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INVESTIGATIONS SERIES: A GUIDE FOR UK EMPLOYERS PART 1

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Investigations Series

1. **Part 1:** Investigation Strategy and Best Practices (17 March 2022)
2. **Part 2:** Disciplinaries, Grievances, Pre-Litigation Strategy (8 June 2022)
3. **Part 3:** Litigation and Tribunal Process and Practice (Q3 2022)

Today's topics

1. Early Considerations
2. Legal Privilege
3. Planning
4. Privacy Considerations
5. Evidence Collection & Witness Interviews
6. Reporting and Remedial Action
7. Challenges of Remote & Cross-border Investigations
8. Trends

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EARLY CONSIDERATIONS

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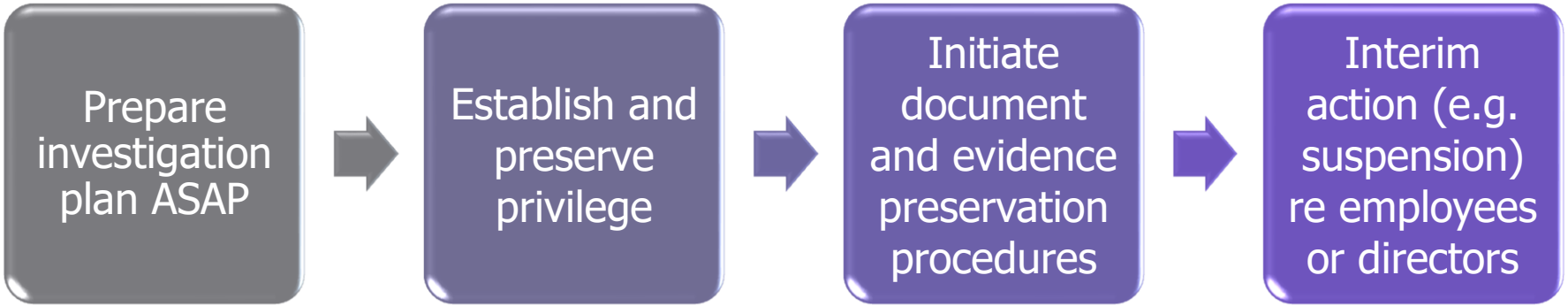
Knowing the right track

Protecting the Company



Instruct external counsel to assist / advise?

Reporting to third parties

Consider whether interim reporting to authorities/regulators is necessary

Potential benefit to self-reporting even if not required

Weigh up risks and benefits of early reporting

Balance out need to establish basic facts with urgency of issues

Keep self-reporting obligations under review

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LEGAL PRIVILEGE

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Legal privilege

Cross-border matters may involve several jurisdictions

Courts generally apply law of the forum (i.e., where being litigated) to determine claims of privilege

Cannot assume that documents privileged in one jurisdiction will be privileged in another

Legal privilege: common law countries

E.g., Australia, Canada, Hong Kong, Singapore, UK, US

Disclosure based on 'all cards on the table'

If privileged, can withhold from producing to 3rd party or court

Generally, two types of privilege:

- Legal advice privilege
- Litigation privilege

Legal privilege: civil law countries

E.g., China, France, Germany, Italy, UAE

Parties required to disclose only docs / evidence on which they rely

Disclosure more limited – privilege rules therefore different

No privilege attaches to comms / docs exchanged between lawyer & client

Emphasis is on lawyer's professional obligations and duty to preserve confidentiality of comms with clients

UK legal privilege & internal investigations

Litigation privilege unlikely to apply to:

- Purely internal investigations
- Investigations carried out further to early stage regulatory investigation
- UNLESS, real likelihood of litigation – but too early to tell?

Legal advice privilege more helpful here

- May be able to claim privilege if lawyers involved and advising

General tips to help maintain privilege

- Involve lawyers (external / in-house)
- Work out which jursidictions are involved and the privilege that could apply
- Identify core team ('client group') to give instructions/ receive legal advice
- Mark privileged communications 'privileged and confidential'
- Control and limit access to privileged information
- Keep privileged and non-privileged information separate

General tips to help maintain privilege

Ensure lawyers conduct any witness interviews

Ensure witnesses are given an 'Upjohn' warning at the start of interview

Ensure witnesses have confidentiality clauses in their employment contract

A lawyer's interview notes may be privileged if they contain the lawyer's opinion / views

Simply verbatim interview notes unlikely to be privileged

In-house lawyers giving business advice (vs. legal advice) unlikely to be privileged

