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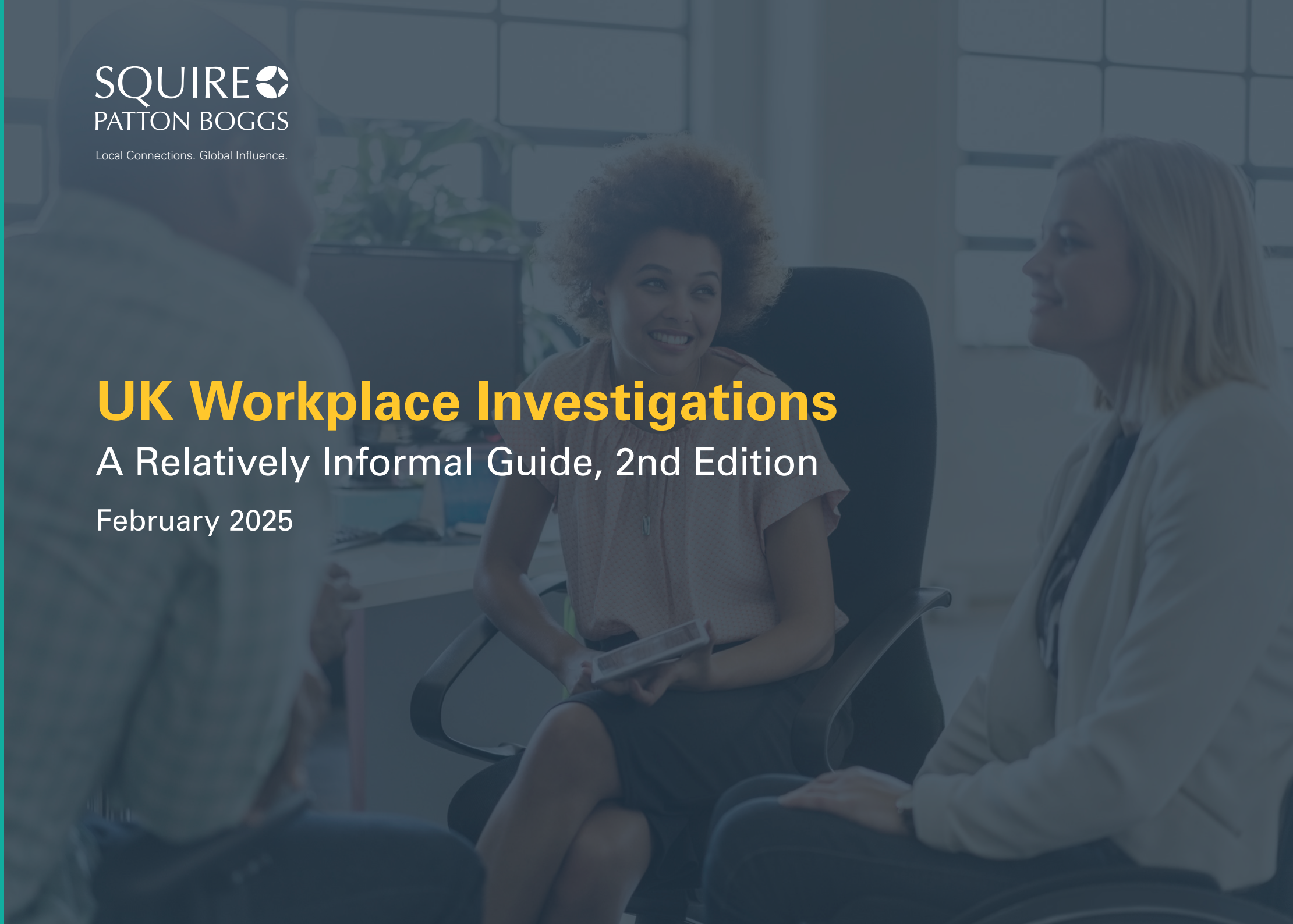

UK Workplace Investigations

A Relatively Informal Guide, 2nd Edition

February 2025

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This guide to conducting workplace investigations was created originally from a compilation of posts by David Whincup on our *Employment Law Worldview* blog.

We edited and republished them in this form in 2023 to reflect a then growing profile for whistleblowing issues in the workplace. While some of these posts appear to focus mostly on the investigation of contentious grievances, many of the same principles (in particular, the need to make decisions based on a reasonable grasp of the facts) apply equally in the whistleblowing arena.

Since 2023 the growth in profile of non-financial misconduct in the financial services sector and the new government's stated intention to bring sexual harassment issues formally under the whistleblowing regime have both reinforced the importance of conducting workplace investigations properly. In addition, it will be an essential plank of complying with their new duty to prevent sexual harassment that employers are seen to conduct investigations into such allegations with reasonable skill and rigour.

This 2nd Edition is revisited and expanded with these new priorities for employers squarely in mind.

1. What Are We Talking About?

In this guide, we will take a look at the vexed area of workplace investigations. We will look at the background law, of which there is very little, and at best practice guidance, of which there is more than can possibly all be useful. We will offer some examples of investigations done badly and consider when and how it may be sensible to use someone outside the business. While we will hopefully take some of the anxiety out of doing these things yourself, we will also offer to do them for you, and explain why that can make legal as well as practical sense.

So here we go, starting with a demystification of the word itself – 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.

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.

However, though the concept is quite hard to nail down, the investigation is still integral to many HR processes. Credibility, reputation and perceived good faith, let alone money, are all at risk for employers and individual managers making those decisions without a proper picture of what happened and why. A reasonable investigation is key, the foundation-stone on which all your later decisions rest.

In the employment world, 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 reputation or 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 that 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 employment tribunal 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. Come on, you can do this.

2. The Questions Behind the Facts

At a very early stage in your investigation, you are going to need to work out what you need to know. Is it literally just the bald facts of what happened, or does it go further into the why? Is there any particular legal, contractual or policy definition in play that will dictate (or at least inform) the decision you have to make? Is the issue limited to that particular employee or should you be looking into the relative treatment of others too? Are you actually being asked to reach a conclusion on law rather than fact, or upon issues that are of a specialist nature outside your technical knowledge?

Take a relatively simple 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 micromanagement, 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 micromanagement, 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 that 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 always 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, however, that is still 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 or counselling. If you face pushback 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 that 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 GCSE Maths, you can get credit for showing your workings, even if there are deficiencies found elsewhere), departures from your initial plan should not worry you.

3. Remembering the Three Rs

There will be few in HR who have not at some time been served with one of those employee grievances which says, paraphrasing only slightly, "I am really unhappy in my work. I have recently discovered that I have been really unhappy for many years. Clearly, this cannot be my fault in any way, so it must be yours. To prove that, I attach a 20-page list of all the knocks and disappointments that I have been subjected to here over the last decade. I await your resolution, though I am not going to tell you what I think that should be." Are you really going to have to investigate the whole lot? When you are drawing up your map of what you need to know, can you take no shortcuts?

