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Tackling Workplace Investigations

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Tackling Workplace Investigations
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Preface

This book has been written to ensure that employers who are carrying out investigations have the correct tools to do a good job. So often, investigations are poorly executed. If you carry out a poor investigation, it's likely that the result of the discipline or grievance process will be equally poor – and that can lead to employment tribunal claims.

Problems with employees come in all shapes and sizes, from small matters such as timekeeping through to complaints of harassment, money or property going astray, poor work performance and accidents and injuries. When problems such as these occur, employers must investigate and determine, as far as is reasonably possible, what really happened. There is no magic formula for conducting workplace investigations. They vary based on the issues and the people involved. Some investigations will be completed quickly with no need to interview witnesses. Others may require a far more detailed approach, involving the interviewing of a number of witnesses.

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About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of down-to-earth, tactical HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or open courses. We provide a wide range of practical employment training, enabling new and experienced managers to ensure that they work in a compliant and ethical fashion, and gain optimum employee output.

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email pm@russellhrconsulting.co.uk for an up-to-date copy of statutory limits. Please cite BookBoon-Workplace Investigations when you do so.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

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Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

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1 Overview of the Ebook

1.1 Introduction

The basis of a disciplinary decision about an employee's future is a good investigation. It can make the difference between a safe and satisfactory disciplinary sanction and an unfair dismissal. Being able to carry out a workplace investigation is an essential skill for any manager and certainly all HR professionals. It's quite horrifying how often the investigation is done poorly. There's no need for this. The process itself is straightforward. It just has to be followed in a structured and timely way.

1.2 What is a workplace investigation?

An investigation is a fact-finding mission ; it is no more complicated than that. The purpose is to find out, on a balance of probabilities, whether there is a case to answer; it is not to make a judgment about an employee's guilt. The investigating officer's role is simply to determine whether there is a case to be explored formally through the discipline process. It will be for the disciplining officer to decide whether the case presented by the investigating officer establishes a breach of performance or conduct.

1.3 Carry out the investigation in a timely way

The ACAS Code states that employers must carry out necessary investigations into potential disciplinary matters without unreasonable delay in order to establish the facts of the case. In any case, it will be necessary for you to collect data as soon as practicable before the evidence is lost or memories fade.

1.4 Employee privacy

It is perfectly acceptable to investigate in an appropriate fashion and to use reputable experts. Take care if you arrange to have employees independently observed; the courts can be very reluctant to accept data from private investigators and you can't use data which is inappropriately obtained, or which breaches data protection or human rights.

1.5 An investigation must be impartial

As the investigating officer, you must not be connected in any way to the facts giving rise to the disciplinary charge, nor should you be involved in chairing the disciplinary or appeal hearings. It's important to build in a degree of independence when considering a disciplinary matter, especially if the outcome is likely to be dismissal. Having one person act as metaphorical judge, jury and executioner in a disciplinary procedure against an employee accused of misconduct is likely to be unfair.

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1.6 Investigation interviews

Investigation interviews can be crucial to the success of the investigation. Most investigators have poor questioning skills, which means they often fail to question in a sufficiently rigorous manner and, in particular, do not probe or test data. An investigating office must take a broad approach. The purpose of the discipline is to establish whether, on a balance of probabilities, there is a case to answer. It is not about trying to establish facts which might taken alone suggest guilt, but ignoring other facts which either provide a defence or mitigation.

1.7 Follow the ACAS Code

The ACAS Code requires that the employee should know the nature of the charge against him and should be given the opportunity to state his case. The evidence you collect during the investigation will be put to the employee in the disciplinary hearing and will enable him to prepare an explanation in response.

1.8 What happens if an employee goes sick with stress?

How do you handle a situation where the employee who is the subject of the investigation goes off sick with work-related stress as a response to the investigation process? It's fairly straightforward to tackle the problem successfully. This chapter considers how to go about it.

1.9 Right to be accompanied

Workers have a statutory right to be accompanied by a companion where the disciplinary hearing could result in:

- a formal warning being issued
- the confirmation of a warning or some other disciplinary action (such as appeal hearings)
- the taking of some other disciplinary action.

There is no statutory right for a worker to be accompanied at an investigatory meeting.

1.10 Planning an investigation

Approach every investigation with an open mind; don't assume guilt or innocence. Think about the data you need to collect. Consider how you might check the rigour of your work. Build in a process to ensure that you reach an objective and evidenced conclusion.

It may be appropriate to suspend the employee on full pay, but this is best carried out as a precautionary measure and it should be made clear that it is not a disciplinary sanction.

1.11 Gathering evidence

The investigating officer's role is to collect data in order to allow the organisation to determine whether there is a case to answer. It's important to approach this task holistically. It is not the aim of the investigation to get enough evidence to escalate matters to a formal disciplinary hearing come hell and high water. Rather it is about approaching the data collection in the round, collecting all the facts, including those which may explain or mitigate an apparent transgression.

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1.12 Burden of proof

If you are investigating the alleged breach of a workplace standard you will have to be satisfied that, on the balance of probabilities, there is a case to answer.

The balance of probabilities means that something is more likely than not to have occurred, or it is more likely than not that it did *not* occur. If the probabilities are equally balanced, you have not discharged the burden of proof.

1.13 Interviewing witnesses

When interviewing witnesses, identify as precisely as you can what needs to be established from each interviewee and prepare accordingly. Prepare some open questions to help get things started, but don't treat the questions as a script.

1.14 Anonymous witnesses

In an ideal world, witnesses will give you a statement and be happy to put their name to it. Sometimes, employees are reluctant to provide a witness statement as part of an investigation into a colleague's conduct. You can't insist on an employee providing a statement, but do speak to him to see what you can do to address his concerns. If necessary, you could agree that the statement will be anonymised as far as possible.

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1.15 Question technique

The ability to ask the right questions is incredibly useful. Successful questioning allows us to do many things, such as:

- acquire information
- test and probe the information
- check our understanding
- check the understanding of the other person
- build rapport
- engage the other person's mind and concentration
- manage and direct a conversation
- regain control of a conversation.

There is a range of question types available to you to use. Choose the type of question that will give you the information you want and will allow you to control the pace of the interview.

1.16 Discipline

Once you have completed your investigation and decided that there is a case to answer, you will set up the discipline meeting. Part of that is to ensure that the disciplining officer, employee and his companion have all been given a copy of your findings.

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2 What is a workplace investigation?

2.1 Introduction

An investigation is a fact-finding mission – it is no more complicated than that. The purpose is to find out, on a balance of probabilities, whether there is a case to answer; it is not to make a judgment about an employee's guilt. The investigating officer's role is simply to determine whether there is a case to be explored formally through the discipline process. It will be for the disciplining officer to decide whether the case presented by the investigating officer establishes a breach of performance or conduct.

2.2 What sort of things trigger an investigation?

An investigation will be triggered either by an awareness that something's not quite right, or by a specific event which demonstrates that the employee does not meet workplace requirements. These events could include, for example, allegations of inappropriate language or conduct. Other prompts might include:

- customer complaints
- an increase in accidents or injuries
- a reduction in productivity
- increased wastage
- falling sales
- an increase in absence
- a visible failure to meet your reasonable management standards, for example, wearing trainers in an environment where smart shoes are required.

2.3 What goes wrong?

A rigorous and fair investigation is essential to the disciplinary process; an inadequate investigation may make any subsequent dismissal unfair. It is important that you understand the essential parts of carrying out a reasonable investigation. Small errors can fatally flaw the process, so in this section we consider the principles and pitfalls of workplace investigations.

The ACAS Code states that employers must carry out necessary investigations into potential disciplinary matters without unreasonable delay in order to establish the facts of the case. In any case, it will be necessary for you to collect data as soon as practicable before the evidence is lost or memories fade.

