



Conducting Employment Investigations

February 2016

Contents	Page
1 Preamble	1
2 Introduction	2
3 Employment Investigations - Why?	4
4 Employment Investigations - What?	5
5 Employment Investigations - Who?	7
6 Employment Investigations - When and Where?	8
7 Key Responsibilities of the Investigator	9
8 Investigative Interviewing	11
9 Lessons from Case Law Decisions	17
Appendix 1 - A Checklist for Small/Micro Employers	20
Appendix 2 - Investigation Process Flowchart	22
Appendix 3 - Investigation Report - Format and Requests	23
Appendix 4 - Pro forma 1- Investigative interview coversheet	24
Appendix 5 - Pro forma 2 - Invitation to attend investigative interview	26
Useful Contacts	27

1. Preamble

This guide is designed primarily for medium-sized organisations in Northern Ireland but the core principles apply as much to small and micro-employers as well as multi-nationals.

The approach to employment investigations that this publication takes is one of 5W - Why? What? Who? When? and Where? It takes an applied common sense approach, guided by court decisions. Its main focus is to ensure that employers get an employment investigation right whilst being fair and reasonable to all those involved in the process.

Employment investigations are not always straightforward and many small employers may wonder why they need something as formal as an "investigation" in order to make what may appear to be a straightforward business decision. (See Appendix 1 Employment Investigations: a Checklist for Small/Micro Employers)

However, smaller employers, as with larger employers, may ultimately need to show an Industrial Tribunal how they arrived at a decision, for example, to dismiss an employee for misconduct. A properly conducted investigation demonstrates the rationality of the process, the logic and overall reasonableness of the employer's decision.

The word investigation can conjure up images of taped interviews, signed witness statements and some sort of court-like process. This is not always the case as the issue at hand may speak for itself, for example, where a sole trader witnesses first hand an employee engaged in something that would reasonably warrant dismissal. In such circumstances there may well be no need for an investigation.

An investigation for a small employer may simply be an accurate record of the decision making "audit trail" whereupon the employer shows what informed the decision making process, for example, clear facts, reliable sources of information, the organisation's custom and practice, policies and rules and the reasonableness of any subsequent decision.

Question: *How do you make a decision regarding whether or not to discipline or dismiss an employee who has allegedly engaged in some form of misconduct?*

Answer: *Conduct an employment investigation.*

2. Introduction

The basic purpose of conducting an employment investigation is to inform a decision making process and as with most decisions in organisations, the situation and context informs everything.

Due consideration must be given to things such as:

- the size and resources of the organisation (proportionate expectations)
- the circumstances of the case (nature of the alleged offence)
- the legal issues associated with the case (eg fraud, whistle-blowing, etc.)
- the fairness and reasonableness of the entire investigation process (demonstrated by a proportionate, even-handed approach)

There is nothing enshrined in law that stipulates how an employment investigation should be conducted but court case decisions from the 1980's onwards require the process to be supported by the concepts of fairness and reasonableness.

Case law has developed, albeit in a fragmented and piecemeal way, to provide some degree of guidance for employers and employees alike. (See Section 9 Employment Investigations - Lessons from Case Law Decisions on page 17).

There is no "one size fits all" approach to employment investigations and how they are conducted. Elements such as the policy, what has happened in the past and what passes for fair treatment and so on, will determine the approach to the investigation in each organisation.

The lack of a model approach to employment investigations can cause confusion over expectations regarding ideas about standards of proof, quality of evidence, the right to cross examine and natural justice.

Throughout this guide, expressions, such as, "each case turns on its own facts", "context informs everything" and "did the evidence provide the grounds for an employer's genuine, honest and reasonable belief?" serve to demonstrate that a tailored approach will be required when developing a set of procedures for handling employment investigations.

In writing an investigation procedure it can be difficult to comprehensively and definitively develop one that is all encompassing. A balance needs to be struck between prescription and flexibility as one size may not fit all.

Line managers who are called in to conduct an employment investigation are often daunted by the task before them given the potential implications for the person who is the subject of the investigation, for example, being faced with discipline or dismissal.

Problems regarding inconsistent approaches, quality of investigative techniques, conflicts of interest, differing opinions on time/effort required all provide the basis of an informal or off-the-cuff approach to employment investigations which may not stand up to scrutiny in the event that the case goes before an industrial tribunal.

These Good Practice Advisory Guidelines seek to give anyone who may be potentially involved in an employment investigation a degree of direction in terms of what is considered good practice. They raise reasonably foreseeable questions that need to be answered in advance of the investigation going ahead.

