

White Paper Conference

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The question posed....

How do you determine the outcome in “word-against-word” situations involving inappropriate behaviour and/or harassment on official or unofficial work nights out?

Breaking this down...

Dispel some myths

How to deal with “word against word” evidence – the standard of proof required

Practical tips - what factors tip the balance?

Lessons from case law

Our “answer”



Dispelling some myths....

A woman with long dark hair is sitting at a desk in an office. She has her right hand pressed against her forehead, looking down with a stressed or frustrated expression. The desk in front of her has papers, a pen, and a small potted plant. The background is dark and out of focus.

This is nothing to do with us



Does it matter if the misconduct happened on an official or unofficial work night out?





Dispelling some myths....



We can't take action without "corroboration"

Time to temperature test..... how will this stand up in terms of a fair dismissal?

The employer must show that

- 1 it believed that the employee was guilty of the misconduct
- 2 it had reasonable grounds to sustain that belief, and
- 3 at the stage it formed the belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances





Dealing with “word against word” evidence



From a legal perspective the standard of proof for internal investigations and any subsequent disciplinary hearing or grievance meeting is based on the ‘balance of probabilities’



That means on the basis of the evidence it was more probable than not that the alleged events took place



It really comes down to one simple question – is it more likely than not that X happened?



This is not the same as criminal standard of proof which looks at whether it is beyond all reasonable doubt since the criminal standard is a higher test



Dealing with “word against word” evidence



Where there is conflicting evidence, it is fine to prefer one version, but the decision maker must be able to justify this and provide an explanation to show the tipping points / additional factors to consider



You may for instance have two people who are not credible. If that is the case then an investigation report needs to explain this



In some situations, it may not be possible to make a decision about conflicting evidence – *Salford Royal NHS Foundation v Roldan*



Acas Guidance



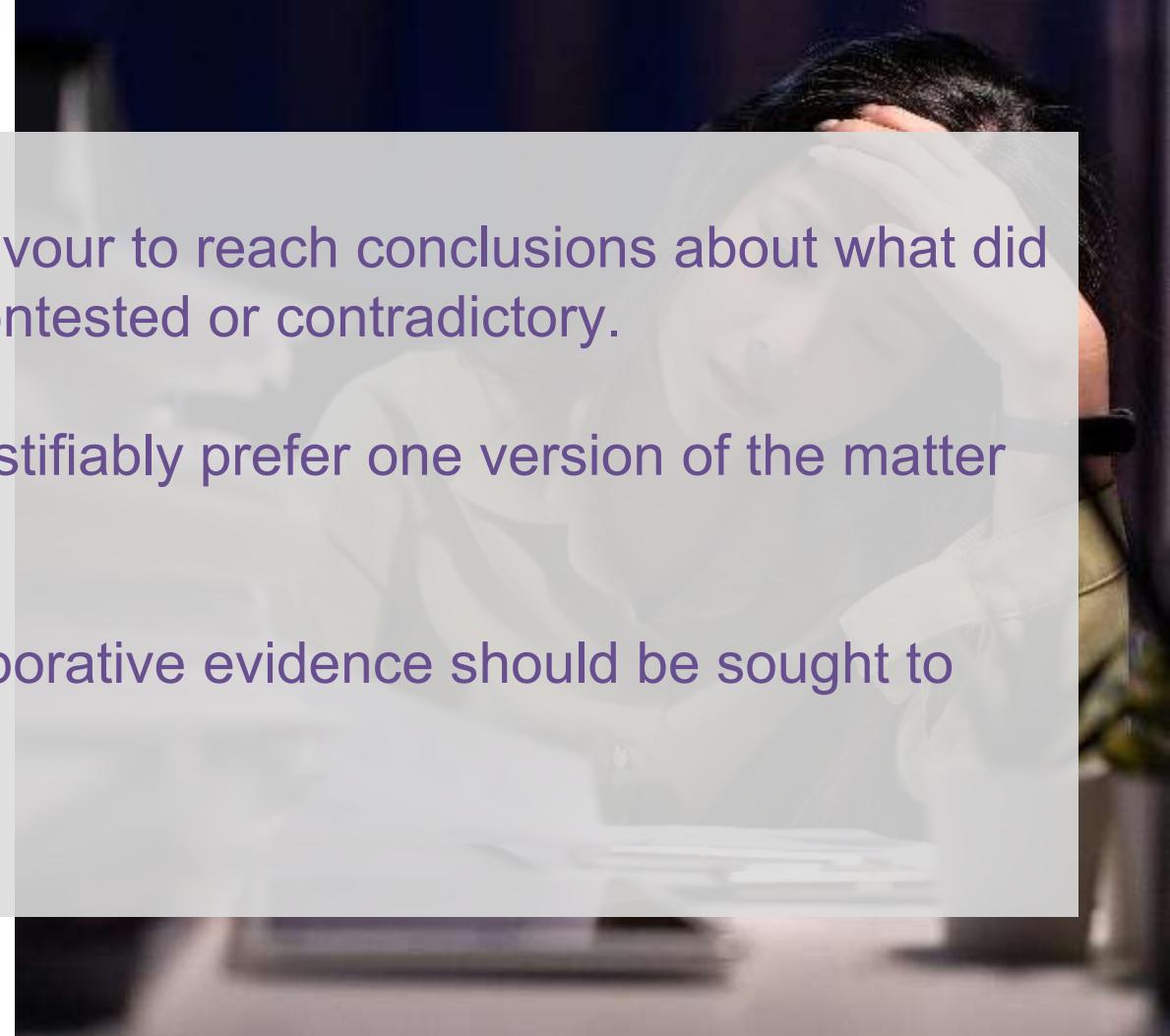
ACAS Guidance: Investigators should endeavour to reach conclusions about what did or did not happen, even when evidence is contested or contradictory.



