

The enemy within

Corporate fraud and the
employee – a roadmap

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Introduction

Recent statistics have revealed that over £40 million is lost every day to fraud in the UK and that 80% of that fraud involves an employee. Couple that with the fact that while many employers may feel that they have a loyal workforce, 90% of fraudulent employees have been with their employer for more than a year – and 20% for more than a decade.

In this guide we look at the three main elements of dealing with insider fraud – deterrent, punishment and protection.

Fraud in an employment context – the essentials

The definition is essentially theft of an employer's property. And we're not only talking about actual physical property such as computers or stationery but also intellectual property, trade secrets, customer databases, and, of course, money.

It is important to appreciate that if an employee steals from his or her employer that it is both a criminal act and a breach of the employment contract. As the burden of proof in criminal proceedings is far heavier than in employment law, it is perfectly feasible for the employee to be dismissed for breach of contract even if he or she is subsequently found to be not guilty in a criminal court.

Deterrent

The employment contract as a weapon against fraud

The employment contract can be used as an effective deterrent against fraud. How? By introducing 'fraud buster' clauses – and by ensuring that these are communicated to your staff from the very first day of their employment:

- Have a fraud policy statement setting out minimum standards for fraud management – this should also compel employees to undertake comprehensive fraud awareness training.
- Ensure that the contract sets out a rigorous monitoring policy which includes workstations, e-mails, internet access, telephone calls, and even desk and bag searches.

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- The contract should make clear that fraudulent activity will be pursued vigorously to recover any property stolen and ensure that there is a contractual claw back provision with regard to sums owed by the employee which should be extended to notice monies, holiday pay, bonuses, stock options etc.
- Include a clause which makes clear that fraudulent activity will result in instant termination without notice, for gross misconduct.
- Ensure that the contract will allow you to suspend the employee, during any fraud investigation.
- The contract should make clear that disciplinary meetings will not be tape recorded. Transcriptions can take time and money and are often used to delay the process – try to proceed on the basis that a note taker will provide a reasoned summary.

Punishment

The Disciplinary Process - Investigating Fraud

If you do suspect that you have a fraudulent employee, what's the best approach?

- **Should you involve the suspect?** If you do then are you tipping them off? Will they destroy the evidence? This is particularly important if there is a suspected breach on money laundering regulations. The wisest course of action is, with few exceptions, to report fraudulent activity to the police. Remember, if you or the money laundering officer are seen to facilitate money laundering activities, both of you potentially face a prison sentence.
- **Should you suspend?** This essentially is a judgment call. Depending upon the extent and nature of the fraud, employers should consider taking legal action to preserve evidence and freeze assets before informing the employee of its suspicion and beginning the disciplinary process through search and seizure orders and freezing injunctions. These are hard hitting legal remedies and are particularly useful in cases of theft of trade secrets.
- **Is your evidence IT based?** If so then make sure that it is clear and understandable – most tribunals think that PC means politically correct!

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- **Get statements from potential witnesses.** Getting witness statements from witnesses at an early stage is good evidence and provides a paper trail of how an employer reached its decision.
- **The decision.** When considering if an employee has acted fraudulently, you should reach your decision based on the balance of probabilities – it is only in criminal proceedings that a guilty verdict is reached on the basis of ‘beyond reasonable doubt’

The Disciplinary Process –The Letter

- Set out the allegations.
- Provide witness statements, unless there is a risk to the witness or there is a risk of tipping off.
- Tell the employee of their right to be accompanied by either a trade union representative or a work colleague – even if the business is not unionised.
- Notify the employee that he or she could be terminated on the grounds of gross misconduct.
- Clarify who will conduct the meeting – usually the line manager.
- Give a date, time and place for the employee to attend.

The Disciplinary Process – The Timetable

- **The timetable must be reasonable, but fraud is serious so employers can take a tough stand.** Tribunals expect employers to act reasonably – the meaning of “reasonable” however is not a fixed one. Employment Tribunals have shown themselves willing to vary what can be regarded as reasonable depending on the sector where the alleged fraud occurred. In the financial services sector for example, where arguably, the impact of insider fraud can be immense, employers can often act in a far tougher fashion than perhaps other sorts of businesses.
- **If you have not already suspended the employee in question, do so when you hand over the disciplinary letter.**

