



## The HR Edit

### Series 1, Episode 10: Conducting a robust investigation

[Music]

0:00:02- **Helen**

Hello and welcome to the final episode of series one of The HR Edit, the podcast from South East Employers taking a look at those common and often tricky HR questions. With me today we have our favourite SEE podcast team, Michelle and Sarah, and we're very lucky to be joined today by South East Employers Employment Director David. Hi David.

0:00:20- **David**

Hi Helen, how are you?

0:00:22- **Helen**

Yeah, I'm good, thank you. And today you're going to be talking to us about investigations, so should we jump right in with the first question?

0:00:29- **David**

That's fine, thank you.

0:00:30- **Helen**

What are the general principles of conducting a robust investigation?

0:00:34- **David**

I think, to start with Helen, the very first thing is that an investigation needs to be handled in a fair and robust way, and there are a number of ways that employers can do this. Mostly, they are dictated by the ACAS code of practice, which sets out a number of things to enable you to do that. So the first one is that issues need to be addressed as promptly as possible, and the second one is that employers and employees need to act consistently in how they approach an investigation. And of course, the investigation is there to establish the facts. That's the main purpose of an investigation. It's not to make decisions or determine sanctions. It's to identify the facts of the matter in question.

And then I suppose, moving on from that, in order to make it fair, any employee needs to be informed of the basis of the case against them, because as an investigator, of course, you have to take account of all sides of an argument, and if the employee has been accused of, say, for example, disciplinary matter, how can they possibly defend their case if they haven't been informed of it?

And that's a pitfall, in fact, that a lot of employers fall into, and allied to that, of course, is that the employee has to be given opportunity to put their case to the investigator.

And I think, finally, in terms of what ACAS says, there is the right to be accompanied and I can say more about that later on, if you want me to and also at the end of the process. It seems strange to move to the end now but there is also a right of appeal. So I think, moving on from ACAS just to give you as full an answer as possible, employers need to ensure that any procedures they have in place do follow those ACAS principles. So that's the first thing to use a fair procedure. And then, whenever, at every stage of the process, whether it's in investigation or any subsequent hearing or appeal, it's extremely important that any individuals, either investigator or the panel members, are fair and unbiased, and what we mean by that is that they've had no part or no knowledge of the issues that are being investigated.

0:02:51- **Michelle**

So, David, you mentioned the procedure. Can you just talk us through the procedure that you would follow to conduct a robust investigation?

0:03:00- **David**

Yes, of course, Michelle. I think the way I think of this is as a nine-point procedure. I think really that sort of gives you a framework for this. So the first one is actually to understand the brief. So, as an investigator, you will be asked to conduct the investigation and you'll be given a rough idea of what the issues are, but often what you think you're being asked to do and what the employer thinks they're asking you to do may not necessarily be the same thing. So it's extremely important, as the investigator, to be very clear about what your brief is, what your remit is and the parameters of that, because of course, you can't investigate something that is not within the remit of the issue that you've been asked to look at. The second one is to, I think, as an investigator, to sort of make any initial observations or decisions, by which I mean you'll have an idea as to whether the issue in front of you is a disciplinary one or is it a grievance. If it's a grievance, is it more appropriate to investigate it under the council's grievance procedure or is it more of a bullying and harassment matter, in which case many councils have a separate procedure for bullying and harassment and you may need to investigate under that procedure instead of the grievance. So it's very clear that you make those decisions at the early stages because, believe me, if you investigate under the wrong procedure, this presents all sorts of problems later on. And you will also, at that initial stage, I think, make an early determination on whether or not there will be witnesses to call, and how many. I mean, obviously, the final decision on that will come after you've spoken to the main protagonists, if I can use that word, but you will need to make some initial observations as to how many people you need to speak to.

