

ESSENTIAL WEBINAR SERIES FOR EMPLOYERS

Welcome

Handling senior exits

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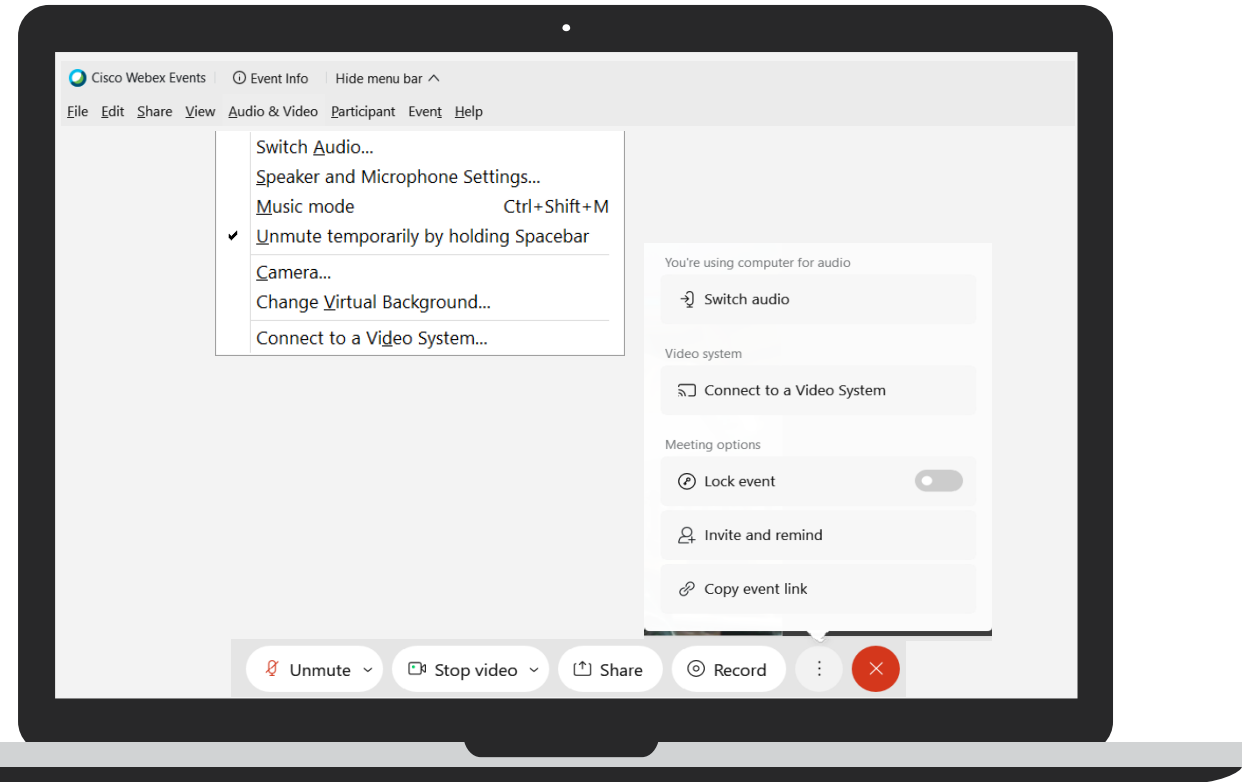