All too often it is tempting to engage in a "cut and paste" exercise using a model template to make life a little easier. However, each case is different and although a consistent and fair approach needs to be adopted every time an employment investigation is needed there is no one singularly accepted model procedure in existence. Context will inform many things in an investigation and due regard must be given to things such as equal treatment for the grievant whose complaint triggers an investigation and an alleged perpetrator who may be the subject of the investigation.

In order to devise a tailored approach to the needs of your organisation it is suggested that you work your way through this publication answering the core

questions posed. This will inform the basis for an outline employment investigation procedure unique to your organisation.

Getting the basics right first time every time is essential and this is where the 5W approach helps to set out a framework. A starting point could be to ask the following questions:

- Why is the investigation necessary?
- What facts do we know for certain
- Who is best placed to investigate the circumstances?
- When should the investigation take place?
- Where should the investigation take place?

Once you can start to fill in the blanks a process and a picture of what happened will begin to emerge and the framework of the investigation process will begin to take shape.

The Labour Relations Agency offers a Good Practice Seminar on conducting an employment investigation which is free of charge and is open to anyone with an interest in the subject, for example HR professionals, line managers, trade union representatives and supervisors.

3. Employment Investigations - Why?

An employment investigation is conducted in order to inform the decision making process and as such it demonstrates how fair and reasonable the employer has been with regard to any decision that is taken subsequent to the investigation.

The importance of the investigation should not be underestimated as the concepts of procedural and substantive or essential fairness apply as much to the conduct of the investigation as to the decision that results from it.

The core question to be answered from the outset is "how reasonable was the employer?" and the answer to this question may ultimately lie with an industrial tribunal or court. However, an employer can examine their own practice and demonstrate fairness and reasonableness by answering some of the following questions:

- Did the approach taken to conducting the employment investigation reflect the size, nature and resources of the organisation, given the subject matter and the severity of the issue?
- Were the basic principles of fairness followed? For example, did the employee who was the subject of the investigation get the opportunity to put their side of the story across during the investigation?
- How structured was the approach to the investigation? For example, who conducted it? How did they prepare for the investigation? What sort of evidence was required? How many witnesses were needed? What sort of questions needed to be asked?

An employer has the opportunity to be proactive in relation to the above issues by drawing up simple rules and procedures in the event that an employment investigation becomes necessary. Having an investigation procedure goes towards demonstrating that the employer has a fair and consistently applied approach to finding out what happened before making a decision. In harassment cases, for example, a fair and reasonable investigation points towards the reasonable steps defence that an employer may need to rely upon in a tribunal (see Equality Commission's [Unified Guide To Promoting Equal Opportunities In Employment](#) - Chapter 16)

The existence and consistent application of procedure cuts across two core issues that an industrial tribunal examines namely procedural and substantive fairness.

Procedures may include checklists concerning sequence of actions, what parties need to be told in advance of the investigation, pro formas to be used in an investigative interview and so on. (See Appendices 2-5 for details)

4. Employment Investigations - What?

An employment investigation is the process of drawing out the facts, making recommendations (in certain cases) and presenting them to an individual(s) with the responsibility of making a decision with regard to any disciplinary or

dismissal sanction that may be necessary. In other words, the employment investigation has a purely informative role and is not responsible for decision-making as such.

An investigator is not required to make a value judgement on the individual(s) who is subject to the investigation and in this respect needs to remain objective in his/her approach to conducting the investigation.

At the core of the investigation is the notion of "informing the decision making process" so that a reasonable employer can rely on the integrity of the investigation as being the sound basis for a fair decision.

Some core questions that need to be answered include the following:

- What is the employment investigation for and what are the sources of evidence at the heart of the investigation? (eg is it hearsay or is there unquestionable documentary evidence?)
- Who determines the Terms of Reference covering the remit and extent of the investigation) for the investigation and are these agreed with the investigator in advance?
- What are the investigator's exact and written Terms of Reference? (For example - To investigate what happened between Mr X and Mr Y in the canteen on the morning of DD/MM/YY)
- What has the approach to employment investigations been in the past?
- Has there been consistency in decision making in the same or similar instances in the past?
- Did the investigation report provide the basis of a fair and reasonable decision by the employer in this particular situation and given all the circumstances?

Preparation is vital if an employment investigation is to be successful and thus the investigator needs to know exactly what is required of him/her in advance of conducting any investigative interviews and drafting an investigative report.

It is vital that the investigator knows particulars such as the timeframes

involved, and the potential legal framework which supports the investigation (e.g. fraud, misconduct, data protection, etc.).

