contested facts**
  Where the facts are contested or contradictory they should determine what, on the balance of probabilities, took place (see below)

- **Unsubstantiated claims**
  Where an investigator is unable to substantiate an allegation they should consider if further investigation is reasonable or report that they are unable to draw a conclusion

The Balance of Probabilities

An investigator should endeavour to reach conclusions about what did or did not happen, even when evidence is contested or contradictory. In these circumstances an investigator will need to decide whether, on the **balance of probabilities**, they could justifiably prefer one version of the matter over another and explain why.

Unlike criminal law, an investigator conducting an employment investigation does not have to find proof beyond all reasonable doubt that the matter took place. An investigator only needs to decide that on **the balance of probabilities** an incident is **more likely to have occurred than not**.

Recommendations

It is common for an investigator to be asked to make a recommendation. However, an investigator should restrict their recommendations to only suggesting whether any further action may be necessary or beneficial. In most circumstances an investigator should recommend **formal action**, **informal action** or **no further action**.

An investigator **should not** suggest a possible sanction or prejudge what the outcome to a disciplinary hearing will be.

Formal action recommendation

The formal action an investigator could recommend will usually be:

- to initiate a disciplinary hearing
- changes to an organisation's policy or procedure
- further investigation into other matters uncovered

Informal action recommendation
The informal action an investigator could recommend will usually be:

- training or coaching for parties involved
- counselling for parties involved
- mediation for parties involved
- notification that further similar action may result in disciplinary action

No further action recommendation
Although an investigator may find there is no further action necessary they could recommend that counselling, mediation or another form of support may be beneficial to the parties involved and the organisation.

Recommendations unrelated to the investigation matter
During an investigation an investigator may identify other issues that, while outside the scope of the terms of reference, may still require action. Such matters should be reported to the requester of the investigation in a separate document for them to consider.

Concluding The Role Of An Investigator

Once your report is completed it should be handed to the person or persons who requested it. They should then deal with the onward distribution of the report to the concerned parties at such time and with such covering comments as it sees fit.

Do not be tempted to throw out all your workings out, as that would deny you or the employer the ability to show that the conduct and outcome of the investigation was within the old range of reasonable responses.

Discussing the report in person
Sometimes an investigator may need to discuss their findings with the individual or panel they report to. In disciplinary matters, the focus of discussion should only be to decide whether any further steps are necessary. The investigator should not discuss what sanction might be imposed if a disciplinary charge is established.

Attending the disciplinary hearing
An investigator may be required to attend a subsequent hearing. However, they should only be there in a fact giving capacity. They should not be there to give their opinion or present the case against the employee.

Input into policy or procedure review
It may be appropriate to use the expertise the investigator has accumulated to advise on amending or updating policies and procedures

If an investigator does continue to be involved in the process for any other reason there may be a perception that the investigation was biased and this should be avoided wherever possible.

It should be the **decision maker** and not the investigator who makes the final decision as to whether or not a disciplinary hearing will be held. This is usually the person or group who would

be conducting the disciplinary process. If their decision differs from the investigator's recommendation, the reasons for this should be written down and included as an addendum to the report.

Data Subject Access Requests.

A DSAR should produce all material related to the requestor, whether or not relevant to the issues investigated. ADSAR can permit the redaction or omission of information relating to others, even where relevant to the subject of the investigation.

In any of those cases, you may fear that having seen at first hand who said what, an individual incriminated in your report will set off to confront the witnesses and exact some form of retaliation or, worse, seek to bully them into agreeing that they are not in fact a bully. While that concern may or may not be legitimate on the facts, it does not represent a solid basis for withholding their evidence. Neither you nor the person requesting the investigation should have promised the witnesses that their evidence would be absolutely confidential or anonymised, but even if that did happen, that represents no defence to a DSAR. Such a promise might be good reason to deny a first-instance simple request for sight of the evidence, but nothing further.

Remember the process of checking your report with Kea HR would mean both your enquiry and our response are covered by privilege.