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When a complaint is made or a concern is felt, you must investigate it immediately. One thing that I have noticed with managers is that they're often reluctant to start the formal disciplinary process when things are not quite right, preferring to rely on little chats to correct matters. If you've had to have numerous chats with an employee, wake up! It's not working. In our office we call this the 'ostrich manoeuvre'. The problem is, all ostriches reach a point when they shake the sand out their eyes and ears and want to invoke the formal disciplinary procedure, rushing in all fired up, usually with dismissal in mind. I am then required to point out that being late for work (or something similar) is not gross misconduct, doesn't merit dismissal (or even a final warning) and as far as the law is concerned, if the manager hasn't considered it important enough to escalate formally at an earlier stage, the employee will be considered legally to be a model employee. It's frustrating, but it has to be done properly.

2.4 Balance the need to collect data against inappropriate invasion of privacy

Take care that data is appropriately obtained and does not breach data protection principles or human rights.

Example

Lynette Copland's employer monitored her emails, internet usage and telephone calls over a prolonged period. The employer argued that it had not intercepted any telephone calls, but had simply reviewed its phone logs and checked Ms Copland's email and internet history.

The European Court of Justice found that even monitoring the date and length of telephone conversations and the numbers called could give rise to a breach of the right to privacy. Although the employer could have obtained the same information legitimately by reviewing the relevant telephone bills, this did not prevent a finding of interference with Ms Copland's rights. Furthermore, simply storing data relating to Ms Copland's private life was a breach of her rights and it was irrelevant that the information was not disclosed to her or used against her in any disciplinary proceedings. Ms Copland had not been given any indication that her telephone calls might be subject to monitoring. As a result, she had a reasonable expectation as to the privacy of calls made and emails sent from work.

Copland v United Kingdom [2007]

For several years now, the biggest category of gross misconduct dismissal amongst office-based workers has related to breaches of email and internet policies. Employers are expected to give reasonable privacy to employees. If you intend to monitor communications then you must set up formal email, internet and telephone policies, ensuring that employees are expressly informed if their privacy is not guaranteed. Any monitoring which takes place should be based on genuine business reasons and should be fair and legal. It is also important that any such policies are clear and consistently applied, so that staff know exactly what private use is permitted and what checks may be made.

2.5 Following procedure is all-important

As the investigating officer, you must not be connected in any way to the facts giving rise to the disciplinary charge, nor should you be involved in chairing the disciplinary or appeal hearings. It's important to build in a degree of independence when considering a disciplinary matter, especially if the outcome is likely to be dismissal. Having one person act as metaphorical judge, jury and executioner in a disciplinary procedure against an employee accused of misconduct is likely to be unfair.

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Example

Ms Henshaw had worked in a tanning salon for five years. Standard procedure was that new customers had to fill in a self-analysis form to determine how many minutes they could spend on a sunbed. They would then be given information on the dangers of using sunbeds. This leaflet contained a disclaimer, which was a regulatory requirement for the salon's licence and a requirement of its insurers.

Ms Henshaw did not ask a new customer to fill out a form, something that she admitted she knew she was supposed to do. She said that it was a 'one-off incident', that it was a slow day during which she felt tired and lethargic, and that the customer seemed to know what she wanted.

Brenda Shirley, a director of the company, asked her daughter, Linda Shirley (a former director of the company), to carry out an investigation, after which Ms Henshaw was suspended. At a further investigatory meeting, attended by both of the Ms Shirleys and Ms Pepper (Ms Henshaw's line manager), Ms Pepper complained that she had been harassed by Ms Henshaw about the allegations made against her and that Ms Henshaw's boyfriend had been unpleasant when he came to collect her wages during her suspension.

Ms Henshaw was invited to a disciplinary hearing and was charged with a failure to comply with the company's procedures. Linda Shirley chaired the discipline meeting and dismissed Ms Henshaw for gross misconduct. Ms Henshaw complained that she had been unfairly dismissed. The employment tribunal agreed, finding that the company had breached the ACAS Code of Practice and its own disciplinary procedure by having Linda Shirley undertake both the investigation and disciplinary hearing.

The company had a potentially fair reason for dismissing Ms Henshaw, but it had wrongly taken into account Ms Henshaw's alleged 'bad attitude', which she had never been formally warned about. In addition, the tribunal thought that the employer had inappropriately taken into account the poor behaviour of Ms Henshaw's boyfriend, rather than concentrating on the matter in hand (her alleged misconduct).

However, Ms Henshaw had contributed to her dismissal. She knew the importance of requiring customers to fill in the necessary paperwork. Her tiredness on the day in question was not an excuse. Her compensation was therefore reduced to zero.

Henshaw v. Touch Tanning Ltd [2009]

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3 Carry out the investigation in a timely way

3.1 Introduction

The ACAS Code states that employers must carry out necessary investigations into potential disciplinary matters without unreasonable delay in order to establish the facts of the case. In any case, it will be necessary for you to collect data as soon as practicable before the evidence is lost or memories fade.

3.2 How far back can I go to collect data?

Where there seems to be some sort of problem, start at the beginning with an investigation to collect the evidence. Having agreed to it, managers often make the mistake of going overboard with examples dating back months, or even years, especially where the problem is long-running. As a rule of thumb, confine the investigation to a fairly short, recent period, perhaps a few weeks. But remember that each case turns on its own facts.

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Example

John worked as a bus driver. He was accused of a ticket irregularity three days after the alleged incident took place. Since one ticket sale is much like another, and he carried out hundreds of these transactions every day, he argued that it was impossible for him to respond with any degree of accuracy after a three-day gap. This was a situation where the manager could have acted immediately and should have done so. The delay – even for as short a period as three days - made it impossible for John to recall the matter, so the manager should have given him the benefit of the doubt.

If you know about a problem, or you could reasonably be expected to know about one, start dealing with the matter immediately. The process may well be found to be unfair if you delay.

3.3 Long, long time ago – can I still remember?

With apologies to American Pie writer, Don McLean, the one case where it may be reasonable to accept a delay in investigating is where you did not know, and could not reasonably be expected to know, about a problem until sometime later. In these circumstances, you must investigate as soon as you learn about the problem. The greater the gap between events and an investigation, the harder it is to gather information and decide whether or not there is a case to answer.

In one case I was asked to investigate the alleged misappropriation of £62,000 by the Managing Director of ABC Ltd, Lionel Brown. The realisation that the money was missing only came about four years after the event. That the money was taken by Mr Brown was not disputed, but he said it was owed to him. It took four months to complete the investigation, sifting through hundreds of papers and emails, interviewing all the people who were there at the time and were still available. Although I requested permission from his solicitor to do so, I was not allowed to interview Mr Brown as he was absent from work, allegedly suffering from an unspecified psychiatric illness. It was a challenge, but in the end, by working closely with ABC's Operations Director and cross-checking the mass of information, we concluded that there was a case to answer. The investigation report was presented to ABC's solicitor (who had commissioned me) and a disciplinary hearing was convened.

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4 Employee privacy

4.1 Introduction

It is perfectly acceptable to investigate in an appropriate fashion and to use reputable experts. Take care if you arrange to have employees independently observed; the courts can be very reluctant to accept data from private investigators and you can't use data which is inappropriately obtained, or which breaches data protection or human rights.

4.2 Use of private investigators in an investigation

In chapter 2, I referred to the employer's breach of Lynette Copland's rights when it inappropriately and disproportionately invaded her privacy. If you use private investigators, make sure they collect data in a compliant and fair fashion; the courts can be reluctant to accept data obtained using PIs, as is evidenced in the following case. While the EAT eventually accepted the employer's evidence, it made clear that employers must not overstep the mark.