5. Employment Investigations - Who?

A key question that can often be controversial is who should actually conduct the investigation? The answer to this question varies from organisation to organisation. For example, this role may be filled by a dedicated investigatory officer, a line manager (who has no identifiable conflicts of interest), or an external consultant brought in specifically to conduct the investigation.

In an ideal world an employment investigator should not be subject to suspicions regarding impartiality and objectivity. However, the reality is that regardless of who is chosen to conduct an investigation there may be cries of foul play, for example, on the grounds that the investigator is an employee and would therefore not wish to upset his/her employer, or perhaps a consultant will be perceived as being obligated to the employer as the paymaster.

Thus an employment investigator may find his/her integrity being questioned from the outset and as such it is almost an occupational hazard which can be countered by the individual conducting the investigation in a professional, objective, timely manner and demonstrating consistent honesty and integrity throughout the process.

A basic principle of investigation integrity is to ensure that the investigator has no connection with those subject to the investigation, thus using a manager from a different department to conduct the investigation is quite a normal approach. In smaller organisations such arrangements may not be possible and an investigation may need to be conducted by a supervisor or manager who may have a connection but is required to be professional and objective in his/her handling of the investigation.

Some core questions that need to be answered are, for example:

- What mechanisms exist to ensure investigators declare conflicts of interest?
- What provisions are in place to confirm the investigator's credibility and integrity?
- What provisions, if any, are there for employees to be accompanied in investigations? (There is no statutory right to be accompanied, but there may be a contractual right and many employers offer union or colleague accompaniment as a good practice gesture)
- Who, or what, will act as a recording mechanism during the investigation? (e.g. a secretary taking word-for-word notes or some form of recording device)

Once again if answers are formulated to the above questions in advance of the investigatory interview process then the job of the investigator is made much easier. A policy document can be drafted to include the planning and management of employee investigations. The policy should be communicated and distributed to all employees.

6. Employment Investigations - When and Where?

When?

Whatever has triggered the investigation, for example an employee grievance, will have an effect on timescales. Common sense dictates that employment investigations should commence as soon as is reasonably practicable whilst employee recollections are still fresh.

Most policies and procedures on grievance and discipline issues will have a quantified timescale built into them but not all will give due regard to how long an investigation will take and how it could impact on other timescales connected with it.

Timeliness is a thorny issue with some organisations opting for a vague approach, saying that the investigation will "be complete as soon as possible"

and others opting for a more specific approach saying it will be complete within fifteen days of commencement".

Once again the law is silent on exact timescales associated with employment investigations.

Some core questions in this area include the following:

- Are there provisions in place for extending the timescales?
- How long is the advance notice given to employees for attending an investigative interview and will it be during normal working hours?
- What are the, contents of the letters to the subject of, or the witnesses to, an incident to be investigated? (e.g. regarding an alleged incident that took place on 00/00/00 we would like to invite you to participate in an investigative interview on 00/00/00 at the following time and location.....) (See Appendix 5)

Where?

In relation to where the investigation process should take place the most common questions to answer relate to the following:

- Are interviews conducted on or off site?
- How are the sensitivities of on-site investigations during normal hours addressed?
- How long are the investigative interviews likely to last and will there be more than one?

7. Employment Investigations - Key Responsibilities of the Investigator

The importance of the roles and responsibilities of the investigator should not be underestimated given that a decision on the fate of an employee's ongoing employment may turn on the contents of the investigator's report.

The key touchstone document will be the Terms of Reference that the investigator is either given or formulates by agreement. The Terms of Reference will determine the remit of the investigation and provide for limitations and latitude alike.

The investigator must ensure that the Terms of Reference are clear and focused because if they are not the investigation may change into something more akin to a general query or cultural audit rather than a drawing out of the facts relevant to a specific incident.

Preparation and planning are central to the investigation process and thus the investigator should:

- Report any real or perceived conflicts of interest and disqualify themselves accordingly
- Examine the Terms of Reference and decide who needs to be interviewed (eg who is the subject of the investigation and who can assist with it)
- Analyse the foreseeable issues that could arise (e.g. stress, reluctance to co-operate, requests for anonymity, requests for copies of statements, and so on)
- Look at the order of the events relevant to the alleged incident and begin to formulate the first set of basic open questions that follow the sequence of events with a view to formulating more detailed questions. In addition, draft a schedule of questions for the subject of, and for the witnesses to, the incident under investigation
- Ensure interviews and questions follow a logical sequence, e.g. key protagonists and key witnesses first, and that the questions are focused within the Terms of Reference
- Examine and identify the underpinning framework e.g. legal, civil/criminal. From here be aware of the issues that may potentially fall out from them (parallel criminal proceedings). What is the context of the investigation? eg claiming expenses (Fraud), bullying or harassment (Misconduct), breaches of legal obligations (Whistle-blowing)
- What are the sources of the evidence? - eye witnesses, e-mail audit trail,

document -based evidence, CCTV, circumstantial evidence, or hearsay evidence

- Record and retain all information gathered whilst checking for gaps, inconsistencies and lack of corroboration

8. Employment Investigations - Investigative Interviewing

Employers, employees, union representatives and witnesses should bear in mind that the investigative process, including interviews, is not court-like in nature and should not be conducted in such a manner.

