

How far must an employer go when investigating an allegation of misconduct? This is often something that employers are concerned about – must they leave “no stone unturned” or will a lesser line of enquiry be acceptable? The Court of Appeal’s recent decision in ***Stuart v London City Airport Limited*** contains useful guidance for employers on what constitutes a reasonable level of investigation when dealing with misconduct.

To start off, let us remind ourselves of what an employer needs to show in order for a misconduct dismissal to be fair. The so-called “Burchell guidance” makes it clear that an employer has to show that at the time of dismissal: (a) it believed the employee to be guilty of misconduct; and (b) that it had reasonable grounds for believing this, having carried out “as much investigation into the matter as was reasonable in all the circumstances of the case”. The investigation is therefore a key component of a fair disciplinary process.

In this case, Mr Stuart was a ground services agent at London City Airport (LCA). In December 2009, he visited the duty-free shop at the airport and was suspected by a member of staff of stealing. The police were called and Mr Stuart was stopped outside the shop with duty-free items in his possession which he had not paid for. He was suspended and the disciplinary procedure put in motion. Mr Stuart’s principal line of defence at the disciplinary hearing and the subsequent appeal hearing was that he could not be guilty of theft, as he had never left the duty-free shop. Having inspected the area in question, however, both the disciplinary and appeal managers were satisfied that the effective boundaries between the duty-free shop and the main concourse were relatively clear. They each separately concluded that it was impossible that Mr Stuart could genuinely have believed this. Accordingly he was dismissed.

Mr Stuart brought an unfair dismissal claim. At the hearing he argued (for the first time) that LCA had carried out an inadequate investigation into his alleged misconduct. In particular, he argued that LCA had failed to interview all the duty-free staff who had been present – LCA had only taken statements from the manager of the duty-free shop and one other employee – and that it had failed to obtain CCTV footage which would have shown, according to Mr Stuart, that he had initially tried to pay for the goods at one till and that he had only left the duty-free shop briefly to talk to a colleague. The Tribunal concluded that LCA’s failure to take these steps was not sufficient to render its belief that Mr Stuart was guilty of theft unreasonable or to make its investigation a flawed one.

Mr Stuart appealed. The EAT concluded that this additional evidence should indeed have been considered, as it went right to the heart of the allegation of dishonest conduct and of breach of trust, especially the CCTV footage. If this did indeed show that he had tried to pay, those allegations would be much weaker.

So, who was right? The Court of Appeal has now come down on the side of the Tribunal and reinstated the original decision that Mr Stuart was not unfairly dismissed. It pointed out that the test was whether LCA had reasonable grounds for its belief that Mr Stuart did not intend to pay for the goods; and in particular whether it had carried out sufficient investigation – i.e. such investigation as was reasonable in the circumstances of the case – before reaching that conclusion. It said it was important to assess the reasonableness of LCA’s investigation in light of the primary defence put forward by Mr Stuart at that time, namely that he was not guilty of theft because he had never left the bounds of the duty-free shop. This argument had been thoroughly investigated by LCA at both the disciplinary and appeal hearings. As LCA had concluded (reasonably) that Mr Stuart was not telling the truth about the main plank of his defence, no further investigation was required. The Court said that in those circumstances LCA was entitled to prefer the evidence given by its employees about what happened before Mr Stuart left the shop without recourse to the further investigations which it was now being said should have been carried out.

The Court of Appeal also referred to the fact that at no stage during the disciplinary process had Mr Stuart (or his trade union representative) argued that further investigation was required. Whilst this did not automatically mean that LCA should not have made these enquiries, it said it was relevant to the question of whether their non-pursuit meant that the dismissal was unfair. Had Mr Stuart’s argument from the start been that he had tried to pay but had then just nipped across the concourse to speak to someone, CCTV footage would have proved this one way or the other – a failure to look at it in those circumstances could clearly have been unfair. However, his argument had been the opposite – that he had not yet needed to pay as he thought he was still within the shop area. Once that main argument is exposed as false, there is no need for the employer to investigate subsidiary or alternative arguments which have not yet even been made.

This decision is useful for employers, in particular the Court of Appeal’s observation that the employer did not need to carry out further investigations where it was satisfied that the employee’s evidence was not credible. They should, however, still be careful about relying on it. The employer here carried out arguably the minimum level of investigation required to constitute a reasonable investigation. As the Court itself acknowledged, the Tribunal and the EAT had both applied the right legal test, but had come up with different answers about the minimum level of investigation which fairness required in the circumstances. This decision could therefore quite easily have gone the other way at the Tribunal hearing and it would have been equally difficult to challenge.

What lessons can employers take from this decision about what constitutes a reasonable investigation? Whilst it is difficult to give hard and fast rules, here are some pointers:

- As with many things employment-related, what is reasonable will always depend largely on the facts of the particular case and the nature of the allegations. Always bear in mind what the purpose of an investigation is, namely to establish the facts on a balance of probabilities not beyond all reasonable doubt.
- Ensure you comply with the Acas Code and any relevant internal policies and procedures governing investigations or at least have a good and documented reason for not doing so.
- Ensure the investigating manager is so far as practicable independent and not connected with the facts giving rise to the disciplinary allegations. Equally, the investigating manager should ideally not conduct any subsequent disciplinary hearing.
- Consider the evidence that may be required (e.g. witnesses, documents/CCTV footage, etc.) and then take steps to obtain this.
- Do not jump to conclusions – even in cases of “obvious” misconduct, employers should investigate the misconduct in question to establish what has actually taken place.
- If the employee admits misconduct then no further investigation will generally be required, although it is still critical to carry out a fair process before any dismissal as there may be issues of mitigation to consider which may themselves require some further enquiries.
- Take statements from relevant witnesses. Any investigation should be balanced – employers should not just speak to people who they know will support the allegations. An investigation should not appear to be just a search for evidence against the employee.

- If an employee asks as part of the investigation for you to speak to certain witnesses or review certain evidence (such as CCTV footage) the employer should take such requests seriously. It is not bound to comply, but it will need a good reason for not doing so.
- Being reasonable does not mean that employers have to speak to every possible person and explore every avenue in the employee’s defence. As this case illustrates, employers have a measure of discretion when it comes to handling investigations and the mere fact they do not interview every single potential witness or consider every possible document will not necessarily be fatal to the fairness of the investigation. So long as the investigation falls within the range of reasonable responses and you can show why you did what you did, there should be little issue.
- If the allegations are very serious and may result in the employee being unable to work again in his/her chosen profession, this is likely to require a more comprehensive investigation.
- Keep records of any investigation carried out so that the employee can be presented with the evidence against him and, if challenged, the employer can prove the steps it has taken to carry out a reasonable investigation.

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