

Workplace Investigations

Contributing Editors

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01. What legislation, guidance and/or policies govern a workplace investigation?

United Kingdom

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In the UK, the primary employment legislation of relevance to a workplace investigation includes the Employment Rights Act 1996 (ERA 1996), the Equality Act 2010 (EA 2010), and the Employment Relations Act 1999 (ERA 1999).

Other legislation includes the retained EU law version of the General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018 (DPA 2018), the Investigatory Powers Act 2016 (IPA 2016) and the Investigatory Powers (Interception by Businesses etc for Monitoring and Record-keeping Purposes) Regulations 2018 (IP Regs 2018), and the Humans Rights Act 1998 (HRA 1998).

In terms of guidance, the Advisory, Conciliation and Arbitration Service (ACAS) have produced a [Code of Practice on Disciplinary and Grievance Procedures](#) (the ACAS Code) as well as a [Guide to conducting workplace investigations](#). The Information Commissioner's Office (ICO) have their [Employment Practices Code](#), and other pieces of guidance on the data protection aspects of investigations (see question 7).

Most employers will have internal policies governing how workplace investigations should be conducted. The level of detail may vary considerably; public sector and regulated employers may be more prescriptive in their policies, which may even have contractual force. There may also be provisions of the employment contract that are relevant (particularly as regards suspension – see question 3).

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02. How is a workplace investigation usually commenced?

United Kingdom

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The trigger could come from several sources, such as a grievance from a current or former employee, a complaint from external sources, a whistleblowing disclosure, or as the result of internal governance measures.

In each case, the employer will need to decide if an investigation is warranted. It may be required by internal policies or regulatory requirements in some circumstances. Consideration must be given to whether an investigation is feasible; for example, is the evidence still in existence and accessible? Are key witnesses still employed or contactable?

If the employer concludes that an investigation is warranted, it should start without unreasonable delay. The first step would usually be to set terms of reference, which outline the purpose and remit of the investigation. These should be closely drafted and continually referred to, to avoid the investigation's scope expanding when new points arise (as they almost always will). An investigator will also need to be appointed (see question 4).

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03. Can an employee be suspended during a workplace investigation? Are there any conditions on suspension (eg, pay, duration)?



United Kingdom

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In the UK, suspension is not seen as a neutral act, so should not be a default approach at the start of an investigation. It may be appropriate if, for example, there is a risk to the health and safety of the employee in question (or any other employee), a risk that their continued presence in the business could prejudice the investigation, or risk of continued wrongdoing.

The employer should always check the individual's employment contract to see if it contains the power to suspend. Suspension should generally always be with pay to avoid any breach of contract. It should also be regularly reviewed and kept to a minimum duration.

Employers should not suspend employees under investigation as a knee-jerk reaction to bare allegations. There must be at least some evidence to support the need for suspension (which may require a preliminary investigation before deciding to suspend). Alternatives to suspension should always be considered, such as a temporary transfer to a different area of work, if the employee agrees or it is otherwise permitted by their contract.

If authorities such as regulators or prosecutorial agencies are involved in the investigation, they may have an opinion about an employee's suspension, particularly if they wish to conduct interviews. Consider whether or not to involve the authorities in the suspension discussions at an early stage.

ACAS have produced a [guide to suspension during investigations](#) (last updated Sept 2022) which gives further guidance on these issues.

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04. Who should conduct a workplace investigation,

are there minimum qualifications or criteria that need to be met?



United Kingdom

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The investigator would typically be a line manager or HR representative. Complex cases, particularly if criminality is suspected, or cases where a senior employee is accused of misconduct, may require the investigator to be someone more senior within the organisation, or someone from the in-house legal team. Employers should bear in mind the need for someone more senior than the investigator to act as a disciplinary decisionmaker, if disciplinary action is found to be warranted.

Check the organisation's policies and procedures, which may stipulate who can act as an investigator.