Acas guidance, not to mention good ER practice, requires that your investigation is conducted reasonably. To help frame that, we can go back to the statutory purpose of a grievance procedure in section 3 Employment Rights Act 1996 (ERA) – to provide a mechanism by which an employee can "seek redress" for their complaint (in other words, to get something fixed or remedied). By extension from there, a complaint that cannot reasonably be fixed or remedied is not a good subject for a grievance, and still less so for any extended investigation. Perhaps the complaint relates to matters too long ago (employment tribunal limitation periods are not determinative here but are certainly relevant) or is impossible to investigate due to staff turnover or data deletion policies, or irrelevant to the main complaint, or simply so petty or trivial that they would not warrant a remedy even if true. It cannot be outside that range of reasonable responses for the employer to limit its investigation to those parts of your employee's litany of misery that are recent, relevant and resolvable, the grievance procedure's three Rs.

But how to decide? This is not solely about the employee's ability to obtain a remedy through litigation. Unacceptable behaviours remain unacceptable even if the employee sits on them for a while and ultimately the desired outcome may not be money but just some acknowledgment that something could have been done better. Against that, you are entitled to conclude that if the employee hasn't felt strongly enough about something to mention it for many months or years, they cannot actually be too concerned about it. Equally, if you can look at an allegation and can reasonably say, "Well, so what?" then there is little benefit to anyone in your formally poking about in it. Where what is done cannot reasonably be undone, the same is true – perhaps there have historically been poor communications with a manager, but if they are now addressed going forwards, what is the benefit of a detailed review of the past?

If it is not your intention to look at every one of your employee's list of gripes or to interview every person or review every document they refer to, it is good practice (not a legal requirement) to put that proposal to them in advance: "I am considering not looking at allegation A or B, documents C or D and your witnesses E and F because for X, Y and Z reasons, I do not think that will help in determining your grievance. Please let me know what you think." You are not bound by the employee's response, but it will strengthen your procedural position no end to be seen to consider it.

Keep in mind that your workplace investigation is not the pursuit of the whole truth for the truth's sake, but pursuit of as much of it as you need to decide whether that redress in section 3 is required and what form it should take. What do I need to know in order to fix what the employee can realistically be upset about? It is within your power as investigator, at least to some extent, to define the boundaries and parameters for your enquiries.

4. Respecting the Rights of Bullies and Harassers

When drawing up your preliminary note of what you need to know as the product of your investigation, remember that the people being investigated have rights, too. Some we will come to later in this Guide, including confidentiality and a fair process, but the first and most fundamental part of a fair "trial" is knowing what you are accused of. Of course, the investigation is not a trial as such, but since it may lead 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 that 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 were now a full-blown disciplinary.

Therefore, the investigator must start by considering whether they 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 disclosure led to the investigation. Proper bullying and harassment and breaches of legal obligation 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 they say? What specific acts or decisions on their 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 or disclosure 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 upfront:

- 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, a shrug and a blanket denial.
- 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, which is not a good look.
- 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 that, though you might find them a bit iffy yourself, seem not to have been an issue for the employee.
- Put bluntly, it is usually a great deal easier to allege ill-treatment at work than to substantiate it. In answer to such a question of a client's employee, we once received the answer "She leant across the table, her eyes flashing" as the totality of the problem, followed many years later in a separate case by an employee who identified a number of witnesses to the treatment she said she had received but asked our client not to speak to them "because they would all deny it". 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 that your accused employee has a right to expect that you will do before they are grilled about it.

Sometimes, it is best to ask the questions in writing in advance and give the employee a bit of time to respond to them outside the heat of the investigation meeting. Where an employee has a mental health condition which makes responding on the hoof more than usually difficult, presenting your opening questions in advance may be advised as a reasonable adjustment in any case. There is no need to require written responses, especially if that is likely to be a deterrent to an employee unused to expressing themselves in that way, nor can you insist on them. However, as investigator, you will obviously need to make a full record of the answers, since they will form the basis of your questions to others in the process.

However important those initial questions may be, you cannot make proceeding with your investigation conditional upon their being answered. If the employee chooses not to do that, despite your guidance, they do so in full awareness of the holes that this puts into your ability to find for them the outcome that they seek.

Relatedly, be comfortable with the fact that you can only go with what you get. If you have told the complainant or whistleblower of your wish for more specifics, then you have done all you can. While a greater imperative may apply in whistleblowing cases where there may be more at stake for the employer than the employee, for the most part it is not for the investigator to make the complainant's case for them. 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.

5. Seeking Truth, Justice or Resolution

Decades of presenting employment law training have taught me that if you ask seasoned HR audiences what they think employees usually want from a grievance, they will generally lie. "Justice", someone will mutter uncomfortably, or "for the truth to come out", "a better relationship with their manager" or "to correct a wrong", all straining every sinew not to say what they actually believe. Eventually someone's self-control will break – "Money", one will suddenly blurt, "money and revenge". Then the tension in the room disappears and we can all stop pretending because everyone knows, surely, that you wouldn't bring a grievance unless you wanted cash and someone else to suffer.

Pre-empting that expectation, employers sometimes adopt a closed and defensive posture on receipt of a grievance, determined to batter flat any allegation they think might cost them. However, that is not always the reality, at least not until lawyers and unions become involved. Prior to that, there may well be a brief point where a more constructive approach may pay dividends, a point before the formal grievance and investigation machinery has groaned into motion and developed a momentum it can be hard to stop.

Go back to that statutory definition of a grievance in section 3 ERA – somewhere the employee can "seek redress". When employers make assumptions about what that redress will be, that then drives the subsequent investigation towards a shock-and-awe carpet-bombing of the employee's concerns. How much better it would be to ask employees right at the outset the simple question of what they are actually looking for.

The Acas Code of Practice states at paragraph 34 that an employee bringing a grievance should be "allowed" to explain how they think it should be resolved. To help shape your investigation, however, you should go further and positively require them to do so. One of your first questions of the complaining employee should be how, in an ideal world, they see their complaint being dealt with. You will not be bound by their answer, but it may well be that the desired "fix" is closer and more achievable and/or depends on a narrower range of facts than you thought. We must keep returning to the point that in a disciplinary or grievance case, you are investigating not for its own sake or in the interests of "justice", but as a necessary precursor to identifying the appropriate redress, if any. If you can get there without the potentially destructive side effects of a formal investigation into fact and (particularly) culpability, then omitting or truncating that investigation process can surely not be said to be outside the range of reasonable responses.

There are other benefits to putting this question early. If asked right at the very start of the process, employees are far more likely to say something positive and constructive – the cash-and-revenge stage tends to kick in a little later – and that might be a good opening to suggest resolution through mediation rather than the artillery duel of a formal investigation and attribution of blame. In addition, if you put employees on the spot with the question of what, in practical terms, should be done about their disclosure, then our experience shows that they may ultimately accept (or it may become clear) that some of their older, pettier and more peripheral allegations are simply not now susceptible to meaningful remedy, so they can reasonably be dropped out of your investigation.

On the other hand, your employee may secretly realise that their ideal outcome will make them look vindictive, greedy or just plain delusional, and then they may say that they are not willing to share their views of a proper resolution and leave it in the company's hands. They cannot be made to answer this question, either as a condition of progressing the investigation or at all. However, they can and should be told in writing that if they cannot be clear as to what would make them happy, your investigation is much less likely to be able to find it for them. A stonewall approach to remedy of this sort will not allow you to narrow your investigation, but it will dramatically limit your employee's ability to appeal convincingly against any recommendations arising from it.

6. Preparing the Statutory Defence

Once you have done all the scoping out and refining of allegations you can before starting your investigation, there will come a point where you have to raise the allegations made with the people they are made against.

