

# The Essentials of Workplace Investigation

Brendan Schütte



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The Essentials of Workplace Investigation  
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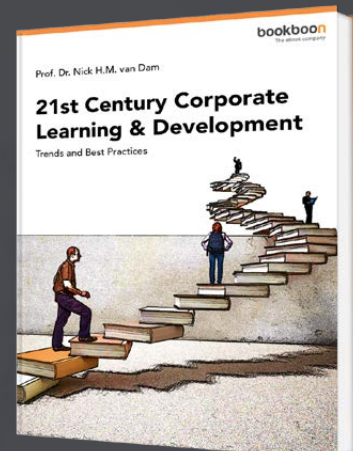


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“Condemnation without investigation  
is the height of ignorance”

*Variously attributed to Albert Einstein or William Paley*

# Dedication

This eBook is dedicated to Karl and Sylvia.

Thanks are due to many people: Myra, Seán and Edna, John, Erica and Michael, Niamh and Tony, Ciarán, Rónán, and to my many friends, colleagues and clients from whom I have learned so much. Special thanks to all at Bookboon, particularly Karin Jakobsen who has been so receptive, supportive and encouraging.

# About the Author

Once you have finished reading this eBook, why not have a look at Brendan's website?

[www.brendanschutte.com](http://www.brendanschutte.com)

Brendan Schütte is an investigator, mediator, adviser, consultant and trainer in workplace and organisational matters. His background is in Human Resource Management and Development in the private, public and non-profit sectors.

He is much sought after as an impartial, clear, respectful external investigator and also provides training in **Workplace Investigation Systematic Enquiry**.

He is the author of a book on mediation: "Fixing the Fighting: A Guide to Using Mediation in Settling Disputes and Resolving Conflict in the Workplace." (Oak Tree Press, 2003), and has recorded an audio CD entitled "Active Listening – seven simple steps to better listening" (2014).

You can find out more about Brendan, his work and a range of articles he has written on his website:

[www.brendanschutte.com](http://www.brendanschutte.com)

# 1 Introduction

Not everybody who is asked to do an investigation at work is trained or qualified to do so. It can be a matter of luck (some would say bad luck!) whether your diary is free and you are considered senior enough to possess the perceived where-with-all to be trusted to do it properly.

Once selected as an investigating officer the pressure is on. The process will need to be started and completed as quickly as possible. Everyone will be seeking a 'win', though in practice few achieve this in investigations. There will probably be little time for planning and even less for cool analysis, two factors which should always be present in every good investigation. Then there are the biases, which we all have in abundance, but which must be suppressed and managed in this important work.

In addition, you will have to ensure your day job is covered. When the interviews and data gathering are over, you will then have to write the report which must be written in a clear style, taking into account all the evidence that you have found. Your logic and reasoning can be severely tested as you outline in writing how you reached the conclusions that you did. Does it make sense? Did you forget something? How will it be perceived? Were you fair and balanced?

Its not easy being an investigator!

Help is at hand. This easy to read guide, which provides all the essential advice you need to get started, will give you the confidence to run an investigation from start to finish and to write a report which will be robust and clear.

Written by a highly experienced workplace investigator it outlines a practical, sensible and logical approach to the task, with repetition of important points throughout the text.

More and more, pressure and expectation is increasing on organisations, and those in charge of organisations, to ensure a fair, just, impartial and efficient investigation in a plethora of complex areas such as discrimination, harassment, bullying, grievance, work performance, competency, misconduct, fraud and so on.

In many workplaces, at least in the western world, the expectation of how people are treated at work has risen in line with wider societal beliefs, hopes and desires. This is often underpinned by laws and regulations introduced in democratic countries to ensure rights are respected. Suitable and accurate implementation of these procedures falls to those in authority in organisations at many levels – supervisors, managers, directors – and, of course, to the human resource professionals who advise them.

Whatever level of responsibility you have for managing risk this resource provides expert guidance on the ‘how’ of fact-finding investigations to deliver workplace justice through a reasonable and reasoned methodology. It is not a pure legal text, though there is a legal substrate underpinning the principles and processes demonstrated. You won’t need it for brief informal enquiry, or immediate gathering of facts. It will not deal in any length with the disciplinary meeting’s use of investigation findings. Rather, it is intended to provide a roadmap and a range of guidelines and templates to enable both new and experienced investigators to complete a competent and robust investigation and report. This is the basis for any decisions the organisation then takes.

While there may be better ways to deal with conflict at work – such as workplace mediation – if an investigation has to happen then it needs to be of a high quality. The anecdotal evidence is that many workplace investigations are lacking in competency, and the impact of this on the complainant, respondent, team colleagues, the organisation, and indeed the investigator can be significant.

A thorough, reasonable and consistent process led by a skillful and, of utmost importance, impartial investigator will go a long way towards guaranteeing the gap is filled.

## 2 Principles of Best Practice Investigation

Procedures and processes will vary from company to company, and from country to country, but the following are the fundamentals of sound investigation.

### 2.1 Thoroughness

You must be thorough in seeking information, in asking questions of interviewees, in analysing the data in front of you and in examining responses and explanations given to you. If it seems like a good idea to look for more information on an issue, then it probably is a good idea. If four people have witnessed something, speak to all four. If CCTV footage is available, go and look at it even if it seems a bit tedious. If there is a niggling question on your mind, go and ask it.

Don't just be content with a superficial look. Probing the detail can often be the key to finding out what actually happened.

This does not mean that you have to prolong an investigation and seek ever more and more information. You are only expected to be **reasonable** in your thoroughness.

### 2.2 Impartiality

You must be open-minded and impartial. This is absolutely essential and can be the one critical thing that many get wrong. It is of course difficult to remain open-minded, especially if you are an internal investigator who may even have some prior knowledge of the person being investigated. Remaining in a neutral stance and examining the evidence, both from interviews and other sources, in a dispassionate manner will lead to a correct outcome and finding.

### 2.3 Respectful

Being respectful to all, including the person who has to answer the allegations, will help you to be impartial. Remember, until the work is completed there are no findings, only allegations. It is possible that the allegations are false or have little or no substance to them.

For most people an investigation is a difficult experience and they will appreciate some courtesy, breaks, a glass of water and so on. You can be polite and show your humanity, but still ask challenging questions. It is not essential to look cross or too serious. If this interviewee was a member of your family – how would you like them to be treated by an interviewer?

## 2.4 Natural Justice

The essence of natural justice is that you are entitled to know the case against you and to be allowed to offer an explanation, or challenge, before any decision or action is taken. Part of this is also that the matter is dealt with in a speedy manner – justice delayed is justice ignored.

## 2.5 Within Boundaries

The investigation is covered by terms of reference and this provides the main boundary which prevents the investigator from straying into irrelevant areas. If necessary this can be modified with agreement from the referrer after the process has started. But do remember that if the terms are too wide the process could go on forever!

There is another boundary, at the far end of the process. Note that this is a fact-finding exercise and the facts should be laid out neatly in the report. The temptation then is to decide what should happen i.e. to decide the punishment. But actually the end point of an investigation is when you have decided:

- a) there is a case to answer
- b) there is no case to answer
- c) it is inconclusive.



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If it is found that there is a case to answer the next stage is a disciplinary hearing which presents the finding to the respondent who then has an opportunity to answer in a disciplinary forum. It is the disciplinary panel who decides what, if any, outcome or punishment should be applied.

**This has to be clear – the investigator does not decide what happens, only whether or not there is a case to answer.**

This creates and maintains a clear boundary so that the investigator is free to focus on finding the facts and deciding on whether or not there is a case to answer.

## 2.6 Consistency

You need to be consistent in doing an investigation. This means being internally consistent in how the process is managed, and also consistent across the organisation.

Internal consistency means, for example, if you have recorded interview notes which are then provided to the interviewee for agreement, that this is done for all interviewees. If you take extensive notes with one interviewee and none with another interviewee this is not being internally consistent.

A consistent process across the organisation means the same process is used no matter in what part of the organisation or who is doing the investigation. Having a robust policy and procedure, as well as training, will support an organisation-wide consistent approach.

## 2.7 Rigour

This is somewhat similar to thoroughness. It is about being clear and logical about the information you have in front of you. If it walks like a duck, quacks like a duck and swims like a duck, then it is probably a duck....not a swan.

Being rigorous in analysing the information can help you to remain impartial – you are following the facts rather than basing your conclusions on whether you like someone or not.

## 2.8 Formality

This is sometimes forgotten in workplace investigations. It is a formal process, even if the manner in which it is done is less onerous than a court of law.

What this implies for the investigator is that everything is 'on the record'. So if one of the parties asks, perhaps conspiratorially, to speak 'off the record', this should not be allowed. The person should be told that everything that is said is 'on the record' and invited to speak on that basis. This may result in the interviewee declining but it is better to ensure there is no confusion about what has or has not actually been told to the investigator.

## 2.9 Facts

A workplace investigation is about fact-finding, not about opinions or personalities. This is the core of the investigator's responsibility and interviewees may need to be carefully pressed for factual detail behind off-the-cuff comments or feelings that they express.

By following these fundamental principles, and perhaps making good use of the templates provided, you shouldn't go too far wrong.

Now, let's get started.

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# 3 Getting Started

An investigation is not a single event, it is a process. Having a clear understanding of what happens at the different stages of the process will provide you with a strong base and will mean you will never become lost or confused in the tasks you need to do.

While there is no single universal methodology for workplace investigations, the following process includes the most common and useful elements:

1. **Preparation** of the groundwork and laying foundations
2. **Gathering** data and scrutinising information
3. **Analysing** information and applying logic and reason
4. **Concluding** with an outcome
5. **Reporting** what you have found and outlining how conclusions have been reached

This process will be followed over the coming sections for illustration purposes, but you will need to be aware that the process in your own organisation may differ in some details and it is important that you understand the specific internal investigation procedure where you are employed or where you have been asked to investigate, and to follow this exactly.

A workplace investigation is not a criminal investigation. Sometimes there may be simultaneous investigations by both the organisation (workplace investigation) and the police (criminal investigation). Sometimes the organisation will call in the police to do a criminal investigation following the result of a workplace investigation. But you must remember that they are two different processes.

Aside from the police there may be other outside bodies interested in the result of your investigation or in running their own investigation – professional institutes, regulatory agencies, quality or health authorities. Sometimes very specific technical skills are needed such as those required to probe into serious fraud, medical negligence or significant accidents.

More often, workplace investigations will be focused on internal matters such as breaching of company rules and policies, and on the competence, behaviour or conduct of individual members of staff.

**What is the subject matter of workplace investigations?**

- Workplace bullying, 'mobbing' by a group
- Harassment or discrimination on grounds of gender, sexual orientation, pregnancy, family status, age, disability, race/colour/religion/ethnic background, or other grounds such as being or becoming a transgender person
- Theft, fraud and embezzlement
- Misuse of organisational resources
- Threats or threatening behaviour
- Misconduct
- Poor performance or lack of competency
- Failure to adhere to policy – human resource, financial, information technology, security, health and safety
- Over-claiming expenses
- Negligence and recklessness

**Figure 1**

### 3.1 The Brief – Terms of Reference

The starting point for a workplace investigation is a referral and the investigation is commissioned to begin by the establishment of the Terms of Reference (ToR).

The referrer is the individual in an organisation who asks for the investigation to be carried out, irrespective of whether the investigator is internal or external. Typically this is a senior manager or a member of the Operations, Human Resources, or Finance functions. The referrer outlines the scope and focus of the investigation and nominates to whom the report of the investigation will be sent.

The ToR should be kept precise, and be clear enough to understand the purpose. Is the investigation to hear a grievance, establish whether misconduct took place, or to explore concerns related to performance? The time frame for completion should be noted, though this may more often be mentioned as '...will be completed as quickly as possible, depending on the availability of witnesses and evidence.' Such an approach manages expectations and prevents an unrealistic completion date being set which is unlikely to be reached.

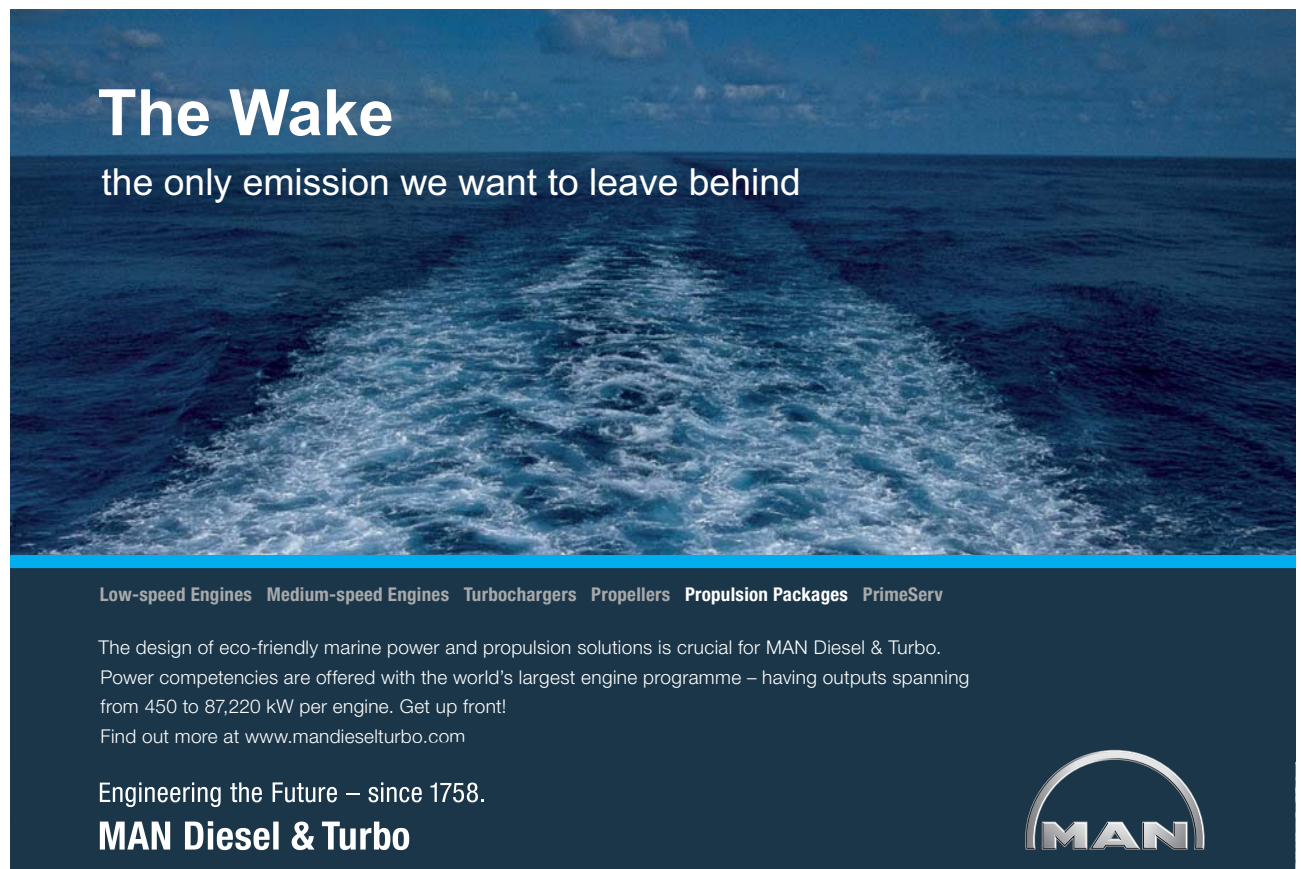
Mention should be made of who will receive the report and the name of the investigator. This provides the 'authority' for the investigator to go about his/her business.