Dealing With Difficult Issues

Inevitably during the investigation process unexpected events occur, which fall outside of the terms of the investigation. These may be dealt with as follows:

Further Or Counter Allegations

If the allegations relate directly to the current investigation or substantiate other information the Investigation Panel must make the decision about whether to include these in the current investigation. If the allegations do not relate, or are made against other parties, these should be dealt with separately from the investigation.

Refusal to Participate (employee)

If the employee against whom an allegation has been made refuses to participate they should be informed that, unless they provide information, either in person during an investigation meeting, or in writing in relation to the allegations, a decision may be made based on the information provided to the Investigation Panel. It is essential that this be communicated verbally and in writing, giving the employee time to reflect and respond appropriately. It is important to offer support to all parties involved, and keep them informed, throughout the process.

If the employee chooses not to participate in the investigation, despite your guidance, they do so in full awareness of the holes which this puts into your ability to find for them the redress which they seek.

Be comfortable with the fact that you can only go with what you get. If you have told the employee of your wish for more specifics, then you have done all you can.

Refusal to Participate (witness)

If a witness refuses to participate it is important that the Investigator meets with the witness to find out the reasons behind why they do not wish to participate, to discuss the process which will be followed and provide reassurances of the support which will be available to them. Dependant on the case in question, it may be possible to continue the investigation even if the witness refuses to make a formal statement.

Allegations lacking dates, detail, evidence, witnesses, etc, must necessarily be less persuasive. When it comes to the old range of reasonable responses, you are fully entitled to take that into account.

Serious Misconduct and Criminal Offences

A common concern for Investigators can be the more serious types of employee misconduct, where a criminal offence may have been committed - for example, fraud or drug dealing on the premises.

There may be a legal requirement to inform other agencies (such as the Health and Safety Executive or the police), so the evidence gathered for the disciplinary investigation may also be required for a criminal investigation. If this is the case, then continuity of evidence is important.

For your evidence to be admissible in a criminal prosecution, you need to be able to demonstrate where it was physically at any point in time. Seek legal advice at an early stage. In some cases it may be necessary or appropriate to wait for the outcome of a criminal trial before taking disciplinary action.

What should be done if the employee confesses to a criminal offence during the course of a disciplinary investigation? In brief, make a note of it. The note should be timed and signed by the person taking it, and the employee should be given the opportunity to read through the record and sign it as correct with, for example, 'I agree this is a correct record of what was said'.

Where the employee disagrees with the record, you should record the details of any disagreement, and ask them to read these details and sign them to the effect that they accurately reflect their disagreement. Any refusal to sign should also be recorded. The investigation should then be terminated with a view to involving the police or any other appropriate investigatory body. Failure to do this is likely to make such unsolicited comments inadmissible in a criminal court.

Respecting The Rights Of Bullies And Harassers

As the investigator, you must start by considering whether you already have sufficient level of detail in the allegations raised or the complaint made, and if not, by then seeking them from the person whose disclosure led to the investigation. Bullying and harassment are not a state of mind or a period of time or an emotion engendered in the recipient, but the product of specific acts or omissions by one or more individuals, with the intent behind them to be assessed separately. Therefore, it is important for the investigator to ask for those specifics.

- When you say your manager bullied you, what *exactly* did he say?

- What *specific* acts or decisions on his part are you referring to?
- When did they happen?
- Are there any relevant documents or witnesses?
- Why do you say that your manager has it in for you?
- Why *precisely* do you consider that conduct to be a product of your race, gender, age, etc?

It can appear unfeeling to respond to a complaint with a barrage of follow-up questions, so much lies in the tone of how they are put. This is not something to do aggressively or sceptically, but as a necessary part of a full and fair process. Ultimately, there are at least four good reasons for pushing for these details up front:

- You need to be sure that you have something meaningful to put to the alleged wrongdoer, something they can reasonably be expected to respond to with more than a bemused look and a shrug;
- the complaint is for the employee to make – if as investigator you find that it is you who is looking for material to put to the "accused", then you have stepped from judge to prosecutor;
- it is not for you to determine what might reasonably be eating the employee – not everyone has the same triggers, and as a general rule you should not be going into behaviours which, though you might find them a bit iffy yourself, seem not to have been an issue for the employee; and
- put bluntly, it is usually a great deal easier to allege ill-treatment at work than to substantiate it.

