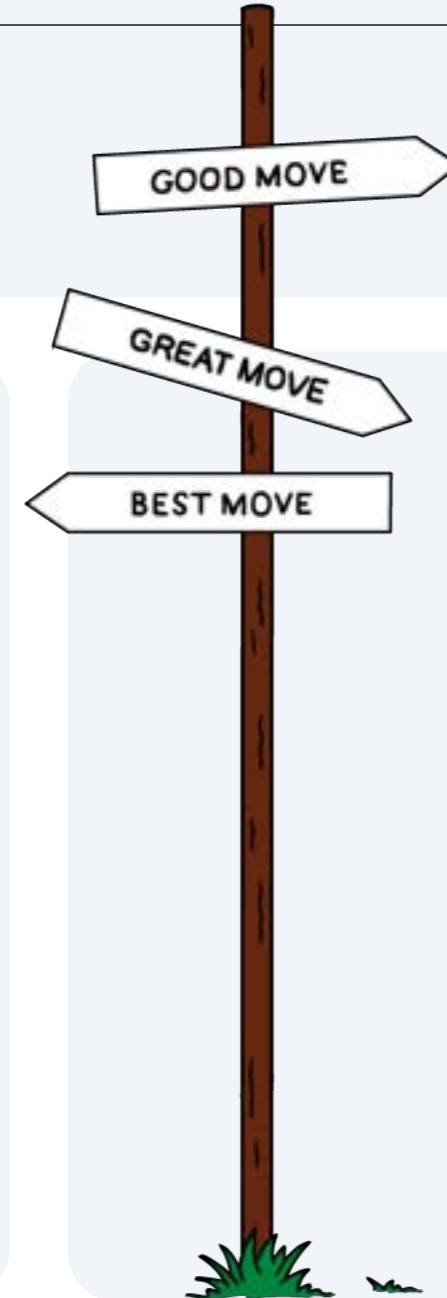

**Managing Difficult
Workplace Investigations**
—the importance of getting it right

Richard Thomas
Partner



Duty to prevent sexual harassment

- Understand the obligations on employers under the new duty to prevent sexual harassment
- Know how to implement and demonstrate ‘reasonable steps’
- Conduct effective investigations
- Analyse evidence
- Identify appropriate outcomes
- Know when to gain support from HR and/or Capital
- Understand risks to the business.



When and why **to investigate**



Why carry out investigations?

- Claims for discrimination, victimisation, bullying and harassment
- Legal compliance
- Mitigating business risks
- Promoting positive workplace culture
- Ensuring fairness and transparency
- Compliance with the legal requirement to take reasonable steps to prevent sexual harassment
- To support managerial decision making.

When to carry out an investigation

Discipline

- Lying
- Theft
 - time
 - product
 - Falsification of records
- Aggressive language or behaviour
- Insubordination
- Absence issues
- Health & Safety breaches such as intoxication on-site
- Fraud

Grievance

- Bullying
- Victimisation
- Discrimination
- Sexual harassment
- Unequal pay
- Whistleblowing

Appeal

- Redundancy Selection

Challenges in complex investigations

- Discrimination, bullying, victimisation and harassment cases
- Sensitive and subjective
- Power dynamics and fear of retaliation
- Navigating implicit bias in emotionally charged issues
- Legal complexities, such as intersectionality and multiple allegations.
- Ensuring fair treatment while maintaining workplace morale and trust is a delicate balance.

Potential impacts of ineffective investigations

- Legal and financial risks
- Reputational damage
- Workplace culture deterioration
- Escalation of issues
- Loss of productivity
- Missed opportunities for improvement
- Liability under the new sexual harassment duty.

Key concepts



Independent vs Interconnected

1. Discrimination
2. Harassment
3. Bullying
4. Victimization

Discrimination

Section 13 and 19 Equality Act 2010

*Discrimination occurs when someone is **treated unfairly** because of a **protected characteristic** under the Equality Act 2010 (e.g age, race, gender, disability, religion...)*

Direct discrimination — *treating someone less favourable **because** of a protected characteristic.*

Indirect discrimination — a policy, rule of practice that applies to everyone but disadvantages a specific group.

What is Harassment

Section 26

Harassment is prohibited under the Equality Act 2010 — *Section 26*

A harasses B if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either:

- *Violating B's dignity, or*
- *Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

In essence, harassment is unwanted conduct relating to a protected characteristic.