The third one, quite a brief one, is to prepare the outline of what you're going to do next. So just determine the witnesses that you're going to speak to, whether you need to get any particular policies that you haven't been sent, whether you're going to ask individuals for supplementary evidence in the form of emails or texts or anything like that. And then that leads you on nicely into the fourth area, which is gathering the evidence, and this is the investigation interviews themselves. So you will meet with the relevant people and any witnesses and from them you will gather your evidence. Now you can do this in a number of ways, and a lot depends on the nature of the issue that is in front of you.

Some investigators, I know, prefer to have a series of set questions that they want to ask the people they're speaking to. Personally, I don't take that approach. I prefer to allow the individual to talk to me, if you like, and give me their point of view, or their viewpoint first of all, and then, based on what they say to me, I will ask any specific questions where I feel that they've not given me enough information or whether they in fact may be deliberately withholding information. And with experience you can soon pick that up. And once you've gone through all the people that you need to speak to and any and all witnesses, you then review everything you've got, because the next stage is to write the report. So when you're reviewing, that to me is usually the time when I start forming an opinion as to whether or not I'm going to either uphold the grievance or recommend further action. I haven't usually picked that up until that stage.

So that moves on to writing the report, and again, this can be done in a number of ways. Obviously, as an external investigator, I have my own template for this, but sometimes a local authority will give you their own, and you then fit your findings into that template. So you set out in the report all the findings from your investigation, all the evidence that you've gathered, etc. And any corroborative materials, and then you make conclusions and recommendations.

Now, usually what you're asked to do is not, as I said before, you don't have to come up with any decisions or sanctions, you just have to recommend the next stages or the way forward. So, for an example, if we're talking about a grievance, what you're saying is based on the evidence you've discovered. Can you uphold the grievance or should you recommend that the grievance be upheld? Should you recommend that the grievance is not upheld? Or, as is often the case, will you recommend that you uphold parts of it and not other parts? And in the case of disciplinary, you will be recommending whether or not you feel there's enough information to support the allegations and then you would recommend that it went off to a disciplinary hearing. But, as I say, these are just your recommendations and it's entirely up to the recipient of the report the council usually as to whether or not they follow those recommendations.

And then, just moving on, possibly slightly outside of this, but I think it is important when you're thinking about conducting investigations that you're aware of the next steps.

So, having submitted your report, it may well be that you're called as a witness to present your report if there should be a subsequent hearing. And, of course, as the investigator, that is part of your role. So it's worth knowing that you may be asked to do this. So, for example, if you recommend that the case goes to a disciplinary, the employer accepts that recommendation, you may well be asked, as part of the management case, to attend that hearing to present the findings of your report. And then I think the final stage in the process as with any HR procedure, I think is you need to monitor and follow up what you've done on a regular basis, because I think it's always worth checking your work afterwards just to make sure that you're clear of bias or anything like that. So it's worth monitoring what you do and,



of course, to see if there are any alternative ways or better ways that you could have approached the investigation in the first place.

0:09:13- **Sarah**

Thanks David that's really interesting. Obviously, I work with yourself and a couple of the other guys who carry out investigations at SEE, and I know it's a huge part of what we do. We're often called in. You talked about witnesses. Now, in every investigation, are there always obvious witnesses that you need to interview, or are there some occasions where there really isn't a witness, and what do you do in that case?

0:09:35- **David**

The answer to that question is both of those scenarios apply. So let's take where you have witnesses first. Witnesses, of course, are extremely useful to an investigator because they will corroborate one side of the argument or the other. Now, of course, as I suppose I should add here that, as an investigator, your burden of proof, as it were, in terms of determining where you're going to go with your outcome, is not like in a criminal court. So it's not beyond reasonable doubt. It's on a balance of probability. So, of course, to have a witness statement that corroborates one side or the other is really helpful.

However, sometimes an individual will say I was shouted at by my boss, for example, and there were 17 people in the open plan office and I want you to speak to all 17 people. Now, of course, you have to have a sense of proportion about these things. Now, I also take the view that if those 17 people are all going to say the same thing, because allegedly they all saw and heard the same thing, then I don't need 17 versions of 17 identical versions, so I will maybe pick three or four. Now, it's quite a difficult balancing act with the individual sometimes, because sometimes they insist that you do that, but that's a discussion you'll have. Now the other side of the coin, of course, is when you don't have any witnesses, and this, as I said before, makes it very difficult for an investigator because if, as is often the case, the allegation just happened between two people and there was no one else present, then all you've got, as an investigator, is one person's word against another.

