

# **Key principles and common mistakes**

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.

### **Timing is everything**

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.

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 are 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 have 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.

Where there seems to be some sort of problem, start at the beginning with an investigation to collect the evidence. Having agreed to it, typical ostriches then go overboard with examples dating back months, or even years. As a rule of thumb, confine the investigation to a fairly short, recent period, perhaps a few weeks. Remember that each case turns on its own facts.

## **Learning from life's lessons**

Tanya worked in a supermarket as a cashier. She was accused of a till irregularity three days after the alleged incident took place. Since one tin of baked beans is much like another, and she carried out hundreds of these transactions every day, she argued that it was impossible for her 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 Tanya to recall the matter, so the manager should have given her the benefit of the doubt.

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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.

The one case where it may be reasonable to allow a delay is where you did not know, and could not reasonably be expected to know, about a problem until some time 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.

## **Learning from life's lessons**

I was asked to investigate the alleged misappropriation of £62,000 by the Managing Director of ABC Ltd, Lyall Brown. The realisation that the money was missing only came about four years after the event. That the money was taken by Lyall 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 Lyall 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. A section of the report is shown in Appendix 7. Names have been changed to protect the parties involved.

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### **Getting professional help**

In some situations, it can be helpful to use professional investigators.

### **Learning from life's lessons**

John Martin and Marcus Vicars were senior engineers employed by a client company. They were found to have set up a web page which appeared to compete with their employer. Following an investigation which concluded there was a case to answer, John resigned but Marcus decided to tough it out. He attended the disciplinary hearing with a trade union representative. I chaired the meeting and decided that, though the answers given to me by Marcus were absurd and his story highly implausible, the representative was sufficiently competent to cause me to conclude that a dismissal would be dangerous. During the hearing, the representative had thrown down a challenge and said that if Marcus had participated in accessing or developing the web page, there would be evidence there.

The company consulted a digital forensic investigator. The report clearly showed that there were serious discrepancies in Marcus's story and that he had accessed the website and landed on some sort of web page at a much earlier stage than he was admitting. The data provided by the independent expert was conclusive and I was able to take it into consideration when I made my decision to dismiss for gross misconduct.

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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 cannot use data which is inappropriately obtained, or which breaches data protection or human rights.

### **Learning from life's lessons**

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]

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