

Training For Success

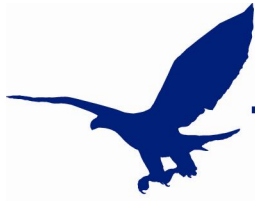
...minimising corporate threats

The Credit Crunch, other fine Biscuits and Foie Gras – Do HR professionals have the appetite to deal with employee driven loss?

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The after effects of the global economic crisis continue to squeeze us all however businesses arguably feel the rap more acutely. In the commercial sector as the sale of primary products and services falter it is probably time for a quick glance behind to have a sneak at what is haemorrhaging via shrinkage and dare I say it, employee driven fraud and theft. The sales and retail sectors are primary victims with everyday goods easily accessible by the light-fingered amongst us and monetary streams that can be easily manipulated by the crafty. Equally all sectors suffer from the malingerers – the ones that fail to produce and when challenged seek the comfort of the stress card or place the counter attack of making an erroneous grievance against management. And we haven't even mentioned those who sit at their workstations viewing or downloading inappropriate material!

To put some of these issues into perspective let's start with some real Monopoly style figures. Across North America, Europe and the Asia-Pacific, disloyal employees are responsible for 35.5% of loss or £27.1 billion (\$40.7 billion) (Bamfield 2009). Or to put it another way a shade off the total GDP of



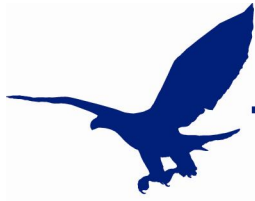
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Austria (World Bank 2008). This figure is arguably dwarfed by the sum that represents the cost to businesses in lost trade, the purchase of preventative measures and investigation that may total many billions more.

Sickness absence is generally accepted to cost UK businesses 12.2 billion pounds a year, according to the latest figures published by the Confederation of British Industry (CBI). Although difficult to answer for each company sickness absence could cost UK businesses as much as 16% of payroll. By 2006, employment tribunals were costing UK employers £210,000,000 every year. That figure is rising, and one message is clear: employers who do not protect themselves are going to have a huge price to pay.

It is arguable that domestically internal dishonest losses are rarely reported and thus represents a significant chunk of unrecorded crime. Nationally this issue has an impact upon the economy albeit at a community level this practice may have dire consequences on the availability of local service delivery. But still the losses continue at alarming levels. So why is it that the actions of dishonest and work shy colleagues continue to be such a massive drain on the bottom line especially since staff have been employed staff since the year dot?

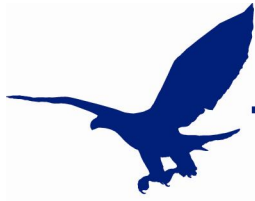


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This topic may be approached from a number of angles although primarily I suspect that there are currently two broad fields of exploration. Firstly, by mechanical means and secondly, by reference to the human element. The mechanical methods are on the up. Electronic data mining systems have hit the market place at an alarming rate. They drill down so far that if someone inadvertently coughs near a till an alarm will ring. Don't get me wrong, these devices are brilliant at collecting primary intelligence and directing managers and investigators to hone in on the higher probability area of detection although do they have the capability to deal with subtle long-term frauds? Nevertheless once this data is acted upon there is the unpredictable element. The human-being. The one piece of the jigsaw puzzle that does not necessarily adhere to the simple truths of the binary coding of the computers that seeks to finger them.

Management training within this arena is at best ad-hoc and at worse simply modelled on what the manager or internal investigator saw on 'Frost', 'The Bill' or any other number of cop shows. Investigations are often crude and one dimensional. Going for the jugular, without notice of any possible defences or knowledge of how far legally one can burrow often leave HR with little option but to take the 'safe ground' of either no action or, in the eyes of the investigator, a slap on the wrists. And so the cycle of deceit continues. Confidence and collusion grow and dishonesty becomes part of the culture.



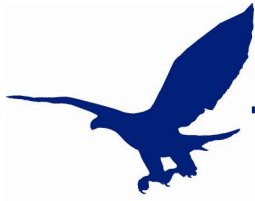
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HR is far from fault too. Decisions are often based on the criminal grounds of 'beyond reasonable doubt' with a smattering of Human Rights legislation thrown into the cauldron. Pity that the former never applies and the latter only applies to public bodies or those organisations providing public services on behalf of Government.