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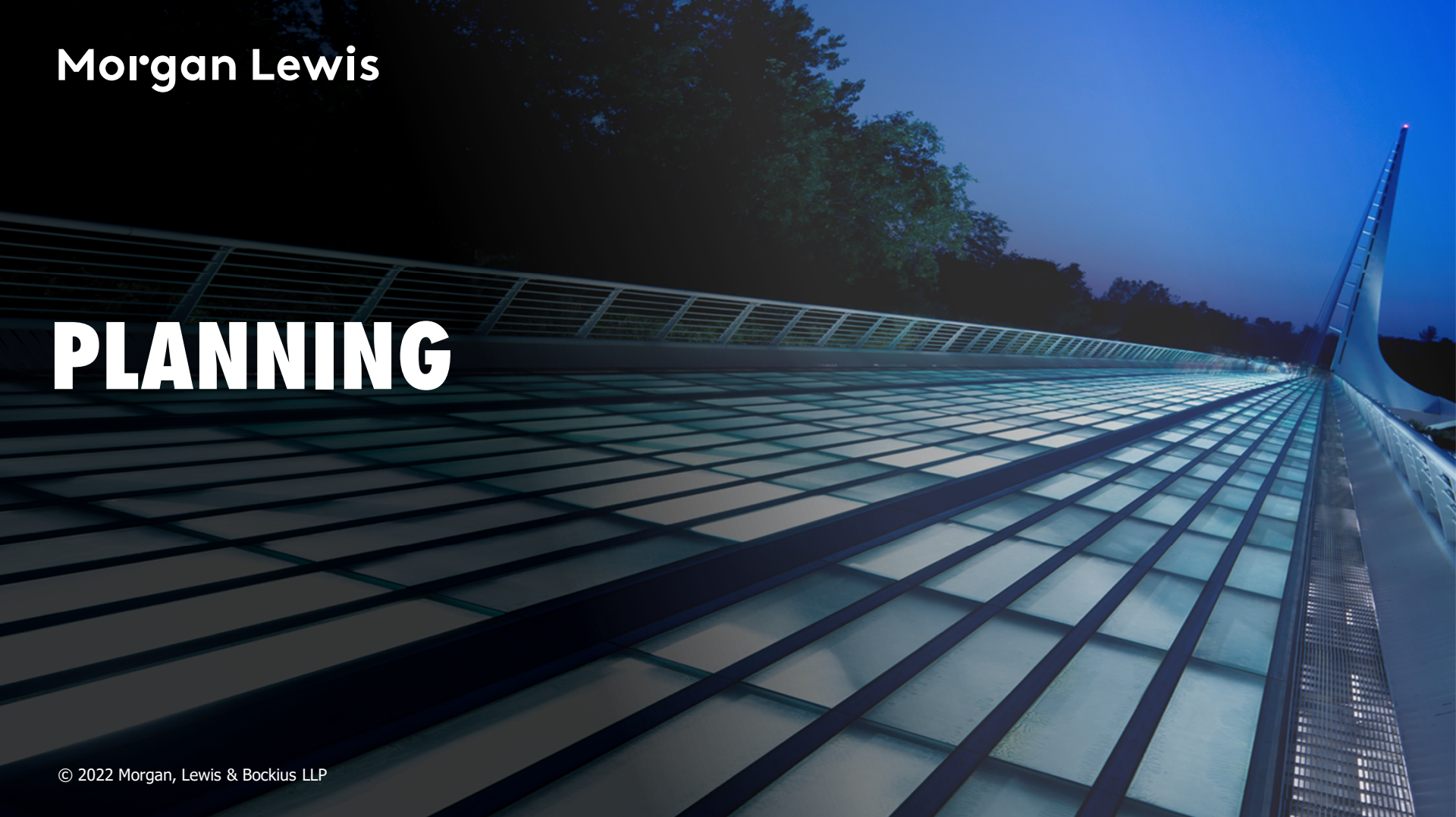
PLANNING



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Planning

Define scope and purpose of investigation

- Consider the jurisdictions and limitations on investigating, e.g. any data privacy restrictions
- Be proportionate to the issues and value
- Define the objectives

Steps to achieve purpose and timelines

- Reach consensus with investigation team on the overall approach and general timing
- Do certain issues / events require prioritising?

Balance of realistic timeframes

- Within budget and other limits
- Managing any logistical issues

Planning

Determine form of reporting

- Consider the form and structure of reporting
- How will the interview notes be recorded (verbatim, summaries, with legal advice included?)