Example

Mr McGowan's employer, Scottish Water became suspicious that he had been falsifying timesheets in relation to call out time, for which he received additional payments. As part of its investigation for the disciplinary process, Scottish Water engaged private investigators to film him coming and going from his house. Evidence gathered during this exercise showed that the company's suspicions were justified and McGowan was subsequently dismissed for dishonesty.

In the tribunal claim that followed, McGowan argued that the covert surveillance of his home breached his rights under the Convention on Human Rights (respect for private and family life) rendering the investigation procedure, and consequently the dismissal, unfair. The tribunal disagreed and found that the dismissal was fair.

The Employment Appeal Tribunal (EAT) agreed with the tribunal's decision (by a majority), although it expressed some reservations. It held that covert surveillance of a person's home, unbeknown to the individual, raises a strong presumption that the right to respect private life has been invaded.

However, the key issue was the question of proportionality. It took into account the fact that Scottish Water was a public corporation and was effectively investigating criminal activity regarding potentially fraudulent timesheets. Scottish Water had considered other means of investigating, such as surveillance in the workplace but that would not have assisted in quantifying the number of times McGowan left his house to go to the process plant, which in turn determined the accuracy of his timesheets.

The EAT also took into account the fact that Scottish Water's suspicions were justified and that McGowan had not actually challenged the finding that he had been dishonest.

McGowan v Scottish Water [2004]

4.3 Test data and don't make assumptions

Even if there is video evidence, it has to be checked and tested.

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Example

Mr Pacey worked for Caterpillar Logistics Services UK (Caterpillar) for over 11 years. He suffered a back injury at work on 30 November 2009. Caterpillar's insurers did not believe the extent of Mr Pacey's alleged injuries and arranged for him to be covertly filmed. From 23 December 2009 he was filmed clearing ice from his car, driving his car, carrying shopping and walking his dog. When he returned to work on 4 January 2010, he was accused of gross misconduct for falsely claiming company sick pay

Mr Pacey's said that his GP had advised him to take light exercise and do as much as possible. He obtained a letter from his GP effectively confirming this. Caterpillar then wrote to the GP, setting out written observations of what Mr Pacey was doing in the film (but not showing him the film), asking whether it was consistent with Mr Pacey's symptoms at the time. The GP commented that he would have been able to do most of the activities described. Caterpillar dismissed Mr Pacey, apparently inferring that he was therefore not able to do all of the activities and was lying about them.

The employment tribunal found the dismissal to be unfair. It was "incomprehensible" that Caterpillar had not obtained medical evidence from its own occupational health doctor (who had at the outset accepted that Mr Pacey was unable to work), or indeed any doctor at all. A lay person watching the video was not qualified to assess Mr Pacey's injury. Caterpillar had "cherry picked" the GP's answers, taking no account of comments that Mr Pacey seemed genuinely in pain and he had never had reason to query his absences in the past. The employer's mistake cost it £49,715.

Pacey v Caterpillar Logistics Services UK [2011]

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4.4 Advise and warn about your right to monitor

For several years now, the biggest category of gross misconduct dismissal amongst office-based workers has related to breaches of email and internet policies. You are expected to give reasonable privacy to employees. Employers can be forgiven for thinking that as employees are paid to come to work, you have a right to monitor and take action for non-work email and internet transactions. As a general principle, this is correct, but it is hedged around with all sorts of employee protections. There have been a number of cases where employees dismissed for shopping online when they should have been working have been found to be unfairly dismissed.

If you intend to monitor communications then you must set up formal email, internet and telephone policies, ensuring that employees are expressly informed if their privacy is not guaranteed. Any monitoring which takes place should be based on genuine business reasons and should be fair and legal. It is also important that any such policies are clear and consistently applied, so that staff know exactly what private use is permitted and what checks may be made.

If you have policies which give you the right to monitor employee communications make sure that you refer to it in your standard job offer letter and make it part of your terms of employment. Even if you do this and gain written acceptance, it will still be subject to the overriding requirement of reasonableness.

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5 An investigation must be impartial

5.1 Introduction

There is no legal requirement that the investigating officer must be separate from the discipline and appeal processes, but the tribunals expect you to instill a degree of separation in the process in the interests of natural justice, certainly where a conduct matter is being considered. It has become so widely accepted that if you fail to do so you are likely to be criticized.

5.2 Build in some separation

It's important to build in a degree of independence when considering a disciplinary matter, especially if the outcome is likely to be dismissal. Having one person act as metaphorical judge, jury and executioner in a disciplinary procedure against an employee accused of misconduct is likely to be unfair. If you work in a small company the requirement is still the same. You may have to bring an independent third party in.

Example

In recent months I was asked to assist with a Town Clerk who had been discovered to be both incompetent and appeared to be guilty of a number of acts of misconduct. She had been asked to attend an investigation meeting. In response she went sick with stress, submitted a 68 page grievance and refused to communicate with us except through her solicitor.

The ACAS Code says that where discipline is being contemplated and the employee puts in a grievance you may wish to defer the discipline and deal with the grievance first. We opted to do that. Despite several attempts to arrange a grievance meeting, the Clerk refused to attend, even though we offered to make reasonable adjustments and obtained medical advice that she could do so. As the reasonable employer, we followed the doctor's advice and on the third occasion she refused to attend we 'parked' the grievance and moved on to the investigation. Once again she refused to attend and after three attempts to meet with her we exercised our option to stop paying company sick pay (SSP continued) and carried out an investigation.

At the completion of the investigation I concluded that there was a case to answer and passed the matter to a panel of councillors to hear the case. Beyond attending at the discipline meeting to answer questions, my role ceased. I was not party to the panel's deliberations nor to their eventual decision.

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5.3 Preserve the evidence

You will have to take steps to access and preserve the evidence gathered in the investigation. To this end, change computer passwords, suspend remote access to the company's systems and remove passes, mobile phones and company laptops, as well as other property that may enable staff under investigation to undermine the case. Consider whether there is evidence that will perish or may be removed and make arrangements to preserve or secure it.

Once an investigation starts, make sure the employee under investigation doesn't have access to any of the evidence supporting the case. There is a risk that he could destroy, modify or hide it. If you have taken evidence from a computer, or other equipment, quarantine the machine to ensure that the data is not lost. Handle any records relating to the disciplinary investigation in accordance with the Data Protection Act 1998.

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6 Take a holistic approach

6.1 Introduction

A good investigation looks at **all** the facts. By this I mean those which support the allegations of misconduct or poor performance as well as those that suggest facts to the contrary.

It is incredibly important to be able to ask questions effectively and I recommend that you read the section on question technique very carefully. If you can't ask questions effectively, any competent union representative or barrack room lawyer will be able to run rings round you.

6.2 Make sure the investigation is adequate

It's really important to take a broad view and to get the fullest possible understanding of the matter under investigation. Keep gathering data until you have all the facts. This can be a bit like unpeeling the layers of an onion and you may have to go back several times to get all the answers.

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Example

When Matt, the owner of an engineering company, discovered a web site which apparently showed that two of his senior engineers, John Martin and Marcus Vicars, had set up an engineering consultancy business (Martin & Vicars Consulting), in competition with him, he was quite angry. He called to ask me if he could dismiss the two engineers instantly for gross misconduct. I told him to carry out an investigation and let me know the outcome before he did anything else. Knowing that Matt can be quite hot headed, I reminded him to confine himself to gathering the facts and not to make any judgements. Thereafter he could put them on precautionary suspension.

When I saw the notes from the investigation meeting, it was clear that Matt's temper had flared up (understandable but unwise). I told him that we would need to have a more impartial approach and he agreed. One of the Russell HR team went in to take statements.