Now, on a balance of probability, because you're not, that doesn't help and you're not allowed, if you're being completely impartial, to take one side over the other, because, obviously, what's, what's your evidence for doing so? What's your grounds for saying, oh, I believe person A over person B, when you've got nothing else. So it is very difficult. Therefore, when you don't have a witness, the way round it, of course, is to say to the individuals well, have you got any other corroborating evidence? Do you have an email? Do you have a text? Have you got reports or document, any other documentation that will give the investigator a help and aid so that they can form an opinion one way or the other.

0:11:57- **Helen**

David, is there a best order for interviews?

0:12:00- **David**

I think the answer to that Helen, depends very much on the investigator and the type of issue you are investigating. From a personal point of view, if you are dealing with a grievance or anything else that has been what our term as employee led then I always prefer to start with the employee, so you get their view first, because I think if this is their issue, they're the one behind this. So I think it's actually quite helpful and not so important if you can get their view first and then, once you've established that, you then go to the other side and any witnesses the opposite, of course, is true if it is a, say, disciplinary, because that is of course employer led and so, for the same reasons, I prefer there to start with the employer, get the allegations on the table, find out what they are and then go to the employee to say this is obviously they will have been notified in advance of the essence of the, if not the full details of the issues, but I've then, as an investigator, I've got the full details and I can use that to inform my questions to the individual. I think the only exception to that, that would be my preferred way of working. The only exception is when you're having difficulty getting the dates in the diaries and, as we all know, it's very difficult sometimes, especially when you're dealing with perhaps more senior members of staff finding availability that works with everybody.

One of the main issues as I said, I think, in my answer the first question is that these things need to be expedited as quickly and efficiently as possible and if you're going to have to wait, say, three weeks before you can speak to the person that's raised the grievance, if it's a grievance, then I don't want to wait three weeks before I even start.

I will then go start with the manager, possibly just to get the process going. The only other thing that I think makes that slightly problematic is, of course, if sticking with the grievance, you start with the manager for the reasons I've outlined, then you go to the person that's raised the grievance. It may be that, based on what they then say, you have to go back to the manager and, of course, when you're doing an investigation, it's actually preferable to only speak to people once, because if you go back it obviously makes it much, much longer process. But yeah, so to answer the question, or to summarise the answer to the question, if it's employee-led, you start with the employee if at all possible, and if it's employer-led, you start with the employer.

0:14:39- **Michelle**

David, we quite often have conversations about the investigations or questions that come in through the advice line, and one of the big ones is what do you do when someone either goes off sick in response to a disciplinary or grievance being raised, or maybe a witness has actually left the organisation by the time the case comes to light? What would you recommend doing in those circumstances?

0:15:06- **David**

Now, this is a hard question Michelle. Thank you, I might have guessed it would come from you! I think we'll take them separately. So the sickness one, I think, is quite a common one and can happen for a number of reasons. The best thing to do, I think, of course, is to, if the investigation has already been ongoing for some time, I think the best thing is to carry on as well as you can, get as much information as you can in the circumstances. But, of course,



ultimately, if the person that's gone off sick is one of the main protagonists in the issue, then of course you do need to speak to them. If it's just a short sickness and you know when they're coming back, or reasonable expectation when they'll come back, you can just wait until that happens and then fix a new date in the diary, as often happens. Of course, the sickness can be much more long term and sometimes very serious indeed. However, just because someone is off sick does not necessarily mean that they can't participate in an investigation, and I think the process then to go through if it's long term sickness, is to get occupational health involved, because just because someone is off work does not necessarily mean they can't participate in an investigation and sometimes, if we're talking about bullying or stress or anything like that, it's often in the individual's best interest to get the issue sorted. So my advice to an employee is always go to occupational health and the specific questions you are asking. The occupational health advisor is okay, we know this individual is off sick for whatever the reason it is, but there's an ongoing workplace issue which we do need to investigate. Is this person is, in your professional opinion, well enough to participate in an investigation? And often the answer is yes, and in which case you then go ahead, fix a date and you deal with it that way. If, however, occupational health says no, then my advice is unfortunately, you know, despite the fact that time is ticking on, you really should not go against medical advice.

