

Inappropriate behaviour

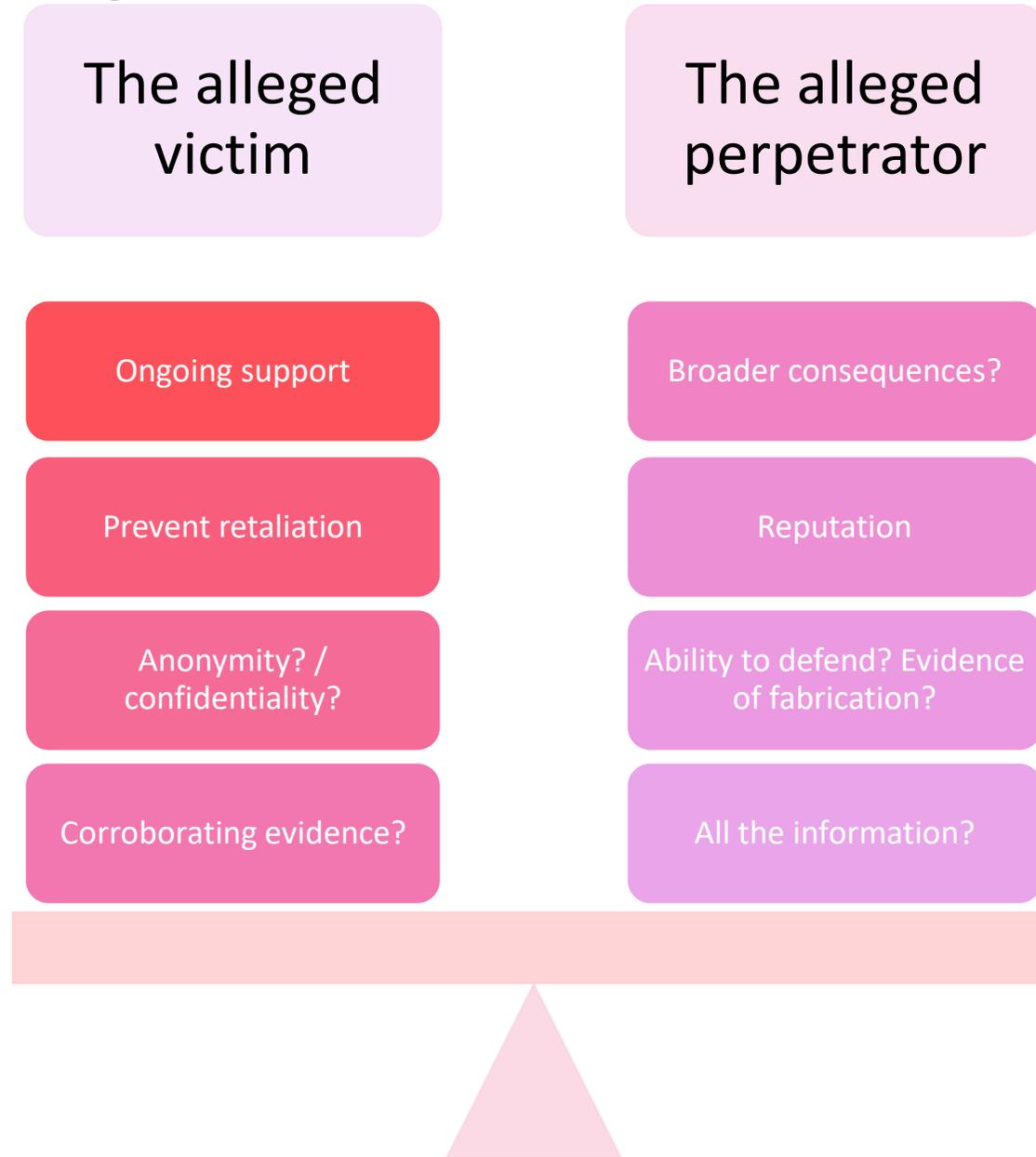
How do you balance
confidentiality and
transparency?

Andrea Finn

24 November 2022

A delicate balancing exercise...