Once these statements had been taken they were reviewed. John Martin and Marcus Vicars both admitted to the existence of the web page, but said it had been posted about three days before the discovery. They both said that it was created pursuant to an email from Matt saying that the company had suffered from the difficult economic climate and that there would be no bonus that year. Interviewed separately, they both stated that it was a 'pipedream', there was no company, no trading and they had done nothing to compete with their employer. Marcus said that beyond discussing the consultancy with John as a possibility, he knew nothing about it and that his name and other details had been used by John without his (Marcus') knowledge. Marcus said he had only become aware of the web page the day before he was suspended and had asked John to remove it immediately. John agreed that he had been the driving force and Marcus had nothing to do with the web page.

We carried out further investigations and the following emerged.

- The domain name had been bought by Marcus' father, Joe Vicars, the previous year. Joe would have had to give consent to allow it to be used by anyone else.
- The web page had been activated some eight months before Matt discovered it.
- It was taken down the evening Marcus and John were suspended.
- There had been access to the Martin & Vicars web page from Marcus' desktop computer some three weeks before Matt discovered it. This was clearly inconsistent with the statements given by Marcus and John.
- Marcus would not answer the question about how he could have accessed the web page if he had only seen it the day before his suspension.
- There were at least two different versions of the web page. One screen shot was taken from the list of websites accessed on Matt's computer. The other screen shot was taken from the older access trail on Marcus' work computer. The more recent web page showed Matt's company's photographs. These had been taken by a photographer commissioned by the company who confirmed that the photos were not available to buy anywhere, he had not been approached by anyone and had not given permission to anyone to use the company's photos.
- There was a web link to the page on Marcus' mobile phone, though he denied that the link worked.
- Marcus' home postal address was given on the web page.
- Although Marcus presented himself as the innocent party he had not reported the matter to his manager.

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There were so many inconsistencies in the stories that we had no hesitation in taking it forward to a disciplinary hearing.

6.3 Take a broad view

If you investigate too narrowly, any resultant dismissal could be unfair.

Example

Ms Aslam joined the BBC in 2004. Problems arose and in August 2007, the employer investigated the issues. The findings were fed back in an edited form and the recommendations were only partially implemented.

Things got worse and Ms Aslam was involved in a number of disputes. In December 2008, Ms Aslam complained of harassment, but was herself suspended in March 2009, because of a complaint of bullying and harassment. The person who made the complaint, Ms Hussain, was interviewed. An edited version of the notes was sent to Ms Aslam and was used by a manager, Ms North, in the later disciplinary proceedings. They excluded Ms Hussain's wider complaints about people other than Ms Aslam.

Ms North chaired the discipline hearing and concluded that the case against Ms Aslam had been substantiated. She concluded that Ms Aslam's actions were a fundamental breach of contract amounting to gross misconduct and dismissed her with immediate effect. Ms Aslam's appeal against dismissal was unsuccessful. She complained that she had been unfairly dismissed.

The tribunal was not satisfied that Ms North's investigation fairly reflected the context of the employee's behaviour. It felt that Ms North might have thought that the issue was one that merited conciliation through the bullying procedure, rather than discipline, had she been able to consider:

- more of the history between Ms Aslam and Ms Hussain;
- the long-standing perceived unfairness about the rota system;
- Ms Hussain's wider allegations against 'union activists'.

The tribunal found that, even if the conclusions had been justified, a fair and reasonable employer would not have dismissed her. A fair investigation by a fair-minded employer would have resulted in a warning that the employee needed to modify her behaviour, or some form of conciliation through the bullying procedure, or a requirement for stronger leadership as to what was and was not acceptable behaviour for all staff on the section. The deficiencies of the investigation were not resolved by the appeal process.

Aslam v. BBC [2010]

Even in a case of gross misconduct you must carry out a proper investigation, though where the facts are clear and admitted you may have to do less.

6.4 Get the full picture and consider mitigating factors

Please note that a simple admission of gross misconduct does not absolve you of the necessity to get the full picture and to follow your disciplinary procedure. It merely means you don't have to do *as much* investigation. If in doubt, it's better to get more information rather than less.

If you are carrying out an investigation, make sure that you're aware of your organisation's own disciplinary procedure before you start as this may lay down rules or guidance for the conduct of a disciplinary investigation.

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6.5 More discoveries

If, when you are investigating the main allegation, you discover additional evidence that suggests another aspect of misconduct, or there is further misconduct before the investigation has been concluded, you can include this evidence in the investigation. If you are still at the investigation stage, there's no need to refer it to a separate investigation.

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7 Follow the ACAS Code

7.1 Introduction

The ACAS Code requires that the employee should know the nature of the charge against him and should be given the opportunity to state his case. The evidence you collect during the investigation will be put to the employee in the letter requiring the employee to attend a disciplinary hearing and will enable him to prepare an explanation in response.

7.2 ACAS guidance

The ACAS Code of Practice 1 came into force on 6 April 2009. It provides that, before determining whether or not there is a disciplinary case to be answered and whether a matter should be dealt with formally or informally, the employer should conduct whatever investigations are necessary to uncover the facts surrounding the allegation.

The fairness (or otherwise) of any dismissal will depend (among other things) on whether or not you have acted reasonably and carried out a fair procedure prior to making the decision to dismiss the employee. A proper, fair and thorough investigation will be a key component of a fair dismissal procedure.

The ACAS Code places a specific duty on employers to establish the facts. You must carry out a reasonable investigation in order to establish the facts before taking any disciplinary action, although the extent of that investigation and the form that it takes will vary according to the circumstances. It is important to carry out investigations of potential disciplinary matters without unreasonable delay.

The most detailed advice about what the law requires is found in the non-statutory Guide which accompanies the ACAS Code.

Investigating cases

When investigating a disciplinary matter take care to deal with the employee in a fair and reasonable manner. The nature and extent of the investigations will depend on the seriousness of the matter and the more serious it is then the more thorough the investigation should be. It is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against.

It is not always necessary to hold an investigatory meeting (often called a fact finding meeting). If a meeting is held, give the employee advance warning and time to prepare.

An investigatory meeting should be conducted by a management representative and should be confined to establishing the facts of the case. It is important that disciplinary action is not considered at an investigatory meeting. If it becomes apparent that formal disciplinary action may be needed then this should be dealt with at a formal meeting at which the employee will have the statutory right to be accompanied.

From: Discipline and Grievances at Work - The ACAS Guide, page 17, ACAS Publications 2009

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The phrase '*If a meeting is held, give the employee advance warning and time to prepare*.' is worth thinking through. At the time of writing, let's be clear; there is no legal duty placed upon you to write to an employee to set up an investigatory meeting, although this is commonly done in some sectors. This risk is that evidence will be destroyed before an investigating officer gets anywhere near it and that is clearly an unsatisfactory state of affairs. While there is a need for an employer to collect evidence in a reasonable and fair way, the Government, the courts and the unions all accept that an employer needs flexibility to establish the facts. Many public sector bodies have a clause in their disciplinary procedures which requires them to write to the employee to advise him about the investigation and its purpose. Some get round it by having an informal 'pre-investigation meeting' which does not have to be set up in advance.

My view is that it's perfectly reasonable to call an employee in without any prior notice to ask questions about the matter under investigation. The ACAS Guide is non-statutory. Further, it is noticeable that that guidance about how the employer should conduct an investigation is given in very broad terms. The guidance about setting up and conducting a disciplinary meeting is detailed and prescriptive. Therefore, it's reasonable to conclude that if the Guide required written notice to be given of the investigation meeting, which set out the matters to be investigated, it would have said so.

Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under your own procedure. If it is, you should follow it.

7.3 Separate investigation and discipline

While there is no legal requirement to do so, the courts have shown an increasing preference for the investigation to be carried out by one person and any subsequent formal meeting to be carried out by another. This is to ensure impartiality. The argument is that if you have investigated and found that there is a case to answer, it's very difficult for you to be impartial as a disciplining officer.