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, their home, their marriage, etc., all at stake.

People who are very angry do foolish things in response, whether it is an aggressive verbal attack on the complainant, to their face or behind their 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. It is hard not to sympathise – one way or the other, an allegation to your employer that you have committed a criminal act, breached some legal obligation, harassed, discriminated or sought to cover up wrongdoing is personally and professionally pretty challenging. Not letting such an allegation affect your workplace behaviour towards that individual in any way can feel like the hardest thing in the world.

But challenging or not, and however hyperbolic or gratutuitously provocative the terms of the disclosure or grievance, retaliation will very likely be unlawful. It will be victimisation under section 27 of the Equality Act 2010 if the disclosure relates to alleged discrimination and detriment under section 47B ERA if it amounts to whistleblowing. In both cases, retaliation may generate a claim not just against the employer, but also the individual doing the retaliating. An allegation of conduct that does not fall within either the Equality Act or the ERA is probably legally unprotected in that respect, but any decent grievance procedure will make it clear that good faith grievances are protected even if objectively unfounded, so any such behaviour by the colleague or manager potentially incriminated is going to be serious misconduct anyway.

Under both the Equality Act and the ERA, the employer may escape vicarious liability for the retaliation of one employee against another if it can show that it took all reasonable steps in advance to prevent it (the "statutory defence"). Therefore, before you get into the details of your questioning any person involved in the circumstances at issue, it makes good sense for their employer to issue them with a clear oral and written shot across the bows to the effect that whatever their contrary factual opinions and immediate emotional reaction to the disclosure or complaint made, they must not subject the maker of it to any less favourable treatment on that basis. Much more easily said than done, granted, but saying it is still half the battle.

This may also be a good point for discussion with them about any impending processes or decisions in relation to that individual – performance management measures, grievance meetings, redundancy selection exercises, bonus rounds, evaluations, etc. – so that steps can be taken to head off or mitigate the risk that they will be alleged to use that process or decision to effect their retaliation for the complaint or disclosure. Should they step out of that process or at least add some visible objectivity by sharing it with someone not caught up in the employee's allegations, for example? [NB: this is not a legal requirement and may not be possible at all in small companies where there just isn't headroom enough in the senior hierarchy to disqualify members of it from key management duties of that sort on the basis of what is, at that stage, possibly a mere assertion – the key is being seen to think about it. The obligation to take preventative steps also depends on the nature of the allegation and the degree of personal animosity or resentment it is likely to engender in the person accused – a technical breach of a legal obligation reported in a cooperative and remedial spirit is a very different thing from an allegation of wilful and malicious conduct or harassment seemingly phrased to cause as much embarrassment as possible.]

Where the identity of the maker of the grievance or disclosure is being withheld from the witness, the same applies – we recommend a clear instruction at the very outset of the investigation process to the effect that they should not take steps to find out who has made the allegation and that even if they do think they know who it is, retaliation is still a no-no. [NB: This is only the investigation stage, after all – if it turns into something disciplinary with prospective adverse impacts upon the witness, then they are very likely to have a right to know the identity of their accuser at that stage before any final decisions are taken.]

That written instruction will be disclosable in litigation, especially if the employer seeks to escape liability for the retaliation via the statutory defence. Therefore, do try to avoid anything in it that implies bias or pre-determination of the investigation or an assumption that the person concerned is innocent of what has been said – "I know this is all frightfully irritating and unnecessary, but we really must be seen to humour X in his latest tedious little grievance-thingy, so would you mind awfully just leaving him be until it all blows over? Many thanks – see you at the bar later", etc. That is not to say that communication with the alleged wrongdoer need be completely impersonal. By all means acknowledge that the process may be difficult and offer the services of your EAP - just be careful to suggest this to your complainant also.

