

# Workplace investigations: Taking a bird's-eye view

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Workplace investigations can be a can of worms: you take the lid off and innumerable issues come wiggling out. Occasionally investigations are straightforward – if there is independent evidence of wrongdoing such as CCTV footage, for example – but more often there are shifting facts and opinions to pick apart. Achieving clarity is difficult and can take busy managers away from their day-to-day roles, at significant internal cost.

Initial steps have to be taken quickly but they can impact on the validity of the whole process, including any future employment litigation. Employers should have strategies in place for managing serious employment matters, just as they have disaster recovery and data breach protocols. This is perhaps particularly true for regulated financial services businesses, given emphasis on good governance and the requirement to be able to demonstrate adequate risk management systems and transparent business arrangements. If inexperienced investigators handle such matters it can leave a business very vulnerable to claims.

There is always a risk of allegations of unfair treatment, whether from the subject of the investigation, whistleblowers or complainants, often coupled with an allegation of discrimination where an individual has personal characteristics which distinguish them from peers.

When defending an unfair dismissal claim an employer must be able to show that:

- (i) it believed the employee was guilty of misconduct.

- (ii) it had reasonable grounds for that belief; and
- (iii) it had carried out as much investigation into the matter as was reasonable in the circumstances.

In a direct discrimination claim the question is whether the person was treated less favourably than others because of a protected characteristic (such as age, sex or sexual orientation, race or disability). If the employer can demonstrate that it proceeded the same way as it would have done with anyone else in the same circumstances such as a claim will fail.

Given the exposure, organisations should consider whether the case justifies bringing in an independent investigator, such as a lawyer with investigation experience, who can scrutinise the matter with an eagle eye. Using someone from outside the business can be a sensible investment and front-loading exercise which saves money longer term, particularly given the litigation risk. It may also be helpful reputationally – if asked to explain the approach by the regulator, for example – particularly as specialists may be able to provide other independent resources such as note-takers.

Using an independent investigator can have unexpected benefits. The objectivity of a fresh pair of eyes can help take a new look at the workplace – and the early bird catches the worm.

**To discuss workplace investigations or any aspect of employment law please do not hesitate to contact a member of the Viberts Employment team.**



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