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Investigations & an Accused Employee's Right to the Disclosure of Evidence

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Agenda

“Investigations – what is the right of an employee who is accused of bullying to see the witness statements or the outcome of a grievance procedure?”

- The general position
- The contractual position
- The Acas Code of Practice and accompanying Guide
- Fair dismissal legislation
- Case law



The general position

- Where an employee raises a grievance about another employee, there is no specific legal requirement that the employer must provide the accused employee with copies of statements made by either the complainant or by other witnesses
- There is no universal requirement of natural justice or general principle of law that in all cases an employee must be shown copies of witness statements obtained by an employer about the employee's conduct...it is a matter of what is fair and reasonable in each case
- However, a prudent employer would normally give statements and copies of all other evidence to the accused employee (albeit protecting the identities of anonymous informants in appropriate cases)...



The contractual position

- The starting point for management will be the employer's own policies and procedures
- Both grievance & disciplinary procedures will typically include provisions...
 - Stating that they comply with the relevant Acas Code of Practice; and
 - Requiring that all evidence relied upon in respect of any allegation of wrongdoing should be disclosed to the accused employee
- If such grievance & disciplinary procedures are contractual then a breach of any such provision could result in a claim
- Even if not contractual, a breach may be relied upon to support any claim of unfair treatment or discrimination



The Acas Code of Practice

- The Acas Code of Practice on Discipline & Grievance Procedures is not law, but Employment Tribunals...
 - Will take it into account when considering cases; and
 - Can increase (or reduce) awards by up to 25% following an unreasonable failure by the employer (or employee) to follow the Acas Code
- The Acas Code is supplemented by 'Discipline & Grievances at Work: The Acas Guide', which contains useful guidance developed from case law



The Acas Code of Practice

- The introduction to the Acas Code sets out some key principles for employers when handling either disciplinary or grievance cases, including:
 - Employers should carry out any necessary investigations; and
 - Employers should inform employees of the basis of the problem...
...and Employees should have an opportunity to put their case in response...
...before any decisions are made



The Acas Code of Practice

The Acas Code then provides guidance when dealing with disciplinary matters:

- The employer should establish the facts of each case, being sure to:
 - Carry out all necessary investigations; and
 - Keep an open mind / look for evidence which both supports the employee's case as well as evidence against it
- The Acas Code explains that the nature and extent of the investigations will depend upon the seriousness of the matter



The Acas Code of Practice

- If it's decided that there is a disciplinary case to answer then the employer should inform employee of the problem in writing:
 - The notification should include sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting;
 - It would normally be appropriate to provide copies of any written evidence, including any witness statements, with the notification



The Acas Code of Practice

- At the disciplinary meeting:
 - The employer should explain the complaint against the employee and go through the evidence that has been gathered;
 - The employee should be allowed to set out his/her case and answer any allegations that have been made;
 - The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses;
 - The employee should also be given an opportunity to raise points about any information provided by witnesses



The Acas Guide

The ACAS Guide provides additional advice when preparing for a disciplinary meeting, explaining that an employer should:

- Ensure that all the relevant facts are available including, where appropriate, written witness statements;
- Allow the employee time to prepare his or her case. Copies of any relevant papers and witness statements should be made available to the employee in advance;
- The employer should state precisely what the complaint is and outline the case briefly by going through the evidence that has been gathered
- The employer should ensure that the employee and his/her representative are allowed to see any statements made by witnesses and to question them
- The employer should give the employee the opportunity to state their case and answer any allegations that have been made



Fair Dismissal legislation

The Employment Rights Act 1996 (“ERA”) gives employees the right not to be unfairly dismissed (subject to certain pre-conditions)...

...For a dismissal to be fair, the employer must show:

- That the dismissal was for one of five potentially fair reasons set out in the ERA
- That the employer adopted a **fair procedure** when dismissing the employee; and
- That the decision to dismiss fell within the band of reasonable responses open to the employer



Case law

British Home Stores v. Burchell [1978] [EAT]:

- Guidance for employers investigating denied allegations of misconduct:
 - First the employer must establish that, as a matter of fact, it believed in the employee's guilt;
 - Secondly, the employer must show that it had in its mind reasonable grounds upon which to sustain that belief; and
 - Thirdly, the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case at the stage at which it formed its belief on those grounds...

...Thus an employer must act fairly in light of the facts of each case...



Case law

Hussain v. Lonex plc [1999] [CA]:

- The question in a case of dismissal for misconduct is whether there was a fair and reasonable investigation of the alleged misconduct before the decision to dismiss was made;
- There is no universal requirement of natural justice or general principle of law that in all cases an employee must be shown copies of witness statements obtained by an employer about the employee's conduct. It is a matter of what is fair and reasonable in each case;
- What emerges from the authorities is not that there is a failure of natural justice where witness statements are obtained but not disclosed, but that there is a failure of natural justice if the essence of the case against the accused is not sufficiently explained in advance



Case law

Turnbull v Mecca Bingo Ltd [2002] [EAT, Scotland]:

- In appropriate, but quite exceptional circumstances, it could be proper for an employer to give an employee less detail of accusations against her than would generally be required;
- In the instant case, the bullying alleged had been of a violent, physical character, and had been carried out by the employee and her associates. Moreover, the employer had undertaken extensive enquiries and had determined that the employee had been guilty of appalling misconduct towards a fellow employee;
- Other employees had been nervous of making any complaints and the tribunal had therefore been entitled to conclude that the employer had been justified in not putting to the employee more details than they had



Case law

Santamera v Express Cargo Forwarding Ltd [2003] [EAT]:

- There is no rule of law which renders it incumbent on an employer, when dismissing an employee for misconduct, to allow the accused employee the opportunity to cross-examine the complainant;
- Whilst there may be cases in which it will be impossible for an employer to act fairly and reasonably unless cross-examination of a particular witness is permitted, the issue under fair dismissal law is always reasonableness and fairness;
- In each case, the question is whether or not the employer fulfils the test laid down in *British Home Stores Ltd v Burchell* and it will be for the tribunal to decide whether the employer acted reasonably and whether or not the process was fair



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