King & Spalding
Client Alert

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For more information, contact:

Jules Quinn
+44 20 7551 2135
jmquinn@kslaw.com

Marie Hoolihan
+44 20 7551 7587
mhoolihan@kslaw.com

King & Spalding

London
LLP
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500

Handling Errors: Flaws in Employee Investigations Risk Impeding the Facts

One would assume if an employee were to openly use highly offensive racists slurs, unashamedly display Swastika tattoos, leave fake drugs on their desk, encourage children to physically abuse a colleague or urinate in public while on official company duties, dismissal would be a straightforward process. However, these are all examples of Employment Tribunal cases from 2021 in which dismissed employees received favourable unfair dismissal judgments due to procedural flaws. These cases illustrate how the genuine merits of an employer's case can be undone by the mishandling of investigations and dismissal procedures.

This month's Client Alert looks at lessons learned from five UK unfair dismissal cases in 2021.

POSTMAN'S SPAT: UNFAIRLY FIRED FOR URINATING ON THE ROADSIDE

A Royal Mail postman dismissed for urinating on the side of the road was awarded nearly £40,000 after the tribunal concluded that he was unfairly dismissed.

A complaint was received by a member of the public who saw the postman, which included video footage. The disciplinary manager concluded there had been a breakdown in trust due to the actions and contradictions in the postman's subsequent interviews.

However, after the investigation meeting occurred, the complainant made additional claims that a postman had been ringing his doorbell repeatedly and harassing him to change his statement. The investigator had failed to redact the complainant's address from the initial complaint provided to the postman. The investigation was not reconvened and this more serious allegation was not included in the disciplinary invite but added into a table (produced in disclosure) recording evidence 'for' and 'against' dismissal. The postie had not been expressly informed of the expanded allegations and there had been no fact finding regarding the allegation of harassment. Other flaws saw the disciplinary manager refuse to consider statements

from other staff members who had not been dismissed for similar offences and no real consideration given to potential mitigating circumstances. The postman had covertly recorded the disciplinary hearing, including a conversation between the decision maker and note taker where the decision maker said the postman was "probably a bane" in his line manager's life. The tribunal concluded that this poor relationship (which was related to the postman's trade union activities) was at the forefront of the decision maker's mind when considering the appropriate sanction and this rendered the dismissal automatically unfair.

Lessons:

1. *Do not ignore other allegations or evidence that comes to light in the course of the investigations, even if you think the existing allegations are sufficient to justify dismissal. There is a risk of the additional allegations being held to be part of the decision without due investigation;*
2. *Avoid any allegations of conscious or unconscious bias by using impartial investigators and disciplinary chairs;*
3. *Treat like cases alike and be consistent in the application of disciplinary sanctions. Any differences in penalties should be justifiable; and*
4. *Beware of covert recordings.*

THE DRUGS…DON'T WORK: IMPROPER PROCESS IN DRUGS PRANK

In ***Buchholz v GEZE UK Limited***, an office-based Product Manager was dismissed after a cleaner found a clear bag containing white powder beside two lines of loose powder and something resembling a straw on his desk. Testing confirmed that this was in fact sherbet powder. Interviewed team members confirmed that the sherbet (purchased by another colleague) had spilt on Buchholz's desk and this had led to 'banter' and jokes within the team.

The disciplinary manager concluded the joke risked bringing the company into serious disrepute by creating the impression it condoned drug use. The employer referred to the third-party cleaning contractor and the potential for the images to end up on social media.

The tribunal found the dismissal to be unfair on three grounds:

- There were no reasonable grounds for the conclusion that the items had been deliberately left there. To the contrary, plausible witness evidence corroborated Buchholz's account that he had worked elsewhere in the office that afternoon and left the office in a hurry for his holiday;
- The sanction of summary dismissal was outside the range of reasonable responses as there was no reputational damage. The employer's own disciplinary policy identified the act of bringing the company into actual and serious disrepute as conduct warranting summary dismissal, not the potential risk, which the tribunal deemed as low; and
- The investigating and disciplinary manager were the same person.

Lessons:

1. *Check the definitions of gross misconduct and misconduct in your disciplinary policy;*
2. *Ensure any conclusions contrary to the employee's account or witness evidence are sufficiently justified; and*
3. *Always ensure the separation of the investigating and disciplinary manager wherever possible.*

INK CREDIBLE? FLAWS WITH SWASTIKA TATTOOS AND BULLYING CLAIMS

In April, a supermarket caretaker was found to be unfairly dismissed after claims of bullying behaviour and showing a staff member a swastika tattoo in the workplace. It had been alleged that he had assaulted a new colleague by hitting her in the back with a trolley and behaved in an intimidating manner towards her.

