

Personnel Today

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How to handle sensitive disciplinary investigations

By James Green on 22 May 2014 in Discipline, Employment law



When an allegation of serious misconduct hits the desk, an employer's first instinct may be to implement the disciplinary procedure immediately, but that is not always appropriate, says James Green, senior associate lawyer at Burges Salmon LLP.

There are some situations where it would be wise to pause before moving immediately into a disciplinary process and activate the usual steps of suspension, investigation and disciplinary action against the employee concerned. This article considers the legal and strategic issues that can arise when handling sensitive disciplinary investigations.

Find the right approach

At first glance, allegations of misconduct against an employee may appear to be straightforward to deal with, and management and HR professionals may be under pressure to act quickly. However, there can be circumstances where allegations against the employee, when looked at more closely, have wider legal, commercial and regulatory ramifications. In those cases, immediate disciplinary action might not always be the right choice.

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The principal issue here is that documents generated for internal disciplinary proceedings will generally be disclosable in future litigation. As the HR team swings into action and commences its investigations into the employee's misconduct, it will generate witness statements, draft reports and email correspondence and may make some findings of fact.

However, some of these documents or findings may be unhelpful in a wider legal, commercial or regulatory context, or may be inconsistent with the strategy that the business wishes to adopt in relation to those wider issues.

It is perhaps easiest to understand the risks that can arise by using an illustration – for example, an employee is accused of taking a bribe in return for awarding a contract, an investigation and disciplinary process is carried out, the evidence is unclear and the employee vigorously denies the charge. However, despite these doubts, the disciplinary manager concludes that there is sufficient evidence to uphold a finding of gross misconduct, and the employee is dismissed.

It can quickly be seen that the disciplinary issue is only one of a number of serious concerns. In the above scenario the business may be at risk of an offence under the Bribery Act 2010, which carries an unlimited fine. There may be an impact on the business's ability to take part in future procurement exercises. There is the risk of considerable reputational damage if the accusation became public. In some sectors, there may be a requirement on the business to disclose this to a regulator. By leaping into the disciplinary process straight away and making findings that the employee is guilty of gross misconduct, the business may be inadvertently tying its hands in dealing with these bigger issues, all of which are likely to be much higher up the corporate agenda than the disciplinary process.

There are instances when, having identified employee misconduct, an immediate report to the regulator or even the police is required. However, in other scenarios the position may be more nuanced, and a business may wish to have a fuller understanding of the factual matrix and the wider risks involved before it commits to pursuing a disciplinary process or making a regulatory report. How does it do this?

Carrying out a privileged investigation

A common tactic is for the employer to carry out a legally privileged investigation through internal counsel or external lawyers. A privileged investigation is a process that is structured so that analysis into the factual circumstances around the allegations is carried out for the purposes of legal advice, and therefore attracts legal advice privilege.

Practical tips

- Always consider if there are wider legal, commercial or regulatory implications before commencing a disciplinary process.
- Engage internal or external lawyers at an early stage if you want an investigation to be privileged.
- Control communications to the employee, colleagues and external parties.
- If you suspend an employee, review the period of suspension regularly and update the employee on a regular basis.

- If and when taking disciplinary action against an employee, ensure that this is consistent with your defence to any potential or active litigation or any communication made to a regulator.

Legal advice privilege applies to communications between the lawyer and client for the purpose of giving or receiving legal advice. The key advantage this structure has is that documents generated during a privileged investigation may be withheld from disclosure in future litigation. This will enable an employer to gather the facts and determine strategy with the support of its legal team before committing to particular allegations in an open, non-privileged disciplinary process.

This raises the question of what happens to the employee while this investigation is underway.

Suspension

A key preliminary decision to take is whether or not to suspend an employee.

In these sensitive scenarios you should think carefully before suspending, as it may make the employee much less likely to cooperate with the investigation. An employee is likely to anticipate that disciplinary action will result, which may cause the employee to take a more adversarial approach to the investigation process.

However, where the employee's continued presence in the workplace would jeopardise an investigation or where there is a concern that the employee would destroy or remove evidence or relevant documents, then suspension is usually necessary.

If an employer does decide to suspend before the privileged investigation has concluded, it may be sensible to frame the disciplinary allegations that have given rise to the suspension in general terms, rather than making specific allegations of misconduct at this early stage. Communications to other employees and to third parties should also be carefully controlled.

As required by the "Acas code of practice on disciplinary and grievance procedures", suspension should be as brief as possible. However, where an employer is investigating difficult or sensitive disciplinary matters, it is easy for the investigation process to become protracted.

The employee may complain about the duration of the suspension and therefore the employer should keep the employee informed of progress and the likely timetable for investigations so far as possible. In some cases an employee may resign and claim constructive unfair dismissal on the basis that the continued suspension without giving the employee an opportunity to put forward his or her case represents a fundamental breach of contract.

An employer must balance the risk of such a claim against the potential damage caused by hasty disciplinary action.

Concluding the internal investigation

Once the privileged investigation has concluded, it should usually be possible for the business to determine its strategic approach, including whether or not it wishes to proceed with disciplinary action against the employee.

If the business wishes to take disciplinary action, it may need to conduct a separate, non-privileged investigation into the possible misconduct. It may be that some documents identified in the privileged investigation could be used for this purpose, provided they themselves are not privileged, but by carrying out a separate process the business will be able to produce an

investigation report which it can rely on for the disciplinary process and (potentially) in an employment tribunal, while at the same time maintaining the privileged position of the initial investigation and any advice given during that process.

The disciplinary investigation report can then be passed to a disciplinary officer to conduct a disciplinary hearing in the usual way.

It may be the case that – having carried out an internal investigation – the company determines that the allegations against the employee are so sensitive or confidential that it does not wish to raise these in the context of an open disciplinary process. There may also be occasions where the allegations against the employee are highly newsworthy or would cause reputational damage if they come into the public domain.

In those circumstances it is unlikely that the business would want the employee to return to work and it may need to consider putting forward a without-prejudice proposal to the employee, with the aim of concluding a mutually agreed termination of his or her employment.

As discussed above, there are some circumstances where an employer's obligations to report to a regulator will override the wish to draw a quiet veil over a problematic incident, but there are occasions where a confidential settlement is an attractive option for all concerned.



About James Green

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