

Strategic guide: internal investigations in the UK

CMS employment

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Introduction

In recent years there has been a sharp increase in internal investigations in UK businesses. This is in part due to an increased focus on ethics and governance and, within certain sectors, increased regulatory scrutiny and a move towards a speak up, listen up culture.

These workplace investigations are as diverse in their subject matter as they are in their origins. Triggers for an investigation include whistleblower reports, workplace grievances, external complaints or regulatory enforcement action. The objectives and outputs therefore vary considerably:

- At the most basic level, an organisation will want to respond to a complaint by investigating whether it has any substance.
- At the other end of the spectrum there may be a ‘root and branch’ investigation into culture. For example, where a previous investigation has hinted towards a widespread institutional problem.
- Some investigations are pre-emptive, in the sense that they seek to avoid a situation where a third party such as a regulator takes matters into its own hands.
- Others are reactive and focus on damage limitation.

It is critical to understand why an investigation is being carried out and to ensure that key decisions such as resourcing, legal privilege and the form of reporting are strategically aligned.

Establishing an effective investigation process will also promote confidence amongst staff and other stakeholders, including investors, that any wrongdoing will be taken seriously, and that individuals are held accountable for their actions. The internal investigation process can also root out more systemic issues such as poor risk culture or certain behavioural problems, which may not be obvious to those at a senior level.

This strategic guide focuses on practical aspects of planning and managing internal investigations. Developed alongside a webinar presented by Hannah Netherton and Steven Cochrane, partners in the CMS Employment Group, this guide contains our expert insights and advice relevant to all internal investigations in the UK workplace with a focus on the nuances unique to whistleblowing and sexual harassment investigations. Finally, given the current workplace restrictions in the UK, we look at some of the challenges when dealing with investigations in a virtual context.

Planning and Scoping

There are many key hallmarks of an effective investigation. In fact, what 'good looks like' will vary on a case by case basis. However, there are some basic considerations important to all investigations, and none more so than the planning and scoping phase.

The appropriate breadth and depth of an investigation will depend on a number of internal and external factors. These factors should be considered upfront and the scope of the investigation agreed upon (bearing in mind that a degree of flexibility may be required to take account of potential developments, such as fresh allegations coming to light during the investigation).

It will also be crucially important for the investigator to understand the scope of the investigation, the wider strategy and their own role in the process. In situations where the HR team is

investigating a relatively routine employee relations issue, this ought not to be particularly difficult. However, with larger or more complex investigations, such as those involving specially formed investigation committees or external investigators, it will be extremely important to articulate all of these points in a formal terms of reference. For more complex investigations the terms of reference should address issues such as the scope of the investigation, the nature of the allegations/issues being investigated, the authority under which the investigation is being conducted and the intended form of output (e.g. a formal written report, presentation to key stakeholders, written recommendations). Again, it is always sensible to ensure that the terms of reference are clear but flexible, so as to accommodate any further material developments that arise during the investigation.

Why are investigations important in the UK?

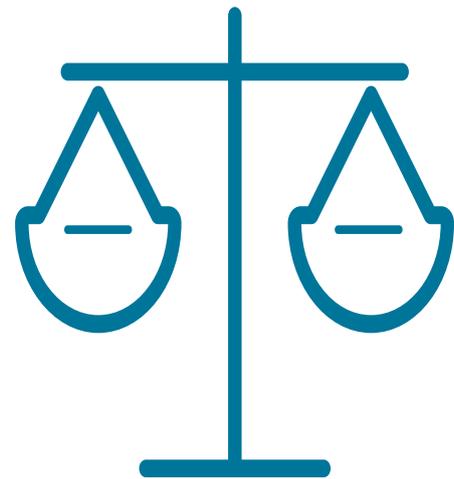
Reduce legal risk

Promote confidence in internal processes

Identify root causes of cultural issues

Proportionality

A proportionate response is key to an effective investigation. A well thought through scope and terms of reference will focus minds and help ensure that the investigation remains on track. Certain investigations demand only a light touch response, with relatively few interviews or documents to review. Conversely, other investigations will require a more rigorous approach with multiple witness interviews and a complex and time-consuming document review exercise. Generally, the level of investigation will depend on the seriousness or complexity of the allegations (as well as the potential for external scrutiny or collateral litigation). However, it is important to exercise judgement in deciding what is proportionate to the facts of the investigation and to avoid an overly superficial investigation (which could appear to be whitewashing the issue) or conversely a heavy handed approach that is more invasive than is necessary. This can often be a delicate balancing act and requires careful consideration at an early stage of the process.



