CONDUCTING AN INVESTIGATION

X-HR Guidance

April 2013
When an investigation might be necessary

• Investigation is first step in addressing concern about employee, or concern employee raised with manager
• Purpose of investigation is to discover all relevant facts in a fair, reasonable and objective manner
• Failure to investigate could lead to evidence being destroyed and potential tribunal claims
• Length and detail of investigation depends on circumstances
Before starting

Before starting an investigation, a manager should prepare an investigation plan, setting down:

• Who will be conducting any subsequent discipline or grievance hearing (if necessary)
• Whether or not suspension should be considered (where relevant)
• Who needs to be interviewed
• What documentary or other evidence is required and
• What the timescales are
The importance of a thorough investigation - to determine the next steps

When confronted with a difficult situation, thorough investigation important to determine:

• What the next steps should be
• Whether or not formal action is required
The importance of a thorough investigation - positive work environment

- Line managers instrumental in creating positive atmosphere
- Where employee raises a grievance, properly investigate so employee feels he/she is treated fairly and his/her concerns are addressed
- If suspect misconduct and bring disciplinary proceedings, failure to investigate may lead to tribunal claim and erode employee’s trust and confidence in employer
Core principles of conducting an investigation

• Core principles will help to ensure carry out investigations in fair and reasonable manner
Inform the employee

• Inform employee investigation taking place:
• Provide employee with copy of relevant internal procedure
• Inform employee of approximate timescales
• Specify next steps
• In limited circumstances may be unwise to inform employee of investigation
Reasonable time frame

Conduct investigation within reasonable time frame:
• To ensure witnesses’ recollections remain fresh and accurate
• To obtain useful documentation that might otherwise be destroyed
Internal procedures

• Familiarise yourself with any relevant internal procedure and follow it
• Supply employee with procedure and make him/her aware it will be followed
• Foster consistency, clarity and transparency
• Failure to follow contractual procedure could lead to breach of contract complaint
Establish the facts

• Establish the facts
• Do not be swayed by opinions
• Do not prejudge outcome of investigation
• Dedicate sufficient time to investigation to establish facts
Confidentiality

• Confidentiality applies to all those involved in process
• Do not discuss investigation with other employees and third parties
• Consider necessity of divulging name of employee to witnesses
• Limit number of people who know about investigation
Clarify the issues

- At start, be clear about relevant issues
- If in doubt, clarify with manager who asked for investigation or employee who raised grievance
Who should carry out the investigation?

- Appropriate procedure might say who should conduct investigation

- Person carrying out investigation should not:
  - Be involved in the issue
  - Be the same person conducting any disciplinary or grievance procedure
Suspension

• May need to suspend employee for short period pending outcome of investigation
Factors to consider

• Decision to suspend should be taken after careful consideration of all circumstances
• Consider alternatives to suspension
• Keep written records of any alternatives considered
Paid suspension

• Suspension from work pending result of investigation should be with full pay and benefits
• In most cases, suspension without pay:
  – is a breach of contract
  – creates impression outcome prejudged
The terms of suspension

Meet with employee to discuss suspension and explain:
• Why employee is being suspended
• When suspension will start
• How long suspension is likely to last
• That suspension is on full pay and benefits
• That suspension is not a penalty
• That suspension does not mean outcome prejudged
• That employee will have a chance to give his/her version of events
• That you will keep employee updated

Follow up discussion in writing
Consider if necessary to remove items, eg employee’s access pass
Interviewing the employee at the centre of the investigation

- May need to interview employee suspected of misconduct or who raised grievance
- This helps to establish core facts and provide guidance about conducting rest of investigation
- Prepare a list of relevant questions beforehand
- Point out and question any discrepancies
- Do not be afraid to challenge what employee says
- Make sure whole story is uncovered
- In misconduct context, ensure interview does not turn into disciplinary hearing
Right to be accompanied

- Generally employees do not have right to be accompanied at investigatory meetings
- Check if internal procedure grants this right
- Restrict meeting to gathering facts
Witnesses