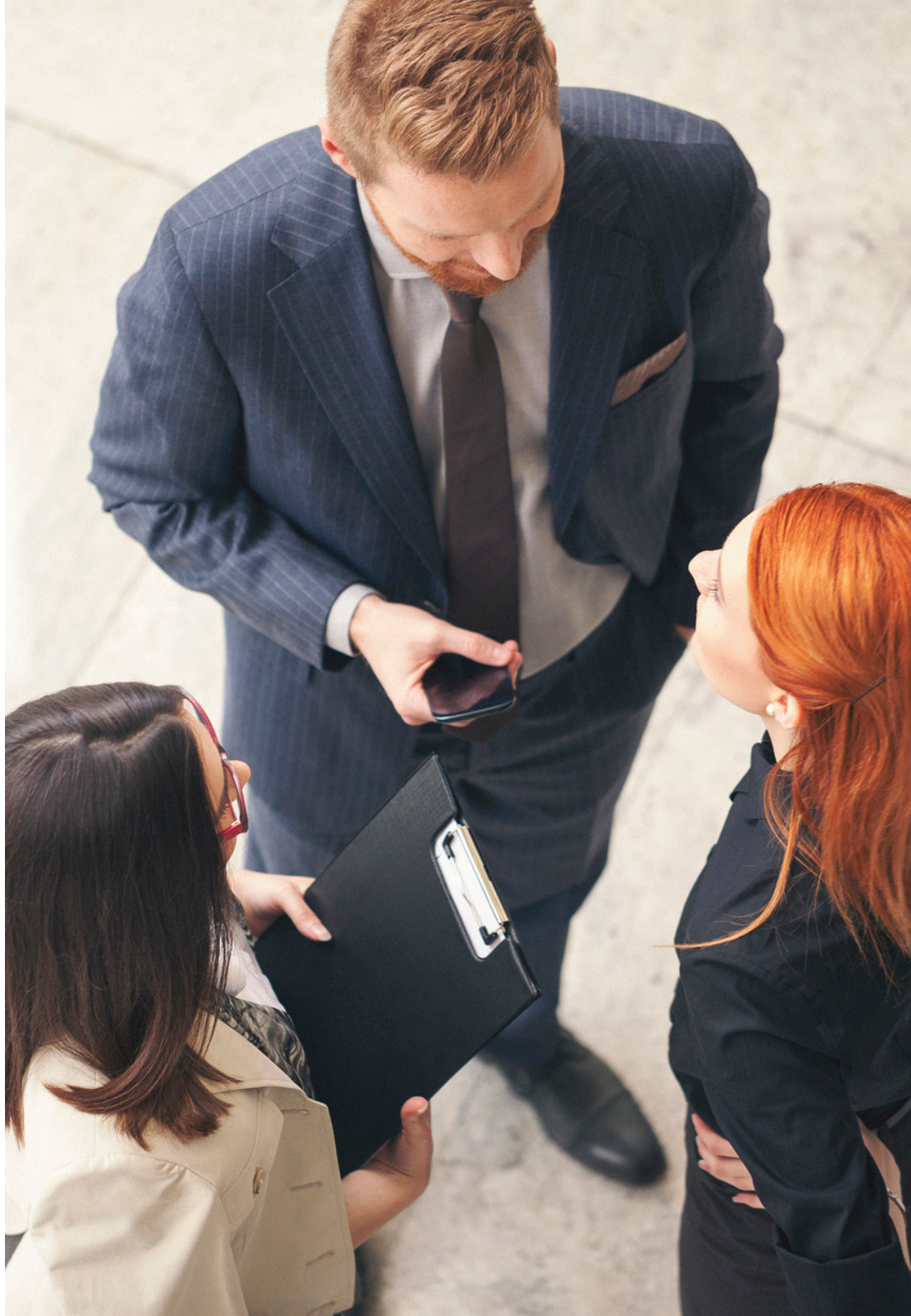
7. The Inclusivity Imperative

The current spotlight upon diversity and inclusion matters shines upon investigations, too. How you investigate employees' disclosures or complaints (especially, but by no means necessarily, of discrimination or harassment) can make a considerable difference as to how those employees and others sharing their protected characteristics view the integrity and value of that process. If you do not believe that you will get a fair hearing because of your race or gender, for example, you are less likely to make disclosures or complaints in a good faith attempt to improve the situation. Instead, you are more likely to sit on stuff that the best interests of the business would suggest should be disclosed, and/or just leave, denying your employer all your talent, experience and commitment, and in no mood to recommend your employer to others who may share that characteristic. Maximising the confidence of all your staff in your investigations process, whether they feature in it as complainant or accused or witness, is therefore a key part of your getting the most out of doing it properly. They must believe that the investigation process you propose is suitable for their complaint or disclosure, that it will be looked at objectively and impartially and that it will lead to meaningful redress where appropriate.

Here are some considerations to that end:

- An inclusive investigations process is not necessarily about obtaining different outcomes. A finding that is affected by the protected characteristics of the investigator will be as discriminatory as one affected by those of the accuser or the accused. The protected characteristics of the investigator are therefore much less important than their being seen to have received appropriate training (both in investigations and in equal opportunities matters), their overall professional credibility and their not having any prior involvement in the matter where possible.
- That training should include note of the clear interplay between investigations and diversity. By way of example only, that might include offering a wider range of possible companions or representatives in investigation meetings for those whose culture, language or disability may make a normal interaction with the investigator more difficult. Similarly, the investigator would have to get past the Western instinct to attach significant credibility to direct eye contact when dealing with witnesses whose cultural or religious background makes that less easy, perhaps through the wearing of a veil or similar, or the temptation to react badly at a conscious or unconscious level to people who by their background or medical condition might become louder or more excitable or speak less coherently when they feel nervous or under threat.
- Deliberately selecting a female or ethnic minority investigator for a diversity complaint does run the risk of sparking a discrimination claim by the person accused. Just as that protected characteristic might (in fact, would be partly intended to) lead the accuser to feel that a decision in their favour is more likely, it may also lead the accused to fear the opposite. As soon as that person is reassured that the ethnicity or gender of the investigator will not make any difference to the outcome, the obvious question becomes why the employer has felt it necessary to pick them for that role if that is the case. Your selection of an investigator should so far as possible be on objective grounds, such as technical expertise, lack of relationship with any of the parties concerned, existing training or experience, familiarity with the relevant working environment, and so on.
- Taking reasonable steps to respect diversity and difference in the conduct of your investigations is not woke-dom gone mad or job-creation for HR - it's the law. If your report is found to be either consciously or unconsciously tainted by discriminatory factors, everything built upon it is likely to collapse too.

- There is nothing implicitly discriminatory about serious incompetence, but if your investigator makes a total hash of the process, that is still an easy allegation for the disadvantaged party to make. The conduct of the investigation process itself must therefore not just be, but also be seen to be, fairly scrupulous (though of course retaining the right to act anywhere within the range of reasonable responses). That means perhaps interviewing some witnesses suggested by the complainant even though you could reasonably conclude on a different day that they would not add anything, or being willing to hear representations on points that you are already pretty certain are too old to be remediable or too trivial to justify any redress in any case. Where the investigator proposes some corner-cutting in these respects in order to get more quickly to the fundamental question of appropriate redress, if any, then this should be put to the person making the complaint or disclosure as a proposal, and their views on it heard before any final decision is made. The investigator will not be bound by their views, but it would be hard to argue a lack of inclusion, even to yourself, if you have been specifically consulted on the detail of how the investigation is to be conducted.
- In order for the investigation process to retain its credibility, it is important that where relevant factual contentions are rejected in whole or part, the reasoning behind that decision is set out clearly and in detail enough that the person raising it can see why they were rejected. That is likely to entail a slightly more detailed rehearsal of the investigator's thought processes than is often seen, but although that is extra work, it also goes to show both the accuser and any later lawyer or employment tribunal behind them that the complaint has been taken seriously. That will make it harder for the complainant to believe reasonably (let alone prove) that the investigation output is itself the product of some form of discrimination.
- Where an investigation does find fault of a discriminatory nature, the whole process will lose credibility unless some sort of follow-up action is taken as a result. That does not automatically mean disciplinary proceedings or dismissal, and it is important that complainants see that there will be some measure of proportionality in the employer's response. That will make it easier for employees to raise small points without fear of the matter running away from them, and also less alienating for those who might be accused of minor or inadvertent wrongdoing who need not feel that their whole job is at risk as a result. There is nothing in the fact of a grievance or complaint relating to alleged discrimination or harassment (except where it is obviously intentional) that prevents mediation being the appropriate way forward in most cases. Keeping in mind the basic principle that the investigation is only a means to an end (the resolution), the greater the extent to which a disclosure or grievance can be resolved amicably in that way, the smaller the damage done to necessary workplace relationships, so the smaller the likelihood of unlawful victimisation.



8. Do Not Skip the Opening Ceremonies

You have now done all the prior preparation for your investigation that you can – identified the relevant policies, noted the points you need to get at, maybe heard what the complainant wants out of it all, understood the limits of your own brief and made sure that there is no avoidable reason why you shouldn't do it. Now it comes to the actual investigation part – talking to the makers of disclosures or complaints, those responding to them and drive-by witnesses.

You can find untold volumes of advice on this particular contact sport – just googling "interviewing witnesses" today pulls up 16 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.

After the introductions, what should you say in opening the process?