Confidentiality

The importance of confidentiality in internal investigations cannot be overstated. There are multiple reasons for ensuring that confidentiality is a key focus. From a PR perspective, robust information barriers are an important measure to mitigate the risk of an information leak and information and documentation should generally only be shared on a 'need to know' basis.

Confidentiality is also vitally important in terms of maintaining trust in the process. Internally, trust will be severely damaged if confidentiality is not respected. In whistleblowing cases in particular, unnecessary sharing of information can increase the risk (or at least the perceived risk) of whistleblowers or witnesses being subjected to retaliatory treatment or detriment. Externally, regulators and law enforcement agencies will generally hold an internal investigation in higher regard where confidentiality protections have been robust. In certain sectors this may mean the difference between third parties, such as

regulators, accepting the internal response or being dissatisfied and commencing their own external investigation.

Another compelling reason for ensuring confidentiality exists where an investigation (or part of it) is intended to be protected by legal privilege. While the law on privilege is in a state of flux in the UK, it is fair to say that privilege is unlikely to attach to all documents produced, created or collated as part of an investigation. However, where the company is looking to maintain a claim for legal privilege over some or all of an investigation (e.g. its outcome), loss of confidentiality will almost always lead to a loss of privilege. This could be a devastating outcome, particularly where the potential cost of adverse publicity is high or where there is a risk of disclosure requests by or obligations to third parties (for example in the context of collateral litigation).

However, as important as confidentiality is, it is not absolute. The need or desire for confidentiality must be balanced with other considerations such as the need for fairness, in particular vis-à-vis the individual subjects of allegations. As a general rule witnesses or complainants should not be given guaranteed confidentiality or anonymity as this could be considered unfair to those under investigation. Similarly, it will not always be

possible to guarantee confidentiality or anonymity and it may be necessary to disclose certain details of an investigation (including the identity of individuals), for example in the context of regulatory enforcement action or disclosure in litigation. The key will be ensuring that reluctant witnesses' fears and anxieties are understood and that, where possible, reasonable reassurance is provided.

Who should investigate?

By choosing the right individual to lead an investigation, the company can do much to ensure its success. Multiple factors should be considered including skills, experience, independence and the risk of perceived conflicts of interest. In certain investigations, even where no actual or perceived conflict exists, the sensitive nature of the allegations may mean that it would be preferable (in terms of overall optics) to have the investigation carried out by persons with particular experience or background.

Independence and perceived conflicts of interest. This issue frequently arises where the subject(s) of the allegation(s) are particularly senior, for example a member of the board or executive committee, or senior management more generally. Where this is the case it can be difficult to create actual and perceived impartiality without appointing an external investigator. Depending on the circumstances this could be an external HR consultant, or senior representatives from another group company. In certain circumstances the Chairman of the Board supported by other independent non-executive directors may be appropriate. Where maintain legal privilege is of particular importance it may be preferential to appoint external counsel to manage or support the investigation.

Skills and experience are extremely important. This covers both requisite experience in investigation skills (for example interviewing witnesses) and, where particularly technical or complex allegations are at play, experience and knowledge of the underlying subject matter. It can be very difficult for an investigator to meaningfully engage in a complex allegation about industry specific or technical matters if they do not have a good grasp of these matters.

Lastly, optics will always be important. This is particularly significant where the investigation is likely to be subject to external scrutiny. It is often the case when dealing with high profile and/or serious regulatory allegations of wrongdoing that external investigators such as lawyers or consultants are appointed. A decision not to appoint external independent experts would need to be carefully thought through and be capable of being justified, as choosing not to make these appointments may appear inappropriate to regulators. In other investigations, particularly those involving serious allegations of discrimination and harassment, it may appear insensitive or inappropriate to appoint a lead investigator who does not share some of the same characteristics as the victim (for example, appointing an investigation committee comprised of three white males is likely to be inappropriate where the complaint is a black female complaining of racism and sexual harassment).