In finding the dismissal to be unfair, the tribunal said the investigator merely recorded witness statements and reported them to the disciplinary manager, rather than investigating and challenging the accounts given. As such, the complainants' statements were taken at face value. The decision maker based the conclusion that the caretaker had behaved in an intimidating and bullying manner, in part, on the fact that the caretaker behaved aggressively in the disciplinary hearing, by allegedly intimidating him. The tribunal held it was not reasonable to draw inferences about the caretaker's likely behaviour on the shop floor from how he responded in the disciplinary hearing, where he was accused of something he said he had not done and was aware he might lose his job.

Previous allegations of poor behaviour had not been put to the claimant at any point yet the tribunal found it influenced the decision that the claimant was guilty in what was otherwise a "he said she said" scenario.

Lessons:

1. *Ensure that previous events and "background" taken into account are fairly raised with the employee for comment in the hearing; and*
2. *Avoid drawing inferences from an employee's behaviour during investigations.*

KICK OFF: ABUSE OF COWORKER HAMPERED BY HISTORIC EVENTS

In *Flynn v Tender Loving Child Care Limited*, a nursery worker was dismissed after a colleague alleged that she had had called her "gay", encouraged children to repeatedly taunt her with "smelly Laura" and "kick Laura, kick Laura". The claimant denied these events, labelling the complainant as a "liar", but a third colleague corroborated that the incidents involving the children had occurred.

Flynn was dismissed after the disciplinary manager concluded that the children had been used as part of an "ongoing campaign of harassment" which constituted a serious offence. However, the tribunal found that there were no reasonable grounds for the employer to form this view and upheld Flynn's claim for unfair dismissal.

While five allegations had initially been raised with Flynn, only the two allegations involving the children officially formed part of the findings and were raised in the disciplinary hearing. The disciplinary outcome referred to the other comments as "background" which painted a picture of ongoing bullying. The tribunal held that these matters were not simply background and that they had not only influenced the decision, but had formed the basis for the conclusion that Flynn had harassed her colleague over a prolonged period of time.

Flynn had no opportunity to respond to the earlier alleged comments nor the allegation that these incidents collectively formed part of a wider campaign of harassment. The colleague's statement that both women appeared to be laughing during the incidents had been ignored, leading the tribunal to conclude that the employer had failed to look into the context or motivation behind the alleged comments, as required in any reasonable investigation. Flynn was awarded approximately £20,000, although this was reduced by 75% on the basis that it was likely that she would have been dismissed, had a fair process been followed.

Lessons:

1. *Be careful when referring to "background" or historic events and ensure that all incidents forming part of the decision to dismiss have been fairly put to the employee; and*

2. The context and motivation for any perceived bullying must always be explored with either side.

DEFENDING OFFENSIVE LANGUAGE? CONTEXT FRUSTRATES CASE WITH EXTREME RACIAL SLUR

In a judgment issued last month, a council worker was found to be unfairly dismissed after saying the "n-word" in an internal training session due to investigation flaws. The council worker had asked the facilitator about when situations should be reported as racism as it is sometimes unclear. The council worker gave an example of a black person referring to his then girlfriend, uttering the offensive term in full. When the use of the term came to light, he was dismissed.

However, the council had been let down by investigative and procedural flaws. The initial letter raising the complaint did not include a copy of the disciplinary policy nor the contact details of anyone the employee could contact if he required information about the policy. No consideration was given to resolving the issue informally, as envisaged by the council's Harassment Policy. The investigator was of the view that if the facts were made it out, he had to recommend it to a disciplinary hearing. However, a reasonable employer would have addressed their minds to whether or not action short of a disciplinary hearing would have been appropriate (for example, mediation or the accepting the employee's formal apology).

The decision maker fundamentally misunderstood the employee's role and had emphasized that the council worker had worked for 24 years in the HR department and as an HR adviser, would have advised others in relation to the council's policies. The employee was actually in an IT payroll support role and the tribunal found that the failure to verify this HR experience was outside the band of reasonable responses. The decision maker also failed to check when the claimant had last undertaken diversity and inclusion training and what the content of that training had been.

Although procedural flaws had rendered the dismissal unfair, the worker's conduct had genuinely broken trust and confidence with the employer so compensation was reduced by 90%.

Lessons:

1. Consider the appropriateness of mediation or informal resolution;

2. Ensure employees are provide with copies of all relevant policies;

3. Ensure that facts relied upon are verified, including the status of training records.

For further information on workplace investigations please see our April Client Alert here.