Example

A client owned a group of shops. In one shop they employed a full-time manager (male) and one full-time (male) and one part-time (female) assistant. The female assistant made an allegation that the manager was harassing her and had allegedly made some inappropriate comments. These behaviours always occurred when they were working alone and there were no customers in the shop. We questioned the manager who looked blankly at us and was shocked. It turned out he was gay and had been living happily with his boyfriend for many years. The manager was very upset by the accusations and was reluctant to return to work, so we suspended him on full pay for a week while we made further investigations. I advised the owner to instal some cameras inside the shop and store room, which he managed to do within a couple of days. It turned out the two assistants were having a relationship and they cooked up the allegations together in the hope the manager would be sacked and the full time employee would be offered the managers position.

Being required to reduce what may be a largely emotional complaint, a matter of impression or suspicion, to dull hard facts can be a deflating experience, but it is still something which your accused employee has a right to expect that you will do before they are grilled about it.

Retention Of Records

Where further action is required following the investigation, the Investigator should retain the evidence compiled during the investigation, to justify any subsequent action taken.

If no further action is required, the Investigator should dispose of the records in accordance with the data protection principle that information should not be kept longer than necessary. If, for example the investigation was the result of a complaint of sexual harassment, but the complaint was found to be without merit, the Investigator should retain the investigation records to demonstrate that they investigated the allegations properly as part of a reasonable procedure. These records could subsequently be relied on before an employment tribunal if the employee making the allegation went on to bring a sexual harassment claim against the employer.

If the Investigator concludes that they should retain records to defend potential legal claims, the time period of retention should be based on when time would run out to lodge a claim. In most cases, retaining records for a year should be sufficient.

Breach of contract claims can be brought at any time within six years of the alleged breach. Consequently, where an investigation examines, for example, pay, bonuses or commission payments, the Investigator should retain the records for at least six years.

Tribunal Proceedings

Since most workplace investigations involve something contested, most investigation reports will disappoint one party or the other. Indeed, since very few workplace disputes are exclusively the responsibility of one party alone, it is entirely possible if you put your mind to it that at one level or another your report will be a disappointment to *everyone* involved. [That is no bad thing. A report which sides wholly with one party or the other is far less credible than the one which finds a degree of culpability (not necessarily serious or disciplinary-actionable) all round].

Given that the legal integrity of your report will be key to the reasonableness of the employer's reliance on it, there is a high likelihood that if the wider issue goes to the ET, you will be going along for the ride as well.

By the date of the hearing, it may be months, maybe a year, since you last saw it so be sure to prepare – go over and over it until you are ready to justify again why you said what you said, doing your best to exclude reliance on any information or facts arising only after it was prepared. Remember the facts, the people, the evidence. Hopefully the report will speak for itself as to the conclusions you reached, but that won't be so useful if under cross-examination you can't recall whether it does so or not.

How you respond to that questioning will be key to the perceived impartiality and reasonableness of your report. Keep front and centre in your mind that you were (and are) not on one side or the other. Your only role was forming a view on some facts, and therefore you should have the minimum comment to make, let alone volunteer, on the merits or otherwise of what happened on the back of your report. If you made recommendations for resolution, that is slightly different because then you will need to be able to justify the prospective merits of the course you proposed, but you still did not actually take the decision. It is the difference between (a) "*I found facts which could justify X's dismissal*" (investigation); (b) "*I found facts which should justify X's dismissal*"

(recommendation); and (c) "*I found facts which did justify X's dismissal*" (decision). You need to be very clear which hat you are wearing and avoid the instinctive temptation to slide from being independent investigator to advocate for the employer. As investigator you are not invested in the overall outcome of the claim, only in the defence of the propriety of your own freestanding part of it, your report.

This requires considerable mental discipline, but it would be a tragedy for all the resolutely impartial work you put into the investigation and the studiedly neutral terms of your report to be undone by conceding in evidence, expressly or impliedly, that you were out to nobble the complainant from the start.

