

## Investigations and Dispute Resolution - An impartial eye

**A disciplinary or grievance investigation can be a sensitive issue; one that may benefit from the impartiality of an external investigator.**

Mary Sutton outlines the issues to consider when deciding whether to keep things in-house. Often the best way to share an open mind and an unbiased view is for an external investigator to be appointed. This may also suit situations where the parties involved are too senior or the issues too sensitive. Such an investigator can also then act as an expert witness should the matter proceed to tribunal.

This tool is particularly useful in disciplinary and grievance matters, especially when a firm is forced to investigate sensitive issues such as discrimination and harassment.

Disciplinary and grievance investigations are often complex and time consuming. With the introduction of statutory disciplinary/dismissal and grievance procedures in the Employment Act 2002, there is an even greater emphasis on these procedures. An employee who wants to bring proceedings against his employer, for example, for discrimination or constructive dismissal, must bring a grievance first. Mary Sutton is a partner with Davies Lavery and heads the employment team. This article first appeared in Legal Week on 22 September 2005.

An employer who wants to avoid a finding of unfair dismissal must follow the statutory dismissal and disciplinary procedure.

A lengthy investigation can cause logistical problems as the investigator tries to fit it in around their "day job".

Using external investigators helps in all of these areas and can either be used at the initial stage or the appeal stage.

### Using an external investigator

The statutory procedures say nothing about the nature of the investigation. The statutory grievance procedure requires only that the employer invites the employee to a meeting to discuss the grievance and confirms the outcome in writing. The employee must also be given the right to appeal against the outcome if he remains dissatisfied.

It should be remembered that the statutory procedures provide a minimum standard to be followed. Many employers have more sophisticated grievance procedures than this and once an employee invokes the grievance procedure, it will be necessary for them to follow their own contractual or internal grievance procedure.

Furthermore, in order to comply with the spirit of the statutory procedure, the employer must carry out such investigation as is necessary to respond appropriately to the grievance. Some grievances are straight forward - a simple meeting with the employee to discuss the problem can result in a solution being identified. Others, such as if the employee is alleging harassment, may require thorough investigation.

Many organisations have the resources and skill to carry out such investigations in-house. But there are a number of reasons why external investigators may be required.

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- some grievances involve very senior members of staff and it may be difficult to find an internal investigator who is not compromised in some way;
- there may be concern that the individual bringing the grievance is about to launch proceedings in the employment tribunal, again making it difficult for an internal investigator to conduct the matter impartially;
- time may be a factor, particularly if there are several potential witnesses to be interviewed;
- the individual bringing the grievance may have lost confidence in the ability of the organisation to resolve the matter fairly; or
- internal staff may not feel they have the skill to carry out a lengthy and complex investigation; they may not have the interviewing skills to extract the relevant information in a sensitive manner.

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The investigator will consider the grievance and determine which individuals should be interviewed. They will also consider any relevant documents. It is important that the investigator is given access to whomever and whatever he or she considers relevant to the investigation. If outside influences attempt to control the process the advantage of an independent investigation will be lost - any professional investigator will refuse to operate under such constraints. However, there is no reason why narrow parameters cannot be set for the initial stage of the investigation and for the investigator to prepare an interim report once they have carried out the initial stage.

It is not always in the interests of the parties, including the person bringing the grievance, for wide-ranging and intrusive interviews to be carried out. This is particularly so if they hope to continue in the workplace. An experienced investigator may be able to reach conclusions based on interviews with a limited number of people who are directly involved.

If it is necessary to widen out the investigation before reaching any firm conclusions, the interim report will make this clear. The employer may then wish to discuss the situation with the employee to see if the matter can be resolved without further investigation i.e. some form of compromise reached.

The investigator will produce a report with findings and recommendations. A time-frame within which a report is expected can be set, but it is important to remain realistic and flexible. Sometimes the initial interviews will uncover issues which require further investigation and prolong the process. There is no point rushing, as this will negate the advantages of the independent investigation.

The recommendations will not necessarily be confined to the steps required to address the immediate grievance; they may have wider implications for the organisation, for example, reviewing procedures, implementing training and addressing issues relating to the culture of the organisation.

## Investigations and Dispute Resolution - An impartial eye **continued**

### Advantages

An independent investigation may be more acceptable to the parties involved.

It may prevent the issue proceeding to the employment tribunal. The employee bringing the grievance may prefer to resolve the matter without going to the tribunal and there may be room for compromise; the employer's commitment to funding an independent investigation may help to defuse the situation.

It may assist the employer to defend any legal proceedings brought. A tribunal is likely to be impressed that the employer has been prepared to invest in an independent investigator, particularly if steps have been taken to implement any recommendations made.

It avoids internal officers feeling compromised. It can be difficult for an internal investigator to criticise colleagues.

It avoids tying up senior managers in protracted investigations.

An external investigator may identify issues, for example with regard to the culture of the organisation, which would be missed by an internal investigator who is steeped in that culture.

An external investigator will bring experience of other organisations and previous similar investigations. This will often assist with identifying solutions.

### Things to consider

When using an independent investigator you may feel you lose control of the process and may not get the result you want - the investigator may uphold the grievance and criticise the organisation. However, it is worth bearing in mind that if there is a problem, it is better to know about it early on, rather than at the end of protracted legal proceedings. It is likely that an employment tribunal or court will uncover the same issues as the investigator.

Cost. It is obviously going to be more expensive than using internal staff. But you may feel it is money well spent if it enhances your chances of avoiding or winning legal proceedings.

Staff may be nervous about being interviewed by a stranger. However, one of the skills of a good investigator is to conduct interviews in a sensitive manner.

An external investigation will not be appropriate or necessary for all disciplinary or grievance issues. But for the most sensitive and complex cases it can be a cost effective solution which will help you to quickly identify problem areas and may improve your chances of avoiding legal proceedings or successfully defending those that are brought.

For further information contact CompleteHR Ltd who have a great deal of experience in conducting grievance and disciplinary investigations and would be pleased to assist.