The investigator should be someone without any personal involvement in the matters under investigation, or any conflict of interest, but with sufficient knowledge of the organisation and where possible with both training and experience in conducting investigations.

The business should consider how any prospective investigator may appear if they are called as a witness in court, or to give evidence before any governmental committee or regulatory panel. They should also consider whether the employee accused of wrongdoing should have any say in the choice of investigator; this would not typically occur, but having the employee's buy-in can increase the chances of a successful outcome to the investigation.

It is becoming increasingly common for businesses to use an external consultant or lawyer to conduct workplace investigations. This may be beneficial where it is not operationally viable within the employer organisation to have a different person conducting the investigation and the disciplinary hearing, or if the investigation is particularly sensitive or complex, or relates to a very senior employee. If an external investigator is appointed, the employer remains responsible for that investigation.

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05. Can the employee under investigation bring legal action to stop the investigation?



United Kingdom

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Not usually, unless the investigation is being conducted in breach of a contractual policy (as sometimes happens in the NHS, for example), or if the investigation is not adjourned pending the outcome of criminal proceedings, and the employee can show that failure to do so is a breach of either an express term or the implied term of trust and confidence. The latter would be rare, but possible if the employee can demonstrate a real danger of a miscarriage of justice (see question 21).

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06. Can co-workers be compelled to act as witnesses?

What legal protections do employees have when acting as witnesses in an investigation?



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Employees may be reluctant to be interviewed or act as witnesses as part of an investigation, perhaps due to fear of reprisals. The investigator should discuss any concerns with the employee and attempt to alleviate any fears.

In general terms, an employer should not compel any employee to provide a witness statement. There may be circumstances in which this could be seen as a reasonable management instruction (and any refusal to comply treated as a disciplinary matter), but these will be rare. Evidence that is compelled is unlikely to be particularly useful to the investigator.

It may be possible to establish an express or implied obligation for senior managers to report on another employee's misconduct – as a feature of either their employment contractual duties, their fiduciary duties or their implied duty of fidelity. However, it is unlikely, in the absence of an express obligation, that a junior employee would be compelled to give evidence against a colleague.

Employees who act as witnesses benefit from their usual employment protections, and must be treated as per their contractual and statutory rights, as well as any policy governing the investigation. If the investigation involves allegations which could involve discrimination, the EA 2010 extends protection from victimisation to “giving evidence or information in connection with proceedings under this Act”. Witnesses should therefore not be subject to any detrimental treatment because they have acted as a witness in this type of investigation. Witnesses may also be entitled to protection as whistleblowers if their evidence amounts to a protected disclosure (see question 9).

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07. What data protection or other regulations apply when gathering physical evidence?



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Most forms of workplace surveillance involve the processing of personal data that is regulated by the UK GDPR and DPA 2018. The UK GDPR requires that personal data must be processed lawfully, fairly and in a transparent manner; it also must be adequate, relevant and limited to what is necessary concerning the purposes for which it is processed.

Employers should ensure that they have undertaken a data protection impact assessment (DPIA) to document the lawful basis for processing data, and informed employees that their files may be searched before proceeding. They should also ideally have a clear policy on the use of electronic communications systems, detailing when, how and for what purpose they may be monitored by the employer. In Q3 2023 the ICO produced new guidance on monitoring workers (<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/employment/monitoring-workers/>) and on email and security (<https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/security/email-and-security/>) which employers should bear

in mind during investigations. Employers should also be prepared to make the data collected through employee monitoring available to employees, should the employee submit a data subject access request under the DPA 2018.

The IPA 2016 makes it unlawful in certain circumstances to intercept a communication (such as one on an employer's telephone or computer network) in the course of its transmission in the UK. The IPA Regs 2018 set out the circumstances where, in a business context, such interception will be lawful. These include monitoring or recording communications without consent to: establish the existence of facts; ascertain compliance with the regulatory or self-regulatory practices or procedures relevant to the business; ascertain or demonstrate standards which are or ought to be achieved by persons using the system; and prevent or detect crime.