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- **Ensure that the employee has no access to computer equipment.** Close down all IT avenues available to the employee immediately including direct and remote access to PCs and if the employee has a laptop, confiscate it.
- **Ensure that the employee is accompanied at all times from the very moment the letter is delivered.**
- **Request a search of the employee's desk and bag.** Ensure that you have the contractual authority to undertake these searches. If the employee refuses a briefcase search, do not insist but make a note of their reticence which can be considered at a disciplinary meeting.
- **Escort the employee out of the building.** Use the assistance of security personnel if necessary.
- **Fix a disciplinary meeting swiftly.** If the employee objects to the date and time, fix another. If the employee objects again, arrange a third meeting and inform the employee that it will take place without them if they do not attend. In the absence of a compelling reason, the gaps between the three meetings ideally should be no more than 48 hours, i.e. over a six day period. If you receive a sick note from the employee's doctor claiming stress, then extend the gaps between meetings to match the expiry dates on the sick notes. This can extend the process significantly, but it is important to achieve at least three invitations to the employee to attend to enable you to proceed with the third meeting without attendance. The only justifiable reason for a longer delay would be a major disabling event.
- **Consider offering a neutral venue to the employee.** This will present a positive approach to a tribunal.

The Disciplinary Process – The Meeting

- **Give the employee an opportunity to comment upon the allegations.**
- **If you are conducting the meeting, remember that you may well be asked to disclose your notes.** Taking no notes at all would be viewed as suspicious by a Tribunal. It is important not to make any allegations in the notes – even if you are convinced that the employee is guilty. Notes should be anodyne, accurate and factual.

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- **Make it clear that the notes of the meeting will be a reasonable summary of the conversation.** Avoid tape recording as this can provide an opportunity for the employee to dispute the transcript and therefore the validity of the meeting.
- **Do not give an instant decision, take your time.** You don't want to make it look as though you have already made up your mind – again you need to think about how that may look to a tribunal.

The Disciplinary Process – The Decision Letter

- **Give the decision and set out the reasons why.** Try and refer to any representations made by the employee at the meeting as this will demonstrate to a tribunal that their representations were taken into account.
- **If the employee is found guilty, terminate their employment immediately without notice for gross misconduct.** Do not be tempted to make a payment in lieu or in any way suggest that the employee should work his or her notice period. If you do then this would suggest that you did not view the employees actions as gross misconduct – otherwise you would not allow them to continue working, or pay them as if they were continuing to work.
- **Assuming there is contractual justification, inform the employee that no payment of contractual sums will be made.** For example bonuses, share option payments, holiday pay etc.
- **Inform the employee of their right of appeal and their right to be accompanied at any appeal hearing.** Usually the right of appeal is to a senior manager who has not previously been involved in the investigation or employment process.
- **Follow company policy on the timing of an appeal. If there is none, impose one.** Usually company handbooks state that an appeal must occur within a certain time. Usually this is five days. If you do not have a stated policy, five days would be a reasonable time to impose.
- **Tell the employee that if on appeal the finding is reversed, then any benefits lost through termination at the first hearing would be reinstated.** This would be viewed positively by a Tribunal as it anticipates an alternative outcome to guilt.
- **If the employee seeks to avoid the appeal hearing, impose a tough timetable** (*see earlier*).

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Protection

- **Follow the process. Failure to do so can render a fair dismissal unfair- and the result would be automatic unfair dismissal.** It may be that the fraud is so clear cut that an employee would lose at a Tribunal in any event. However, it's unwise to start off on the back foot by giving the employee an extra weapon to use against you.
- **Failure to report to the police undermines deterrent.** Sometimes the senior management team may feel that by reporting matters to the police, they will somehow lose control of the process. This is unlikely to happen unless there are money laundering issues, and in those cases given the risks to the manager or the money laundering officer, the involvement of the police is essential.
- **Where the balance of probabilities is finely balanced, check to see if the fraudulent employee falls into one of the discriminatory categories.** This is in part related to the failure to follow process. Where the employee could claim discrimination through gender, race, religion, sexual orientation, disability etc., by following the process stringently, you will protect yourself.
- **Using Compromise Agreements can send the wrong signal and add little to limiting publicity.** A Compromise Agreement is an agreement reached between an employer and an employee to settle all employment law claims that an employee may have against an employer. This can be a dangerous route
 - **The fraudulent employee is unlikely to advertise his own fraud**
 - **Colleagues of the fraudulent employee will draw their own conclusions when they hear of a Compromise Agreement. Has the employee been paid or let off for being fraudulent?** From a deterrent point of view, this sends out a disastrous signal.

Conclusions

Employee fraud is a growing trend. Research from BDO Stoy Hayward last year found that the cost of employee fraud had increased by over 200% since 2003. So take a close look at your workforce – have you put everything in place to ensure that the inside threat doesn't become a reality? The objective of any employer when dealing with the potential 'enemy within' should be to deal with the employee swiftly in order to punish, deter and at the same time protect themselves.

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