

Dealing with Sexual Harassment Allegations

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Dealing with Sexual Harassment Allegations

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Steps



Agenda

1. When suspension for alleged sexual harassment is appropriate
2. When and how to undertake a disciplinary investigation
3. How to conduct the investigation
4. Who should do it
5. Is it covered by privilege?
6. Managing the disciplinary meeting

7. Definition of sexual harassment
8. Dealing with the regulatory issues having found misconduct – including regulatory references
9. Settlement negotiations – pre disciplinary meeting
10. Will the confidentiality clause be valid?
11. Professional practice issues for lawyers

The Allegations

Juliet has raised a grievance about her treatment by her manager Darren whilst in Amsterdam closing a major deal. Both of them are certified employees. Juliet, Darren and the team had been working on the transaction for the previous three months. It was a major deal for their employer, an international bank.

IN THE SEXY SEAL BAR/RESTAURANT AMSTERDAM

HOTEL INTERCONTINENTAL AMSTEL AMSTERDAM

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BACK IN THE OFFICE IN LONDON



HR MANAGER'S OFFICE LONDON



Suspension – points from case law

- Suspension is not a neutral act - South West St George's Mental Health Trust [2010] FWCA Civ 293
- Suspension must be not be a “knee jerk reaction” Gogay – v – Hertfordshire CC [2002] IRLR 703
- Suspension can be breach of the implied term of mutual trust and confidence Agoreyo -v- London Borough of Lewisham [2017] EWHC 2019

Suspension in practice

- Are there valid reasons for suspension? Contractual right?
- Consider the alternatives
- Damage to individual: reputation, stress and ill health
- Progress as fast as possible; support to individual

Who should undertake the investigation?

- Internal manager or HR professional?
- External HR consultants?
- Bank's internal lawyers?
- External lawyers/Counsel?

WHAT DO YOU THINK???

Can you rely on privilege with internal investigations?

- Privilege only applies to legal advice (given by a qualified lawyer) or work undertaken in connection with litigation
- Two issues:
 - Is litigation pending? – unlikely
 - Is undertaking an investigation providing legal advice?

Gathering and Managing evidence

- Define the scope of the investigation
- Keep the investigation confidential
- Assess who needs to be involved (internally and externally)
- Assess what they need to know

Interviewing Witnesses

- Consider how to manage and record the interviews
- Identify who is relevant
- Ensure questions link into the scope of the investigation

Update ...

The investigation report:

Concludes that it is reasonable to believe that Darren propositioned Juliet and that he touched her inappropriately.

Decides that he followed up by sending her a series of inappropriate text messages, but only after receiving some encouragement.

Decides that Juliet is working on the same type of deals as everyone else.

This is in breach of the Bank's Code of Conduct and Dignity at Work at policy.

Do you invite Darren to a disciplinary meeting?

Yes

No

Disciplinary issues

- The right to be accompanied
- Should employee have legal representation? *Re (G) v Governors of X School [2011] ICR 1033 SC*
- Consider the content of the disciplinary invitation letter
- Is there a right to cross examine witnesses?

Definition of Sexual Harassment

Definition of Sexual Harassment (Section 26 of the Equality Act 2010)

A harasses B if—

A engages in unwanted conduct of a sexual nature, which has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B; and/or

Because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

Further update...

The finding of the disciplinary meeting is that harassment has occurred but there are some mitigating circumstances.

After much debate a decision to dismiss is made rather than give a final warning and a reduction in bonus.

Has Darren breached a Conduct Rule?

Is he fit and proper to continue in his regulated role?

Sexual harassment : misconduct

- *“Sexual harassment is misconduct”*
- *“Sexual harassment and other forms of non-financial misconduct can amount to a breach of our conduct rules which include the requirement to act with integrity”*

FCA Letter to the Chair Women and Equalities Committee
28.09.18

Consider Tier 1 conduct rules...

- You must act with integrity
- You must act with due skill, care and diligence
- You must be open and cooperative with the FCA and other regulators
- You must pay due regard to the interests of customers and treat them fairly
- You must observe proper standards of market conduct

Is it a conduct rule breach?

Yes

No

Factors to consider for F&P...

- Assessment is against Regulatory Standards
- Apply FIT section of the FCA handbook
- It's a judgment based exercise
- Consider Meghan Butler's letter

Is Darren Fit and Proper?

Yes

No

Alternative Outcome: Settlement Negotiations Pre Disciplinary Meeting

- Initiated by Darren's lawyers because he feels everything is stacked against him and it's impossible to go back.
- Darren's lawyers complain about process, suspension etc.
- Bank's lawyers are relieved to receive the approach as they are not 100% confident that their actions will withstand scrutiny.
- Darren's lawyers drive the money up; the Bank insists on strict confidentiality.

Settlement Negotiations

- Darren will only settle if Juliet waives claims against him and enters into a confidentiality agreement with him
- Deal with Juliet?
- The confidentiality clauses of all parties can be overridden by:
 - Whistleblowing
 - Disclosure in the public interest
 - Disclosures to regulators

Professional Practice Issues for Lawyers

- Solicitors Regulation Authority (“SRA”)
- SRA Warning Notice
- Current SRA investigations into solicitors
- Referrals of solicitors to the disciplinary tribunal
- SRA Guidance on Balancing Duties in Litigation

Settlement Negotiations

- Regulatory reference
- Should the suspension and the proposal to take disciplinary action (never concluded) be included in a future reference?
- Should Darren's confidentiality clause have a carve out to give him the right to explain his side of the story to a new employer/FCA/PRA?
- Would this affect his certification as fit and proper?

Can you agree a reference?

Yes

No

How do you approach referencing?

Non-regulatory references

Regulatory references

- Use the template reference
- Include all information which is reasonably relevant to an assessment of whether the person is fit and proper
- Consider the principles of fairness

SO, WHAT NEXT FOR DARREN?



Talking to the Press afterwards

After the settlement Darren is proposing to talk to the Daily Telegraph. He says there are many in the industry who agree he is the victim of the post #metoo “political correctness gone mad” environment in which men are the victims. He is minded to go to the press and spill the beans on this and to name other male colleagues of the bank who have been treated equally badly.

Can he do this?

SO, WHAT NEXT FOR JULIET?



REFLECTIONS FROM THE HR MANAGER

Practical Take Aways

Remember that all involved have legal rights and need support during the process:

- Person affected
- Person raising the complaint (may be separate)
- Alleged perpetrator
- Team
- HR

Contact details



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