- What your role is – are you merely producing a report on the facts as you find them, or also making recommendations for next steps?
- Who within the employer has asked you to carry out that role? That gives the interviewee someone to complain to about you, but, more particularly, shows that you have internal accountability to the business.
- The particular issue you are looking into. How much detail is required here will depend on who you are interviewing: (a) the person making the allegation or complaints knows more about what is going to be discussed than you do, so no real explanation is required there; (b) a third-party witness need (in fact, should) only be told about the parts of the complaint that concern them (the wider context is unlikely to be relevant and could lead the witness to give answers aimed at the bigger picture rather than based on their direct knowledge of their own little piece of it); and (c) where the interviewee is to be asked to respond to particular allegations against them, they will fairly have the right to understand what is being said in almost all the detail you can provide, as a minimum enough to allow them to admit, deny or explain each incident and to know what further evidence may be relevant. If they do not have that information in advance then you should consider granting any reasonable request that they may make for a little time out to consider or collect evidence on any points new to them.
- How you will be noting what is said – a separate note-taker, doing it yourself, making an electronic record, etc., and your willingness for the interviewee or any companion to make their own notes if they wish, plus your intention to send them a copy of the typed-up notes when they are done.
- Some sources say that the investigator should promise to **agree** those meeting minutes afterwards, but Acas does not and we would not generally go further than inviting comments on them. Seeking agreement can be an obstacle to progress – you know what you heard, but the inevitable temptation for a party asked to agree notes is to require them to say what they realise in retrospect they should have said, rather than what they actually did. Comments or supplementary evidence received can still be kept on your file, however, and taken into account if it becomes appropriate to do so.
- An approximate but not binding timescale for the completion of your investigation.
- That you are not able to guarantee confidentiality for anything that the interviewee tells you, on the basis that if the issue becomes disputed or there is a data subject access request, their evidence may have to be disclosed.
- On similar grounds, that you will not be able to take into account in your conclusions anything that you are not able to refer to in your report. Therefore, there is no real scope for the interviewee telling you things "off the record".
- It may be that the launch of a formal investigation and the realisation that it is all a bit more serious than they thought (in particular that they are imminently going to be pressed to put flesh upon the bones of their allegations) may lead the employee to seek some form of exchange with you about a resolution that could be reached without all this fuss. How you react as investigator depends on whether that approach is on or off the record. The employee may be answering belatedly your question about their ideal outcome from the grievance, in which case you note it down and move on. Alternatively, they may be making or inviting a proposal outside the formal process (in particular, almost anything involving monetary compensation), which will probably be without prejudice. If it is the latter, it is wise to shut that conversation down immediately. They can be invited to pursue it instead with HR, Legal or a suitable line manager, but if you as investigator get into it, then you will hear things that you cannot then rely on and/or are very likely to lose your perceived neutrality. We have known cases where (with the knowledge and consent of all parties), the investigator has very successfully morphed into a broker or mediator, so it can be done. However, the obvious risk is that if it turns out that no agreement can be reached after all, your perceived ability to investigate impartially may be prejudiced.
- Any questions? Happy to go ahead?

9. To Lead or Not to Lead, That Is the Question

A great deal of the available guidance on conducting workplace investigations relates to the form of your questions of the parties involved and, in particular, to whether they should be open, closed or leading. This is the difference between:

- "And what happened next?" – Open, because the answer can go off in any direction.
- "Did X happen next?" – Closed, because it allows only a yes or no answer.
- "And then X happened, didn't it?" – Leading, because it clearly points the witness towards a particular answer.

The big no-no in internal investigations is the leading question. It risks suggesting that the investigator already has their conclusions made and is just looking for evidence to corroborate them. In court or tribunal, excessive leading of the witness will be valid ground for objection and some discretion lies with the judge to discount or attach less weight to evidence given in response to such a question. But what significance does it have in an internal workplace investigation that is likely to be some steps back in time from the issue that forms the grounds of a later claim? Will evidence of your asking leading questions in the course of your investigation invalidate the outcome or leave open to challenge any decisions taken on the basis of what you found?

Not asking leading questions is harder than it sounds, especially where as investigator you do already have at least a provisional view of who did what and why. Seeking affirmation of one's understanding is just human nature. The obvious problem is that seeking corroboration to support a provisional or developing version of events (which is quite legitimate) is outwardly indistinguishable from doing so to reinforce a conclusion already made (which is not). Because even professional advocates get on the wrong side of this on a regular basis, sometimes even inadvertently, avoiding leading questions is not an absolute requirement of a legally robust investigation. That would be a counsel of perfection and that is simply not required, only that your conduct of the enquiry is reasonable. A handful of such questions won't make any material difference to this, especially if they relate to relatively uncontroversial matters or if the same evidence is given by others or repeated by that employee at a later point without that prompting. You would also gain additional protection against a challenge to your findings if the witness receives a note of your meeting with them and does not seek to revisit what they said, or if you allow the employee to be accompanied by a colleague or trade union representative in the meeting and they don't take the point.

However, there are still limits and a good investigator will try to keep inside them. Where key facts remain unresolved, it is better to ask an open question about them than for the investigator to present their understanding of the position and then ask the witness to agree or disagree. That can blur recollections and lead to witnesses losing track of what they know for a fact as against what they have been told is a fact. Once the broad factual outline is established, a move to more closed questions can then help nail down individual details within it. Leading questions are best kept for facts that are completely incontrovertible or to echo what the witness has said, so help them feel heard. In a bullying investigation, for example, you might start with open questions – "what did they do that you say was bullying?" Then closed – "and on that occasion, what were the words they used?" Then (technically) leading – "and that is what made you feel threatened and demeaned, yes?" That is leading because it suggests the answer, but is not a problem because since that is the subject of the grievance, you already know how the employee will respond.

Do keep in mind that the employment tribunal will not expect the standards of a professional advocate and therefore that the likelihood of its ruling your investigation an unsafe foundation for the subsequent actions of the employer is usually negligible. The principal exception to that will be where your questions are so consistently leading, especially towards one side of the argument at the expense of the other, that you forfeit any appearance of impartiality. That will put a bus through the Acas guidance, will certainly take your investigation outside the range of reasonable responses, and so will greatly risk undermining the legitimacy of that subsequent action.

Related to this is avoiding the temptation to use the language of cross-examination that you may have seen in court television dramas. First, it's just television. Second, you are not seeking to discredit the witness evidence, so any challenge from the investigator beginning "I put it to you …" is almost certainly a mistake (quite aside from what a colossal charlatan you feel saying it), along with "Is that what you're telling me? Really?" and televisual rolling eyes, theatrical sighing or derisive snorting. However, it is your job to test what you are hearing, so there is nothing at all wrong with pointing out obvious inconsistencies within the witness' evidence or between theirs and someone else's, and asking them nicely to explain them. Seeking clarification is part of your role but overt scepticism or attack is not. You are not Holmes or Poirot, so not spotting tiny clues or cues for new lines of enquiry won't do you any harm. You don't have to go down every possible evidential rabbit hole to see what you can find, just in case. But not picking up clear gaps or clashes within the evidence – the sort of thing where if sat in an employment tribunal in a year's time, you would be quite unable to explain how you had missed it – is a different matter. It will indicate that you weren't really focusing on what you were hearing or indeed on what you were doing there in the first place.

10. Sticking to the Brief?

One question that may come up at or before you plunge into your investigation questions is that of legal representation at the meeting for the witness. If the employee says that they wish to bring their lawyer, do you have to agree? If not, should you agree anyway?

The law on this is very clear - there isn't any - and therefore your witness can effectively forget about any absolute right to turn up armed with legal counsel. Even if the statutory entitlement to be accompanied at grievance and disciplinary meetings applied to purely investigatory get-togethers, which it doesn't, it provides for colleagues and trade union officials only. It remains good practice to offer equivalent rights to a companion in an investigatory meeting, but that still rarely includes lawyers. There are some obvious grounds for declining that request, but also a number of less obvious reasons why it might not be the worst thing in the world to have a lawyer present and may actually help you get to the bottom of the questions you are looking into.

Reasons for saying no:

- The risk that the lawyer will feel obliged to earn their fee by undertaking a pointless but vigorous cross-examination of you while you are trying to get something out of their client.
- Some lawyers are, whether intentionally or not, more adept than others at keeping to the point.
- Legal representatives may advise their clients not to answer certain questions or otherwise discourage a free and frank dialogue around the issues at stake.
- If the witness brings a lawyer, you may feel it necessary, even as neutral investigator, to ensure that you are not legally outgunned by bringing your own. If that is the plan, then for maximum effect, your lawyer should ideally be taller and better-dressed than the employee's (a top tip inexplicably omitted from the Acas guidance on investigations). However, having two lawyers present risks the unhappy prospect of the representatives sparring round each other at your joint enormous expense while neither you nor the employee dare to say anything at all.