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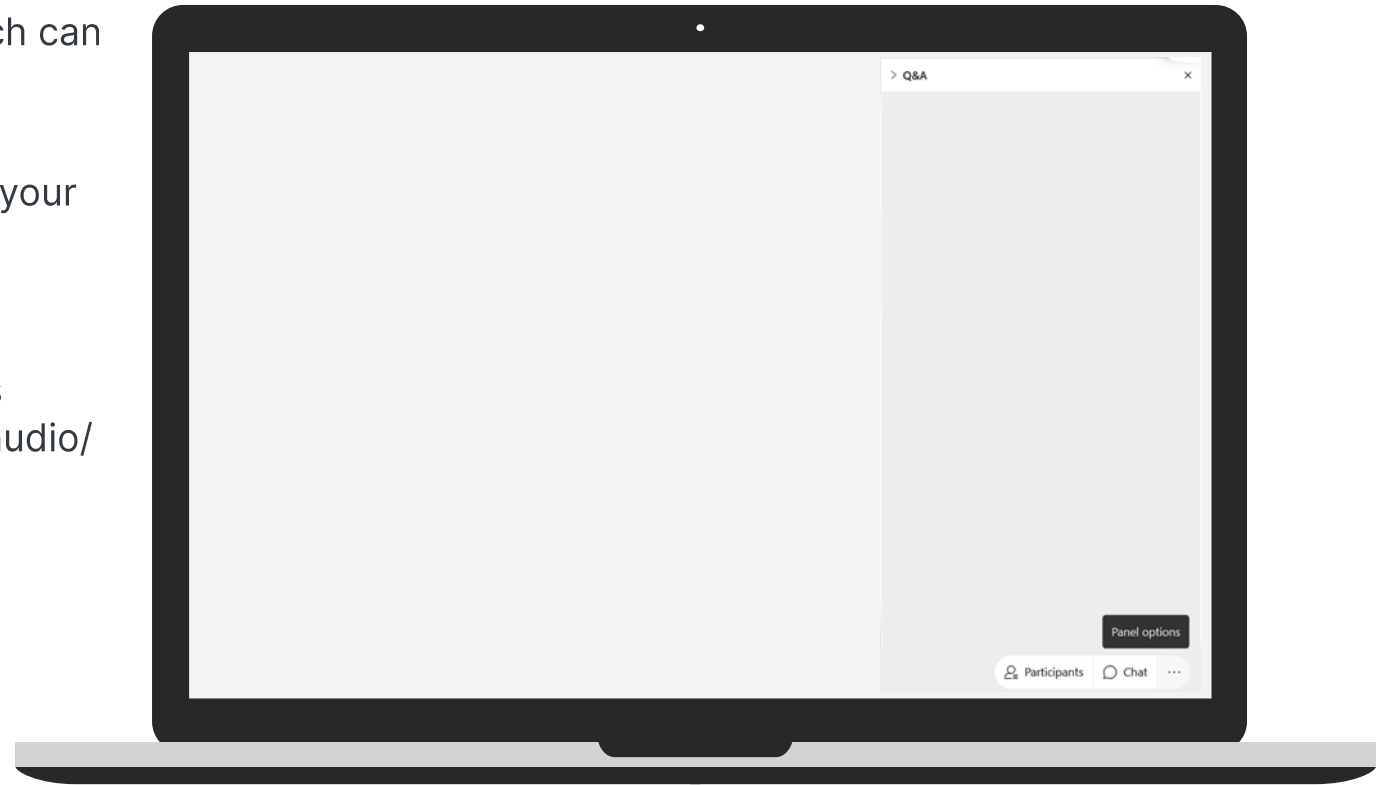
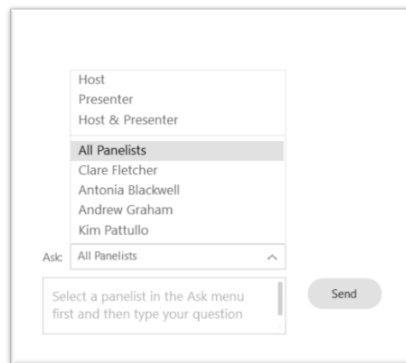
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Your hosts



