



HR Bulletin

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Keeping Whistleblowers Anonymous

The latest fallout from Peter Clarke's investigation and report into the so called 'Trojan Horse letter'¹ concerns the disciplinary proceedings being conducted by the National College for Teaching and Leadership (NCTL) in relation to five of the teachers accused of professional misconduct.

The BBC has reported¹² that witnesses who gave evidence to the initial investigation were told that the transcripts of their interviews will be disclosed to the representatives of the teachers concerned despite assurances given in the course of the investigation that their evidence would remain confidential. The disclosure of the transcripts has now been temporarily blocked pending a final decision on whether the evidence should be disclosed or not.

There is a difficult conflict of rights here. On the one hand individuals who cooperated with the investigation thought that their identity would be protected and now fear that they may be targeted by extremists. On the other hand, the accused teachers stand to lose their careers if the case against them is upheld and they are entitled to a fair hearing. If they do not know who has accused them of wrongdoing they may be seriously hampered in their attempts to challenge that evidence. They are entitled to a fair hearing – and knowing the details of the case against you is a fundamental aspect of natural justice.

In the employment context, employers are frequently faced with a similar dilemma when employees are only prepared to make a complaint on the condition that their anonymity is assured. The employer can, of course, maintain that anonymity in the course of internal disciplinary

procedures – but this does make it harder to follow a fair procedure.

The leading authority on the use of anonymous evidence is *Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235*. In that case the EAT held that the employer should take particular care when the identity of a witness is not disclosed to the employee and take into account the difficulty that employees have in putting their side of the case without knowing who their accusers are. In particular the EAT emphasised the importance of trying to obtain corroboration of an informant's account, and investigating whether there were any grounds to believe that the informant may have some ulterior motive for making the accusation and is hiding behind the veil of anonymity in order to avoid scrutiny.

The EAT also suggested that the manager conducting the disciplinary meeting should test the anonymous evidence by interviewing the witness personally – in the absence of the accused employee. There are no fixed rules, however, and in *Ramsey v Walkers Snack Foods Ltd [2004] IRLR 754* the EAT held that dismissal could be fair even if the identity of the informant was also kept from the manager conducting the hearing. In that case there was simply no other way of persuading employees to give evidence of a serious case of wrongdoing and the HR manager had interviewed the informants and produced a detailed witness statement of her own, giving details of the evidence they had provided.

¹http://dera.ioe.ac.uk/20549/1/Report_into_allegations_concerning_Birmingham_schools_arising_from_the_Trojan_Horse_letter-web.pdf

² <http://www.bbc.co.uk/news/uk-england-birmingham-38507968>

If a case based on anonymous evidence subsequently reaches an employment tribunal, however, the employer is no longer in a position to guarantee that the anonymity of witnesses will be respected. The Tribunal's overriding objective is to deal with cases fairly and justly. That means that both sides are entitled to a fair hearing and if the only way to give the employee a fair hearing is to order the disclosure of evidence that reveals the identity of someone who believed that they were making their allegations in confidence, then that is what the Tribunal will do. Complying with an order issued by a court or tribunal overrides any other duty the employer may have to the employee, either as a result of assurances that were given when the evidence was obtained, or under the provisions of the Data Protection Act.

Nevertheless a Tribunal will not want to reveal the identity of anonymous informants unless that is necessary for a fair resolution of the claim – and in many cases it won't be.

In the 'Trojan Horse' case the key issue for the NCTL is whether the teachers are actually guilty of the misconduct alleged. One can see why the panel would want to assess the evidence against them and also why the teachers themselves need to know exactly what that evidence consists of. In an unfair dismissal case, however, the issue is different. The Tribunal does not usually need to decide whether the evidence shows that the employee is guilty of the misconduct. The question is whether the employer has behaved reasonably in deciding that the evidence is sufficient to warrant dismissal. In making that assessment, it will often not be necessary to disclose the identity of the witnesses concerned, because the emphasis will be on how the employer used that evidence and whether it was reasonable to rely on it rather than whether it was actually accurate.

The Tribunal will usually try to respect any reasonable assurances that witnesses have been given about confidentiality – in so far as that is consistent with the need to dispose of the case fairly. That may mean that evidence is disclosed to the Tribunal in the first instance, and then redacted to remove any material that might identify witnesses.

If a Tribunal does order disclosure on terms that would reveal the identity of anonymous informants, then the employer can challenge that and insist on a hearing where the arguments on both sides can be heard.

But in those cases where the Tribunal does feel that the identity of an informant must be disclosed in order for the claimant to have a fair hearing, then the only way the employer can realistically protect that individual is by negotiating a settlement or even conceding liability and bringing the case to an end.

Protecting the identity of informants always presents a risk. There is a risk that internal procedures will be unfair and a risk that at some stage the informant's identity will have to be disclosed anyway. It is clearly better for evidence to be open so that it can be properly assessed and with witnesses provided with appropriate support and protection. Where informants insist on anonymity, however, the employer must decide whether the case is serious enough – and the evidence sufficiently cogent – to proceed on that basis. It is important not to 'over promise' potential witnesses that their identities will be kept confidential.

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In the SPOTLIGHT



Aspire is aimed at Strategic HR/OD professionals who want to develop the business skills necessary to challenge and influence organisational direction and drive culture.

It is a 10 day programme of modular learning and project development taking place over a six month period and culminating in a celebration event. The programme is led by the Chartered Institute of Personnel and Development (CIPD) with a key aim to enhance self-awareness, build confidence and help individuals develop a strong personal profile within their own organisation and with their stakeholders.

Aspire is delivered in partnership with the CIPD with a key aim to enhance self-awareness, build confidence and help individuals develop a strong personal profile within their own organisation and with their stakeholders, delegates will;

- understand the difference between advocacy and inquiry and be able to capture learning from collaborative situations and organisational analysis
- develop a more detailed awareness and understanding of the business context in which they operate
- understand the personal characteristics, qualities and behaviours that will enhance their influence within the organisation and as a leader within their profession
- gain confidence in applying organisational insight by using models that strengthen understanding and enable joint analysis, diagnosis and problem solving with service leads to operate effectively as an internal collaborative consultant

The Aspire programme requires delegates to work on a project topic from a list of themes, key issues or questions posed by Heads of HR from across the region.

Working as a group delegates gather research to support their propositions or arguments around a potential solution and develop a final report that they present to a professional panel and guest audience on the Celebration Day.

There are 3 facilitated project days within the programme and delegates can expect to commit at least an extra 5 days to work on the project.

We are currently receiving applications for 2 new cohorts.

- London – <http://aspirehrbp.org.uk/london-2/>
- West Midlands - <http://aspirehrbp.org.uk/west-midlands-2/>

For more information on the programme please visit <http://aspirehrbp.org.uk>

“The Aspire programme was an invaluable experience for me; not only from the programme content point of view, but also from the networking opportunities that it provided. Since undertaking the programme, it is the networking aspect, in particular, that has proved to be most beneficial in terms of sharing knowledge and ideas with colleagues across the region.

I would have no hesitation in recommending the programme to both current and aspiring HRBPs”.

Andy Dunn, HR Business Partner, Warwickshire County Council