Investigating investigations: trials and tribulations from recent case law

An investigation into an employee’s alleged misconduct at work will go to the heart of any subsequent unfair dismissal claim. It’s not always clear how much investigation to undertake and getting it right isn’t always easy. A couple of recent cases highlight the pitfalls involved in failing to investigate enough – the worst case being a finding of unfair dismissal but also, nearly as bad, a claim which although ultimately successful, is likely to swallow up precious management time and costs to defend. To set the scene, we set out below a reminder of the purpose and method of carrying out an investigation.

Investigations and the law of unfair dismissal

To avoid unfair dismissal claims, an employer will need to identify a potentially fair reason for dismissing its employees. One of those potentially fair reasons is related to the misconduct of an employee.

Establishing fairness in a conduct dismissal case, an employer, at the time of dismissal, must:
– believe that the employee was guilty of the misconduct;
– have reasonable grounds for believing that the employee was guilty of that misconduct; and
– have carried out as much investigation as was reasonable in all the circumstances of the case

Not only this, but an employer must also consider the ACAS Code of Practice on Disciplinary and Grievance Procedures when carrying out a disciplinary investigation.

As one of the elements of the test of establishing fairness is that the employer must have carried out as much investigation as was reasonable in all the circumstances, the method and findings of the investigation are often closely examined by employment tribunals and the higher courts.

Purpose of carrying out an investigation

By way of reminder, where some form of formal disciplinary action is needed, the purpose of an investigation is simply to establish the facts of the case.

The ACAS Code states that it is important to carry out investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require an investigatory meeting with...
the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence for use at any disciplinary hearing.

What is clear is that disciplinary action must not be considered at an investigatory meeting. If it becomes apparent that formal disciplinary action may be needed then this should be dealt with at a formal disciplinary hearing.

**Carrying out the investigation**

An investigation should not be carried out by the same person who will hold the disciplinary hearing or any appeal meeting. We advise that someone impartial, such as an HR manager, should hold the investigation.

Whilst the facts of each case are different, the employee needs to be made aware from the outset of the disciplinary proceedings what the allegation is against him/her. This appears to be straightforward, however, if this is not explained to an employee, he/she may be able to argue before a tribunal that any subsequent dismissal was unfair. There are two reasons for this: first, the employee may argue that they did not know what the charge was against them and couldn’t therefore defend themselves or their case properly. Secondly, not setting out the allegation may undermine the employer’s ability to establish reasonable grounds for believing that the employee was guilty of the misconduct.

**Keeping an open mind**

It is recommended that employers keep an open mind and look for evidence which supports the employee’s case as well as evidence against it. The recent case of *Carmelli Bakeries Ltd v Benali* [2013] reminds employers that even where an employee admits to committing an act of gross misconduct, an employer should still carry out a reasonable investigation into the gross misconduct.

Mr Benali was viewed by the employer as a “problem employee”, particularly as he had previous and ongoing claims against his current employer for reasonable adjustments. He knowingly used non-kosher jam to make cakes at a kosher bakery. He admitted this fact but his reasons for doing so, that he was authorised to purchase the jam, were not properly investigated. The investigation lasted no longer than an hour and was carried out by the person who was “in the frame” for authorising Mr Benali to purchase the jam. Nevertheless, he was summarily dismissed for gross misconduct.

The tribunal awarded one year’s lost earnings and another £14,000 injury to feelings award for victimisation on the basis that the real reason for dismissal was not misconduct but was because he was viewed as a problem employee for his reasonable adjustments claims. On appeal, the Employment Appeal Tribunal (EAT) refused to overturn the tribunal’s finding of unfair dismissal, finding that there were failures in the investigation and procedures which closed off any possibility of facts coming to light and being considered in mitigation of the otherwise likely penalty of dismissal. There was some let out for the employer though - the case was sent back to another tribunal to reconsider the award on account of the fact that Mr Benali’s conduct may have contributed to his dismissal.

**Thoroughness of the investigation**

There is judicial precedent providing that an investigation that is too thorough is “never likely” to be deemed unreasonable solely on the grounds of being too thorough. However, being extra thorough in every case just isn’t practical - there is clearly a scale as to what is deemed a reasonable investigation. At one end of the scale, a highly thorough investigation would be needed where, for example, the allegations could ruin the employee’s career. By comparison, less investigation might be needed where the employee is caught red-handed.
But how do you decide how much investigation is enough to be reasonable? The tribunal has a wide discretion to determine what is reasonable. The minimum might in some cases be enough to win an unfair dismissal claim, but is this always wise? The recent case of Stuart v London City Airport Ltd [2013] demonstrates the pitfalls of an employer electing not to consider certain items of evidence in an investigation.

Mr Stuart was employed by and worked at London City Airport as a ground services agent. Whilst at work, he visited the departure lounge and picked up several items in the duty-free shop. He was beckoned over to a seating area outside of the shop by one of his colleagues. A police officer then approached him and accused him of stealing the items from the shop. Despite Mr Stuart arguing that he had no intention of stealing the items and that he felt that he was in the general shop area, he was arrested. Mr Stuart’s allegation was that essentially his employer did not carry out an adequate investigation, and specifically that it had not approached the colleague he had been speaking to and had failed to obtain CCTV footage.

Mr Stuart brought a claim for unfair dismissal in April 2010 and lost at tribunal. He appealed to the EAT on the grounds that the tribunal’s decision was perverse; the EAT agreed. His employer appealed. The Court of Appeal was asked to determine whether the employer had carried out a reasonable investigation and fairly dismissed the employee and whether the employment tribunal’s decision was perverse.

The Court of Appeal said that the employment tribunal needed to determine whether the employer had reasonable grounds for its belief that Mr Stuart did not intend to pay for the items; and in particular whether it had carried out a sufficient investigation – that is, such an investigation as fairness required in the circumstances of the case – before reaching that conclusion.

It went further and said that whilst both the employment tribunal and the EAT asked the right question regarding the minimum level of investigation which fairness required in the circumstances, they simply came to different conclusions. It said that this is regrettably bound to happen where two tribunals are both conscientiously considering the “range of reasonable responses” test since they may nevertheless reach different conclusions as to where the limits of the range lie.

Whilst the employer in this case did take a risk in not considering CCTV footage, the Court of Appeal held that the employer had been entitled to form a reasonable view as to the employee’s credibility and so it was reasonable not to go further in its investigation.

The case highlights the increased litigation risk for employers should they not consider investigating certain factual elements that could support an employee’s case since this could leave the employee with the impression that the employer failed to carry out a reasonable investigation. The case also recognises that a differently composed tribunal, on a different day, may have reached a different conclusion that the investigation was not reasonable.

Approaching investigations

Whilst it is always a judgement call as to how thorough an investigation should be, we recommend that employers should carry out an investigation with the aim of closing off as many of the employee’s potential arguments as possible. Not only will this minimise the risk of any litigation being brought in the first place (and saving potential time and costs of arguing legal points before a tribunal, or, the Court of Appeal as per the Stuart case) it will also help in any settlement negotiations with the employee.