



## **DISCIPLINARY PROCEDURES LAW AND PRACTICE**

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### **Disciplinary and dismissal**

Employers are constrained by some very strict rules as to how and in what circumstances they may dismiss an employee. Prior to October 2004 there were more general rules about the 'fairness' of dismissals, supplemented by case law and the ACAS Code of Practice on disciplinary and grievance matters. Employers were expected to make such

decisions ‘reasonably’, that is, not to dismiss without investigating and giving the employee a fair chance to explain their conduct.

The position changed on 1<sup>st</sup> October 2004, with the implementation of new statutory procedures – which rigidly regulate the steps that an employer is required to take prior to dismissing. The procedures apply to all dismissals, regardless of the reason for the dismissal. The rules therefore apply to redundancies (except large scale redundancies) as well as misconduct. It is still important to make sure that a dismissal is ‘reasonable’ in the circumstances, but it is also imperative to comply with the statutory procedures *to the letter*. Failure to do so will mean that the dismissal is *automatically an unfair dismissal*. Where the procedure has been complied with a dismissal will usually be fair, provided the employer has behaved reasonably in responding by dismissing the employee. The average compensation for unfair dismissal claims was around £8,000 in 2006/7. The amount that the Employment Tribunal can award for loss of earnings in an unfair dismissal case is capped £60,600, and even this cap can be exceeded if the employee claims reinstatement or re-engagement as a remedy. There is no cap on awards for some types of claims, for example, those involving whistleblowing, and for discrimination claims.

If the statutory procedures are not adhered to and the dismissal is automatically unfair, the Employment Tribunal is usually obliged to increase the compensation (beyond the employee’s actual loss of earnings) by between 10 and 50%.

### **When do the Statutory Procedures Apply?**

The statutory procedures do not have to be followed for giving warnings – although you are advised to follow them prior to giving a final written warning because, should the matter escalate to a dismissal for a further offence, the Employment Tribunal would consider the ‘fairness’ of the final written warning which preceded the dismissal. The procedure does apply to suspension as a disciplinary sanction; if you have the right to suspend without pay as an alternative sanction (as opposed to a suspension on full pay simply to allow you to investigate) you should follow the procedure prior to imposing this, but there is some flexibility about whether to hold the disciplinary hearing prior to the suspension taking effect.

For employees with less than 51 weeks service, in most (but not all) circumstances the employee will not have the right to make a claim of unfair dismissal.

### **The Statutory Procedures**

The rules are contained in the Employment Act 2002 and are set out at the back of this handout. The rules were introduced because the government felt that it was spending far too much public money on resolving small scale disputes between employers and their employees, and wanted to encourage parties to resolve matters internally, before they got

to the stage of needing a tribunal to enforce a decision. The procedure requires employers to go through much more defined procedures prior to dismissing, and also requires employees to raise written grievances, before they are permitted to bring certain claims before the Employment Tribunal. The procedures have not worked very well in practice, and were so severely criticised that the government commissioned the Gibbons Report to review the situation and make recommendations as to how the procedures should be modified. The independent report did not recommend mere modifications, and said bluntly that the only solution was to repeal them entirely and start again with something much less prescriptive.

The statutory procedures are likely to last for another 18 months or so, and will then be repealed. However, although employers will be given more flexibility, and we will hopefully see an end to the absurd decisions that have resulted from the present legislation, the fundamental principles of dismissal law are unlikely to change. The best advice is to continue to follow the 'spirit' of the statutory procedures (which are actually quite simple) and use a bit of common sense in their application.

## **Disciplinary Procedure**

### **Stage 1 letters**

The current procedure requires employers to send a 'stage 1 letter' which sets out the allegations. It is necessary to ensure that the employee knows what they are accused of having done wrong, so that they have a fair chance of defending themselves, if the allegations are incorrect or the seriousness has been inflated. Normally such letters will also include any documents or other information which are relied upon by the employer, to assist the employee in answering the allegations. If you are contemplating dismissal, tell the employee in your letter that this is a possibility, depending on the outcome of the disciplinary hearing. It is a good idea to stress that no decisions will be made until the employee has been given an opportunity to discuss the allegations at the hearing.

*E.g. Mark has been off sick with a back injury and has claimed company sick pay for the past 5 weeks. Another employee reports seeing Mark up a ladder at his house cleaning upstairs windows, leading to suspicions as to whether he really is unfit for work. The letter to Mark should advise of the allegations, including dates and times, and what was reported by witnesses, to give him an opportunity to explain his position. It will ultimately be the disciplining officer's decision as to whether Mark's explanation is adequate or not.*

Give the employee at least 24 hours notice of the disciplinary hearing. Remind the employee of his right to be accompanied to the disciplinary hearing by a colleague or a trade union representative (if he has one).