Covert surveillance can lead to a breach of an employee's right to privacy under the HRA 1998. The employer will need to consider if covert surveillance is proportionate, which will depend on the facts of each case. Employers should be careful not to use the investigation as an excuse to undertake a "fishing expedition", and should avoid gathering material that is obviously personal, such as private messages and diary entries (see question 8).

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08. Can the employer search employees' possessions or files as part of an investigation?



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It may sometimes be difficult to draw a clear distinction between the property of the employer and employees' personal property, both physical and electronic, particularly where employees are increasingly working from home. Employers should ideally have a clear policy to delineate what is the employer's property.

Employees typically have a reasonable expectation of privacy at work, although how far this extends will depend on the circumstances of each case and the employer's policies.

When it comes to employees' personal possessions, a search should only be conducted in exceptional circumstances where there is a clear, legitimate justification. The employer should always consider whether it is possible to establish the relevant facts through the collection of other evidence. Even if the employee's contract specifies that it is permitted, employers would usually require explicit employee consent for the search to be lawful. The employee should be invited to be present during the search; if this is not feasible, another independent third party (such as a manager) should be present.

If the employee refuses to consent to a search of their personal possessions, their refusal should not be used to assume guilt; the investigator should explore why the employee has refused and seek to resolve their concerns if possible.

If the employer believes that a criminal offence has been committed it should consider involving the police, since they have wider powers to search individuals and their possessions.

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09. What additional considerations apply when the

investigation involves whistleblowing?



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The employer should first identify which individuals may have protection as whistleblowers. This could be a current or former employee who raises the initial complaint, a co-worker who gives evidence as part of the investigation, or the accused employee.

In each case, consider whether a “protected disclosure” has been made (under Part IVA ERA 1996). This requires analysis of the subject matter of the disclosure, how it is made, and a reasonable belief that it is made in the public interest.

Employers must then ensure there is no detrimental treatment or dismissal of any worker on the grounds of their protected disclosure. Although the causation test for these purposes is not straightforward, as a general rule if the protected disclosure has a “material influence” on the decision to discipline or dismiss, there may be liability. Individual managers may be personally liable alongside the employer. Compensation for whistleblowing cases is uncapped, meaning businesses and individuals can face significant financial and reputational exposure.

What this means in practical terms is that the employer should promote a “speak-up” culture and, where protected disclosures are made, ensure they are handled by a team who are properly trained in how to do so.

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10. What confidentiality obligations apply during an investigation?



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Workplace investigations should usually be conducted on a confidential basis, so that only those involved in the investigation are aware of its existence and subject matter. The need to maintain confidentiality about both the fact of the investigation, and any content discussed with an investigator, should be emphasised to all those involved. It may also be necessary to explain that a breach of confidentiality could be viewed as a disciplinary matter. Appropriate exceptions must, however, be made to allow employees to speak to any relevant employee or trade union representative, legal adviser and potentially the police or other regulators. Confidentiality provisions cannot override the rights of workers to make protected disclosures (see question 9).

In some situations, such as those involving a wide-ranging investigation into the organisation’s working practices and culture, it may be more appropriate to investigate a more “open” basis, and inform employees and other stakeholders.

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11. What information must the employee under

11. What information must the employee under investigation be given about the allegations against them?



United Kingdom

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The employee must be able to effectively challenge the allegations against them. They should be given the terms of reference for the investigation, and any relevant documentary evidence, including copies of witness statements.

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12. Can the identity of the complainant, witnesses or sources of information for the investigation be kept confidential?



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Only in exceptional circumstances, such as where there is a genuine risk of retaliation. Anonymising a complaint puts the employee under investigation at a significant disadvantage, as they may be unable to properly challenge the evidence against them. It can also impair the effectiveness of the investigation. Employers should, therefore, not provide any guarantees of confidentiality to complainants or to employees who are to act as witnesses. That said, employers should think carefully about any necessary disclosure of names or facts. This can be particularly relevant where the witness is subordinate to the employee being investigated.

