

# Conducting Investigations

Employer's that are about to undertake a formal investigation or disciplinary process should contact an advisor at Laveer and have your **FREE** consultation to discuss and explore your options with a legally trained advisor.

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## Introduction

This briefing examines how to conduct an investigation, including practical guidance on dealing with witnesses and documents, and suspension during the investigation. While disciplinary investigations may be the most common form of investigation, much of the guidance would apply equally to other situations where an investigation may be necessary, for example on receipt of a grievance or where an employee is underperforming or suffering from stress.

## When an investigation might be necessary

An investigation is the first step in addressing an employer's concern about an employee, or a concern or request that an employee has raised with his or her manager. The key purpose of an investigation is to discover all the relevant facts and information in a fair, reasonable and objective manner. If a employer is confronted with a situation that needs to be actioned, but fails to carry out a proper investigation within a reasonable time, it could lead to valuable evidence being destroyed and potentially costly tribunal claims for discrimination, unfair dismissal and breach of contract.

The necessary length and detail of an investigation will depend on the circumstances.

Employers will encounter a number of situations where an investigation might be necessary, including:

- when an issue of alleged misconduct has been raised, in order to ascertain whether or not formal disciplinary proceedings should be commenced;
- if they are concerned about a poorly performing employee;
- on receipt of a grievance, for example when an employee alleges that he or she should have been promoted over a colleague;
- on receipt of a customer complaint;
- when alerted to a problem between colleagues; and

- when alerted to an employee experiencing stress.

## Top tip

Before starting an investigation, a manager / investigating officer should prepare an investigation plan, setting down who will be conducting any subsequent discipline or grievance hearing (*if necessary*), whether or not suspension should be considered (*where relevant*), who needs to be interviewed, what documentary or other evidence is required and what the timescales are.

If you are a small company and lack the resources internally to undertake this process speak with one of our advisors who will be able to provide you a quote for undertaking the entire investigation process on your behalf!! All prices will be based on

**fixed fees and start from just £500 + vat for a  
legally trained individual to undertake the process on your behalf!!**

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## The importance of a thorough investigation

There are several reasons why an employer should carry out a thorough investigation where the situation calls for one.

### To determine the next steps

When a employer is confronted with a difficult situation, unless the manager conducts a proper investigation before making a decision, it is unlikely that he or she will make an accurate decision about what should be done next, and be able to back up the decision with evidence. A thorough investigation is important to determine what the next steps should be and whether or not any formal action is required.

### Positive work environment

Employers are instrumental in creating and maintaining a positive working atmosphere. For example, if a manager takes grievances raised seriously and properly investigates them, employees will feel that they are treated fairly and that their concerns are addressed, which can help to build confidence and trust in the employer.

Where an employee raises a grievance, even if the employer is confident that the outcome will not be what the employee was hoping for, the employer should still carry out a thorough investigation to demonstrate that the employee is valued and that his or her concerns are understood.

Where a employer suspects that an employee has committed an act of misconduct, if the employer brings disciplinary proceedings against the employee without having conducted a thorough investigation, not only might this give the employee cause to make a claim in the employment tribunal, but it would also erode his or her trust and confidence in the employer.

### Adverse employment tribunal findings

If an employee is dismissed following disciplinary proceedings and claims unfair dismissal in the employment tribunal, the tribunal will closely examine whether or not the employer followed a fair procedure. A reasonable investigation is a fundamental aspect of a fair procedure.

Similarly, if a manager suspects that an employee is suffering from stress, but fails to investigate this concern, it could lead to a costly personal injury claim.

Evidence of a thorough investigation is essential for defending employment tribunal claims. While it may seem time consuming and a burden on resources, carrying out a proper investigation could save time and costs in the future, because the manager will have evidence to back up why he or she made a certain decision.

## Core principles of conducting an investigation

There are a number of core principles that employers should take into account to ensure that they carry out investigations in a fair and reasonable manner.

### Inform the employee

It is good practice for the employer to inform the employee who is the subject of an investigation that it will be taking place. This will include:

- providing the employee with a copy of the relevant internal procedure;
- informing the employee of the approximate timescales; and
- specifying the next steps, for example interviewing witnesses and collecting data and information.

In limited circumstances, it might be important that the employee is not informed that a situation is being investigated, for example where this might result in important evidence being destroyed.

### Reasonable time frame

The employer should conduct the necessary investigation within a reasonable time frame. This is important to ensure that witnesses' recollections remain fresh and accurate, and to obtain useful documentation that might otherwise be destroyed. For example, the employer 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.

## Internal procedures

At the outset of an investigation, the employer should reacquaint him- or herself with any relevant internal procedure, for example the disciplinary or grievance procedure, and follow it. The manager should supply the employee with a copy of the procedure and make the employee aware that it will be followed.

If this principle is followed, both the employer and the employee will know what the next steps are, and it will help 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

During an investigation the employer needs to establish the facts. The employer should not be swayed by his or her own opinion or the opinions and views of any witnesses. It is also important that the employer does not prejudge the outcome of the investigation by assuming guilt or innocence.