## **Investigation**

Normally, it is recommended that you first send out the stage 1 letter to give the allegation to the employee, and then commence your investigation. However, sometimes it will be necessary to gather evidence by covert means. You should be prepared to justify why this is necessary. In the above example it may be justifiable to send a senior manager to observe, to see if Mark's actions are incompatible with his claim that his back is injured. It may also be necessary to obtain a report from his GP, or an independent practitioner. Any witnesses should be asked to give statements – these don't need to be formal, but should be signed and dated, and simply confirm the information that the witness has. Be open with the employee about the information you gather during the investigation – trial by ambush will not be accepted by an Employment Tribunal. In most cases you should send to the employee copies of witness statements and any other material which is relevant to the disciplinary charge.

If possible the investigation should be carried out by an appropriately senior employee who is not involved as a witness, will not be making the decision at the disciplinary hearing and who will not be required to hear an appeal.

### **The disciplinary hearing**

It is very important to take proper notes of the disciplinary hearing – it might be difficult for the person who is conducting the meeting to do this and so it is useful to have someone else present to take notes. Keep the handwritten version, even if you have the notes typed up later. The employee should be given a copy (it is difficult for the employee to disagree with the content later at an Employment Tribunal if they have had a copy for 5 months and have not commented upon them in the interim!).

If the employee has no companion get him to confirm that this is his choice, and enter this in the minute. Also, for the purposes of taking minutes, go through the allegations and confirm that the employee has received copies of the evidence and had an opportunity to look through these prior to the hearing. Ask the employee for his comments. Did he do what he is accused of? Are there any mitigating circumstances? Make a note of his replies.

### **The Decision**

You can make your decision on the day of the hearing, but it is wise to have a short break to give you time to consider the evidence, even if the case seems very clear. Employment Tribunals expect the decision to be considered carefully and the break is your evidence that you did do this. Consider the list of offences in your disciplinary rules and procedures. Is it reasonable to expect an employee to know they had done wrong? Is this set out in your rules as a gross misconduct offence? Consider what the appropriate sanctions would be. An Employment Tribunal would consider whether a dismissal was within 'the band of reasonable responses' open to the employer in those circumstances. If you are relying on past warnings, check that these are current, and have not expired.

Caselaw; The employer must evaluate the evidence logically and decide which witness to prefer. If the employer does this then the Employment Tribunal cannot substitute its decision, and evaluate the evidence in a different way. *Linfood Cash & Carry v Thompson*

Your letter advising of the sanction should give the right of appeal to a different member of senior management (at least as senior as the person who made the decision in the first place).

If you are giving a warning specify how long the warning will remain on file – usually 12 months. Check your own internal procedures and ensure that you comply with these regarding the window of time to submit and appeal and the life-span of the warning.

### **The Appeal**

This should be a complete re-hearing. If the employee requests an appeal he should do so in writing and should be required to state his ‘grounds of appeal’ – why he feels the sanction was inappropriate. In response to an appeal letter the manager hearing the appeal should set up an appeal hearing with the employee to reconsider the decision. It will not usually be appropriate to increase the severity of the sanction even if your own procedures say that this is permitted.

Caselaw; do not delay unreasonably at any stage of the procedure. *Patel v Leicester City Council*

### **The modified procedure**

The statutory procedures contain a modified procedure in which no hearing is required. However, you should only use this in circumstances where there is obvious gross misconduct and it was reasonable not to hold a hearing – basically a ‘caught red handed’ dismissal.

### **What constitutes Gross Misconduct?**

There are some offences which may reasonably be considered so serious that they fundamentally damage the relationship, so that the employer is not expected to continue to employ. The procedures must still be followed in the lead up to dismissal, and it is usual to put the employee on paid suspension whilst you investigate and convene a

disciplinary hearing. For gross misconduct offences, you do not have to give notice of the dismissal. Gross misconduct would usually include;

Refusing to obey a reasonable lawful instruction

Fighting

Unlawful discrimination against a colleague

Theft or fraud

Being under the influence of drugs (and sometimes alcohol)

What constitutes gross misconduct will change to some extent with different employers. Whilst it might be gross misconduct for a train driver to work under the influence of alcohol, it would be unreasonable to dismiss an investment manager for having a glass of wine with a client at lunchtime! Give careful thought to what is suitable for your business, and set the rules out in your policy handbook, ensuring that you make the list 'non-exhaustive' to give you flexibility.