In particular, Sexual Harassment

Section 26(2)

Sexual harassment occurs where both:

A engages in unwanted conduct of a sexual nature.

The conduct has the purpose or effect of either violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Victimisation

Section 27

Section 27 Equality Act 2010:

Victimisation occurs when someone suffers a detriment for doing or intending to do a "protected act."

A protected act involves actions related to discrimination law, such as making a complaint, supporting someone else's complaint, gathering information for a potential complaint, acting as a witness, or giving evidence that doesn't support a complaint.

"Detriment" refers to being treated worse than before or having one's situation worsened.

Victimisation

Under the Equality Act 2010:

Under the Equality Act 2010:

“Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.”

Bullying

ACAS Definition

Unwanted behaviour that is:

- offensive, intimidating, malicious or insulting
- an abuse or misuse of power that undermines, humiliates, or causes physical or emotional harm to someone

The new duty...

New legal obligation on employers as of October 2024 to take **reasonable steps** to **prevent** Sexual Harassment.

- Part of the *Worker Protection (Amendment of Equality Act 2010) Act 2023*
- A positive and proactive duty rather than reactive Applicable to all employers and workers, including contractors and freelancers
- Applies to third party harassment.

Consequences of non-compliance

1. 25% uplift

If an employer is found to have neglected their duty to take reasonable preventative steps, the tribunal may increase the compensation award by up to 25%.

2. Enforcement action by the EHRC

The EHRC have enforcement powers including the powers to...

- Investigate potential breaches
- Serve notices requiring employers to prepare an action plan to remedy breaches and prevent future breaches
- Require employers to enter into legally binding agreements to take certain steps to address issues of discrimination and harassment
- Seek injunctions against an employer to restrain it from committing an unlawful act.

Whatever action, it must be a ‘reasonable step’

In deciding whether a step is reasonable, relevant factors include the:

- Employer’s size and resources
- Sector it operates in
- Working environment and risks present
- Types of third parties the worker may have contact with, the frequency and environment
- Likely effect of taking a particular step and whether an alternative step could be more effective
- Time, cost and potential disruption of taking a particular step, against the benefit it could achieve.

Harassment by third parties

Mr Jayeola v Commissioners for HMRC [2017]

- Failure to properly investigate racist remarks from a contractor.
- Harassment by third parties is already an issue that employers can be held liable for, but under the NEW duty, employers are also required to take 'reasonable steps' to prevent sexual harassment only.

Case example

E Woolf v Universal Science (UK) Limited

- Submitted a grievance regarding non-payment of commission and sexual harassment after resigning;
- An investigation was conducted but dismissed due to ‘lack of evidence’
- The Tribunal upheld claim of sexual harassment and awarded £23,107, finding both the harasser and employer joint and severally liable and highly criticised the investigation and HR process.

Inadequate investigations in discrimination claims

Inadequate investigations can lead to discrimination claims....

Example, *Ogbonna v Partnership of East London Cooperatives (PELC) [2017]*

Key Lessons:

- Fact based investigations
- Avoid assumptions and bias
- Thorough and fair procedures
- Legal and financial risks

Recommended steps for Employers

Inadequate investigations can lead to discrimination claims....

- Develop an effective anti-sexual harassment policy
- Engage and educating staff
- Fostering an inclusive culture in the workplace
- Carry out a risk assessment
- Clear reporting methods
- Training

Conduct thorough investigations....

Dealing with harassment by third parties

- Understand your duties as an employer
- Ensure employees know how to report incidents of harassment
- Create zero-tolerance of harassment culture including from external sources
- Document all processes

The investigation



Stage 1

*Understanding the remit
of the investigation*

Who investigates

When appointing the Investigation Manager consider:

- Independence of the matter to be investigated
- Seniority
- Circumstances and knowledge
- Separation of roles
- Internal vs External investigator
- Must not be a decision maker on an outcome.

The role of the investigating officer

- Immediate appointment
- Thorough investigation
- Drafting a comprehensive report that is clear and unbiased
- Role in disciplinary proceedings.

