

# Inappropriate Behaviour – what is the correct approach to confidentiality and transparency in inappropriate behaviour grievances?

WELCOME TO CLARITY

**Lindsey Cartwright**  
**Partner**

[lindsey.cartwright@morton-fraser.com](mailto:lindsey.cartwright@morton-fraser.com)

Tel: 0141 274 1141; Mob: 07769 614123

[linkedin.com/in/lindsey-cartwright-a5bb389](https://www.linkedin.com/in/lindsey-cartwright-a5bb389)

Twitter: @LindseyCartwr8

# Context

- The World has changed since 2017  
#MeToo
- Full transparency becoming more common
- Websites such as Glassdoor, Fishbowl, Indeed etc. expose flaws/perceived flaws



## The practical melting pot....

- Good staff will leave if you do not handle complaints properly
  - The fast pace of social media when chatter has started
  - Risk of future poor culture if perception is that nothing gets done/cover ups happen
  - Reputational issues for the organisation
-

## The legal melting pot...

- Implied term of trust and confidence with both accuser and accused
  - Suspension has implications
  - Data protection/privacy
  - Later disciplinary action – conducting a reasonable investigation
  - Vicarious liability for acts of harasser
  - Complaints of discrimination (including harassment)
-

## Existing UK tools for reference

- ACAS guidance on handling a bullying, harassment or discrimination complaint at work
  - ACAS Code of Practice on Disciplinary and Grievance Procedures
  - Equality and Human Rights Commission – Technical guidance - Sexual harassment and harassment at work
-

# Barriers to reporting – EHRC Technical Guidance

- “Around half of respondents hadn’t reported their experience of harassment to anyone in the workplace. Barriers to reporting included:
    - the view that the employer would not take the issue seriously
    - a belief that alleged harassers, particularly senior staff, would be protected
    - fear of victimisation
    - a lack of appropriate reporting procedures”
-

# Request for confidentiality about the complaint

- Risk assess the complaint
  - Could options other than formal action suffice?
  - Balance risk to complainant against risk to others
  - Consider ability to address the issue without exposing the complainer
- Put safeguards in place
  - Regular check-ins
  - Counselling
  - Separation from the accused/  
suspension

"I'm reporting this but I don't want anyone knowing I've reported it and I don't want anything done"

# Confidentiality and Suspension

- Do you really need to suspend? Can effective separation be achieved using remote working?
  - Even where there is evidence supporting an investigation, suspension is not automatically justified – “entitled to something better than a knee-jerk reaction” - Gogay v Hertfordshire CC (2000)
  - Should only be invoked after careful consideration of the circumstances – Crawford v Suffolk Mental Health (2012)
  - Was there “reasonable and proper cause”? Agoreyo v London Borough of Lambeth (2019)
  - ACAS Code – para 8
    - Any period of suspension should be as short as possible, the decision to suspend should be kept under review and it should be made clear that suspension is not considered to be disciplinary action
-

# Confidentiality in investigations

- Ensure policies and procedures are adequate to outline in advance what will happen
  - Explain to witnesses that the investigation is confidential
  - Explain the importance of not discussing with others whilst the investigation is ongoing (may damage credibility)
  - Do not labour the point, otherwise it may appear that you are leaning towards a cover-up
  - Commit to investigating with urgency so the risk of any leak is minimised
-

# Transparency

- Key to building a culture of no tolerance for poor behaviours
  - Balance between interests of business v interests of complainer v interests of harasser
  - All starts with good 'hygiene' around documentation
    - Contracts, policies, procedures and data privacy notices should all set out when the outcome of complaints and disciplinarys may be disclosed
-

# Transparency

- Do not assume that disclosure of the harasser's personal data will be a GDPR breach
  - Comply with Art 5 GDPR (7 Principles of DPA18)
    - Process lawfully and fairly
    - Collect only for a specified legitimate purpose
    - Limit to what is necessary for that purpose
    - Ensure accuracy and keep up to date
    - Keep no longer than necessary
    - Process securely
    - Be accountable
-

# Transparency

- Consider each time the basis on which data can be processed lawfully (Art 6 and Art 9)
  - Consider each time the measures which can be put in place to ensure disclosure is proportionate
  - Record the decision re disclosure and reasons and retain this just in case a complaint is made to ICO
-

# Transparency

- Ideally, disclose outcome to the complainant
  - Once concluded, cannot oblige employees to maintain confidentiality:
    - NDAs should only be contemplated in very limited circumstances
    - NDAs must exclude whistleblowing, crime or anything required by law or by a regulator
  - Consider other ways of increasing transparency e.g.
    - publishing annual statistics
    - providing annual training containing reassurances
    - having specially trained staff (not management) for people to approach initially
    - act on lessons learned
  - Risk-assess any potential high-risk areas of the business and act to reduce risks
-

# Questions

