10 top tips: employment and privacy law dangers in carrying out employee investigations

Jack Skinner, Senior Associate, and Sam Rayner, Associate, at Baker & McKenzie LLP, provide practical guidance and tips on how to minimise the risks and avoid some of the major pitfalls of conducting employee investigations

As any employer who has carried out an internal employment investigation will know, the stakes are often high and the risks can be daunting. This is especially so in a fragile economic climate and when those involved may be conducting their investigations quite differently due to Covid-19.

Some of the risks are more obvious than others. If an employer is hoping to rely on an investigation to show grounds for dismissal, and that investigation is clearly flawed, there is a very real risk of unfair dismissal. Similarly, if an investigation is conducted in such a way as to undermine trust and confidence in the employment relationship, employees may resign and claim constructive unfair dismissal.

Further, if employees allege they have been singled out or treated differently because of a protected characteristic or the fact that they blew the whistle, this ups the ante further from the employer's perspective with the possibility of uncapped liability.

Employers must also navigate their way through applicable data protection and privacy restrictions when planning and implementing an investigation. For example, employees can, and often will, submit data subject access requests during the course of or following the process which, if not handled correctly, could prejudice the outcome of that investigation and, if challenged by regulators, could also result in significant penalties.

Finally, depending on the nature of the issues under investigation and the people involved, there may well be significant employee or public relations considerations that come into play.

Although the risks involved in conducting employee investigations are numerous and varied, this article explores the many ways that an employer can minimise its exposure, before, during and after the process, and preserve good employee and customer relations.

1. Be prepared

Employee investigations can be highly sensitive, resource-intensive and time-pressured exercises. Whilst processes will vary depending on the size of your organisation and the severity of an allegation, preparation is key to an efficient, transparent and, above all, lawful investigation.

With this in mind, all employers should consider implementing an internal governance framework for employee investigations. This type of document can help to ensure that the division of responsibilities (for example, between human resources and management teams) are clearly understood in advance. Such a framework often takes the form of a process map or step plan, setting out triage processes, department responsibilities, potential decision makers and timing expectations, all of which may vary depending on the nature or seriousness of the issue in question.

To maximise transparency throughout the workforce, you should also ensure that you have an employee-facing policy that summarises your approach to investigations and reflects the procedural requirements set out within the ACAS Code on disciplinary and grievance procedures (see http://www.pdpjournals.com/docs/99025). Well-drafted and consistently applied guidelines are crucial in managing employee expectations about anticipated timings and, in the case of the accused, the potential consequences or sanctions to which s/he could be subject if the employer considers that there is a disciplinary case to answer.

Up-to-date privacy notices and employee monitoring policies are also part of a broad spectrum of data protection compliance considerations to cover as part of your organisation's investigation readiness; privacy risks will be particularly acute where access to employee records, colleague correspondence and/or sensitive witness evidence may be required. This topic is covered further below at point 3.

2. Review and scope

Once you become aware of a potential disciplinary issue, project scoping is always a sensible first step. This generally requires an initial high level assessment of the potential severity of the allegations or suspicions at issue; clearly establishing the identity of those involved, including any alleger, the accused and relevant witnesses; and clarifying any potential sensitivities which may arise from the process, including internal conflicts or reputational issues.

As well as informing whether or not an investigation is necessary in the first place, these initial considerations should also be used to assess key stakeholders, the location of potential evidence, expected deadlines and resourcing requirements, including any external support which may be required, such as legal or PR advice.

Project scoping also presents an opportunity to develop and cross-check a project plan against internal policies and ACAS guidance, ensuring that any departures from those guidelines are necessary and justified (see http://www.pdpjournals.com/docs/99026). It should also prompt questions about the context of the allegations (see below) which may not necessarily be apparent without stepping back and taking a structured approach.

3. Assess privacy implications

Employee investigations inevitably involve the processing of personal data, much of which is often highly sensitive. You should therefore consider your organisation's data protection obligations before commencing any investigation. Data Protection Impact Assessments (DPIAs), which are mandatory where data processing is likely to result in high risks to individuals, are a sensible first step in most cases as they allow employers to identify potential privacy risks and mitigation strategies in advance.

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A DPIA will help you to identify valid legal bases for data processing in the context of your investigation: a central element of any lawful investigation. Where "special categories" of data - including information revealing race/ethnic origin, religious or philosophical beliefs, trade union membership and data concerning health, sex life or sexual orientation - or data relating to criminal convictions or offences may be involved, you will need to satisfy an additional, enhanced legal threshold. UK employers will often seek to justify the processing of sensitive data during an investigation based on reasons of "substantial public interest". However, this should be verified on a case by case basis and specific legal advice, depending on the nature of your investigation, is advisable.

A DPIA will also help your organisation to identify and address broader data protection considerations, including measures to ensure any proposed use of personal data is transparent (i.e. explained through clear and compliant privacy notices), necessary for a particular identified purpose; and undertaken in a secure and proportionate manner.