An investigation meeting should not result in disciplinary action. If it becomes clear during the course of a meeting that disciplinary action is needed, adjourn the meeting and write to the employee, giving him notice of a separate disciplinary hearing, setting out the findings of the investigation and advising of his right to be accompanied. Chapter 9 deals with this right in more detail.

If you are a small business with very few managers available to take part in the investigation and disciplinary process, it can be useful to include a form of words in your discipline procedure which allows the investigating officer to chair the disciplinary hearing as well. Note that you should confine the exercise of a dual-role individual to a situation which has been agreed by the employee and is not at a stage which is likely to lead to dismissal.

Once you have completed the investigation and decided that there is a case to answer, write to the employee to set up a formal meeting. The letter should give details of the time and venue for the disciplinary hearing and advise the employee of his right to be accompanied at the meeting.

The letter should also contain sufficient information about the alleged breach of standards to enable the employee to prepare to answer the case at a disciplinary hearing. You should provide a copy of the investigation report or notes, copies of the evidence upon which you have based your decision to move to a disciplinary hearing, including witness statements, and any other relevant material.

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8 What happens if an employee goes sick with stress?

8.1 Introduction

How do you handle a situation where the employee who is the subject of the investigation goes off sick with work-related stress as a response to the investigation process? It's fairly straightforward to tackle the problem successfully.

8.2 First steps

Where an employee submits a medical note, write to him and say how sorry you are that he is unwell and that you will reschedule your meeting with him to the following week. If he remains unwell then, write again and say that you will carry out a welfare meeting with him, as you are concerned for his health.

Meet with him, have an informal chat and listen to him carefully; if he is lucid (i.e. can understand what you're saying and can express himself clearly to the same extent as he normally can) then he can probably continue with the investigation process. As most of us are not doctors, our conclusions will be based on our observations as a lay person. However, if the employee says he cannot attend the investigation, say that you will write to your occupational health advisor, briefing him on the facts and obtaining his advice. If you write the letter in an appropriate fashion, you will receive an official confirmation that the employee is fit to attend. A failure to do so will then be an unauthorised absence.

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8.3 Recalcitrant employees

If an employee refuses even to meet you for a welfare meeting, look at the employee's terms of employment. It is usual for the terms to have a clause which gives the employer the right to require an employee to attend for a medical examination.

Use your own occupational health advisor and ensure that he or she is robust. The employee's GP is likely to be partisan, which is understandable, but doesn't help us get to the facts.

Write to an occupational health advisor explaining the situation and making clear that the employee is only being asked to attend an informal welfare meeting. Say that we are very happy to support the employee throughout the process by making reasonable adjustments. If you have already offered reasonable adjustments, list them and ask what else we can reasonably do.

If the report is reasonable, then take the advice. In the case of the Town Clerk described in 5.2, we took medical advice to take matters forward.

Example

The Council had something of a history of poorly performing Town Clerks; a number had gone off sick with stress, enjoying the benefit of a year's sick pay, then been given a pay-off. I imagine that the current clerk under prospective investigation thought we would do the same for her, but the current Council was made of rather sterner stuff.

In this case, we required her to go and see our doctor. As ever, we offered reasonable adjustments to help her comply. Company sick pay was paid on a discretionary basis and we made it clear that if she refused unreasonably she would be put on SSP. She went, albeit grumbling loudly.

The doctor found that she had a genuine but minor anxiety disorder, which was treatable. The reason she still had it at that stage some two months after she had gone off sick was that her own doctor had failed to diagnose and treat her condition. She had only just started medication and our doctor said she would be fit enough to attend the investigation in four-six weeks. He also said very helpfully that he did not consider that she had a disability and her work requirements were not so onerous as to produce a serious break down in health.

We followed the doctor's advice and gave her the six weeks grace. She still refused to attend either the grievance meeting (which was then 'parked') or the investigation meeting. We continued to offer to make reasonable adjustments, but she simply refused to attend on grounds of ill health.

We told her that as she was refusing to co-operate with the process we were exercising our right to move to SSP payments.

On a final note, while there is a marked trend for employees to try to avoid investigations and disciplinary processes by going sick as described here, there will be occasions where people are genuinely unwell. Do ensure that you approach matters with an open mind and try to be fully supportive. In some cases it would be quite wrong to withdraw company sick pay. Each case turns on its own facts.

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9 Right to be accompanied

9.1 Introduction

Workers have a statutory right to be accompanied by a companion where the disciplinary hearing could result in:

- a formal warning being issued
- the confirmation of a warning or some other disciplinary action (such as appeal hearings)
- the taking of some other disciplinary action.

9.2 Companion at investigations

There is no statutory right for a worker to be accompanied at an investigatory meeting.

Example

Mr Skiggs was a union representative employed by South West Trains. He was required to attend an investigation meeting and asked to be accompanied. He argued that, because the results of the investigation meeting could lead to a formal warning being issued, albeit at a later meeting, he should be able to exercise the right to be accompanied. An interesting argument, but the EAT didn't accept it. Upholding the decision of the original employment tribunal, the EAT said that an investigative meeting concerning a grievance about an employee who had previously been disciplined was not a disciplinary hearing for the purpose of section 10 of the Employment Relations Act 1999. Accordingly, there was no right to be accompanied.

Skiggs v. South West Trains [2005]

9.3 Statutory pool

If there is a right to be accompanied at the investigation stage in your disciplinary process, confine the choice of companion to the statutory pool. The companion may be a fellow worker, a trade union representative or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by his union as being competent to accompany a worker.

The companion has the right to help the employee prepare, to address the hearing, present his case, to confer with the worker during the hearing and to sum up on his behalf. It doesn't give the companion the right to answer for the employee.

Many employers (especially in the public sector and not-for-profit organisations) do give a right to be accompanied at the investigation stage. I'm not entirely clear why they do that, since the organisation is merely fact finding at this stage and no charges will have been formulated for the employee to answer. Check your disciplinary procedure before starting the investigation process. If it gives a right to be accompanied at an investigatory meeting to an employee, then you must adhere to that process.

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9.4 Exceptions

9.4.1 Custom and practice

You should note that if employees have generally been allowed to be accompanied in the past, they may be entitled to be accompanied because of custom and practice. Contract terms can come into being or be amended through custom and practice. There is no precise definition or timescale, but it may arise where a practice or benefit within a particular workplace, which has not previously been explicitly recognised or recorded in a contract of employment, may become an implied part of the contract following regular informal usage. Any such custom or practice must be 'reasonable, certain and notorious' for it to amount to an implied term of the contract.

Some individuals could be at a disadvantage if they're involved in an investigation meeting without any sort of companion. They may, therefore, need extra support during the disciplinary process. There are three exceptions to the usual rule.

9.4.2 Disability

The first is where an employee has some disability which impacts adversely on his ability to understand the issues, participate in the process and answer the questions addressed to him. If this is the case, consider allowing him to have a companion. For example, if an employee is deaf and his first language is British Sign Language (BSL), you may wish to arrange to have a BSL-trained interpreter present.

9.4.3 Young workers

Secondly, where an employee is a minor (i.e. is under the age of 18), the law considers him to be a child. He may look and sound like an adult, but we still have a duty to support him. Intellectual and emotional development has not been fully achieved in the eyes of the law and an employee of that age may not fully understand the process, or may find it intimidating. Make arrangements for him to be accompanied by a suitable adult to help him understand and participate in the process.

9.4.4 English is not the employee's first language

The last category is an employee who does not speak English as his first language, a situation that many employers in our multicultural society may face. Such employees must be able to understand the process and be able to engage with it; even where their day-to-day English is adequate, an investigation is an unusual and stressful situation, and it may challenge their English vocabulary and comprehension. Check to establish whether they need language support.