The employer should dedicate sufficient time to the investigation to establish the facts. It is helpful if the employer does not regard the investigation as being a burden.

## Confidentiality

The principle of confidentiality applies to the employer, the employee who prompted the investigation and all witnesses.

The employer should not discuss the investigation with other employees or with third parties.

The employer will need to give thought to whether or not it is necessary to divulge the name of the employee who prompted or is the subject of the investigation to witnesses. More often than not, this will be necessary to establish the facts. However, in some situations, the employer should consider protecting the identity of the employee, for example where he or she has alleged that a fellow employee is bullying members of staff.

It is good practice for the employer 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.

## Clarify the issues

Before starting the investigation, the manager should be clear about the relevant issues. If in doubt, the employer should ask the employer who asked for the investigation to be carried out, or the employee who raised the grievance, for clarification.

## Who should carry out the investigation?

The appropriate internal procedure, for example the disciplinary procedure, which could be contractual, might stipulate who should conduct the investigation.

The person carrying out the investigation should not be involved in the issue, for example a witness should not carry out 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 organisations it might not always be possible to designate the role of carrying out the investigation and that of any subsequent procedure to different people. The employer could consider using an external party to conduct the investigation. If that is not possible, the employer carrying out the investigation should be as objective as possible.

## Suspension

In some circumstances, it may be necessary to suspend an employee for a short period pending the outcome of the investigation.

### Factors to consider

Suspension pending the outcome of the investigation might be necessary:

- where relationships have broken down;
- in cases where serious misconduct has been alleged, and which, if proven, would result in summary dismissal, for example where the employee is suspected of theft or bribery;
- where there are grounds to believe that the employee might deliberately cause damage, to the employer's computer network for example, if he or she remained in the workplace;
- where the employee's continued presence at work might prejudice the investigation in some way, for example where there is a risk that he or she might intimidate witnesses;
- where the employee has acted in a violent manner or has threatened violence;
- where the employee has been accused of serious bullying or harassment; or
- where the matter under review is of a highly sensitive nature.

A decision to suspend an employee should be taken only after careful consideration of all the circumstances. The employer should consider alternatives to suspension, for example temporarily relocating the employee or assigning new duties to him or her. It is advisable for the employer to keep written records of any alternatives considered, including why they were not thought appropriate.

### Paid suspension

Any suspension from work pending the result of an investigation should usually be with full pay and benefits. This is because suspension without pay would, in most cases, be a breach of the contract of employment and create the impression that the manager had judged the employee at the centre of the investigation "guilty" without having investigated the facts.

### The terms of suspension

If the employer determines that suspension is necessary, he or she should meet with the employee to discuss the terms of the suspension and why it is considered necessary. This should be followed up in writing to the employee. It will be necessary for the employer to explain:

- why the employee is being suspended;
- when the suspension will start;
- how long the suspension is likely to last;
- that the suspension is on full pay and benefits;
- that the suspension is not a penalty or tantamount to disciplinary action;
- that the suspension does not mean that the employee has been judged guilty of any offence, or that the outcome of the investigation has already been determined;
- that the employee will have a full opportunity to put across his or her version of events, explain his or her conduct, or answer any allegations; and
- that the employer will keep the employee updated as to the progress of the investigation and will stay in touch.

It might be necessary for the employer to remove items such as the employee's access pass, computer password and company laptop and Blackberry, if the manager considers that it could undermine the investigation if the employee retained these items.

## **Interviewing the employee at the centre of the investigation**

As part of the investigation, it may be necessary for the employer to interview the employee who is suspected of misconduct or raised the grievance. 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 employer should:

- 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.

Where the issue is one of misconduct, the employer should be very careful to ensure that the interview does not turn into a disciplinary hearing. An investigatory interview is not the same as a disciplinary interview. 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.

## Right to be accompanied

Generally, employees do not have the right to be accompanied at investigatory meetings (although the employer should check if an internal procedure grants this right). The employer should ensure that the investigatory meeting is restricted to gathering facts and finding out what happened.

Employees do, however, have the right to be accompanied at formal disciplinary hearings. Where the manager is 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.

## Witnesses

Witness statements are often an essential part of the information collated during an investigation, particularly in cases of misconduct and employee grievances.

### Who to interview

At the outset of the investigation, the employer should make a list of all the potential witnesses, within the organisation and externally. It is important that the employer interviews anyone who can contribute to the facts of the case or the surrounding circumstances.

Where an employee has, or may have, relevant information about an act of misconduct committed by a colleague, the employer should interview the employee in private to establish what he or she knows.

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

The employer should take a flexible approach. It might be that the witness would prefer to be interviewed with a companion, or on the telephone (where the witness is, for example, a customer). Alternatively, the witness may be prepared to provide a written statement. If that is the case, the manager should supply a list of questions for the witness to answer.

In some cases, the witness may be scared to give evidence against a colleague. The employer 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.