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Handling senior exits

Agenda for today:

- The initial stages
 - Reason for termination
 - Tactical issues
 - Without prejudice discussions v pre-termination negotiations
- Risk areas
- Tricky issues
 - Protecting the business
 - Taxation
 - Directors and shares
 - References and announcements
- Financial services considerations

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The initial stages



Reason for termination

- Potentially **fair reason** for termination
 - Poor performance
 - Gross misconduct
 - Redundancy
 - Personality clash / Loss of faith

Tactical issues

- How **quickly** do you need to terminate and what would be the **impact** on the business?
- What sums are payable under the **contract** or compensation for breach of contract?
- Compensation for breaches of **statutory** rights
- Taxation, share options, pension rights, corporate governance and company law issues
- Garden leave
- Post termination **restrictions** and confidentiality

Without prejudice discussions

- “Without prejudice” – what is it?
 - rule of evidence
 - prevents statements being put before court
 - orally or in writing
- BUT – can only be relied upon where there is an **existing dispute**
- Case law shows that even a grievance situation may not amount to a dispute

Pre-termination negotiations

- Pre-termination negotiations under **Section 111A** of the Employment Rights Act 1996 introduced in 2013
- Aim:
 - encourage early settlement of employment disputes without recourse to the Tribunal
- Only applies to **ordinary unfair dismissal** claims
- **NB:** employee can still refer to such discussions in automatic unfair dismissal claims such as whistleblowing/trade union membership or in other claims such as breach of contract or any form of discrimination
- No need for a dispute
- A conversation can be protected by the without prejudice rule **and** Section 111A of the Employment Rights Act 1996

Pre-termination negotiations

- If there is “improper behaviour” then such discussions become admissible in the Tribunal
- Improper behaviour includes:
 - bullying and intimidation
 - discrimination
 - putting undue pressure on the employee (such as a short time scale for acceptance)
 - saying that if the proposal is rejected the employee will be dismissed

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Risk areas



Wrongful Dismissal

- Dismissal in breach of **contract**
- Fairness not an issue
- Breach of express or implied terms of the contract
- Actual or constructive dismissal covered

Types of Claim

- Breach of **notice** term
- Termination of **Fixed** Term Contract pre expiry
- Breach of contractual or redundancy **procedures**

Damages

- Damages: put employee in same position had contract been terminated correctly
- No maximum limit (but ET £25k)
- Net value of salary/contractual benefits
 - During notice period/time to complete contractual procedure
- Mitigation

Losses beyond notice period? Dispelling the myths!

- Loss of chance dismissals
- Dismissal to deny qualifying period for unfair dismissal?
- Failure to follow contractual disciplinary process?
- Stigma damages – dishonest/corrupt practices that affected job prospects
 - *Malik & Mahmud v BCCI SA (In liquidation) [1997]*

When can an employer dismiss without notice?

- In breach of employment contract – wrongful dismissal/restrictive covenants fall
- Correctly exercising a PILON clause
- Accepting a repudiatory breach committed by employee

Repudiatory breach

- Conduct so undermine[s] **trust/confidence** that “E/er should no longer be required to retain E/ee in his employment”
- Gross negligence can be “gross misconduct”
 - *Adesokan v Sainsbury's Supermarkets Ltd [2017] CoA*
- Acts discovered **after** dismissal can justify dismissal
 - *Williams v Leeds United Football Club [2015] HC*
- Reliance on repudiatory breach by employee following repudiatory breach by employer justified termination
 - *Palmeri v Charles Stanley and Co Ltd [2020] HC*

Statutory Claims

- Unfair dismissal
- Redundancy
- Discrimination
- Whistleblowing claims

Unfair Dismissal

- Fair reason
 - Conduct – including outside of work
 - Capability – poor performance/ill-health
 - Redundancy
 - Some other substantial reason
 - *Perkin v St Georges Healthcare NHS Trust [2005] CoA*
- Reasonableness/circumstances (size/admin)/equity and substantial merits of the case
- Compensation cap
 - Basic Award = maximum of £16,140
 - Compensatory Award = £88,519, or 52 weeks gross salary- whichever is the lower
- Does a fair dismissal matter? The old “fireside chat!”

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Conduct



The Guardian

24/09/20

The chair of Unicef UK, Douglas Alexander, has resigned after being accused of bullying behaviour towards staff. One of the charity's vice-chairs, Caroline Underwood, also announced she had stepped down, a day after the executive director, Sacha Deshmukh, resigned amid the bullying allegations.



The Guardian

06/04/20

Nicola Sturgeon has disclosed she asked Scotland's chief medical officer to resign on Sunday night after realising her breaches of lockdown regulations were damaging public confidence



BBC News

20/11/20

Boris Johnson's adviser on the ministerial code has resigned after the PM backed Home Secretary Priti Patel over a bullying inquiry the PM rejected his findings, saying he did not think Ms Patel was a bully and had "full confidence" in her

Conduct (2)



BBC

04/11/2019

McDonald's has fired its chief executive Steve Easterbrook after he had a relationship with an employee.Mr Easterbrook had "violated company policy" and shown "poor judgment



CITYAM

19/11/20

Three of M&C Saatchi's founders are stepping down following a long-running accounting scandal that has sent shockwaves through adland. Jeremy Sinclair, David Kershaw and Bill Muirhead, who set up the company when they split from Saatchi & Saatchi in 1995, will hand over the reins in a bid to draw a line under the saga



BBC SPORT

31/08/20

The chief executive of the Jockey Club has resigned after an independent inquiry upheld allegations of bullying, racist comments and the circulation of offensive material. Delia Bushell, who had been in the role since September 2019, tendered her resignation on Sunday, having been informed that disciplinary action had begun "on the grounds of gross misconduct

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Poor performance?