To this extent line managers should not treat the investigative interview as a one-sided inquisition, nor should Trade Union (TU) representatives take an over-zealous approach to defending a member's rights in what is a fact finding process where representation should be unnecessary.

Investigators should pay due attention and regard to the following:

- The time, location and privacy of the interview (core hours, on/off site, etc.)
- How to address the matter of accompaniment or representation in advance of the meeting, e.g. perhaps write to the TU representative and be transparent about the process
- Eradicating possible distractions to the interview (telephone, mobile, tannoy, temperature, persons entering the room)
- Room lay-out (types of chairs, angle of chairs, use of desks), access to refreshments and use of comfort/smoking breaks
- Recording mechanisms and provisions for copies to be made (tapes, CDs, notes), or procedures regarding receipt of typed personal copies of statements made
- Questioning techniques open and framed for example, "Tell me what happened....", "Describe for me if you would....", or Who?, What?,

Where?, When? and Why? (although be careful about asking the why question as it requires tact)

- Questioning styles:
 - Closed - useful for verifying facts but can be limiting
 - Focused - aimed at getting more information by probing
 - Specifying - designed to elicit particular details
 - Clarifying - enabling the investigator to check facts, content and meaning
 - Challenging - used to check relevance
- Remember to use active listening skills by paying careful attention to what the interviewee is saying, listening for the meaning from what is being said as well as what is not being said, and by using accurate paraphrasing to verify accuracy, e.g. "so what you are telling me is....."
- Use techniques such as asking the interviewee to think of himself/herself as having a memory like a DVD film and to remember back to the relevant scene and then "play back" the events in chronological order
- Body language whilst actively listening is vital, thus the investigator should ensure that he/she is facing the interviewee. Always avoid folded arms. Other good practice tips include - leaning towards the interviewee and not slouching or leaning back, and giving the interviewee an appropriate amount of eye contact with a relaxed body posture
- Be aware of appropriate physical proximity, appropriate facial expressions, affirmative gestures (such as nodding), being neither too still nor too animated and remaining non-judgmental
- Examine the quality and sources of the evidence that is being presented in terms of credibility and reliability - a genuine and honest first-hand eye witness, genuine and honest corroborating statements, copies of e-mails (and audit trail e-mails), web monitoring reports, and clear CCTV imagery, all of which are good quality evidence

Many investigators use the **PEACE** model for investigative interviewing:

P = Plan and Prepare - prepare, prepare, prepare (Terms of Reference and key objectives)

E = Engage and Explain - build rapport and be open and transparent about the process

A = Account - allow the employee to provide a full account of what happened *

C = Closure - draw process to end checking all areas have been covered and asked

E = Evaluate - examine the quality of the information you have acquired for your report

**This is where the facts as presented are given to the investigator and it is here that the skills of conversation management are used by the investigator. Bear in mind that the Terms of Reference are central, and that the interviewee does not veer off on an irrelevant tangent, attempt to raise counter-grievances, raise matters which are historical supposition, or engage in conjecture.*

Interview skills need to be practiced and honed and cannot be imparted by an advisory guide such as this. However, due regard should be paid to the need to use conversation management to keep the interview on track. Focus on the facts presented without leading a witness or missing out on facts.

If a witness or the subject of the investigation invokes the contractual right to bring someone with them, the investigator needs to be aware in advance about the capacity in which the other person is acting e.g. a colleague in an accompanying capacity or a TU representative in a representing one. This issue can change the dynamic of the interview given that the representative may argue that they have the ability to answer on behalf of their member which may prove problematic in terms of interview efficiency.

