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# Top Tips for Remote Workplace Investigations



**While business is busy preparing for life after lockdown, the advice is still where services are non-essential, and you can work from home, you should do so. This means many office-based workers will continue to work remotely so the technology that we have all harnessed in recent weeks will continue to be utilised.**

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One of the features of lock down is that many internal investigations have been parked pending a return to normal. However, as the return to normal is not going to be any time soon, organisations do need to proceed and conduct workplace investigations remotely to avoid a deterioration of the situation for both the workforce and organisation.

The bottom line is that a failure to act and investigate complaints for example, harassment or bullying, will prevent an employer from being able to rely on defence that they took action to prevent or reverse the effects of discrimination or bullying. Underlying this, is the obligation on an employer to provide a safe place of work. A failure to investigate and act because of the pandemic, will not cut it where remote investigations are possible.

Also, a failure to conduct an investigation on a timely basis where perhaps an employee has made a health and safety complaint, could be deemed to be an act of penalisation contrary to *section 27 of the Safety Health and Welfare at Work Act, 2005* in respect of which a claim could be brought against an employer in the Workplace Relations Commission. The WRC has the power to order the employer to take a specified course of action and/or award such compensation, as is just and equitable.

A badly conducted investigation, including substantive delay, can have huge ramifications for a business. In a worst case scenario, it can result in one of the participants in the investigation taking legal action challenging the process in the High Court. In the last few years, the courts have been very active in this area and will readily set aside a process that perhaps is in breach of contract and/or infringes an employee's constitutional right to a fair hearing.

For example, where the conduct being investigated is an allegation of sexual harassment, the damage to reputation is potentially huge. It is possible a mismanaged process could be legally challenged by an employee, given the devastating impact such a finding could have on their career.

The team at CC Solicitors are experienced in conducting workplace investigations and it is evident - given the prevalence of home working and technology - that there is no impediment in continuing to investigate workplace

complaints remotely by teleconference. The usual rules of fair procedure apply, providing the employee with notice of the meeting and relevant documents, notifying the right to be accompanied as per the disciplinary procedure and of their right of appeal.

As with all investigations, preparation is key. We have set out some top tips for conducting a workplace investigation remotely, as there will be some specific challenges to ensure this process runs smoothly.

## Remote Investigations

### Pre-investigation

- Identify the issue/complaint to be investigated
  - Where are you in the process? - do a road map of the potential outcomes
  - Is there a complaint in writing?
  - What is the relevant policy?
  - Who will investigate this - are they independent and experienced?
  - What is the policy/ Terms of Reference requiring you to do ? Are you required to investigate the facts and establish if there is "a case to answer" or are you required to make actual findings on the facts
  - How do you gather the relevant evidence with remote working? - this may be a challenge if material is contained in offices or homes - it may be that only materials initially that are held remotely can be used
  - Consider how documents will be provided to interviewees - it may be preferable to provide all documents in advance as you will not be able to pass over documents during the meeting
  - Consider your technology - is it suitable - do all employees/witnesses to be involved in the investigation have access to the appropriate technology - run a test before the meeting
  - You need to consider who will attend the meeting, the investigator, note taker, interviewee and representative, witnesses
  - Plan questions - who, what, when, why, witness, dates, records, evidence
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## Investigation Meeting

- Microsoft Teams and Zoom allow a visual and interactive experience, which is more suitable for workplace investigations. The investigator should control the meeting when who will enter the meeting and should be the last person to leave the meeting
- Ask all participants to mute their microphone when not speaking
- While it is possible to see who is in the meeting, it may not be possible to be sure that the interviewee is alone. It would be worth asking to confirm at the outset that they are alone and not being assisted by anyone other than in the capacity as a representative
- Consider how participants will communicate - if an interviewee is with their representative - agree to allow them to talk privately by phone - some video conferencing such as Zoom allows for breakout rooms
- Ensure the interviewee understands the process and check if all parties have all the same and relevant documents at the beginning of the meeting
- Be aware that some technology also allows for recording - you need to agree at the outset if the meeting will be recorded - it is possible one party will record anyway so you need to be prepared for this and a copy of the hearing appearing at a later date. If it is recorded, it will amount to personal data and an interviewee can request a copy of it.
- If it is not being recorded then an interviewee should be asked not to covertly record the proceedings, as this may amount to misconduct, in respect of which disciplinary action may be taken for a refusal to comply with this request
- Body language is key - if you are conducting the investigation professional office attire is recommended in keeping with the formality of the process
- Care should be taken throughout to ensure an interviewee understands the process and what is being said
- Put all facts to all parties and check inconsistencies
- Review investigation plan regularly - monitor time frames and explain delays to the participants
- If notes of the meeting are to be shared - avoid agreeing them as minutes as that will delay matters and confirm they are simply a record of the meeting and any comments will be noted

## The Report

- Remind yourself what the policy/Terms of Reference is asking you to do. Either to make a recommendation on the basis of a "case to answer" or make actual findings on the facts - this is probably where many investigations unravel in our experience where investigators exceed their remit. If they do, it will be unfair and potentially subject to a legal challenge
- The report should confirm the Policy/Terms of Reference and methodology applied
- The report should evaluate the facts and either make findings/case to answer on each allegation, identifying the evidence that supports the findings on the balance of probabilities

## Post Investigation

- Allow appeal if provided for in the procedure
- Consider if the appeal is not upheld and there is a finding, if a disciplinary sanction is warranted and apply the disciplinary procedure
- Other approaches - training, restorative approach to bringing harmony back to the workplace and monitor the result and outcome/impact on the workforce

**The team at CC Solicitors are experienced in conducting workplace investigations and it is evident - given the prevalence of home working and technology - that there is no impediment in continuing to investigate workplace complaints remotely by teleconference.**

**The team at CC Solicitors specialise in conducting and advising on workplace investigations and have a dedicated team that can advise on such investigations and/or conduct them remotely on your behalf. If you require assistance in conducting a workplace investigation, please do not hesitate to contact one of the team.**

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