

12 April 2023

Weekly Blog

By Philip Pearson-Batt



CAPTAIN TURBO CARE

shares his wisdom on how to trump
employees facing criminal charges

Wilkommen. Bienvenue. Welcome.

This week, you all have the pleasure of getting to know me – **Turbo Care, Philip Pearson-Batt.**

There's not much to tell because, as those who do know me well will tell you, I am a very shy and retiring person. I'll try and break myself down Precept style – nice and simple:

I love: my husband (yuck), my dog (yay), my family and friends and (my biggest love) musical theatre (if you get that opening sentence then you have my respect and undying loyalty).

I hate: sport (yawn – oh, apart from tennis for which we can blame my husband. Simona Halep, if you're asking), The Repair Shop (super massive big yawn) and cheese (I know this will mean I'm no longer popular. I can hear the shouts of "no!" as I type this. But please respect my decision).

One thing I am big into is American politics. Alright, alright, I know I sound like a right barrel of laughs but it has become something of an in-joke with my in-laws. When I met my now father-in-law, I was nose deep in Hillary Clinton's memoir of her time as Secretary of State, because what 25 year old wouldn't be? And, fun fact – if you can call this "fun" – I now have a complete set of memoirs of every US Secretary of State going back to Madeline Albright.

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So, nothing big is happening in American politics at the minute... right?

There is just the little matter of Donald J Trump recently having received the honour of becoming the first US president to ever be indicted of criminal offences (some 34, but who's counting?)

I can hear you all asking – “what's that got to do with my job?!” Well, I will tell you.

What happens if you get an employee who comes knocking at your door, tail between their legs because they've been arrested and are now looking at spending quite a bit of time in the dock at the local crown court? How easy is that going to be to deal with?

It's a question that I have been asked several times in my career as an employment lawyer and let me tell you it's a really thorny issue and employers often feel like they're losing their mind trying to get to grips with it.

I sometimes find that employers get blinded by certain myths. So let me bust some of those myths for you, because I think that is going to be helpful:

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Myth #1: I can just dismiss straight away.

It's a bad idea to jump straight into dismissing staff because they're facing criminal charges outside of work.

The first thing to think about is, what impact does this have on the employee and on us? Does the alleged conduct have any bearing on the employee's employment. If so, then some sort of action probably is going to need to be taken.

Criminal activity is likely going to have a bearing on an employee's employment where that activity:

- Relates to conduct at work (so, for example, theft of company property);
- Impacts the employee's suitability for their role;
- Impacts the employee's ability to work (because of bail conditions or because they are in prison);
- Affects the employee's relationships with colleagues;
- Impacts the employer's reputation.

If any of the above apply and you do want to dismiss then remember where staff have 2 years' service, they have a right not to be unfairly dismissed. If you do want to get rid of an employee who is facing criminal charges then you're going to have to show that any dismissal:

- Is for a fair reason (that's most likely going to be conduct or some other substantial reason); and
- Only occurs following a fair process (investigate the issues, meet with the employee and allow them to put across their version of events, allow the employee a right of appeal); and
- Falls within the range of reasonable responses for you to have taken.

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Myth #2: Better not get fidgety feet, I'll have to wait for the criminal process to finish before I do anything.

At the other end of the spectrum, quite often employers come to me and say "there are criminal proceedings, we have to stop the world for this employee don't we? We can't do anything!" The short answer is: no.

Remember, it can take years for a criminal process to complete and there's a string of case law that makes clear employers don't have to wait for the outcome of a trial so long as they obtain sufficient material to justify the decision to dismiss (even if the employee is later found not guilty of the criminal offences!)

The best thing to do is to look at the information available to you at the time and assess whether it is reasonable to wait for criminal processes to complete.

So, if you've got somebody whose trial is listed for next week, might be best to wait. Likewise, if you've got somebody whose trial isn't listed for quite some time but they're free and able to work and there's no real impact on their employment, it would probably be unreasonable to dismiss. On the other hand, if you've got somebody whose trial isn't listed until late 2024 and there is a close connection between the charge they're facing and their job, you could look to dismiss (following a proper process internally).

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Myth #3: I need to put my CSI Derbyshire hat on and solve the crime myself.

Lawyers always talk about “the burden of proof” – how certain have you got to be that somebody has done the thing that’s been alleged. For criminal lawyers the burden is “beyond reasonable doubt” (99% sure). For employment lawyers, the burden is much lower. You only have to prove that you have a reasonable and genuine belief that the person has done the thing that’s alleged based on the balance of probabilities.

Myth #4: If the employee refuses to cooperate, I can’t do anything

Again, not true. If an employee refuses to cooperate with internal processes then so long as you have given them sufficient warning of the consequences of that, you can still progress matters and can even dismiss. The point is, you need to tell the employee that if they aren’t going to play ball you’ll make decisions without their input.

The position is perhaps best summed up by Acas in their Code of Practice for Disciplinary and Grievance procedures where at paragraph 31 they say:

If an employee is charged with, or convicted of a criminal offence this is not normally in itself reason for disciplinary action. Consideration needs to be given to what effect the charge or conviction has on the employee’s suitability to do the job and their relationship with their employer, work colleagues and customers.

Thank goodness for Acas!

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If you do find yourself in this position and you're not sure what to do, can I suggest one thing and thing alone? Pick up the phone and call Precept. We are here to help and we understand how to deal with these issues. I won't bore you with talk of the latest Olivier award winning shows (20 points if you can tell me the most recent winner) but what I will do is talk you through what's going on and what to do.