

**Off-the-Record Allegations: How should you handle 'off the record' allegations from employees who explicitly state they 'want to make HR aware' but 'don't feel comfortable' with action being taken because of a power imbalance?**

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## What will be covered:

- **What allegations have been raised**
    - Against who?
    - Which policies need to be considered?
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- **What are the options?**
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- **Alternative business-led investigation**
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- **Consequences of doing nothing**
    - Disclosure obligations
    - Future litigation
    - DSAR requests
    - Sexual harassment preventative duty
    - Reputational damage
-

## What allegations have been raised?

- Has the employee raised a grievance?
- Has the employee raised allegations of harassment?
- Is the allegation a whistleblowing complaint?
- Is the allegation related to the culture of the workplace?



## Who are the allegations against?

- Has the employee raised an allegation against another employee?
- Has the employee raised an allegation about the workplace overall?  
For example, general conduct/culture of a team, department or company approach.



## What policies are in place that should be followed?

- The nature of the allegations the employee has raised will impact the formal process to be followed
- It may be that multiple policies need to be considered
- What alternative options are available that do **not** involve a formal investigation?



## What are the options?

- The ACAS Guidance on Conducting Workplace Investigations (“ACAS Guidance”) states that *“only in exceptional circumstances where a witness has a genuine fear of reprisals should an investigator agree that a witness statement is anonymised”*.
- The ACAS Guidance explains this in a disciplinary context, because it is likely to disadvantage the employee under investigation who will not be able to fully understand the evidence against them without details of the reportee. This can apply similarly to a grievance situation.
- Can anonymity be maintained?
- How can we make the witness feel more comfortable?



## What are the options?

- Are there any safeguarding measures that could be implemented?
- Buddy/ mentorship/point of contact
- Mediation

NB – any other duty of care support? EAP?



## What are the options?

### Safeguarding measures?

Could safeguarding measures be appropriate to consider so the employee feels more comfortable / safe to formally report the allegation(s)?

- Work from home perhaps on a temporary basis while investigations are being carried out;
- Move to a different department or change teams on a temporary basis;
- Change line manager temporarily.

#### **Benefit:**

- These measures could get to the root of the “power imbalance” that the employee feels.



## What are the options?

### **Mentorship/Buddy support**

Could a buddy/mentor be offered so that the employee feels more comfortable reporting issues to someone other than HR?

- Could this act as a way of monitoring behaviour? For example, on one occasion it is noted but, on another occasion, it is investigated further.
- Whether this is appropriate will depend on the nature of the issue being reported.

## What are the options?

### Mediation

*"A confidential and voluntary process in which a neutral person helps people in dispute to explore and understand their differences so that they can find their own solution."*

#### Benefits:

- Less stressful than formal processes
- Parties control and create own solution
- May remove need for formal procedure
- Promotes a culture of managing conflict positively
- Relatively quick and offers flexibility
- Confidential

BUT....need employee "buy in" and participation



## What are the options?

### **Practicalities of Mediation:**

- Little preparation needed by parties
- No paperwork required
- No notes
- No one else needs to know about it
- Details of discussion do not need to be shared with anyone
- Only the parties and the mediator involved
- No witnesses
- No blame/right and wrong
- Aims to improve the employment relationship/communication

NB – important mediation is handled in a sensitive way for both parties

## What are the options?

### Practicalities of Mediation:

- Good faith agreement, not legally binding
- No representation (can be optional)
- Can be arranged quickly
- Less time-consuming (average a day and a half)
- Cost-effective
- Less stressful
- Aims to maintain the employment relationship



## When is mediation particularly appropriate?

- When the conflict is causing “absence”
- Behaviour labelling e.g. bullying, harassment, disrespect
- Complaints about management style
- Communication difficulties/impasses
- Dealing with emotional impact, feelings, needs
- Peer-to-peer conflicts
- Line management/report conflicts
- More about relationships and behaviour rather than “rights”
- Personality clashes

## When is mediation not appropriate?

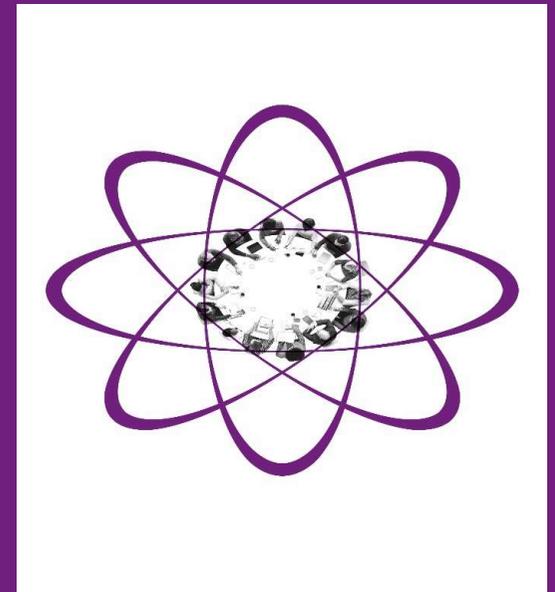
- When one or both of the parties are not committed to the process
- As a method of dealing with overt and actual acts of discrimination or harassment
- As a method of dealing with overt and actual acts of violence or abuse
- Allegations of criminality
- When one or both of the parties may not be mentally capable of pursuing the process
- When one or both of the parties wish to enforce a “right”

## Business Led Investigation – Culture and Behaviour

- Following “off the record” allegations, the business can consider a business led investigation.
- A business-led investigation can frame the underlying concerns of the employee’s allegations as a basis to investigate certain issues – but can be wider as appropriate.
- The investigation should not reveal the identity of the employee raising the off-the record allegations and any allegations will be “de-personalised”.
- This option can involve extensive resources and will usually be broader in scope than an employee-raised grievance investigation.
- Might be appropriate to use external/independent investigator.
- Process can be unsettling for a wider employee population/team or department impacted.