On the other hand:

- If your witness is particularly young, nervous, garrulous or confused, a calmer presentation of the evidence may be helpful. Similarly, it might well be a reasonable adjustment to allow legal representation if the employee suffers from a disability that makes it hard for them to put their case coherently. If you would be prepared to go outside the traditional colleague or trade union official in such cases, then your objection on principle is already holed below the water line.

  To then agree that someone can bring a friend or relative into your investigation "so long as they're not a lawyer" just suggests that you intend or expect to say something inappropriate in your meeting, and do not want it heard by anyone likely to recognise it as such – not an attractive stance.
- Where the potential consequences for the employee of your findings are exceptionally serious (i.e. they go beyond possible loss of employment to loss of career, most commonly in regulated environments such as teaching, medicine or financial services), then the employment tribunal and perhaps the relevant regulator will welcome the extra layer of procedural insurance that the attendance of counsel for the employee should bring.
- Actually, lawyers really don't like attendance at such meetings, as it denies them the ability to do what they do best, being wise after the event. A lawyer in the thick of an investigatory meeting knows that if they miss a point or their client goes particularly off-piste and they don't correct it immediately, it will be very hard for them to use it against the employer later. It also has the potential side effect of making them into a witness in any later employment tribunal proceedings when they would much sooner be on the far side of the table from the judge.
- Allowing the witness to bring their lawyer denies them one basis on which to delay the process. That is particularly important where there is some imperative to resolve the matter quickly, e.g. where the protagonists are still working together.
- How would the employee's seeking some sort of right to silence impact your investigation? You might not hear evidence that could have been helpful, but that does not prevent you from reaching a conclusion on the balance of probabilities based on what you did get from that witness or others. There is no actual right to silence in internal investigatory matters, even if there might be in relation to parallel criminal proceedings. A witness is fully entitled to take the view that protecting their position on the criminal front is more important than in relation to their employment or the subject of the investigation, and so to clam up when asked about anything awkward. In the end, however, that still does not prevent the investigator from drawing reasonable adverse inferences from that silence, especially if the witness could easily have given a non-incriminatory reply if it were true, but doesn't.

So, overall, the question of whether you should let lawyers into your investigation meetings is one that you should answer on a case-by-case basis, not as an issue of blanket policy. If you allow that right for some witnesses who request it in a particular investigation, and not for others, then expect to be called upon to justify that difference in treatment. If there are good reasons within that range of reasonable responses, however, your conduct should not be open to challenge.

11. "All the Right Notes, But Not Necessarily in the Right Order" – Previewing Your Investigatory Record-keeping Requirements

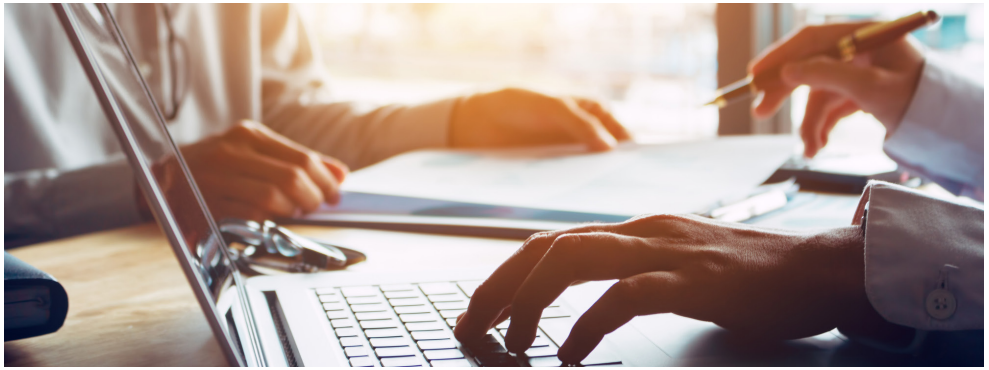
The integrity of your investigation will depend heavily upon your being able to show that the factual conclusions you reached were reasonable having regard to the evidence you heard. Decent notes of that evidence will be fundamental to that. They will show what the witnesses said (and sometimes as importantly, 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 it 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 their normal picture of themself and not on the specific events in question.

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 a grievance appeal than the discovery that the investigator went into the matter with their 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.

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 their 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, keep your notes in the right order, be clear around who is taking them and who is doing the talking. For confidentiality reasons, it is common for someone from HR 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 multitasking 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.



12. Reporting Fit for the Job

So you have asked your questions, made your notes and looked at any relevant documents. You have formed the necessary views about what happened if that is the question or why it did if that is the issue instead. Now you just have to write it all down and job done, yes?

In our experience, internal investigators do reach most of the right conclusions for most of the right reasons but can tend to undo some of that work by the way they reduce them all to paper. 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 that 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, asked some further questions, approached different witnesses or included something else in the report. The only burden on you is to act within the other of the three Rs of a robust investigation, the "range of reasonable responses". If your investigation report shows that you considered a point and rejected it for a half-way sustainable reason, neither the employment tribunal 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 impugned. That means explaining your thought process by express reference to the evidence you heard. 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. Quote the specific bits of testimony or documents that get you to your conclusion. Tiresome, I appreciate, but 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 which is 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 disclosure or grievance that 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 three Rs of a good workplace investigation, the focus on matters that are 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 to move on to those parts that have real practical significance.

The Acas guidance on workplace investigations includes a template report at the back, a turgid great thing almost guaranteed to produce a document heavy on structure and process but without nearly the same attention paid to the vastly more important question of content. Put bluntly, the format of your report is irrelevant. There is no need for separate schedules of documents reviewed, of witnesses, of interview notes, chronologies, etc. 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 and (only if you were asked to make them) your recommendations for next steps. Something like this perhaps:

- What is the question I am investigating, and any questions I am expressly not looking into
- My executive summary of the main findings
- The tests or standards against which I assessed the evidence, whether statutory or regulatory definitions, contract or policy terms, industry practices, official guidance, etc.
- The findings of fact I made in relation to each salient point, plus how I got there
- If appropriate, what I think should happen next

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?

13. Post-report Disclosure Requirements

Your report is done, so what next? Where does it go now, and what should you do with all your papers?

As a rule, your "client" for the purposes of the investigation is your employer, not any one or more of the individuals who may have participated in it. It needs to be able to present those people with not just the facts, but also (remember that investigations are just a means to an end – resolution – not an end in themselves) its decisions or proposals as to what should be done about them, which may or may not be in line with any recommendations made by you. Therefore, your report goes first to the employer and not to the parties themselves. It is the employer that should deal with the onward distribution of the report to concerned parties at such time and with such covering comments as it sees fit, not you.

It is of the very nature of workplace investigations that someone will probably be unhappy with the factual conclusions or recommendations for resolution contained within them. They will demand sight not just of the report itself (there are very rarely any good reasons for denying this), but also of all the inputs into it by way of witness testimony. They will then spend many hours crawling through the details to see if any tiny cracks can be levered open in your journey from evidence to outcome which might allow them to discredit your work. This is rarely a fruitful exercise because, unlike a criminal investigation where tiny doubts or procedural errors could lead to the case falling over, an employer needs only that the investigation outcome was within the range of reasonable responses. Minor omissions and inconsistencies generally have far less significance to the integrity of the outcome than complainants would like to think. Nonetheless, people try. So what are your rights and obligations in relation to the disclosure of the evidence you heard, any preliminary drafts of your report and any correspondence with the employer about it?

