ActifHR

Where people matter...

## July 2019 Update

Welcome to this month's update - where we discuss the latest guidance and legislation.

In this Edition we report on:

- If an employee makes a covert recording at work - is it misconduct?
- Investigating Grievances
- Personal Liability of Directors

## If an employee makes a covert recording at work – is it misconduct?

Basically yes, except in very certain circumstances, held the Employment Appeals Tribunal (EAT) in Phoenix *House v Stockman.*

During her successful unfair dismissal claim, the employee disclosed a covert recording she had made during employment.

The employer disputed this and argued that her compensation for unfair dismissal should be reduced, to reflect her conduct in making a covert recording as it was dishonest.

The EAT rejected the Respondent's argument and gave views on the varied circumstances in which covert recordings may be misconduct.

It is always good practice for an employee or employer to say if they plan to record a meeting.

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It is generally thought of as misconduct not to be open about it, except in the most pressing of circumstances.

The purpose for making a covert recording (on both sides) may vary from guarding against misrepresentation by people later trying to argue they did not say things, to attempting entrapment.

On certain occasions, where what is recorded may be highly relevant, for example, a meeting where a record is normally kept, to highly confidential or sensitive information directly relating to the business.

An employee may have recorded a meeting covertly, despite being told not to by someone else. Employees may even record a meeting secretly without giving any indication they have done so.

Be mindful that the court observed that an employee's covert recording is not usually an example of gross misconduct in disciplinary procedures.

**Employers:** make sure you are clear to employees that covert recording are not acceptable.

**Contact us:** we can assist you with policies and/or meeting support.

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## Investigating Grievances

Employers will frequently spend many weeks investigating a grievance, particularly if it is detailed.

Then after having done this, they occasionally issue a decision letter which says little more than "I have decided not to uphold your grievance".

Without a proper explanation to the employee this can often lead to problems, bearing in mind the time and emotion often invested by an employee in their grievance.

It is a good idea as an investigator to say what they believe happened on balance when relating to each allegation.

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Correctly refer to documents or other evidence in the report and suitably attach them to the report or put them in a separate file.

If the investigator cannot easily set out their reasoning at the time of preparing the outcome letter, they are really going to find it hard if it ends up in a Tribunal.

If there is a proper explanation of why the decision was reached the employee can at least feel that there is logic to it, even if the employee disagrees with the decision.

A detailed decision is of great advantage if the decision is ever directly challenged. Contrast this with a manager attempting to recall his rationale in an employment tribunal many months later when memories fade.

Tips: Don't only say 'not proven' when it's one person's word against another.
There's no such thing as 'not proven. The harasser won't be silly enough to pursue the complaint in front of 12 witnesses.

By using the words "Not Proven" / "Proven", may destroy your case in the Tribunal.

The very first question that the person who heard the grievance will be asked is did they believe the complainant, in which they normally just flounder, due to them never having to enunciate their answer to that question before.

**Employers:** ensure your managers write a detailed factual decision letter.

**Contact us:** we can help with grievances and disciplinaries.

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## Personal Liability of Directors

Can a director of a limited company be solely liable for company breaches of an employment contract?

Yes, found the High Court in *Antuzis v Houghton.* The Claimants were employed by the company in a highly exploitative manner, being paid less than the minimum wage and working extremely long hours.

Payments were often pending, and they were often not paid holiday pay or overtime.

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A director is not normally liable for a breach of contract where they are acting properly with respect to the company.

However, if the breach of contract has a statutory element (for example not paying the national minimum wage and/or holiday entitlements), this could suggest a failure by the director to comply with their responsibilities to the company.

This could furthermore make a director potentially liable (here to their employees) for this breach of contract.

In this situation the court found the directors were not acting accordingly because they did not genuinely believe that they were paying the minimum wage, holiday pay and overtime. Therefore, they were personally liable for the breaches of contract that they had induced.

**Employers:** as a director make sure you make the right payments to employees

**Contact us:** we can guide directors on managing their business

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**Caroline Robertson, CEO**

Caroline has a wealth of experience supporting business clients with practical hands on HR and Employment Law advice. Caroline's pragmatic approach helps businesses of all sizes deal with complex HR situations. She qualified as a Solicitor in 1999 and now acts as a specialist Human Resource / employment Law Consultant to business.

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