Retail Gazette

11/07/20

M&S has confirmed speculation that its clothing & home managing director Jill McDonald has resigned. McDonald, who led the bellwether retailer's non-food division, will be leaving the business after nearly two years in the role. M&S did not make it clear as to why McDonald was leaving, although recent news reports indicated that McDonald was on the verge of resigning after the retailer's non-food arm posted another set of declining sales



Reuters

21/09/19

M&S's chief financial officer, Humphrey Singer, was stepping down after little more than a year, a further setback as the retailer is demoted from Britain's leading share index.



Financial Times

11/12/19

Invesco stockpicker Mark Barnett has been sacked as the manager of a £1.3bn investment trust due to poor performance, marking a new low point for the former protégé of disgraced fund manager Neil Woodford

POOR PERFORMANCE (2)



The Guardian

26/05/19

Palmer had served as Aston Martin's chief executive since 2014, Its share price collapsed 98% from its £19 float price in October 2018 to just 35p on Friday, giving it a market value of about £540m, compared with £4bn when it floated. Aston Martin's shares jumped 28% to 45p on Tuesday after Palmer's departure was announced. Neil Wilson, the chief market analyst at the trading platform Markets.com, said the reaction from investors was "a pretty damning indictment of his tenure that the shares jumped this much after news of his sacking

Automatic Unfair Dismissal

- Whistleblowing
- Health & Safety

Discrimination

- Protected characteristics:
 - age
 - sex
 - Race
 - disability
 - sexual orientation
 - gender reassignment
 - marriage and civil partnership
 - pregnancy and maternity
 - religion or belief
- It is also unlawful to discriminate on grounds of fixed-term or part-time status
- Careful consideration how the termination is documented/procedure adopted

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Tricky issues



Protecting the Business

- Garden leave
 - When and how to use it
 - What does the contract say?
 - What to say in the settlement agreement
 - Consider the impact on restrictive covenants
- Restrictive covenants
 - Are they going to be enforceable?
 - Staying as they are or being amended
 - Extra consideration or signing as deed – points to keep in mind
- Confidentiality
 - What does the contract say?
 - What to say in a settlement agreement – restating or expanding?

Taxation

- Usually one of **3** scenarios applies:
 - Tax as earnings (income tax, NICs)
 - Post employment notice pay (PENP)
 - First £30,000 tax free, balance taxed
- Common **challenges** that arise with the £30,000 tax free allowance
 - Attempts to mutually alter the notice period
 - Bonuses not yet payable
 - Is the payment “in return for” something earned?
 - Tax indemnity – does that solve the problem?
 - Revenue clearance – not often sought
 - Note some payments are less tricky – redundancy, legal costs
 - Position with monies paid directly into a pension scheme

Directors and Shares

- Directors - consider whether shareholder or some other governance **approval** needed
 - Does one of the shareholder exemptions apply?
 - Organisations like Charities etc - check any specific Governance rules
- Removal of Directors
 - Check what the employment contract says
 - Timing – when will the Director stand down?
 - Where Directors refuse and use of Powers of Attorney
- Shares and Share Options
 - Share buybacks – be mindful of Corporate Law formalities
 - Shares and Share Options – the governing documentation must be considered
 - NB: Where leaver status is relevant, this should usually be stated in the Settlement Agreement

References/announcements

- References
 - The legal position on giving references
 - Personal reference versus standard one
 - Wording to include in a reference clause in a settlement agreement
- Announcements
 - What will be said and when – does this need to be covered off?
 - Key issues to cover in the agreement – keeping control and consistency
 - Interaction with reason for leaving or any “derogatory statements” clause

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Financial services obligations



Senior managers and certification regime (SM&CR)

