

Employment investigations

Part 1: Criminal issues

The unwelcome news that one of your employees has been accused of a criminal offence often triggers an investigation and action by the employer, particularly if the allegations are connected to the employment environment itself. Additional concerns will arise if the offence was committed by an employee acting in the course of his or her duties, or in a specific capacity which could raise issues of corporate criminal liability for the employer.

In this article, we explore the issues involved with investigating criminal conduct by employees, and suggest some ways of addressing those concerns, recognising that the employer is often involved in a delicate balancing act involving juggling different types of related risk.

Understand what you are facing

The first step in dealing with potential criminal conduct on the part of an employee is to understand the context and nature of the allegations.

What has the employee been accused of? Is it linked to the employee's work? Did some or all of the offence happen at work, did it involve colleagues of the accused or was work IT equipment involved? These are just some of the initial questions that should be answered in order to develop an understanding of how to deal with the issue.

If the particular conduct is very minor and/or truly unrelated to the employee's job, and happened outside work, it may have no bearing on the employee's suitability for the job or his/her relationship with colleagues, the employer or its customers. Where this is the case, starting a disciplinary investigation is unlikely to be appropriate, according to the ACAS Code, and may well increase the risk of an unfair dismissal claim if the employee were dismissed as a result.

However, if the company operates in the regulated sector, such as financial services, the employer may nonetheless have to take steps to

address the alleged misconduct, even if (on the face of it) the allegations are not connected to the employment.

At the other end of the spectrum, the offence could have been committed in the course of the employee's employment, and that may attract both civil and criminal liability for the employer, as well as for the employee.

A separate but important issue for an employer to consider is whether, even if not directly liable under criminal law, it could be vicariously liable for the employee's acts. This could form an article in and of itself, but should be considered at the outset of an investigation in order to assess the overall risk. The key test in determining this factor is whether there is sufficient connection between the employee's act and the employment contract. However, it is not always easy to interpret this rule in practice, as the two recent judgments involving the supermarket Morrisons show:

- i) the Court of Appeal held that Morrisons was vicariously liable when a petrol station attendant carried out a racially aggravated assault on a customer (*Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11);
- ii) the Supreme Court ruled that Morrisons was not vicariously liable when an IT auditor disclosed payroll data for the entire workforce to a newspaper (*W M Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12).

Could the employer have committed a crime too?

Particular criminal offences committed by the employee in the course of performing his/her duties, or while acting in the capacity of an "associated person", could also give rise to corporate criminal liability on behalf of a corporate employer, as detailed below.

Bribery

If an employee commits a bribery offence under the UK Bribery Act

In the first of a three part series of articles, Jack Skinner, Senior Associate, and Eleanor Wallis, Associate, at Baker & McKenzie LLP, explore the main factors for employers to bear in mind in the context of an employee investigation concerning criminal conduct, and provide practical guidance on managing the risks involved

2010, the employer may face liability for failure to prevent that offence. There is a possible defence available to the employer if it can show that it had adequate procedures in place to prevent bribery.

Facilitation of tax evasion

There is a provision under the Criminal Finances Act 2017, similar to that in the Bribery Act 2010 mentioned above, which covers situations where an employee facilitates tax evasion in the course of performing his/her role.

Also similarly, a defence is available to the employer if it can show that it had reasonable procedures in place to prevent the employee committing the offence.

Fraud

If the criminal offence in question is fraud (or some other type of economic crime, such as money laundering), another factor to consider at the outset of the investigation is the seniority and role of the employee who has committed the offence. This is because the employer may be held responsible if it can be shown that the so called "directing mind and will" (often the Board) of the employer was guilty of the offence.

It is also worth noting that the scope of corporate criminal liability in the UK is currently under review by the Law Commission, which is expected to publish its views on reform in late 2021.

In the case of each of the above-mentioned scenarios, the employer

should immediately take legal advice to understand whether there may be any potential corporate criminal liability for the company and, if so, what steps should be taken to minimise the exposure. Likely next steps may include conducting an internal investigation, and either voluntarily self-

reporting the misconduct to the relevant authority (for example the UK Serious Fraud Office ("SFO") or HMRC), or at least checking whether there is an obligation to self-report the conduct. A voluntary self-report can lead to the employer being offered a deferred prosecution agreement ("DPA") as part of the resolution of the matter, and/or receiving a reduced penalty for any misconduct.