That mental discipline is important because being cross-examined in ET, especially by a pro, can be a deeply unpleasant experience. Someone you have never even seen before sets out deliberately to make you look unprofessional, incompetent and dishonest in a public forum. One common means of doing this is to lead you down the path of defending the indefensible and then, having poked a tiny hole in the fabric of your investigation, to let you make it much bigger by seeking to argue that it doesn't exist at all. If you are drawn in evidence to a slip or error or something which you might have done differently next time, don't deny it – accept that it wasn't perfect, knowing full well that perfection is not the test, only whether your report was within the range of reasonable responses.

Similarly, beware the question which your opponent says "must" be answered with a simple yes or no. If questions around the facts could be answered so easily, you probably would not have needed to investigate them in the first place. Fifty Shades of Grey is a very limited palette compared to some workplace enquiries. Therefore, if to do to justice to the question your ideal answer is "*Yes, but…*" or "*No, but…*" or "*It simply can't be answered on that basis*", then say so. You may get a lot of theatrical huffing and tutting and flouncing around from the other side, but the ET will hear you loud and clear.

Disclosure of Documents

Whereas a Data Subject Access Request should produce all material related to the requestor, whether or not relevant to the issues investigated, a litigation disclosure will cover everything that is relevant to the legal issue, whether or not it contains the personal data of the individual. In addition, while a DSAR can permit the redaction or omission of information relating to others, even where relevant to the subject of the investigation, litigation disclosure generally does not.

Therefore, if a claim is made to the tribunals, then the personal data contained in those background papers may become disclosable. Deleting all your "workings-out" denies you or the employer the ability to show that the conduct and outcome of the investigation was within the old range of reasonable responses.

Therefore the broad principle is that you should be ready for any documents you generate in the course of your investigation to be seen by pretty much all the parties to it. That means not just the final report and earlier drafts, but also your notes of evidence, any audio recordings, any technical research, and so on.

Best Practice

In order to demonstrate a fair process the Investigator should not be directly responsible for the employee or employees concerned.

In the interests of natural justice the investigation and disciplinary hearing should be separated out and conducted by two different manager's. This also enables protocols to be established and good levels of communication will be maintained throughout the investigation period.

Approach every investigation in a non-judgemental manner - guilt or innocence should not be assumed. It may be appropriate to suspend the employee on full pay, but this is best carried out as a precautionary measure, and it should be made clear it is not a disciplinary sanction. Only consider this in the most serious cases where an employee's continued presence in the workplace might enable them to tamper with or remove evidence or to interfere with witnesses.

It is also important to remember to remove access to passes, computer passwords and mobile phones, as well as other property that may enable staff under investigation to undermine the case against them - for example, company laptops.

Suspended employees can be allowed back on to the premises to prepare their case for disciplinary hearings, but access to the workplace and files should only be permitted under supervision.

Fair's Fair

A thoroughly planned and well-executed investigation will help you demonstrate that a fair procedure was followed and that any subsequent action taken is based on sound evidence. Thus reducing the risk of tribunal claims and therefore saving time and avoiding the costly need for re-investigating when a claim is made.

Top Tips

- Those conducting the investigation should not be involved in the decision-making at any subsequent disciplinary hearing.
- For more serious cases of alleged employee misconduct, consider suspending the employee on full pay, particularly if there is a risk the employee may disrupt the organisation or remove evidence.
- Approach investigations with an open mind and decide in advance what evidence you need to gather to support your case. If you decide to interview the employee against whom the allegation has been made, ensure you make it clear that it is not a disciplinary hearing.
- If you suspect a criminal offence has been committed, put the relevant investigatory body on notice straight away.
- The civil standard of proof ('on the balance of probabilities') is an acceptable standard to work to support any disciplinary action you take.

Summary

Step 1: Investigate the Allegations Promptly but Thoroughly

You want people's memories to be fresh but you don't want to rush and miss important evidence. If there's a delay (perhaps because a witness is on leave), record the reasons and update affected employees.

