

Top Tips for carrying out a Workplace Investigation

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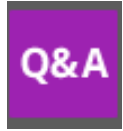


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Lastly clicking this button will hide the newsletter sign up button. However, we hope you will all sign up to receive regular updates on employment law news, HR topics and of course info about the next HR Room.



Mary Cullen
HR Consultant

Mary Cullen established Insight HR in 2000. She is a graduate of UCD and the National College of Ireland with over 20 years of experience in a wide variety of industry sectors. Mary is a member of CIPD and specialises in workplace conflict management, disciplinary and grievance processes, workplace investigations.



Liam Barton
HR Consultant

Liam has over 17 years of experience working in HR, with 11 of those gained at Insight HR. He is a graduate of UCD and the National College of Ireland. He is a member of CIPD and specialises in employment law compliance, executive recruitment, pay and benefits, third-party representation and dispute management.



Adrian Twomey Solicitor

Adrian Twomey is a solicitor and a founding partner at Jacob and Twomey Solicitors LLP. He is a graduate of UCC and Trinity College with over 25 years of experience in the field of employment law. Adrian represents both employers and employees and acts, for example, for multinational pharmaceutical and healthcare device companies, mid-sized construction companies and smaller employers such as accountants, solicitors and childcare providers.

About Insight HR

Insight HR is a HR consultancy based in Kilkenny.

We were founded in 2000 by Mary Cullen, current Managing Director.

We have worked with some of Ireland's leading companies and work with a wide range of industries and sectors.

We provide the full suite of HR services.

Defining a workplace investigation



Presented by

Liam Barton
HR Consultant

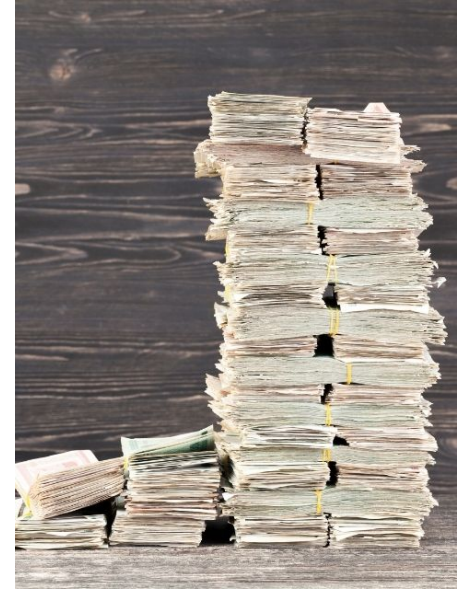
What is a Workplace Investigation?

A workplace investigation should be an impartial and neutral process designed to gather relevant evidence to determine whether or not an employee has engaged in misconduct, or whether a specific incident did or didn't occur, or simply to establish the facts regarding a particular set of circumstances.



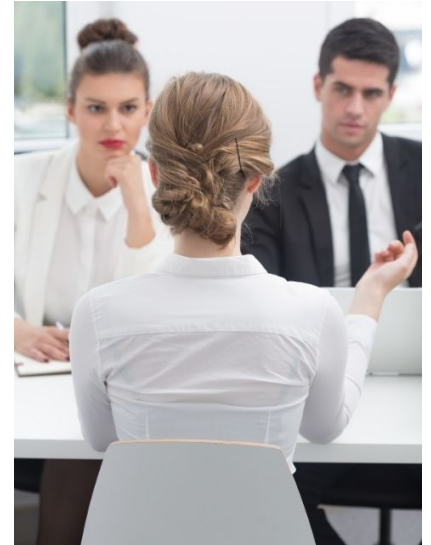
What is a Workplace Investigation?

- A fact-finding mission conducted strictly in line with a pre-drafted **Terms of Reference**.
- Collation of **facts** regarding certain events or activities at work
- A forensic **analysis of evidence** gained throughout the process
- **Determination of the truth** regarding what actually occurred
- **A defensible basis** to justify objectively any further action which might be implemented – separately - following the investigation process



What is a Workplace Investigation?