The exceptions described are not legal rights, but it's always wise to demonstrate that you're a reasonable employer and are doing everything you can to support your employee.

9.5 Legal advisor

Unless your discipline procedure permits it there's no statutory right to be accompanied by a legal advisor, even at a formal disciplinary hearing.

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10 Planning an investigation

10.1 Introduction

Approach every investigation with an open mind; don't assume guilt or innocence. It may be appropriate to suspend the employee on full pay, but this is best carried out as a precautionary measure and it should be made clear that it is not a disciplinary sanction. Only consider this in the most serious cases where an employee's continued presence in the workplace might enable him to tamper with, or remove, evidence or to interfere with witnesses.

10.2 Decide what you are going to investigate

Plan the investigation carefully. Define the issues to be investigated. Break these down further by identifying the potential areas within each issue. In some cases, this will require the holding of an investigatory meeting with the employee. In other cases, all you need to do is collate documentary evidence, for example, clock cards to show late arrival at work. Decide which witnesses you want to interview and list additional sources of information and evidence. Consider the questions you want to ask during the investigation.

Physical investigation within the workplace might be appropriate, depending on the nature of the report or incident and photographs of an incident or hazard might be required. If you do carry out a physical investigation, respect the employees' privacy. An employer's right to conduct searches in the workplace and similar acts, such as drug testing and surveillance, varies from one organisation to another. If in doubt, take advice before carrying out any searches or tests.

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Collect any documents that are relevant to the alleged disciplinary breach. For example, if it concerns an allegation of fraudulent expense claims, collect the claim forms so that they can be shown to the employee for his explanation. Consider all possible sources of information. This includes files, documents, CCTV footage and computer records. Relevant information might be found in roster sheets or absence records (if it is necessary to establish who was on duty on a particular day) any letters, memos or emails relevant to a disciplinary incident or chain of events. Policy documents and training records can also be produced as evidence.

10.3 Writing to employees at the investigation stage

Many organisations write to the employee prior to setting up an investigation meeting. As I pointed out in the section dealing with the ACAS Code Guide, there's no legal requirement to do so and I don't recommend it. If you write to say that you're carrying out an investigation and give details of what it's about, it is very likely that evidence will be destroyed or excuses and counter arguments considered in advance. The advantage of surprise can be very useful.

Trevor was the sales and marketing director for one of my client companies. The company operated a loyalty card type system for some of its customers. It worked along the lines of a repayment of money to the customer when sales had passed a certain point (similar to systems used in supermarkets.

Angus, the MD, had noticed that repayment to one customer had been made, even though the sales had not met the required level. He started to investigate. Angus was concerned that the evidence was very fragile and it would be too easily buried if Trevor got wind of the company's concerns. Angus and a non-executive director had a meeting with Trevor to raise their concerns. Taken unawares, Trevor sang like the proverbial canary. Once he'd started to confess, it gave us something concrete to look at.

It became clear that Trevor had made substantial payments back to a number of purchasing managers. In return, he had received vouchers, goods, cash, and services totalling at least £25,000 from them. In truth, that was probably the tip of the iceberg. Although the Board knew of one payback arrangement, they did not know about the large volume of money being transferred back and had not sanctioned it. It also emerged that a number of Trevor's arrangements had been made entirely without the Board's knowledge. The company was satisfied there was a case to answer and Trevor was invited to a disciplinary hearing and eventually dismissed for gross misconduct.

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11 Gathering evidence

11.1 Introduction

The investigating officer's role is to collect data in order to allow the organisation to determine whether there is a case to answer. It's important to approach this task holistically. It is not the aim of the investigation to get enough evidence to escalate matters to a formal disciplinary hearing come hell and high water. Rather it is about approaching the data collection in the round, collecting all the facts, including those which may explain or mitigate an apparent transgression.

It can be very useful to ask witnesses to draw a diagram or plan of the area they are describing and which show how events took place. You can cross-check and ask for distances, lighting conditions, clarity of the view etc. to add further detail.

In one case we asked a person who had raised a grievance to draw a plan showing the incident, giving details of the positions of various people and objects. It became apparent that, unless the witness could see though solid walls or round 90-degree corners, he could not possibly have seen the incident he had described.

11.2 Interviews

Conduct interviews as soon as you can, before memories fade. When conducting interviews, set up ground rules, describe the process to interviewees and explain the need for confidentiality. Witnesses can also be interviewed more than once if necessary, for example, if further evidence comes to light.

Make full notes at the time of any interview. The interview notes must be sufficiently detailed, capture the relevant content of the conversation and be as factual as possible.

Do	Do not
Note specifically what the person said in response to a question.	Write down your judgments at this point, for example, *I think he is lying.*
Note behaviours, for example *he kept playing with a key ring and looking out the window.*	Note your interpretation of the behaviour, for example, *I think he is holding out* or *I think he is hiding something*.
Note the start/finish time, participants, location, purpose of the conversation or meeting and any key agreements.	Attempt to write everything that is said, if the meeting needs to be fully recorded then use recording equipment.
Note information that relates to the purpose.	Note information that is of interest to you but irrelevant to the case.
Date your interview notes, and include the duration of the interview.	

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At the end of the interview, ask the witness to read through the notes (or read them back to him) and allow him to make any additions or amendments that he thinks are appropriate. Ask the witness to sign the handwritten notes. Once it has been typed up, give the transcript of the interview to the witness for further checking and signature and keep the original notes on which the statement was based.

11.3 What happens if the facts are not in dispute?

It's your responsibility to get the fullest possible understanding of the facts. An admission in itself, even of potential gross misconduct, does not absolve you of the responsibility to investigate fully. If you don't establish all the facts you risk a finding that any resulting dismissal is unfair, both for a failure to carry out a reasonable investigation and a failure to comply with the ACAS Code.

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Example

Nena Okoro had been employed as an assistant catering manager. She had 17 years of unblemished service. She and her manager Mr Cannon had a bantering, informal working relationship, which included the playing of practical jokes. When the company was presented with an MP3 player as a corporate gift, Ms Okoro asked her line manager if she could take it home. Her request was turned down, but she later took the device anyway.

There was an express provision in the company's rules, of which Ms Okoro was aware, to the following effect:

Employees are not allowed to borrow either stock or equipment from their place of work without written authorisation. This will be treated as theft and will result in summary dismissal.

When her line manager inquired about the device, Ms Okoro would only say that she knew where it was and that she knew who took it. Two weeks later, she admitted that she had taken the gift as a joke and returned it unused and unopened.

As a result of this, Ms Okoro was suspended on full pay, and an investigatory meeting was planned, but later cancelled. She was then invited to a disciplinary meeting where she was summarily dismissed on the grounds that her taking of the MP3 player was an act of gross misconduct. She complained that she had been unfairly dismissed.

The EAT agreed. It said that although there will be some cases in which an employee admits misconduct where no further investigation would be needed, in most cases an investigation should be carried out to ascertain if there are any mitigating factors and to determine the seriousness of the misconduct itself.

In this case, Ms Okoro had defended her actions by explaining that she and her line manager had a working relationship which included pranks and jokes. Taking the MP3 player was one such joke, even if it was somewhat misjudged.

If her employer had carried out a proper investigation into the incident and the circumstances surrounding it, the nature of this working relationship would have been disclosed, and her behaviour would have been seen in its proper context. By not carrying out the investigation beyond gaining her admission, the employer was at fault and so the dismissal was unfair.

Okoro v. Compass Catering [2009]

If an employee refuses to attend an investigation meeting, or simply does not attend, reschedule at least once. There's no legal duty to do so, but you should always take the approach of the reasonable employer. Thereafter, you're entitled to make a decision as to whether or not to invite the employee to a disciplinary hearing or deal with the matter informally on the basis of the information available.

