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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 allegations of inappropriate behaviour – and what if the complainant wants anonymity?



What are we dealing with?



Legal framework



Risks and liability



Investigation principles



Anonymous reporting



Practical steps

Case study



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- Employer's annual Summer party - hotel terrace, with paid for food and alcoholic drinks.
- Tom is the manager of the Sales team and Sarah is one of his direct reports. Chrissy is the team's newest trainee.
- After the event, a few colleagues stay on in the hotel bar. Management covers the first round of drinks on a tab.

- The next morning, Sarah comes to the HR office.
- She says she saw Tom touching Chrissy, who was visibly drunk, inappropriately at the hotel bar and asking if she wanted to share a taxi. Sarah made sure that Chrissy got in her taxi, on the pretext that they lived closer (which was untrue).
- When she got to the office today, Tom was making comments about how drunk Chrissy was and how he was having to “hold her up at the bar”. Sarah doesn’t want Tom to know she has said anything.

Case study

Follow relevant policies and guidance

Take the concern seriously



Don't make assumptions or promises

Take action promptly

Anonymity – confidentiality vs anonymity

Anonymous reports are common in sensitive cases

Confidentiality \neq anonymity

Anonymity is the exception not the rule

Fairness to the accused still matters

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Legal framework

- Equality Act 2010: discrimination, harassment, victimisation
- Employer vicarious liability (S.109 EqA)
- Duty to prevent sexual harassment
- Employment Rights Act 1996: unfair dismissal, whistleblowing



Is it a work issue?

Work conference

Staff party

After work drinks



Case study

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

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?

Anonymity requests

- Anonymity can make investigations more difficult
- For a disciplinary or grievance process to be fair, the accused must understand the substance of the allegations and have a proper opportunity to respond
- Anonymous evidence is **not automatically unfair** but employers must have **genuine and reasonable grounds for maintaining anonymity**
- Blanket approach is risky:
 - *ACAS v Woods* – blanket anonymity without evidence of fear undermined procedural fairness
 - *Ramsey v Walkers Snack Foods Ltd* – anonymity was justified where witnesses had genuine fear of reprisals and substance of the case was disclosed

Anonymity - ACAS Guidance

“Where possible, investigators should avoid anonymous witness statements. This is so the person under investigation can fairly question any evidence against them.

An investigator should only make a witness statement anonymous in exceptional circumstances. For example, if a witness genuinely fears revenge action. The investigator should explain that if there are legal proceedings, an employer might have to share the names of anonymous witnesses.

Where anonymity is agreed, the investigator should carry out the interview and take notes as usual. They should then remove relevant parts to prevent identification”

Anonymity – practical tips

- Gather as much evidence as reasonably possible, including any corroborative material
- Do not promise anonymity at the outset!
- Explore the reason for anonymity and whether concerns can be addressed
- Keep clear records of engagement and decision-making
- Apply a balancing exercise:
 - complainant's circumstances
 - fairness to the accused
 - whether a reasonable investigation can still be carried out

Case study

Policies, procedures and reminders

Risk assessments, monitoring and review

Training and awareness

“How do we avoid this happening again?”

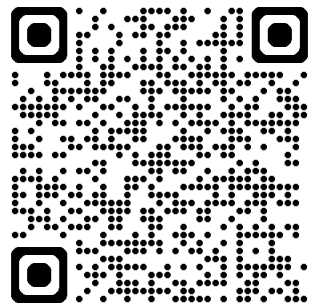
Reporting channels and support

Culture – inclusive, transparent, respectful

Questions



Thank you



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