- A **complex and stressful** process typically undertaken by HR/legal professionals with significant experience in this area.
- Process to establish the **sequence of facts** around controversial questions, suspicions or allegations.
- Involves extracting and interpreting **relevant information** from many sources.
- Involves the **documentation** of the process in the form of a report.
- Often undertaken by an external, **third party** unconnected with the company or employee subject to the investigation.



Issues to Consider

- 1 Appointment of investigator (internal / external)
- 2 Consideration of possible conflicts of interest
- 3 Expertise / experience of the investigator
- 4 Drafting of Terms of Reference for the investigation
- 5 Consideration of internal company policies
- 6 GDPR and it's impact on the process
- 7 Project planning / resourcing for the investigation
- 8 Virtual vs face to face investigation process

Terms of Reference

- Define the **objectives** of the investigation
- Limit the **scope** of the investigation
- Should be issued in draft form and **agreed in advance** of the process
- Establish the **issues of concern** to be investigated
- Set out the **timescale** envisaged
- **Define expectations** regarding confidentiality
- Confirms the report will be issued in **draft form** to parties for comment prior to the final report being issued



Terms of Reference

- **Representation** for parties involved
- Who is **responsible** for the issuing of the final report / follow -up action?
- Defines a **separation** of the investigation and any subsequent process
- Refers to relevant **internal company policies**
- **Balance of probabilities** standard
- Defines how evidence will be gained and stored during and after the investigation (**GDPR**)



Why an Investigation arises or should be conducted?

- Dignity at Work / Grievance issue
- A disciplinary issue
- A Health and Safety concern
- Complaints made by a member of the public or a client or customer
- Action / behaviour arising outside of the workplace
- A legal requirement / specific qualification needed to work in a particular industry
- A protected disclosure made under Whistle-blowing legislation



Why would a company decide to conduct an investigation?

- To manage risk (employment and commercial)
- To take corrective action
- Under their duty of care to staff under Health and Safety legislation
- To protect employees' Dignity at Work
- To address Grievance policy complaints
- To prevent an escalation of issues
- To exercise a legal responsibility

Why do some investigations not succeed?

- A lack of pre-investigation planning / resources
- Poorly drafted Terms of Reference
- A failure to distinctly separate the investigatory and disciplinary processes
- Failure to forensically test all evidence gained throughout the process
- Lack of investigator experience, skill and knowledge
- Lack of independence or impartiality within the process
- Delays within the process

The Investigation Process



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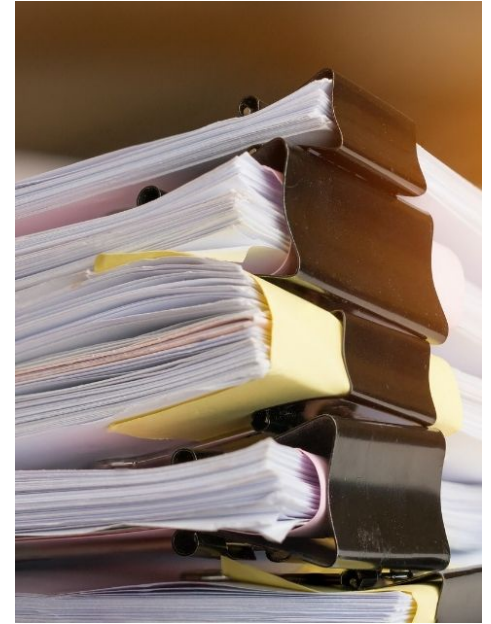
Mary Cullen
HR Consultant

Role of the Investigator

- To establish the facts and explore all reasonable avenues
- To act with integrity at all times
- To be fair and impartial in determining what happened
- To be respectful to those you interview irrespective of your personal views on their conduct or behaviour
- To complete the investigation in a timely manner
- To prepare a comprehensive, unbiased report

Categories of Evidence to Consider

- People Evidence
- Paper Evidence
- Physical Evidence (e.g. damage to property)
- Recording Evidence (CCTV, Fobs, Tachographs, Photographs, GPS systems, Time & Attendance systems, Forensic IT)



Establishing Facts During the Investigation

- Did it happen or not?
- When did it happen?
- Was conduct intentional or unintentional?
- Was conduct condoned?
- Who witnessed it?
- Is there an explanation or are there mitigating factors to consider?
- Am I certain I can use certain data?

