

Responding to Allegations of Inappropriate Behaviour Outside the Workplace



09 August 2024

A consistent approach to conduct outside the workplace - managing staff involved in police investigations, and the misuse of social media

Conduct outside of work

Regard should be had to contractual provisions and local policies (e.g. disciplinary, diversity and inclusion, dignity at work, bullying and harassment, social media etc) in respect of when conduct outside of work might result in disciplinary action.

Where such conduct is raised with an employer (even where there is no police involvement) if it is relevant to an employee's employment, including trust and confidence in the employee; and/or any impact on the employer's reputation, it may be investigated based on the evidence available e.g. social media entries/screenshots, witness statements.

Any action should balance individuals' rights to freedom of expression, and to peacefully protest where relevant.

Police investigations

The fact of a police investigation should not automatically result in disciplinary action.

Should employers be notified that members of staff have been arrested, charged with, or convicted of offences related to the riots, consideration should be given to the nature of the allegations and whether the offence has an effect on:

1. **the employee's ability to do their job** (e.g. are they in custody? have restrictions been placed on their practice by regulatory bodies?)
2. **their relationship with the employer** (e.g. is there a loss of confidence arising out of demonstrably racist or violent conduct?), or
3. **the reputation of the employer** (e.g. Islamophobic social media comments made on public forums which identify them as an employee of the NHS organisation).

Where there is such an impact, employers should liaise with the police to determine whether there is any reason it should not investigate and take forward internal processes now, or whether the police wish the employer to wait for the criminal investigation to be completed and if so, how long that is likely to take.

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Suspension

Where the nature of the offence creates a risk to patients, risk to colleagues and/or the presence of the employee may impede any investigation, consideration should be given to suspending the individual in accordance with employer's relevant policies.

Disciplinary Investigation

Whilst employers are not bound to await the outcome of criminal proceedings before taking internal action in line with its disciplinary procedures, employers will not wish to take any steps which might prejudice a fair criminal process and risk undermining a successful prosecution. If the police are content for you to do so, employers can proceed to an internal conduct investigation and disciplinary hearing in the usual way, although note that for concerns relating to doctors and dentists, Maintaining High Professional Standards in the Modern NHS (MHPS) requires that employer investigations should only proceed in respect of those aspects of the case which are not directly related to the police investigation underway.

If either an investigation or hearing is conducted pending completion of a criminal investigation, the employee may choose not to participate, relying on their right not incriminate themselves under Article 6 of the European Convention on Human Rights (ECHR). A dismissal following a disciplinary hearing in such circumstances could be unfair, particularly if the employer would only have to wait a relatively short time before the police investigation concludes. Therefore, again understanding the timescale from the police will be key here.

In exceptional circumstances, employees may seek an injunction to prevent employers from proceeding with internal processes pending the outcome of a police investigation.

In light of these risks, consideration should be given to pausing any internal disciplinary process until the police investigations conclude, unless the individual has admitted the offence, there is indisputable evidence of the offence being committed, or police confirm that the employer may proceed, or indicate that the criminal investigation may run for a significant length of time (i.e. 12 months +) and/or cannot give any indication of a potential date for the end of the investigation.

This may not be such an issue in relation to offences arising out of the recent riots, as it has been reported that the criminal justice process has been expedited in this instance with some sentences already being given for acts committed a matter of days earlier.

Convictions

Employers are entitled to accept criminal convictions without the need for further investigation of the offence itself, although some investigation will still be required to determine the impact of the conviction and/or sentence on the employee's ability to do their role and/or the reputation of the employer.

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DBS referral

Employers that provide regulated activities and employ people in either a paid or unpaid capacity have a duty to make a referral to the DBS for them to decide whether an individual should be barred from engaging in Regulated Activity with children, adults or both in England, Wales and Northern Ireland where certain conditions are met (primarily related to harm to children or vulnerable adults). A failure to do so without reasonable justification is a criminal offence (the penalty on conviction is a fine of up to £5,000).

There could also be times when an employer considers that a referral should be made in the interests of safeguarding children or vulnerable adults even if these conditions are not met. This could include acting on advice of the police or a safeguarding professional, or in situations where the employer doesn't have enough evidence to dismiss or remove a person from working with vulnerable groups. Employers should seek legal advice in relation to such cases.

For further guidance on how and when to refer a case to the DBS, see:

- [Making barring referrals to the DBS](#)
- [DBS barring referral guidance](#)
- The barring and referrals webinar in NHS Employers' [DBS checks webinar series](#).

Social Media

It has been reported that social media has played a key role in promoting and coordinating the recent violence and racial and religious discrimination.

Where objectionable statements are made in a way which links those statements to the employer, the damage to the employer's reputation with the public or particular groups may be significant.

Social Media Policy

A good social media policy is the first step to protecting your organisation and employees against these. Employers should:

- remind individuals that there are consequences for breach and social media should not be used in a way which may cause harm to the employer or their colleagues;
- consider broadening the scope of the policy to include those who are not employees such as bank, agency and locum workers or develop separate policies for such staff groups on the use of social media;
- emphasise that all activity in and out of work is potentially covered and should be honest and accurate;
- Advise employees on adapting their privacy settings for social networking sites and about the duty of confidence;

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As well as employer's policies on social media, for those who are subject to professional regulation there is clear guidance from each of the regulators which links to the individual Codes of Practice.

Inappropriate Communications

Concerns about inappropriate communications on social media should follow your normal disciplinary procedure referencing potential breaches of social media policies if you have one and other policies as relevant (e.g. bullying and harassment, dignity at work, diversity and inclusion). Most employers' policies will require staff to refrain from making comments which could amount to bullying harassment or discrimination or making statements that could bring the employer into disrepute. Similarly, any such posts are likely to be in breach of employers' values.

Employers should ask the following questions:

- What was said/done?
- What damage is there?
- What mitigation is there?
- What sanctions may be appropriate?

This should be followed by a fair investigation and selection from a range of reasonable responses. As with other conduct outside work and police investigations, consideration should be given to the impact of the posts on the employee's ability to do their job, their relationship with the employer, and/or the reputation of the employer.

Potential pitfalls

- Conflicts in terms of beliefs.
- The public / private nature of the communications.
- The severity / impact of the post in question.

Taking action against an individual simply because they have posted material on line expressing a protected philosophical or religious belief is likely to be discriminatory. However, it is legitimate to take action when the individual has manifested that belief in a way to which objection could justifiably be taken (which will be inherently so where it amounts to discrimination or harassment of another). What amounts to a protected belief, or an objectionable manifestation of such a belief, are complex issues and we recommend that further legal advice is sought in respect of individual cases as needed.

For more information please contact:

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