Now, the second part of your question, I think, was when an individual has left the organisation. Now, again, as an investigator, you have to take an issue. If they're presumably you're talking about a witness here, Michelle If you feel they're an important witness, then of course you would want to speak to them. Now, as a general principle, people who are still within the organisation still work for the employer. If they are asked to be a witness, there's an expectation.

It's an implied contractual term, if you like. There's an expectation that they will participate in in any investigation. However, once they've left, that employment relationship has terminated, that implied term obviously no longer exists. So as an investigator you would get the contact details if the former employer had them contact that individual and explain to them what you're doing and say it would be really helpful if you participated in my investigation. But of course you can't force them. In my experience, though, it depends on the issue. It depends on what they feel they have to say. I would say seven times out of ten, if not slightly higher than that, an individual is more than happy to participate.

0:18:28- **Michelle**

So, David, you mentioned there about getting occupational health advice as to whether they're fit to participate. What would you do if occupational health said yes, but they're not fit enough to attend meetings or the investigation interviews?

0:18:41- **David**

Okay, thanks, Michelle. There's a couple of answers there, I think. I mean. First of all, I think the current situation in which we all now work, the hybrid situation, is actually quite helpful for this, because obviously it's no longer as important for the investigator to physically sit in a room with that individual to conduct the investigation. So I think the first alternative or first



option would be to say you know, would you be happy for me to speak to you, but remotely, because if someone is ill, whatever the illness might be, I mean, it may be far more, far easier for them to not have to travel to the workplace or a work office and speak to me from the comfort of their own home, with me speaking to them remotely. So that's the first thing. The second one, I think, again, it does happen irrespective of occupational health.

I think sometimes some individuals, for whatever reason, are just adamant maybe I'm being unkind, but just adamant that they do not want to participate, do not want to speak to me or the investigator because, for whatever reason there could be a myriad of reasons and I think the one way around that is to then say would it help if I submitted a set of questions that I would like to ask you and you can then provide a written response, and that usually helps.

That that's usually the way of breaking that barrier. I think the issue for the investor, from the investigator's point of view, is you. Then, if the response doesn't answer the question or raises other questions, if you're going backwards and forwards via email, it does elongate the process unnecessarily and worst-case scenario, of course, is an individual just will not participate. And it does happen. And I think the only thing you can do as an investigator is if you have already offered those two alternatives the remote meeting or the written responses. You then say well, unfortunately I will have to proceed with my investigation based on the information to hand. So you know, if you haven't submitted anything, then that's, you know, probably not going to help your cause, but I have no option but to continue in that way.

0:20:55- Sarah

David, just on the hybrid working then, in terms of people being able to kind of do this remotely, interview people remotely, do you find now that they don't have to be summoned to an office necessarily? Are they more open with you and will engage more with the investigation, with your questions?

0:21:14- David

I don't think so, Sarah, I think I think if people want to participate, they'll do that, whether they're in front of an individual or not.

The only issue I think that I would say about the remote interview is more from a personal perspective as the investigator, because when you're in a room with someone it's so much easier to pick up what isn't said. As we all know, communication is, whatever the figures are, you know 70% of what comes out of someone's mouth sorry, 30% of what comes out of someone's mouth and 70% of non-verbal communication. You know how much they're shifting around, how much they're fiddling with things, whether they're. You know, we've all heard it when someone is telling a fib, they tend to glance down to the left. All of all of these kind of things you pick up much better when you're, when you're actually physically in the room with the individual. But you know it is a reasonable compromise to to have this hybrid arrangement and obviously it's better than nothing. And over time I think certainly as an investigator you get you get more used to interpreting, as it were, what you don't hear.



