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Disciplinary Issues in the Workplace Webinar – Follow-up Questions Answered (Part 1 – UK)

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During our recent webinar on Disciplinary Issues in the Workplace, we received a number of questions via the chat facility that we will address in a few blogs over the next few weeks.

First off, we have a couple of questions about bias and the independence of managers.

Can a manager who witnessed an incident conduct the investigation or will this be deemed unfair/biased?

Can a manager chair the disciplinary hearing of a direct report or will there be any concerns about bias?

Yes, a manager can chair a disciplinary hearing involving one of their direct reports. Simply being the employee's manager would not, without more, require them to be discounted from holding the hearing. If, however, there are any reasons as to why the independence or impartiality of the manager may be in question then it would usually be appropriate to appoint another manager to conduct the hearing, e.g. they had been involved in the investigation (but see below), there was a history of animosity between them, etc. Keep in mind the need to avoid not just bias but also the perception of bias. If there is a good reason for a third party in possession of the facts to see a possibility of bias if a particular manager hears the meeting, then ideally someone else should do it. But that possibility must be real and material. It is not enough simply for the employee to allege that the manager doesn't like them, for example – there would have to be some evidence of earlier manifestation of that or of some conduct (whistleblowing or other personal allegation against the manager) which might reasonably give rise to ill-will towards the employee.

The choice of manager for a disciplinary hearing will depend on the terms of the disciplinary policy, the availability of managers at a certain level and, in the case of appeal managers, the need to "keep somebody back" in the event the employee appeals the disciplinary decision. Remember that there is little law here beyond that the choice of disciplinary chair must be reasonable and that is a function largely of the options open to the employer at the time – if you can accommodate the employee's concerns without undue disruption, so be it, but if you cannot realistically do so, then go with your best option.

In a similar vein, a manager should not conduct the investigation if they have been involved in some way in the disciplinary matter. This may include having been a witness to the alleged incident of misconduct. Any investigator should be independent so far as practicable (this will again depend on the size of the employer and the seniority of those accusing and accused). The investigator should also be familiar with the company's policies and procedures and preferably have had some experience in investigating disciplinary matters.

As discussed at the webinar, the person holding the disciplinary hearing should usually be different to the person who conducted the investigation, in accordance with the provisions of the Acas Code of Practice on Disciplinary and Grievance Procedures. Even that guidance, however, is still subject to the overriding question of whether the employer acted reasonably in light of the circumstances facing it at the time. For an in-depth review of the law and practice relating to workplace investigations, why not take a look at our blog series, starting here.

Can businesses bring in external consultants to help with investigations and to make decisions in relation to disciplinary matters? Any advice or watchouts?

Yes, this is possible. Sometimes, for example, employers choose to use external consultants to carry out disciplinary (and grievance) investigations, perhaps because they do not have the resources in-house or because they are particularly keen to be seen to be independent, especially in sensitive matters. Employees often seek this as a defence against alleged bias on the part of company management, but there is never any legal obligation to look outside the business for investigators or disciplinary chairs.

Engaging an external consultant to make decisions in relation to disciplinary matters is more unusual – and certainly fraught with more difficulties. See our previous blog post on the case of ***Kisoka v Rydevale Day Nursery*** [2013] in which the employer engaged an external third party in connection with an appeal and ended up with an appeal finding that it was not expecting! As per the blog, we would generally recommend that employers do not use external parties to conduct grievance or disciplinary hearings or appeals or, as a minimum, not state that their decisions will be final. Use them as advisers, by all means, but delegating your decision to them is normally losing control of it altogether and risks subordinating it to their own personal issues and agendas. Bluntly, not all external HR consultants are equally good, nor will they necessarily possess the experience or technical industry knowledge to put the matters being investigated into proper context. If you are going to hand the reins on a potentially significant or high-profile investigation to what is essentially a stranger, be very sure that you have someone who knows what they are doing – after all, it is your company that will carry the can for any errors, omissions or other inadequacies in their findings.

If engaging an external consultant to support an investigation process, employers should always be clear about the scope of the investigator's role (just facts, or facts and recommendations?) and ensure they comply with the company's policies and procedures. Remember – at the end of the day a Tribunal will be interested in the employer's decision. Also don't forget that any instructions which the employer provides to the consultant as to facts, process, outcome, etc., and also the resulting report, will all be disclosable in the Tribunal even if the external resource you use is a lawyer.

Does a disciplinary allegation have to be stated in the outcome of the investigation meeting or just detailed in the disciplinary invitation?

The purpose of an investigation meeting is to help establish the facts of the case and to determine whether there is sufficient evidence of wrongdoing or poor performance to justify inviting the

employee to a disciplinary hearing. The disciplinary allegations do not have to be stated at the end of the investigation meeting – not least because at that point it still might not be clear if disciplinary action is necessary. Further investigatory steps may be required, for example. In any event, it should be the decisionmaker and not the investigator who makes the final decision as to whether a disciplinary hearing should be held.

There is no necessary rule that the matters which are investigated should also be those considered at the disciplinary stage. The whole point of the investigation is to separate which allegations should be taken further and which not. It may lead to some being dropped and potentially to others, originally unsuspected, being added. However, the disciplinary allegations finally relied upon should be included at the latest in the letter inviting the employee to attend a disciplinary hearing. As per the Acas Code of Practice on Disciplinary and Grievance Procedures, the invitation should include sufficient information about the alleged misconduct and its possible consequences to enable the employee to answer the case at a disciplinary hearing. The best test is to ask what details you would want to know if the allegations were against you.

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