
Come rain or shine

Commercial solutions for corporate lives



Investigating Dishonesty, Fraud and Bribery

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Introduction

- Recent media scandals
- Due diligence on character of recruits
- Importance of whistleblowing and expenses policies
- Reason for dishonest behaviour: prevention is better than cure
- Confidential stress management programmes
- Adapt appraisal systems for partners and senior executives
- Mitigating circumstances and option to self-report to regulator
- When to report to Police?
- PR implications
- Handling sensitive information to prevent media leaks
- Whistleblowing policies: confidentiality is key to their success
- Implementing expense policies in practice

ACAS Code of Practice on Disciplinary and Grievance Procedures

- Failure to follow the ACAS Code can lead to an adjustment of up to 25% in the level of unfair dismissal compensation awarded by the Tribunal
- Did employer act reasonably in all the circumstances?
- Was dismissal within the band of reasonable responses?

Fairness in Misconduct Cases: The Burchell Test (1)

- Burden of proof: civil test of balance of probabilities
- Employer must establish that at the time of dismissal:
 - > It believed the employee was guilty of misconduct;
 - > It had reasonable grounds for that belief; and
 - > At the time it held that belief, it had carried out as much investigation as was reasonable

(British Home Stores Limited v Burchell [1978] IRLR 379)

Fairness in Misconduct Cases: The Burchell Test (2)

- Investigation should take place prior to any disciplinary action.
- Investigation is not a disciplinary hearing.
- No right to be accompanied at investigatory meeting.

How much investigation is required?

- Ensure allegations are clear and sufficiently detailed to enable a meaningful response.
- The more serious the allegation, the more detailed the investigation.
- Investigation should be fair and even handed.
- Look for evidence of innocence as well as guilt.
- Limited investigation may still be necessary even if admission obtained.

Confidentiality of investigation process

- Disciplinary offence for interviewees to breach their confidentiality obligation.

Interview preparation “Fail to prepare, prepare to fail”

Key preparatory steps:

- What is the factual background to the complaint?
- Which witnesses do you need to speak to?
- What records do you need to check?
- Examine employee’s personnel file and training record: are there any current warnings on record? Expiry dates.
- Is there documentary evidence to prove that the employee acknowledged the existence of the disciplinary rule which has been breached?

Nuts and bolts of investigation process

- Conduct investigation without unreasonable delay.
- Speak to witnesses before memories fade.
- Consider preservation of critical evidence.
- Delicate balance between employer's need to gather information and employee's right to fair and reasonable treatment.
- Do not treat investigation as a "fishing expedition".
- Respect employee's right to privacy under Data Protection Act.
- HR to be present at investigatory interview and witness interviews to take notes.
- Notes are disclosable in litigation and if employee makes a subject access request.
- Good practice to provide employee with copies of notes taken.

Suspension

- When is suspension appropriate? Contractual right?
- Handle communication of suspension sensitively both internally and externally, to avoid breach of implied duty of trust and confidence.
- Suspension period should be as short as possible.
- Keep suspension decision under regular review.
- Suspension is not a means of punishment.
- Consider whether employee can be moved to another area of the business whilst investigation is carried out, rather than suspended.
- Confirm suspension in writing and its effect.

Reluctant witnesses

- Witnesses who want assurance of anonymity.
- Employees: remind them of obligation of fidelity owed to employer.
- Senior employees with fiduciary duties may have implied obligation to report wrong doing of another employee.
- Investigate reason for anonymity request and motive of informant.
- Do not guarantee complete confidentiality.

Analysing the Evidence

- Evaluate evidence and decide whether there is a case to answer.

- Key issue is whether criminal conduct is relevant to nature of work and has a bearing on the employee's suitability for the job or their relationship with colleagues, the employer or customers?
- Positions of trust with children or vulnerable adults justify more stringent approach to criminal conduct outside work.

- If employee refuses to respond to employer's investigatory questions for fear of prejudicing a criminal trial , employer should:
 - > Give employee opportunity to consider his position
 - > Not seek to pressurise the employee into making an admission of guilt
 - > Not interrogate the employee
 - > Permit the employee to make any statement he may wish
- If employee refuses to co-operate with investigation process, employer can take decision on available evidence, if it has warned employee in writing of its intention to do so first (paragraph 108 ACAS Guide).
- An employer should not dismiss when there is a pending criminal trial without a disciplinary hearing.

Appropriate level of investigation into criminal allegations (1)

- ACAS Guide: employers must carry out their own investigation and disciplinary hearing and should not ask the Police to do so on their behalf.
- Police should not attend any internal disciplinary hearing.
- No general rule as to whether an employer can rely solely on a Police investigation without also making its own investigations. Employers must, subject to certain safeguards, be entitled to treat information received under an official disclosure regime as reliable, but employer must review information received critically.
- *Harding v Hampshire County Council*: Employer can rely on information supplied by Police when conducting its disciplinary process.

Appropriate level of investigation into criminal allegations (2)

- ACAS Guide
 - > If employee unavailable for work because they are in Police custody, employer should decide whether employee's job can be held open in light of their company's needs.

When is it appropriate for employer to involve the Police?

- *Crawford –v- Suffolk Mental Health Partnership NHS Trust [2012] EWCA CIV 138.*
- Do not subject employee to heavy burden of criminal proceedings without genuine and reasonable belief that employee’s conduct is “criminal”.
- Breach of implied duty of mutual trust and confidence to pass matter to Police before completing thorough internal investigation first.

Information concerning disciplinary hearing

- Employee needs to be in no doubt that they are fighting for their job, otherwise dismissal may be unfair.
- Dismissal must be for one of the reasons specified in letter setting out allegations.
- Do not frame accusations so broadly that their potential seriousness is lost in translation.

Reasonableness of dismissal

- Did employer act within band of reasonable responses in treating misconduct as a sufficient reason to dismiss?
- Employee should be asked to comment on any mitigating factors before final decision is made.
- Consistency regarding level of sanction imposed unless material differences in circumstances.

Any questions?



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There is a tremendous atmosphere and team spirit within the firm. This manifests itself in the way they act towards clients and in how they act in court.

Chambers 2012, A Clients Guide to the UK Legal Profession