Safeguards which can be put in place include carefully considered retention periods, "need to know" access restrictions, and clearly defined limits on any search parameters which may be used. Where personal data may be transferred to third parties (e.g. external investigators) or across borders (including where data are accessed by those within other group companies), those data flows will also need to be justified and made subject to appropriate contractual clauses and/or international transfer mechanisms, as appropriate.

For detailed training on 'Conducting Data Impact Assessments', see www.pdptraining.com (www.pdp.ie in Ireland).

4. Be aware of the context

It can be tempting to get straight into the details when commencing an investigation without first considering the wider picture. There is clearly a time for detail but, initially, employers should ask themselves some immediate questions about the context in which the issue has arisen. Two of the key questions to ask are:

Can you and do you need to suspend the accused?

If you have a contractual right to suspend employees, this is easier. If not, employers will need to consider whether the employee might have an implied contractual right to work. That could happen if their skills would otherwise atrophy or they are deprived of the opportunity to earn additional remuneration, such as overtime, shift premiums, or other bonuses.

Even here the employer has the right to suspend a worker, the act of

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suspension has been referred to as "not a neutral act" (*Mezey v South West London and St George's Mental Health NHS Trust ([2008] EWHC 3340 (QB)*). A phrase which is often repeated, what this means in practice is that an employer needs to have good reasons for suspending an employee in order to avoid, or at least minimise, the risk of damaging the relationship of mutual trust and confidence between the employer and the workforce. While that seems straightforward, in practice employers are often tempted to implement an automatic suspension for all or certain types of conduct. Such a "knee jerk" reaction is inevitably risky as it does not assess why the employee must not be at work while the investigation happens. Reasons for suspension must be clear and should ideally be explained to the employee in writing. - they may include concerns that an employee may try to influence the investigation in unlawful ways, or that there may be a repeat of serious misconduct.

Are there potential criminal or regulatory issues involved?

Potential criminal or regulatory issues will not stop an employer investigating and coming to a conclusion about what happened (though based on a balance of probabilities, and not the higher criminal standard of proof). However, the existence of criminal and/or regulatory issues will make the consequences of the investigation all the more significant for the individual concerned. As noted in *A v B [2003] IRLR 405*, this can change the way that the investigation is conducted with more thorough and detailed investigation required for more serious allegations that may give rise to greater consequences for the employee.

Employers should also bear in mind that employees facing criminal charges may be counselled by their legal advisers not co-operate with investigations due to the potential risk of self-incrimination if they do participate. If an employee does want to participate in an investigation, but is concerned about the impact on his or her criminal defence, one solution can be to adapt the process to allow the employee's lawyer to be involved.

5. Choose the right people

Even with all the planning in the world behind the process, choosing the right investigator for a particular issue is still crucially important.

Individuals with experience of conducting investigations who are sufficiently senior and impartial usually make good candidates, but do they have the time? Are they willing to commit to conducting a thorough investigation? Are there other senior employees who could act as disciplinary or disciplinary appeal managers?

If the answer to any of those questions is "no", employers may need to think of exploring alternative solutions including, in complex cases or those of high importance, using external investigators. If the employer plans and scopes the investigation when the issue first arises, these concerns can be addressed at the outset and not rear their head further down the line.

Just because an investigator is impartial, it is not always the case that his or her report will follow suit. There is a potential for the extension of the 'Iago principle', where a nefarious employee provides false information which results in an innocent decision-maker coming to the wrong conclusion, as was the situation in *Royal Mail Ltd v Jhuti [2019] UKSC 55*. The judgment in this case underlined the importance of having an investigator equipped to make balanced decisions after testing all the evidence.

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6. Don't over-share

You should take steps - both technical and organisational - to ensure that all allegations, information and evidence gathered as part of the investigation is shared on a confidential and "need to know" basis only, within a limited group of interested parties.

An internal governance framework, as discussed above, can help to identify key stakeholders and reiterate their obligations of confidentiality and data security.

It will, of course, almost always be necessary to inform the accused of the detail of the allegations and of the ongoing investigation process in writing, save in exceptional cases where putting the individual "on notice" may prejudice the collection of evidence or place the reliability of witnesses at risk. As relevant witnesses are identified, it will also be necessary to explain to them the reasons for their potential involvement and what will be required of them during the process (with an appropriate reminder of an ongoing need for confidentiality).

A controlled internal working group consisting of relevant line managers and HR colleagues should generally be involved, with a view to managing practical issues within the workplace and advising on process, respectively.

Where your investigator considers that relevant evidence may be held by those outside of the company, such as ex-employees, members of the public or other businesses (who may, for example, hold CCTV footage or other records/accounts of work-related incidents), these avenues should also generally be pursued. It may, in appropriate cases, be possible to obtain third party input without disclosing significant or personal details relevant to the investigation.

However, where personal information needs to be disclosed and discussed with those outside of the employer, additional data protection risks should be considered and addressed, perhaps with reference to the DPIA discussed above.

7. Obtaining information from the accused and witnesses

In-person or virtual interviews with the accused and any relevant witnesses will generally form a key element of a fair investigation, but there may be circumstances where the collection of written, documentary and/or physical evidence is sufficient. All will depend on the circumstances of your individual case, bearing in mind the general rule that the more serious an allegation is - taking into account its gravity and potential effect on relevant individuals - the more thorough will be the anticipated level of investigation.