That depends partly on how the demand for that disclosure is made – a simple request, a data subject access request (DSAR) or under litigation disclosure rules. An obvious preliminary point applicable to all three is that the more visibly reluctant the production of documentation relating to your investigation, the greater the impression created that you have something to hide. If your investigation was genuinely independent and your conclusions all defensible, there should be little reason for that.

Then we should note the separate parameters of material responsive to a DSAR as against litigation disclosure. A DSAR should produce all material related to the requestor, whether or not relevant to the issues investigated, while 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.

In any of those cases, the employer may fear that having seen at first hand who said what about them, 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 employer 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 or employment tribunal disclosure requirement. Such a promise might be good reason to deny a first-instance simple request for sight of the evidence, but nothing further.

Should you avoid all this bother and potential pushback by simply chucking out all the prior paperwork relating to the investigation report immediately after it is finished and then blaming the GDPR for making you do it? No. First, the GDPR imposes no such requirement on you, as a minimum not until the limitation period has passed for any legal challenge to the report by the employee. Once such a challenge is intimated, even if not brought, then the personal data contained in those background papers may become necessary to allow the employer to comply with a legal obligation (defending itself against the threatened challenge) or to preserve its legitimate interests and so may be retained entirely lawfully. Second, 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 range of reasonable responses. Third, evidence that the HR shredder was running hot the day the investigation finished just looks like an organisation too keen to cover its tracks, not like an impartial professional with no fear of scrutiny of their work.

The disclosure obligations are particularly important if you seek the views of any party on the report itself before you finalise it. This is not generally a great idea because it opens the door to allegations that you have somehow needed the approval of that person to your conclusions, and as a truly independent fact-finder, that should not be the case. Any correspondence that you may have with the employer about the report before it is finalised will be disclosable, as will earlier drafts. Be careful in particular to avoid a situation like *Ramphal v. Department of Transport* in 2015, where in the process of checking it with HR, the disciplinary manager's recommendation somehow morphed from warning to dismissal without any disclosed explanation as to how, creating obvious scope for challenge. If you are genuinely uncertain about some part of your report, in particular around the relevant law and whether it is engaged by the factual conclusions you have reached, then take professional legal advice in order to ensure that both enquiry and response are covered by privilege. 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.

14. Closing Submissions

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 that if you put your mind to it at one level or another your report will be a disappointment to everyone involved. That is no bad thing. A report that sides wholly with one party or the other is far less credible than the one that finds a degree of culpability (not necessarily serious or disciplinary-actionable) all round.

In this guide, we have considered the various precautions that can be taken as you go along to minimise the scope for effective challenge to your report. However, you cannot ultimately control whether what the employer then does with it will lead to litigation. 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 employment tribunal, you will be going along for the ride as well.

Unless the complainant can hole your investigation below the waterline, their chances of making much headway are limited, so if you are there at all, expect some fairly aggressive questioning. 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 and 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 that could justify X's dismissal" (investigation); (b) "I found facts that should justify X's dismissal" (recommendation); and (c) "I found facts that did justify X's dismissal" (decision). You need to be very clear on 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.

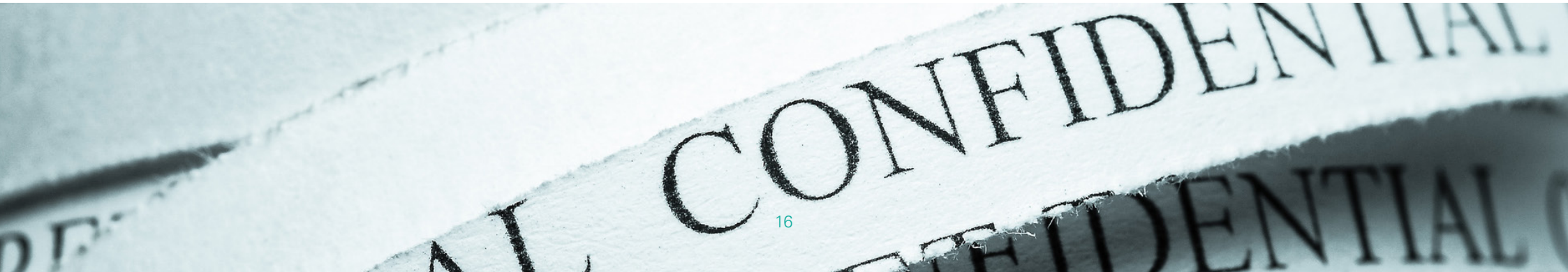
That mental discipline is important because being cross-examined in employment tribunal, especially by a pro, can be a deeply unpleasant experience. Someone you have never even seen before sets out deliberately to make you look unprofessional, incompetent and dishonest in a public forum. One common means 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 that 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 that 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 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 employment tribunal will hear you loud and clear.

15. Legal Notices

Throughout these pages we have referred repeatedly to the absence of any law about the conduct of workplace investigations in the UK, and in broad terms that is true. However, while there may be little to no law **about** investigations, there is quite a lot **around** them. It is important to ensure that in your steely-eyed pursuit of the truth, you do not accidentally fall over some other jurisdiction's trip-wire and blow the whole thing up. Please keep an eye on this non-exhaustive list of other law to think about:

- In any workplace investigation you will almost inevitably be processing third-party personal data. In principle that is obviously OK, and in many cases it will be with their actual or deemed consent. Even where the fact of processing is accepted, however, you will remain bound by all the remaining data protection principles, including obligations in relation to security, access and data minimisation (holding it for the shortest practicable time, for the narrowest practicable purposes and disclosing it to the smallest practicable number of people). It is probably over-simplifying things only slightly to suggest that if you hold that data until the realistic time has passed for any challenge to your report, you are unlikely to face material problems.
- Even where you are in-house counsel, work done to ascertain facts probably will not be covered by legal privilege since it does not concern the seeking or provision of legal advice. Internal colleagues used to dealing with you under cover of privilege should therefore be put on notice at an early stage that correspondence with you about facts for these purposes is unlikely to gain the same protection.
- Periodically one or both of the parties to a workplace investigation may start jumping up and down about alleged defamation in the original accusation, the push-back it receives or where you have put someone's nose out of joint by the findings in your report. This is not something which as investigator you should counsel against, since it risks forfeiting your impartiality. Furthermore, you can usually rest assured that the people who do the most jumping up and down about defamation are those who know the least about the practical reality of such claims, in particular their eye-watering costs. Those tantrums tend to blow over once the enraged employee has taken some proper advice. In any case, so long as your report sets out its workings in reasonable detail and is not wholly fanciful or malicious, you will generally have a cast-iron defence to any such threats.
- You are investigating a complaint within the workplace, not fighting international terrorism, so do steer clear of methods of investigation which might take you too close to the edge of what is lawful. Trespass, invasion of privacy, unlawful interception of written or electronic communications, poking about in bank accounts or police records, and breaking into desks and cupboards at night in a balaclava should all be left to those nice people on the television. In real life, that can only end badly for you and your employer. The same is often true of the use of external private investigators – no doubt there are periodic successes in exposing deception or other wrongdoing by employees or managers, but you are going to need some really phenomenal wins to get past the potential adverse employment relations consequences of its becoming known that the company uses such tactics. As internal investigator, you should only go down this path with consent from the highest levels within your organisation and on the basis of very tightly drafted terms of reference for the external private investigator.
- If it is likely that your investigation will involve potential criminal matters and you are keen to give a clear run to any police or regulatory prosecution of your employee, additional formalities may be advised in the course of your witness interviews. In particular, you should strictly "read them their rights" making it clear that they do not have to say anything if they don't want to. For obvious reasons this is the very opposite of what most workplace investigators will wish to do (see chapter 10), so unless a subsequent criminal prosecution of your employee is important to the company, don't worry about this.
- This Reasonably Informal Guide is written very much from the UK perspective. If your investigation has a material overseas component (whether through the location of the witnesses, the conduct complained of or the legal obligation at risk in a whistleblowing report), do take separate advice. Data protection and privacy rules in particular can be much more rigid than in the UK and increased procedural safeguards may be appropriate.