Other Roles

Fact-finding Officer

- High level gathering of initial evidence
- Not to stray into IO role

Grievance Manager

- Independent
- Senior to the Investigation Officer

Disciplinary Manager

- Normally the individual's line manager or superior

Appeal Manager

- Independent of the business area
- Senior to the original decision-maker

Stage 2

Planning the investigation



Plan

- Scope — what are the key issues to be included?
- Roles
- Time frames
- Reasonable adjustments
- Data collection
- Interviews
 - Order of interviews
 - What questions (relevance for each individual)
- Documentation
- Report

Invite to investigation

Written invite to investigation interview should inform:

- Allegations under investigation
- Reserve right to amend allegations as investigation progresses
- Clarify matters that have been established to date
- Purpose of the investigation
- No decisions have been taken
- Time, date, location of meeting

Stage 3

Conducting the investigation



Conducting meetings

- Establish consent to recording — if not a note should be taken
- Be clear you cannot guarantee confidentiality
- Ask if those being interviewed would like to be kept up to date
- Follow up with the witness
- Anonymity

Investigation interviews

Do's v Don'ts

Do:

- Encourage
- Verify
- Challenge
- Use logic
- Avoid hearsay and gossip

Investigation interviews

Do's v Don'ts

Don't

- Offer an opinion
- Offer advice
- Argue
- Evaluate
- Intimidate

Good Listeners

- Look at the person they are listening to
- Maintain natural demeanour
- Appear interested - nodding your head for example sends the silent message back to the talker that you have heard and understood
- Take an active part in the conversation — reflect back the words or meaning. Ask questions to express interest
- Take account of body language