Investigative Interviewing is simple. If you like a gossip you are, I submit, ninety five per cent of the way there! You just need a simple structure and an understanding of the key Employment Law drivers that underpin the process. After all, the dishonest colleague can only act in one of four ways – they can lie, tell the truth, say nothing or go for a mixture of all three – and if you have a tactical response to all, then collusion, counter allegations and whistle blowing are a piece of cake!

However, the picture on the ground seems a little less impressive as the research findings from my 2009 Masters degree tends to show when under a 1,000 HR and senior managers were asked to respond to the following questions -



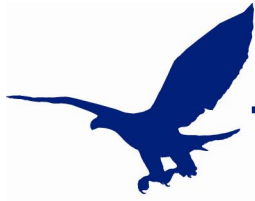
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In your opinion, what is the primary purpose of an internal disciplinary interview?

To establish the truth	69%
To ask questions	29%
Until the suspect begins to talk, the outcome always remains flexible	2%
To obtain a confession	0%

Given the fact there remains a constitutional right not to self incriminate the right to silence has to figure as a likely outcome within the overall investigative plan. Thus if an employee makes this lawful choice then the notion of the truth must remain an unrealistic and unattainable goal in most circumstances. The following statement illustrates that even within the Criminal Justice System those who actively maintain a silent posture is still noteworthy, "The proportion of suspects who refused to answer some or all police questions fell from 23 per cent to 16 per cent. The proportion who gave complete 'no comment' interviews fell from 10 per cent to six per cent." (Home Office Research Study 199, The Right of Silence, page ix (1994)).



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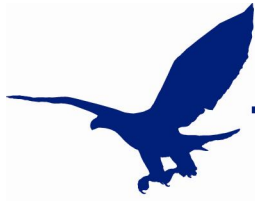
Within the context of employment law decisions are made on the civil test of the 'balance of probabilities'. Arguably in the case of *British Home Stores v Burchell* [1980] ICR 303 the requirement to establish the truth is proven to be somewhat of a myth.

Birchell Vs BHS (1980) – An overview

Birchell worked at the sunglasses kiosk. One day she was searched and found to have sunglasses and a signed receipt. The sunglasses were expensive and the receipt was for glasses of a lower value. At the time she was in sole charge of the kiosk and couldn't explain why. She was dismissed for theft (gross misconduct). She was not criminally convicted and appealed against the decision of dismissal at Tribunal. The case was subsequently heard at the House of Lords (now the Supreme Court) where Lord Denning stated that it was absurd to think that HR and business managers could be at the same level as the criminal justice system. Lord Denning laid down the standard now known as the Birchell test, which is:

Genuine Belief in employee's guilt

Does objective evidence exist that supports this notion?



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Reasonable grounds for this belief

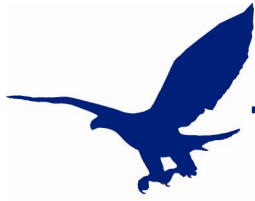
Is the 'reasonable person test' met? The legal standard that can be applied to a persons behaviour (Blyth v Birmingham Waterworks Company (1856) 11 Ex 781, and others). Given the facts of the case what would the 'reasonable person' on the street deduce?

Thorough and full investigation

Is there engagement with all relevant issues? For example, mens rea (if applicable) and potential defences?

Fair procedure

Have all pertinent domestic laws been met and policy complied with? It is contended that the vast majority of the respondents are wholly incorrect in their view as to the primary outcome of the interview process and this links to the requirement for more specialised training. It is therefore submitted that the principle purpose of any interview is to simply ask questions.



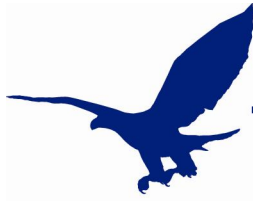
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In respect of decision making in relation to internal disciplinary cases what, in your opinion, is the level of proof required to form a prime facia case?

Beyond all reasonable doubt	48%
On the balance of probabilities	50%
Whatever the HR/personnel department decree	2%
Gut feeling or experienced hunches	0%

The chief domestic arbitration service states that all disciplinary and grievance issues should, in the first instance, ideally be resolved within the workplace. Resolution outside of this domain is within the gift of employment tribunals. All of the previous processes are governed by civil law that is judged on the 'balance of probabilities'. 50% of all respondents selected the incorrect legal test. In other words, 'is it more likely than not that the person is guilty / innocent'. Arguably the threshold of criminal convictions may merit at least a 95% degree of certainty whilst at employment law the minimum requirement would be a 51% certainty rating.