It is also important to consider at an early stage whether the employer may hold or be using proceeds of crime as a result of the employee's criminal

conduct. For example, where the employer has won a contract in a tender scenario as a result of an employee's bribery, the proceeds under that contract (and any property which is subsequently derived from that) may be criminal property. Where individuals or the employer know or suspect that they hold (or are otherwise dealing with, or entering into arrangements relating to) criminal property, they may be committing an offence under the Proceeds of Crime Act 2002. A defence is generally available if, prior to the act that would amount to the offence, the employer has made an "authorised disclosure" (for example, if it has filed a "suspicious activity report" with the National Crime Agency) and has obtained the "appropriate consent". Unfortunately, as the above commen-

tary shows, there is no "one-size fits all" solution to investigating criminal conduct, so taking early legal advice on the specific circumstances, and involving the compliance and legal functions of the organisation as soon as possible, is highly recommended.

In situations where the employer could be held liable for criminal conduct, it will probably want to engage its own separate legal representation. In such cases, it is also important to consider whether it is necessary to engage an independent legal adviser to represent the employee, whose interests could ultimately end up in conflict with those of the employer.

Privilege

In most circumstances, as a matter of English law, correspondence between a solicitor and his/her client for the purpose of giving or receiving legal advice will be privileged, and this will cover advice given in respect of allegations of criminal conduct.

One of the first judgments for the employer to make is whether to conduct an investigation under privilege. A typical employment investigation is not conducted under privilege, as that privilege would then need to be waived if the employer wanted to use it to demonstrate its process in investigating the issue and the matters that it considered. As a result, it would not assist an employer in proving that dismissal (or any other sanction or outcome) was fair.

However, there are circumstances in which investigations into employees' criminal conduct could open the company up to further liability, as explained above. In such instances, the employer is likely to want to assert its right to privilege over communications with its lawyers.

In addition, the employer will want to consider whether litigation privilege is applicable to any internal investigations it conducts. Litigation privilege applies to confidential communications between a solicitor and his/her client (or between either of them and third parties) if that communication is created for the dominant purpose of

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ongoing or reasonably contemplated civil or criminal litigation.

The applicability of litigation privilege to internal investigations is a complex area which has been the subject of recent debate in the courts. (See, for example, *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006). Of particular consideration will be the point at which it becomes clear that criminal proceedings are reasonably in contemplation, as it is only after that point that litigation privilege will apply to the internal investigation. This issue must be determined on a case by case basis.

When considering the question of privilege, it is also important to consider the risk of follow-on civil litigation which results from the issue, e.g. from contractual counterparties, shareholders, competitors, customers, or other employees. If there is a risk of such litigation, it may be prudent to ensure that the investigation work product is privileged and, as a matter of English law, not liable therefore to be disclosed as part of any follow-on civil claims.

Finally, if the employer's lawyers interview the employee as part of its investigation, they should provide the employee with a so-called "Upjohn" warning at the start of the interview, making it clear that:

- the lawyers act for the employer, not the individual;
- any privilege over the information provided in the interview, belongs to the employer alone, and;
- the employer may choose to waive that privilege to third parties, such as prosecution agencies.

Damage limitation

Limitation of damage may sound like it should be the first step taken and, by its nature, damage limitation does need to occur quickly. However, the employer will be in a much better position to consider the following steps once the nature of the allega-

tions are fully understood and a strategy for dealing with them has been put in place. Some of the key points that are likely to inform that strategy are:

Regulatory issues

If the employee is under regulatory investigation, what are the boundaries of what the employee can be told? If there is a risk that the employer could "tip-off" the employee about an investigation, for example under the Money Laundering Regulations, particular care and specialist advice is needed about how to proceed.

Similarly, putting the employee on notice will be viewed negatively by the SFO and may impact the employer's ability to enter into a DPA. On the other hand, certain regulatory investigations may require notification to be made to a particular regulatory body (for example, a notification made to the Financial Conduct Authority ("FCA") under Principle 11 of the FCA Principles of Business).

Suspension issues

Even if there is no regulatory issue, can the employee remain in the workplace while the allegations are investigated, or are the allegations such that this would not be safe or appropriate? Although the employer cannot default to suspension of an employee's contract for criminal cases without the risk of it undermining the fairness of the employment investigation, it should consider relevant factors such as whether the accused employee might tamper with evidence, affect the accounts of others involved, or retaliate against his/her accuser.