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Why does it matter? (Risks of getting it wrong and why to get it right)



- Importance of fairness and due process
- Impact on individuals
- Impact on working environment
- Reputational concerns
- Regulatory consequences
- Focus on culture
- Legal risk – claims/ costs
- Possible EHRC action
- Spin out risk from badly managed/ delayed/ stressful process
- And ACAS.....

“Providing a workplace where employees have safety and dignity is no less important than other corporate responsibilities such as preventing money-laundering or protecting personal data.”

Women & Equalities Committee

Why is it important to try to get it right?

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ACAS Code of Practice on disciplinary and grievance procedures (the “ACAS Code”) is a statutory Code



ACAS has also published guidance on handling disciplinary and grievance procedures in Discipline and grievances at work: the ACAS guide (the “Guide”).



ET can award 25% uplift for unreasonable failure to follow the Code. If an employee has unreasonably failed to follow the Code they can reduce any award by 25%

there were ... such significant failings, that in some respects there may as well not have been a grievance process at all
(Macken v BNP Paribas London Branch
EJ Taylor para 318)



Project Plan and Timeline

- Undertake scoping exercise
- Is an investigation necessary?
- Identify relevant individuals / sources / data / documents
- Who will deal with the matter?
- Consider confidentiality
- Consider victimisation/retaliation
- Choose an investigator
- Choose the decision maker
- Is suspension necessary? Any alternatives?
- Arrange interviews

Handling complaints: common challenges

Historical complaints

- Initial review: severity and specificity of complaint
- Time limit constraints to claims but:
 - Ongoing threat to workplace environment
 - Reputational risk
- Apply usual harassment policy and process
- Has the pendulum swung too far the other way?

Complaints about senior individuals

- Impartiality of investigation more difficult to establish
- External investigator? What is “independence”?
- Reassurances/warnings on non-retaliation key

Handling complaints: common challenges

Anonymous complaints

- Balance concerns raised by anonymous complaint with position of alleged perpetrator
 - Managing stress/mental health risks
 - Pastoral support; employee assistance/counselling programme
 - Limit spread of information relating to the complaint
 - Leave a clear paper trail

Handling complaints: common challenges

Witnesses wanting anonymity/confidentiality

- Offer discretion, not confidentiality unless very specific reasons
- Provide reassurances/warnings on non-retaliation
- ACAS Guidance: *“avoid anonymising witness statements whenever possible.... Only in exceptional circumstances where a witness has a genuine fear of reprisals.”*

Personal devices

- Whats App & text
 - Check policy
 - Be alert to selective provision of evidence

Covert recording

- Prior to investigation?
- During investigation?
 - Increasingly common
 - Evidence likely to be admitted
 - Request no recording

