



## What should employers do when employee misconduct might be criminal?

By **Lisa Rix** and **Mark Callaghan** - 30 April 2019

Following a good disciplinary process can be a challenge, even in the most straightforward of cases. If an employee's conduct might also be a criminal offence, then the approach for employers is likely to be even more complicated. Before considering anything else, a good HR manager might ask whether it's even permissible to run a disciplinary process, if there's a chance that it will run concurrently with a police investigation!

Well, the Court of Appeal of England and Wales has recently confirmed that, in the vast majority of circumstances, employers are able to progress their own internal disciplinary processes where an employee is also subject to related criminal investigations or proceedings.

In *North West Anglia NHS Trust v Gregg*, a doctor was investigated by his employer and then by the General Medical Council (GMC), for alleged malpractice relating to two patients who had died under his care. Whilst the employer's investigations were ongoing, the police also opened their own investigation into the doctor's actions and the Criminal Prosecution Service (CPS) later elected to arrest him on suspicion of unlawful killing and release him on bail.

Despite the CPS confirming on multiple occasions that they did not object to the employer's parallel investigations, Mr Gregg was clearly unhappy that his employers were progressing their investigation without waiting for the outcome of the criminal proceedings. He therefore applied for, and obtained, an injunction from the High Court to stop the employer from continuing with its disciplinary proceedings whilst the criminal proceedings were pending.

The Trust appealed and the Court of Appeal overturned the High Court's decision. The court confirmed that a court should usually only intervene to prevent an employer from continuing with an internal disciplinary processes if the employee can show that the continuation will give rise to a real (and not merely a notional) danger of a miscarriage of justice in the criminal proceedings. An employer will only risk breaching trust and confidence where there is no reasonable and proper cause for the employer's conduct.

This judgment is a helpful reminder for employers, but it is not surprising. The Acas Code requires the employer to hold any disciplinary hearing without unreasonable delay, which suggests that it should not wait for the conclusion of court proceedings. The non-statutory Acas guide also provides that "where the matter requires prompt attention, the employer need not await the outcome of the prosecution before taking fair and reasonable action". Criminal proceedings can take many months – most employers don't want to wait that long!

Despite this, employers should note that they can still choose to wait for the conclusion of a police investigation, if it is appropriate to do so (for example, if the police are investigating and prosecuting the employee for the same offence).

Finally, it should always be remembered (and the Acas Code makes clear) that if an employer finds out that an employee is subject to a police investigation which is related to off-duty conduct and which has no bearing on the employee's suitability for the job or their relationship with their colleagues, the employer or its customers, then it is unlikely to be appropriate for the employer to commence disciplinary action at work against the employee.