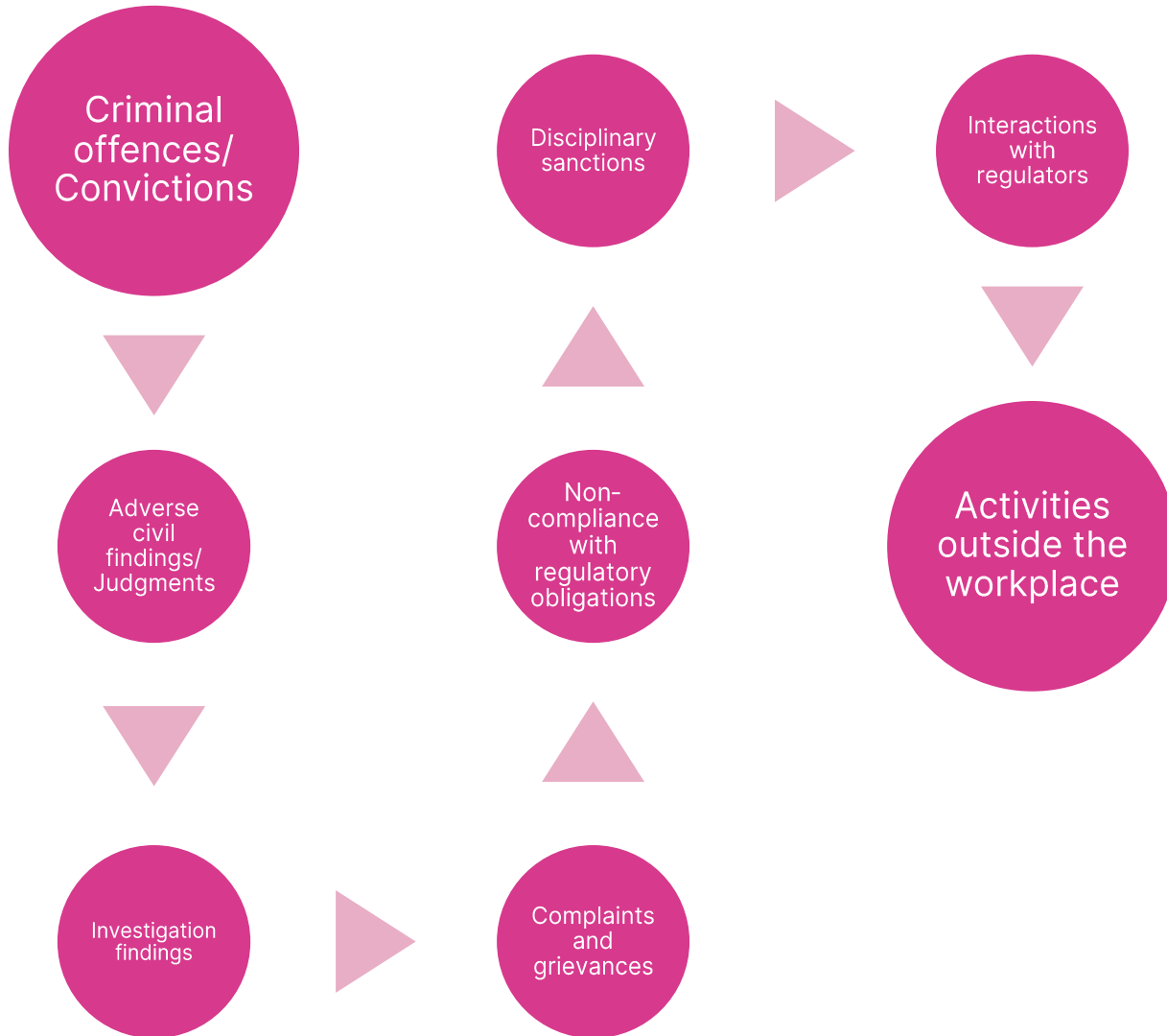
- Framework applicable to individuals working for firms regulated by the *Financial Conduct Authority* (FCA) and the *Prudential Regulation Authority* (PRA).
- Three elements:
 - Senior Managers Regime (SMR) – SM Functions – eg CEO/CFO
 - Certification Regime (CR) – significant harm/risk takers
 - Conduct rules
- Aim:
 - individual responsibility for their actions
 - easier to hold to account
 - bring more individuals within financial services firms into the regulated sphere

Fit and Proper

- Senior managers and CR staff must meet certain standards of **fitness** and **propriety**
- Assessed upon **recruitment** and **annually**
- Requirement to consider fitness and propriety on an **ongoing** basis
 - disciplinary or investigation processes
 - performance reasons
 - *Radia v Jefferies International Limited UK [EAT] 2018*

