

For your eyes only

A witness' anonymity can never be guaranteed as the overriding factor is the need for a fair hearing

Dealing with allegations concerning an employee's conduct made by an informant who insists on maintaining anonymity is one of the most sensitive of HR issues. What steps should employers take to achieve the right balance between protecting witnesses who genuinely fear having their names exposed and providing a fair hearing for employees accused of misconduct? Two recent EAT cases have examined this delicate matter.

In **Defoe v HMPS** (UKEAT/0451/06/DA), Defoe's solicitors sought disclosure of some security reports, which record information about matters involving prison officers and prisoners. The Prison Service would only disclose the reports on the basis of the identity of the informants being concealed, to ensure their safety and that others would not be dissuaded from providing information in the future. The EAT held that the ultimate test is whether discovery is necessary to dispose of proceedings fairly, with the starting point being full disclosure unless there is a strong case to the contrary. Where a confidential relationship exists and disclosure would be in breach of some ethical or social value involving the public interest, there is a discretion to exclude relevant evidence which was permissible in this case.

In **Arqiva Limited v Sagoo** (UKEAT/0135/07/ZT), Sagoo had raised a grievance against a number of his colleagues. During the investigation, "A" requested anonymity because he feared reprisal by Sagoo. "A's" evidence was relied on by Arqiva in dismissing Sagoo's grievance, but had not been disclosed to him. The EAT overturned the tribunal's order for full disclosure. The tribunal had only considered whether the document was relevant and not whether it was necessary for a fair hearing. Therefore the wrong test had been applied. Furthermore, no consideration had been given to the issue of confidentiality or the public interest issue which must allow statements to be given in confidence if reprisal is feared.

These cases highlight the difficulties sometimes faced by employers when conducting investigations and where employees wish to remain anonymous. Striking the right balance is not easy when trying to be fair to everyone involved, but this is not the first time the EAT have become embroiled in the matter.

In **Ramsey v Walkers Snack Foods Ltd** [2004] IRLR 754, the EAT held that Walkers had not acted unfairly in dismissing employees for theft on the basis of statements by colleagues who did not wish to be identified. The offer of anonymity was not unreasonable as the factory had a history of workers enacting intimidation and retribution against anyone who cooperated with management.

In **Asda Stores Ltd v Thompson** (No.2) [2004] IRLR 598 the EAT found that a tribunal erred in not allowing Asda to show how confidential statements alleging that certain employees were guilty of illegal drug use could be edited to conceal the informants' identity. Insufficient attention had been given to the sensitivity of the information. Allegations of drug taking were serious and the witnesses' fears of violent reprisals were real.

Practical guidance on the process to be adopted when anonymous witnesses are involved was given by the EAT in **Linfood Cash & Carry Ltd v Thomson and others** [1989] IRLR 235. The EAT stressed that employers must strike a careful balance between the need to protect anonymous informants and ensuring that an employee accused of misconduct receives fair hearing. The EAT went on to set out a number of key steps including:

- The evidence should be set out in writing concealing the identity of the informant.
- Further investigation should take place to corroborate the information given.
- Tactful inquiries may also include the character and background of the informant which may tend to add or detract from the value of the information.
- The employer should assess whether the informant has any reason to fabricate evidence.
- The employer must be satisfied that fears of reprisal are genuine.
- The informant's statement should be made available to the employee accused of misconduct.
- If the evidence is disputed, then further enquiries must be made with the informant in private.

But employers should be conscious of the fact that anonymity and confidentiality can never be guaranteed, since ultimately, the question of disclosure is a matter for the tribunal having regard to whether disclosure is necessary to ensure a fair hearing.

**Key points**

- ☑ Employers should be mindful that anonymity can never be guaranteed, since the overriding factor in disciplinary-related proceedings is the need for a fair hearing.
- ☑ The starting point is always full disclosure unless there is a strong case to the contrary, e.g. a confidential relationship exists and disclosure would be in breach of some ethical or social value.
- ☑ Where a witness wishes to remain anonymous employers should check that the informant had no grudge to bear and there are genuine fears for safety.
- ☑ Where evidence is given in confidence, relevant facts should be revealed during proceedings without disclosing the identity of the witness and reinvestigated in private if there is any dispute.

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