

How to conduct a disciplinary investigation

Introduction

The disciplinary investigation is key to carrying out a fair disciplinary process. If a disciplinary process leads to an employee's dismissal, an inadequate investigation may make the dismissal unfair. It is therefore important that investigating officers are made aware of the essentials of carrying out a reasonable investigation.

For a misconduct dismissal to be fair, the employer must establish a genuine belief on reasonable grounds, after a reasonable investigation, that the employee was guilty of misconduct.

In misconduct cases, fair procedures must at the very least include a full and fair investigation and an opportunity for the employee to have their case heard.

Acas code of practice on disciplinary and grievance procedures

The Acas code of practice on disciplinary and grievance procedures provides practical guidance on handling disciplinary and grievance situations in the workplace, and includes recommendations about disciplinary investigations. It states that it is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case.

The code is not legally binding, so employers are not liable to proceedings if they fail to follow its recommendations. However, employment tribunals take the code into account when considering relevant cases and are able to adjust any award made by up to 25% for an unreasonable failure to comply with the code.

This adjustment can be up or down, depending on which party is at fault.

The purpose of the investigation

The purpose of the investigation is to establish the facts surrounding an allegation of misconduct. It is not to judge the employee's conduct or to make any decision on a disciplinary sanction.

Depending on the organisation's procedures, the role of the investigating officer may include making a recommendation as to whether there are grounds for a disciplinary hearing, or they may simply pass the evidence to the person or panel responsible for making that decision.

Where the employer decides that there is a disciplinary case to answer (i.e., there are facts from which it could be concluded that the allegations are well-founded), this should be dealt with at a separate formal disciplinary hearing.

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

Who should carry out the investigation?

To avoid any suggestion of bias, the investigating officer should not be connected in any way to the facts giving rise to the disciplinary charge. The Acas code states that 'where practicable, different people should carry out the investigation and disciplinary hearing'.

The role of HR in the investigation should be determined by the organisation's own procedures. It can be appropriate for someone from your internal HR function to conduct the investigation. Alternatively, HR may provide advice and guidance to a manager on how to carry out the investigation. *Where the role of HR is to provide guidance on the procedure, it is important that they do not seek to influence the decision as to whether disciplinary action is warranted.*

In some cases, it may be appropriate for the organisation to engage someone external to carry out the investigation, such as an HR consultant or a lawyer.

This could be the case, for example, where there is no suitable manager who is not involved in the facts of the case, and/or there is no one with the necessary experience or skills to carry out a particularly complex or sensitive investigation.

The investigating officer should be aware of the employer's own disciplinary procedure as this may lay down rules or guidance for the conduct of a disciplinary investigation.

Defining the scope of the investigation

The exact steps that the investigating officer will need to carry out will depend on the circumstances and the nature of the allegations of misconduct. The investigation might involve:

- checking if the employee has any previous disciplinary warnings on file, and whether these warnings are still active;
- reviewing the employee's written appraisals to check whether a similar problem has been discussed at an appraisal review;
- talking to other employees who may have relevant information;
- checking telephone and computer records and/or CCTV (subject to laws and privacy, and the employer's own policies on this matter);
- reviewing any other relevant documentation; and
- holding an investigatory interview with the employee.

Is suspension appropriate?

There may be occasions when it is necessary for the employer to suspend the employee with pay while it carries out its investigations.

Suspension might be appropriate where, for example, the employee's conduct would be grounds for summary dismissal if proven, or the employer has grounds to believe that the employee might deliberately cause damage if allowed to remain in the workplace.

However, the employer should suspend the employee only after careful consideration and keep the suspension under review to ensure that it does not become unnecessarily protracted. The

employer should make clear that the suspension is neither a disciplinary sanction nor an assumption of guilt.

Preparing for the investigatory interview with the employee

Depending on the circumstances, it may be necessary for the investigating officer to interview and take a statement from the employee who is accused of misconduct, so as to obtain their account of events. This is likely to be appropriate where the case against the employee depends to a large extent on witness evidence given by third parties such as fellow employees.

Wherever possible, the employer should give the employee notice of the interview, to give them time to prepare for it. Where the meeting is to be held remotely, the employer should ensure that all parties have access to the necessary technology and are comfortable with how to use it.

In advance of the interview, the investigating officer should give some thought to the issues they will need to address with the employee and prepare a list of relevant questions.

Companions at investigatory interviews

There is no statutory right to be accompanied at a disciplinary investigation interview.

The statutory right to be accompanied, under s.10 of the Employment Relations Act 1999, applies to a disciplinary hearing that could result in the administration of a formal warning to the worker by the employer; the taking of some other action in respect of the worker by the employer; or the confirmation of a warning issued, or some other action taken.

This does not encompass an investigatory interview. However, the employer should check if its own disciplinary procedure gives a right to be accompanied at an investigatory interview. If employees have been allowed to be accompanied in the past, this past custom and practice should be followed.

In some cases, it may be appropriate for the employer to make an exception to allow an employee to have a companion at an investigatory interview. In particular, where an employee has a disability, the employer should consider if it would be a reasonable adjustment to allow them to be accompanied.

Failure to attend an investigatory interview

If the employee fails to attend an investigatory interview, the employer should contact them and find out the reason for the non-attendance. There is no legal obligation on the employer to rearrange the meeting, but the employer should be mindful of the need to carry out a reasonable investigation as part of a fair disciplinary process. It would therefore be good practice to rearrange the meeting, unless it is clear that the employee does not intend to cooperate with the investigation.

