

“He said, she said”

Assessing employee credibility – guidance for employers from the Court of Appeal when faced with two conflicting stories

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One of the most difficult positions an employer carrying out a disciplinary process can find themselves in is having to decide which employee is most likely telling the truth when their statements of facts do not agree, and there is no or little corroborating evidence. Unfortunately, the factors and the process that employers should take into account in arriving at their decision and ultimately preferring one story over the other is not a straightforward one. The recent Court of Appeal decision of *A Ltd v H* can however shed some light for employers over how they should arrive at a decision when faced with two conflicting accounts.

Mr H brought a claim that his employer (A Ltd) did not properly investigate a sexual harassment claim made against him by Ms C which ultimately led to his dismissal. After an investigation involving multiple meetings with Mr H and Ms C, the investigator preferred Ms C’s account. Mr H had some gaps in his explanation and Ms C’s evidence seemed to A Ltd to be more credible.

At the Employment Court level, the Court held that this issue required an assessment of the credibility of the persons involved, and that the factors to be taken into account in this assessment depend on each case. The Court said, however, that an employer can consider:

1. Potential bias – to what extent was information given from a position of self-interest?
2. Consistency – has the person being questioned presented information which is consistent throughout?
3. Were non-advantageous concessions freely tendered?
4. Sometimes, demeanour when providing information can assist, although scientific research has cast doubt on the possibility of being able to distinguish truth from falsehood accurately solely on the basis of appearances.

These must be assessed with common-sense and in an even-handed way. An employer’s decision should not be based on one element to the exclusion of others.

The Court was required to determine whether there was clear evidence upon which a reasonable employer could safely have relied after conducting a fair and reasonable investigation. Ultimately it held that Mr H’s dismissal was unjustified as A Ltd adopted different recording and interviewing practices for different employees. The Court said that A Ltd had failed to ensure that all witnesses were questioned with the same level of detail. Accordingly the Court considered that the employer did not have reliable evidence for believing the employee was at fault.

On appeal, the Court of Appeal held that the Employment Court had made an error of law by requiring the same level of rigour i.e. the same interview process, to be adopted towards each witness. The test for justification of dismissal required an assessment of what was fair and reasonable in all the circumstances and this should have included an assessment of the parties and their respective positions. The Court said that using different interviewing methods and recording interviews differently did not necessarily mean that a dismissal was unjustified.

This is a reassuring decision for employers, with the Court of Appeal

accepting that employers do not necessarily conduct all interviews perfectly the same, but that still conclusions can be reached. The law requires employers to conduct a full and fair investigation into allegations of employee misconduct but there is room for flexibility. Having said that, assessments of credibility are difficult to make. Where there are serious allegations being made, and a seemingly irreconcilable difference in stories, we strongly recommend that employers take advice before making potentially costly – both to them and to the employees concerned – decisions.

If you would like more information regarding the above, or have any questions, please contact us.

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