## Business Led Investigations – Culture and Behaviour

- No requirement to provide an outcome to an individual.
- Individual raising concerns may be happy to support investigation
- The investigation may help the employer uncover issues and identify any areas of concern or specific individuals that might require further investigation, training, or disciplinary action.
- Is there an appetite from the business to understand potential issues, and take action if these are uncovered?



## Consequences of doing nothing

What if an employee makes an “of the record” allegation and there are no alternative options available to proceed with a formal process - should the employer do nothing?

### Consequences:

- Breakdown in employment relationship
- Potential future litigation
- Placing other employees at risk?
- DSAR requests
- Disclosure obligations
- Sexual harassment preventative duty
- Reputational damage



## Consequences of doing nothing - Future Litigation/Disclosure Obligations

- Ongoing employee relation issues/breakdown in relationships
- Impact on health/mental health of employees involved
- Constructive unfair dismissal claims
- Whistleblowing/Discrimination claim
- Another employee may raise similar issues/bring an ET claim for an issue that the employer was aware about
- Disclosure obligations in litigation: ongoing duty to disclose documents relevant to an issue in a claim that in a party's possession, custody or control

## Consequences of doing nothing – DSAR Requests

- Frequently used for tactical reasons, particular since repeal of old statutory discrimination questionnaires.
- ICO consider right of access is “purpose blind” i.e. for purposes of compliance, does not matter why an employee is making a DSAR (even if “fishing expedition” ahead of or in parallel with litigation).
- Scope of DSAR is often wide, resulting in a huge number of documents to be reviewed and associated time and cost.



## Consequences of doing nothing - Duty to prevent sexual harassment in the workplace

- Worth bearing in mind – new sections 40A and 124A of the Equality Act 2010 came into force on 26 October 2024.
- These provisions impose a **positive** duty on employers to take reasonable steps to prevent the sexual harassment of employees in the course of their employment.
- Employment tribunals have discretion to award an uplift of up to 25% where they find that there has been a breach of that duty.
- ECHR have issued an eight-step guidance for employers on preventing sexual harassment at work.
- Should bear this in mind when potential issues being flagged by employees, even on an anonymous/off-the record basis.

## Consequences of doing nothing - Reputational Damage

- Reputational damage can be on a wide scale (e.g. where story published in the media)
- The reputational damage could cause issues with recruitment/ impact business relationships with suppliers, contractors or clients.



# Reputational damage



The screenshot shows the top of a Sky News website. The header includes the Sky News logo, a weather widget for 3 Dec with 8° and 5° temperatures, and a 'Watch Live' button. The navigation menu lists Home, UK, Politics, World, US, Money, Science, Climate & Tech, Ents & Arts, Programmes, Videos, and More. The main headline is "'Toxic' and 'vindictive' culture at Welsh Rugby Union revealed in damning report". Below the headline is a sub-headline: "The Welsh Rugby Union's chair admitted there was 'a lot of work to do' to win back trust after a report uncovered a culture of bullying and discrimination, where slurs about women in same-sex relationships were being used." At the bottom left, it says "© Tuesday 14 November 2023 22:20, UK".

Steve Phillips resigned as WRU chief executive in January 2023 after allegations of sexism and misogyny were made against the governing body

**An independent review has found aspects of the Welsh Rugby Union (WRU) culture were sexist, misogynistic, racist and homophobic and not properly challenged.**

The WRU environment also had elements of bullying and discrimination, and was described as toxic by some employees.

The governance was found to have not been fit for purpose.

The WRU board was also described as dysfunctional, ill-equipped and unable to address the serious institutional and culture problems it faced.



The screenshot shows the top of an ITV News website. The header includes the ITV X logo, the ITV NEWS logo, and a navigation menu with Your Area, Politics, Royal, World, Climate, and Health. The main headline is "Two decades of complaints: Who knew about allegations of inappropriate behaviour by Gregg Wallace?". Below the headline is a sub-headline: "GREGG WALLACE | ENTERTAINMENT | MASTERCHEF". At the bottom left, it says "© Tuesday 3 December 2024 at 12:49pm". Below the text is a photograph of three women in kitchen aprons, likely from the MasterChef show.



The screenshot shows the top of an ITV News website. The header includes the ITV X logo, the ITV NEWS logo, and a navigation menu with Your Area, Politics, Royal, World, Climate, and Health. The main headline is "S4C in serious crisis after 'culture of fear and secrecy' revealed at Welsh broadcaster". Below the headline is a sub-headline: "WALES | S4C | BROADCASTING | Wednesday 6 December 2023 at 9:59pm". Below the text is a profile picture of Rhys Williams, Wales Reporter, and a large S4C logo.

## Summary

- Consider what allegations are being made and who the allegations are being made against.
- Are there policies that need to be followed?
- Consider what alternative options are available to make the employee feel more comfortable/reassure them with regards to non-retaliation and other measures as appropriate.
- Business led investigations can be a potential solution where other options are not viable.
- Consider the legal consequences of taking no action particularly the new preventative duty to prevent sexual harassment and reputational damage to the employer.





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