Procedure for providing updates to stakeholders

- Is an interim report required?
- Monitor progress
- Is invesitgation tracking against the relevant budget?

Enable review of scope and communications

- Be flexible; adapt the plan as required / as new info received
- Plan should remain fit for purpose
- Strategy for media, PR and internal communications

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PRIVACY CONSIDERATIONS

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Privacy Considerations

- Lawful processing of evidence including personal data:
  - Likely legitimate interests; other grounds?
  - Notice to interviewees and custodians of data needed?
  - Data transfer agreements
  - Engagement of a vendor – need a data processing agreement
- Privacy rights:
  - Subject access
  - Restriction or deletion of data
- Can we rely on GDPR exemptions to certain obligations if investigation to detect/prosecute potential crime or breach of ethics (for regulated professions) or enforcement of claims?

Privacy Documentation

- Need to review early on:
  - Privacy notices to see if the investigation activity is included
  - Any applicable policies e.g. monitoring policy
  - Check if other agreements are needed e.g. data transfer agreements (SCCs/IDTA) and any transfer impact assessment and/or a data processing agreement

GDPR Exemptions

- GDPR allows local laws to be implemented to exempt obligations of transparency and data rights (amongst others):
  - Local law advice needed to consider how the exemptions apply
- Data Subject Access Requests:
  - Exemptions under UK Data Protection Act include legal privileged communications
  - Different exemptions apply in other countries

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EVIDENCE COLLECTION & WITNESS INTERVIEWS

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Evidence collection

Identify relevant custodians and other sources of relevant information

Run searches for relevant documents using agreed, thoughtful methodology

Implement secure storage for documents located and minimise personal data to that which is reasonably needed

Don’t forget hard copy documents

Witness interviews: best practices (1)

- Do you need to carry out preliminary interviews?
- Who will be on the interview panel? Any SMEs?
- Should lawyers carry out the interview?
- In what order should witnesses be interviewed?
- Do any witnesses have specific needs to be factored? E.g. health issues, or language requirements?

Witness interviews: best practices (2)

- Can the interviewee be accompanied?
- Information and warnings to employees?
- Prepare for each individual interview
- Consider implications of hybrid working e.g. at start of interview, check not recording
- Take stock and prepare summaries

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REPORTING & REMEDIAL ACTION

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Reporting

Exec summary

Background

Scope

Factual findings

Conclusion

Recommendations

Key risk areas

Privilege and disclosure

If report is intended to be privileged, ensure marked 'privileged and confidential'

If risk may need to disclose to 3rd parties in litigation, consider:

- Setting out privileged and non-privileged material separately OR
- Preparing a separate, open version of the report

Remedial action

Might include:

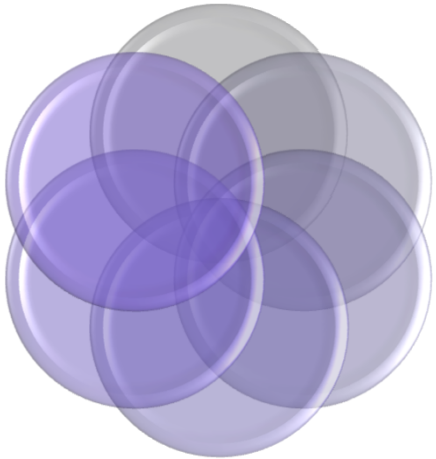
- Disciplinary action
- Compliance improvement plan
- Corrective action plan
- Compensation schemes

Post-investigation items

Debrief with key stakeholders

Consider root cause analysis?

Consider regulators – updating and prospect of penalties



Consider internal / external announcement?

Is litigation anticipated? Need a strategy?

Keep an investigation file

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CHALLENGES OF REMOTE & CROSS-BORDER INVESTIGATIONS

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Considerations for remote, international and cross-border investigations

Document collection

Adequacy of legal hold

- Does it address the multiple ways that employees may now be communicating and storing work product?

Custodian and data map

- Does it identify the various locations and accessibility of physical documents and electronic data?

Protocols and tracking

- Have secure protocols been established for the handling and transmittal of data?
- Do they address all issues e.g. GDPR and privilege?
- Is the data collected thoroughly logged and tracked?

Witness interviews

Planning and scheduling

- In person or via video conference?
- Timing?
- Translators?
- Local 'companion' requirements?

