

Kate Russell

How to Get Top Marks in ...

Tackling Workplace Investigations

First edition published in 2011

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How to Get Top Marks in ... Managing Poor Work Performance

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Readers' reviews

Kate's latest practical HR Headmistress' Guide is well structured, providing an easy to use framework to undertaking workplace investigations supported by 11 tips and some 17 examples termed 'learning from life's lessons'. Be assured that this book will be of use to those new to this important management task and also to those with experience as a reminder of what needs to be done and how to achieve a professional, auditable and robust result.

Professor Simon Burtonshaw-Gunn PhD, MSc, MA Divisional Leader: Business, Leadership and HRM - Northampton Business School Visiting Professor, Salford Business School - University of Salford, Manchester.

All organisations have to undertake workplace investigations at some point, but just reading this book will give everyone a good insight into exactly what should be taking place and by whom. This book is crammed full of really helpful tips and is heaven sent for all levels, from novice to expert. It is a thoroughly enriching and inspirational read with very clear and easy to understand guidelines. I would certainly recommend this book as a 'must have' to all HR professionals.

Annette Bulger, HR & Corporate Services Manager, Brian Currie Milton Keynes Limited

Do you want to conduct an efficient and effective workplace investigation? Then read this book! Covering all aspects of an investigation, you will be provided with all the essential knowledge, plus there are top tips, checklists and examples of letters to assist you. No investigation should go ahead without it!

Jo Clarke, HR Professional

So much is written about correct disciplinary or grievance procedures that it's surprising that the initial investigation, a crucial stage in the whole process, is so often only given cursory attention.

This book remedies this. It sets out the logical sequence to prepare for and conduct such investigations. I like its collaborative style and conversational, 'non-preachy' tone. The author obviously has first-hand experience of the concerns and trepidation often felt by managers faced with having to investigate an employee problem and can anticipate many of their questions. Chapter headings are clear so it's also easy to 'dip in' and find the answer to a particular question.

The book is not overburdened by legal jargon – it's a practical manual, giving straightforward advice to busy line managers. The working examples, the HR Headmistress tips and appendices all serve to support and illustrate this advice. It's a book to keep close to hand, not filed away on the book shelf!

Myra Heffernan FCIPD, Consultant, HR2HR Solutions Ltd.

The book gives an excellent practical step-by-step guide on how to complete workplace investigations. It will be useful for those who have never been involved in workplace investigations to understand what needs to be done and lessons in what can go wrong if they are not completed correctly. The book also serves as a useful reminder to those who have completed investigations. The HR Headmistress tips were very helpful, as were the real work examples. The case law put the text into context—a good read.

Catherine Beattie, HR Manager, Dermal Laboratories

I have completed a workplace investigation myself and I wished I had read this book beforehand. I found it easy to understand. I like the way Kate guides us through each process giving tips and life's lessons which would

have made my own experience easier. This book gives you the step-by-step process needed to take on workplace investigations.

Lisa Brook, H Arundale Ltd

An easy to read, step-by-step guide to tackling workplace investigations? Check. Clearly and concisely written, without an ounce of waffle? Check. Useful references to relevant case law? Check. Handy and reassuring sample documentation? Check. An excellent reference tool for me and also my managers and directors? Check.

Amanda McDermott, HR Manager, Kings House Management (UK) Ltd

About the author

After studying for a degree in business law, Kate Russell qualified as a barrister. She gained several years experience in operations, moved into human resources and later became a training specialist working in the manufacturing, distribution and service sectors.

She started Russell HR Consulting in 1998 and now divides her time between advising businesses of all sizes on HR issues and delivering a range of highly practical employment law awareness training to line managers, including a range of public workshops. Her unique combination of legal background, direct line management experience and HR skills enables Kate to present the stringent requirements of the law balanced against the realities of working life. She is a senior presenter for several companies and a popular public speaker. Kate completed an MA in strategic human resource management in 2004.