The ToR places a boundary between what should be examined and what should be left alone. An investigator can be tempted to expand the investigation beyond what has been asked, and a written ToR can always be referenced to decide what to do when uncertainty arises. If an issue is discovered which is central to the issues being investigated, but which is not covered by the ToR, it may be necessary to discuss this with the referrer and the ToR updated to include this issue. If this is done it will need to be referenced in the written report.

Establishing written ToR with the referrer is an excellent discipline and should not be skipped. There will often be pressure to start immediately – probably a symptom of some panic in the organisation. It may seem to the referrer that writing a ToR is superfluous and a waste of valuable time that could be spent interviewing. However, it is a necessary first step and sets the scene for everything which follows. A well thought-out ToR provides the foundation for a careful, planned approach.

Some larger organisations may have detailed policies and procedures which cover most aspects of an investigation – in these cases the ToR may be shorter and simply refer to the specific clauses in these policies in relation to the parties and allegations involved.

Once the ToR is agreed it is time to get to work, and the next thing that the investigator should do is to start an Investigation Diary. But before we move on to this, here is a sample ToR:




## The Wake

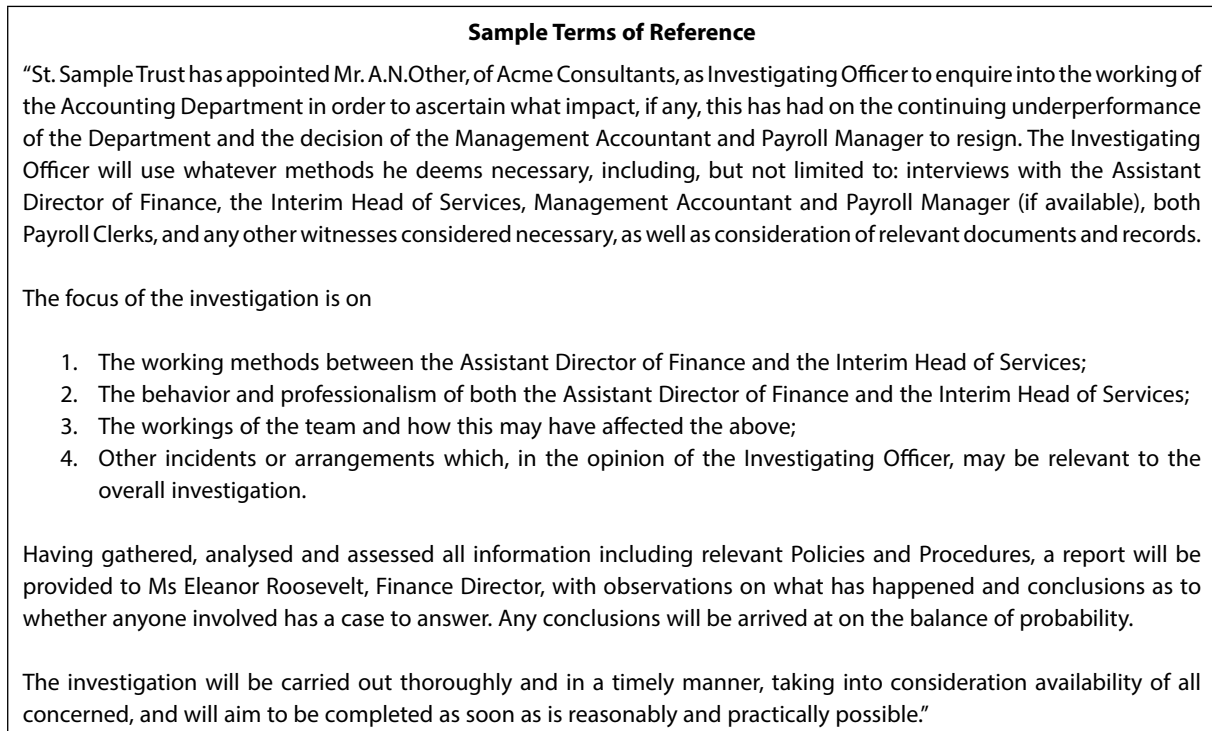
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**Figure 2**

### 3.2 Investigation Diary

Once you have an agreed ToR, the next important thing to do is to create a diary for the investigation. In this you will make a record of all the main items that you do (e.g. interview dates, sending notes for agreement, requesting CCTV footage etc.) and conversations that you have (e.g. if someone has been unable to attend interview due to illness, when you invited them again, what was the response, and so on).

The Investigation Diary is priceless. It will allow you to ‘recall’ things a year or two later when you may be tested on your investigation but have difficulty remembering the details. For example, you may be asked why there was a gap of two weeks between an interview and seeking related data. It may be that you were on holidays at the time, or an important witness was unavailable due to illness, details which will have been recorded in your Investigation Diary.

While it may feel like more unnecessary administration, it is well worth the effort. The Diary can be electronic or hardcopy. What matters is that it is updated in a timely and regular manner. Concise notes are kept, as in the example below:

Date	Time	Item	Reference	Comment
19/6/15	9.30am	Interviewed complainant	Mtg note	
20/6/15	10.15am	Complainant note sent for agmt	Email	
22/6/15	2.30pm	Requested training records from HR	Telecon	Asked P. Smith 10.20am
23/6/15	8.53am	Respondent on leave to 29/6	Email	Request 30/6

If you take just one piece of learning from “The Essentials of Workplace Investigation” – always start an Investigation Diary and maintain it throughout the course of the investigation.

Next, let’s do some sound preparatory work.

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# 4 Step 1

## 4.1 Preparation of the groundwork and laying foundations

Initial preparation is a fundamental part of an investigation process and the following outlines what you will need to do. While some of this will seem obvious, many investigations do not include much of this basic preparation – these are the ones that go wrong.

### A. Read initiating document(s)

Your first task is to familiarise yourself with the initiating document. This may be a grievance, an allegation of bullying, a series of unanswered questions giving rise to concerns, a complaint from outside the organisation, or some such script. You must understand the question upon which your investigation seeks to conclude. After reading, it is probable that there will be gaps apparent. These gaps will form the basis for your questions in the interview with the ‘complainant’.

Even at this early stage you will note further possible sources of evidence as mention may be made in the document(s) of names of others who may have been present, or may know something, as well as spotting places where there may be records available.

### B. Read any response

If there is a written response you should read this carefully. Again, what gaps do you see? Are the answers focused and comprehensive, or quite generalised and lacking in facts? How does the response differ from the allegation? What other information will you need to decide on what has happened?

### C. Read and understand the organisation’s policies and procedures

Make sure you have the correct and relevant policy document to hand. What policy was in place at the time of the incident? If a new policy has been created since the incident you may be looking at the wrong document. Always check the date of documents!

You should be especially familiar with the company procedure in relation to the investigation, e.g. as documented in the Grievance Procedure, and follow this precisely. Cases which fall down at external adjudication stage often do so because a procedure was not followed, rather than being due to the merits of the case.

Depending on the organisation, and on the complexity of the case, there may be a considerable amount of policy reading to do prior to starting the interviews. Other than Grievance Procedure, these can include Disciplinary, Capability, Use of Information Technology, Dignity at Work, Equality and Diversity, Training & Development, Performance Management, Core Values, and so on.

If you an internal investigator you may already be aware of policies and procedures but you should nevertheless re-read them as it is probable that you will have forgotten parts. If you an external investigator, make sure that you get guidance from the referrer on anything that you don't understand from the policies. A sturdy familiarity and understanding of the organisation's policies is needed.

#### **D. Sources of evidence**

Even at this stage you should be on the look out for sources of information other than solely interviews. Where are you likely to find information? Think about written records, computer and telephone records, accounts and expenses information, clocking records, minutes of meetings, rosters, CCTV footage, diary entries.

As humans we leave trails everywhere and a careful and systematic search will very likely be rewarded with new information. Get help if you need it – even computer records that have been 'deleted' can be exhumed by those with the right skills in the I.T. Department.

Sometimes looking at the very obvious will lead to useful information or evidence. People have been known to buy personal goods with company funds or by using company credit cards or claiming on expenses, and these can easily be traced. Look at the internal systems – these are not often as fool-proof as some managers may believe. For example, a company may allow different ways of claiming expenses which can be approved by different people with no cross-reference – a double claim for the same item can be made using an actual receipt with one and a credit card receipt with another.

Be alert to making assumptions, especially with items such as spreadsheets. We are so used to these at work now that few question them and it is assumed that they have been correctly created, but this is often not the case. Close scrutiny of spreadsheets may provide important keys to the investigation.

#### **E. Preparation of question areas**

A crucial part of preparation is developing a set of interview question areas in advance. This allows you to reflect on what information you need and to form questions around this.

Some questions will be factual and straight-forward – 'What date did that happen?' 'Who was in the room with you?' 'Did you turn to the right or left when you went out of the conference hall?' But there will be areas that won't be as clear and will require more open-ended questions – 'Tell me what happened last Tuesday?' 'How has your working relationship been with your manager since you started?' 'Can you describe what is the normal way customer relations is run here?'

Either way you should have a written list of questions to begin with, and the answers will then give rise to further questions during the interview, and perhaps later on once you have reflected on the answers you received. The questions are customised to each interview, there is no one standard list. Setting aside an hour or two in a quiet room to draw up your list of questions is a sound investment which will reap its reward.

Each interview will require different questions, but here is an example of what you might produce:

*You are dealing with a grievance from an employee of unfair treatment by their manager and part of the complaint concerns an incident at the weekly meeting. Here is an excerpt from the complaint: “The way she behaved in that meeting was disgraceful. Every time I asked a question I would be shot down. No-one else was. It ended up that she shouted at me to ‘grow up’ and ‘not be such an idiot’. This was in front of everyone and they were a bit embarrassed, though nobody said anything. It was very clear that she was angry at me and was using her position as manager to attack me.”*

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Here are some questions that may be prepared prior to interview...you may come up with more:

- What date was that meeting?
- Are there any minutes? If yes can you, or someone else, provide me with a copy?
- This is your weekly staff meeting attended by all the team? Start and finish times?
- Can you recall who exactly was at the meeting when these incidents happened?
- How would the meetings normally be run?
- Was there anything different about this particular meeting?
- Can you explain what the meeting was dealing with when you started asking questions?
- Why were you asking questions and would this be normal?
- Were the questions for information or by way of a challenge?
- Do you think your manager perceived it as a challenge?
- Were others asking questions as well or was it just you? If others, who were they and can you recall what they asked?
- What do you mean by you were 'shot down'? How many times did this happen in the meeting?
- Describe what happened before she shouted at you to 'grow up' and 'not be such an idiot'
- How do you know others were embarrassed?
- Why do you think she was using her role as manager to attack you?
- Was there anything that you were doing which may have triggered her reaction?

Preparation of questions gives you confidence in what you are about to do, but it is better to be alert and watchful rather than simply going through your questions in a bureaucratic fashion. It is often by spotting the 'cracks' that an investigation is brought to a successful conclusion and you need to be vigilant and observant to notice these. Such 'cracks' are found in the detail and the investigator must not skim too lightly over information in trying to move to the next question on the list.

### **G. Setting up interviews**

There are differences in how organisations approach the question of interview scheduling. One such style is to interview the 'complainant' and the witnesses and to amass all other information before arranging to see the 'respondent'. The idea is that a complete understanding of the case is at the disposal of the investigator and he/she can now listen to a response with a critical and well-informed ear. However this approach puts a very large onus on the respondent and seems to imply prior guilt. It is a mountain to climb and the investigator, in possession of this 'knowledge' may find it especially difficult to maintain impartiality and listen with an open mind to what the respondent has to say.

A far more effective, and fairer, approach is to schedule interviews as follows:-

- a) Complainant
- b) Respondent
- c) Witnesses
- d) Consideration of further evidence
- e) Further interviews, if necessary, with respondent, complainant or witnesses.

This allows the investigator to understand the basis of the complaint, to then hear what the respondent has to say about that complaint, and to consider what witnesses say in support of either complainant or respondent. The investigator is better equipped to maintain impartiality as the complete 'story' is formed as the process moves along.

Allowing for second, and maybe even third, interviews means that any anomalies or conflicts of evidence can be put to interviewees for comment – there may be a simple explanation, and conclusions should not be drawn until the end of the investigation.