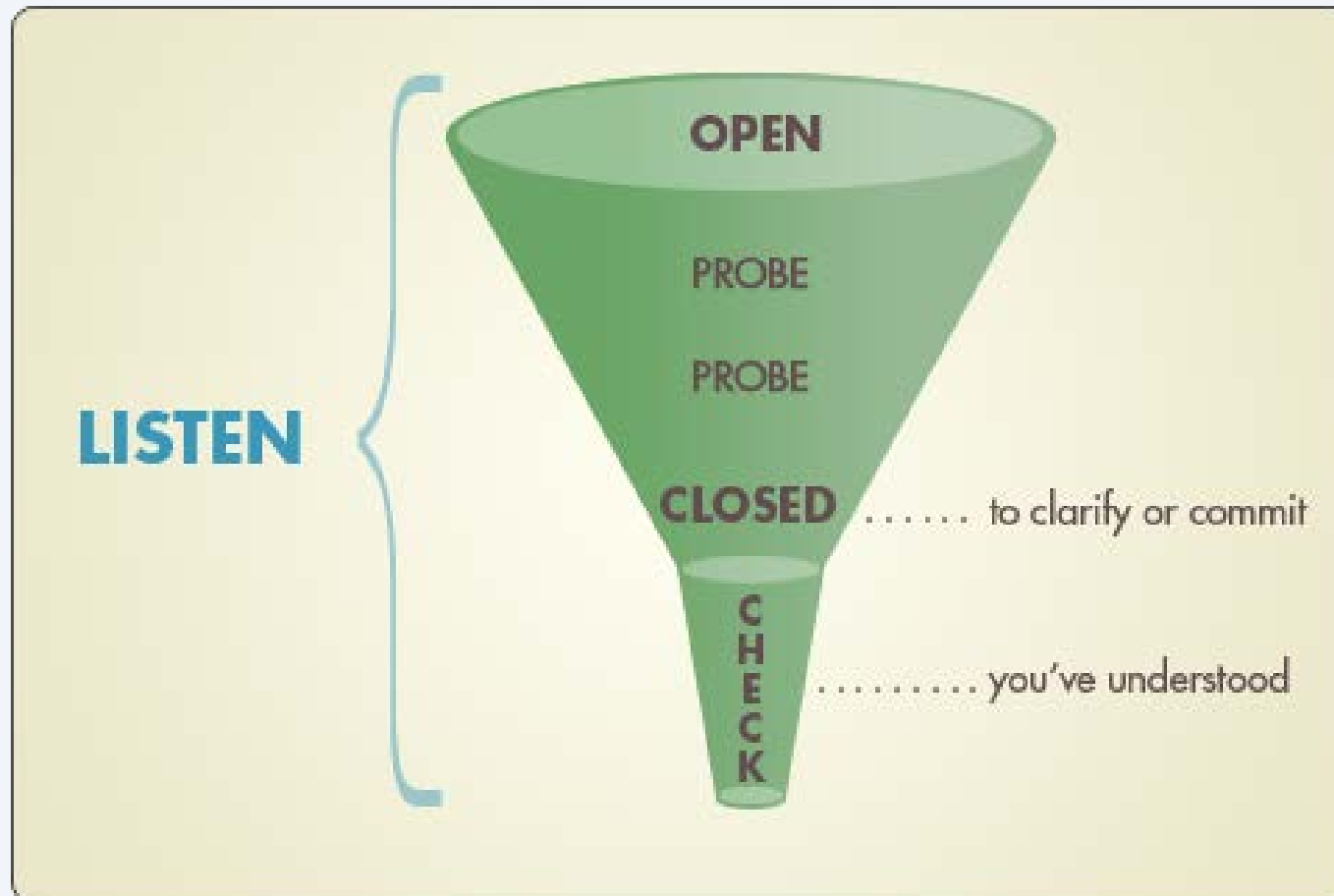
Poor Listeners

- Think of what they are going to say rather than listen. Don't hold eye contact — demonstrates lack of interest, fear or criticism
- Jump to conclusions without hearing the other person out / interrupt
- Listen to their own dialogue inside their head instead of what the other person is meaning.
- Daydream or just "switch off"
- Guilty until proven innocent
- Fail to allow for English not being first language

Effective Questioning

Effective Questions	Questions to avoid
Open and probing	Hypothetical
Reflecting	Leading
Closed or direct	Closed or direct
Summarising	Multiple
Use Pauses and Silence	

Questioning Skills — *Funnelling*



Avoiding bias

- Maintain objectivity
- Avoid prejudging the situation
- Recognise your own biases
- Ensure fair treatment of all parties
- Use a structured approach
- Document decisions and rationale
- Conduct with others when necessary

Fact v Opinion

Fact

- Measurable
- Quantifiable
- Verifiable
- Observable
- Unquestionable
- Objective
- Logic

Opinion

- Related to person
- Depends on a Point of view
- Questionable
- Subjective

Stage 4

Evidence and Review



Bundle collation

1. Bundle of documentary evidence
2. Bundle of transcriptions

Why:

- Strengthens legal defensibility
- Supports fair decision making
- Ensures transparency and accountability

Other types of information

Forensic information

- CCTV footage
- Tracker/GPS
- Attendance recording
- 3rd party statements
- Social media
- Metadata
- Financial reports
- Emails — passwords
- Drug and/or alcohol tests.

Reviewing the evidence

1. Gather and organise evidence
2. Assess credibility
3. Look for corroboration
4. Maintain objectivity
5. Document and justify findings
6. Identify whether any further investigation is necessary

Considerations and Inconsistencies

Considerations

- Motivations
- Organisational circumstances
- Environment
- Historical practices
- Personal relationships

Inconsistencies

- Contradictory statements
- Missing paperwork

Stage 5

Report writing



The Report

Contents

- Introduction and terms of reference
- Methodology
- Parties involved
- Chronology
- Allegation
- Evidence for and against the allegations
- Considerations & Inconsistencies
- Findings & Recommendations
- Appendices

The Report: *Top Tips*

Accuracy

- Say what you mean
- Be objective and stick to the facts
- Good punctuation
- Good spelling
- Using the active rather than passive to avoid ambiguity
- Be consistent in terminology

Brevity

- Short simple words
- Short sentences
- Short, numbered paragraphs — whenever the topic changes
- Keep an impersonal tone and don't assume an overly formal or legalistic writing style

Clarity

- Use Plain English
- Only use jargon in the right place
- Check that the flow of the writing is logical
- Start by making the topic and purpose clear
- Finish by making it clear what happens next
- Check for ambiguity from the reader's point of view
- Avoid waffle

Findings and Recommendations

- Find For or Against
- Recommendations for action
 - Grievance Hearing
 - Disciplinary Hearing (Sanction may be covered)
 - Whistleblowing process
 - Matter dismissed / No further action
 - Overturn previous decision
 - Police
 - Report to the Board
- Development action points
- Policy review/implementation
- Any further investigations

Our Support

- **Portal Library**
- Template documents:
 - Investigation planning
 - Invite letters
 - Scripts
 - Outcome letters/reports
 - Reviewing drafted final investigation documents
- Staff handbook — HR policies and procedures
- **Helpline**
- **Complex investigation support**

Thank you.
Any questions?



Capital Law



Breakfast Briefing:
**Effectively managing a
multi-generational workforce**

Tuesday 18th March
9:00am – 10:00am



Managing Difficult Workplace Investigations — the importance of getting this right

Contact me:



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