Kate is known as The HR Headmistress due to her combination of a devastating ability to cut through the mire, a certain briskness and unwillingness to tolerate absurdities and steely gaze over the reading glasses, all of which tend to make some people quiver. After a while, she stopped trying to pretend to be soft and fluffy and embraced her headmistress persona wholeheartedly. Well, 'if life hands you a lemon, make lemonade and sell it!'

She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service *Law on the Move*, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

For more information about Russell HR Consulting, visit www.russellhrconsulting.co.uk

Acknowledgements

Periodically, I take to my office to write a book, hedging myself round with reference manuals, files, pads of paper and mugs of tea. Like all writers I suffer frustrations which cause me to gnash my teeth and complain bitterly that I shall never get done on time; (real life has a habit of getting in the way while I'm trying to write!) Nevertheless, the writing element is still relatively straightforward compared with the rest of the work that goes into the making of a book.

My thanks therefore go to all those who helped to create the finished product; Sarah Vance for writing the foreword and contributing the 'so what' test; Dick Peake of Aperio Digital Investigations for his help with clarifying aspects of forensic information; Alex Caina for his excellent and efficient admin support; once again to Helen Coolen, my kind, encouraging editor; designer Caroline Massingham; Suzie Tatnell of Commercial Campaigns; indexer Robert Spicer; and the inimitable David Stoch of Meerkat PR.

Thanks are also due to the pre-publication reviewers who have kindly taken time from their busy schedules to read the manuscript and provide feedback; and to my clients for sharing their case histories with me to help me create Life's Lessons.

Last but not least, thanks as ever to Peter for his patience, support and willingness to soothe the pangs of irritable authorhood with tea and sympathy. Where would I be without you?

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email info@russellhrconsulting.co.uk for an up-to-date copy of statutory limits.

Keep up-to-date with employment law

Sign up for Kate's free e-newsletter: subscribe@russellhrconsulting.co.uk

Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

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Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

Abbreviations

ACAS	Advice, Conciliation and Arbitration Service
CA	Court of Appeal
CIPD	Chartered Institute of Personnel & Development
DPA	Data Protection Act 1998
DWP	Department of Work and Pensions
EAT	Employment Appeal Tribunal
ECJ	European Court of Justice
EEA	European Economic Area
ECHR	European Court of Human Rights
EqA	Equality Act 2010
ERA	Employment Rights Act 1996
HMRC	Her Majesty's Revenue and Customs
HSE	Health and Safety Executive
LEL	Lower earnings limit
SOSR	Some other substantial reason
SSP	Statutory Sick Pay
WTR	Working Time Regulations 1998

Foreword by Sarah Vance

'It wasn't me – it was him!'

'She made me do it!'

'I'm not the only one – everyone else does it!'

These are the familiar cries of someone suspected of misconduct and may mark the start of a workplace investigation.

The point of an investigation is to find the facts. Isn't that a bit obvious? Well, no, hardly ever. It is very easy to jump to conclusions and to assume that the person is guilty (or, equally, that he is not guilty).

A good investigation avoids that danger and enables you to gather the facts. It also ensures that you comply with your company's policies and procedures and employment law; it prompts you to undertake a risk assessment and take precautions if necessary and it helps you to ascertain whether there is a case to answer and, therefore, whether any disciplinary action should follow. If action of any kind is to be taken it must be fair and reasonable, and must take into account all of the circumstances, including any mitigation, offered. The purpose of your investigation is to ascertain what those circumstances might have entailed.

Few people would dispute that managing staff is the most demanding of management tasks and tackling staff misconduct is the hardest of all. You have to be willing to think the unthinkable about people, you have to be prepared to be unpopular and accept that you will be damned if you do tackle misconduct and damned if you don't; ignoring it and hoping it will go away, or covering it up, are actions guaranteed to store up trouble for the future. So often, a minor matter that could be readily addressed and resolved promptly, with the minimum amount of pain and disruption, is allowed to quietly fester. If the issue isn't addressed, it can eventually grow into a problem of monster proportions, by which time it has become more complicated, the impact has become greater and the possible outcomes are much more serious.