Policies and sources of guidance

Although it may seem obvious to establish and follow sound internal policies, doing so is not always straightforward. Misconduct allegations are rarely cut and dry, and some organisations develop separate policies for handling harassment and bullying, alongside their standard grievance policy. Employers should also consider at the outset whether the matter is captured by a company whistleblowing policy. Ideally, these policies will align alongside each other. However, since these types of documents are regularly updated, both the appointed investigator and HR should read and reread the relevant policies before an investigation starts.

The investigator (and of course HR) should also be familiar with other sources of guidance for investigations, including the ACAS Code of Practice on disciplinary and grievances, which sets the minimum standard of fairness in the workplace in the UK, and the ACAS Guide to Investigations.

If the employee operates in a regulated environment, then any additional layers of compliance should be considered according to the relevant rules. Where harassment is in scope, an investigator should familiarise themselves with the Technical Guidance on Sexual harassment and harassment at work issued by the UK's Equalities and Human Rights Commission (EHRC).

Interim safeguards

Investigators, as well as HR staff assisting in an investigation, should consider at the outset whether any other interim safeguards are required and, in particular, whether any further action is needed to protect evidence and the investigation's integrity. This might include decisions around suspension of alleged wrongdoers from the workplace pending investigation in order to prevent contact between witnesses or the undermining of evidence during an investigation.

Investigators may also look to put a document preservation system in place to protect evidence. This might include suspending any existing IT procedures on the deletion of emails from the company servers following a determined period, to prevent any potentially important records being lost.

The investigation must also comply with data protection legislation including the UK's Data Protection Act 2018 and the GDPR. Where it becomes clear that an investigation will require a substantial search of employee communications, the company should consider whether a Data Privacy Impact Assessment (DPIA) should be completed before the processing of any personal data takes place. Failure to do so could lead to investigation, criticism and/or enforcement action from the UK's data regulator, the ICO, as well as potential collateral litigation from any data subjects whose personal data is not processed lawfully. If a DPIA is deemed unnecessary, it is advisable to document the rationale for this in writing, to ensure there is an audit trail should that decision subsequently need to be justified.

Whistleblowing

Focus on ... whistleblowing investigations

What issues are particularly important when dealing with whistleblowing investigations?

Generally speaking, the best practices discussed above should be equally applicable to most whistleblowing cases. However, there are specific nuances in whistleblowing investigations that merit further consideration.

In certain sectors, such as financial services, whistleblowing and the need to have a 'speak up, listen up' environment is part of the regulators' broader agenda on culture. Regulators such as the Financial Conduct

Authority have made it clear that psychological safety and an open environment, where people are empowered to call out problems without the fear of reprisal, is a regulatory requirement rather than a 'nice to have'. As such most financial institutions have relatively sophisticated whistleblowing frameworks, including policies, escalation procedures and multiple internal and external channels for the reporting of wrongdoing. But the recognition of this need and this framework for a healthy workplace culture and sound risk management is not unique to the financial services industry.

Clearly, maintaining a robust and well communicated 'speak up' infrastructure is key. However, this is only the beginning and, without the correct mindset throughout the organisation, this infrastructure becomes impotent. Businesses need to follow through on their promises and ensure that values and corporate commitments around whistleblowing do not become mere platitudes.

Confidentiality and anonymity will be particularly important in the whistleblowing context, as the cornerstone of any good regime will be protection of whistleblowers against detriment and victimisation. This can only exist where whistleblowers are able to come forward on an anonymous basis or where high levels of confidentiality and trust exist.

It is also crucial for those that investigate whistleblowing to wear a 'purpose blind' lens, focusing on the allegations and the fact finding and avoiding the trap of focusing too much (if at all) on the potential motives of the complainant. Doing so, whilst perfectly natural, can severely undermine the perceived impartiality and neutrality of the investigator and in turn, the integrity of the whole investigation.

