

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

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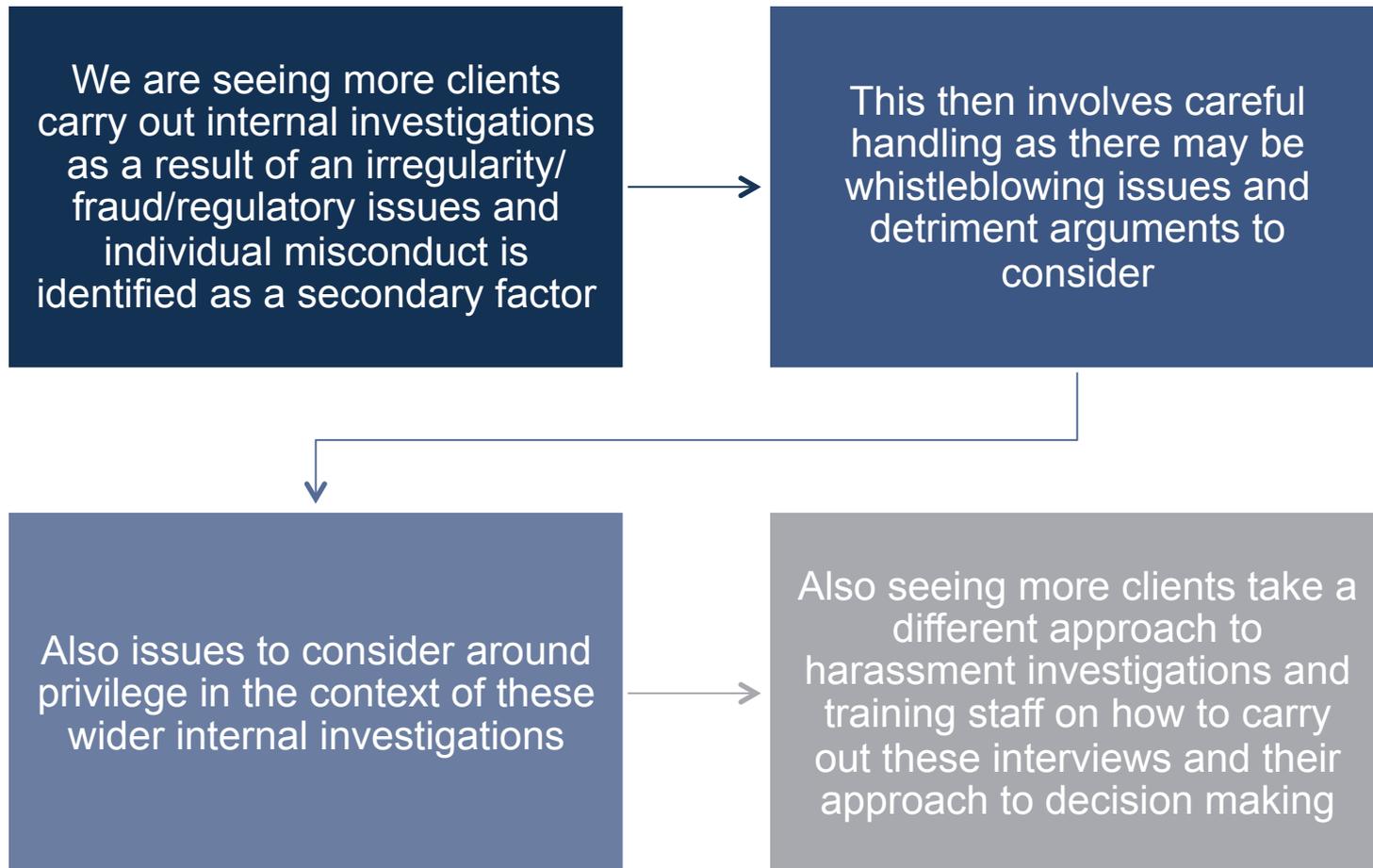


Agenda



Current trends
What does a reasonable investigation look like in practice?
What can make an investigation unfair?
The role of HR
Tricky issues
Final thoughts

Current trends in investigations?



To recap

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
- Failure to do carry out a reasonable investigation can result in an unfair dismissal
- Acas Code of Practice also refers to investigations – failure to follow this can result in a 25% uplift in compensation

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*)



Employer failed to establish if glazed eyes/slurred speech was a medical condition or a result of alcohol – dismissal unfair (*Martin v British Railways Board*)



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*)

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 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
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
Incomplete investigation	Missing/relevant or anonymous witnesses which presents an incomplete picture of material events
Standard of proof	Thinking that unless there is absolute certainty in relation to evidence that no decision can be made – particularly relevant in harassment investigations and incidents taking place in private
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

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

A practical example

Facts

- Mr S a mechanic with 42 years exemplary service loses his temper and grabs an apprentice by the neck
- He later apologises and they shake hands
- His manager issues him with an informal warning letter
- HR say that's not correct and suspend him and carry out an investigation, Mr S admits grabbing the apprentice
- HR do not interview the 2 managers he has reported to regarding his general character
- HR do interview the apprentice and 2 employees
- Company decide to dismiss Mr S on the basis of physical violence which amounts to gross misconduct – upheld on appeal

Questions

- do you think this is a reasonable investigation?
- do you think this is a fair or unfair dismissal ?

The role of HR in an investigation

HR should provide guidance to the investigator but should not step into their shoes.

HR officer should not go further than providing advice to the investigating manager, and should not try to make the decisions for them.

In 2015 the EAT explained in *Ramphal v Department for Transport* 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.

In the Supreme Court case of *Chhabra* in 2013, 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.

HR's role

HR must limit advice essentially to questions of law, procedure and process and to avoid straying into areas of substantive decision making.

Avoid numerous versions of the investigation report – impact of DSAR and/or as a result of disclosure obligations the employee will be able to recover the earlier versions of the investigation report

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

Tricky issues - dealing with conflicting accounts of an event

- A group of people who witness an event are likely to remember it in slightly different ways
- That does not mean some of them are lying; some of us will remember more about a situation than others plus we all apply our own unconscious biases and perceptions to how we remember an event
- The standard of proof for internal investigations is based on the 'balance of probabilities'
- That means on the basis of the evidence it was more probable than not that the alleged events took place
- It comes down to one simple question – is it **more likely than not** that X happened?
- This is not the same as criminal standard of proof which looks at whether it is beyond all reasonable doubt since the criminal standard is a higher test

Contradictory evidence

- Where there is contradictory evidence, it can be appropriate to prefer one version, but the decision maker must be able to justify this and provide an explanation
- 'I took into account the explanation from x which was supported by y. I found this evidence more compelling than the version given by z
- In reaching this view the relevant factors are: the credibility of evidence from a witness; their reliability in terms of recollection of events and the impact of circumstantial evidence'
- In some situations it may not be possible to make a decision about contradictory evidence. An investigator may have 2 people who are not credible. If that is the case then the report needs to explain this.

Tips for fair investigations

- Start with an open mind - avoid preconceptions or defending a position
- Don't just look at the incident in isolation – include context
- If additional misconduct is uncovered - avoid the kitchen sink approach – ask is this material new evidence?
- Don't be afraid to make findings of fact where there is contradictory evidence
- Do not discount lines of enquiry raised by the employee – present a balanced picture
- Understand the scope of the investigator's role and boundaries with HR and the decision maker
- The more serious the issue the more investigation is required
- Follow process – both substance and form are important

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