### **Practical Tips**

- The letters you write and notes you make of meetings are your best evidence that you have thought through the issues logically and have followed the necessary procedures. Draft with the view that they may eventually be seen by an Employment Tribunal Chairman.
- If any employee is being difficult about attendance at meetings you can turn this to your advantage – give in a little on issues that are less important to you as this could weigh the balance in your favour in a borderline decision about the general fairness of the decision.
- Check your own procedures and rules as you go through the disciplinary process and adhere to them.
- Do periodic checks on your disciplinary rules to ensure these are clear about what is expected.
- Be transparent with the employee about the allegations and the evidence you have, and give the employee an opportunity to comment.
- Do not involve the person appointed to hear the appeal in any earlier stage of the investigation or decision making. That way any appeal will be properly impartial.
- If you lack sufficient grounds but need to dismiss for commercial reasons, consider a compromise agreement!

## **THE STATUTORY DISMISSAL PROCEDURES**

**EMPLOYMENT ACT 2002 SCHEDULE 2**

**STANDARD PROCEDURE**

### **Step 1: statement of grounds for action and invitation to meeting**

**1 (1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.**

**(2) The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.**

### **Step 2: meeting**

**2 (1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.**

**(2) The meeting must not take place unless—**

**(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and**

**(b) the employee has had a reasonable opportunity to consider his response to that information.**

**(3) The employee must take all reasonable steps to attend the meeting.**

**(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.**

### **Step 3: appeal**

**3 (1) If the employee does wish to appeal, he must inform the employer.**

**(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.**

**(3) The employee must take all reasonable steps to attend the meeting.**

**(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.**

**(5) After the appeal meeting, the employer must inform the employee of his final decision.**

## **MODIFIED PROCEDURE**

### **Step 1: statement of grounds for action**

**4 The employer must—**

**(a) set out in writing—**

- (i) the employee's alleged misconduct which has led to the dismissal,**
  - (ii) what the basis was for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and**
  - (iii) the employee's right to appeal against dismissal, and**
- (b) send the statement or a copy of it to the employee.**

## **Step 2: appeal**

- 5 (1) If the employee does wish to appeal, he must inform the employer.**
- (2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a meeting.**
- (3) The employee must take all reasonable steps to attend the meeting.**
- (4) After the appeal meeting, the employer must inform the employee of his final decision.**

## **GENERAL REQUIREMENTS**

### **Introductory**

**11 The following requirements apply to each of the procedures set out above (so far as applicable).**

### **Timetable**

**12 Each step and action under the procedure must be taken without unreasonable delay.**

### **Meetings**

- 13 (1) Timing and location of meetings must be reasonable.**
- (2) Meetings must be conducted in a manner that enables both employer and employee to explain their cases.**
- (3) In the case of appeal meetings which are not the first meeting, the employer should, as far as is reasonably practicable, be represented by a more senior manager than attended the first meeting (unless the most senior manager attended that meeting).**

### **Sample Disciplinary Procedure**

The following procedure does not form part of your contract of employment, and may be varied depending on the circumstances, particularly in cases of short serving employees. The procedure is designed to give a fair framework through which to investigate, assess

and address any potential misconduct. Except in cases of gross misconduct, the aim of the procedure is to bring any misconduct to the attention of the employee with a view to encouraging improvement.

1. The employee will be given full written details of the allegations, following which they will be afforded an opportunity to attend a disciplinary hearing with an appropriate member of the managerial staff in order to discuss the allegations. The employee may be accompanied to the disciplinary hearing by a colleague, or a trade union representative if the employee has one (the “Companion”).
2. The disciplinary hearing will not take place until an appropriately detailed investigation has been carried out. The investigation will not normally be carried out by the person who is to make the decision at the disciplinary hearing. The information collected during the investigation will be sent to the employee prior to the hearing, so that they have time to consider it and prepare a response.
3. At the disciplinary hearing the employee will be given an opportunity to make representations in response to the allegations, prior to any decision being made. The employee’s Companion will also be given an opportunity to address the hearing, but may not answer questions which have been put directly to the employee who is the subject of the disciplinary proceedings.
4. The employee will be informed in writing of the decision and will be given the right of appeal against any sanction (warning or dismissal) which has been issued or enforced. If the employee wishes to appeal they must do so in writing, giving their grounds for appeal, within 7 days of receiving written notification of the sanction.
5. If the right of appeal is exercised, an appropriate member of the senior managerial staff who has not been involved in the previous investigation or disciplinary

hearing will be appointed to hear the appeal. The employee will be asked to attend an appeal hearing and may be accompanied by a Companion.

6. The decision at the appeal stage will be communicated or (if communicated at the hearing) confirmed in writing to the employee. This decision will be final.