What makes for an effective investigation? Doing an investigation is like solving a puzzle and you need to gather all the pieces together in the right order before you can clearly see the whole picture.

You need to make sure you are familiar with your company's disciplinary policy and procedure and any policies and procedures that may have been breached by the misconduct. Focus on the facts and don't get distracted by hearsay, opinions and irrelevancies. Ask the awkward questions and wherever possible test your evidence by seeking corroboration. Keep an open mind and don't draw conclusions until you have assembled every piece of evidence. Make sure you take a balanced approach and pay due regard to any evidence that disputes the allegations, as well as any evidence that substantiates them. You only need to gather *enough* evidence – avoid the temptation to collect enough mud to see if it some of it sticks – and apply the 'So what?' test by asking yourself what this evidence tells you that substantiates the allegation or otherwise.

The test of evidence in an employment investigation is based on the balance of probabilities rather than being beyond all reasonable doubt. Your job is simply to assemble the evidence on which the decision can be made as to whether or not there is a case to answer and, if so, to determine the most appropriate management action to deal with it.

Remember that if a case ever proceeds to an employment tribunal, the judge will be interested in the process that's been followed as well as the rights and wrongs of the case. *Every* manager should observe an employment tribunal in action and learn the importance of following your own procedures and writing things down. It's the best free management development available.

Much of my knowledge and learning about workplace investigations has been gained as a result of painful trial and error and I have many scars to show for it!

You are much more fortunate; I firmly believe that you cannot go wrong if you follow the sensible, practical and clear advice contained in this book.

Sarah M Vance

Professional Standards and Complaints Manager

Portsmouth City Council

The role of investigations in the workplace

This book has been written to ensure that employers who are carrying out investigations have the correct tools to do a good job. So often, investigations are poorly executed. If you carry out a poor investigation, it's likely that the result of the discipline or grievance process will be equally poor – and that can lead to employment tribunal claims.

Much of this book focuses on disciplinary investigations; the skills, knowledge and approach for grievance investigations are, by and large, the same except that there aren't as many procedural requirements in grievance investigations.

Problems with employees come in all shapes and sizes, from small matters such as timekeeping through to complaints of harassment, money or property going astray, poor work performance and accidents and injuries. When problems such as these occur, employers must investigate and determine, as far as is reasonably possible, what really happened. There is no magic formula for conducting workplace investigations. They vary based on the issues and the people involved. Some investigations will be completed quickly with no need to interview witnesses. Others may require a far more detailed approach, involving the interviewing of a number of witnesses.

An investigation is a fact-finding mission – it is no more complicated than that. The purpose is to find out, on a balance of probabilities, whether there is a case to answer; it is not to make a judgment about an employee's guilt. The investigating officer's role is simply to determine whether there is a case to be explored formally through the discipline process. It will be for the disciplining officer to decide whether the case presented by the investigating officer establishes a breach of performance or conduct.

Note that in some organisations, the investigating officer collects the facts then passes them on to someone else to determine whether there is a case to answer. Then (where there is a case to answer) this decision maker passes it on

to a third person to chair the discipline. If that is the procedure in your organisation you should follow it. That said, there is no need to do this and it is not required by the ACAS Code of Practice. It's not my preferred route as it's unwieldy and slows down the process. Indeed, in my view, the investigating officer is probably the best person to make the decision about whether there's a case to answer and write to the employee because he'll have the facts at his fingertips.

An investigation will be triggered either by an awareness that something's not quite right, or by a specific event which demonstrates that the employee does not meet workplace requirements. These events could include, for example, allegations of inappropriate language or conduct. Other prompts might include:

- customer complaints
- an increase in accidents or injuries
- a reduction in productivity
- increased wastage
- falling sales
- an increase in absence
- a visible failure to meet your reasonable management standards, for example, wearing trainers in an environment where smart shoes are required.