The investigator should also pay due regard to aspects of good practice whilst in the interview and these could include:

- Witness anonymity - this can be a thorny issue and case law decisions give guidance on when it should be granted (internally and externally), for example, if the employee can reasonably demonstrate a genuine fear of serious reprisal
- Is the evidence collated - Clear, Conspicuous and Corroborative (think of 3C's)? Is the evidence Credible, Reliable, Adducible, and Weighty (Think CRAW)?
- Be aware of the procedures involved if an employee attempts to raise a grievance or counter-grievance during an investigatory interview (indicate that there is a separate process for this). Similarly, do not allow the investigatory interview to transform into a disciplinary hearing if things get heated
- Do not confuse assumptions and opinions with facts; investigative reports should deal in just the facts only
- Always retain clear, intelligible and accurate notes; everything is potentially discoverable at an industrial tribunal
- Pay attention to the basics when recording information - dates, times, places, people present, relevant times, relevant facts, relevant answers, signed and dated (signatures are preferable but the process should not be derailed by their absence)
- Try to avoid the need to conduct a second interview as it may get limited results second time round. (Those attending for a second time may be anxious about their recall and this may affect their answers in the interview)
- Familiarise yourself with your policy if there is a criminal element to the nature of the alleged offence. In other words, does the organisation automatically defer to the police and put any internal investigation into abeyance until the police have concluded their investigation regardless of the nature and seriousness of the alleged criminal offence? For example, if £10 is stolen from petty cash is an internal investigation impossible until after the involvement of the PSNI?

- Familiarise yourself with the grievance and disciplinary policies to see where and how investigations fit into these
- Ensure that, where the investigation is on bullying or harassment, the investigation procedure complies with any Dignity at Work policy in terms of things such as protection of victim, precautionary suspensions and compliance with timescales. ([See joint LRA and Equality Commission advice on Harassment and Bullying in the Workplace](#))
- Be prepared for things such as data subject access requests being made, by those involved in the investigatory or grievance or discipline process, under personal information rights afforded by the Data Protection Act (1998). ([See "Guidance from the Information Commissioner's Office - The Employment Practices Guide" section 2.13 page 49](#))
- Check your understanding of the procedure involved when an employee is being uncooperative with the investigation process. Will the employee be made aware that this can be virtually the same as a failure to obey a reasonable instruction and possibly lead to a disciplinary sanction?

It is always difficult for an investigator to balance being prescriptive, for the sake of certainty and consistency, and being flexible in order to adapt to the requirements of the particular case. In this regard each case will turn on its own facts and the investigator will need to make decisions on issues that arise at any given time, for example:

1. How many attempts should be made to re-schedule interviews when witnesses/subjects cannot attend an initial date? (e.g. a maximum of two)
2. What is the policy if an interviewee wishes to record the proceedings in an employment investigation interview? (check data protection requirements)
3. What are the arrangements in place for a witness/subject who becomes angry or distressed during the interview process? (personal safety provisions should be in place)

4. How will the quality and sources of evidence, especially if solely circumstantial or based on hearsay, impact on the finding and recommendations of the investigator?
5. What if the investigator is asked to make recommendations even though they were not part of the original Terms of Reference? This issue should be clarified from the outset as many external investigators will see their role as fact finders only and that it is a management role to interpret the report in accordance with company policies and procedures. Once again ensure the Terms of Reference are clear from the beginning so that the investigator is in no doubt about whether or not he/she is required to make non-binding recommendations
6. What about counter-allegations that are made during an investigation? If supplementary issues are raised during the course of the investigation the investigator needs to be able to know when to advise the interviewee of the separate grievance procedure which should be invoked whilst including the fact that a separate grievance or counter-allegation was raised during the course of the interview in his or her report
7. What if an interviewee refuses to sign the transcript of the interview? This does not mean that the process is invalidated, but attempts should be made to record reasons why a signature was not forthcoming. Provisions should be in place for interviewees to verify the accuracy of their statements and if appropriate make agreed amendments

Problem areas such as those detailed above are quite common and many of these can be traced back to the confusion that arises regarding rights and responsibilities. Many misperceptions exist about what should or should not take place in an employment investigation and this is where individuals fall into an easy trap. All too often individuals substitute their own view of what should happen in an investigation for what a reasonable employer would do. Industrial Tribunals in Northern Ireland are all too aware of the problems that arise from the classic mistake of substitution of views and the impact this can have on the management of expectations in the internal employment investigation process.

9. Employment Investigations - Lessons from Case Law Decisions

Case law decisions essentially drive the key requirements of an employment investigation, but these decisions need to be treated with caution for a variety of reasons including the following:

- Case law decisions can date quickly and be superseded because a higher court may decide that the lower court decision was wrong and thus overrule it
- The authority level of the court is vitally important, for example the Supreme Court is the highest court in the UK, and a general rule of thumb is the higher the court making the decision the more likely the decision is to remain binding on lower courts for longer
- Many cases are "fact sensitive" and the decision may not be applicable in all circumstances because of specific facts and the impact of laws on statutory dispute resolution
- In Northern Ireland there is no Employment Appeals Tribunal (EAT) as there is in England and Wales. EAT decisions are not binding on Industrial Tribunals in Northern Ireland but they do have strong persuasive value

Disclaimer- The following extracts from case law decisions are used for illustrative purposes only and should not be deemed to be authoritative statements of law. Reliance should not be placed on quotes or extracts from cases as this area of law changes frequently. Only the Industrial Tribunals and Courts can give authoritative statements of law and this should be remembered when pursuing a case which has an employment investigation as part of it.