**Occasionally an interviewee may ask for another person to accompany them to the interview.**

This could be a work colleague, a family member, a trade union representative, or sometimes a legal representative. As a general rule there is no right to be accompanied at a fact-finding interview, though you should always consider the nature of the investigation. If the allegations are so serious that, if well founded, they may lead to someone losing their professional job and by extension possibly their livelihood, you should be as accommodating as possible in allowing accompaniment.

It is worth asking why the accompaniment is sought as many misunderstand the nature of an investigation. It is not a disciplinary meeting, it is simply an enquiry to discover what actually happened. A representative will not normally be allowed to speak on behalf of the interviewee – the questions are directed at the interviewee and that is the answer that will be on the record. Of course, allowing the representative to have a side meeting with the interviewee, or to provide emotional support is perfectly acceptable.

If someone is allowed to accompany the interviewee, their presence should be recorded and they should be asked politely to refrain from answering on behalf of the interviewee or from interrupting the process.

**H. You are ready to go!**

Having invested in some good planning you are now ready to start. Make sure to keep good track of your notes and where you are in the process, and do keep administration tidy. The Investigation Diary will provide a strong back-up and the templates covered in this eBook will be a guide to making your role less onerous. But make sure of one thing – you must know, understand and follow the organisation's procedure. All advice and templates are provided to help you in doing this and to facilitate a thorough yet reasonable process.

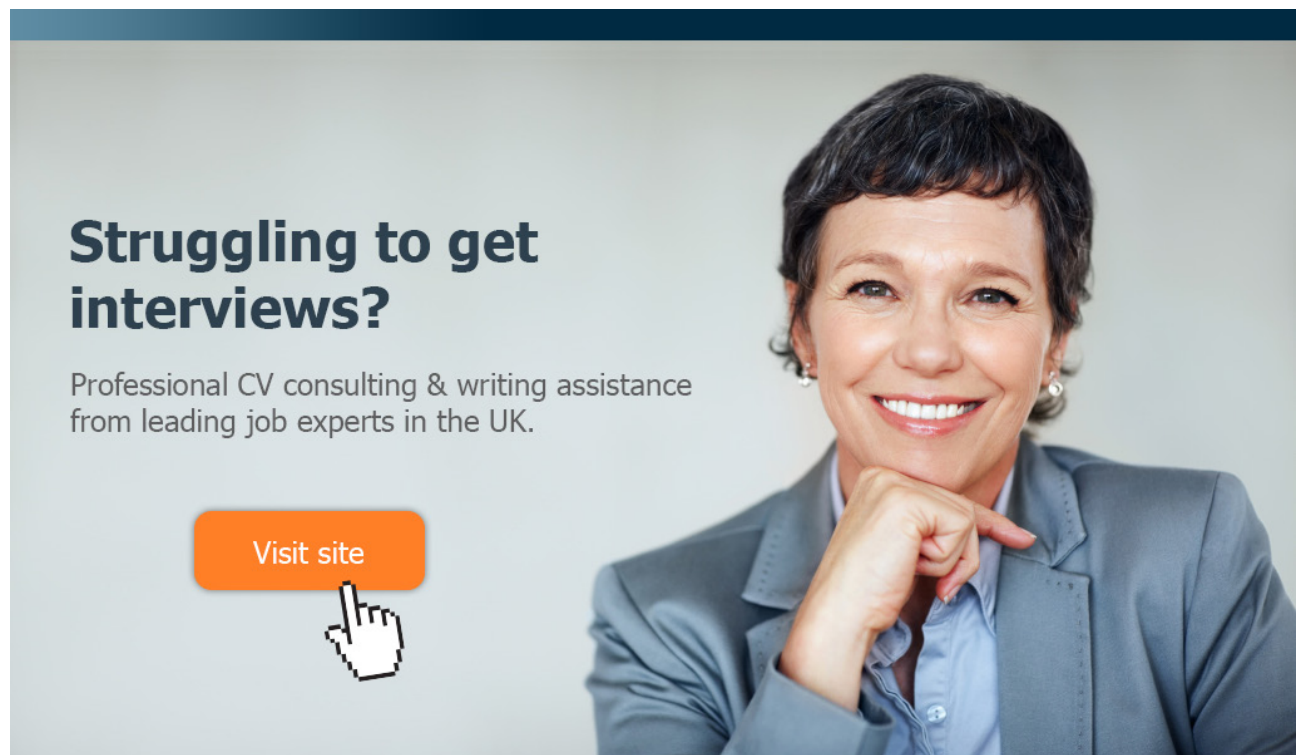
# 5 Step 2

## 5.1 Gathering data and scrutinising facts

Perhaps the primary data gathering tasks in workplace investigations are the interviews. These should be approached with care and attention, with proper records kept. Once commissioned by the ToR, the investigator is both responsible for the interviews and invested with the authority to ask the questions needed.

### 5.1.1 Interview Environment

You should always be aware that people attending an investigatory interview, whether as complainant, respondent or witness, will be nervous and suspicious of what will happen in the room. Perhaps this is due to too much dramatic TV police programmes, but it is how many interviewees feel. Even the words used, such as ‘investigation’ and ‘witness’, may have a resonance to police work. It may be possible to use other words to describe the process such as ‘fact-finding review’ and ‘interview with colleagues’, but some discomfort will almost certainly remain.



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An initial task for the interviewer therefore is to put the interviewee at ease. While it may be a formal process it is nevertheless quite possible for the interviewer to show some warmth and empathy and to ensure basics such as a comfortable seat, a jug of water, control of room temperature, and assurance of breaks if needed.

As one of the basic fears is fear of the unknown, the interviewer should explain clearly and calmly how the interview will proceed and deal with any concerns raised. If notes are to be taken this should be mentioned in addition to what will happen to the notes – will the interviewee be asked to sign them, will they get a chance to review them, will they be provided with a copy? If a note taker is present an introduction should be made.

Some context for the questions may be given though care needs to be taken that this is kept brief.

It is worth investing in these initial minutes to help the interviewee to relax and the resulting interaction should be more normal and co-operative.

### 5.1.2 Active Listening

An important skill in interviewing is active listening. This means **engaging** with the speaker rather than just listening passively. To do this properly requires:

- Concentration
- Hearing the feelings as well as the facts, and what is not being said
- Summarising/paraphrasing
- Checking for correct understanding

For this you will need energy and to control the level of distraction. As humans we are easily distracted and this is not helpful to a fact-finding investigation! Being well-prepared with question areas will help you to focus but you will also need to maintain control of your thoughts and your 'inner voice' as you listen to the answers you are given.

Here are two links to Youtube videos which illustrate how much information we can miss when we only half pay attention or get distracted by other tasks:

Test your awareness: Whodunnit: <https://www.youtube.com/watch?v=ubNF9QNEQLA>

Selective attention test: <https://www.youtube.com/watch?v=vJG698U2Mvo>

One way to ensure that you will listen well is to paraphrase or summarise what the interviewee has said. This means that you **have** to listen or you will not be able to summarise correctly. It also shows the interviewee that you have been listening carefully, and if you have left out anything the interviewee can correct you at the time.

Summarising is also helpful for a note taker, who may sometimes have difficulty keeping up with the pace of the answers. It allows for a pause and check-in with the accuracy of the recorded note.

### 5.1.3 Types of question

An investigation is about finding out the facts – who, what, when, where, how. You are seeking clarity and understanding. Ensure that interviewees answer your questions and don't ramble on or introduce irrelevant topics. You are there to lead the questioning, not to be led by the interviewee.

All questions should be asked in a neutral tone, without investing any blame or assigning guilt in the way that the question is asked. As interviewer you should be aware of the different types of questions and how they can be used to control the meeting. The standard questions are **Open**, **Closed** and **Probing**.

**Open** questions expect a longer answer and that the reply will contain a mixture of facts, feelings, beliefs and other items which the investigator must make sense of, but which provides raw material for further probing.

Examples are:

Tell me what happened that day?

How have you got along with A.N.Other up until this incident?

Describe how the meeting is usually run?

These types of question are helpful in encouraging someone to open up and say more and are useful if you have only been getting monosyllabic answers. It also allows the interviewee to choose what to say and what to emphasise as well as what to leave out. The interviewer will need to be watchful and to then probe further.

**Closed** questions expect a 'yes' / 'no' answer or a very short, factual answer.

Examples are:

What date did that happen?

What is your job title?

Who heard you say that?

Was a training record kept?

These types of question are useful to get specific information and to test a particular piece of information. You are seeking factual clarity about specific data. They are direct and call for a direct answer. If the interviewee is slow to answer a closed question the interviewer, again, should be alert to this and probe further.

Be careful that your closed questions are not too leading – suggesting the answer that you want. It is preferable to ask “Who did you tell about the theft of the laptop?” rather than “Did you tell John Smith about the theft of the laptop?”

Closed questions can also be used to close down a very talkative interviewee and allow the investigator to ‘come in’ and take control of the conversation if it is felt that the interviewee is speaking about irrelevancies.

**Probing** questions try to go deeper and expand on what has been said. They may also refer back to something that has been said earlier, or to some anomaly that is appearing in the narrative.



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Examples are:

Can you tell me exactly what you did after the accountant refused to give you the expenses?

You mentioned earlier that you were on annual leave on the 15<sup>th</sup>, but then you said you were at the meeting to discuss the new organisation – this was held at 3pm on the 15<sup>th</sup>, can you explain this?

You said that you don't consider this to be harassment; can you tell me what your understanding of the company policy is?

Using a mixture of open, closed and probing questions is the best approach, rather than, say, reading out a list of closed questions. You are aiming for a flow, for discussion rather than one-off answers. Of course, there will be times when you just need an answer to a very specific question and in this you may need to be assertive. Remember, the word here is 'assertive', not 'aggressive'. You can repeat the question but still maintain an air of calm and ask it in a neutral manner. Getting angry because your question is not being answered will not help you. Simply be persistent and allow time for the interviewee to gather thoughts. Remain respectful throughout even if the question is not answered and you have to advise the interviewee that this will be noted.

#### **TMQ – Too Many Questions!!**

Be careful of multiple questions. If you ask two or more questions in the same sentence the interviewer has to choose which one to answer. You will therefore lose an answer because one of the questions will probably be disregarded.

For example:

*Investigator:* 'Where did you go after the meeting and what did John say to you? Was there anyone with you when you were talking to the Quality Manager?'

*Interviewee:* 'No, there definitely wasn't anyone with us when I was talking to the Quality Manager. There may have been some people nearby but I don't think they would have overheard us. Anyway, there was still a lot of noise in the room as the meeting had been crowded and most people were chatting as they were leaving the room. I just went back to my office after talking to the Quality Manager, Paul.'

The question about what John had said has been ignored in this answer, yet no doubt the interviewee may feel that a response has been provided to the question(s). It may not be a deliberate evasion, but rather due to the difficulty of trying to deal with TMQ (too many questions)!

While it may be natural and due to the curiosity and enthusiasm of the investigator to ask a number of questions together, the interviewee must be given an opportunity to answer each question. This means that the pace of the interview is slowed down and this is far better than a rushed or superficial interview.

**Figure 3**

**Loaded** questions are to be avoided. A loaded question contains an assumption of guilt, such as “When did you stop stealing from petty cash?” This is akin to manipulation – if one has stopped it means it must have happened in the past, if one has not stopped it means that it is still going on.

#### 5.1.4 Taking notes

Part of the interview process is to decide on how answers to the questions will be recorded. There is no universally correct way to do this. Does the interviewer take notes? Is an audio recording made of the interview? Is there a someone else present whose only task is to take notes? The answer will vary depending on the company, the culture and the specific laws and regulations in the country where the interview takes place.

Process	Advantages	Disadvantages
Interviewer takes notes	Easy to follow and connect with questions	Extra work, and interviewer may become distracted or overloaded
Audio recording	No extra work needed during interview  Everything that was said is available	A written record will still have to be made from the recording  The sense and meaning of what is said may not be obvious to someone listening to the recording later  The recording itself becomes part of evidence which may be used to detriment later in a subsequent court case  If an answer is indistinct information may be lost
Note-taker	Interviewer can focus on probing	Note-taker may have little or no understanding of the case  Note-taker may ‘fall behind’ and not alert the interviewer

**Figure 4**

If you decide to use a note taker, do:

- involve him/her in the planning stage
- provide your list of questions or question areas
- ensure the note taker is empowered to say ‘Wait a moment!’
- ensure the note taker is empowered to ask for clarity
- ensure technical/medical terms and names are spelled for the note taker
- check in every so often that the note taker is all right
- have the note taker read back the notes every so often to the interviewee
- if the notes are to be finalised later, ensure the note taker completes the task within a day or two – it should certainly not be left for longer than this as understanding and memory will begin to fade.

If an interviewee wants to make an audio recording there is probably no harm in allowing this but do ask for a copy of the transcript. Some organisations do not allow this but actually it may help to keep nerves calm and at least you will be aware of the recording – some interviewees have been known to secretly make a recording and not inform the organisation until later when it is introduced as evidence in a court case to the embarrassment of the defending barrister!

The best type of note is one which is not verbatim (i.e. not every word is recorded). Remember, you need to understand the meaning of what is said rather than simply the words that are spoken. This requires the interviewer to **listen, summarise, confirm**, and only then **record**. Every so often the record should be read back and verbal agreement gained about what has been written. At the end of the interview the interviewee should be allowed to read the full record that has been made. Even though you may have read parts of the record as the interviewee progressed there may be changes that the interviewee wishes to make at this point.

Such requested changes may need to be probed further and you may find some interesting new information as a result. Pay attention to such requested changes.



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Rather than argue over particular words or disagree about what was actually said versus what was meant, it is far better to record the changes as requested on the end of the record. In this way the record will contain both the original record and the changes which were requested, giving you a fuller and more complete record of the interview.