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13. Can non-disclosure agreements (NDAs) be used to keep the fact and substance of an investigation confidential?



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Only to a limited extent. As a matter of law, NDAs cannot prevent a worker from making a protected disclosure, or reporting a crime to the police. As a matter of the regulatory obligations of solicitors, NDAs should not be used in other ways, including as a means of influencing the content of disclosures, or by using warranties, indemnities and clawback clauses in a way that is designed to, or has the effect of,

improperly preventing or inhibiting permitted reporting or disclosures (see the [SRA's warning notice on the use of NDAs](#)).

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14. When does privilege attach to investigation materials?



United Kingdom

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There are two limited types of privilege which may be relevant to investigations:

- Legal Advice Privilege (LAP), which protects communications between lawyers and their clients provided they are confidential and made for the dominant purpose of obtaining or giving legal advice; and
- Litigation Privilege (LP), which can extend to communications between a lawyer and client or third parties, but only where the dominant purpose of the communication is to prepare for or conduct existing or contemplated litigation.

If the relevant tests for privilege are met and apply to materials generated in the course of the investigation, the employer retains greater control over their subsequent disclosure to third parties. The materials would, for example, be protected against disclosure in any subject access request under the DPA 2018.

That said, privilege can be difficult to maintain in investigations, particularly where litigation is not active or in contemplation. Interview notes and witness statements may not attract privilege, particularly if these were conducted with employees who do not fall within the narrow definition of “the client” for LAP purposes (which is limited to employees who are capable of seeking and receiving advice on behalf of the employer).

If privilege applies to investigation materials, the investigator should keep tight control on what documents are created and how they are circulated, to avoid inadvertent disclosure and potential waiver of privilege.

Bear in mind that even if privilege applies to certain investigation materials, there may be a need to create disclosable documentation at a later stage, particularly if there is a decision to instigate disciplinary action.

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15. Does the employee under investigation have a right to be accompanied or have legal representation during the investigation?



United Kingdom

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There is no statutory right to be accompanied at a disciplinary investigation meeting; the right only applies to disciplinary hearings (section 10 ERA 1999). There is, however, a right to be accompanied by a colleague

or trade union representative at any grievance investigation meeting, under section 10, although this is only in respect of the person who raises the grievance (not any person who is the subject of the grievance or other witnesses).

That said, the employer's policies and contracts should be checked to see if they contain a broader right to be accompanied. Employers may also need to allow a broader right to be accompanied as a reasonable adjustment for disabled employees (for example, to allow family members or medical professionals to be present). Equally, where the allegations are sufficiently serious (eg, criminal, especially if the findings are likely to be shared with the police), it may be appropriate to allow legal representation during the investigation.

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16. If there is a works council or trade union, does it have any right to be informed or involved in the investigation?



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Aside from the statutory right to be accompanied (see question 15), any further involvement by the works council or trade union would depend on the terms of the relevant works council or trade union recognition agreement.

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17. What other support can employees involved in the investigation be given?



United Kingdom

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The employer needs to consider the health and wellbeing of all staff involved in the investigation, since this can be a very stressful process. The employer and investigator can assist by ensuring that all parties are aware of what is expected of them. Timings are also important; having a clear and expeditious timetable and providing updates if the timetable slips will help. Regular catch-ups by managers can be used to monitor how employees are coping. They should be reminded about any resources to help support them, such as employee helplines or employee assistance programmes.

Where an employer has particular concerns about an employee's health, a referral to occupational health can assist. The employer may also wish to consider whether employees should be given additional time off, or whether any other adjustments can be made to the investigation process. For particularly serious allegations, the employer may consider facilitating the provision of independent legal advice for the employee, or making a contribution towards legal fees.

