



March 2019 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

- Unfair Dismissal following a positive drug test
- Confidentiality and Non-Disclosure Agreements (NDA)
- Grievance Investigations – have you been involved where the manager felt the grievance against them was unjustified?

Unfair Dismissal following a positive drug test

A recent case by Kenneth Ball (B) v First Essex Buses (2018) has dealt with what employers must consider during disciplinary procedures if an employee test positive for drugs.

In this case, the court found the decision to dismiss B for failing a drug test was procedurally unfair. B denied taking cocaine and that the positive reading was due to cross contamination. He said he had not been given the opportunity to wash his hands when tested, he handled bank notes and he had pricked his fingers with needles for his diabetes test, which could have caused a misreading.

Since the date of his test, B had found that 80% of the bank notes in circulation were contaminated with drugs.

B later tested negative during two hair follicle tests. However, the employer refused to consider the later hair follicle test as evidence. The employer had also failed to allow B the opportunity to challenge the drug test.

The employment tribunal found the employer had also breached the ACAS Code of Practice due to discounting key evidence from B; the managers should have kept an open mind.

The company also failed to consider the employees' exemplary record of attendance and punctuality.

The important note to take away from this case is that employers must not predetermine the outcome of the disciplinary hearing. Companies must also ensure they consider all the evidence and take an impartial view when considering what action to take.

In addition, you must consider the employee's previous record before deciding whether to dismiss.

Employers: during disciplinary procedures, employees must be given the opportunity to submit any evidence to support their case and your policies are in line with the ACAS Code of Practice.

Contact us: during disciplinary procedures, employees must be given the opportunity to submit any evidence to support their case and your policies are in line with the ACAS Code of Practice.

Confidentiality and Non-Disclosure Agreements (NDA)

The #metoo movement has put NDAs into the spotlight with concerns that NDAs were being used to cover up potential wrongdoing. This has resulted in public pressure to reform the law on non-disclosure agreements (NDA).

What can employers do to make a NDAs more likely to be enforced?

- If you need to reinforce confidentiality rules and these are vital to your business, make sure you have it as a standalone agreement, rather than just relying on a confidentiality clause within an employment contract. The fact the contract or agreement is all about confidentiality and non-disclosure, rather than it being one

clause in a wider document, is a factor in balancing the public interest in enforcing a contract. It can therefore be argued the individual knew what they were signing.

- Add in exceptions, such as making it clear the NDA doesn't prohibit disclosures to regulatory bodies or information which is already in the public domain.
- Limit the duration. Unless there is a good reason otherwise, try and keep the NDA limited to between two and five years after employment ends. Usually by that time, the emotional drivers to tell the story have faded. The employee has probably moved on with their life. There's nothing legally wrong with stating it lasts forever, but a judge is more likely to find it could be unreasonable if it is not time limited.
- Ask the signatory to obtain independent legal advice before signing the NDA, and make sure that a lawyer countersigns in an advisor's certificate. A settlement agreement requires this anyway. This very useful safeguard helps avoid the argument that you took unfair advantage of your employee.

Employers: when you are dealing with high level employees who have access to highly confidential information it may be wise to ask them to sign a separate agreement.

Contact us: we can help you draft a confidentially or non-disclosure agreement that is right for your business.

Grievance Investigations – have you been involved where the manager felt the grievance against them was unjustified?

Sometimes if you are dealing with a grievance lodged against another employee or manager it is very difficult to work out who is telling the truth and who is lying or exaggerating.

Often you get conflicting views of events and opinions and it difficult to work out what actually went on. Some will exaggerate their response, positioning themselves as the best and most caring employee or manager you're ever likely to meet.

Often, the investigation is less about working out who is telling the truth, and more about trying to work out who is lying the least.

Try coming at their story from a different angle which allows you to test their evidence. For example, ask for surrounding details ('What were they wearing?', 'Where were they sitting in the room?', 'What time was it?' and 'How did they /and or others feel?'). By asking questions in a different way to cover timings, situation and effect can often produce inconsistencies to work out the exaggerator.

Sometimes it is useful to go through events out of chronological order ('What happened just before they said XXXX?'), as that confuses people who have memorised a story. So replay what they said in a random order, or in reverse, and see how their recollection holds up. Or repeat some of the questions at a later stage as you may get a slightly different answer.

It is also helpful to ask what they thought other people saw/thought, eg 'Why do think he said that?', or 'What do you think your witness will tell me?', which tends to confuse those who have rehearsed a lie.

Employers: in complicated investigations it is useful to use an external grievance investigator or grievance officer to provide you with support.

Contact us: we can advise on grievances, investigations and disciplinaries and help you on site as external support.

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



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