If the record of the meeting is to be word-processed, or cleaned up, it is useful to get a signature of agreement to the record on the day, complete with any requested changes. A photocopy of this can be given to the interviewee on the day and this is re-assuring for them. If you then follow up by sending a 'clean' version they can compare the records and, of course, you should be as accurate as possible and careful not to change the meaning in any rephrasing or when correcting grammar.

If you request the 'clean' copy of the record to be signed and returned, then make sure that you ask that it is returned by a set date. A default in your communication can be that if it is not received back by a certain date it will be assumed that there is agreement. This will put responsibility on the interviewee to raise any issues pro-actively rather than just not to reply or not return the signed note. If an interviewee will not provide a signature, at least you will have the hardcopy that was signed on the day. If there was a refusal on the day to sign you can simply record this in the note of the meeting at the time including the reason given, if any.

#### 5.1.5 Accompaniment at interview – who?

It can happen that an interviewee, more particularly the complainant or respondent, will request to be accompanied by someone. But who is allowed to accompany at a fact-finding investigation?

Many jurisdictions do not provide a right to accompaniment, at least at the investigation stage. It is therefore important to look at what the organisation's policy and procedure has to say on the matter.

It is likely that the policy will state who is allowed to accompany and perhaps who is not allowed to accompany at this stage. Some organisations will allow for accompaniment by a work colleague or a recognised trade union representative (either shop steward or full-time official). It is unlikely that the policy will allow either family members or legal representation at this stage.

However, requests for accompaniment, including those that are outside of the policy, should be taken seriously. The role of the accompanying person is not one of advocacy. The accompanying person is there as a support to the interviewee but not to take part in the interview or to speak on behalf of the interviewee. As such, it may be helpful to allow a family member if this makes things more comfortable for the interviewee and means that they will be more obliging to the interviewer. It may also be reasonable to allow legal representation at this stage for the respondent, on the same basis as above, especially if there are serious allegations which may result in a detrimental impact on someone's profession or career.

But take care!!!

Sometimes an accompanying colleague, family member, trade union representative or legal representative may become adversarial. This is not their role and it will probably upset the investigation and distract from the fact-finding task. It may even be done deliberately in a small number of cases. It is essential in such situations that the investigator takes this in hand and addresses it.

***Three strikes and you're out – dealing with aggressive accompaniment!***

On the first occasion, the investigator should pause the interview and point out, politely and courteously, to the accompanying person that he/she is going beyond their remit and ask that they simply act in accompaniment. It should be brief, to the point, but not unfriendly. It may have been that emotions became heightened and the person forgot themselves in the heat of the moment. We are all human, this can happen.

On the second occasion, the investigator should again stop the questions and mention that this is now the second time that the investigation has had to stop because of the actions of the accompanying person. Again with politeness but also firmness, the investigator should repeat that the role is simply accompaniment and ask that the person remain quiet and not become so involved in the interview.

On the third occasion, the investigator should stop the interview and meet with the accompanying person privately. He/she should note that this is the third interruption and that the investigation is not helped by such actions. He/she should ask for complete co-operation and note that, if this is not forthcoming, the interview will be stopped and the reason for it recorded.

If the behaviour persists, then do as you said you would do. Refer to this in your report.

Any remaining questions can be put in writing and a short deadline set for returning answers.

**Figure 5**

### 5.1.6 A note about the 'Reid Technique'

It is worth mentioning briefly a specific style of interviewing – more correctly called interrogating – that has been used extensively in the past by a number of police forces. This is known as the 'Reid Technique' and it was developed by John E. Reid and Associates. Supporters of the technique note that it is a key skill to elicit confessions from otherwise uncooperative suspects, while detractors say that it can (and has) resulted in false confessions.

The technique consists of a narrative by the police interviewer with an imbedded presumption of guilt on behalf of the suspect. The interviewer then offers various reasonable suggestions to explain why the suspect may have behaved as he did. The interviewer acts in an understanding way to give the impression that the behaviour is consistent with what any normal person would do in the circumstances. Its ultimate aim is to lull the suspect into making a confession. (For more information see [https://en.wikipedia.org/wiki/Reid\\_technique](https://en.wikipedia.org/wiki/Reid_technique))

Needless to say, this is **not** what is done in a workplace interview. Rather, the investigator must remain open minded and not allow natural biases to affect the questions which need to be asked. It is **not** about getting a respondent to confess something, it is about understanding factually what happened...and if the information suggests that the respondent did not do the things accused of, that may well be the correct conclusion.

### 5.1.7 Reliability of witness recollection

For many years, in court cases, witness testimony was considered sacred. After all, the witness had sworn on a bible to tell the truth, the whole truth and nothing but the truth. In many cases the witness was of impeccable character. But guess what? People tell lies. It happens. Even in workplace situations, not only murder trials. Not everyone, not all the time. But it does happen. This is one very good reason why seeking evidence from sources other than interviews is important.

People may also provide information that is not true, even though they firmly believe it to be true. There has been a lot of research on the topic of witness recall since early work by Elizabeth Loftus and John C. Palmer on recollection and integrity of memory.

Here is an overview of some of their early research work from 1974:



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A group of 45 students were shown 7 short (7–30 seconds) clips of road traffic accidents. After each clip the students were asked to write an account of the accident and were also asked some questions, the main one being about the speed that the cars were traveling.

There were five versions of this question, each using different verbs. Each was asked of 9 participants:

‘About how fast were the cars going when they smashed into each other?’

‘About how fast were the cars going when they collided into each other?’

‘About how fast were the cars going when they bumped into each other?’

‘About how fast were the cars going when they hit each other?’

‘About how fast were the cars going when they contacted each other?’

The answers were quite surprising and suggested that the result had been influenced simply by using different verbs in the question:

Verb used	Average estimate of speed (mph)
“Smashed”	40.8
“Collided”	39.3
“Bumped”	38.1
“Hit”	34.0
“Contacted”	31.8

The difference in estimate between the weakest verb (“contacted”) and the strongest verb (“smashed”) was close to 30%.

There was a second experiment in which 150 students viewed a short film (1 minute) which included a scene of a multiple car accident lasting about 4 seconds.

They were then questioned about what they had seen, and 50 participants were asked each of the following questions:

‘How fast were the cars going when they hit each other?’

‘How fast were the cars going when they smashed into each other?’

The other 50 students were not asked about the speed of the vehicles and this group acted as the control group.

A week later, they returned and answered a number of questions about the accident. The key question this time was ‘Did you see any broken glass?’ which was in a longer series of questions in a random position on each question paper. There was in fact no broken glass in the film.

The answers were again surprising:

Response	“Smashed”	“Hit”	Control Group
“Yes”	16	7	6
“No”	34	43	44

Once again, the questions with the stronger verb (“smashed”) elicited a higher positive response, while the weaker verb (“hit”) also drew a positive response. Remember that factually there was no broken glass shown in the video. Even in the control group some 12% (6) thought they had seen broken glass!

Loftus and Palmer thought about what their research meant and concluded that the way our memory works is quite different to how we thought it worked. It isn’t an ‘internal video’ recording that we see and store like a computer until needed. Rather our memory is made up of the immediate impressions and senses of what happened at the time, but to this is added what happened afterwards.

So the questions that the police ask, or the things a doctor or nurse later tell you about the accident, would be interpreted and added to the sense memory that you have. However, rather than being stored as two different things, it is stored as **one memory** of the event, which we fully believe is what we saw at the time.

This means that a witness may firmly believe that his or her testimony is true, even if it is not what actually happened.

**Be careful of witness memory and seek factual corroboration whenever possible.**

### 5.1.8 Lying

How do you know if someone is lying?

This is a difficult question and there is a plethora of quasi-scientific advice purporting to give an easy and definitive answer. Much of this centres around body language and ‘reading the signs’. We often feel we know a lot about things like lie detector tests even though few of us have ever actually taken part in, or seen, such a test. But then, dramatic film and TV images are everywhere!

This internet article may shed some light on this topic:

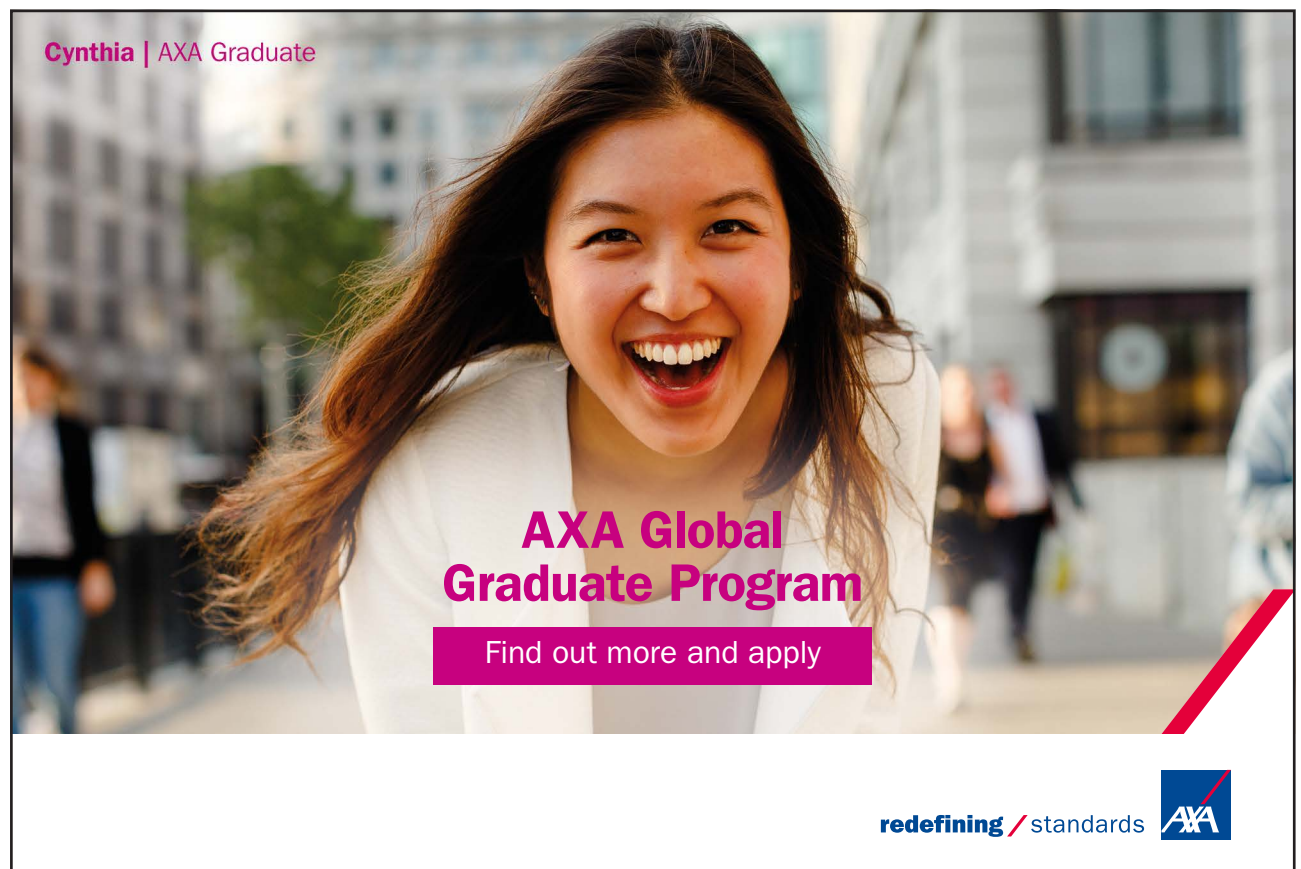
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There is no universal body language which tells you when a person is lying. People are different. Cultures are different. People react and respond differently to different stimuli. A 'sign', such as scratching an ear, may simply mean that the person is nervous rather than telling a lie, or even just that the ear is itchy!

We have a human propensity to look for short-cuts and this is another place where you may be open to bias. How simple it would be to assign motivation (i.e. lying) to particular groups based on what you observe to be 'tell-tale' behaviour. Or perhaps to put it in a slightly different way, how simple it would be to use my prejudices to decide if someone is lying or not.

Surely we can tell a person is lying by looking in their eyes? Again, it may be comforting to believe this. However many liars have no difficulty looking you straight in the eye and telling an untruth.

The problem with reading body language as a way to discover lying is that body language can be ambiguous and therefore has no simple direct cause-effect link. As an investigator you are not asked to use a 'gut feel' – you are asked to probe, unearth factual information, and then use your logic and reasoning (as free from bias as possible) to reach a reasonable conclusion.



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### 5.1.9 Meyrabian and the importance of body language

One of the myths about body language is a PowerPoint slide which has been used in countless courses on management training and communications, based on research by Albert Meyrabian, a professor of psychology, from the 1960s.

The slide typically shows a pie chart divided into three sections and is usually described as showing the most important factors in effective communication. The three sections are: body language, tone of voice, and words. The relative importance attached to each is given as:

Body language	–	55%
Tone of voice	–	38%
Words	–	7%

From this, most students are taught that body language and tone of voice are far more important than the actual words that are said in a communication and this has contributed to the myth of the apparent primacy of body language and tone when seeking to spot a lie.

However, a key piece is missing and that is the fact that Meyrabian was studying communication in ambiguous situations. His point was that where there is confusion in a communication, the listener will pay more attention to body language and tone, rather than words, in trying to make sense of what is being said. He was not stating that effective communication is primarily body language and tone of voice.

If we cannot rely on reading body language, then how can we know if someone is lying in an investigation?

Very simply, it depends on your calm, conversational, open questioning. The more the interviewee speaks, the more he/she will have to remember...if it's a lie. This is a heavy cognitive load to deal with.

Pay attention to small details and ask questions about seemingly innocuous things. Ask the interviewee open questions – ‘so, tell me about the journey into the meeting that day’. Ask how long the journey took, whether it was by car or public transport? If it was a train journey what line did they take and what time did it leave and arrive? Who was on reception when they came into the building? Ask for a description of the room and where things or people were situated. What time did something happen, what time did something else happen? Ask about what would normally happen and then what was different about this situation. How did the interviewee feel about what was happening then...and how does the interviewee feel about it now?