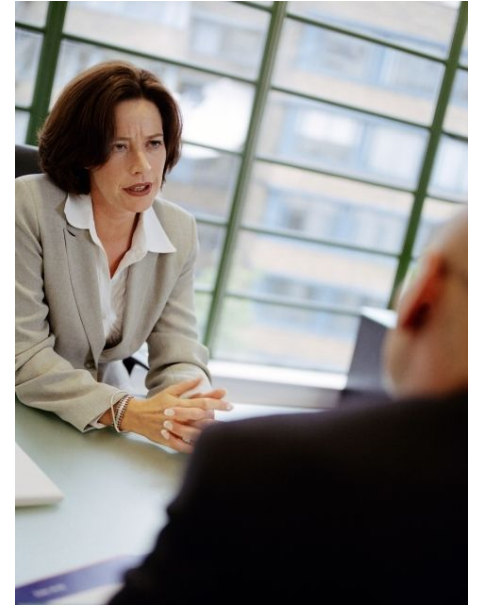


Establishing Facts During the Investigation

- Look carefully at each party's story
- Identify gaps in the information you gather. What is missing?
- Look for corroboration from witnesses
- Consider other evidence presented (documentary, CCTV, photographs, social media posts, text messages, GPS etc.)
- Consider how similar incidents or issues of this nature were treated in your organisation

Conducting Investigation Interviews

- Keep an open mind
- Ask open-ended questions
- Start with easy questions (e.g. job title, details of role, length of service)
- Focus on the facts
- Look for other possible forms of evidence at every interview
- Ask about anomalies, conflicts in evidence or contradictory statements
- Record and document all interviews



Investigation Challenges

- Information gathered can sometimes be misleading
- Witnesses may tell conflicting stories about the same incident
- Witnesses don't want to be involved
- Witnesses or those involved conceal information
- Cited witnesses have left the organisation
- Paperwork has been lost or altered
- Physical evidence has been damaged or deleted

The Investigation Report

The Investigation Report

- Refer back to the original complaint and ensure you've addressed each issue/element of the complaint in your report.
- Review the TOR for the Investigation (*what was I actually asked to do?*)
- Outline issues of credibility (complainant, respondent, witnesses)
- Set out the facts and stay away from expressing your personal opinion.



The Investigation Report

- Words play an important part in creating understanding.
- Use everyday words/avoid jargon.
- When using abbreviations, define each one the first time you use it.
- If you must use specialised language, give definitions or examples.
- Be consistent with words used/use the same words for the same concept throughout.

The Report

- Is the content in a logical order?
- Is the content factually correct?
- Do dates and days agree?
- Do headings in contents correspond with those in the document?
- Are there grammar, spelling or punctuation mistakes?
- Do paired items match, e.g. (brackets), ‘quotation marks’, “quotation marks”?



Case Law



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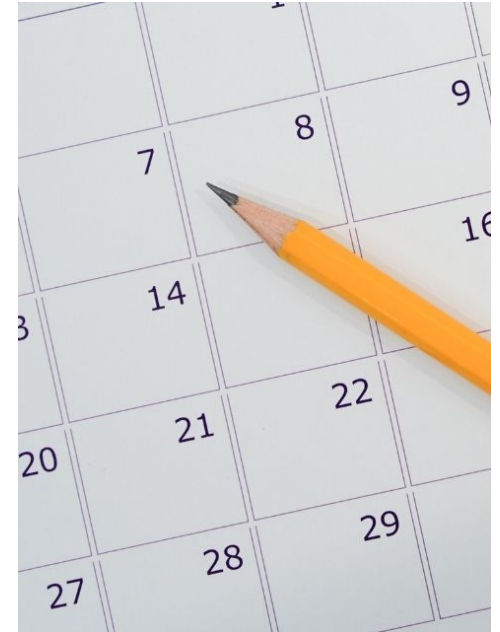
Adrian Twomey
Solicitor