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From an interviewer's perspective, in terms of difficulty, what in your opinion is the easiest scenario to deal with?

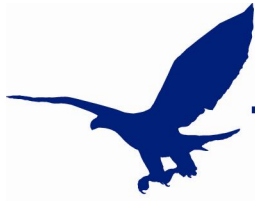
A liar	21%
Someone who tells the truth	55%
Somebody who refuses to say anything	12%
Somebody who combines all of the above	12%

This question and the following one are linked.

From an interviewer's perspective, in terms of difficulty, what in your opinion is the hardest scenario to deal with?

A liar	7%
Someone who tells the truth	0%
Somebody who refuses to say anything	86%
Somebody who combines all of the above	7%

One of the most emphatic returns and perhaps one of the most misunderstood of all investigative issues. Arguably the right of silence should be a considered outcome prior to the commencement of the interview process. Indeed this posture allows for a decision to be made on the balance of probabilities with due regards to case law (*inter alia* British Home Stores v Burchell [1980] ICR 303) without additional investigation which would, no

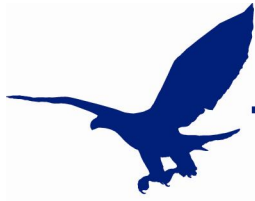


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doubt, be the case with liars and those that engage with the truth. For example, with the former alibis may have to be checked out and with the latter probable mitigation and potential legal defences could exist (for example duress). Anecdotal evidence will point to the increased likelihood of further complications when suspects talk including, for example, collusion (in concert with others) and whistleblowing (“whistleblowing occurs when an employee or worker provides certain types of information, usually to the employer or a regulator, which has come to their attention through work. The whistleblower is usually not directly, personally affected by the danger or illegality. Whistleblowing occurs when a worker raises a concern about danger or illegality that affects others, for example members of the public.” (Whistleblowing (2009)).

William Christopher, Head of Fraud, McGrigors Lawyers, 5 Old Bailey, London muses, “There are, in fact, six truths. Truth perceived by the defendant. Truth articulated by the defendants counsel. Truth perceived by the aggrieved. Truth stated by the prosecution. Truth maintained by the jury. And of course, the truth itself.” (Christopher, W., personal e-mail communication, June 2nd 2009). It is therefore contended that dealing with those individuals who choose their constitutional right not to self incriminate is, on balance, one of the easier options to deal with from the point of view of the interviewer.



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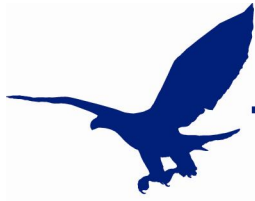
If during an investigative procedure an individual admitted a wrongdoing but sought a 'deal' (e.g. to implicate others involved in a serious company fraud) to lessen the likely punishment what would you do?

Ignore it - our company doesn't do deals	21%
Probe it and seek to establish its authenticity	52%
Our organisation has a policy on this, and I would simply follow it	17%
I'm not sure	10%

“The key piece of whistleblowing legislation is the Public Interest Disclosure Act 1998 (PIDA) which applies to almost all workers and employees who ordinarily work in Great Britain.” (Whistleblowing: Legislation (2009)). Nearly a third of all respondents were wholly ignorant of any facility that appertained to this likely event.

Some Key considerations

Union / Staff Reps – Stroke their egos! Do not attack even under the most challenging of situations. Thank them for making a contribution and simply record it. And remember that you do not have to disclose any evidence at the interview stage.



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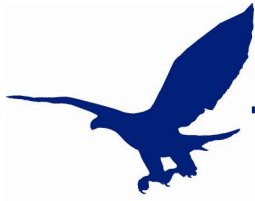
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Liars – Encourage them to lie more! Explode the lie! It is much easier to disprove their accounts.

Those that tell the truth – Are they telling the truth? Have they got a legal defence? Is a disciplinary panel the most 'proportionate' course of action?

The strong silence types – Whether you like it or not they have every right not to self-incriminate. Enjoy the experience as you are only there to ask questions.

To discover why many FTSE 100 companies and public bodies have chosen the Training For Success programme why not give it a test drive? Coupled with existing software solutions and in-house policies this pragmatic approach has saved organisations millions of pounds and sent out a terrific cultural message – steal from us or take us for a ride and you will be discovered, dealt with and more likely than not dismissed, unless you cut a deal - but that can always be discussed on the 2-day course!



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