Employment investigations Part 3: Cross border investigations

In the third of a three part series of articles, Jack Skinner, Senior Associate, and Catrin Bush, Associate at Baker McKenzie LLP, look at the issues raised when employee investigations are conducted across jurisdictions, and identify how to manage some of the risks involved

As readers of previous articles in this series will know, it is difficult to adopt a "one size fits all" approach to running investigations and that is never truer than for investigations which have a multijurisdictional dimension.

This article explores some of the key issues in conducting a cross border employment investigation and provides some practical recommendations for overcoming difficulties and potential issues when they arise.

Identifying locations involved and avoiding jurisdictional accidents

A priority for employers will be understanding what they are intending to investigate and the various locations involved. While those may appear to be relatively straightforward questions, they do often require some thought, and the results will help determine the structure and scope of the investigation as well as avoiding "jurisdictional accidents" - where, for example, an employer instigates an action which may give rise to jurisdiction over potential claims in a country where that result was not intended.

Once the approach and type of investigation has been considered, we recommend that employers prepare an investigation scoping document. This is a good way of keeping the investigation focused, and can avoid the investigation running into some of the potential problems identified later on in this article.

The location of any evidence, the jurisdiction in which relevant individuals work, and the jurisdiction in which the relevant conduct took place should all be considered. There are also strategic considerations, such as the impact (if any) that running an investigation out of a certain jurisdiction might have on the jurisdiction in which future claims might be heard, so it is best to take stock before diving straight into an investigation.

One approach an employer may opt to take is to make clear to employees, from the outset, the jurisdiction in which the investigation will take place. Although, of course, it is not possible to "forum shop", this approach can provide a degree of certainty and may mitigate some of the jurisdictional risk, depending on the countries involved.

If an employer does not wish to conduct the investigation in Great Britain, it could have an impact on whether the employee might be able to assert British employment rights. *Lawson v Serco Ltd [2006] UKHL* 3 sets out the key test for whether an employee comes within the scope of British employment rights. Three types of cases were identified in *Lawson v Serco* where employees may receive protection: (i) peripatetic employees; (ii) employees ordinarily working in Great Britain; and (iii) expatriate employees. It was also suggested that a fourth type of individual may be able to receive protection if s/he had an "equally strong" connection to Great Britain and British employment law. Employers should consider whether the employee has a sufficient connection and falls into any of the categories of employee identified in *Lawson v Serco,* or even whether investigating and disciplining the employee in Great Britain might establish or strengthen such a link.

Protecting privilege

The varying rules that apply in different jurisdictions regarding legal privilege pose a significant challenge to cross-border investigations. It is important for employers to decide at the outset of an investigation whether it is desirable that it be privileged, and also whether it will be possible to sustain that privilege. Too often this question is overlooked, or the pros and cons not given sufficient consideration before irreversible steps are taken.

It may be that the investigation needs to be open to be used as evidence when taking action against an employee perpetrator. On the other hand, some investigations are carried out purely to understand and assess legal risk - in that case, the employer will generally intend the investigation to be privileged.

Once the intention is clear, the next questions become "is there a basis on which to assert privilege in the

relevant jurisdictions?" and "how do we address any disparities in potentially relevant jurisdictions?". The questions need to be answered based on the facts of each case, but one common area of difference is that which exists between the wider concept of attorney client privilege in the United States, and the more limited privilege attached to communications between lawyer and client with the dominant purpose of giving or receiving legal advice in the UK.

One area of particular focus where these kinds of differences can be pronounced has been the definition of "client" under English legal advice privilege, which is more narrowly construed than for the purposes of attorney-client privilege. In *Three Rivers District Council v Governor and Company of the Bank of England (No 5)[2003] EWCA Civ 474* the Court held that only a very limited number of employees qualified as the "client" for the purposes of legal advice privilege, contrasting the broader approach taken in the US Supreme Court in *Upjohn Co v United States, 449 US 383 (1981).*

This narrow definition of "client" was examined again more recently in *Re the RBS Rights Issue Litigation [2016] EWHC 3161 (Ch),* in which the Court held that internal investigation interview notes, conducted by RBS and external lawyers with employees and ex-employees, were not covered by legal advice privilege. This was on the basis that the interviewees did not fall within the narrow definition of "client". In contrast, the approach taken in the US is that such notes are likely to be privileged under the Work Product Doctrine. For this reason, it is important for those involved in an internal investigation to identify at the outset those individuals who need to be in the investigation group. This will help to ensure effective decision making and also help the employer to clearly identify the "client" for the purposes of maximising protection under legal advice privilege.

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In the RBS case, the Court considered the question of the appropriate choice of law. The Court held that the law of the jurisdiction in which the case was brought (Great Britain) should be applied to issues of privilege, despite the investigative interviews themselves actually taking place in the US.

The Court did acknowledge that it has discretion to prevent the disclosure of documents, in certain circumstances, and that foreign law considerations may be taken into account, but that declaration provides relatively little comfort or certainty in practice. Employers should therefore consider carefully how and where investigation interviews are carried out and recorded, and how any documents related to the investigation should be handled, so as to reduce the risk of inadvertently creating non-privileged documents.

