

Investigations



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Introduction

This Inbrief sets out the main considerations for organisations faced with grievances or allegations of wrongdoing which may require formal investigation. We deal with how to appoint the right investigator, scoping the investigation, dealing with witnesses and tricky issues that can arise.

We also recommend the helpful ACAS guidance on this topic, which sets out the steps organisations of all sizes must or should follow.

When to investigate

The first decision for any organisation which receives a grievance, complaint or other allegation of wrongdoing will be whether or not to conduct a formal investigation. Organisations should consider a formal investigation in the following circumstances:

- When an internal policy requires a formal investigation.
- When the organisation has formally investigated similar issues in the past and should act consistently now.
- If the complainant has requested it (although the organisation may be satisfied that it is not necessary).
- Regardless of whether the complainant has requested it, if the issues raised are serious enough that the organisation believes that they merit formal investigation. For example, organisations may choose to investigate formally all allegations of sexual misconduct or discrimination as a matter of principle.

In some cases, you may be able to resolve matters informally through mediation or a quiet word with the people involved, for example where the allegations are not serious and where the complainant wants them dealt with informally.

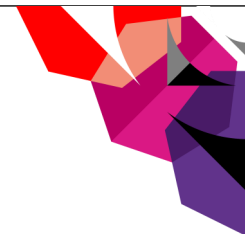
Making a decision about how to deal with an allegation without first conducting a thorough investigation can leave organisations open to claims that a fair process has not been followed, or even to allegations of cover-up. Failing to take appropriate action can lead to legal claims and reputational risk. Recent years have shown an increasing tendency for organisations to carry out a full formal investigation.

Appointing an investigator

Once the decision has been made to investigate, the next step will be to appoint a suitable person to conduct the investigation, and (in most cases) a separate person to consider the investigation report and act as the decision-maker.

There are a number of considerations to take into account when choosing an investigator:

- The investigator must be independent from the matter in question. Consider whether they have had any prior involvement with the subject or individuals involved which may render them an inappropriate person to run the investigation. Can they approach the investigation fairly and objectively? Might the complainant who has raised the issues have concerns about their impartiality?
- The investigator must be sufficiently senior to conduct the investigation. The appropriate level will usually depend on the seniority of the individuals who are the subject of the complaint, but organisations' internal policies may require someone of a certain level of seniority. In particular, if the people involved in the matter are senior themselves, you may decide that only someone of an equivalent or higher grade would be appropriate to carry out the investigation.
- Depending on the subject matter, it may also be best to choose someone with previous experience of investigations or at least some experience of other HR matters - for example, where the investigation potentially involves gross misconduct or discrimination.
- As well as identifying the decision maker, consider also who will hear any appeal arising from the process. Ideally this person should be at least as senior (ideally more senior) than the original decision maker.
- Does the potential investigator have time to do a thorough and careful investigation alongside their other responsibilities? Bear in mind that these matters can last for weeks and even months, depending on the scope of the complaint. There is also the potential for follow-on litigation if the complainant remains unhappy after the process is complete.
- Would there be any benefit to having the investigation conducted by an external third party? Is the topic particularly sensitive, is there no one internal with enough time to do a thorough job or, where allegations are levelled against very senior individuals, is there no one sufficiently senior or impartial? Would it



be particularly beneficial to minimise disruption to the organisation's day-to-day work?

- Might it be helpful to have the investigation conducted by a solicitor and conducted on a legally privileged basis?

In some cases it may be appropriate to appoint an external investigator. Lewis Silkin has a dedicated team of experts who conduct investigations of all sizes for clients across a wide range of sectors. We are happy to advise you on how to conduct an investigation, or you may choose to appoint one of our specialist investigators to carry out the investigation for you.

Scoping the investigation

Once you have chosen your investigator, it is helpful to establish the detailed scope of the investigation at the outset to ensure that the final report covers everything you need. The scope should deal with:

- Precisely which allegations / questions are to be investigated.
- What format the findings should be presented in, and to whom. In most cases, the investigator will write a report with their findings and append the relevant documents and interview notes. This should only be shared with appropriate people.
- Whether the investigator will be required to: (1) simply present the information they gather; (2) produce findings of fact; or (3) make recommendations to the decision-maker.
- Whether the investigator should comment on the credibility of the witnesses interviewed.

In a potential disciplinary matter, the investigator's role will be to establish whether there is a disciplinary case to answer; they do not make a decision on whether a disciplinary offence has occurred, or whether disciplinary action should be taken – that is the decision maker's role.

Internal policy may prescribe a certain timeframe for the investigation. However, if that is not sufficient to conduct a thorough investigation, that should be modified so the

process can be fair and reasonable. Be clear about who will keep the complainant up to date on progress and timescales.