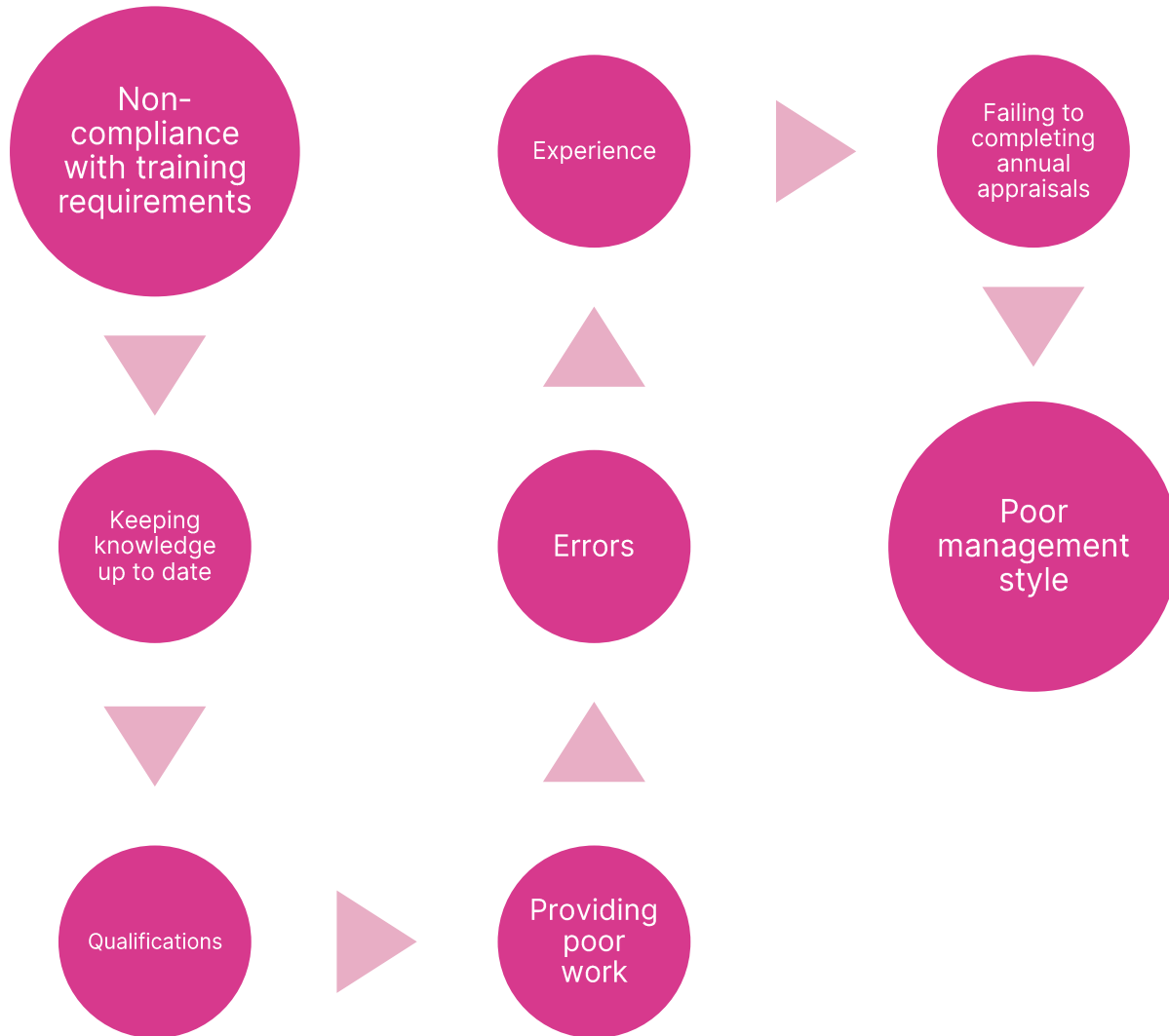
Fit and Proper

- FCA: **fitness** and **propriety** is judged by reference to:
 - Honesty, integrity and reputation
 - Competence and capability
 - Financial soundness
- PRA: **requires**:
 - personal characteristics
 - necessary level of competence, knowledge and experience
 - appropriate training and qualifications
 - to enable the sound and prudent management of the firm.
 - plus regard to FCA requirements