Sexual harassment

Focus on ... sexual harassment investigations



What are the nuances or specific issues to consider when dealing with sexual harassment investigations

Whether triggered by a direct complaint or concerns about the culture in a particular business area, many current corporate investigations involve sexual harassment allegations, reflecting the global #Metoo movement that has focused on tackling this type of workplace issue.

Investigators should be fully acquainted with the latest EHRC Technical Guidance before carrying out the investigation, bearing in mind that this guidance offers recommendations and is not a statutory code.

Where harassment has been alleged, investigators should be sensitive to the delicacy of this issue and conduct themselves appropriately. As discussed above, the decision around the identity of the investigator, together with their skills and background, are crucial. When interviewing victims of sexual harassment, investigators should choose their words and

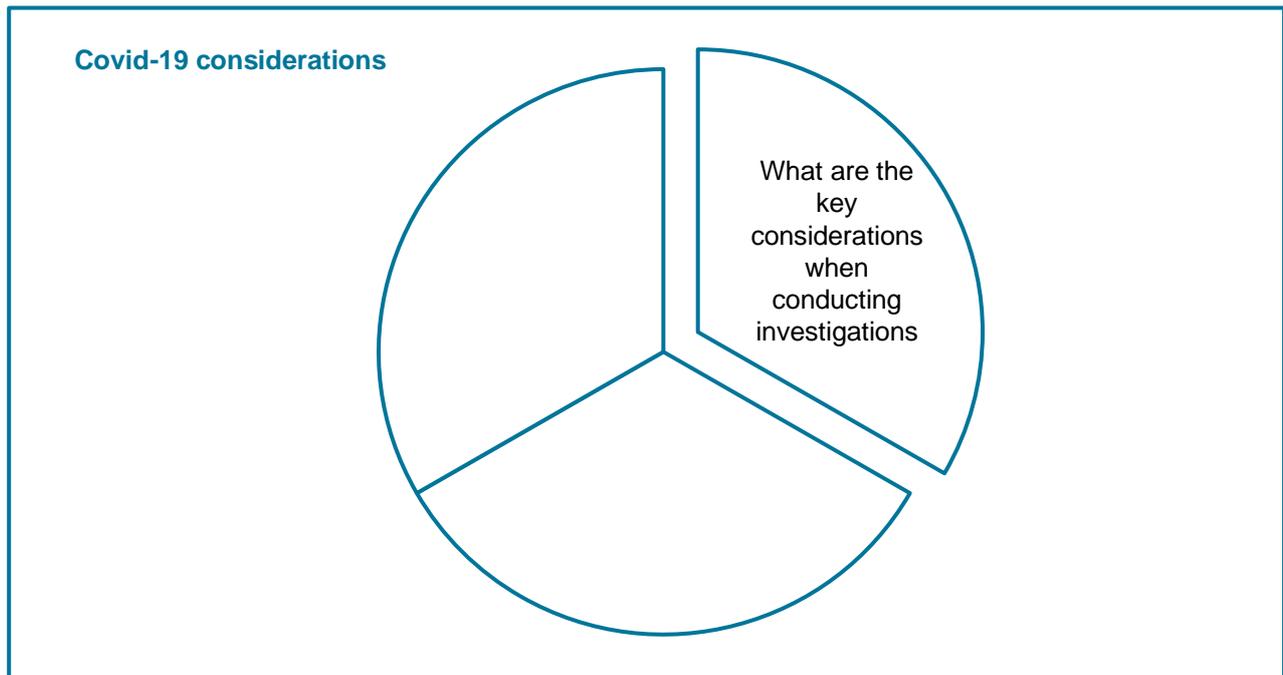
approach carefully in order to ensure both a fair outcome and that the complaint has been heard. Sexual harassment investigations also require the investigator to ask about subjective feelings and not purely objective facts, as an integral part of the process is to obtain an understanding of the impact on the individual. This will obviously be a sensitive but important process for an investigator to tackle.