If new material comes to light, you may need to adjust the scope. Bear in mind that the ACAS guidance does not require organisations to "leave no stone unturned". The investigation does not have to cover every detail of the matter, only what is reasonably likely to be important and relevant.

Witness meetings

Some points for the investigator to consider are:

- Who the witnesses will be; investigations will often start with a small number of key witnesses, but the investigator will need to consider whether further witnesses should be interviewed in light of evidence received. New issues may come to light during the investigation, and investigators should consider expanding the scope to include them if it is necessary for a fair and thorough investigation.
- Where the interviews should take place. Generally we recommend that they take place in person whenever practicable. Consider the privacy of the location; witnesses will most likely prefer not to be overlooked, so choosing a room in a private part of the offices is a good idea whenever possible.
- What information should be sent to witnesses in advance, if any. While witnesses might want to know the detail of what they will be asked about, the investigator will generally get a better sense from them if they are not pre-prepared. Consider also whether the person who shared the information or raised the grievance is happy for that to be passed on. You may decide to share a summary of the key points which relate to that witness rather than the full document, or indeed to share nothing. It may even be appropriate for the complainant not to be given written notice of the meeting, in circumstances where the organisation has a legitimate concern that this may lead to tampering with evidence or refusal to attend.

- Whether they will have a note-taker or record the meeting. Whether an audio recording is appropriate will depend on the organisation's internal policy, and the investigator may wish to advise the witness that they are not permitted to take a recording, where appropriate. We would recommend that if the meeting is not recorded, a separate note-taker is present in the meeting. The notes should be shared with the interviewee following the meeting, and they should be invited to add any comments or corrections. These can be either incorporated into the final version of the notes, or stored alongside the original notes where any changes are not agreed.
- Whether the witnesses will be permitted to bring a companion to the interview. This is not generally something they are entitled to, but it may be appropriate in certain circumstances.
- Do any witnesses require reasonable adjustments to the interview process to accommodate a disability?

Tricky issues

Reluctant witnesses

You may find that some witnesses are reluctant to participate in the process. Firstly, consider whether anything can be done to make the witness feel more comfortable. Could the investigator call them for an initial conversation before the meeting, to introduce themselves and talk through how the meeting will be run? Could the meeting take place in a neutral location rather than in the organisation's offices? Could the witness bring a companion to the meeting? There is no statutory right to be accompanied at an investigation meeting, but consider both internal policies and whether it might help the witness feel more comfortable. It may also help to send the witness some detail of what is to be discussed (although see above for the considerations to bear in mind here).

The investigator could reassure the witness (where appropriate) that their conduct is not under investigation. If possible, they could tell the witness that they are not the only person

to have raised the issues in question, and that the investigator is also speaking to others about the same topic. It can be helpful to let the witness know that the organisation is committed to carrying out a full investigation to properly understand the issues raised, but that it is very difficult for them to do so without the full participation of the people who hold the information.

In some circumstances, it may be appropriate to allow a complainant who works for the organisation to work away from their immediate working environment while the process is ongoing. Consider whether they could work from home, if they request, but bear in mind the repercussions for a complainant who is seen to be out of the workplace and talk to them about what will be said to others about their absence. In serious cases, it may be appropriate to suspend the person/people accused of wrongdoing.

As a last resort, you may wish to consider allowing witnesses to give evidence anonymously.

Confidentiality

Some investigations may overlap with regulatory or criminal considerations. An organisation may decide to alert the police to a matter, and possibly to provide information. There is no general obligation to report suspected criminal activity, but organisations should consider whether they are under any internal or regulatory obligations to do so, or any obligations to report the matter to any other regulatory body.

If the organisation is regulated, consider whether witnesses should be informed of the potential for information that they give to be shared with the regulator.

Next Steps

Following the investigation, potential next steps could include:

- Considering whether further investigation is required, including investigation into any new issues which have arisen over the course of the matter.
- Writing up an investigation report – this should set out the issues under investigation, summarise the evidence obtained, and explain what findings have been reached and why. The report may also include recommendations for what should happen next.
- The investigator is likely to need to compile a bundle containing a copy of the evidence obtained, which will be made available to the decision maker.
- The decision maker will need to be satisfied that a reasonable investigation has been conducted and then reach a decision on the outcome of the complaint. The decision maker could refer matters back to the investigator if further information is needed.
- Where the investigation has determined that there is, or may be, a disciplinary case for a complainant to answer, that disciplinary process should commence.
- Informing the complainant who raised the grievance or complaint of the outcome. Consider carefully whether you will send them the full detail of the report, meeting notes and relevant documents. You may wish to take advice on whether this is appropriate.

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