



Morgan Lewis

INVESTIGATIONS SERIES: A GUIDE FOR UK EMPLOYERS PART 2

8 June 2022

Morgan Lewis Team



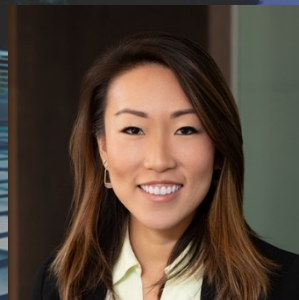
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Investigations Series

- 1. Part 1:** Investigation Strategy and Best Practices (17 March 2022)
- 2. Part 2: Disciplinarys, Grievances, Pre-Litigation Strategy (8 June 2022)**
- 3. Part 3:** Litigation and Tribunal Process and Practice (29 September 2022)

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CASE STUDY FACT SCENARIO

Case Study Fact Scenario 1

- Amy is an assistant to Joe (Head of Investor Relations) at Blue Fox Financial Services (Blue Fox). She has been in the Company for 3 years. Amy has been working remotely during the recent COVID-19.
- Amy is asked to return to the office at least 4 times a week. She informs the Company that she is worried about catching COVID-19 because she suffers from Chronic Obstructive Pulmonary Disease. She says that she has been able to perform her role from home and is refusing to return to the office.

What are the employment risks for Blue Fox here?



Key legal claims

Discrimination claims

Claims under
sections 44 and 100
of the Employment
Rights Act

Negligence claims
(e.g. personal
injury)

Disability Discrimination

- Amy could bring a type of disability discrimination claim but she will first need to prove that her COPD falls within the definition of a disability.
- Disability is widely defined under the Equality Act 2010:

6 Disability

(1) A person (P) has a disability if—

*(a) P has a **physical or mental impairment**, and*

*(b) the impairment has a **substantial and long-term adverse effect** on P's ability to carry out **normal day-to-day activities**.*

Disability Discrimination

- COPD is a lung disease characterised by chronic obstruction of lung airflow limitation – does it fall within the definition of a 'disability' under the EA 2010?
- Nonetheless, Blue Fox should have an open discussion with her to further understand her concerns.
 - Blue Fox should ask for medical evidence/ her GP and medical practitioners' advice.
 - Consider asking for an Occupational Health report.
 - Consider the possible measures Blue Fox can take and consider if any reasonable adjustments need to be made.



Sections 44 and 100 claims

- Employees may have claims against dismissal or detriment if in circumstances of danger that:
 - The employee reasonably believed to be serious and imminent, he refused to return to work; or
 - The employee reasonably believed to be serious and imminent, he took or proposed to take appropriate steps to protect himself or other persons from danger
- No service qualification and compensation is uncapped
- ***Rodgers v Leeds Laser Cutting Ltd***
 - EAT decision which accepted that COVID-19 could in principle give rise to circumstances of danger that an employee could reasonably believe to be serious and imminent, but the case failed on its facts
- Is there anything else Blue Fox could do to mitigate the risks of these claims?

Case Study Fact Scenario 2

- Joe tells Paul in HR that Amy is underperforming. Amy is invited to a performance meeting with Paul and Joe where she gets upset.
- Amy separately phones Paul and says she thinks this is all because she raised concerns with Joe about some business expenses. Amy says that Joe has accepted F1 tickets for the upcoming race in Canada, that have been paid for by a business acquaintance and did not disclose this to Blue Fox. She says that Joe has also submitted hotel and travel business expenses for days when she knew he was on vacation. When Amy confronted Joe, he told her “not to be a gimp and just do as she is told”.
- Paul feels awkward because he and Joe are best friends. He sends an email to Joe about this and Joe responds to Paul saying “don’t listen to Amy...she is a mad woman who is obviously menopausal and losing her mind”.
- Paul does not want to get on the wrong side of Joe. He ignores Amy’s allegations against Joe and puts Amy on a PIP. Paul sends a meeting inviting Amy to her first performance meeting.

Was Paul right to proceed with Amy’s PIP or should it have been dealt with in a different way?

ACAS Code of Practice on disciplinary and grievance procedures

- Follow Company policies.
- ACAS provides a statutory Code and guidance. There is no legal requirement to follow the Code.
- Reasons to follow the Code:
 - Tribunals will consider the Code when deciding if an employer has acted reasonably. There must be a good reason for departing from the Code.
 - Up to 25% on awards made to employees for an employer's unreasonable failure to comply with the Code.