Suspending Employees

- Can employees be suspended pending the outcome of the investigation?
- Should they be paid during any suspension?
- *Bank of Ireland v Bell*, [2015] IEHC 241.
- Employee suspended pending investigation into alleged breach of email and internet policy.
- Court stressed the potential reputational damage to the employee.
- Suspension legitimate if to prevent repetition of conduct, prevent interference with evidence, protect individuals at risk or to protect the employer's business or reputation.

Duration of the Investigation

- Investigations can be time-consuming and lengthy.
- There is no defined time limit or period during which they must be carried out (save for any set out in terms of reference or a policy).
- However, the employer and investigator must not delay.
- *Rajpal v Robinsq*[2004]No. 63 J.R.
- A surgeon was suspended without pay pending investigation by a health board. After 6 months, the employee went to court seeking relief.
- The High Court (Kearns J.) noted that “months passed” during which no real action was taken and effectively quashed the investigation.



Fair Procedures

- *Carroll v. Busátha Cliath*, [2005] 4 IR 184 (Clarke J.)
- “A court should be reluctant to intervene and in particular to intervene at an interlocutory stage, in an as yet incomplete disciplinary process”.
- “There may, however, be exceptions to that general rule Where an employer has, in clear and unequivocal terms, indicated that procedures would be followed which would be manifestly unfair there may be circumstances where it is appropriate for the court to intervene at that stage.”

The Lyons Case

- *Lyons v Longford Westmeath ETB* [2017] IEHC 272, High Court, Eagar J.
- An investigation into a bullying complaint took a year to complete even though it only involved four interviews.
- The judge was critical of the report, saying that it did not set out sufficiently the basis upon which the investigators concluded that the complainant's dignity had been undermined.
- The judge indicated that the accused had a right to cross-examine their accuser through solicitor or counsel where his job was at stake.
- Different views have been expressed in different cases.

Fair Procedures

- *Lyons v Longford Westmeath ETB*, [2017] IEHC 272, High Court, Eagar J.
- Where a complaint is made which could lead to an employee's dismissal, the employee is entitled to fair procedures at the initial investigation stage (complaint related to alleged bullying).
- *EG v The Society of Actuaries*, [2017] High Court.
- Less formal procedures may be followed where the investigation is just a fact-finding exercise and the investigator cannot make findings of misconduct or impose sanctions.
- The *EG* decision was echoed in *NM v Limerick and Clare ETB*, [2017]

The Code of Practice

- *Code of Practice on Grievance and Disciplinary Procedures* (2009 Regs)
- “[G]rievance and disciplinary procedures should be in writing”.
- Grievances and disciplinary matters should be handled “in accordance with the principles of natural justice and fairness”, including:
 - That details of any allegations or complaints are put to the employee concerned;
 - That the employee is given the opportunity to respond fully to any allegations/complaints;
 - That the employee is given the opportunity to be represented during the procedure;
 - That there be a fair and impartial determination of the issues concerned.

Conclusions

- Try to limit investigations to being mere fact-finding exercises and avoid making findings of misconduct or imposing sanctions (reflect that in any terms of reference or procedure).
- Best to adhere to fair procedures / natural justice where possible.
- There is no hard and fast rule regarding legal representation. Each case is different and professional advice should be sought.
- Push investigations along. Inactivity and delay can create big problems.
- Don't automatically suspend employees. Pay them. Consider your reasons for any suspension.

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Q&A time



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