Witness statements are often an essential part of information collated during investigation.
Who to interview

• At outset make list of all potential witnesses
• Interview anyone who can contribute to facts of case
• If a witness refuses to be interviewed:
  – try to reassure him/her about process and address any of his/her concerns
  – do not pressurise or intimidate him/her
  – explain relevance of his/her information
• Take a flexible approach to interview
• If witness scared to give evidence against colleague, treat him/her with sensitivity
Preparation in advance of interview of witness checklist

- Prepare questions, but be flexible about asking additional questions or amending them as new information comes to light
- Be familiar with the facts and the sequence of events
- Prepare a chronology
- Reassure the witness that you are simply looking to establish the facts
- In advance of the meeting, provide the witness with any documents that may act as a memory prompt or help him/her to give evidence
- Be open to answering any queries that the witness might have prior to the meeting
Conducting the interview

• Try to make witness feel calm and relaxed
• Encourage witness to:
  – Speak freely
  – Convey his/her version of events
• Through open and closed questions, direct witness to focus on issue
Dos and don’ts

Do

• Allow the witness to refer to any documents to refresh his/her memory
• Pause the meeting if the witness needs a break, or adjourn if the witness is very upset
• Record all the pertinent facts
• Keep calm and focused
• Remind the witness to keep the matter confidential

Don’t

• Be afraid to question the witness’s version of events
• Encourage the witness to offer his/her opinion
• Offer your own opinion, be judgmental or speculate on the outcome of the investigation
• Draw hasty conclusions
• Disclose any confidential information
After the interview

- Give witness a copy of interview notes to check and sign
- Prepare witness statement based on information witness gave
- Statement should be in witness’s own words
- Send copy of statement to witness to approve, date, sign and return
Confidentiality of witness statements

• Treat witness statements as confidential
• Do not give absolute guarantee of confidentiality
• Employees have right to request access information about them, eg witness statements
• Can refuse to disclose witness statement that reveals identity of third party
• Preferable to get third party’s consent to disclosure or make witness statement anonymous
• Make reasoned decision whether or not to disclose witness statement
Written statements from non-employees

Options where a non-employee does not want to attend a meeting to provide a witness statement:

• Take statement over the phone
• Witness can provide a written statement
Documents and other evidence

Collating and reviewing documentation makes up bulk of many investigations

Examples of documents might need to consider:

• Attendance issues: absence records
• Poor performance: written appraisals
• Misconduct: letters of complaint
• Dress: dress code policy
Computer and telephone records

- May need to examine computer and telephone records
- Act in accordance with internal policies
- Act in compliance with data protection laws
- In exceptional cases, covert monitoring may be acceptable
- Take advice from HR before monitoring
Refusing to disclose evidence

• Employee may refuse to disclose evidence
• Do not compel employees to disclose personal documents
• Work documents belong to employer
• Manager can request work documents are disclosed and state employee could be disciplined for refusing to do this
• If employee is at centre of investigation, point out refusal may negatively effect investigation and outcome
Dos and don’ts once manager gathered all information

**Do**
- Examine all the evidence objectively
- Take into account the employee’s explanation and version of events
- Try to distinguish between fact and opinion, and weigh accordingly
- Review the evidence on the balance of probabilities
- Consider whether or not a witness’s version of events is accurate

**Don’t**
- Make a decision based on instinct, but rather based on the factual evidence before you
- Discount evidence that points to innocence
Conclusion of the investigation

• Misconduct: present evidence to person who will conduct disciplinary proceedings and make recommendation
• Informal concern: meet with employee who raised concern and discuss outcome
• Formal grievance: pass on information to person handling grievance and make recommendation
Retention of records

• Retain evidence if action required after investigation
• Dispose of records in accordance with data protection principles if no action required
• If potential legal claim, retaining records for one year normally sufficient
• Where investigation examines breach of contract claim, retain records for six years