Key cases - Principles and Extracts

1. British Home Stores v Burchell (1980) ICR 303 EAT -

This is a highly influential case regarding employment investigations relating to misconduct. Key quotes from the case include - there must be established

by the employer the fact of his belief, it must be shown that the employer had reasonable grounds for his belief, the employer must have carried out a reasonable investigation, an employer does not need to have absolute proof of misconduct, the employer must have carried out as much investigating into the matter as was reasonable in the circumstances.

2. Midland Bank v Madden (2000) ICR 1283 CA -

This case used the principles set out in Burchell above and went further by saying that the employer, not the tribunal, was the proper person to conduct the investigation. The tribunal must decide whether the investigation was reasonable in the circumstances and whether the decision to dismiss in light of the investigation was a reasonable response. A tribunal will err if it substitutes itself as the employer in assessing the weight and quality of the evidence in making a determination.

3. Garry v London Borough of Ealing (2001) IRLR 681 CA -

An employee was subjected to a "detriment" when, for reasons connected with her ethnic origin, an investigation by her employers was continued for longer than an ordinary investigation would have been, even though she was unaware that the investigation was continuing.

4. Sainsburys Ltd v Hitt (2002) EWCA Civ 1588 -

This case took the concept of reasonableness and said that it applied equally to the investigatory process as it did to the decision to dismiss. The court said that the range of reasonable responses test applied as much to the question of whether the investigation into the suspected misconduct was reasonable in all the circumstances as it did to the decision to dismiss for misconduct.

5. Santamera v Express Cargo Forwarding t/a I EC Ltd 2003 IRLR 273 -

This case stated that an employer does not have to carry out a forensic or quasi-judicial enquiry and an investigation will not be unfair overall simply because individual components of the investigation might have been dealt with differently or were arguably unfair.

6. Tesco Stores Ltd V Pryke (2006) EAT -

This case took the principles of all of the above cases and referred to each of them in the judgement, for example: by referring to the core "Burchell principles", whether the decision fell within the band of reasonable responses; as per "Madden", the tribunal must not substitute its own views for that of the employer; as per the "Hitt" case, the core principles apply as much to the reasonableness of the investigation.

7. Deadman V Bristol City Council 2007 EWCA Civ 822 -

This case, albeit fact sensitive, decided that the investigatory procedures were a part of the contract of employment and the employer failed to properly comply with them. However, this breach of contract did not give rise to the right to compensation as the psychological harm caused was not reasonably foreseeable.

8. Rhondda Cynon Taff Borough Council v Close 2008 EAT IRLR 868 - This case stated that if an employee had been the subject of a police investigation and the employer had appropriate access to that information then to use it as part of the decision making process fell within the band of reasonable responses.

Appendix 1

Employment Investigations: a Checklist for Small/Micro Employers

- If a decision needs to be made on an incident eg issue of employee misconduct, then the key question is, how did you arrive at this decision? (Have you documented the decision making process - the audit trail?)
- Was the basis for your decision fair and reasonable in all the circumstances, bearing in mind that even where misconduct warrants dismissal an investigation is still required?
- The law will take into account the size, nature and resources of your organisation but it will not give small employer exemptions to issues such as a lack or breach of fair procedure and fair hearing.
- Small employers who do not have specialist staff such as human resource officers will not be expected to have as thorough or comprehensive an approach as a large organisation, but small employers must show that they acted fairly, reasonably and proportionately in all the circumstances.
- An Industrial Tribunal will not substitute its own view for that of a reasonable employer but rather it will examine whether the approach taken to investigating the matter falls within the band of reasonable responses.
- Key questions
 - What are the facts?
 - Are the facts disputed? (different versions of events?)
 - What are the sources of evidence?
 - Who did you talk to in order to find out what happened?
 - How much time has passed since the alleged incident?
 - Were you a witness?

What have you done in similar circumstances in the past?

How did you come to your decision?

Was the investigation procedure fair and even-handed?

