



CLYDE & CO

# Disciplinary Investigations

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**In a disciplinary investigation, if your role is to advise but not alter decisions, what do you do when an investigating manager's recommendations for further action are just wrong or don't fit the allegations?**

# Why are effective investigations important?

- Ensure consistency and fairness
- Promotes confidence
- Reduce legal risk
  - Unfair dismissal
  - Breach of contract
  - Constructive dismissal
  - Discrimination

# Unfair dismissal

A dismissal will be unfair unless:

It is for one of 5 potentially “fair” reasons.

The employer acted reasonably in treating the reason as a ground for dismissal.

# Breach of contract

- Investigation must be undertaken in such a way that does not breach contract of employment
- Express terms
- Implied terms

# Constructive dismissal

- Employees can resign and claim they have been constructively dismissed
- Breakdown of mutual trust and confidence
- May resign in response to breach of express term

# Discrimination

- What is discrimination?
- How can discrimination be alleged as part of the investigation process?

# Investigating disciplinary matters

- Is there sufficient evidence to support employer's genuine belief of employee's misconduct ?
- Has a fair procedure been adopted?
- Have you carried out an investigation and allowed the employee an opportunity to respond?

# The Role of the Investigating Officer

- To be fair and objective
- Establish the facts and report the findings
- Reach a conclusion on what did or did not happen
- Investigate if there is a case to answer

# Roles

***West London Mental Health NHS Trust v Chhabra 2013 UKSC 80:***

**Investigator:** *“The case investigator gathers relevant information by interviewing people and reading documents...He or she can only record the conflicting accounts of the interviewees and, where appropriate, express views on the issue.”*

**Case manager:** *“If the case investigator were to conclude that there was no prima facie case of misconduct, there would normally be no basis for the case manager to decide to convene a conduct panel.*

*But if the report recorded evidence which made such a finding by the case investigator perverse, the **case manager would not be bound by that conclusion...The case manager can make his or her own assessment of the evidence which the case investigator records in the report.**”*

# Role of HR

## **Chhabra (continued):**

*“There would generally be no impropriety in a case investigator seeking advice from an employer’s human resources department, for example on questions of procedure.*

*I do not think that it is illegitimate for an employer, through its human resources department or a similar function, to assist a case investigator in the presentation of a report, for example to ensure that all necessary matters have been addressed and achieve clarity. But, in this case, [the investigator’s] report was altered in way which went beyond clarifying its conclusions.”*

*“The report had to be the product of the case investigator.”*

# Limits to the role of HR

## *Ramphal v Department for Transport UKEAT/0352/14*

- HR must limit advice essentially to questions of law and procedure and process and avoid straying into areas of culpability.
- HR can give advice in respect of consistency but must not advise on what the appropriate sanction is in respect of the investigator's findings of fact.
- If the integrity of the decision to dismiss has been influenced by persons outside the procedure it will be unfair.

# Advising and redrafting

## ***Dronsfield v Reading University 2016 ICR 1107***

- Earlier drafts more favourable to the employee, but passages were omitted or changed in the final draft, following discussions between the investigator, HR manager and in-house employment solicitor.
  - The Employment Tribunal accepted the final version represented the investigator's genuine conclusions after receiving honest and unbiased advice.
  - The Appeal Tribunal, however, considered the question was whether it was reasonable for the university to dismiss in circumstances where there had been excised from the investigation report important conclusions, favourable to the employee.

**In a disciplinary investigation, if your role is to advise but not alter decisions, what do you do when an investigating manager's recommendations for further action are just wrong or don't fit the allegations?**

# Reflections

- When are recommendations for further action “wrong”?
- Make sure it doesn't happen!
  - Appoint the right investigator
  - Prepare clear Terms of Reference
  - Appoint HR officer as investigator?
- Advise Case Manager / Disciplinary Officer appropriately:
  - Have all allegations been properly investigated?
  - Do you require further investigation?

- Remind case manager they are not bound by that conclusion – they can make their own assessment of the evidence
- Give advice in respect of consistency
  
- Take legal advice – benefit from privilege!
- If you are not protected from privilege – don't put it in writing



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