

11 July 2023

Weekly Blog

By: Rob Tice



What's in a name? Anonymity & confidentiality in employment processes

It's a busy time at Precept at the minute (which we are very happy about!) but even when it's busy, it's still important to stop and take stock. I usually do this when I'm at the beach, building a sandcastle with my girls or (more often) when I am washing the car – yes that is right, I am the rare breed that actually ENJOYS washing the car...Emma is a lucky lady!!!! In all seriousness though, I find it cathartic and gives me a real sense of zen afterwards – I guess it is a type of mindfulness of a sort....whatever the reasons, it works for me!

I think that it is so important to make time for "you" whether that is 'worker you' or 'parent you' or 'rugby player you' or 'bbq master you' or even just 'I am going to sit on the sofa and eat a whole tub of ice cream you'.... Everyone is always told to make time for themselves, but how many of us actually do it? Hmm, not many! Well, we decided that we would take the bull by the horns and make time for our staff at our very first Precept away day.

The away day was a long time in the planning, obviously mainly by "The Boss" our PA Catherine...but Emma also helped! Our away day took us to the sunny heights of Black Rocks in Cromford for some team building challenges in the great outdoors and put it this way it was a much bigger success than our attempt at an escape room last summer! We then went to a lovely café/bar nearby – The Family Tree (I can recommend the cakes!) for the afternoon filled with good food, good discussion and real bonding time!

This gave us the opportunity to not only enjoy ourselves (have you seen that photo of us in the rainbow "bag"?!) but also to reflect on how far we've come and where we're heading.

If I can take this moment to be a bit sentimental... I, for one, am extremely proud of the business that we've created here. I feel like we've built a cracking team of likeminded but unique lawyers who offer a refreshing type of service to clients that we genuinely care about. All in just 4 years - that is no easy feat!

There are exciting times ahead and I can't wait to share with you all what that entails but for now let me get back to all things employment law and HR.

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Obviously, the big news story at the minute is all about this (at the time of publication) unnamed BBC presenter who has allegedly paid a teenager for sexually explicit photos.

The BBC is coming in for heavy criticism on several aspects of their handling of matters but, in particular, they're being criticised for not naming the presenter.

It's a really tricky line for the BBC to walk. On the one hand, by not naming the presenter it's led to a whole host of rumour and speculation online about who it actually is. On the other hand, in naming the presenter they risk breaching his confidentiality and right to privacy. After all, there's that old adage "innocent until proven guilty" right? And the Supreme Court in 2022 went a bit further and said that individuals usually have a reasonable expectation of privacy if they are the subject of criminal investigations up to the point they are charged with the offence.

Let's have a think about this from an employment law and HR perspective and, actually, from the viewpoint of three different individuals who might be involved in this sort of matter in an employment or HR context.

The employee facing the allegations

The big question here is, should other staff be aware of what is going on in relation the employee who is facing disciplinary processes? For instance, if you suspend somebody, should you be telling other staff that they are suspended pending investigation into disciplinary allegations?

The short answer is, no. Sharing this sort of information is likely to be a breach of confidentiality, which could result in a breach of contract, and also breach of GDPR because in essence you're sharing personal information about that particular employee.

Where you are suspending somebody it's a good idea to agree with them what you'll tell colleagues and this will often involve agreeing a formal statement about the employee taking some time away from work for a short period. Other than that, you should avoid sharing any personal information about ongoing processes. This includes when you are investigating any such allegations – which is when things can get really tricky!

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The person who raises a concern

In some cases, disciplinary processes might start because an individual (a colleague or external third party) raises concerns about one of your employees. We tend to find that in these cases the complainant often wants to know whether the concerns they've raised have been found proven and, if so, what disciplinary action has been taken. Again, however, it is paramount that you maintain confidentiality here.

If somebody does want to know the outcome of a disciplinary process, it should just be a case of explaining to them that you cannot share that information due to confidentiality reasons but that they should (and this is where it gets a bit wishy washy) "rest assured that appropriate action has been taken".

The witnesses

You'll have started to notice a theme here: confidentiality is key.

Anybody involved in a disciplinary process should be reminded of the need to treat matters confidentially. Specifically, when interviewing witnesses, the investigating officer should remind them that they must not discuss any details of the investigation with colleagues or third parties.

Witnesses should also be informed about how the information they are providing is going to be used: i.e. if matters proceed, the information will be used as evidence in a disciplinary hearing. Sometimes, that leads to the witness battenning down the hatches and becoming reluctant to give evidence. In those cases, they may ask if they can give their evidence anonymously.

The starting point here is that the employee facing the allegations needs to know the case against them and that often means they need to know who is saying what about them. Reluctant witnesses should be reassured that matters will be handled sensitively and that there will be no repercussions for them giving evidence.

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If a witness does require anonymity, thought should be given to the reason behind their request. If there's a real and legitimate fear of reprisal, anonymising the statement might be the only reasonable way to get hold of the evidence they have. If there's no real reason for requesting anonymity, you need to think about whether this impacts the witness' credibility – do they genuinely believe what they are saying is true, or is there some ulterior motive at play here?

If you do decide to anonymise a statement, witnesses must be informed that you will take all reasonable steps to protect their anonymity but that you can't guarantee complete confidentiality. When anonymising the statement, all efforts should be taken to remove any clues about the witness' identity. It goes without saying, you should remove their name but you should also take reasonable steps to remove any reference which could lead to their identification. Sometimes this can be really tricky to achieve. But don't worry, at Precept we have advised on and undertaken many investigations with reluctant witnesses and have many tricks up our sleeves to deal with it and ensure that the process is completely fair.

You can see why the BBC might be struggling to handle the current situation their facing then can't you? It's a bit of minefield! For those of you who aren't the BBC, that's where Precept can step in. We're expert mine sweepers (we even did it as part of our away day). We can guide you through dealing with the thorny issues of confidentiality and anonymity in internal processes and in fact, it's something we'll be covering in our upcoming disciplinary session in September. Keep your eyes peeled for details.