

## **Employee Misconduct: A Practical Approach to Conducting Internal Investigations with Criminal and Regulatory Aspects**

An investigation into employee misconduct is invariably a delicate process and one typically fraught with pitfalls. Failing to follow a proper and consistent investigation process can affect directly the fairness and lawfulness of any subsequent disciplinary action, including summary dismissal for gross misconduct; and may have a significant adverse impact for both employee and employer on the outcome of regulatory and criminal allegations. A mishandled investigation may also result in allegations of unlawful discrimination or detriment on the grounds of whistleblowing, data protection breaches and even defamation.

We consider best practice for employers when conducting an investigation into misconduct in order to minimise such risks as far as possible, with a particular focus on how to adapt that practice when the allegations concern criminal conduct or regulatory breaches.

### **Key Principles**

A successful internal investigation will always respond to the particular demands of each case, however, there are certain key principles which should be observed:

#### 1. Choose the correct investigation team

Employers should first establish whether the investigation should be conducted by persons internal to the business, or by an external third party, typically an independent HR consultancy or a law firm (the latter can be more appropriate in circumstances where potential criminal or regulatory risks are in issue). The key point to remember is that the investigator should be independent, sufficiently senior and should not be the same person who will have a decision making role in any future disciplinary action. When deciding whom to appoint as investigator the following factors may be relevant:

- the seriousness of the allegations;
- the seniority of the individual or individuals concerned;
- the size of the organisation;
- the potential for damage to the business or key relationships; and
- any potential criminal or regulatory risks.

#### 2. Adopt a fair procedure

As a starting point, you should refer to your internal investigation policies and procedures (including considering the extent to which they may be contractual), and as far as possible follow the procedure recommended in the ACAS Code of Practice on Disciplinary and Grievance Procedures. Potentially there could be financial penalties if an employer unreasonably fails to follow the ACAS Code, should an employee subsequently raise concerns about the procedures adopted in the investigation or any subsequent disciplinary process. You may also want to consider the best practice

guidance in the ACAS Guide on Conducting Workplace Investigations – this is only guidance but will go some way towards demonstrating fairness.

The ACAS Code and relevant guidance recommends that you should consider at the outset the estimated timeframe of the investigation process, which should be reasonable depending on the individual circumstances of the case. You should also allow the employee reasonable time to prepare for the investigation meeting and as a matter of best practice you may want to allow the employee to be accompanied at any investigation meeting (albeit there is no statutory right to a companion at this stage).

There is no requirement for you to undertake a quasi-judicial approach to the investigation in order for any subsequent decision to be deemed reasonable.

### 3. Structure the investigation

It is important to establish the precise scope and extent of the investigation required from the outset; the investigator should only be gathering information and facts relevant to the matter. You should consider for example the specific issues which are to be investigated; the estimated time frame for the process; the date range of any allegations; the sources of evidence and who will be interviewed as part of the investigation. The alleged misconduct should be defined as precisely as possible.

The nature of internal investigations is such that further issues may come to light and you should give due consideration to any new issues which arise, for example you could consider whether the investigation should be extended (both in scope or in duration).

### 4. Identify ‘the client’ and manage privilege

As a general rule, legal advice privilege attaches to all communications between a lawyer and a client for the purpose of seeking and receiving legal advice. In the context of advising employers, however, it has been established that ‘the client’ is to be defined narrowly, extending only to the group of individuals charged with seeking and receiving advice on behalf of the employer.

Accordingly, it is essential that if you, the employer, instruct a legal team to conduct an internal investigation on your behalf, you should identify the core group of staff members, often an internal committee or steering group, who will represent ‘the client’ and with whom communications may then be privileged.

Further, although some communications in the context of an internal investigation may attract privilege despite not being strictly legal advice (for example, factual briefings by the legal team), draft versions of reports and notes of interviews will not necessarily engage such protection and may be potentially disclosable in any subsequent litigation. It is therefore key to ensure that the investigation report is based on the investigator’s conclusion of the facts and that the rationale behind any significant changes in draft versions of the report can be substantiated in order to avoid inferences of unfairness or lack of impartiality.

## 5. Control data processing risks

Investigations will inevitably involve the handling of personal data of the employee who is under investigation and of witnesses and other related third parties. Careful consideration is needed to ensure that the employer does not breach the Data Protection Act 1998 (the “DPA”) in conducting the investigation and any investigation process should be reasonable and proportionate. Free-rein access to information about the employee, witnesses or third parties which is beyond the scope of the investigation may breach the relevant individual’s data protection rights. Some typical DPA issues of which to be aware in relation to an internal investigation include, for example, the following (this is not exhaustive):

- (A) As indicated, it is important to bear in mind that documents created during the investigation process, including witness statements, are likely to contain third party information protected under the DPA (which can include for example, the witnesses’ names, job titles and other biographical information from which they can be identified).

Unless the witnesses (or other relevant third party) consent to your disclosure of their information, you should consider redacting such data or otherwise anonymise such documents, when disclosing them in the investigation, in any subsequent disciplinary process or in response to any relevant subject access request.

Further, any multi-national employer who undertakes an investigation in the UK should keep in mind the prohibition on the transfer of personal data, including employee personal data, to a country outside the EEA unless that country has ‘adequate levels of protection’ for the personal data. This prohibition would be relevant for example to the transfer of data to a US company which is conducting an investigation into one of its UK based employee.

- (B) Transfers of employee personal data can currently be made to the US under the EU-US Privacy Shield where the US parent has signed up to that program; or, for example, where it seeks the specific consent of the relevant employees to the transfer of their personal data to the US (though this is not without risk); other data transfer options are also available, although they tend to be less commonly used.