Step 2: Ensure Different People Investigate and Decide the Case

If you're a small business, this may not be possible but the investigator should preferably not go on to hold the disciplinary hearing, as this might prejudice a fair 'trial'. The investigator must also not be a witness to the misconduct. The investigator might be an HR or line manager, while a more experienced person, such as a senior manager, should handle the disciplinary hearing.

Step 3: Maintain Confidentiality

Tell witnesses not to discuss the investigation with colleagues or they could face disciplinary action themselves. This will reduce gossip about the (potentially innocent) person under investigation and deter witnesses from colluding. You should, however, allow employees to discuss the matter with a trade union rep.

Step 4: Carry out Interviews

It's likely you'll need to interview the employee accused of misconduct, as well as the accuser and witnesses. You should normally warn the accused employee about the investigation, unless you're concerned they may destroy evidence or pressurise witnesses. They do not have the right to bring a companion to an investigatory interview.

The interviewer or a colleague should take notes or, if the interviewee agrees, you could record the meeting. Use these notes to prepare the person's witness statement for use in the disciplinary proceedings and give them a copy to approve and sign. Alternatively, ask them to write their own statement. Explain who will see the statement: the accused person is entitled to see statements by their accuser and witnesses. If necessary, re-interview people if new facts emerge.

Avoid taking any disciplinary action at this stage – the purpose of the accused person's interview is just to investigate whether there is a case for them to answer.

Step 5: Gather Evidence

This might involve accessing and taking copies of emails or records, taking photos of the scene of the alleged incident or collecting CCTV footage. You should normally only check emails, phone messages, Internet use or CCTV if the employee knew in advance that you might monitor their activity in this way (see box below). You should also intrude on the employee's privacy as little as possible while gathering evidence. For example, if you think an employee has fraudulently claimed expenses, you would need to collect receipts and expenses forms but you probably wouldn't need to examine their emails.

5 Reasons To Outsource Workplace Investigations

We mentioned earlier in these guidance notes that outsourcing your investigations helps demonstrate impartiality. Here you'll find 5 more reasons to outsource a workplace investigation to a third-party professional investigator such as Kea HR.

1. Trust

Many employees in your organization do not trust internal investigators. Employees have seen and heard what the company has done to their colleagues and they believe their friends side of the story. With an outsourced investigator that barrier to trust is lower. A skilled investigator is disarming and able to receive information employees would never provide an internal investigator.

2. Time

Internal management is busy and when that complaint is received an investigation must be launched without delay. The ability to take swift action is sometimes a challenge with an internal investigator. Outsourcing the investigation eliminates the distractions that the internal investigator manages daily. Distractions come in the form of meetings, deliverables, calendar reminders, phone calls, text messages, social media, a knock on the door, and more complaints to investigate. Ample opportunity exists for an internal investigator to be preoccupied and not be as attentive as necessary for a thorough and objective investigation.

3. Technique

Remaining impartial is a challenge for an internal investigator. When the complaint comes from a manager that is well liked or the internal investigator has an established relationship with the alleged offender it gets dicey. Outsourcing the investigation provides a neutral third party who is objective. The ability to remain impartial and facts focused is an advantage for an external investigator as there may be a conflict of interest with an in-house investigator.

4. Talent

Professional third-party investigators follow best practices. They are well trained and able to document the complaint and its timeline, keep confidentiality, conduct quality interviews, and provide recommendations on reasonable corrective action(s). Hiring an external investigator mitigates the risk of errors in the investigation process.

5. Treasure

Internal investigators have duties and responsibilities that are not accomplished when they are executing an investigation. The cost of a haphazard investigation that leads to litigation is much higher than hiring an external investigator. It comes down to pay now or pay later. Investigations outsourced save a tremendous amount of money by avoiding the lost productivity time. As well as averting litigation, upholding a company's brand, and maintaining workplace morale.

Bringing in a specialist independent investigator means though that you are much more likely to be able to show a reasonable investigation has been carried out. An investigation which has focused on the facts and has provided you with a sound base for the decision that you have made is key.