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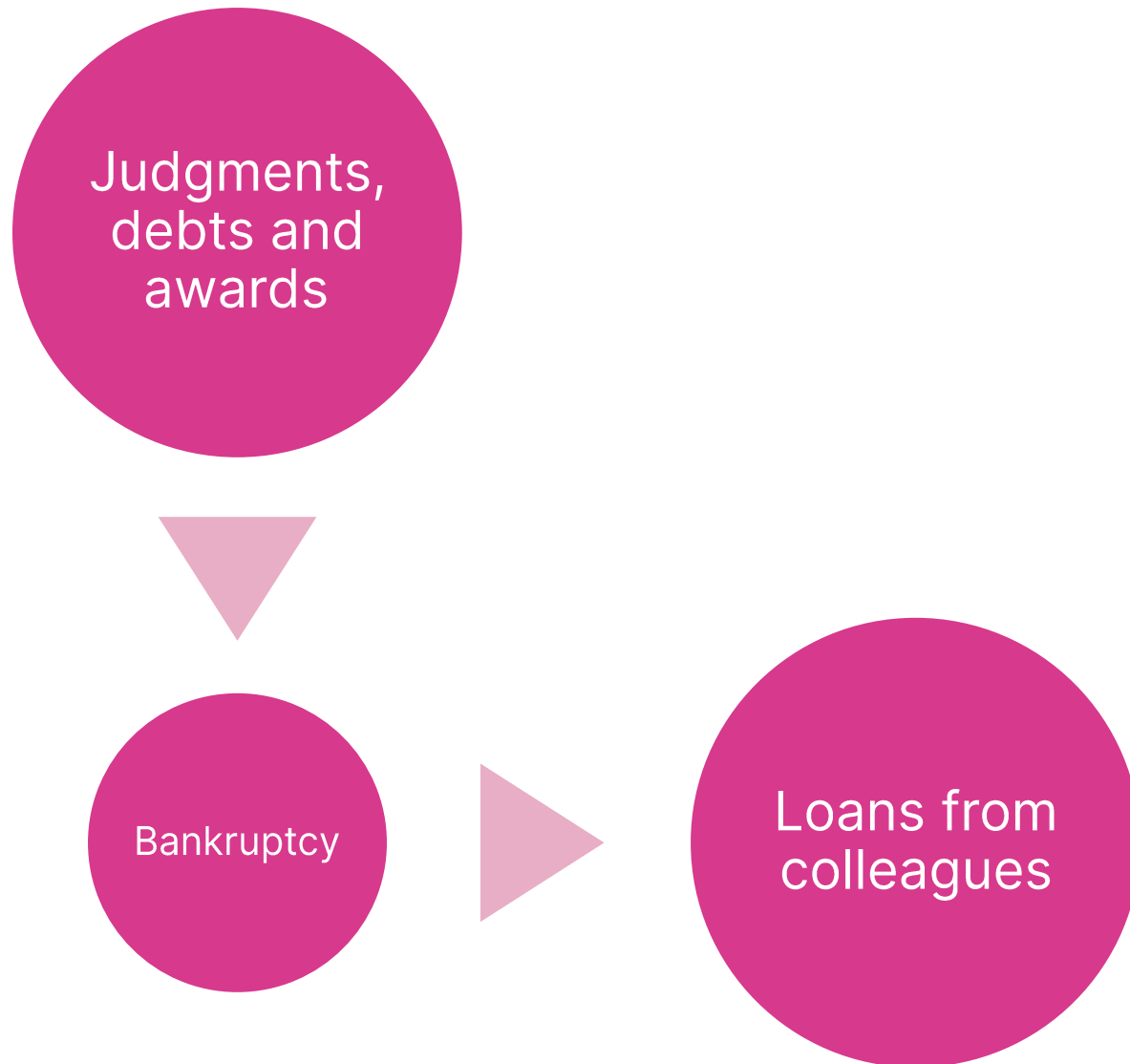
Factors that may impact honesty, integrity and reputation



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**Factors that may
impact
competence and
capability**

Examples of factors that may impact financial soundness



Fit and Proper

- Keep a **paper trail** – assessments may be borderline
- If SM requirement to report failings to regulator

Final points to consider

- Regulatory references
- Whistleblowing



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