

Investigations round-up



November 2023

1 Introduction

Welcome to the inaugural edition of our investigations newsletter, bringing you up-to-speed on the latest trends and developments in this ever-evolving area.

In this edition, we consider the trend towards greater support for those participating in investigations. We also pick out two interesting recent cases, the first illustrating how easily privilege can be lost without the right safeguards, and the second illustrating the tensions which can arise when both a corporate and certain of its employees are under parallel investigation by a regulator.

We hope that you enjoy reading this round-up, and that you will share it with any of your colleagues who may find it useful.



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2 Trends and Developments

Market trend: supporting those involved in investigations



Investigations can be stressful experiences for the individuals involved. Whether the individual is the complainant, under investigation themselves or a witness participating in the investigation, being part of the process can be difficult. We regularly work with our clients to consider ways in which those involved in an investigation can be best supported. Employers will want to consider this as part of their duty of care to their employees. Providing support is beneficial not only for the individual involved, but also for the investigation itself, which is more likely to run smoothly if individuals are given appropriate support. Organisations naturally think about supporting those who have alleged

experiencing misconduct (particularly in a workplace investigations context), but consideration should also be given to supporting the individual who has been accused, which is something that can at times be overlooked. Ways in which employers might support those involved include:

- considering support available, e.g. Employee Assistance Programmes (which provide practical support to employees on issues which may impact their wellbeing and performance) and other counselling programmes;
- assigning them a specific contact in the HR team;
- providing regular updates as to the status of the investigation, or otherwise being clear that they should not expect to hear anything further;
- discussing the impact of the investigation on their general workload (and considering whether existing workload needs to be reduced); and
- considering requests for time off, or (if appropriate) offering a period of time off.

We are increasingly working with mental health experts when dealing with the most complex workplace investigations.

3 Cases

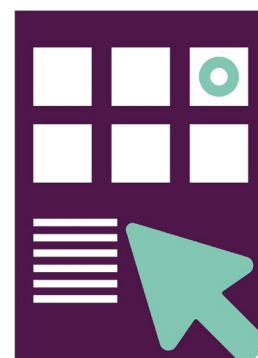
Case law: privilege and investigation reports

The way in which an investigation is structured and conducted will impact whether its output is privileged. A recent decision of the Scottish Court of Session, which is binding on all UK Employment Tribunals, highlights the issues that can arise when privilege is not at the forefront of the minds of those involved.

The University of Dundee had instructed an internal body to investigate a grievance raised by one of the University's employees, and to prepare an internal investigation report. The University subsequently received legal advice which it shared with the internal body. The internal body amended its report, which in its final form included a footnote to the effect that it had been "amended and reissued on 23.06.2022 following independent legal advice". The employee commenced Employment Tribunal proceedings and received the final version of the report. Alerted to the existence of the original, unamended report by the footnote, the employee sought disclosure of it. The University resisted on the basis that a comparison of the original report with the final report would betray the tenor of the legal advice obtained by the University, which was privileged.

The court held that, not only were the original and final reports unprivileged, but privilege in the underlying legal advice the University had obtained was likely waived at the point at which it was shared with the internal body (and certainly waived when the footnote was added to the original report). Structuring the internal investigation differently from the outset, and exercising caution before sharing the University's legal advice with the internal body conducting the investigation, could have resulted in a different outcome.

Click [here](#) for the judgment, [here](#) for our briefing on the case, and [here](#) for more on privilege considerations in investigations.



Key takeaways

- Consider from the outset whether you want the output from your investigation to be open, or protected by privilege.
- If the latter, obtain advice on whether privilege is likely to apply in the circumstances, and how best to structure the investigation to maintain it.
- Ensure that all those involved in the investigation understand the tests for when privilege applies, when it doesn't, and how it can be lost.
- Exercise caution before sharing privileged materials (such as legal advice) beyond the original recipients.
- Don't reference privileged materials (such as legal advice) in non-privileged documents (such as an open investigation report).

Case law: tensions in parallel investigations of corporates and individuals

In February 2022, the FCA issued a final notice against Julius Baer International Limited (Julius Baer) for various breaches of its rules, following a settlement in which Julius Baer agreed relevant facts and partially admitted liability. The FCA had also issued decision notices against three former Julius Baer employees arising out of the same subject matter (arguing that they had acted recklessly and consequently with a lack of integrity). However, rather than settling (as their employer had done), those individuals challenged their notices in the Upper Tribunal.

In June 2023, the Tribunal effectively overturned the decision notices against the individuals (and, in doing so, made some trenchant criticisms of the way that the FCA handled its investigation and enforcement). As a result, an odd circumstance now persists where the FCA's (unchallenged)

final notice against Julius Baer continues to stand, even though it contains findings subsequently undermined by the Upper Tribunal in overturning the (challenged) decision notices against the bank's three employees.

In reaching its decision, the Tribunal acknowledged the potential conflicts of interest that can arise in the relatively common scenario where an employer is keen to reach a settlement with a regulator – perhaps in order to draw a line under a matter or to benefit from an early settlement discount to a proposed fine – while its employees, facing a threat of career-ending consequences and potentially devastating reputational harm if they are found to have committed individual misconduct, are not. To some extent these tensions cannot be mitigated. However, careful thought at the scoping stage of an investigation as to the issues to be investigated, and whether any allegations against individual employees can be divorced from the allegations against their employer (as the Tribunal recognised could in hindsight have happened here), could perhaps have avoided the unsatisfactory outcome that eventuated.

Click [here](#) for the judgment.

Practical tips

- Tensions can arise where employees and their employers are under parallel investigation by a regulator.
- Ensure where possible that the employees under investigation have separate legal representation.
- Establish a clear channel of communication with those representatives, to the extent appropriate.
- Consider carefully at the scoping stage of the investigation precisely what is being investigated and whether the allegations against individual employees can be divorced from the allegations against the corporate.

4 Our Investigations Practice

At Travers Smith, we are experts in supporting clients at times of crisis, including when dealing with significant potential reputational risk. We can guide you through any investigation, however complex, contentious or sensitive. Our lawyers have market-leading experience in regulatory and internal investigations, enforcement actions and disciplinary proceedings across a range of sectors.

You can read more about our Investigations offering [here](#). Please get in touch to explore how we can help you to be prepared.

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