

Your World First



Conduct investigations: just what is fair enough when it comes to the tribunal?

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Agenda



Why is a fair investigation important?
What does a reasonable investigation look like in practice?
What can make an investigation unfair?
Tricky issues
Procedural hotspots
Final thoughts

Why is it important to conduct a fair investigation?

- To show that a dismissal is fair
- To provide a robust reason for dismissal where discrimination or whistle blowing is alleged
- Two issues here:
 - Demonstrating that you reached the correct substantive decision
 - Showing that the procedure you adopted was fair

The legal framework



The legal issues to consider with misconduct investigations

- *Burchell* requires the tribunal to consider three questions:
 - the employer had a genuine belief in the employee's guilt
 - that belief was formed on reasonable grounds
 - the employer carried out a reasonable investigation
- Acas Code of Practice also refers to investigations – failure to follow this can result in a 25% uplift in compensation
- Your own disciplinary process

How far should an investigation go?

*As much investigation as is
reasonable in all the
circumstances...*



“The question was not whether a different form of investigation could have been carried out but, rather, whether a reasonable investigation was carried out.”

What does a reasonable investigation look like in practice?

Lack of reasonable investigation into an employee's explanation made the dismissal unfair (*Choksi v Royal Mail Group Ltd*)

But there is no requirement that an employer is expected to extensively investigate each line of defence advanced by an employee (*Shrestha v Genesis Housing Association Ltd*)

Making personal phone calls at work in breach of company policy did not amount to dishonesty where employer failed to investigate reasons for calls – dismissal unfair (*John Lewis v Coyne*)

What can make an investigation unfair?

Partiality	Where the investigator takes sides and forms a partial view from the outset and the investigation amounts to defending a position rather than being open to different outcomes
Lack of balance	Refusal to interview a witness suggested by the person under investigation to gain a balanced approach. Refusal to investigate an explanation/or points raised in mitigation by the employee
Incomplete investigation	Missing/reluctant or anonymous witnesses which presents an incomplete picture of material events. Ignoring factors such as length of service.
Loss of focus	Where the issue under investigation starts off as one issue and then goes off into tangents (commonly referred to as the “kitchen sink” approach)
Scope of role	Where the investigator moves on from primary fact finding into the decision making role
Unjustifiable delay	Delay is common particularly in complex investigations but employees should be kept up to date and managers should be proactive

Including evidence of past conduct

Could an investigation be unfair because it contained too much information? NHS 24 v Pillar

- The claimant was a triage nurse working on the NHS 24 helpline who failed to correctly assess a patient having a heart attack – this triggered a Patient Safety Incident (PSI) report
- During the investigation it was reported that 2 other PSI's had taken place which had resulted in support and training
- On this occasion the claimant was dismissed for gross misconduct
- Claimant argued that it was unfair for the investigation report to include details of these similar incidents
- EAT said it was reasonable to include all material evidence in an investigation report and the fact that similar incidents had happened in the past was relevant



Investigators should therefore include evidence about previous similar behaviour even where the previous incidents had not been treated as disciplinary matters

The role of HR in an investigation

HR should provide advice and guidance to the investigator but should not step into their shoes or make the decisions for them



In Chhabra, alterations had been made to an investigatory report that went beyond clarification, with the result that the report was no longer truly the product of the investigating officer



Ramphal v DfT said that the decision in *Chhabra* effectively established an implied term that the report of an investigator for a disciplinary enquiry must be the product of their own investigations



Dronsfield v University of Reading the final version of the investigation report had been significantly altered in light of HR and in-house legal advice. The EAT were surprised that the investigation report had been produced as though it was the joint responsibility of the investigator and the HR representative

Other tricky issues

Dealing with conflicting accounts of an event

- He said, she said...
- Standard of proof – “balance of probabilities”

Contradictory evidence

- Possible to prefer one version, but must be justified

Procedural hotspots

Suspension – a trap for the unwary

Recording the investigation meeting and minutes of meetings

- What should an employer do if the employee insists on recording the meeting?
- Pros/cons of recording meetings?
- Beware covert recordings and confidential discussions during breaks

Choice of companion at an investigation stage?

- There is no statutory right to be accompanied at the investigation stage (some disciplinary procedures may offer this right)
- Consider ***Stevens v University of Birmingham*** - a medical case involving potentially career damaging consequences where the failure to allow the chosen companion at the investigation stage amounted to a breach of the implied term of mutual trust and confidence

Q...so – just what is fair enough when it comes to the tribunal?

A....it will depend on a number of factors

- An investigator should start with an open mind – this involves asking what assumptions have been made and consciously trying to overcome them
- The investigation should not just look at the incident in isolation – include context
- If additional misconduct is uncovered - avoid the kitchen sink approach – the investigator should consider is this material new evidence?
- Reasonable lines of enquiry raised by the employee should be investigated and included in the report to present a balanced view
- The investigator should understand the scope of their role AND where the boundaries lie in relation to advice from HR and encroaching on decision making territory with the decision maker
- The more serious the issue the more investigation is required. Also more is expected where the employee has long service, and with larger employers
- Follow process – both substance and form are important

Questions

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