

MILLS & REEVE

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White Paper Conference

Dismissal for HR

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Question

Word-against-word: How far do you delve into word-against-word situations involving inappropriate behaviour between employees at a work conference, Christmas party, or work night out?



What are we dealing with?



Legal framework



What counts as the
“workplace”?



Investigation
principles



Practical steps

Case study



Case study

Colleagues Sarah and Tom attend their employer's annual Christmas party - hotel function suite, with paid for food and alcoholic drinks. After the event, a few of the team continue the night in the hotel bar. Management covers the first round of drinks on a tab.

Sarah and Tom are the last to leave. The next morning, Sarah tells her manager that Tom touched her inappropriately at the hotel bar and tried to get in her taxi. Sarah messaged Tom when she got home to say he was out of line – he said he didn't know what she was talking about.

Legal framework

- Equality Act 2010: discrimination, harassment, victimisation
- Employer vicarious liability (S.109 EqA)
- Duty to prevent sexual harassment
- The “reasonable steps” defence
- Employment Rights Act 1996: unfair dismissal



Case study: manager question

Follow internal policies
and guidance

Don't make
assumptions or
promises



“What’s next?”

Take the concern
seriously

Take action promptly

Is it a work issue?

Work conference

Christmas party

After work drinks



Case study: manager question

Reasonable process

Look beyond direct witnesses

Consider surrounding circumstances and evidence

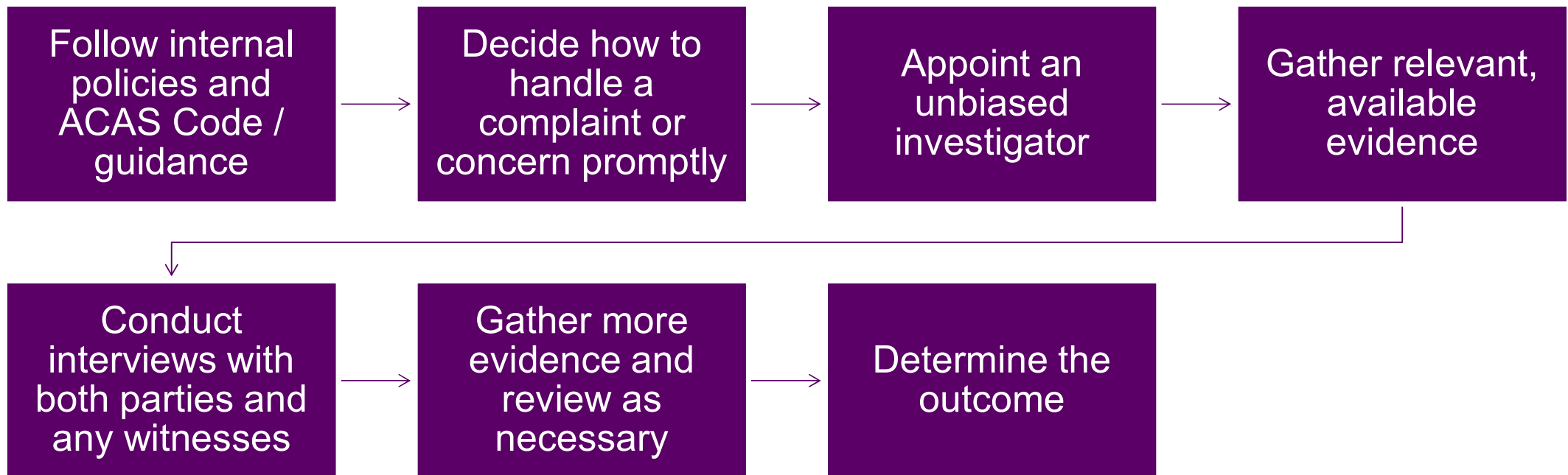
“How do we investigate?”

Word-against-word doesn't mean “we can't do anything”

Careful and sensitive interviewing

Impartial investigator

Investigation principles



Investigation principles

Reasonableness

Evidence

Credibility

Balance of probabilities

Investigation principles – reasonableness

- The investigation must be **reasonable** not perfect or judicial/criminal standard
- *British Home Stores v Burchell*:
 - Genuine belief in misconduct
 - Reasonable grounds for that belief
 - Reasonable investigation in the circumstances

Investigation principles – evidence

- Types of evidence:
 - Direct
 - Circumstantial
 - Corroborative
 - Hearsay
- Investigators must take time to understand and analyse the evidence
- Some conflicts/grey areas are inevitable

Investigation principles – credibility

- In word-against-word situations, the investigation may well turn on **credibility**
- How much weight to give to each person's account?
- Key factors:
 - Relationships and power dynamics
 - Motivations
 - Consistency of recall
 - Demeanour
 - Passage of time

Investigation principles – balance of probabilities

- Balance of probabilities
 - Not a criminal standard
 - Task is to determine what is more likely than not to have happened
 - Could be 50.5%
 - ACAS guidance - investigators should “endeavour to reach conclusions” even when the evidence is contested or contradictory
 - What if you can't?

Case study: manager question

Set clear expectations before work-related social events

Review lessons learned

“How do we avoid this happening again?”

Provide clear routes to raise concerns early

Reinforce standards of behaviour, especially where alcohol is involved

Practical guidance

- Policies and procedures
 - Up to date and accessible
 - Regular reminders - “Christmas party emails”
- Staff training
 - Mandatory
 - Practical and regularly refreshed
- Monitoring and review
 - Rolling process
 - Tracking themes from complaints and investigations



Practical guidance

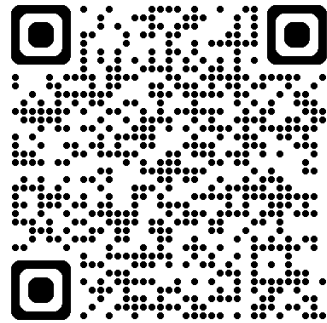
- Inclusive culture
- Red flags and warning signs
- Reporting channels and support
- Take reports and investigation seriously



Questions



Thank you



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