0:22:31- **Helen**

So can people be accompanied to an investigation?

0:22:36- **David**

Yes, Helen, and no, says he helpfully. There is in workplace issues, workplace concerns, discipline and grievance. There is what is known as the statutory right of representation, and that is that says that at any formal stage of the process an individual can be represented by either a trade union representative or a workplace colleague. Now, an investigation, of course, falls outside of that and investigation is not part of the formal process. So there is no statutory right representation at the investigation stage. However, the vast majority of employers in local government now have extended that right to say that even at the investigation stage the non-formal stages you can be accompanied by a trade union rep or workplace colleague. So the answer to your question therefore really depends on policy. So if your policy allows it, yes, but from a statutory point of view, no.

0:23:41- **Michelle**

So, David, would you ever allow a legal professional in as a representative?

0:23:47- Speaker 3

Now there's an interesting question, Michelle, and in fact there's been lots of case law on that very issue. As I've just said to you, the statutory right is to a workplace colleague or trade union rep. So therefore there is no statutory right to any legal representation at a formal stage of the process or, if the policy allows it, at the informal stage, ie the investigation stage. However, there are important exceptions to that, and you do occasionally have an individual who says can I bring my lawyer or barrister or something like that to my meeting? The answer to that is usually no.

The main exception is if the issue that is under consideration, say, for example, a disciplinary matter, is such that the individual could not only potentially lose their job, but could also. But if in doing so they would actually lose their right or their ability to continue in their chosen occupation, then it may be that may be a case where you where legal representation is deemed possible. So, for example, this usually applies to something like in education, where maybe a teacher and, depending on the issue, maybe it's a safeguarding concern. If that teacher was to be dismissed because of that concern and therefore placed on a barred list, they would never be able to work as a teacher. Again, that is a case in point where legal representation should be considered and potentially allowed.

0:25:25- **Sarah**

David, are there any circumstances that you would allow a representative to talk on behalf of an employee or in their absence?

0:25:34- **David**

Again. That's a very good question, Sarah. I think I'll start by briefly explaining a bit more about the right of representation. I've already said when that comes into play, but the representative sorry has a limited role in the meetings. They can ask questions on behalf of





the person they're representing, but technically, what they can't do is answer on behalf of that individual. As the investigator, you want the response from the individual, not from their rep. So that's the main principle.

However, of course, to answer your question, there may be occasions when it's expedient to move away from that slightly. I think the circumstances are limited. The first I would mention it goes back to Michelle's question about when people aren't participating because of ill health. You could and I didn't mention this at the time but one of the other options is, instead of speaking to the individual or getting them to send in written responses, you could ask them if they were willing for their rep to speak to me instead. It's very unusual, but it can happen. Then I think the second one is you may, as an investigator, allow the rep to speak as a reasonable adjustment. Say, you have an individual who is disabled under the Equality Act and, as an example, communication or verbal communication is difficult. It may well be that you decide and you get agreement from the employer to do this, but you may well decide that it's expedient for the representative to circumstances such as those speak on behalf of their member. But they're the exceptions rather than the rule. Usually, you want to hear the member's own words.

0:27:18- **Michelle**

What should be included in the report.

0:27:21- **David**

Okay, I'm going to slightly change that question, Michelle, and ask myself what shall be included in the reports, plural, because as an investigator, I always submit two copies of my report to the commissioning local authority, one with and one without appendices. The reason I do that is for several reasons. But to start answering your question, obviously what should be included in the report is as follows an overview of the remit, a little bit about, a little bit of background about the issue and what led to it, the methodology that you've adopted as an investigator. And then the main two sections are the actual main body of the report, which is where you set out your evidence, who you spoke to, what they said, what the witnesses said, etc. So setting all that out. And then the final section is your conclusion and recommendations. So again, you draw your conclusions and you make your recommendations based on that. And another thing that you can include in the report are management recommendations outside of or slightly outside of the remit of the report. So, for example, you're dealing with a grievance and there have been some side issues raised, perhaps in respect of performance for a member of staff. Your role as an investigator obviously is not to investigate the performance concerns, because that was outside of your remit, but they've nevertheless been mentioned, and so you could make a recommendation within your report that those issues need to be looked at or considered in a different way, in accordance with the appropriate policy.

