

# White Paper Conference on Dismissal

Anonymous Complaints

**21 November 2023**

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# The Question

If no-one will go on record – stating “I don’t want you to do anything”, “I’m just letting you know” – but the complaints keep coming about that one person, when do you take decisive action?



## **Some preliminary issues**

# Terminology

## ***Anonymous and confidential complaints***

- Anonymous complaints
  - employer does not know identity of complainant
  - may have been raised through whistleblowing hotline etc
- Confidential complaints
  - employer knows complainant's identity
  - complainant does not want their identity revealed to subject of complaint

## Employer's duties

***Consider what duties employer owes to:***

- the complainant
- other employees
- the subject of complaint

# Employer's duties

## ***Duties owed to the complainant***

- Maintain trust and confidence

*Employers must not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between employer and employee*

- Must provide opportunity to obtain redress of grievances
- Must provide safe working environment
- Must not victimise complainant contrary to EqA 2010
- Must not dismiss or subject complainant to detriment for making protected disclosure contrary to ERA 1996

# Employer's duties

## ***Duties owed to other employees***

- Must provide safe working environment
  - common law of negligence
  - statutory duties under Health and Safety at Work Act 1974
  - implied term of employment contract
- Must take reasonable steps to prevent physical or mental injury/harm
- Must take reasonable steps to protect employees from unacceptable behaviour (such as bullying/harassment)
- New statutory duty to take reasonable steps to prevent sexual harassment due to come into force in 2024

# Employer's duties

## ***Duties owed to the subject of the complaint***

- Maintain trust and confidence
- Implied duty to conduct disciplinary processes fairly?
  - *Burn v Alder Hey Children's NHS Foundation Trust* (2021)
  - *Lim v Royal Wolverhampton Hospitals NHS Trust* (2011)
- Duty not to unfairly dismiss (where employee has more than two years' service)

# Unfair dismissal

- Key questions to consider in misconduct cases
  - Did the employer genuinely believe that the employee was guilty of the misconduct?
  - Did the employer have reasonable grounds for that belief?
  - Was the belief based on a reasonable investigation?
- If dismissed, was dismissal within band of reasonable responses?
- Employer must not act on basis of mere suspicion
- Accused must know the case they have to answer. Likely to be disadvantaged if identities of witnesses are not disclosed

# Unfair dismissal

## ***When can identity of witnesses be withheld?***

- Need for confidentiality of witnesses' identity
  - e.g. genuine fear of reprisal
- Balance need for confidentiality against accused's need to know details of case against them
- *Ramsey v Walkers Snack Foods* (2004)

## Unfair dismissal

*When can identity of witnesses be withheld?*

*Ramsey v Walkers Snack Foods (2004)*

- R worked at Walkers crisps factory
- R and some colleagues implicated in theft of cash from promotional packets of crisps
- History of intimidation at factory and factory located in small, tightly knit community
- Employer considered threat of reprisals to be real
- Witnesses requested that their identities not be disclosed
- Disciplinary manager did not know their identities
- R dismissed and brought claim for unfair dismissal

## Unfair dismissal

*When can identity of witnesses be withheld?*

*Ramsey v Walkers Snack Foods (2004)*

- R claimed that Walkers had:
  - failed to corroborate statements against him
  - no reasonable basis for believing allegations against him were true
- ET dismissed claim and R appealed
- EAT held that ET had been entitled to find that:
  - offer of anonymity was not unreasonable
  - reasonable that disciplinary manager did not know their identities
  - fairness of disciplinary process had to be balanced against very real risk of reprisals

# Unfair dismissal

## ***When can identity of witnesses be withheld?***

*Linfood Cash & Carry v Thomson* (1989)

- Information from informant should be put in statement initially without erasure/redaction
- Consider:
  - witness' opportunity/ability to observe relevant incidents
  - relevant circumstantial evidence
  - whether witness has any reason to fabricate evidence
- Seek corroboration
- Consider character/background of witness
- Is witness genuinely fearful of reprisals?
- Witness statement should be made available to accused with appropriate omissions/redactions
- Consider adjournment if accused raises issues that require further investigation