Reputational issues

Are the allegations public knowledge? What would happen if the information became public? Having a draft statement ready can facilitate clear and consistent messaging and mitigate some of the initial PR fallout. In situations where the employer may be vicariously liable

for the criminal conduct, a high likelihood of the allegations being leaked may encourage a more proactive approach in managing both internal and external communications.

Victim/accuser issues

In the rush to address the criminal accusations, the employer should not forget any victim or the accuser who is employed by the same employer. The employer needs to consider what support the victim

might need as part of its duty of care to employees, and this is likely to vary significantly depending on the circumstances.

The accuser may also qualify as a whistleblower and be entitled to protection from detriment or dismissal because of the disclosures about the accused employee.

The allegations may also amount to a grievance that should be acknowledged and considered even if the accused is ultimately dismissed. Engaging with the accuser and/or victim early can help to mitigate the secondary risk that the accuser complains that the allegations were not taken seriously, which could escalate into allegations that the accuser is being subjected to a detriment as a result of blowing the whistle.

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Dealing with regulators and/or the police

In addition to the internal investigation, the employer must also carefully consider the appropriate management of, and liaison with, the external agencies that may be involved.

Timing

Even in the best of times, it can take several months, or even years, from a suspect being arrested or first interviewed to him/her being convicted. From an employment perspective, therefore, it is not always an option to wait for a guilty verdict before starting to investigate the issues. However, investigating an employee alongside criminal proceedings does bring with it several challenges.

There is the most obvious risk that the employer's finding of "guilt" may differ from that of the court. The aims of the two processes are different, however, and different standards of proof and of evidential rules apply. A court will consider whether there is evidence beyond reasonable doubt that the defendant committed the particular offence, whereas an employer needs to carry out a reasonable investigation to discover what has happened and then conduct a disciplinary process if applicable.

In principle, the two processes can run concurrently and employers' implied duty of trust and confidence should not be breached by this action, save where there is a real risk of causing a miscarriage of justice in the criminal case (*North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387). Employees can (and do) seek injunctions where there is an arguable breach of contract, either of the implied term of trust and confidence, or of a contractual disciplinary process which commits an employer to waiting for a criminal conviction before proceeding. There have been a number of these cases in the medical profession, for instance.

Employees are often wary of engaging in internal investigative processes, especially without a criminal defence solicitor present, due to the risk of self-incrimination. Employers will

need to consider, in each case, whether it is reasonable to go ahead without hearing from the employee or whether alternatives, such as allowing the criminal solicitor to attend and advise the employee or allowing the employee to submit a statement in writing, can help. Factors like the length of time until trial, the size of the employer, the nature of its business, and the number of employees in total and the number impacted by the alleged conduct will be relevant in deciding the most appropriate route.

Control of the investigation

If a regulatory body or prosecuting authority becomes involved in an investigation, it may seek to take control of the internal investigation or may conduct its own separate investigation. The employer should be aware of this at the outset because, if it chooses to (or is compelled to) self-report the conduct, it may find itself unable to conduct its investigation in the way that it would wish. For example, the level of co-operation expected by the SFO in order to qualify for co-operation credit is particularly high:

- the regulator could ask the employer to put its own investigation on hold to ensure that it does not jeopardise or prejudice the regulator's own investigation. This could include requesting the employer not to conduct any interviews before the regulator is able to do so;
- the regulator could expect the employer to consult with it in advance of it taking any HR actions, such as commencing disciplinary procedures;
- as mentioned above, the regulator could request that the employer waive privilege over any key material identified in the course of its investigation, including interview notes or investigation reports;
- the regulator could also expect the employer to make its employees available to it for interviews and to provide contact details of any former employees.

Dismissing fairly

The consequences for the employee of being dismissed for criminal conduct are potentially career-limiting, if not, career-ending, particularly for employees who require professional licences, references, or registrations. With that in mind, employers must conduct a particularly careful and thorough investigation if they wish to be able to dismiss the employee without a finding of unfair dismissal. The test is the same as in any unfair dismissal case: whether the employer had a potentially fair reason to dismiss and whether the employer's decision to dismiss was within the band of reasonable responses.

However, there are often circumstances where a balancing of the risks is required. Damages for unfair dismissal are capped at the lower of one year's salary or £88,519, whereas the potential consequences of not dealing with an employee engaged in criminal conduct straight away can be much more serious and costly, particularly where there are wider regulatory or reputational issues involved.

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