If the interviewee has been telling you something working forward, ask them to tell you again working backwards, and vice-versa.

Somewhere in all this, if a person is lying, you will begin to notice anomalies. Things won't add up. Details will be forgotten or will be changed. There may be inconsistencies in what is said at different times of the interview. You should not react to this ("So, you have been lying to the investigation all along!") but rather remain calm and gather the information. If someone is lying and believes the investigator has been fooled, it is probable that the lie will be continued and you will discover more anomalies which you can record.

#### 5.1.10 Other evidence

Aside from interviews you will probably need further information and you can get this from a variety of different sources, such as:



**Figure 6**

It is quite amazing what some people believe they will get away with. But inevitably a trail will be left, which an astute and careful investigator will be able to find. Given the amount of media and information technology in all areas of our lives, this is especially true today.

While we don't need fingerprints or DNA evidence in workplace scenarios, there is an abundance of data waiting to be viewed which can provide equally useful results. We just need to go and look for it.

#### 5.1.11 Visit the Scene

Make sure that you examine the location where any incidents took place. This may prove to be invaluable. It is useful to ask interviewees to draw a location map and explain where people were situated and this can then be compared to the actual environment.

See for yourself the distances involved, the nature of the atmosphere, setting and surroundings.

Are there noisy machines nearby?

Is view of sight obscured by some pillars?

Who is seated next to whom?

Is there a glass panel in the office?

Is there a lot of dirt around or does it appear clean and tidy?

Who has access to what parts of the building?

Are keys or digital cards used for access and exit?

Is there CCTV anywhere?

Take pictures with a digital camera or your phone.

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Have you noticed something at variance with what an interviewee has told you?

In short, is there anything which might be of relevance to the investigation?

**Make sure to visit the scene!**

In an unfair dismissal case involving a NHS Foundation Trust, Ms. R, a Filipino nurse who had worked in the hospital with a good record for four years, was dismissed for alleged mistreatment of a patient. Her claim was processed through an Employment Tribunal, the Employment Appeals Tribunal and eventually was decided by the Court of Appeal.

On a point of fact the evidence of Ms. R's accuser, a Ms. D, was severely disputed. Part of this was that the incidents were alleged to have occurred in a room off the main unit which had a window and door, though evidence suggests that the door would have been closed and the window was high up with drawn blinds as the patient was being washed. Ms. D would not, therefore, have been able to see in.

The investigation took extensive notes of Ms. R's interview but none of the interview with Ms. D and the evidence of Ms. D was 'preferred'. It would have been a simple matter to visit the room and check what the line of sight was and whether, in fact, it was possible for Ms. D to have seen Ms. R with the patient. The investigation did not visit the ward and this was a contributing factor in Ms. R winning the case.

Salford Royal NHS Foundation Trust-v-Roldan (2010) EWCA Civ 522

**Figure 7**

### 5.1.12 Re-interviewing

In examining your interviewee notes and looking at other data that you have found, it may appear necessary to re-interview the complainant, respondent or a witness. Do not hesitate to do this – if there are anomalies or further explanations needed, then such re-interviewing is an absolutely essential task for the investigator.

In following up on further information which may contradict something recorded in an earlier interview, present it to the interviewee as a neutral question not as an allegation of lying. There may be another explanation that you are not aware of and you should be open to this.

Once you have collected a sufficiently extensive amount of information it is time to analyse this and to reach conclusions on findings.

# 6 Step 3

## 6.1 Analysing information and applying logic and reason

No doubt you are analysing information while you are doing the investigation. You will also come to a point where you believe that you have all the information needed and it is now time to lock yourself in a room and spread all the data in front of you (at least metaphorically if not actually physically).

You will probably have a mixture of interview notes and other evidence and you now want to bring all your powers of logic and reasoning into action.

For each item under review, what information do you have? Does all the information point to a particular conclusion? Is there anything which would cast doubt on such a conclusion? Are you being reasonable? Are you sure?

### 6.1.1 Cognitive bias

A heuristic is a cognitive, or mental, shortcut that we use in problem solving. It is instant and intuitive and draws on our personal experience without having to do much research or thinking. An 'educated guess' and 'common sense' are examples of a heuristic. It is a good way to deal with complexity and information overload in our daily lives.

The point of using a heuristic is, of course, to make an accurate assessment and once this is achieved the heuristic is helpful. But sometimes the heuristic results in an incorrect judgment of the actual situation – our continuing reliance on the faulty mental working can lead to bias.

The study of cognitive biases by psychologists and behavioural economists has increased considerably in recent years. See, for example, such books as 'Thinking, Fast and Slow' by Daniel Kahneman and 'Why Smart People Make Big Money Mistakes and How to Correct Them: Lessons from the Life Changing Science of Behavioural Economics' by Gary Belsky. Cognitive bias is an error in thinking typically arising from difficulties in memory, attention, attribution and other psychological faults.

Numerous biases have been described and used to explain behaviour in a variety of situations. Here are some examples of cognitive biases which may impact on an investigator's ability to be impartial and to logically analyse the available information:

*Belief bias*: one's assessment of the logical strength of an argument is biased by how believable the conclusion is. But remember what Arthur Conan Doyle said, through his Sherlock Holmes character in *The Sign of Four*: "How often have I said to you that when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth?"

*Confirmation bias*: The inclination to search for, interpret, focus on and remember information in such a way that it confirms one's preconceived ideas. This is why a workplace investigation should never be based on the mythology of the Royal Canadian Mounted Police motto 'We always get our man'.

*Backfire Effect*: When a person deals with hearing some contradictory information by confirming their belief even more strongly.

*Fundamental Attribution Error*: the tendency to explain people's behaviour with reference to either a trait we think they have (internal attribution) or to the particular situation that they are in (external attribution). The 'error' is that we habitually attribute other people's mistakes to some internal characteristics, while we attribute our own mistakes to external factors beyond our control.

(For a basic, broad overview of this area, see [https://en.wikipedia.org/wiki/List\\_of\\_cognitive\\_biases](https://en.wikipedia.org/wiki/List_of_cognitive_biases))



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Most intriguing of all perhaps is the **bias blind spot**. This suggests that one sees oneself as less biased than others and believes that one can see more cognitive biases in others than in oneself!

Take note that it is not only new or inexperienced investigators who are subject to bias, it is everyone. Experienced investigators in particular may be prone to confirmation bias – “I’ve seen this all before”.

Be aware of natural bias and be vigilant that it does not impinge on your work as an investigator.

### 6.1.2 Some useful analysis tools

A **timeline** is a handy analysis tool which also helps to spot anomalies in any accounts that have been given.

The method lists all incidents chronologically, as described by different interviewees and as found in a variety of pieces of evidence. Having all the information laid out in this way will make it easier to notice where there may be inconsistencies or logically impossible assertions.

Here is an example of what a timeline looks like:

Timeline of What Happened			
<i>Date/time</i>	<i>!!!</i>	<i>Element of investigation</i>	<i>Who</i>
3 <sup>rd</sup> July		Project team meet and agree targets	All team
6 <sup>th</sup> July		Project team assess range of computers	Subgroup (Jane,Bill,Tim)
7 <sup>th</sup> July	*	Bill buys Y laptop computer on his company credit card	Bill
12 <sup>th</sup> July	*	Team decides to buy fifteen X computers, noting that Y computers will be incompatible with the new system	All team
15 <sup>th</sup> July		Bill’s laptop is incompatible and he decides to use it at home without telling anyone	Bill
30 <sup>th</sup> July		Finance queries Bill’s expenses form for a laptop at home – it is outside company policy and not approved by anyone	Finance Manager
4 <sup>th</sup> August		Bill explains to Finance that the decision to buy Y computers had been made at the assessment on the 6 <sup>th</sup> July and he had seen a bargain on the way home on 7 <sup>th</sup> and had bought it to save the company money.	Bill and Finance Manager
5 <sup>th</sup> August		Finance Manager reports to Bill’s manager a possible case of inappropriate use of company funds, to be investigated.	Finance Manager

Figure 8

The information above is clearly laid out and facilitates making reasonable decisions. Collecting the information in the first place may not have been as clear so using a timeline in this way is part of being rigorous with the available data.

You can also use visual tools such as Force Field Analysis and Mind Mapping – in fact anything that will let you examine the information as clinically as possible.

In the following example you can visualise which arguments push more or less strongly in the other direction.

Use of Force Field Analysis to visually analyse strength of arguments	
Reasons <i>for</i> Case to Answer	Reasons <i>against</i> Case to Answer
A. Mary was working near the perfume counter from 9am to 12.30pm →	←← A. Many of the keys on the lockers are interchangeable
B. Nobody recalled seeing her from from 10.10am until 10.35am and from 10.55am to 11.15am →	← B. Mary claims that the perfume had been planted in her locker
C. The perfume was found in her locker →→→	← C. Mary claims that her manager dislikes her and is trying to get her fired
D. Her manager said she had no reason to be absent from her counter – tea break is from 10.30am to 10.45am →→	← D. She also claims that she doesn't need to steal perfume and doesn't wear this brand

Figure 9

Once you have completed your analysis the picture should begin to emerge clearly. You should have a good understanding of who said what and who did what, and why. You should know how this compares to the behavioural expectation as outlined in company policies and guidelines, as well as external best practice guides such as those provided by ACAS.

The question you then need to answer is...given what we now know, is there a case to be answered?

The standard in looking at workplace issues is not as onerous as the criminal test. In a criminal test the standard is whether the conclusion is reached 'beyond reasonable doubt'. This is quite a high standard and is why such detailed techniques as DNA profiling are used in these cases.

The standard in workplace cases is the civil standard of 'balance of probability'. What this means is that, provided you have carried out a thorough and reasonable investigation, then you can reach a decision even if you do not have all the facts or have not followed up on some lines of enquiry. It is the **balance** that you are looking at, in other words if your belief in one conclusion is 51% then it is reasonable to make this conclusion above another where your belief is 49%. Remember this can only be relied on if you have carried out a reasonable and thorough investigation.

One case in the UK has become the standard in looking at how balance of probability is viewed.

### The Burchell Test

In an unfair dismissal case, British Home Stores Ltd (BHS) v Burchell (1978) ICR 303, an employee was dismissed following allegations of dishonest conduct involving other staff in relation to a staff purchase scheme. She was dismissed following an investigation and brought a case to the Employment Tribunal which she won. The company appealed to the Employment Appeal Tribunal and won. Most importantly, the judgement established clearly what an employer needed to do in order to behave correctly in investigating and deciding on such cases.

There are three elements:

1. The employer must have a reasonable suspicion amounting to belief that the employee was guilty of the misconduct.
2. The employer must have reasonable grounds upon which to sustain that belief.
3. At the stage at which that belief is formed, the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances.

This is the 'Burchell Test' and is often described in short as a *genuine belief*, based on *reasonable grounds*, after a *reasonable investigation*.

**Figure 10**

A simple test is the classic: "If it walks like a duck, quacks like a duck, and swims like a duck...then it probably is a duck. Its not a swan." If you use logic to reach a conclusion then you won't go too far wrong.

The conclusion of an investigation is a decision as to whether or not there is a case to answer. That is the point at which the investigator should stop and allow others to either proceed to a disciplinary hearing (if there is a case to answer), or to wrap up the process (if there is no case to answer).

The output from an investigation is a written report and this will be dealt with in the next chapter.

#### 6.1.3 Consider the opposite

Always remember that there may be another explanation. A technique to test this out is to use the 'Devil's Advocate' approach. This means arguing against what you believe has happened in order to identify weaknesses and ensure that your assessment is as accurate as possible.

The term originates from the process of canonisation (becoming a saint) in the Catholic Church. A canon lawyer is appointed to argue against canonisation of a candidate and is expected to be sceptical, to cast doubt on any attributed miracles and to advance reasons why the candidate should not be made a saint. It is meant to be a critical opposition and is used to make certain that the candidate's case is strong.

Similarly an investigator should consider the opposite as a way to ensure reasonable analysis and conclusion. Be a 'reflective sceptic' and be ready to change your view if more evidence comes to light or logic points to a different conclusion to what was on your mind.

In all your assessments aim to be as precise and accurate as possible. Rather than stating: “Fred has a very poor timekeeping record and is unreliable” it is better to state factually “Fred has been late 23 times in the last 60 working days, with an average lateness of 32 minutes. This is above the acceptable level of 2 lates in 60 days averaging 10 minutes.”

#### 6.1.4 Logical Reasoning

There are two basic types of logical reasoning – deduction and induction.

**Deduction** starts with specific, known and accurate premises that lead on to a specific and accurate conclusion. Once a correct premise has been used to begin with, the conclusion to this type of argument is correct and can be verified.



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Jane, Chinese architect

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Some examples of deductive reasoning:

All squares are rectangles (premise). All rectangles have four sides (premise). Therefore, all squares have four sides (conclusion).

It is dangerous to drive on icy roads at more than 50 miles per hour. The roads are icy now. It is therefore dangerous to drive at more than 50 miles per hour on the roads now.

If the whole team was at the meeting on Wednesday, and Bill is a member of the team, then Bill was at the meeting on Wednesday.

The basic model is *if  $A = B$ , and  $B = C$ , then  $A = C$ .*

You can see that the initial premise must be correct or the logic will not work. Take, for example, the following:

People get wet when it rains. Lucy arrived home wet. Lucy must have been out in the rain.

People don't necessarily get wet when it rains – they may take shelter or have an umbrella. Lucy may have got wet in some other manner – she walked through the garden sprinkler, some friends played a prank. The conclusion here is not logically certain.

The investigator needs to be careful in using deductive reasoning to reach a conclusion about a case to answer. Use critical thinking instead of distorted, biased, unclear or imprecise thinking.