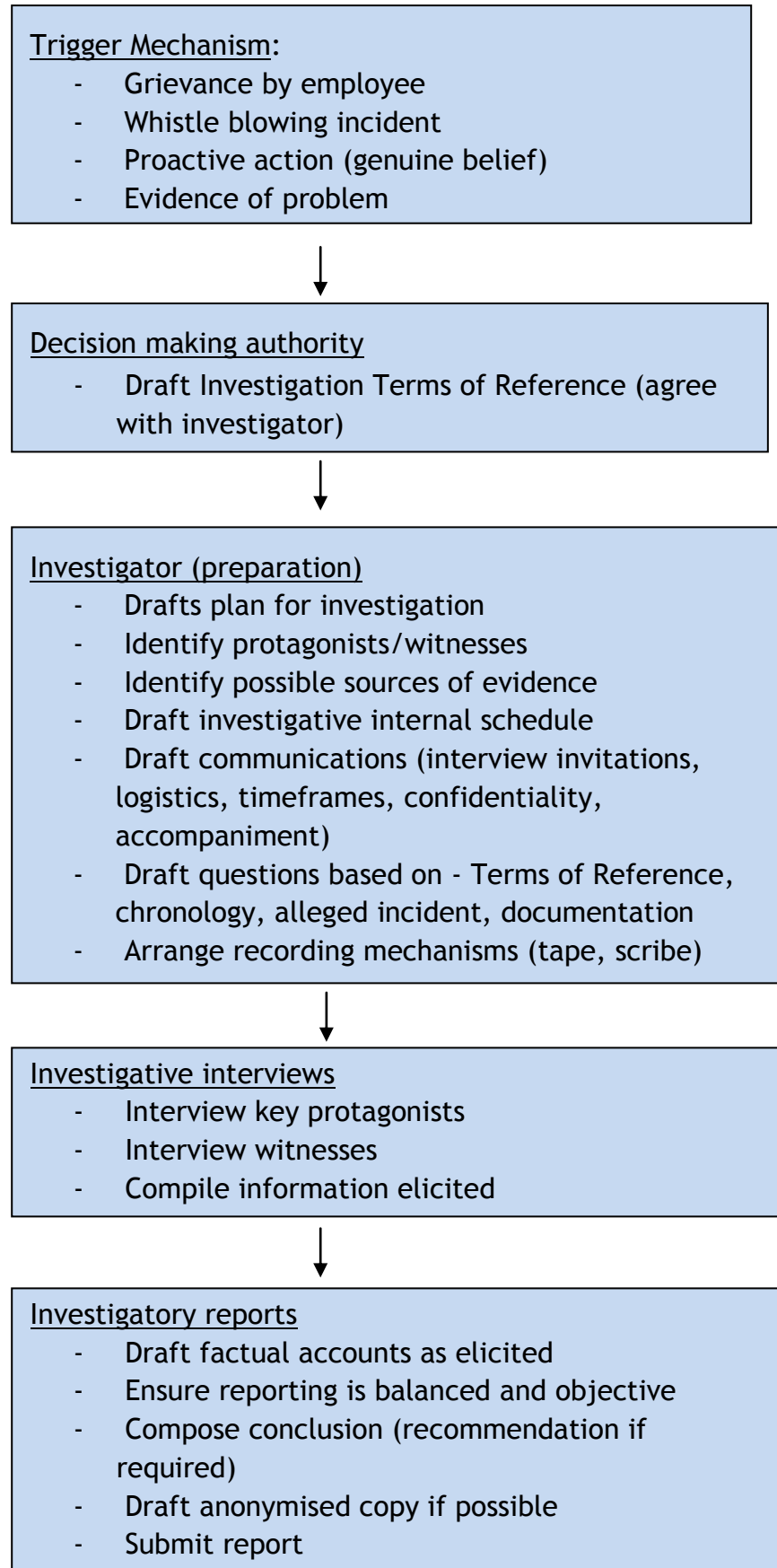
Did the investigation create the basis for a genuine, reasonable and honest belief?

Do the facts speak for themselves?

- It is only by examining and answering questions such as those above that a small employer can demonstrate that the approach to fact finding (investigations) has been both procedurally and substantively fair.
- The two-pronged approach of both being fair in terms of procedure and being fair in terms of the subject matter is vital for all employers to follow.
- The investigation must precede any disciplinary action (taken in accordance with the requirements of the law) and the investigation meeting must not "turn into" a disciplinary meeting as a result of things such as admissions of culpability.
- Any decision that follows the investigation must then also be reasonable, fair and proportionate in all the circumstances.
- The concept of fairness extends back to the start of the decision making process and even small employers need to demonstrate that the process was fair from fact-finding through to decision which was informed by the investigation.

