

White Paper Conference

Alison Treiving
Partner, Labour & Employment
Squire Patton Boggs

19 March 2025



"How should you deal with 'off the record' allegations from employees who explicitly state they 'want to make HR aware' but 'don't feel comfortable' with you taking action because of a power imbalance?"



What are “off the record” allegations?

- Not a legal term
- If someone says something is “off the record” - they do not want the allegations to be publicly reported/dealt with
- Usually because the complainant is worried about the potential consequences for them of making the allegations public, e.g. retaliation, damage to career prospects, being seen to be a “troublemaker”, etc.

How should an employer respond?

- First step - speak to the complainant
 - Understand why they do not want to go “on the record”
 - Provide reassurance
 - Be careful not to overpromise!
- Q: Can you simply reassure the complainant that any investigation will be kept confidential? Or that they can be anonymous? Or both?

Confidentiality v anonymity

- Confidentiality – the identity and facts of the matter under investigation will be kept confidential, i.e. on a “need to know” basis
- Anonymity – the identity of the complainant and/or any witnesses will not be revealed to anyone as part of the investigation

Acas Guidance on Conducting Workplace Investigations:

“An investigator should try to avoid anonymising witness statements whenever possible.”

“Only in exceptional circumstances where a witness has a genuine fear of reprisals should an investigator agree that a witness statement is anonymised.”

Some case law examples

Practical guidance from EAT
on protecting witness
anonymity

***(Linfood Cash & Carry Ltd
v Thompson)***

It is necessary to carry out a
balancing act between the
perceived need for
anonymity and the need for
the employee being
investigated to know the
case against them and to be
able to challenge that
evidence

(Surrey CC v Henderson)

Employers must balance
the duty to investigate with
the claimant's right to a fair
process and the
complainant's right to
protection from retaliation

(Woods v Acas)

To investigate or not to investigate?

- Employer is “on notice” - A failure to take action could put the employer on the legal “back foot”
 - EHRC’s Technical Guidance on Sexual Harassment
- Individual’s rights – complainant employee may bring claims against the employer, e.g. unfair constructive dismissal, victimisation, etc.



Concluding comments

- Always speak to the complainant to find out why they do not want to go “on the record”
- Anonymity – possible in very limited circumstances – always balance the duty to investigate with the claimant’s right to a fair process and the complainant’s right to protection from retaliation
- If the complainant does not wish to take action, assess the seriousness of the allegations – do the risks of not taking action outweigh the risks arising from overriding the complainant’s wishes?
- Consult Acas Guidance on Conducting Workplace Investigations and EHRC Technical Guidance on sexual harassment and harassment at work

Questions



Alison Treliving
Partner
Labour and Employment
Squire Patton Boggs
T +44 161 830 5327
E alison.treliving@squirepb.com

Abu Dhabi
Amsterdam
Astana
Atlanta
Beijing
Beirut
Berlin
Birmingham
Böblingen
Bratislava
Brussels
Cincinnati

Cleveland
Columbus
Dallas
Denver
Dubai
Dublin
Frankfurt
Geneva
Hong Kong
Houston
Leeds
London

Los Angeles
Madrid
Manchester
Miami
Milan
New Jersey
New York
Palo Alto
Paris
Perth
Phoenix
Prague

Riyadh
San Francisco
Santo Domingo
Shanghai
Singapore
Sydney
Tampa
Tokyo
Warsaw
Washington DC

Africa
Brazil
Caribbean/Central America
India
Israel
Mexico

■ Office locations

■ Regional desks and strategic alliances