**Induction**, examines existing information and makes a broad statement about what might be considered probable, knowing that this conclusion may not be completely true. It usually establishes a rule or standard based on observable experiences.

Some examples of inductive reasoning are:

In every accident that happened the safety guards were not used. Nobody uses the safety guards in this factory.

The correct information about the new communication protocol was provided at the meeting and Mary was at the meeting. She didn't follow the new protocol, so Mary is resisting it.

Deduction and induction are closely linked and it may be pointed out that a premise in deductive thinking may have arisen from induction. Consider the following deductive reasoning: “All people are mortal. Jenny is a person. Therefore Jenny is a mortal and will die.” While this is a deductive form, the basic premise (“All people are mortal”) arises from the observation over many years of people dying and with no examples of anyone living beyond a certain age. This fits inductive reasoning which takes observations and experiences and suggests a general explanation, in this case that all people are mortal.

**Fallacy** – beware! This is logic which seems right but is flawed in some way. It is a mistake in reasoning rather than a mistake in fact. There are many examples of where fallacies can occur including inconsistency, wrong presumption, relevance and insufficiency. A fallacy which investigators must pay particular attention to is *lack of proportion* – exaggerating the relevance of some evidence or downplaying some facts which may not suit the desired conclusion.

Example of the lack of proportion fallacy in an investigation report:

“We established that Mr. J did take the iPad from the shelf and concealed it under his coat when approaching the check-out. He walked past the check-out without paying. He then held open the door for a female customer who was also going out, and it was then that the retail assistant noticed he was taking the product out of the store without paying for it.

It has to be noted how very encouraging it is to see such manners nowadays. Mr. J did not have to hold the door open for the lady but he was clearly well brought up and felt obliged to do so. Given his obvious values and decency, I can only conclude that Mr. J was meaning to return at that point to the check-out in order to pay for the iPad.”

For more information about fallacy, including explanations of the many different types, see:  
[www.iep.utm.edu/fallacy](http://www.iep.utm.edu/fallacy)

Once the analysis stage is completed it is time to finally decide what the outcome of the investigation is to be, and this will be dealt with in the next chapter.

# 7 Step 4

## 7.1 Concluding with an outcome

Under each allegation you will reach a conclusion based on applying your rigorous logic to the evidence available.

Following this you will make a decision about whether or not there is a case to answer under each heading and overall. You will need to be explicit about this so that the referrer knows what you have found and what you haven't found.

There may also be situations where it is unclear whether or not there is a case to answer and, if so, this should be clearly articulated in the report. Note that this should not be used to avoid making a painful decision. You are entitled to decide on a finding even if not everything is clear, but provided you have carried out a reasonable investigation.

Remember it is a balance of probability i.e. 51%/49%, not 100%, as the following case illustrates.



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**Balance of Probability and Reasonableness of Investigation**

Consider the case of *Stuart v City Airport Ltd.* in the Court of Appeal (2013) EWCA Civ 973. This was an unfair dismissal claim in which an employee had been dismissed following an investigation which had concluded that he had taken goods from a shop in the airport without an intention of paying for them. His defence was that he had only stepped outside the shop briefly to speak to a colleague who had called him over and that there was a queue at the check-out at the time.

It was suggested that the investigation should have interviewed more staff and viewed CCTV footage which was available. The Court of Appeal upheld the Employment Tribunal's finding that Mr. S had been dismissed fairly following a reasonable investigation. It decided that what the company had done in its investigation was reasonable and that the conclusion reached was reasonable based on this investigation.

Adjudications have been consistent in this aspect – reviewing the work of the investigation to decide if it was reasonable, rather than setting a standard to which the investigation should have adhered.

**Figure 11**

Once you have completed the report it is now in the hands of the referrer to proceed. If there is no case to answer there won't be a disciplinary stage, but there may still be communication to the parties involved (claimant and respondent, not witnesses) and other paperwork to conclude the process.

If there is a case to answer, then the referrer will decide how to proceed. It is not the investigator's responsibility to suggest any 'punishment' and you have completed your work once you have concluded on findings. You may, of course, be asked to attend a disciplinary or appeal hearing to be asked questions about your report and you may also be asked to attend any external adjudication process if the case goes this far.

If the referrer decides to proceed to a disciplinary hearing then a separate process is set up with someone to hear the case who has not been involved in the investigation. This is to ensure fairness and impartiality. This process starts from the point that there is a finding against the person involved and they now have an opportunity to answer this finding. Each organisation will have its own process but, again, the company must act reasonably in how it operates the process and listens to what is said. If necessary, there can be adjournments while something is considered or some further enquiry is made.

It is important to emphasise that the fact-finding investigation should be separate from any disciplinary process which may follow and the investigator should not decide on any 'punishment'. While this may be difficult for smaller organisations it is necessary in order to ensure fairness and maintain a sense of natural justice, keeping the investigator free of any allegations of bias.

The conclusion arising from the disciplinary hearing is an outcome to be processed. This can range from 'no action necessary' through extra training through a warning, suspension, or dismissal. There will normally be an internal appeal process and, if this is activated it will need to be heard by someone new. A small number of cases may proceed to external adjudication, such as unfair dismissal claims, and such adjudicating bodies will scrutinise the investigation and report for reasonableness.

While seeking information during the course of the investigation, some things may come to light about policies, procedures, practices, culture and so on. They may not have an immediate and direct effect on the matters being investigated but could be something that it would be useful for the organisation to be aware of and to act upon. The investigator may even be able to provide recommendations, based on past experience. For example, it could be that the organisation's policy on workplace bullying contains out of date definitions which could benefit from being re-written.

Such recommendations can be given following the investigation but it is better to provide these under separate cover to the referrer, rather than risk causing confusion by including them in the report of the investigation. They are simply given by way of observations and suggestions, and are dealt with differently to the core work under the ToR which is to decide on findings.

It is worth keeping in mind when you are writing the report that it may end up in an external adjudication process. Now, go over your report one more time to ensure no mistakes!



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# 8 Step 5

## 8.1 Reporting findings in a structured and clear manner

Preparing a clear report of the investigation, with conclusions, is a crucial element in the process. It is also a task which many find difficult, partly because it requires different skills to those used in interviewing such as questioning, summarising, or recording.

Writing with clarity is not a common skill but even before this consideration, there are some basic things to be conscious of:

1. Competent use of grammar and following grammatical rules.
2. Correct spelling (note that many computers will have a default US English spell-checker, for example using 'Z' for 'S')
3. Keep sentences short and to the point. Use full stops and begin a new sentence. This is preferable to long sentences with many commas. Long sentences can be difficult to follow.
4. Use numbering for paragraphs – this makes it easy to refer to.
5. Use punctuation and make sure to use capital letters correctly.
6. Use bold, italics and underlining as needed. This helps to structure and give meaning.
7. A badly structured and written report will detract from its credibility. If possible, get someone else to read over your report to sense check and spot typing or grammatical errors.
8. a badly structured and written report will detract from its credibility. If possible, get someone else to read over your report to sense check and spot typing or grammatical errors. (!!)
9. Start a new section on a fresh page.
10. Use page numbering and footers and ensure a table of contents at the start.

### 8.1.1 Write with clarity

Surely, one of the greatest of the arts is to express thoughts and ideas clearly in written form?

This is undoubtedly the key to being a great investigator – to prepare well and uncover the required information, yes – but to then be able to express what you have found in a succinct and straight-forward manner. The acid test is that someone who knows nothing about the investigation can read the report and, at the end of it, say that they now understand what happened and can see how the conclusion has been arrived at.

Use less, rather than more, words to make your point. Clarity is not served by being verbose. Why use 200 words when you can get the meaning across in 50 words? Investigators do not get extra marks for the large number of pages in a report.

A useful website on clear writing for reference is [www.plainenglish.co.uk/](http://www.plainenglish.co.uk/)

Consider the following:

**Example of a verbose paragraph, and what to do about it...**

"The main point of this section is to lay out in as much detail as is possible, and within the confines of the task allocated to me, how this particular series of events came about, how it was approached by the different parties involved, and how this eventually led to the unfortunate situation that is now before us. This will be supported by a record of each of the discussions held with those involved, and in a few cases, those not involved but who have something to add on the matters which are under investigation. Subsequent to the meetings these notes were viewed and cleared for inaccuracies and the person involved appended their signature to the hard copy note."

(119 words)

Would it not be better to have written...

"This section sets out a summary of matters investigated, with signed records of the interviews available in the appendices."

(19 words)

This has cut out 100 words while maintaining the meaning.

**Figure 12**

Avoid naming someone as different things e.g. the 'Section Leader', then 'the leader of the team', the 'TL'. Just use initials and include a code at the beginning. **But**, do be careful that there are not two people with the same initials which could confuse matters!

Most importantly, write your report in a **neutral style**, avoiding any blaming or exaggerating language, or embellishments that distract from the facts. As investigator you are expected to carry out your duties in an unbiased and factual way, and this extends to the writing of the report. It should not read like a thriller. The following illustrates different ways of expressing the same set of facts.

**The 'Little Red Riding Hood' story using different writing styles**

The following are three versions of part of the classic fairytale using (A) a sympathetic style biased in favour of Little Red Riding Hood, (B) a critical style, biased against Little Red Riding Hood and (C) a more neutral and factual version of what happened.

**A**

This story is all about a little girl who lived in the woods very near her lovely old grandmother. She was a happy little child and was really very sweet indeed. She was so good that she visited her granny nearly every day and would bring her something nice that her mother had cooked. Her granny was very old and she was so delighted to see the little girl and to eat the goodies which she so looked forward to.

One day the girl was on her way to see her granny and was going through the woods which she dearly loved and which filled her heart with joy. But who else was in the woods that day? That's right, a big bad wolf. He was horrible, drooling from his mouth as he looked at the little girl who he wanted to pounce upon and eat. The wolf followed the little girl through the woods and every time she turned around he would jump back behind a tree so she couldn't see him. 'Who is there?' she would cry, frightened out of her wits as she heard noises. The mean wolf just laughed to himself – he didn't care that the little girl was scared and all alone in the woods far from home.

**B**

The story is about a little girl who should have known better. She lived with her parents in a house in the woods near her granny, who had always been watchful of her grandchild. The child was happy but didn't pay any attention to the dangers in the woods. She visited her granny every day but seemed to think that all the animals were her friends, even stoats, foxes and wolves. Her mother gave her some food to bring to her granny every day and the little girl would walk through the woods without a care in the world, totally oblivious to what might happen.

One day, as she was on her way to visit her granny, the inevitable happened. A large wolf followed her and you know what wolves are like – he wanted to eat the food **and** the little girl. He sneakily hid behind trees and followed her like a hunter. She would cry out 'Who is there?' as if the wolf was going to answer her. The foolish girl probably thought someone would come to her help if they heard her. But who was going to help a silly child with no sense?

**C**

The story is about a young girl who lived in the woods near to where her granny lived. Every day her mother would give her food to take to her granny and the little girl would walk through the woods to her granny's house. She usually had no fear of going through the woods on her own.

One day a wolf was in the woods and saw the little girl going to her granny's house with the basket of food. He followed her and hid behind the trees so that she couldn't see him. The little girl heard noises and became frightened, crying out 'Who is there?'

It's the same story but using different writing styles and the use of specific words to impute different meaning. In (A) the sympathetic writing conveys a sense of innocence, in (B) the style carries blame. Only in (C) is there a neutral, factual commentary. Keep this in mind when writing the investigatory report and try to use the style in (C).

**Figure 13**

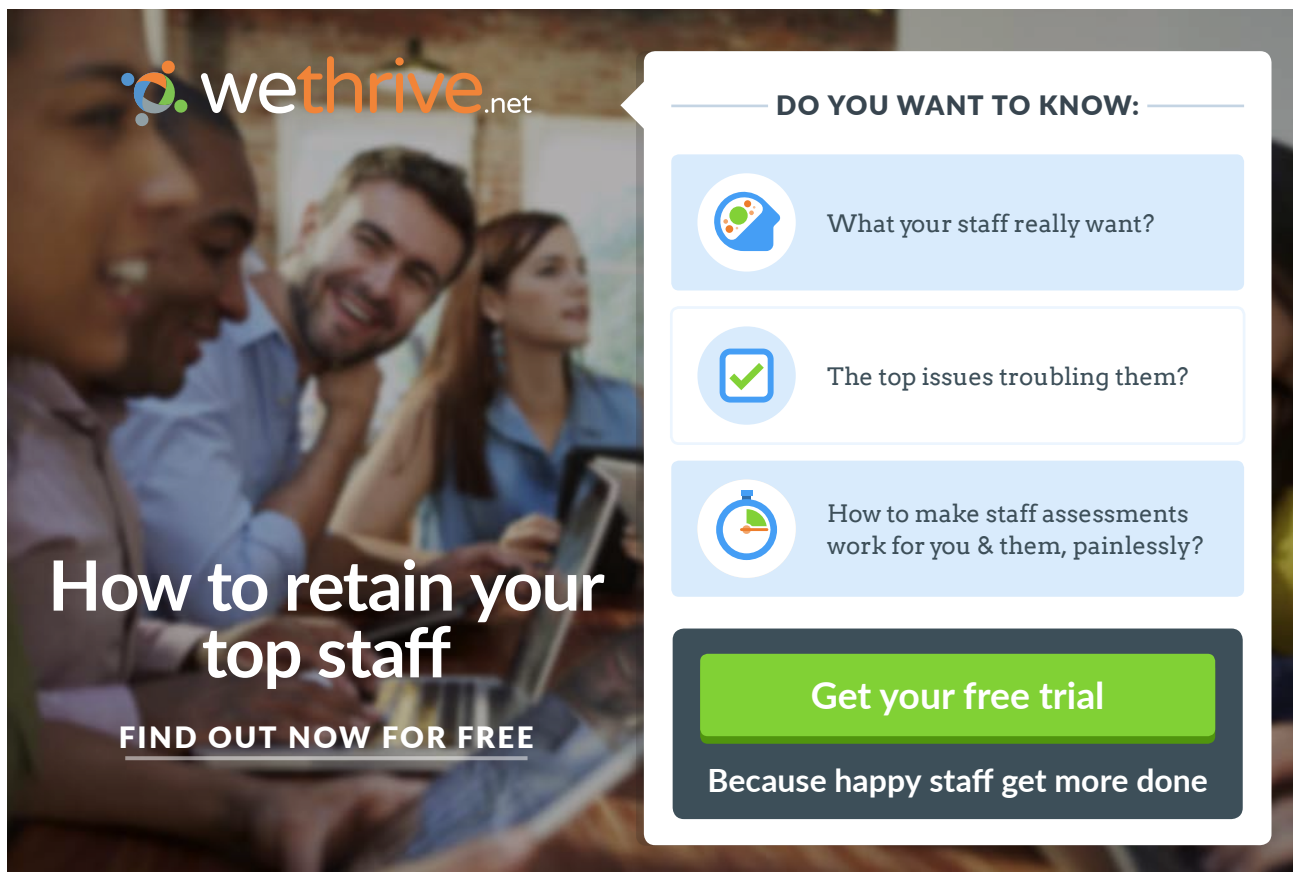
It may be tempting to write the report with a multitude of facts supporting the conclusion while leaving out facts which do not support the conclusion, but this has to be avoided. The report needs to set out **all** the facts that you have established even if some of those facts are in opposition to what you have decided. You should be able to explain your thinking – why was one item not considered to be as strong as another? Give due credit and weight to the facts which oppose your conclusion, remembering that the finding is based on balance of probability and does not have to be 'perfect'.