ACAS Code of Practice: 46. *Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.*

Protected disclosures

- Amy receives the meeting invite and reacts badly. She sends an email to Paul saying that she is “outraged by this shady behaviour as this clearly goes against company policy and is wrong!”

Is Amy’s complaint capable of amounting to a protected disclosure?

There has been a disclosure of information

The information relates to certain specified types of wrongdoing or malpractice

The disclosure was made to the right person

The whistleblower has a reasonable belief that the information shows the wrongdoing

The whistleblower has a reasonable belief that the disclosure of information is in the public interest

Interplay between whistleblowing and grievance processes



- It's not always clear if an employee has made a grievance. Contents of a grievance can sometimes amount to a 'protected disclosure'.

Should Blue Fox deal with Amy's email under a grievance or whistleblowing process?

- Considerations:
 - What do the relevant policies say
 - Logistical/timing factors
 - Mitigating legal risk
 - Mitigating reputational and/or regulatory risk

Managing overlapping processes

- Depending on what the Whistleblowing Policy says, one approach that Blue Fox might want to consider is: (a) asking Amy if she wants to raise a formal grievance under the Grievance Policy; and (b) if she says no, deal with this under the Whistleblowing Policy. Alternatively, Blue Fox might want to initiate neither process but still carry out a separate investigation into Joe's conduct.
- Practical factors for Blue Fox to consider when managing overlapping processes:
 - Assuming that the PIP continues, who will attend the performance meeting with Amy given that Joe, her line manager is the subject of her allegation?
 - In light of Amy's email, should her PIP now be paused?
 - Are there any legal or other practical factors that Blue Fox needs to consider depending on which process is chosen? Are there any safeguards that need to be implemented to protect Amy, Joe or other third parties?
 - Are there any regulatory reporting obligations for Blue Fox?

Case Study Fact Scenario 3

- Blue Fox gets external legal advice on the employment risks that they are now facing and are told that “there are some significant risks with the way this matter has been handled and that Blue Fox might want to consider restructuring Amy’s role if the business no longer needs her”.
- This email is forwarded to Paul.
- 3 days later, Amy sends an email to Paul saying, “*I’m really upset with how this matter has been handled. Please provide me with all the data that Blue Fox holds about me to date.*”

Has Blue Fox inadvertently waived a form of legal professional privilege?

How should Blue Fox respond to Amy’s request?

Legal privilege

Generally, two types of privilege:

- Legal advice privilege
- Litigation privilege
- **Legal advice privilege** is broader than litigation privilege. It allows clients to discuss their legal position with lawyers knowing that their communications will remain confidential even if there is no anticipated litigation.
- **Litigation privilege** unlikely to apply to purely internal investigations. Legal advice privilege is more likely to be helpful and relevant here.
- May be able to claim privilege if lawyers are involved and advising.
- Communications between a lawyer and individuals outside the designated client team or between the client team and individuals outside the team are generally not privileged. Privilege may be waived if documents are sent outside the team.



Responding to DSARs (Art 15 of GDPR)

- Right of access to obtain a copy of the individual's personal data.
- There is no prescribed form to submit a DSAR.
- Normal time limit to respond to a DSAR is one month from the date of receipt (may be extended an additional two months).
- If a large amount of information is held on an individual, ask them to specify the information or processing activities their request relates to.
- Exemption in Data Protection Act 2018 not to disclose information which identifies another individual unless the other individual consents or if it is reasonable to comply with the request without consent.
- Do not need to disclose documents that are subject to legal professional privilege.

What happens next...

- After taking external legal advice, Blue Fox decides to take Amy off her PIP.
- Blue Fox does not open up either a grievance or whistleblowing process in response to Amy's complaint and there is no investigation into Joe's conduct.
- Amy is moved to another team but does not receive her mid-year bonus and is very upset.
- One month later, Amy sees the response from Blue Fox on her DSAR which includes the email from the external lawyers to Blue Fox.
- Amy sends Paul an email resigning. She says that she is outraged by how she has been treated and warns that Blue Fox will pay dearly for this...



PART 3 Reminder

Topic: Litigation and Tribunal Process and Practice

Date: **29 September 2022**

[Register for the event](#)

THANK YOU

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