On the **balance of probabilities**, can you justifiably prefer one version of the matter over another and explain why?



Consider surrounding circumstances - corroborative evidence should be sought to shed further light on disputed sets of fact.





How far does an employer have to go?



It is not about leaving no stone unturned



It is about conducting a **reasonable investigation**



Bear in mind that the more serious the allegation the greater the need for looking at exculpatory evidence – a “sliding scale”

“Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him.” A v B 2003



Learning the lessons from case law...



Nayfeh v Barclays 2025, in this case the tribunal stressed **robust credibility testing**. There was not enough focus in the investigation on **exculpatory evidence**



Sellers v The British Council 2019, here the tribunal criticised the employer for **failing to consider contemporaneous documents** and making an **assumption that no witness would have seen the incident**



Tobin v William Hill 2025, in this case the employer was criticised for **failing to obtain CCTV evidence** from the bar where the allegation of sexual assault was made



Learning the lessons from case law...



In *D Rustambekov v Fieldfisher LLP* the tribunal ruled that **the employer failed to follow a reasonable investigation** – the claimant was not given transcripts of witness interviews, matters which did not support the complainant's account were not included in the investigation report. There was a discrepancy between the CCTV description of the key incident and the complainant's evidence



Obiagwu v. Greystoke and Pantheon International Advisors Ltd 2024, when assessing credibility in this sexual harassment case the tribunal preferred the evidence of the claimant and looked at whether she could have an **ulterior motive** for lying and her **contemporaneous behaviour** – she texted her colleague afterwards



Other factors which should be considered



Is there other evidence immediately after the incident? For example, texts, conversations with others?



Is there CCTV at the venue and has the employer asked for this?



How consistent have accounts been?



Has there been prior behaviour? On the flipside, does the alleged perpetrator have a (long) clean record?



Is there any relationship or history between those involved?



Is there a power imbalance that may provide the wider context?



What is the view on the credibility of the individuals – could there be a motive for the person making the complaint to lie? Or equally for the perpetrator to lie?



How much alcohol was consumed and how much did this affect memory?



What if we can't reach a finding?

This may happen and may be justified

Potential consequences?

Potential ET claim from employee who raised concerns?










Back to the question.....

- *How do you determine the outcome in “word-against-word” situations involving inappropriate behaviour and/or harassment on official or unofficial work nights out?*



The answer?



-  We need to consider how to **fill the gaps** in the evidence we have to allow the decision maker to form a view based on reasonable grounds following reasonable investigation
-  We need to support the decision maker to ensure they understand the test to be applied is the **balance of probabilities** (and more importantly what is NOT required)
-  **No need to investigate exhaustively** but more will be expected depending on the gravity of the situation (the “**sliding scale**”)
-  There will need to be clear reasons to explain why the decision maker preferred one party’s evidence over the other
-  If the decision maker cannot reach a decision on the disputed evidence, then they can reach that finding



Questions?



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