16. Policy Matters

So all that said, should you consider introducing some form of investigation policy to give both employees and responsible management some prior idea of what the process would look like? After all, employers are increasingly encouraged to maintain policies on all sorts of things, so what harm could it do?

One possible answer to that, if your policy is not carefully put together, is "really a great deal". Inadequate guidance to management or insufficient clarification or expectation management for whistleblowers or employees with grievances or other complaints could leave you saddled with a worse outcome than had you not tried to bring some order to it all. But that is not necessarily the case. A policy which is helpful, pragmatic, flexible, proportionate and not actively off-putting in its tone could go a long way towards demystifying what can be quite a fraught business all round.

So far free-standing investigations policies are relatively rare, but the increased emphasis placed on proper investigation of alleged wrongdoing of almost any description suggests to me that this will change. It is obvious that the proper investigation of allegations of sexual harassment or non-financial misconduct, for example, will stand an employer in good stead should the EHRC or the FCA come knocking.

I can't see much chance of further help from the Government or Acas at this level of detail, so here are some Relatively Informal suggestions for what such a policy might usefully include, whether you maintain it as a separate document or simply build these thoughts into your existing grievance and whistleblowing policies:

- a statement that the policy provides guidelines only and is not contractual, with the consequence that the employer may depart from it as it reasonably considers appropriate;
- notice that while the employer may choose an external investigator, it is never obliged to do so;
- an express right for the business to request that the dispute be mediated as a first step, rather than its being subjected to a contested and destructive drains-up investigation of matters of little legal and/or practical significance;
- an expectation that someone raising a complaint or protected disclosure will be willing to provide all the information that they rely upon to substantiate their concern, including the identification of witnesses and any relevant emails or other documents;
- express encouragement to the complainant or whistleblower to consider and indicate specifically what they seek from their disclosure, if anything;
- a note that while complaints and reports will generally be treated confidentially, this may not be possible if that would prejudice the company's ability to investigate the matter fully or if there is litigation or a Data Subject Access Request;
- a clear statement that complainants should not usually seek to run any parallel investigation of their own;
- a reiteration of the confidentiality obligations applicable to all parties to the dispute, but also of the limitations which may be placed on the company's ability to investigate if the complainant reports only anonymously or declines to let the employer use their name or particular bits of information for fear of being identified;
- an express rehearsal of the "recent, relevant and resolvable" principle to encourage employees to raise matters as they arise and to manage expectations as to the possible breadth of the company's investigation; and
- a reminder that if any disciplinary or other action is taken against another employee following a grievance or whistleblowing investigation, the details of that action are generally confidential as between them and the business and may not be disclosed in full to the complainant.

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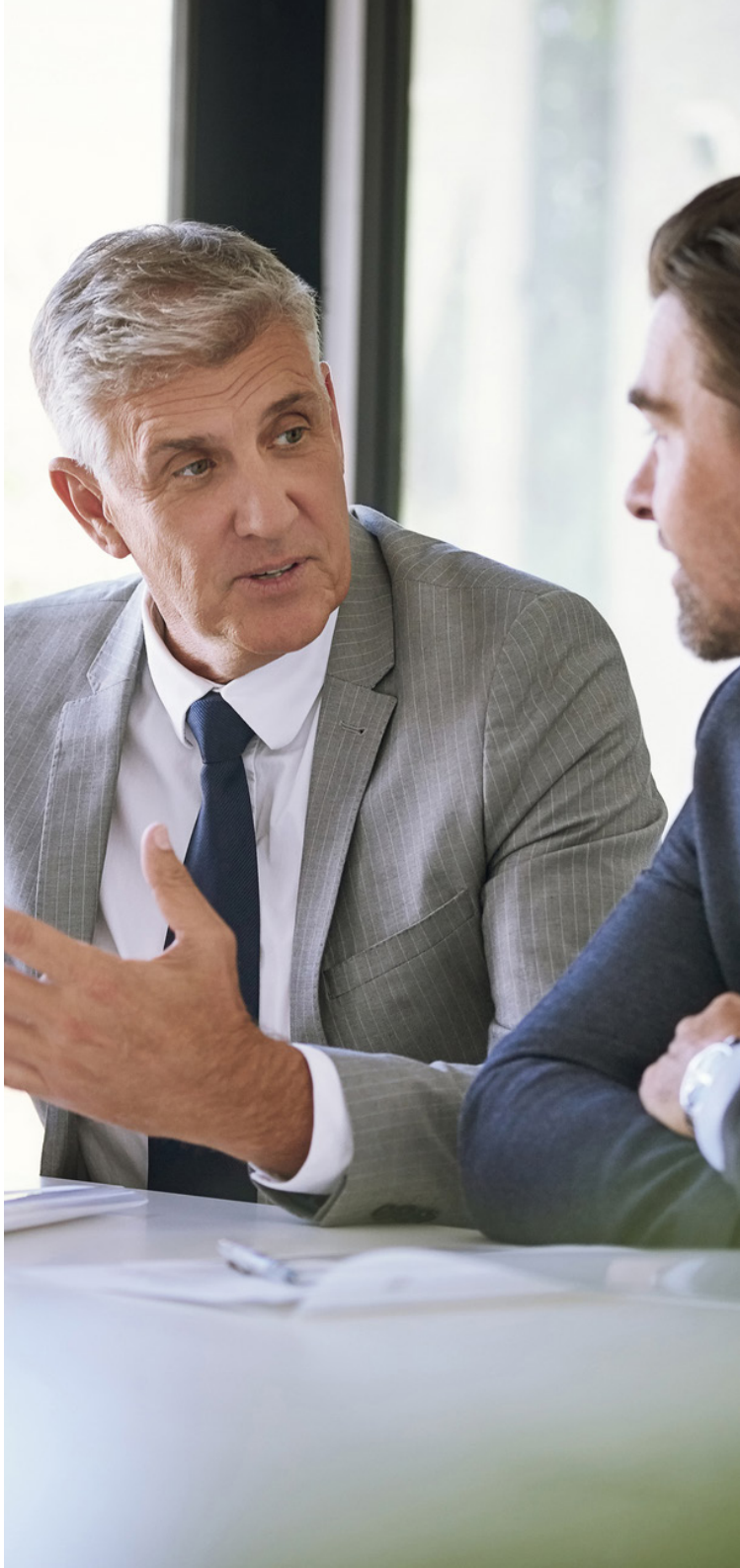

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