

Criminal Allegations v Employment Obligations

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Common Scenario:

An employee has been arrested.

The facts are unclear.

The allegations are already public.

The client wants advice.

The pressure on the lawyer is immediate.

Employers are expected to act before the facts are known.

What does an arrest *really* tell you?

When should you advise a client to act - or wait?

What does the HR investigation need to include.

When can a dismissal be fair?

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Issues:

- Arrest & Criminal Proceedings
- Priority Initial Steps
- Parallel police investigations
- Self- Incrimination
- Perverting the Course of Justice Offences
- Dismissals
- Value-added Issues

Initial Steps:

Information Gathering (contract; witnesses)



Where is the employee? (bail/remand?)



Internal v External Circumstances (contract/HB)



Suspension? (reasoning)

Acas:

“Criminal charges or convictions

An employee should not be dismissed or otherwise disciplined solely because he or she has been charged with or convicted of a criminal offence. The question to be asked in such cases is whether the employee’s conduct or conviction merits action because of its employment implications.”

Scottish Special Housing Association v Cooke & Ors

[1979] IRLR 264: ‘...some inquiry at least might have disclosed the nature of the information upon which the police were proceeding...’.

Blanket dismissals likely unfair!

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Remand:

Prison until trial (e.g. past convictions; abscond; crime during bail;
and/or past bail breach)

Uncertain period (182 days)

Location

Hare v Murphy Bros Ltd [1974] 3 All ER 940

Bail:

Reside at certain address

Prohibition on contact

Surrender of passport

Reporting to police

Frustration?

Impossibility

Radically different to what was agreed by the contract

F. C. Shepherd & Co Lt v Jerrom [1986] ICR 802

C/f:

Caution: *Acas & Chakki v United Yeast* [1982] ICR 140

Information

Frustration

Suspension

Pause...

Remand

Bail

Handbook

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Establish Facts:

Corresponding in prison (location key)

Defence Lawyer

Police

Press

Social Media

Internal

Court

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Investigate:

Investigate what?

Timing (wait for the police?)

Pay

External body involvement

North West Anglia NHS Foundation Trust (appellant) v

Gregg (respondent) [2019] IRLR 570

Burchell

Self-Incrimination:

Harris and Shepherd v Courage (Eastern) Ltd [1981] IRLR 153

Later acquittal (R A Costa v Optolis [1976] IRLR 178)

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Perverting the Course of Justice:

‘obstruct, divert or disrupt criminal proceedings or police investigations generally may suffice—the offence does not need to have taken place in respect of a particular trial or investigation’

(R v Headley)

- fabricating or falsifying evidence
- Destruction or concealing evidence
- Assisting a person to evade arrest and obstructing the police
- Making a false allegation

Dismissal:

Back to basics: Fairness! (s98 ERA)

Avoid a criminal investigation

Burchell:

1. Did E believe the employee to be guilty of the misconduct;
2. Was that belief by E was reasonable; and
3. Holding that belief, had the E carried out a proper & reasonable investigation?

Dismissal:

Conduct or SOSR?

Dismissal:

- Reputation
- Third-Party/Internal Pressure/
Internal Conflict

Dismissal:

- Reputation

Lv K [2021] IRLR 790

Dismissal:

Third-Party Pressure:

*Scott Packing & Warehousing Co Ltd v
Paterson* [1978] IRLR 166

Dismissal:

Third-Party/Internal Pressure/

Internal Conflict:

Value-Added

Communication & PR

Press Enquiries

Defamation

Checklist:

- What is known?
- What is public?
- Where is the employee?
- Internal or External?
- Communication with the employee
- Suspension
- Investigate
- Review
- Decide

Questions?