Some US and other non-EEA employers on occasion take a commercial decision to transfer employee data out of the EEA without adhering to one of the lawful means of transfer. They need to bear in mind the risk that the potential penalties for breaches of data protection rights could significantly exceed the level of potential liability relating to the matters under investigation. Currently a serious DPA breach may lead to a fine by the UK Information Commissioner of up to £500,000, and/or potentially to claims for compensation by individuals. Further the Information Commission’s financial

penalties under the General Data Protection Regulation will increase significantly from May 2018, potentially up to (the greater of) 20 million Euros or 4% of the company's annual worldwide turnover.

To minimise the risk of substantial penalties, multi-national employers may consider localising as far as possible the handling of any internal investigation to within the UK or EEA.

#### 6. Criminal allegations

Any employer faced with criminal allegations must first give careful thought to the interaction between an internal investigation and disciplinary process and any formal criminal investigation by the authorities. There is no prohibition on an employer taking disciplinary decisions in respect of an employee before the conclusion of any criminal proceedings particularly as these can take many months or even years to come to trial; it will however require careful consideration as to how best to proceed.

In some serious and complex cases, as set out below, the findings of an internal investigation may be reported to the authorities and form an important part of any criminal investigation, whereas, in other cases, an internal investigation will be restricted to a disciplinary process and remain entirely independent of any criminal investigation. It is important to seek specialist advice on criminal and regulatory law aspects, particularly in cases of serious alleged criminal conduct, and how these will affect the employer's handling of the matter including any proposed investigation. This will include advice on the extent to which the employer itself may also potentially face criminal liability in the matter.

In the event that criminal allegations are made against an employee, the following additional factors should be observed in order to substantiate and strengthen the findings of an internal investigation and to guard against any allegations of unethical behaviour.

#### 7. Secure evidence

The most important first step in any internal investigation concerning alleged criminal conduct is to ensure that all potentially relevant evidence is identified and preserved without delay. Such evidence may well include hard copy documents, but will typically also extend to electronic material, including laptops, phones and emails. Further, depending on the nature of the allegations, you should consider whether it is necessary to instruct all staff that normal document destruction is to cease on a temporary basis in order to safeguard potential evidence.

#### 8. Provide interviewee protections

It is often best practice for the employees concerned to be provided with separate legal representation for the purposes of any interviews that are to be conducted. Whilst separate representation may not always be proportionate, an employee who is in receipt of independent legal advice is likely to provide more useful and reliable evidence

than they otherwise might. In addition, given that criminal proceedings may be pending, an employer could potentially rely on litigation privilege in respect of any communications in the investigation. As litigation privilege (unlike legal advice privilege, as discussed above) notably extends to communications with third parties, such as interviewees, it is best practice to begin any interview by explaining that any such privilege belongs to the employer, not the interviewee.

#### 9. Ensure proper evidence handling

The proper handling of evidence gathered in the course of the investigation is essential to any eventual findings. In any event, whenever allegations of criminality are made, it is best practice to establish a “chain of custody” documenting the control of evidence. As a matter of practicality, however, any analysis of evidence should be proportionate to the nature of the alleged conduct. For example, some investigations may warrant the establishment of a document review programme, or the instruction of forensic accountants, whereas other investigations will not merit that level of expense – frequently, the deciding factor is the exposure of the employer to any potential liability.

#### 10. Consider reporting to authorities

With certain limited exceptions, including FCA regulated businesses, there is no general legal obligation on companies to report allegations of alleged criminal misconduct to any authorities. Nevertheless, should a company face liability of its own arising out of the conduct, then reporting the matter to the relevant authority may, only after very careful consideration, be an appropriate course in order to mitigate any potential enforcement action, although this is rarely without risk and you should seek specialist advice in this area before taking any decision to self-report. For example, the Serious Fraud Office will take into consideration whether a company ‘self-reported’ in deciding whether to undertake a prosecution, and the Competition and Markets Authority is able to provide immunity for the first member of a cartel to report. In the event that the decision is taken that a company is to ‘self-report’ then a strategy should be agreed as soon as possible – this is especially important if the conduct concerns multiple jurisdictions, each of which may have distinct approaches to internal investigations. It is worth noting that an enforcement agency faced with a ‘self-report’ is likely to require the employer to waive privilege in respect of parts of the investigation and careful advice will be necessary to ensure that any such waiver is properly limited.

#### **Remedial action**

At the conclusion of the investigation process, the investigator should have established the facts of the matter and may make recommendations as to next steps, which could include disciplinary action and also, in relevant cases, reporting the alleged wrongdoing to the appropriate authorities. Any subsequent disciplinary proceedings should then be conducted by someone independent, ideally an internal senior manager who has not been involved in the investigation.

One of the positive outcomes of an internal investigation can include an opportunity for an employer to redraw and redress the internal controls or procedures which may have contributed to, or otherwise permitted, the original alleged misconduct. In the wake of an internal investigation, employers will often be able to take the opportunity to implement new systems and policies to reduce the risk of any similar misconduct occurring again. This can also extend to targeted employee training and, where appropriate, specific mediation sessions to avoid a recurrence of the issues identified.

*This alert was co-authored by [Christopher Gribbin](#), [Zeinab Harb](#) and [Bettina Bender](#). Christopher Gribbin is an Associate Solicitor at Peters & Peters. [CM Murray LLP](#) can assist in managing or conducting internal investigations into employee misconduct; Peters & Peters can advise on the specialist criminal and regulatory aspects of internal investigations.*

*If you would like any further information on managing internal investigations please [contact us](#).*