Now, in terms of going back to the issue of two reports, both of them contain exactly what I've just said there, but one of the reports will contain the appendices. So, as an investigator, you will take notes of your conversations with each of the individuals that you spoke to, and then it's actually quite important that you get the notes agreed with those individuals. That's

important for two reasons, or a number of reasons. One is that the notes will be appendix to the report or to one of the reports, so it's important that they are agreed. And the second thing is that, should a case go to proceed beyond the internal processes, ie. go to a tribunal or anything like that, then the full report, which is your findings, recommendations, and any appendices are disclosable as evidence at a tribunal. So it is extremely important that you get the notes agreed with the individuals.

So you may then ask well, why do you need the report without appendices? The main reason for that is, of course, it depends who you're sharing it with and the extent to which you want to share everything. It may well be that some of the comments in the appendices are of a sensitive, personal or whatever nature or relate to issues slightly outside of the main ones of the report, and it would not be appropriate to divulge the full disclosure to give absolutely everything. So in that case, it is therefore possible to send a copy of the report without the appendices, and I'm not sure whether you asked me, Michelle, but I'm going to say a little bit more as a supplementary answer as to who the report exactly should be shared with, because obviously, an individual that's raised a concern feels they have an automatic right to hear everything that has been said about them, and that actually is not necessarily true.

As I said before, if it goes to a tribunal, then there would be full disclosure, but most cases, of course, don't, and so it may well be that an employer decides that they're not going to share the full report, or indeed not going to share the report at all, because they think it might do more harm than good. That, of course, is a matter for the employer to decide, and, as an investigator, I'm always extremely clear with the individuals I speak to because I think 99.9 times out of 100, they ask me when are they going to see my full report? And of course the answer to that is they may not see my full report or they may not see any report, but that is entirely a matter for the employer.

0:31:38- **Michelle**

So, David, what is your view of recording the interviews?

0:31:45- **David**

OK, another good question, Michelle. Thank you. I think my view as an investigator would probably agree with most employers and almost certainly disagree with most employees. But again, the answer to this question really sits in policy. If an employer has a policy that allows for recordings of investigation meetings, then obviously they have to follow their own policy. However, I do say that I must say that is extremely rare.

I think in the 15 years of doing this I've only ever come across one employer that allows for recordings within policy. So therefore recordings are usually not allowed and so, as an investigator, at the beginning of any meeting you would explain that to individuals, even if they don't ask. You would explain to them that they must not record it and, assuming that there is no right in policy to record it, you also explain that if they were to ignore that advice and do it anyway and you were to find out, that's potentially a disciplinary matter. And again that has happened. I think the only exception to that and again as an investigator you would clear this with the commissioning, local authority would be a game where recording might be



expedient as a reasonable adjustment to help in a case of disability or something like that. So that would be my main reason for allowing recording, but generally the answer is no.

0:33:15- **Helen**

Thank you for joining us today, David, and for giving us that overview of some of the considerations when conducting an investigation. If you are a member of SEE and have any questions or queries related to investigations or any other topic of HR advice, you can always contact us at [advice@seemp.co.uk](mailto:advice@seemp.co.uk). You can also visit the SEE website, [www.seemp.co.uk](http://www.seemp.co.uk) for more information on the assistance the SEE team can offer when conducting an investigation or mediation or the various other areas of support we provide. This is the end of series one of the podcast, but please do subscribe on Apple Podcasts or whatever you get your podcast or check the updates on our webpage, [www.seemp.co.uk/theHRedit](http://www.seemp.co.uk/theHRedit) as a new series will be released later in the year answering more tricky HR questions. Thank you for listening.

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