If an Employer is having issues with witnesses providing witness statements & confidentiality of statements should contact an advisor at Laveer and have your **FREE** consultation to discuss and explore your options with a legally trained advisor.

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## Preparation

Employers should prepare in advance of interviewing a witness.

### Preparation checklist

Prepare questions, but be flexible about asking additional questions or amending them as new information comes to light.

Be familiar with the facts of the issue and the sequence of events.

#### Prepare a chronology.

Reassure the witness that you are simply looking to establish the facts.

In advance of the meeting, provide the witness with any documents that may act as a memory prompt or help him or her to give evidence.

Be open to answering any queries that the witness might have prior to the meeting, particularly as some witnesses might be nervous about the proceedings.

## Conducting the interview

During an interview with a witness, the employer should try to make the witness feel calm and relaxed. A nervous or anxious witness will not necessarily provide the facts in a logical or accurate manner. The witness should be encouraged to speak freely and convey his or her own version of events. However, the employer, through a series of open and closed questions, should direct the witness to focus on the issue at hand.

### Dos and don'ts

**Do** allow the witness to refer to any documents to refresh his or her memory.

**Do** pause the meeting if the witness needs a break, or adjourn it if the witness is very upset.

**Do** record all the pertinent facts, eg dates and times, names, and context of behaviour. You may find it easier to have a separate note-taker to accompany you.

**Do** keep calm and focused.

**Do** remind the witness to keep the matter confidential.

**Don't** be afraid to question the witness's version of events.

**Don't** encourage the witness to offer his or her opinion.

**Don't** offer your own opinion, be judgmental or speculate on the outcome of the investigation.

**Don't** draw hasty conclusions.

**Don't** disclose any confidential information.

## After the interview

It is good practice for the employer to give the witness a copy of the notes made during the interview for the witness to check and sign. The employer should then prepare a witness statement based on the information that the witness gave. As far as is possible, it should be in the witness's own words. The employer should send a copy of this statement to the witness for the witness to date, sign and return to the employer. It might be that the witness will want to make some amendments to the statement before signing it, which he or she should be allowed to do.

## Confidentiality of witness statements

Statements provided by witnesses should be treated as confidential documents. However, managers 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, whether manually or on a computer. This includes witness statements of which they are the subject. A employer 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 manager 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, managers 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 him or her.

## Written statements from non-employees

Where evidence is required from a third party who is not an employee, the individual may not want to attend a meeting to provide a witness statement. One option is for the manager to take a statement over the phone, and then send it to the witness for him or her to check, sign and date. Another option is for the witness to provide a written witness statement, in which case it is advisable for the manager to provide a list of questions and issues for the witness to address.

## Documents and other evidence

Collating and reviewing documentation will make up the bulk of many investigations. The following are examples of documents that the employer 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 employer conducting the investigation might need to examine and rely on computer records (eg emails and website-browser history), and telephone records. This should be done in accordance with the organisation's internal 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 the employer suspects 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 employer should take advice from the HR department before proceeding.

### CCTV

The employer 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. Managers should not compel employees to disclose personal documents, nor should they read private emails or diary entries. However, any work files (whether on paper or held on the organisation's computer systems) or work-related emails and letters belong to the employer. Consequently, a manager 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 manager should point out in writing that a refusal to cooperate will limit the depth of the investigation, that he or she 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.

## Conclusion of the investigation

Once a employer has gathered all the information, he or she will have to consider what, if any, further action is required.

### Dos and don'ts

**Do** examine all the evidence in an objective manner.

**Do** take into account the employee's explanation and version of events.

**Do** try to distinguish between fact and opinion, and weigh accordingly.

**Do** review the evidence on the balance of probabilities, ie what is more likely than not to have occurred?

**Do** consider whether or not a witness's version of events is accurate. For example, could he or she be exaggerating, lying or emotional?

**Don't** make a decision based on instinct. Make a decision based on the factual evidence before you.

**Don't** discount evidence that points to innocence.

The manager should present all the evidence to HR/the person who will conduct the formal disciplinary proceedings, and make a recommendation to him or her. That person should then make a decision as to whether or not disciplinary proceedings are appropriate. If they are, he or she should supply copies of the evidence (including all witness statements, bearing in mind any promises to maintain anonymity) to the employee and invite him or her to a formal disciplinary hearing. Alternatively, if the person to whom the evidence has been presented concludes that disciplinary action is inappropriate, he or she should inform the employee in writing. If the employee was suspended, he or she should be allowed to return to work.

Where the investigation was the result of a concern raised informally, the manager should meet with the employee who raised the concern and discuss the outcome.

If a grievance was raised formally under the grievance procedure, the manager will need to pass on all the information that he or she has obtained to the person handling the grievance, and make a recommendation to him or her as to how to proceed.

## Retention of records

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

If no further action is required, the employer 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 employer should retain the investigation records to demonstrate that he or she 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 employer concludes that he or she 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 employer should retain the records for at least six years.

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