Parameters of video interviews

- Have clear ground rules been established with the witness in advance?
- Who will be present?
- How will documents be shared?
- How will the interview be memorialised?
- What is to happen if there are technological issues?

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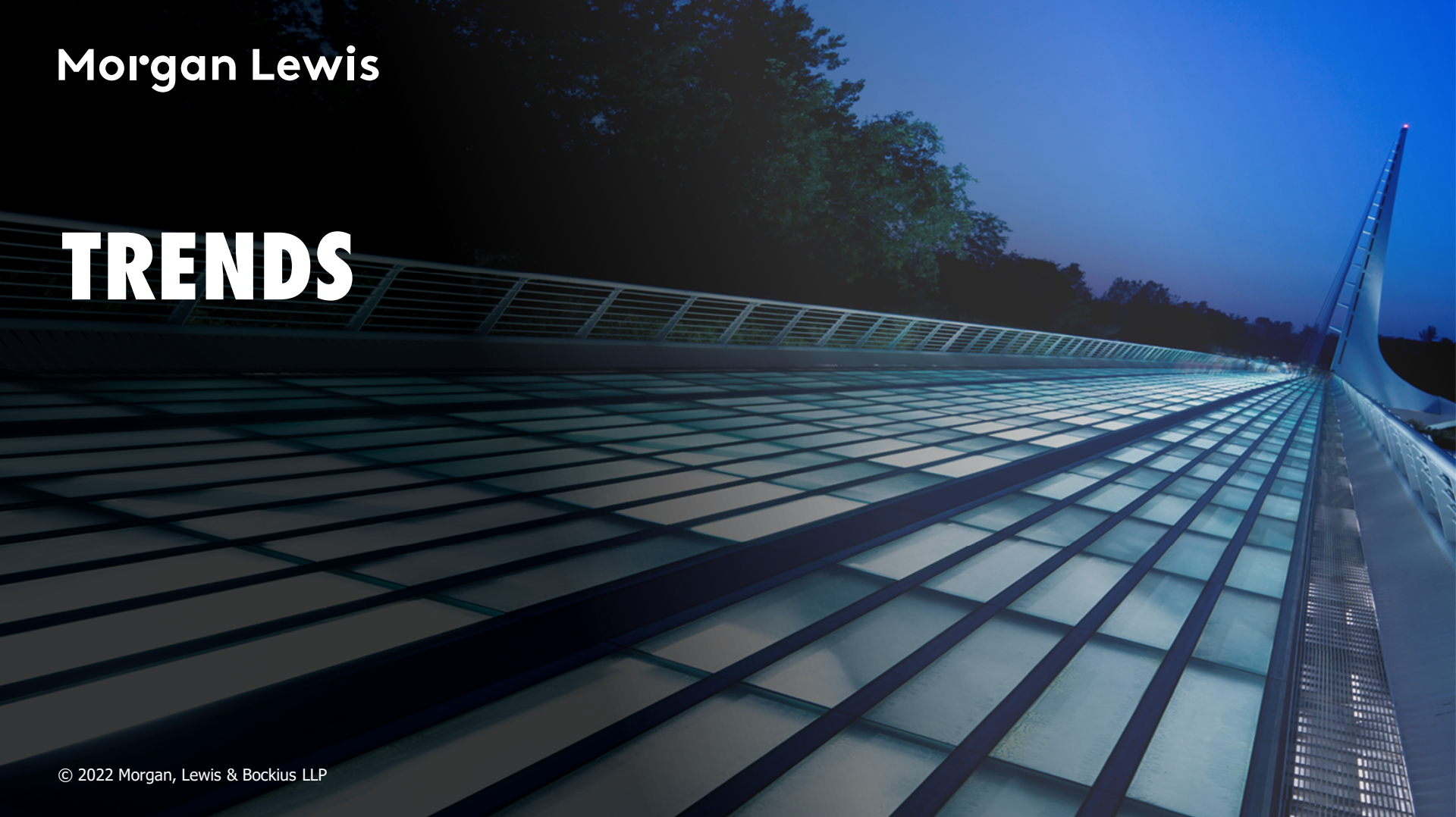
TRENDS



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Trends

Increased litigation concerning retrospective action

More employees taking data to preserve their positions

Growing concern about extent of confidentiality obligations

More requests for legal rep during internal processes

Employees contacting regulators / ICO / EHRC / HSE

Threats to 'go public'

PART 2 Reminder

Topic: Disciplinaries, Grievances, and Pre-Litigation Strategy

Date: **8 June 2022**

Case study to explore the key issues

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