## Unfair dismissal

### *When can identity of witnesses be withheld?*

#### *Woods v ACAS (2019)*

- W investigated for numerous allegations of sexual harassment towards younger female colleagues
- Investigators presumed that witness evidence would be anonymous and guaranteed it even though some witnesses had waived it
- No participant had expressed fear of reprisals (issue not explored by investigators)
- ACAS did not follow own policy and guidance
- ET held that dismissal was unfair as W was at a disadvantage and unable to offer rebuttal evidence

# Unfair dismissal

## ***When can identity of witnesses be withheld?***

*Tai Tarian v Christie* (2019)

- C worked for housing association as carpenter. C suspended after tenant (T) alleged C had made homophobic comments while working at her flat
- Employer interviewed T who requested anonymity
- C denied making homophobic comments and produced character references
- C dismissed and brought claim for unfair dismissal
- ET held dismissal was unfair concluding that employer did not hold genuine belief that C had made comments and/or dismissal was outside band of reasonable responses
- EAT allowed appeal – no logical or substantial grounds to say that employer acted unreasonably in accepting T's evidence

# Case study

## Case Study

- You are the HR director of Windspill Consulting, a firm which advises clients on their transition to green energy. The firm has about 250 employees.
- You arrive in the office to find an envelope on your desk containing an anonymous handwritten letter which states as follows:

*“As you are the HR Director of this company, I thought you ought to know that the way Rob treats his team is outrageous – we work late every night to meet deadlines and then get shouted out for not delivering. I’m not the only one who feels this way but no-one will speak up as we’re all too scared of losing our jobs. I’ll leave it with you.”*
- Rob is the firm’s head of client development. He joined the firm when it was set up 10 years ago and has close relationships with all of its key clients. He has about 20 employees in his team and reports to the firm’s CEO, Sarah.

## Case Study

What would you do next?

1. appoint someone to conduct a full investigation
2. inform Sarah about the allegations
3. speak to Rob about the allegations
4. conduct a staff engagement survey
5. something else
6. nothing

## Case Study

- A few weeks later, Hannah, a member of Rob's team, asks to meet with you on a confidential basis.
- Hannah tells you that she was working all weekend to complete a proposal for a client which Rob had requested to see by 9am on Monday morning. When she had said that she would not be able to get it to him until 12 noon, he had shouted at her saying "*For f\*ck's sake, just get it f\*cking done will you?*".
- Hannah says that this was not an isolated incident and that Rob's behaviour towards three or four members of the team has been unacceptable for a while now.
- She says that she does not want to bring a grievance and does not want Rob to know that she has spoken to you as she fears losing her job.

## Case Study

What would you do next?

1. Assure Hannah that on no account will her identity be disclosed to Rob
2. Take a statement from Hannah and try to get further details from her
3. Provide assurances to Hannah that on no account will she lose her job for raising these allegations
4. Speak to Rob and tell him to moderate his behaviour
5. Instruct a senior colleague to conduct a full investigation
6. Suspend Rob pending a full investigation
7. Something else?

## Case Study

- You ask one of your senior HR managers, Prakash, to conduct an investigation and speak to three other members of the team who have been identified by Hannah as having suffered similar treatment from Rob
- Their stories are largely consistent and the evidence suggests that Rob:
  - regularly sets unreasonable deadlines
  - is highly critical of their work without good reason
  - regularly swears and shouts at them in the office
  - has said that they will lose their jobs if they don't perform
- Prakash has taken statements from them but they are all adamant that they do not want their identities disclosed to Rob

## Case Study

What would you do next?

1. Proceed to a disciplinary hearing and disclose the witnesses' identities as Rob needs to know the case against him
2. Proceed to a disciplinary hearing but providing edited versions of the statements so that the witnesses' identities are not disclosed
3. Speak to Rob informally about the relevant issues because it's not possible to hold a fair disciplinary hearing without disclosing the witnesses' identities
4. Something else

## Key points

- Ensure that you have anonymous/confidential reporting systems in place
- Once a complaint is made (even if anonymously) you are “on notice”
- Do not promise to keep witnesses’ identity confidential
- Statements should only be anonymised in exceptional circumstances
- Consider whether the witness has a genuine fear of reprisals
- Consider what assurances can be given to the witness regarding retaliation
- Can the witnesses’ evidence be corroborated by other witnesses or by documentary evidence?
- Is there any reason why the witness might not be being truthful? What might their motivations be?



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