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18. What if unrelated matters are revealed as a result of the investigation?

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These should typically be disregarded by the investigator. From a data protection perspective, the ICO's position is that other information collected during an investigation should be disregarded and, where feasible, deleted unless it reveals information that no reasonable employer could be expected to ignore. In those circumstances, the employer should arrange for an independent third party to determine whether a separate investigation into unrelated matters is needed.

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19. What if the employee under investigation raises a grievance during the investigation?

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This is a relatively common tactic. The employer will need to decide whether to suspend the investigation to deal with the grievance, or conclude the investigation first, depending on the circumstances. It would usually be difficult to deal with both the grievance and the investigation concurrently, unless the facts overlap significantly.

If the employee becomes uncooperative and refuses to take part in the investigation, they should be told that the investigator may need to make a decision in the absence of their account based on all the other evidence available. The employer may decide to treat it as failure to comply with a reasonable management instruction and take disciplinary action on that basis.

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20. What if the employee under investigation goes off sick during the investigation?

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This is a relatively common occurrence. It would usually be appropriate to suspend the investigation

temporarily, to determine how serious the health issue is and when the employee may be fit to return. The investigator should consider what adjustments or allowances can be made to progress the investigation despite the employee's absence. If their evidence has not yet been gathered, the employee may be invited to provide a written statement instead of attending an investigation meeting, or the meeting could be held remotely or at a neutral location. If none of this is possible, it may be difficult to fully conclude the investigation.

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21. How do you handle a parallel criminal and/or regulatory investigation?



United Kingdom

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This situation needs to be handled with caution. It is important to remember that regulatory or criminal proceedings, and employment proceedings, are separate; while there may be an overlap of alleged misconduct, they are usually addressing different questions, with different standards of proof. The outcome in one should not, therefore, be treated as determinative of the other.

Where the employee is suspected of, charged with, or convicted of, a criminal or regulatory offence, the employer should still investigate the facts as far as possible, come to a view about them and consider whether the conduct is sufficiently serious to warrant instituting the disciplinary procedure.

In terms of timing, there are no concrete rules governing how an employer must proceed in the circumstances of a parallel criminal investigation. Much will depend upon the circumstances of the case, the length of delay, the size of and resources available to the employer, and the preferences (if expressed) of the external authority. If the employer is concerned about prejudicing the regulatory or criminal proceedings or otherwise prefers to wait for their conclusion before instigating internal proceedings, they are unlikely to be criticised for delaying. The accused employee may also be advised not to provide a statement in the workplace investigation for fear of a negative impact on the criminal investigation. This would make it difficult to proceed with the workplace investigation, unless the employer is confident it has strong enough evidence to justify any disciplinary action subsequently taken.

On the other hand, regulatory or criminal investigations may take months or years to progress; it may not be realistic for the employer to keep any investigation in abeyance for so long. This is particularly true when the accused employee is suspended on full pay, witness recollections will grow less reliable, and the alleged victim may feel unable to return to work until the matter is resolved.

In these circumstances, the employer may continue with their investigation if they believe it is reasonable to do so, and consultations have commenced with the external agency. The court will usually only intervene if the employee can show that the continuation of the disciplinary proceedings will give rise to a real danger that there would be a miscarriage of justice in the criminal proceedings.

Employers should consider carefully whether and when to involve the police in allegations of employee misconduct. Employers must be careful not to subject their employees to the heavy burden of potential criminal proceedings without the most careful consideration, and a genuine and reasonable belief that the case, if established, might justify the epithet "criminal" being applied to the employee's conduct.

Where the police are called in, they should not be asked to conduct any investigation on behalf of the employer, nor should they be present at any meeting or disciplinary meeting. The employer should, however, communicate with the police to see if they have a strong view about whether the internal process should be stayed, or whether they should interview witnesses first.