### 8.1.2 Template Report

While different investigators will have different styles of writing, having a template report makes things easier and consistent across the organisation. It also helps to organise one's thoughts reflecting the methodology of the written report.

Here is a standard template list of sections that can be used as is or adapted to your own needs:

1. Cover sheet
2. Index
3. Introduction
4. Terms of Reference
5. Investigating Officer
6. Methodology of Investigation
7. Interviews and other evidence gathered
8. Expert advice, guidelines or standards
9. Detailed report for each allegation
10. Conclusions and findings
11. Mitigation
12. Appendices



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1. The Cover Sheet should contain basic details such as the name of the organisation, a reference to the case ('Investigation into Allegations of Bullying and Harassment brought by Mr. J. Reynolds against Ms. J. Turner, Curatorial Section'), the date, and the investigator's name.
2. An index shows you are organised. It allows the reader to quickly find sections. It ensures a logical arrangement in the report.
3. The introduction should be kept brief and refer to where in the report each element is mentioned, any particular difficulties encountered during the investigation and how they were overcome.
4. The Terms of Reference have been mentioned earlier and should be included in full here, including if any discussion/agreement/debate was needed before finalisation.
5. There should be a few words about the Investigating Officer and any qualifications or experience which bring extra credibility, for example if he/she has been trained in investigatory techniques.
6. This section allows you to describe the investigation, how it was planned, implemented and concluded, and any blockages that had to be dealt with. It is good to provide a bit of the detail such as the following:

"Once the interviews were completed, a written record was sent to each interviewee for review, agreement, signature and return. In one instance (AB, witness, 23 June 2015), the interviewee corrected a date he had given in the interview after checking his diary. In another instance (ST, respondent, 16 June 2015), the interviewee requested a number of changes which the interviewer felt substantially changed the meaning of what had been said at interview. Following discussion it was agreed to add the interviewee's comments to the end of the note as a suggested amendment."

Decisions on both seeking further information or not seeking further information can be included here and explained. Avenues of enquiry which produced no useful information should also be noted, e.g. "CCTV footage of the room from an hour before the incident and an hour after it was viewed but this showed nothing of interest to the investigation in relation to the allegations".

At the end of this section the reader should have a good understanding of what was done during the investigation and to what extent the principle of thoroughness had been respected.

7. This is where you note the information gained from all sources. The detail of the interviews are mentioned here in summary and reference is made to the section in the appendices which will have the full interview record.
8. Any guidelines, standards, or expert advice consulted. Includes both internal policies and procedures and external input such as ACAS.

9. This is the core of the report and is where you will explain your rigorous analysis and logic. Each item of the complaint should be dealt with and the facts you have established outlined, with reference to where the full detail can be seen in the appendices. This will include the detailed allegation and anything added by the complainant, the response received, any evidence from witnesses and other sources, and your analysis of this information.
10. The conclusions should seem obvious if you have written the report correctly thus far. Findings are written as ‘case to answer’, ‘no case to answer’, or occasionally ‘inconclusive’.
11. You may have discovered some mitigating circumstances and these should be mentioned. While the mitigation may not be strong enough to overturn your factual finding, it should be noted for consideration by any disciplinary meeting which may follow.
12. Appendices are important as these contain the raw material of your investigation and a reader of the report should be able to find what you refer to easily and quickly.



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# 9 Some Other Important Matters

The following are some further matters to which the investigator should pay attention.

## 9.1 Mitigation

In some cases you may uncover information about the circumstances which really must be taken into consideration for a full and complete understanding of what has happened, even if it does not change the fact of what has been done by the respondent. It is something which should be stated clearly in your report so that any decision about outcomes can be properly weighted by any disciplinary panel. Essentially, it has the effect of moderating or lessening the gravity of what the respondent has done in what you have investigated.

What might be considered mitigating circumstances? Each case will be different and there will frequently be excuses put forward which do not necessarily amount to mitigating circumstances. However, by way of example consider the following:

### 9.1.1 *Actions of the other or others e.g. provocation*

Has the complainant's actions in some way contributed to how the respondent has reacted and are these actions unreasonable? A common situation at work is that a manager is frustrated in dealing with performance issues by a grievance brought in defence. The pressure on the manager to ensure improved performance may lead to him or her to 'explode' emotionally at work and uncharacteristically shout angrily, or otherwise to behave in an unprofessional manner. This 'explosion' then becomes the topic of grievance by the underperforming employee, but the action has been brought on by the employee at least in part by his under-performance and this needs to be noted.

### 9.1.2 *Health*

Health affects our actions in many ways. Behaviour at work can often be traced to poor mental or physical health, or to poor mental or physical health of someone else close to us. Investigators should be alert to any signs that there may be an underlying health issue which may explain some or all of the behaviour. There may even be a doctor's report on file which may be referred to in the mitigation section.

### 9.1.3 *Undergoing treatment or taking medicines*

Related to issues of health are treatments that the respondent or complainant may be undergoing. This could be counseling, for example, which may bring negative issues to the surface which the person then finds difficult to quell when in work. Pharmacological drugs can have various adverse reactions or side effects including drowsiness, depression, nausea, headaches, anxiety, dizziness, and muscle pain. The employee may even be unaware that the physical or mental state being experienced is connected to the medicines. Such knowledge may not excuse the behaviour complained of, and there may well be sufficient evidence to state that the behaviour did in fact occur, but mentioning this as mitigation means a full and accurate report which allows the disciplinary panel to consider matters fully.

Do remember that these are sensitive and very personal areas and you need to have a careful, discrete and considerate approach in enquiring about these matters. The employee may not wish to discuss what he or she considers to be a private matter, so your questions may not be answered and, if so, it is better not to probe too deeply.

### 9.1.4 *Stress*

Stress can be simply defined as a person's ability to handle pressure. This is something which differs from person to person and some people are more adept at thriving under a heavy load. In extreme cases stress can lead to poor mental health and this may well affect work and interactions with colleagues. If you notice signs of stress it may be a mitigating factor and some gentle questions can be asked about this and reported upon.

### 9.1.5 *Remorse and attempts to make things right*

It may be that the respondent has already realised the impact of her or his behaviour and has begun to attempt to put things right by reaching out in some way towards the complainant. This may have included an apology. The attempts may have been rebuffed, of course, as the complainant could feel a sense of grievance that can only be assuaged by a 'day in court'. Nevertheless, the respondent has made the first steps and this should be included in describing mitigating circumstances.

### 9.1.6 *An otherwise good record and long service*

This is something which should always be considered and taken into account and which may be a mitigating circumstance to note.

## 9.2 **Malicious complaint**

Most organisations will have a small section in the grievance policy on malicious complaint. This is a complaint which has been made against someone while knowing the basis of the complaint to be false. Most policies will state that such malicious complaints will be taken seriously and that the complainant may be disciplined.

In practice, deciding that a complaint is malicious is fraught with difficulty. It is often the case that a complainant really believes that the respondent has done something wrong, even if they cannot provide objective proof. In other words, the complaint is made in good faith.

To conclude that a complaint is malicious may mean finding evidence that the complainant *knew*, in advance of making the complaint, that the respondent did not engage in the behaviour under investigation.

A further complication is that, while an organisation may include malicious complaint in the policy, it may omit this in the terms of reference or when instructing an investigator. The investigators' natural tendency is to finish the investigation, write the report and get back to their normal job. The prospect of re-opening the investigation to deal with matters of malicious complaint may not seem very appealing. Nor may it seem necessary to the organisational referrer who will probably want the investigation concluded as soon as possible.

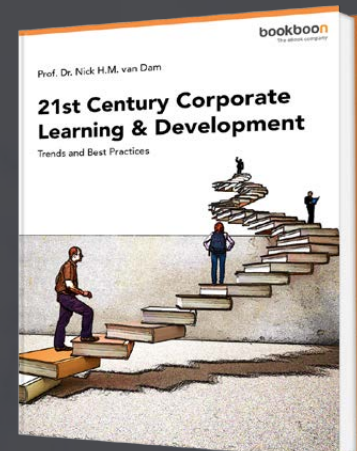
To be fair to all concerned, if there is a suspicion of malicious complaint it should at least be followed up, even if no definitive conclusion can be made. An investigation involves considerable expense in terms of time, energy, human resources and loss of productivity, so if an employee is using this for some malicious reason then surely the organisation needs to know this and deal with it accordingly?

If there is a finding of malicious complaint, then the matter should proceed to the disciplinary meeting stage.

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### 9.3 Hiring an external investigator

There may be certain situations when it will be more convenient and straightforward to bring in an external investigator, or team of investigators, to lead the inquiry on behalf of the organisation. For example, cases involving very senior staff, situations where there may be some suspicion of bias, in small or medium sized companies which may not have sufficient internal resources, where internal managers cannot be released from other duties because of workload, or where there is a lack of investigation competency.

The external investigator must be impartial and able to maintain that impartiality all the way through the investigation, including the manner in which the report is written. Is there any conflict of interest that may emerge later on that will embarrass the organisation? An external investigator must be independent as well as impartial – an internal investigator can only be impartial as he or she is under contract to the organisation and therefore cannot claim to be independent.

If the investigation calls for particular expertise then check that whoever you choose is qualified in that area. Most importantly, verify that the person appointed is experienced in carrying out workplace investigations. It does happen that misunderstandings occur about this. For example, a solicitor may claim that they have been involved in many ‘investigations’ and when the detail of this is examined it is found that the solicitor means they have met with a new client and been briefed about their case. This is clearly only a small part of what is involved in workplace investigation and if this is the only experience of ‘investigation’ then they are unlikely to be competent to undertake this work.

In looking at potential external investigators go to their website and check what work they have done and what publications or speaking engagements they have delivered. What is their Linked In profile? Do a Google search and see what you can find. Does it appear they are knowledgeable as well as experienced? How have they maintained their knowledge – have they engaged in continuous professional development, attended courses and seminars, written blogs? Are they a member of a reputable professional body, such as the Chartered Institute of Personnel and Development?

When hiring an external investigator do make sure that a written contract is agreed as well as terms of reference for the investigation itself. Consider how to have some control over the investigation without interfering with the investigator’s independence and freedom to do the work. This could include set times for briefing on procedural progress, adherence to the organisation’s specific investigation procedure, acting as an escalation point for any difficulties encountered, and setting a reasonable target completion date.

## 9.4 HR Advice for the Investigator

It can happen that a member of the Human Resource Dept, possibly the referrer or someone who is 'case-managing', may want to give advice to the investigator, or perhaps see a draft of the report before it is finalised.

This can be quite helpful, especially if there are complicated internal procedures to be followed or to provide input about policy. It can also be useful for checking correct job titles, understanding reporting relationships and organisational structures, and for access to other internal sources of evidence.

There is a risk, however, that the advice may go beyond this and stray into areas that amount to interfering with the investigation. This is where the advice may be about the case history or perceived attitude of one of the parties or witnesses. It may also extend to a low-key enquiry and challenge about the investigator's conclusions or what is written in the report. This may, of course, be done with the best intentions.

Let us be clear about this point. The investigator is responsible for deciding on and presenting conclusions and findings. Any attempt to manipulate or sway the investigator in one direction or another is unacceptable and should be strongly rejected, to the point of resigning from the task if necessary. A report that has been meddled with will reflect badly on everyone including on the reputation of the investigator.

### **Dealing with the 'Assistance' of the Human Resource Department**

Mr. R was an Aviation Security Compliance Inspector who spent a lot of time traveling by car to different locations around the country, entailing multiple expense claims for car hire and petrol among other subsistence items.

Following an internal audit of expense claims Mr. R was investigated and found to be non-compliant with company policy for which he was dismissed. The claim for Unfair Dismissal centred around the conduct of the investigator in responding to advice from members of the Human Resource Department.

As Mr. G, the investigator, was undertaking an investigation for the first time, he sought advice from Human Resources. This was correct and proper.

He later sent a first draft of the report to Human Resources as well and it seems that he received some feedback about the credibility and potential guilt of Mr. R. Subsequently he revised the report which became more critical of Mr. R and excluded matters favourable to him which had been in the first draft. This included the rejection of explanations provided by Mr. R, which had earlier been considered sympathetically.

He did not cite any new evidence to explain the difference in the analysis and it did seem that the input by HR had been the reason for these changes.