Handling complaints: common challenges

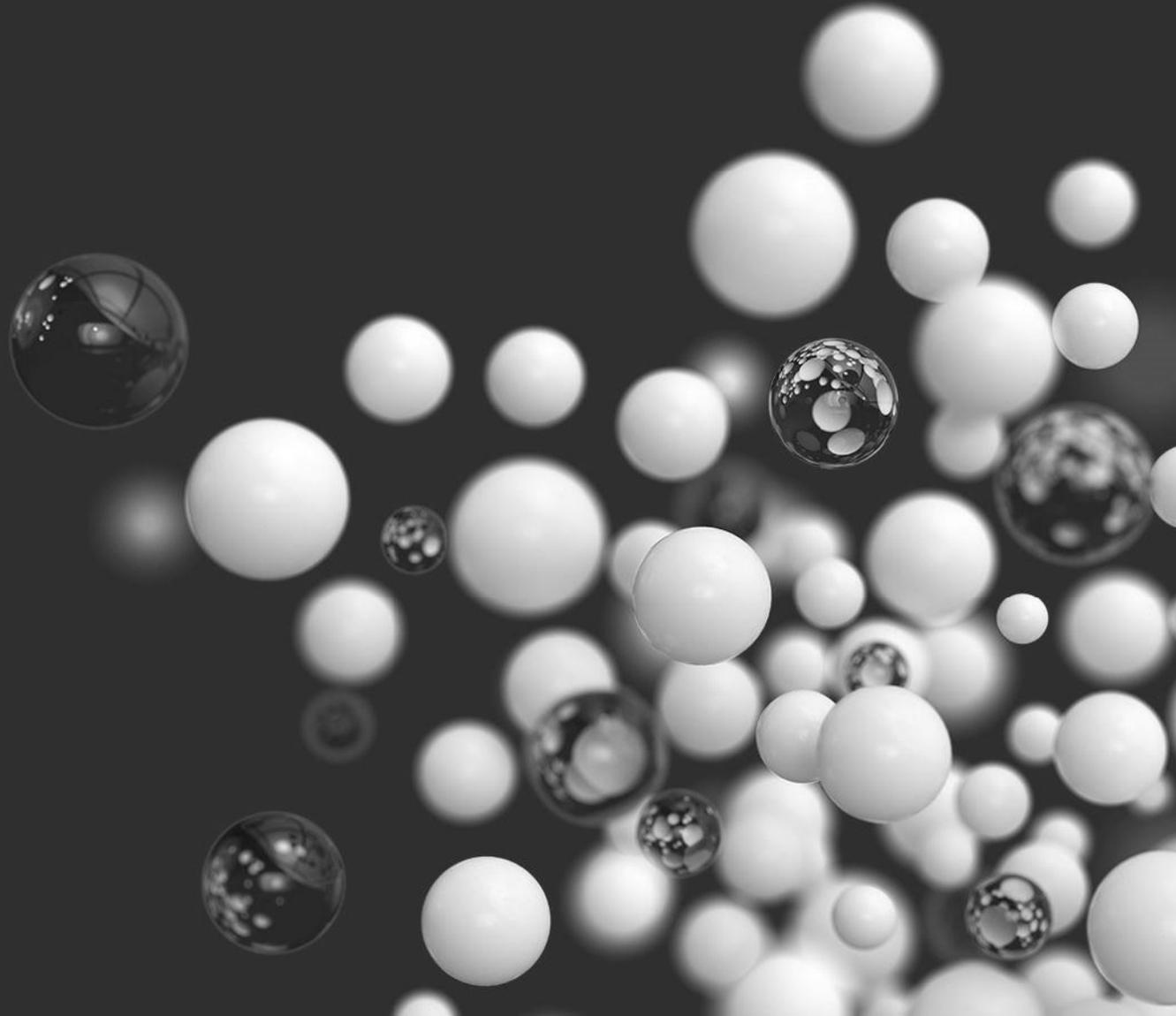
Investigation meetings

- Should employees be accompanied? What about request to be accompanied by a lawyer?
- How much notice should be given? How much information?
- Tone of meeting – need for sensitivity, not a cross examination, not prejudged
 - Person complaining
 - Duty towards alleged perpetrator – at what stage is independent advice needed?

Maintaining confidentiality

- Maintaining confidentiality – “need to know” – fact and content
- What if allegations leak?
- Timing, communication and updates

Case Study



Case Study

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HR receives an anonymous complaint by email from X@abc.com. The complaint relates to an MD, James.

The complaints relate to a period over 10 years ago and include the following allegations:

James led and oversaw a culture of pervasive sexism within his team. This included:

- Making suggestive comments to women on the team.
- Giving nicknames based on physical characteristics.
- Ranking female colleagues/contacts as “bid” or “offer” depending on attractiveness.

On one occasion, James made a pass at X whilst sharing a taxi home after an evening event. He subsequently repeatedly asked her out for drinks and sent flowers to her flat.

This made X deeply uncomfortable, but she did not make a fuss at the time as those who rejected James’ advances or complained were side-lined/ not promoted/ received lower bonuses. On the few occasions when concerns were raised, the concerns were ignored.

What are your next steps?

Case Study (continued)

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You think you know who X is but decide to undertake some initial investigations based on the Bank's records. Your initial investigations cover a 2-3-year period around the relevant time and identify:

- Limited documentation on file
- No similar complaints on record
- No dismissals in team in that period
- Only leaver was a man
- No women hired into the team in that period
- No women promoted in that period
- Bonus decisions look fairly random – some women seem to receive less than comparable men – no record of justification

What are your next steps? What does fair look like given serious concerns raised?

Contacts



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