11.4 Get help to increase impartiality

It can be helpful to enlist the help of an independent third party in planning and carrying out the investigation. Use a cyclical approach to ensure that you have asked everything that you need to ask. By this, I mean carry out the first round of interviews, write it all up, give the first draft to the third party to review and discuss what information you have elicited and what else needs to be uncovered. Often, the answers to questions give rise to a series of questions. Conduct further investigations, including a second round of interviews, if appropriate. Repeat the process until you are satisfied that you have all the information that you need.

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11.5 Collate the information and decide on next steps

Compile your findings into a report. Your conclusions should rely on evidence and should not engage in speculation. If you conclude that there is a case to answer, write to the employee arranging a disciplinary hearing, giving the reasons for your findings. You should provide all the relevant information to the employee so that he can properly understand the charges and can prepare himself. The employee should have the opportunity to see these papers a few working days in advance of the hearing. If the papers are presented to the employee on the day of the hearing, he may argue that he has had insufficient time to prepare a proper response to the disciplinary hearing.

If you decide that there is no case to answer, tell the employee that you will not be taking it any further and confirm it in writing. Shred the evidence that you've gathered. It should not be placed in a relevant filing system, such as a computerised personnel file, as this may be in breach of the Data Protection Act.

If the employee has been suspended during the investigation, lift the suspension immediately and allow him to return to work.

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12 Burden of proof

12.1 Introduction

If you are investigating the alleged breach of a workplace standard you will have to be satisfied that, on the balance of probabilities, there is a case to answer.

The balance of probabilities means that something is more likely than not to have occurred, or it is more likely than not that it did *not* occur. If the probabilities are equally balanced, you have not discharged the burden of proof.

12.2 Three part test

Where it is a matter of conduct, you have to satisfy the rules in the 'Burchell Test'. In British Home Stores v. Burchell [1980], Ms Burchell was dismissed for shoplifting. Giving guidance on the employer's level of responsibility, the court said that the employer had to have a genuine belief, based on reasonable grounds after a reasonable investigation, of the guilt of the employee of the misconduct at the time.

The test deals with the reason for dismissal, not the reasonableness of the dismissal and the burden of proof is on the employer. However, as you might expect, the more serious the consequences of dismissal for an employee are likely to be, the more thorough the disciplinary investigation must be.

Example

Ms Roldan was a nurse from the Philippines working for the NHS. She had four years of service when a healthcare assistant, Ms Denton, complained that Ms Roldan had mistreated a patient. Ms Roldan was told that a serious complaint had been made against her and was suspended.

During the investigation, Ms Denton was interviewed and completed an incident report; Ms Roldan and her supervisor were also interviewed. After hearing the evidence, the disciplinary panel dismissed Ms Roldan for gross misconduct. The panel stated that it accepted Ms Denton's evidence and preferred it to Ms Roldan's evidence, which it found to be inconsistent. The Trust rejected her appeal. As a result of the summary dismissal, Ms Roldan lost her work permit and therefore her right to work in the UK. She was the subject of a criminal investigation by the police. She complained that the dismissal was unfair.

The Court of Appeal agreed. One of the matters it considered in deciding whether the investigation was fair and adequate was the consequence for Ms Roldan of a finding of unfair dismissal. It said that, given that dismissal would lead to her deportation, a more careful investigation should have been carried out. This was particularly important because Ms Roldan had a previously unblemished record over four years of employment with the Trust.

Where there are allegations of misconduct, and there are two opposing accounts of an incident with little or no corroborative evidence either way, employers are not required to believe one employee and disbelieve the other. It is perfectly proper for the employer to say that, whilst not disbelieving the complainant, it has found the case against the accused to be 'not proven'. The benefit of the doubt is therefore given to the accused.

Salford Royal NHS Foundation Trust v. Roldan [2010]

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13 Interviewing witnesses

13.1 Introduction

When interviewing witnesses, identify as precisely as you can what needs to be established from each interviewee and prepare accordingly. Prepare some open questions to help get things started, but don't treat the questions as a script.

13.2 Guidance for taking witness statements

Establish ground rules for the interviews, describe the process to witnesses and explain the need for confidentiality. By 'witnesses', I include the employee whose acts are under investigation, as well as others who are not themselves being investigated for any breach, but who may have seen, heard or experienced the matter under investigation.

Try to have two investigators present during an interview so that one can ask questions and the other can take notes.

Where you are interviewing the employee under investigation, explain to him that an investigatory meeting is not a disciplinary one.

When I'm taking a statement I ask the witness to run through his narrative a couple of times verbally and ask some questions so he has a chance to compose his thoughts and get things in the right order. Ask him to 'paint a picture with words' for you, describing the events in as much detail as possible.

Ask the witnesses to give an account of what took place. This should be in terms of what they personally witnessed or had involvement with.

Questions should be focused on the issue at hand and phrased in an open manner that does not lead to simple yes or no answers. Listen carefully and explore the answers. Avoid putting words into witnesses' mouths or suggesting answers. All questions should aim to encourage witnesses to recall their version of events in their own words. See 'Question technique' for more information about asking questions.

If you are faced with a situation where a misconduct issue comes down to one employee's word against another's, you can give the accused the benefit of the doubt.

13.3 What to include

Witness statements should start with a positioning statement. For example, 'My name is Jon Finch and I am the Warehouse Manager. On 26 October at about 9.30am I was working in my office when Terry James came in.'

The statement should set out events in chronological order, in as much detail as possible. The statement is given with the witness referring to himself in the first person singular, that is, 'I saw this' 'I heard that'.

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Encourage the witnesses to stick to the facts. It's very easy for bits of hearsay or opinion to creep in. Hearsay is second-hand information. For example, if John tells you that Janet saw the postman arrive at 10am, this is not evidence that Janet saw the postman, only of what John says Janet told him. We would have to go back to Janet to gather direct evidence. If this happens it's likely to adversely affect the quality of the data you gather.

13.4 Failure to attend

If the employee fails to attend an investigatory meeting, contact him and find out the reason for his lack of attendance. There is no legal obligation to rearrange the meeting, but be mindful of the need to carry out a reasonable investigation as part of a fair disciplinary process. It's good practice to rearrange the meeting, unless it is clear that the employee does not intend to cooperate with the investigation. Consult the employee to ensure that the rearranged time is suitable for him. If the employee fails to attend again, without good reason, you can decide whether or not to go ahead on the information you have.

If the employee refuses to attend the meeting unaccompanied, make a decision as to whether or not to allow the employee to be accompanied, applying principles of fairness.

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14 Anonymous witnesses

14.1 Introduction

In an ideal world, witnesses will give you a statement and be happy to put their name to it. Sometimes, employees are reluctant to provide a witness statement as part of an investigation into a colleague's conduct. You can't insist on an employee providing a statement, but do speak to him to see what you can do to address his concerns.

14.2 Taking an anonymous witness statement

If necessary, you could agree that the statement will be anonymised as far as possible. This can be done by blanking out parts of the statement to remove any information by which the witness could be identified, or providing only a summary of the statement to the employee who is the subject of the investigation. Alternatively, you could take several statements and put them together so it's impossible to determine who has contributed.

If you have to take an anonymous witness statement, you need to take particular care to ensure the accuracy and quality of the data gathered. The EAT set out guidelines relating to anonymous witness statements in Linford Cash and Carry Ltd v. Thomson [1989]:

- Try to obtain independent supporting evidence from other witnesses or sources. Consider whether or not the witness has any reason to provide false information.
- In taking statements note: the date, time and place of each observation or incident; the witness' opportunity to observe clearly and accurately; circumstantial evidence, such as knowledge of a system, the reason for the informer's presence or any memorable small details and whether the informant had any reason to fabricate evidence.
- Make tactful enquiries into the character and background of the witness.
- If the disciplinary process is to continue, the responsible member of management should personally interview the witness and decide what weight is to be given to his evidence.
- The witness statement, anonymised if necessary, should be made available to the employee and his companion.
- If the employee raises an issue at the disciplinary hearing, it may be necessary for the disciplining officer to adjourn to further question the witness.

