



HR Bulletin

E-Update 62 - June 2016

Trust and Confidence

The duty not to undermine mutual trust and confidence is now a well-established part of all employment relationships. Although the duty applies to both sides, we tend to see it crop up most when it is the employer that has acted in breach of it and the employee has responded by resigning and claiming constructive dismissal.

When I talk about the duty it is usually in this context and I am often asked how the duty applies to employees. I usually reply that in practice anything an employee does to undermine mutual trust and confidence is likely to be treated as gross misconduct under the disciplinary procedure. Thanks to the EAT however, I now have a rather more concrete example to work with.

In *House of Fraser v Christofidou* the employer was investigating the loss of stock from its flagship Oxford Street store. They interviewed the employee after it emerged that her home address was associated with an ebay account that had been selling items very similar to stock that had gone missing from the store. Her defence was that the account was nothing to do with her but was in fact operated by her ex-husband who, for some reason, continued to use her address to operate his ebay business. However she refused to give her employer his contact details - or even confirm when she had last seen him - and he was not interviewed as part of the investigation.

The Tribunal held that her dismissal was unfair because the employer had not done enough to check the employee's story and The EAT overturned this finding. Since the employee was relying on her ex-husband as her defence it was up to her to make sure that the employer had access to his evidence.

It was not the employer's job to go chasing after him since the employee refused even to furnish them with his phone number.

The case becomes more interesting, however, when we look at the reason for the dismissal. The employer had not simply concluded that the employee was in some way involved with the theft of stock. Rather, she was dismissed 'for gross misconduct due to a lack of trust'. The Tribunal found that the reason for dismissal was not theft, but that her evasive, inconsistent and suspicious answers during the course of the investigation had 'led to a breakdown in trust and confidence'. The Tribunal found that this conduct was not sufficiently serious to warrant a summary dismissal but this conclusion was overturned by the EAT. The EAT observed that the obligation to maintain trust and confidence went to the heart of the employment relationship. By being evasive and uncooperative when questioned the employee had acted in breach of this fundamental term and this entitled the employer to dismiss without notice.

Now it is important to be careful here. There is a danger of using 'trust and confidence' as a fall-back whenever the employer feels that there is not enough evidence to establish misconduct but feels that there must have been 'something going on'.

If an employee is accused of misconduct then in general, the employer should either conclude that the employee is guilty (and have the gumption to say so clearly) or conclude that there is insufficient evidence to establish the point and take no disciplinary action. In most cases it would not be right to act simply on the basis of some lingering suspicion.

This case is different, however, because the breakdown in trust and confidence was caused by the employee's own actions in adopting an uncooperative approach to the investigation. The dismissal was not, therefore, based on some general feeling that the employer could no longer have trust and confidence in the employee but rather on the basis that the employee had acted in such a way as to undermine that trust and confidence.

This is a very positive decision from the EAT which should strengthen the position of employers investigating misconduct who come up against an employee who thinks it is appropriate just to sit back and say 'no comment'. The employee is under a duty to cooperate with the employer and act in a way that furthers the employer's interests. That means answering truthfully and helpfully when the employer is conducting an investigation into alleged misconduct.

What this case does not help with, however, is the more ambiguous case where the employee's lack of cooperation is based on sickness absence – often through stress or anxiety. Punishing an employee in these circumstances would be quite inappropriate in the absence of very clear evidence that ill-health is being deliberately faked in order to delay or avoid the eventual outcome. This does not mean that all procedures should grind to a halt of course. An employer only has to do what is reasonable in the circumstances and it may be that the procedures can go ahead even if the employee is unable to cooperate with them. That, though, is a separate issue entirely.

My one reservation in this case was that the employer dismissed without ever putting the employee's lack of cooperation to her as an allegation in its own right. The basic requirement of a fair procedure is that the employee knows what he or she is accused of and then has an opportunity to put his or her side of the case.

It is not clear in this case that the employee had the chance to do that with the allegation that the employee had breached trust and confidence. The EAT didn't address the issue but I think that if an employee blankly refuses to cooperate with an employer's investigation, then that should be the subject of a disciplinary hearing in its own right. The employee should be told of the charge and that there is a risk of dismissal if it is upheld. That would give the employee an opportunity to explain his or her attitude, knowing how seriously the employer is taking the matter. It may also lead to an employee rethinking his or her approach to the main investigation.