22. What must the employee under investigation be told about the outcome of an investigation?



United Kingdom

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The employee would usually get a copy of the investigation report (which would typically have the relevant evidence considered by the investigator annexed to the report, unless the report is privileged). It is not usual practice to allow the employee to make representations on the report before it is finalised.

The report will set out what facts the investigator was able to establish by reference to the available evidence. The investigator's role is to gather and consider evidence about what did or did not happen, so the employer can understand if there is a case to answer. This is distinct from determining culpability, which is something for the manager conducting the disciplinary hearing (not the investigator) to determine, in addition to deciding any disciplinary sanction.

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23. Should the investigation report be shared in full, or just the findings?



United Kingdom

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The answer to this depends on whether or not privilege attaches to the report, as well as whether criminal proceedings are contemplated – if so, there may be a danger of waiver of privilege, or witness evidence being contaminated if they have an opportunity to read each other's evidence as part of the report. This could inhibit the fairness of any subsequent criminal trial.

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24. What next steps are available to the employer?



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The investigator may recommend further action, but should not decide whether allegations are true, or suggest a possible sanction or prejudice what the outcome of any subsequent disciplinary process would be.

The employer will need to consider whether it is necessary to commence disciplinary proceedings. For regulated businesses, there may be an obligation to inform their regulator of the investigation outcome. In some circumstances, the employer may feel the need to make an internal or external announcement about the outcome, and any action it intends to take to implement any recommendations made by the investigator. There may also need to be certain updates to policies or procedures as a result of the investigation.

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25. Who can (or must) the investigation findings be disclosed to? Does that include regulators/police? Can the interview records be kept private, or are they at risk of disclosure?



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Primarily, the investigation findings are disclosed to the employer and the employee under investigation. In scenarios involving allegations of a breach of regulatory duty or criminal law, the authorities may have the power to compel disclosure of any non-privileged materials generated in the investigation. Powers of compulsion do not apply to privileged materials.

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26. How long should the outcome of the investigation remain on the employee's record?



United Kingdom

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The investigation outcome may not need to be noted on the accused employee's record at all. Usually only the outcome of any subsequent disciplinary or grievance process would be noted, rather than the prior investigation.

The employer should keep the investigation report for as long as it remains relevant. This would usually be no longer than six years, unless regulatory obligations dictate otherwise. The report along with all documentation and witness statements gathered during the investigation should be retained securely and confidentially but for no longer than is absolutely necessary under the requirements of the DPA 2018 and the employer's data protection policies and procedures. There may be additional retention requirements in a regulated context; the position for each particular business and employee should be checked.

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27. What legal exposure could the employer face for

27. What legal exposure could the employer face for errors during the investigation?



United Kingdom

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A reasonable investigation is a key component of a fair disciplinary process. Errors in the investigation could therefore expose the employer to liability for unfair dismissal under ERA 1996.

Failure to follow the ACAS Code does not automatically make an employer liable in any proceedings taken against it. However, an employment tribunal will take the ACAS Code into account when deciding whether an employer has behaved fairly, and has the power to increase awards by up to 25% where it believes an employer has unreasonably failed to follow the ACAS Code's provisions.

There may be liability for breach of the employee's contract of employment if the employer breaches aspects of the investigation policy that are contractual, any contractual provisions relating to suspension, or otherwise conducts the investigation in a manner that breaches the implied term of trust and confidence.

There may be liability under the EA 2010 if the investigation is conducted in a discriminatory manner, which could include not making reasonable adjustments to the process for disabled employees.

Where the investigation involves protected disclosures, there may be liability under the whistleblowing provisions of ERA 1996 if the whistleblower is subjected to detriment or dismissal on the grounds of their protected disclosures.

Improper evidence gathering or processing may be actionable under the DPA 2018, IPA 2016 or the IP Regs 2018.

Finally, there may be common law claims in some circumstances (for example where reports need to be made to regulators, which in turn may affect the relevant employee's future employment prospects) for defamation, or, more unusually, for stress-related personal injury.

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