If witnesses are reluctant to provide evidence, you should seek to explore their reservations and potential ways of providing assurance, though without resorting to immediate promises of anonymity. Anonymous evidence should only be permitted in exceptional cases, following a detailed balancing exercise - as held in *Linfood Cash & Carry v Thomson [1989] IRLR 235, EAT* - which takes into account the need to protect the witness and sets this against the disadvantage anonymity would cause the accused by inhibiting his or her ability to fairly challenge the evidence.

ACAS Guidance (http://www.pdpjournals.com/docs/99026) notes that the anonymisation of witness statements should only be permitted in cases where a witness has a genuine fear of reprisal - specific legal advice on this topic is always recommended.

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Where investigatory interviews take place, it is important to remember that they are not disciplinary hearings and should not - in themselves - result in disciplinary action or decisions. Instead, these interviews simply represent an opportunity for the investigator to establish facts by posing questions and asking interviewees to provide their version of events in a neutral and non-adversarial manner.

Save where an interviewee has submitted a grievance that has prompted the investigation, an individual does not have a statutory right to be accompanied to an investigation meeting. However, organisations should consider whether allowing a companion could help facilitate proceedings, for example where this may support language barriers, or may represent a reasonable adjustment for those with health issues.

A written record of any investigatory interview should be taken (generally with the assistance of a note taker), and signed witness statements should be required where possible.

The prevalence of smartphones means that individuals may wish to record proceedings; whether this is permitted is a matter for your organisation - the organisation's position should be communicated in policies and procedures, as well as at the beginning of any meeting, so that any covert recording made could properly treated as a potential disciplinary offence in itself (although the evidence garnered would probably still be admissible).

8. Get on with it

Particularly in the wake of coronavirus, there is the potential for an investigation to get stuck in a rut. This can occur for a number of reasons, including availability of the parties or relevant evidence, if an employee goes off sick or raises a grievance or counter-complaint, or by reason of another of the many and various challenges facing the business.

As well as potentially affecting the fairness of the investigation, delay can also invite an aggrieved employee to raise a formal grievance about the process (or related matters), or to seek information about the reasons for the delay through a data subject access request ('DSAR'). Both require significant amounts of management time to address and ultimately make the process more time-consuming that it would otherwise have been.

If there are unavoidable delays, explaining and documenting the reasons for those delays and what is being done about them can often help to allay some of the uncertainty and anxiety that often trigger formal grievances and DSARs.

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9. Conclude clearly

Your investigator should be clear on what the role encompasses, which is to establish the facts about what has actually happened, but not to impose a disciplinary sanction. The disciplinary part of the process should, in almost all cases, be kept separate if the employer is to avoid an unfair dismissal situation.

That is not to say that investigators should sit on the fence about what they think happened; they shouldn't. Tribunals will expect a fair and reasoned investigation and there is room in the 'range of reasonable responses test' for investigators to give their own conclusion on the most likely cause of events based on their investigation. This does not require a criminal standard of proof but does need a fulsome, coherent and logical explanation of the investigator's reasons for reaching the particular conclusions.

In cases where there is a potential career loss or criminal aspect to the matters being investigated, tribunals are likely to scrutinise the reasoning more closely, particularly as the disciplinary decision maker will rely on the investigation outcome in determining the disciplinary sanction. However, tribunals are also aware of the need for matters to be investigated internally before external regulators and/or the police have reached their findings, and certainly before an employee is found guilty of any criminal offence. In order to conclude clearly on these matters, investigators must be fully aware of their existence at the outset of the investigation or as soon as possible thereafter.

Investigators, at all levels of investigation, should be offered appropriate support and training, and sufficient time must be carved out from their usual roles to allow them to perform the task well. In reality, this can be difficult to achieve, but in the long run it is likely to save time and cost, as well as mitigating some of the legal risks associated with the investigation and its eventual outcome.

10. Post-investigation

Tempting as it is to archive an investigation and forget about it once the long, and sometimes draining, process is concluded, there is real value in learning from what went well and what did not. That is equally true with respect to the process of the investigation, as well as for the underlying behaviour itself.

Amongst the many questions from which valuable lessons can be learned are: was there a large enough pool of skilled and trained investigators/hearing managers? Were there any obstacles to the investigation proceeding as planned? Does the investigation lead to concerns about the conduct of other employees or any wider concerns?

The responses to these questions often lead to opportunities to review and improve the established way of investigating employment matters, including by considering the involvement of external expertise earlier in the procedure to advise on individual cases or refine the process.

On a broader level, investigations can also trigger or underline the importance of an organisation's values and commitments, particularly to issues such as gender or race equality, by demonstrating that misconduct is not glossed over.

On the other hand, a failure to investigate thoroughly and meaningfully very often has a wider negative impact on employees' engagement and confidence in management.

As a result, employment investigations should be planned and implemented carefully to avoid some of the dangers we've highlighted, and to create, instead, a force for positive change.

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