What is clear however, is that an employee cannot simply thwart an employer's investigation by refusing to cooperate with it. Disciplinary investigations are simply meetings between the employer and employee and the normal rules of that relationship apply. An employee who thinks that he or she in an episode of 'The Bill' (remember that?) and has 'the right to remain silent' is making a serious mistake.

Keep in Touch

Twitter - @DazNewman

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Quirky Questions Part Deux

In last month's bulletin we shared some quirky questions that CEO's have incorporated into their recruitment interviews. We shared these questions with you and challenged you to take part in our on-line interview and as promised we have included some of the best responses and also what these responses tell an employer about their candidates.... possibly!

"What did you learn from your Mum?"

- Everything about life and how to conduct yourself in so many situations
- Never to get into debt
- To be a survivor and fight
- Hard work brings its own rewards and how to make really nice gravy
- Never trust a blonde (I have three blonde sisters)

What century was the French Revolution in?

57% got this answer right - It was in the 18th Century

What magazines and books have you read recently?

- Sunday papers magazines and the Insurgent Novel.
- Chronicles of St Mary's – series
- Snow White Must Die - can't remember the author though!
- The Girl on a Train – 'unputdownable' if that's a word, The Daily Telegraph cryptic crossword book - one a day as brain exercise
- Sunday Times supplement. Unbroken (nothing to do with the EU vote)

If you failed at this job in your first 90 days, what things wouldn't you be doing well?

- Selling myself!
- Engaging with the team and local managers
- Making good tea
- Communicating with others
- I wouldn't be listening to people telling me I was going off track.
- Slowing down, taking the time to learn the culture

How can I tell if you're having a bad day, and how does that manifest itself?

- Not feeling that inner happy buzz
- Saying 'oh for goodness sake' a lot
- I won't talk to you
- When I don't talk to anyone and stay silent instead
- I'd probably tell you, get it off my chest and move on
- I am quiet

"Basically I'm testing them to see, 'How human are you ready to be with me?'" he told The New York Times.

Lars Dalgaard, Venture capitalist at Andreessen Horowitz and former CEO of Success Factors asks this to gauge a candidate's emotions.

Stewart Butterfield, CEO of work-messaging app Slack asks this to see if a candidate is curious about the world.

"The question it answers for me is, 'Are you investing in yourself?'"

César Melgoza, founder and CEO of business-intelligence firm Geoscapev says this gives a sense of what motivates a candidate.

"You want the candidate to recognize the aspects of themselves where they can be confident and the parts they're going to need for them to be successful in a new company,"

Don Charlton, Founder and CEO of the software recruiting firm Jazz asks this to find out if the candidate is self-aware.

"If they say they become quiet, then I'll ask, 'Tell me what comes next? How do you deal with it? Do you walk away from the issue?' And I'll drill down on that, because it leads to a lot of good discussions around what motivates them, and what they enjoy about their work and what they don't like about it." Gary Smith, CEO of broadband and telecommunications company Ciena asks this to gauge further responses.

In the SPOTLIGHT



West Midlands Coaching and Mentoring Pool Conference

Beyond the conversation

9th Annual Conference



14th
November
2016
Villa Park,
Birmingham



A great conversation can transform your thinking and give you courage to try more, but there are so many things at play that enable conversations to be effective: trust, confidence, attitude, culture and challenge are just a few that spring to mind.

Our 2016 conference will aim to equip you to focus on the things that influence the effectiveness of your conversations, so that your positive impact as a coach, mentor and leader really resonate beyond the conversations we have.

Always looking to dig deeper, our 9th annual conference has a great line up of speakers who will provide different tools, frameworks and research to bring insight and challenge your thinking, and with time to experiment and debate how they can be introduced into your workplace.

Join us and network with fellow coaches, mentors, experts, and professionals with a keen interest in coaching and mentoring from across the UK.

We look forward to seeing you there.

Fees	Delegate
WMCMP Coaches/Mentors	£55+Vat (£66)
Early Bird discount – book before 12 th September 2016	
WMCMP Member Organisations and EMCC Members – Early Bird	£130+Vat (£150)
Non Member – Early Bird	£145+Vat (£174)

Standard Booking	Delegate
WMCMP Partner Organisations and EMCC Members – Standard	£155+Vat (£186)
Non Member – Standard	£165+Vat (£198)

Who should attend:

Whether you are responsible for coaching and mentoring in your organisation, a manager supporting your staff or coaches and mentors working with clients, we have something for you.

Group Bookings

Available when booking 3 or more delegates, email hub@wmemployers.org.uk for details

Find out more:

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