Multiple regulators

Depending on the type of investigation being undertaken and the jurisdiction in which the investigation is conducted, relevant regulators may have differing expectations regarding co-operation and disclosure of investigation documents. This can vary between jurisdictions, and even between regulators in the same jurisdiction, and the approach adopted may also be influenced by the strength of the ongoing relationship with a relevant regulator.

Some regulators may expect to be involved with, or consulted on, the investigation process, particularly if they have been contacted directly by an employee. If employees under investigation hold regulated roles, it is important to consider whether there is a duty to self-report to relevant regulatory authorities, or whether it is in an employer's interest to do so even in the absence of a strict duty.

Privilege, as we have seen, can be a particular sticking point and this is especially so when dealing with regulators. The contest over the scope of litigation privilege in *Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd [2018] EWCA Civ 2006* serves as a reminder that even if privilege is successfully maintained in the end, asserting it to regulators can be a fraught and expensive business. By way of very brief summary, the SFO instructed ENRC to hand over materials prepared in the course of an investigation into allegations of bribery and corruption following a self-report made by ENRC under the SFO's previous self-reporting rules. ENRC refused on the basis that the materials were subject to litigation privilege, and the matter was eventually decided in the Court of Appeal in a judgment that overturned that of the High Court, and allowed ENRC to assert privilege. The risk of waiving privilege in the UK and US was a major factor in ENRC's decision not to disclose the materials, demonstrating that it can be very difficult to balance the demands of overlapping regulators and privilege regimes.

Additionally, in some jurisdictions, legal privilege is not recognised as a concept at all, and in others it only applies in very limited circumstances. It is therefore crucially important that employers consider this issue on a case-by-case basis and develop a strategy on how best to respond, as the financial and reputational consequences of failing to co-operate with, or to comply with requests for information from, regulators can be material.

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Timing challenges

In some jurisdictions, there are strict rules around timing, both of the investigation itself, and of sanctions that result from it. For example, in Germany, if an organisation wants to terminate an employment contract with immediate effect for "serious cause", an employer only has two weeks after having obtained full knowledge about the facts of a case to issue the dismissal notice. Practically, that leaves little room for a complex investigation, so it is paramount to establish the facts quickly to avoid losing the opportunity.

Even without the impetus of mandatory timeframes, delay can affect the fairness of an investigation, particularly when it takes place across multiple jurisdictions. We would always advise employers to act promptly and efficiently when planning and carrying out a cross border investigation. Delay can often impact upon procedural fairness as well as the quality and reliability of evidence. Employers may want to consider hiring external investigators if the seriousness of the allegations warrants it and availability is stretched internally.

Practicalities

There are a number of practical difficulties employers may encounter when conducting a cross-border investigation.

Language and cultural differences

Employers should be aware of potential language and cultural conflicts from the outset, and we recommend that social and cultural differences should always be considered when designing procedures for handling allegations. For example, in some jurisdictions, it may not be culturally or legally acceptable to make digital recordings of investigation interviews, so thought will need to be given to the format of investigation meetings, how questions will be phrased, and how the answers will be noted.

Time zones and locations

A simple point sometimes overlooked is where the investigator and witnesses are located and whether this allows for the investigation to be conducted efficiently across different time zones. Before Coronavirus, managing this aspect of the investigation would have involved considering travel times, and allowing extra time where there are conflicted time zones, in order to determine the length of time needed to complete evidence gathering.

Technology

With the current restrictions on travel, remote video interviews have become more common but these still present challenges, such as reliability of connection, difficulty of judging the veracity of evidence at a distance, and how to maintain confidentiality over the conversation itself and documents shared during interviews.

Some of the key practical measures employers can take are to:

- Secure the meeting with a password, ensure participants dial in from a secure internet connection and nominate a "host" to permit participants entry to the online platform which should prevent "Zoom-bombing" or similar;
- Avoid using wording in the meeting description which identifies any parties involved in the investigation;
- Issue clear instructions to the participants that the meeting is confidential, and that they are not permitted to share materials they are shown or to allow anyone else access to the meeting or the documents;
- Share documents on screen rather than sending via email to limit, to an extent, the risk of losing control over whole documents. Employees can still take screen grabs of particular parts, so very clear warnings about confidentiality and instructions not to take screen shots are important in advance and during the meeting. Similarly, the participants should confirm whether or not a recording is being made, and also confirm with the employee that s/he is not making a separate recording and there is no-one present with them off-camera who has not introduced themselves;
- Allow more time and additional breaks for virtual interviews. There are more opportunities for delays to occur and for communication to break down when interviewing via video. As anyone experiencing "Zoom fatigue" can attest, the intensity of video conferencing can be draining for interviewee and interviewer, so factor in time to take frequent short breaks during longer interview sessions.

Conclusion

International investigations will almost invariably prove to be complex and time-consuming undertakings. In light of this, addressing (both at an early stage and on an ongoing basis) the key issues of identifying the jurisdictions and the regulators involved, working to protect legal privilege within that environment, and taking on board the practical challenges that the particular cross-border investigation poses, can be crucial to an efficient and successfully managed solution.

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