At the conclusion of any witness interviews, tell the witness that if the case results in a disciplinary hearing, he may be required to attend to give evidence.

It's also a good idea to ask the employee if he is 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.

Following the meetings with the witnesses, type up the statement and ask the witnesses to check and sign them. They should be given the opportunity to make any necessary amendments to ensure accuracy.

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Example

In this case, the dismissed employees had worked at a crisps factory in Peterlee. The employees were dismissed for alleged participation involving the theft of money inserted into crisps packets as part of a sales promotion. Management became aware of the allegations when approached separately by three employees who made the allegations, but did so on the basis that they must remain anonymous. There was history of intimidation and reprisals at Walkers in instances where employees were considered to be working too closely with management.

The allegations were investigated and statements were taken. However, the informants insisted on anonymity and statements were therefore general and were unsigned. The statements were taken by the same HR manager and the informants were not questioned during the disciplinary hearing. Walkers was satisfied that the statements were reliable and truthful and that the informants had made them in good faith.

After considering the evidence, Walkers dismissed the accused employees, who subsequently made claims of unfair dismissal to the Employment Tribunal. Those claims were dismissed and each former employee appealed to the Employment Appeals Tribunal. The employees argued on appeal that a lack of detail in the statements and the failure of the disciplinary panel to interview the witnesses made the process unfair.

The EAT disagreed and held that in assessing the overall fairness of the employer's approach, it was necessary to consider the employer's reasons for granting anonymity and refusing to allow the disciplinary panel to interview the informants. The EAT held that, in the circumstances, the Employment Tribunal had adopted the correct approach. The EAT held that this case raised two new additional concerns that had not been considered in previous cases. First, the unwillingness of the informants to sign a statement unless it had been redacted. And second, the informants' unwillingness to be exposed to further questioning for risk of their identities being revealed. The EAT further concluded that the approach was reasonable within the confines of a factory in a close-knit community, where retribution and reprisals were a real risk.

Ramsey v Walkers Snack Foods [2004]

This case takes a reasonable and encouraging approach in terms of balancing the rights of individuals accused of misconduct with individuals who wish to remain anonymous when giving evidence. However, it does not provide employers with a fail-safe mechanism to refuse to provide witness statements in all cases and each case should be considered on its merits. What is clear is that Walkers considered the possibility of retribution as a real threat, given the history of Walkers and the close-knit community in which is was based, and went to considerable lengths to ensure the informants remained anonymous.

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15 Question technique

15.1 Introduction

The ability to ask the right questions is incredibly useful. Successful questioning allows us to do many things, such as:

- acquire information
- test and probe the information
- check our understanding
- check the understanding of the other person
- build rapport
- engage the other person's mind and concentration
- manage and direct a conversation
- regain control of a conversation.

There is a range of question types available to you to use. Choose the type of question that will give you the information you want and will allow you to control the pace of the interview.

Take your time when you're questioning. Think about what you want to ask so that you can target your questions appropriately, give the employee time to answer fully and remember, silence can be your friend; if you allow people some space and silence, they often talk a lot more – the more they talk, the more information they give.

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15.2 Open questions

Being able to use open questions effectively is an important managerial skill. They're useful for developing an open conversation – 'What did you do on holiday?' – or finding out more detail – 'What else do we need to do to make this work?'

In workplace investigations, an ability to ask open questions is essential; they are the basic tool of interviewing. Open questions are so called because they open up the discussion by encouraging the person being questioned to provide data, which leads on to more questions. You'll find that you can get much better data, much faster if you ask open questions. Once you have asked a question, keep quiet and listen – let the person you're questioning respond. You need only interrupt with another question if the person is going off the point or not giving you the information you need.

Useful words and phrases which encourage the employee to respond include:

how	why
when	where
who	what
describe	explain
demonstrate	give an example
list	expand on
tell me	help me understand

Target your questions carefully. The human brain manages information best when handled in small chunks. If you ask someone what sort of year they've had, they may struggle to collate their thoughts. If you say, how were your summer holidays, it's more targeted and you're likely to get better information.

Note that we have a national habit of putting 'Can you …?' (or 'Could you …?', 'Would you …?' and so on) in front of questions. This can have the effect of closing an otherwise open question. Try to avoid it. Many people will answer the question, but some will not and you have to work harder to acquire information.

When asking someone to tell their story, it can be very useful simply to ask a series of 'What happened then?' type questions.

15.3 Questions to use carefully

15.3.1 Closed questions

A closed question usually receives a single word or very short, factual answer. For example, 'Are you thirsty?' The answer is 'Yes' or 'No'. However, they can be useful if you just want to confirm a fact, for example, 'Is your name John?' In this case a yes or no answer would be appropriate.

15.3.2 Leading questions

These can put words into someone's mouth, so answers may not be a true representation of the facts. An example of a leading question would be 'You picked up the bag and went out on to the street, didn't you?'

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You can use this style of questioning if you are checking or summarising information that your interviewee has already given you. So, for example, you might say 'So what you're saying to me is you heard the fire alarm go, so you picked up your bag and walked after John on to the street? Have I understood you correctly?'

Never be afraid to go back over information if you're not clear about it and want to check your understanding. It's important that you grasp correctly what the employee is saying to you.

15.4 Questions to avoid

- Multiple-choice questions – where you offer a range of answers for the interviewee from which to choose, for example, 'Was it this …? Or this …? Or this …?'
- Multiple questions – where you ask more than one question at a time.
- Rambling questions – where you haven't really thought out what you want to say, so the question is too long, tending to turn into a statement in the middle and often doesn't make sense.

15.5 The question funnel

Most investigators ask questions in a very random way. This scattershot approach means that information gathering is superficial and important evidence is often missed. Explore one area fully using the question funnel (see guidance below). Only when you are fully satisfied that you have gathered all the relevant information do you move on and start exploring another area.

You use the question funnel to drill down and get to the detail of the information you need.

- Start by asking an open question about a particular matter you want to explore.
- Get more detail by probing, using as many open questions as you need,
- Summarise to check your understanding.
- Close by asking a sweeper question. Ask 'Is there anything you'd like to tell me about this matter that I haven't asked you about?'

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Open questions …….

Probing open questions ……..

Summarising/ clarifying ……

Closed/ sweeper ……

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16 Discipline

16.1 Introduction

The purpose of an investigation is simply to find out on a balance of probabilities whether there's a case to answer. It is not to make a judgment about an employee's guilt.

16.2 Discipline hearing

Once you have completed your investigation and decided that there is a case to answer, you will set up the discipline meeting. Part of that is to ensure that the disciplining officer, employee and his companion have all been given a copy of your findings.

Note that in some organisations, the investigating officer collects the facts then passes them on to someone else to determine whether there is a case to answer. Then (where there is a case to answer) this decision maker passes it on to a third person to chair the discipline. If that is the procedure in your organisation you should follow it. That said, there is no need to do this and it is not required by the ACAS Code of Practice. It's not my preferred route as it's unwieldy and slows down the process. Indeed, in my view, the investigating officer is probably the best person to make the decision about whether there's a case to answer and write to the employee because he'll have the facts at his fingertips

Some organisations leave it like that and don't require the investigating officer to attend the disciplinary hearing. I prefer the investigating officer to attend the discipline hearing to present his findings. It also means that the discipline officer can question the investigating officer, as can the employee and his companion. This saves time and facilitates a clearer understanding, though often a discipline officer will want to adjourn to carry out his own additional investigations.