The EAT noted that Mr. R should have been entitled to expect the decision to be made by the appropriate officer without lobbying from others, and that he should have had notice of any changes which he could then have responded to.

The EAT sent the case back for re-hearing. This case serves as an important warning to investigators not to allow themselves to be pressured, however subtly, away from a rigorous and factual, logically correct finding.

Ramphal v Department for Transport UKEAT/0352/14/DA

**Figure 14**

## 9.5 Learn from each investigation

The natural tendency once an investigation report is concluded and passed to the referrer, is to want to forget about it and return to one's usual job, hoping never to be called upon again. While this is understandable, there is one final thing which needs to be done and that is to distill some learning from the experience.

It was noted earlier that the investigator can provide recommendations for the referrer which arises from what has been discovered about policies, procedures, practices and so on. Now it is time to turn attention to the investigator.

What have you learned about the practice of investigation and about how you behaved? Is there something you noticed about your own reactions which you will want to moderate the next time you do an investigation? Where there any slip-ups and what did you learn from these?

Approaching this in a professional manner will mean that you will gain far more from the experience. Completing a self-evaluation form, debriefing with a more experienced investigator or coach, seeking extra training are all part of this. A systematic evaluation and improvement plan will mean that you are being a professional rather than an amateur and will gain interest for you personally in any future investigations.



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# 10 What Could Possibly Go Wrong?

What are some of the more common mistakes and things that should not happen in a good investigation?

## 10.1 Lack of preparation and planning

All too often there is no proper preparation or planning. A half-hearted list of questions will not suffice – there must be thoughtful groundwork and research prior to interviews. Critical consideration should be applied to a search for information sources other than interviews. It is surprising what and where information can be found when it is thoroughly thought through. Investigations can take unexpected turns and the more preparation you have done in advance, the better you will deal with any such surprises.

## 10.2 Little time allocated coupled with pressure to finish and report quickly

It is almost inevitable in the fast-moving working world of which most of us are now a part that there will be pressure to finish quickly. There are always other priorities and an investigation is often seen as a distraction from the ‘real work’. The referrer will usually be impatient to know the outcome so that the issue can be finalised and completed. Such pressure is unlikely to be helpful to the investigator and a strong resilience in dealing with these pressures is needed. Those who succumb to the pressures will probably not investigate as thoroughly as they should, nor will they give sufficient time for logical analysis, and the conclusion and finding may well be fragile...and easily challenged in an external adjudication.

## 10.3 Lack of necessary skills such as listening, probing, analysis

Active listening is a necessary skill for many jobs and tasks in organisations. But in investigation the required level of the skill is even more intense as the investigator seeks to understand fine detail and nuances of what is said, and to be able to cross-reference that to other information in order to ask more probing questions. If the investigator stops listening, for however short a time, a crucial point may be lost to the investigation.

Not everyone is good at active listening. It necessitates using energy to maintain focus and concentration, sometimes for long periods of time. We can be easily distracted, become impatient, uninterested in what is said. While the elements of active listening can be developed through training, actually doing it needs determination and dedication. If an investigator lacks this, the listening will suffer and the risk increases that something will be missed.

Logical analysis is also a skill that needs concentration. While the investigator may do a good job of listening and gathering information, if critical thinking is absent or poor in the analysis stage then an incorrect conclusion is more likely.

**Tip!** To practice and exercise your logical analysis do puzzles daily. Sudoku and its various cousins are perfect for filling in gaps in a very logical way (there can only be one answer in each square) and codewords are great for considering different options and finding the correct answers through logical deduction.

#### 10.4 Badly written report

The investigation is carried out properly but then the resulting report is so badly written that it has no credibility. It is not sufficiently robust to stand up to intense scrutiny at the disciplinary stage. The logic may not be clear and the basis for reaching conclusion may seem blurred and imprecise. The skill of report writing is different to the other skills used – listening, questioning, analysis and so on. What may have begun as an excellent investigation can finish on a poor report, and that report is how the investigation will be judged. There is no excuse for a poor report – refer to the points above for how to do this properly.

#### 10.5 Lack of investigator impartiality

Of all the things that can go wrong in an investigation, perhaps this is the most common. We are all familiar with the concept of knowing where you want to get to, and then asking questions to ensure that is where you arrive – like a self-fulfilling prophecy. It is not easy being an impartial investigator, particularly if you are an employee, however senior, of that organisation.

Consider numerous biases that get in the way of impartiality and logic.

The Warren Commission ran the hastily-convened investigation into the shooting of US President John F. Kennedy in Dallas in 1963. There were many theories of what had happened and it was hoped that the Commission would investigate and find out the truth. There have been numerous criticisms of the Commission's work and some conclude that they were not actually trying to find the truth. Whether or not this was the case we may never know but there are many reported biases listed in how the Commission looked at evidence, ignored certain facts, misrepresented others, and in how they reached their conclusion.

It has been said that the commission started out with their conclusion and then fitted everything to suit this conclusion including making numerous mistakes of fact. To learn more about this particular investigation see:

The Warren Commission's Failed Investigation by Michael T. Griffith

<http://michaelgriffith1.tripod.com/failed.htm>

While the Warren Commission's investigation was not a workplace investigation it does show how the credibility of a report can be damaged by obvious bias on the investigator's behalf. A closer example from workplace investigation is the case of *Heemskerk v Amicus*. In this case the internal solicitor for Amicus had carried out a fact-finding investigation which resulted in the dismissal of Mr. Heemskerk who then brought an unfair dismissal claim to an Employment Tribunal in the UK.

In the hearing the Employment Tribunal judge severely criticised the conduct and biased nature of the investigation including noting the following:

**Biased nature of an Investigation**

"So perhaps Ms. AB was not the ideal person to put in charge of the investigation.... Bias against Mr. H was evident throughout her dealings with the matter.... She accepted that upon being commissioned to undertake the gathering of the evidence she had in her own words "charged off in a single direction". Her mind was made up before she started. Her prejudices blinded her to the possibility of anyone other than Mr. H being responsible for the leaks – and all her efforts thereafter consciously or otherwise were devoted to seeking evidence proving her presumption rather than seeking the true perpetrator.

A clear example of this was that notwithstanding she actually had in front of her evidence demonstrating that not all leaked documents had been accessed electronically she concentrated her investigation only on the improper sourcing of the leaked material electronically. This prejudice, this prejudgement led Ms. AB completely to ignore the variety of other ways in which the leakers might have obtained the material, for example by removing physically from her office files.... This unwarranted finding – that he was the leaker – was the key finding on which the allegations of serious breach of trust was founded."

*Heemskerk v Amicus*, ET Case Number: 2201475/2006

**Figure 15**

## 10.6 Seeking more and more information in order to avoid concluding

This may seem to be an unusual problem, particularly given that an investigation needs to be thorough and rigorous. But remember, the investigation also needs to be reasonable, and seeking large amounts of information that goes beyond 'reasonable' will not contribute to the quality of the investigation. There is also a question of courage, and some investigators may find it difficult to decide either way. Once the reasonable amount of investigative work is done in a reasonable manner, then it is time to decide and that decision is made on 'balance of probability' not absolute certainty. The decision is about whether there is, or is not, a case to answer, and hesitating too long around this will not serve justice well.

## 10.7 A word about mediation

This eBook is about investigation. But there is another way to deal with grievances that is gaining ground in recent years, and that is mediation. Many people underestimate the stress and intensity involved in taking part in an investigation. With mediation you are seeking resolution at the earliest opportunity and can have an open, direct and authentic conversation about what is going wrong. It provides for outcomes such as apology and understanding of the impact one may have on another. It is about reconciliation rather than crime and punishment.

Using mediation can be particularly effective where the parties involved continue to work with each other afterwards. It restores the working relationship and provides useful learning and development. Usually these are not things you get from an investigatory approach.

Those who continue to work together post-investigation often do so harbouring residual resentment, perhaps on both sides. This is natural and normal – few people are happy after an investigation. A process has taken place and has been concluded, but that does not mean the problem has been solved. Mediation, on the other hand, deals directly with the core issues and has a high success rate. Choosing mediation does not preclude investigation later, and a number of organisations are now requiring claimants to consider mediation before setting up an expensive and time-consuming investigation and disciplinary process.

In investigation the complainant and respondent may not meet together, but only individually through the investigator. In the mediation process the parties are brought together after one or two initial individual meetings with the mediator. They are encouraged to speak openly, to gain a deep understanding of what has happened and to speak about the impact each has had on the other.

The big difference in the mediation process is that, once a more comprehensive understanding has been gained, the focus is then firmly on resolution and a search for ways to gain closure and a better future for both. The process ends with a written agreement on commitments from both to address any issues that have been causing concern.

Mediation is a high-intensity communication process, actively assisted by the mediator, in which an acceptable way forward is developed by the parties and underpinned by a robust written settlement.

# 11 Investigation standards

There is no single, globally accepted standard and, in cases where guidelines are available, there is often more information provided about the conduct of the disciplinary meeting rather than about the investigation itself.

The Conference of International Investigators includes the following in their standard:

- > The purpose of an investigation by the Investigative Office is to examine and determine the veracity of allegations of corrupt or fraudulent practices as defined by each institution including with respect to, but not limited to, projects financed by the organization, and allegations of misconduct on the part of the organization's staff members.
- > The Investigation Office shall maintain objectivity, impartiality and fairness throughout the investigative process and conduct its activities competently and with the highest levels of integrity. In particular, the Investigative Office shall perform its duties independently from those responsible for or involved in operational activities and from staff members liable to be subject of investigations and shall also be free from improper influence and fear of retaliation.
- > The staff of the Investigative Office shall disclose to a supervisor in timely fashion any actual or potential conflicts of interest.

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- > Appropriate procedures shall be put in place to investigate allegations of Misconduct on the part of any staff member of an Investigative Office.
- > The Investigative Office shall take reasonable measures to protect as confidential any non-public information associated with an investigation.
- > Investigative findings shall be based on facts and related analysis, which may include reasonable inferences.
- > The Investigative Office shall make recommendations, as appropriate, to the Organization's management that are derived from its investigative findings.
- > All investigations conducted by the Investigative Office are administrative in nature.

*Uniform Principles and Guidelines for Investigations. 2<sup>nd</sup> Edition, 2009.*

For the full document see the following website:

[www.conf-int-investigators.org](http://www.conf-int-investigators.org)

These are some further useful websites to consult:

Arbitration Conciliation and Advisory Service (ACAS) (U.K.):

[www.acas.org.uk](http://www.acas.org.uk)

Workplace Relations Commission (Ireland)

[www.workplacelrelations.ie](http://www.workplacelrelations.ie)

Chartered Institute of Personnel and Development (U.K.):

[www.cipd.co.uk](http://www.cipd.co.uk)

Society for Human Resource Management (U.S.):

[www.shrm.org](http://www.shrm.org)

Fair Work Commission (Australia)

[www.fmc.gov.au](http://www.fmc.gov.au)

Organisations have developed their own standards, based on local best practice, but it is important that these standards are revised often and that input is received about what is happening elsewhere. 'Best practice' is a continually changing concept and an organisation that is too inward-looking will be by-passed by new developments.

# 12 Conclusion

I hope you have enjoyed reading this eBook.

Perhaps it has made you reflect some more about the detail involved in workplace investigations and the pitfalls that await the unwary.

Perhaps you have picked up some new tips, skills, methods or approaches. Maybe you will find the templates particularly useful. Or did the small number of cases quoted provide some additional insight?

Whatever you took from a first reading I would recommend that you read it again and look for specific points to apply back on the job.

Can you improve your policies and procedures?

Is further training needed for your investigators?

Is there one thing to change in how you will investigate in the future?

Before you finish, have a look at the very last page which is a ‘takeaway’ of the main learning points. Learn from each and every investigation and keep in touch with what others are doing.

Let's end with an appropriate quote from *The Name of the Rose*, a book by Umberto Eco, which was also made into a film starring Sean Connery. It is primarily a detective story set in an Italian monastery in the 14<sup>th</sup> century but it contains many layers of meaning which must be negotiated before the mysteries are eventually solved.

“How beautiful the world would be if there were a procedure for moving through labyrinths.”



RECORD of INVESTIGATION INTERVIEW		
Parties involved:		
Date:	Interviewee:	Time: to
	Accompanied by:	
	Title:	Location:
	Investigator:	
	Note-taker:	

Question area/no.	Record	Further data referred to
Amendment:		Initialed:
Question area/no.	Record	Further data referred to
Amendment:		Initialed:
Question area/no.	Record	Further data referred to
Amendment:		Initialed:

TIMELINE of WHAT HAPPENED			
Date/time	!!!	Element of investigation	Who

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<b>Investigator Reflection and Learning Questionnaire</b>	
Date:	Investigator:
What did you do well?	
What did you not do well?	
How might this be improved for the next time?	
Did you feel that you were impartial throughout?	
If no, how will you improve this for the next time?	
Is there any skill that you need to make improvements in?	
If so, how will you gain this?	
What difficulties or barriers did you encounter and how did you deal with them?	
How did you handle the relationship with the referrer?	
Would you make any improvements in this for the next time?	
What is the one most important piece of learning that you gained from doing this investigation?	

**THE TAKEAWAY...**

Establish clear Terms of Reference **before you start**.

Open an **Investigation Diary** and keep entries up to date.

Be thorough, speedy, respectful, consistent, rigorous, formal, and, most importantly, impartial.

Be reasonable.

Be considerate of **natural justice** and allowing an opportunity to respond.

Actively **listen** during interviews with claimant, respondent and witnesses.

**Agree the contents** of the interview note with the interviewee.

Look for **other sources** of information in addition to interviews.

Use **logic** and **reasoning** when examining the information you have gathered.

Write the investigation report in a **neutral** style, **explaining** your thinking and logically **connecting** the information to your conclusions.

Your findings should be written to conclude whether or not there is a **case to answer**.

Reflect on how well you performed in your role as investigator and set goals for improvement.

Well done, another investigation completed!

**Figure 16**