The employer should consult the employee to ensure that the rearranged time is suitable for them. If the employee again fails to attend, without good reason, the employer can decide whether or not to proceed to a disciplinary hearing on the information it has available.

Conducting an interview

The investigatory officer should open the meeting by introducing themselves and others present. They should explain that the purpose of the interview is to establish the facts and to determine whether a disciplinary hearing is warranted. They should make clear that the investigatory interview will not in itself result in disciplinary action.

When conducting an investigatory interview, the investigating officer should:

- use a combination of open and closed questions to establish the facts;
- avoid asking leading questions;
- point out and question any discrepancies;
- not be afraid to challenge what the employee is saying;
- avoid making assumptions;
- be careful not to express disapproval or opinion about what the employee is saying; and
- make sure that the whole story is uncovered.

It would be advisable for the investigating officer to ask the employee if they are aware of any other witnesses to the incident or any other documents or issues that may be relevant, so that these can be followed up.

Ideally, there should be someone at the interview whose only role is to take accurate notes of what is said. These notes should be written up after the interview and sent to the employee to check. Where the employee wishes to amend the notes, this can be done if the investigator agrees that the employee's version accurately reflects what they said.

If they do not agree that the employee's version is accurate, they should keep both versions on record so that the decision-maker can take both into consideration.

Interviewing witnesses

The investigating officer should arrange to meet individually with any witnesses to the incident or events giving rise to the investigation. They should reassure them that the purpose of the interview is to gather information and explain that their assistance is important.

The interviewer should ask the witnesses to give an account in their own words of what took place. It is important that the witness focuses on what they have personally witnessed or been involved with. The interviewer should apply the same principles as they did when interviewing the accused employee.

There may be occasions when the witness is not the employer's employee.

If this is the case they should be asked to assist in the disciplinary investigation, for example by providing a written statement. This will help to show that reasonable steps have been taken to obtain the relevant information.

Following the interviews with the witnesses, statements should be written up and the witnesses should be given the opportunity to review them. As with the notes of the accused employee's

interview, if a witness wishes to make amendments that cannot be agreed, both versions should be kept on record.

Employees may be reluctant to provide a witness statement as part of an investigation into a colleague's conduct. The employer cannot insist on an employee providing a statement but could speak to them to seek to address any concerns that they may have, for example around confidentiality.

Disclosure of witness statements

Witnesses should not be given an absolute guarantee of anonymity. The accused employee will have the right to be told about the witness statement and should generally be provided with a copy, so that they are aware of and able to challenge the evidence against them.

The employer should take a reasoned decision about whether to disclose a witness statement, where the witness objects to this. This will involve balancing the witness's right to privacy against the employee's right to know what information is held about them.

If necessary, the employer could decide to take steps to anonymise the document before disclosing it. However, it should bear in mind that if anonymisation means that the employee does not understand the case against them, it may undermine the fairness of the process.

Anonymisation could involve:

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

Under data protection law, the employee has the right to make a subject access request, to see information the employer holds about them, including statements prepared as part of the investigation. The employer may legitimately refuse to disclose a document if it would reveal the identity of a third party, especially if this might be a breach of confidence to the third party.

The witness should be made aware that, should the matter result in tribunal proceedings, the tribunal may order disclosure of relevant documents, including the witness statements, irrespective of whether they are confidential.

Collecting documents

The investigating officer should collect any documents that are relevant to the allegation. There is no exhaustive list of the type of documents that may be required.

Police investigations

If the police are carrying out a criminal investigation into a matter that is also the subject of an internal disciplinary investigation, the employer should be careful that its own investigation does not prejudice or disrupt the police proceedings.

An employee may be less likely to cooperate with an internal investigation if they believe that this could prejudice their defence with regards to the police.

The employer must carry out its own reasonable investigation, as far as the circumstances allow. It should not rely on the outcome of the police investigation.

If the police investigation does not result in prosecution, the employer could still conclude that disciplinary action is justified, on the basis of its own investigation.

This is because criminal proceedings require allegations to be proved beyond all reasonable doubt, whereas an employer has to show that it had reasonable grounds for believing that the employee committed the alleged conduct, on the balance of probabilities (i.e., more than 50%).

If a police investigation results in prosecution, it will generally not be necessary for the employer to await the outcome of a criminal trial before deciding if to take disciplinary action, based on its own investigation. However, employers do have discretion when making this decision and if the employee is suspended in these circumstances, suspension should be on full pay.

At the completion of the investigation

The investigating officer should compile the information gathered during the investigation so that this can be submitted to the person or panel who will decide whether disciplinary proceedings should be instigated.

If this is part of their role under the organisation's policies, the investigator can make a recommendation about whether there are grounds for a disciplinary hearing, based on the evidence gathered.

To show that a fair investigation has been carried out, the investigator should prepare a report explaining what evidence has been relied on to make each finding of fact. The report should set out the reasoning behind any conclusions or recommendation.

If the investigation results in a disciplinary hearing, the evidence gathered should be provided to the employee. This information will usually amount to a set of statements and the documents that will be relied on.

The employee should have the opportunity to see the evidence a few working days in advance of the hearing, so that they have sufficient time to prepare a proper response to the charge.

If, following the investigation, it is decided disciplinary action is not appropriate, the employer should inform the employee of this in writing. If the employee has been suspended during the investigation, the suspension should be lifted and the employee should return to work.

Employers should treat any records relating to the investigation as confidential and keep them securely, for no longer than is necessary, in accordance with data protection rules.