Investigators may also decide that it is in the best interests of the person bringing the complaint that they are accompanied to interviews for emotional support. This may already be a requirement under the relevant workplace policy but this is often limited to a colleague or union representative only. Additional discretion may well be appropriate here in allowing the individual to bring a person of their choice for support.

Investigators may face situations where it becomes difficult for an investigation of this type to proceed. For example, the person making a complaint does not want an investigation to take place, or the person accused resigns after a complaint has been made. In these situations, even though it may be tempting for the organisation not to investigate, it will often be prudent to continue. There are a number of good reasons to do so, not least that a failure to act could be perceived as a cover-up or lack of interest in tackling an underlying cultural issue.

Further considerations are necessary where an individual concerned in the investigation leaves the company. This could be the complainant, the accused or a witness, and they might leave for all manner of reasons. However, where they have left under terms of a settlement agreement, the company should carefully consider whether it is appropriate to insist that the employee signs a non-disclosure agreement (NDA) as part of the settlement terms. While these have become entirely standard in UK settlement agreements, both the EHRC and the Law Society of England and Wales have published important guidance and practice notes on the use of NDAs in discrimination and harassment cases. Both legal and HR advisers should carefully consider these obligations and the impact of an absence of confidentiality obligations as part of any exit discussions.

The impact of COVID-19: Investigations during the pandemic



While much of the business world is locked down during the COVID-19 pandemic, a central question is: how can internal investigations – particularly highly sensitive ones – be conducted while employees are working remotely?

Investigations, particularly workplace investigations, tend to be largely ‘people’ focused. The fact-finding exercise is typically based on witness evidence rather than extensive document review exercises. Emotional connection and the ability to read body language, build rapport and empathy are critical. All of these things are undeniably more difficult in the context of a remote or ‘virtual’ interview. However not all complex or sensitive investigations can or should be put on hold until the current lockdown restrictions are eased.

Whilst creating an emotional connection in a virtual world is a challenge, it is not insurmountable. Perceptions around the use of technology have dramatically changed since lockdown was implemented in the UK. We have seen courts and tribunals successfully manage virtual hearings and emotionally charged settlement discussions. Mediations have successfully played out using video technology. A successful remote investigation is therefore achievable.

Certain issues will need to be given special or additional consideration (for example the right to be accompanied, the need to give witnesses access to highly restricted documents during the interview or confidentiality – which may be difficult depending on the participants’ home-working environment). However, in most cases, with careful consideration and planning the investigation can proceed without face to face interaction. Generally speaking, the benefits of proceeding with the investigation (as opposed to putting on hold indefinitely) will outweigh the downsides or challenges attaching to doing so virtually.

Key takeaways

In summary, internal investigations can be carried out successfully where companies remain focused on the following:

- Planning is key. A clear scope and terms of reference will help ensure that the investigation remains on track. A considered strategy will help to pre-empt potential unintended consequences before they occur.
- Selecting an appropriate investigator will be essential to the investigation running smoothly. An investigator without the requisite investigative skills, technical/subject matter knowledge or perceived independence can undermine the integrity of the whole process.
- Confidentiality must be maintained so far as possible. Information should generally be shared on a 'need to know' basis. A lack of confidentiality increases the risk of information leaks (as well as loss of legal privilege, if claimed) and erodes internal and external confidence in the process.
- Understand the limitations of legal privilege and decide on your strategy upfront.
- Remember to act proportionately. Not all investigations demand a 'root and branch' fact finding exercise. Conversely, a light touch investigation will be inappropriate in relation to serious allegations and may result in allegations of 'whitewashing' or avoidable intervention by law enforcement agencies and/or regulators.
- Make sure the investigator and company are fully versed on company policies, rules of the relevant regulatory body and the most recent guidance from ACAS and the EHRC.
- Ensure that all decisions as the investigation progresses are based on the evidence collected.
- Manage the risk of collateral disputes or litigation and adhere to data protection law when collecting and storing evidence.
- Ensure that the investigation is carried out in a manner that is consistent with the company's culture, particularly regarding fairness and equality.

For more information on conducting internal investigations in the UK, contact your regular CMS advisor or local CMS experts:



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