Employment Newsletter

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MAY

BACKHOUSE JONES

How to manage a reluctant witness in misconduct cases?

An employee who is fearful of giving evidence as part of a disciplinary process can cause difficulties for an employer.

It is common for employees who are acting as witnesses to request to remain anonymous. Often the employee will be concerned that the employee under investigation will target them for providing a statement, or they may simply want to be able to keep a harmonious team environment when the dust has settled.

Here we will look at the issues you should consider when dealing with such a situation.

Where an employee is accused of misconduct, your first step will be to investigate the matter and gather evidence as part of a fair disciplinary process. However, there are occasions where an employee will only provide assistance if their anonymity is guaranteed.

There may be a variety of reasons why someone may request anonymity:

- They have been subject to a form of harassment/discrimination and
- genuinely be fearful of repercussions
- They may not want to be seen as "snitch"
- They have already been threatened or placed under pressure by the alleged perpetrator

Where possible the reluctant employee or witnesses should be assured that an investigation is there to establish the facts of what happened.

The investigator should explore any issues the employee has and try and put them at ease and resolve any outstanding problems they have about providing the information.

It is crucial to establish the reason for any reluctance as there could be a possibility that the employee may have reason to fabricate, or otherwise embellish the evidence they give. So, you may want to consider if there is other evidence that backs up what they are saying and has this witness had any personal issues with this employee?

In exceptional circumstances, investigators could agree to anonymise a witness statement. However, natural justice in disciplinary matters dictates that the employees facing disciplinary action must be made aware of the full details of the investigation against them and be able to meaningfully challenge any evidence put forward by the employer - this is also in accordance with the ACAS code of practice on disciplinary and grievance procedures. This can cause difficulty for employers, who must balance the witness's desire for anonymity against fairness to the accused.

In some cases, it may be possible for witness statements to be anonymised where the statement does not contain anything that could make the identity of the witness clear. However, this is far trickier in bullying investigations, where it is likely that particular conversations between a witness and the accused will have to be recounted.

You should consider allowing the employee to formulate written questions to be put to the anonymous witness through the employer. The witness's answers can then be examined during her disciplinary process.

You could also redact certain parts of a witness statement before sharing the statement but potentially issues could arise where the statement is so heavily redacted that it is difficult to make sense of. This could potentially be unfair to the accused as they are not in a position to challenge the statement.

If you do proceed to dismissal based on anonymous statements and the employee claims unfair dismissal as a result, they are likely to call into question the fairness of the procedure as a result of being unable to challenge the evidence. An Employment Tribunal must assess the fairness of the

decision to dismiss as well as the procedure leading to dismissal, and a finding of unfair dismissal could be made on either of these points. For these reasons it is preferable not to use anonymous statements.

Furthermore, once proceedings have been issued you will be required to disclose witness statements as part of the process.

The witness should be made aware that his anonymity cannot be guaranteed and especially when legal proceedings have commenced and he or she may be the subject to a witness order requiring their attendance at tribunal to provide evidence in the proceedings.

Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust

The Court of Appeal held that a completely non-discriminatory explanation for an action done by the Employer does not necessarily exclude the possibility of a discrimination claim being brought.

The Facts

In this case, the Claimant was a consultant surgeon employed by the NHS Trust as above and specialised in breast reconstructive surgery.

Following some concerns in relation to Iwuchukwu's conduct and capability, including one particular incident whereby a patient was set on fire during an operation, the Trust launched an investigation against him and placed restrictions on his practice pending

investigation. Following the investigation, the NHS later referred him to the GMC (General Medical Council) as this is the body that is able to take action under the Medical Act 1983, if they believe a doctor's fitness to practise is impaired by reasons such as misconduct, deficient performance, criminal conviction etc.

The Claimant then raised a grievance against the Chief Executive (which was repeated at a later date), however the Trust declined to consider it because it was outside the time limit. The Claimant was subsequently dismissed on the grounds of capability.

The Claimant brought a number of claims against the Trust, including direct discrimination and victimisation on the grounds of his race, on the basis that the Trust failed to investigate or deal with his grievances against the Chief Executive. The Claimant was the only consultant in this hospital of black African ethnicity.

The Employment Tribunal upheld the Claimant's claims and rejected the Trust's position that the Claimant's grievances were an attempt to delay or derail the capability process that he was at that time going through. The Trust appealed on the grounds that their reasoning for not dealing with the grievance was a complete (but unsatisfactory) explanation for its behaviour, which was unrelated to race. The Employment Appeals Tribunal allowed the Trust's appeal.

At the Court of Appeal, the Claimant's claim was upheld and the Court of Appeal found that the Employment Tribunal had properly assessed the evidence and found that the burden of proof was reversed and was therefore placed on the Trust.

It was held that the Claimant had been excluded without proper review for a significant period of time during the proceedings and the Employment Tribunal had identified this as the 'additional factor' which caused the shift in the burden. The Trust's explanation was rejected partly because the first grievance was raised before the capability process had begun. Once the Employment Tribunal rejected this explanation, it was possible to see that the reason for not dealing with the grievances as stated earlier was tainted by discrimination on the grounds of race.

Commentary

There will be cases whereby an Employer's complete explanation is untainted by any considerations relating to any protected characteristics such as race, sex, religion etc, however each case will turn on its own facts.

The above highlights the importance of dealing with an Employee's grievances in a timely manner and additionally, in line with your own grievance policy which may set out specific timelines and procedure.

Although not strictly the situation in the above case, it is a common tactic for employees or workers who are subject to proceedings at work, including capability and conduct related disciplinary proceedings, to raise a grievance against another staff member (often the disciplining or investigating officer) in order to try and delay the impending outcome of those proceedings and their ultimate dismissal. This is because often, they are aware that the probable outcome is summary dismissal and therefore that they will lose their income as a result. There are of course genuine grievances that are raised as well, however, regardless of the authenticity and/or questionable timing of the grievance raised, it is extremely important that you as the employer deal with it to prevent it rearing its potentially ugly head later down the line as with the above case.

Please note: This publication does not constitute legal advice.

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