Disclaimer - The above checklist and associated questions are by way of good practice advice only and are not intended to be statements of required practice under the law. Court decisions in this area occur frequently and as such readers should be aware that legal requirements regarding employment investigations may change over time. The Labour Relations Agency cannot be held responsible for changes in case law therefore specialist legal advice should be sought before placing reliance on this guide.

Appendix 2 Investigation Process Flowchart



Appendix 3

Investigation Report - Format and Requests

- Contents page (include paragraph number, paragraph contents, page number)
- Introduction (other details, brief background to case, nature and basis)
- Terms of Reference and purpose of employment investigation (Remit boundaries)
- Key parties to the investigation and methodology (people and process)
- Issues, facts and evidence elicited (subject and witness statements, documentary evidence, photographic/CCTV evidence, e-mail evidence, etc.)
- Findings and conclusions drawn from evidence (must be reasonable and fair)
- Recommendations, if required, eg that the decision making authority implement the disciplinary process, or the facts are inclusive and there is no substantial basis to pursue the matter further.

Investigation Report (give due consideration to requests for):

- Witness anonymity rules; when and why is it granted? eg genuine fear of physical reprisal
- Redacted witness statements (ie where witness names are blacked out of the statement). How reasonable, fair and practical is this?
- Data subject access requests, as provided for under the Data Protection Act (1998) during investigatory process (take advice from the Office of the Information Commissioner - (see Useful Contacts on page 28)

Appendix 4

Employment Investigations - Pro forma 1 (to be tailored to suit organisation)

Pro forma 1 - Investigative interview coversheet

- Name of Investigator:
- Interview relating to:
- Interviewee (subject/witness):
- Those present: Scribe

Accompanying/representative

- Date:
- Time:
- Location:

Introductory processes - Once again explain the purpose of the interview, reiterate the capacity in which the interviewee is attending (witness to or subject of the investigation). Reiterate that your role is one of fact finder rather than decision maker, remind them of the requirements of confidentiality, ask them to relax, offer refreshment, clarify role of representative or accompanying individual, indicate approximately how long it will last, detail information regarding toilet/smoke breaks, ask interviewee to speak slowly and keep focused on the question being asked and the facts, ask the interviewee if they understand and if they have any questions before the interview begins.

Begin interview with questions which are - open-ended but not too broad, in chronological and sequenced order, focus and probe further where answers are vague or lacking in detail, progress through questions, periodically verify accuracy, ask if interviewee needs a comfort break, progress through questions verifying that scribe/recording mechanism is ok.

Close interview by accurately summarising the evidence provided for in the witness statement and again verify accuracy, indicate arrangements regarding requests for copies, acquire signature (if copy of statement can be provided there and then), remind interviewee of duty of confidentiality, ask interviewee if they have any questions before interview termination, thank interviewee for participation and co- operation, end interview.

Appendix 5

Employment Investigations - Pro forma 2 (to be tailored to suit organisation)

Pro forma 2 - Invitation to attend investigative interview

Dear

I am writing to you in my capacity as an investigating officer to invite you to attend an investigative interview on / / at 00.00 am/pm to be held in _____.

The purpose of the interview is purely to elicit facts as part of an employment investigation into _____ (**suggested wording** - an alleged incident between..... or information which has come to light regarding).

My role as the investigator is simply to elicit material facts and inform the decision making process and not to make decisions on disciplinary sanctions.

On the day of the interview I will be accompanied by Mr/Mrs/Ms__ who will act as note taker and who will provide you with a copy of your statement shortly after the interview schedule is complete. For the purposes of accuracy I would ask that on the day of the interview you speak clearly and slowly to ensure all relevant facts are recorded.

***Suggested wording if the contract of employment provides for it, or it is custom and practice to do so:**

**You may wish to invoke your contractual right of accompaniment when attending the interview.*

Can I remind you that this requirement to participate and co-operate with the investigation constitutes a reasonable request by your employer and that unreasonable refusal to attend or co-operate could constitute a disciplinary offence.

Please confirm in writing your intention to attend this investigatory interview at the above date and time as opportunities to re-schedule are quite restricted.

Many thanks in advance of your anticipated participation.

Yours sincerely

Useful Contacts

The Information Commissioner's Office - Northern Ireland

3rd Floor, 12 Cromac Place,
Gasworks
Ormeau Road
Belfast
BT7 2JB

Telephone: 0303 123 1114

Email: ni@ico.gsi.gov.uk

Website: [The Information Commissioner's Office - Northern Ireland](#)

The Equality Commission for Northern Ireland

7-9 Shaftesbury Square
Belfast
BT2 7DP

Telephone: 028 9050 0600

Email: information@equalityni.org

Website: www.equalityni.org