Hogan Lovells

ELA – INTRODUCTION TO EMPLOYMENT LAW: DISCIPLINARY PROCESS

Handout

1. **Aim of session** – to ensure that, if you are advising on a disciplinary situation, you understand the legal and business implications and why it is important to get it right. We are going to cover:

   (a) what a fair process looks like;

   (b) what to think about when advising a client on an investigation into potential misconduct and the key things they should bear in mind before a disciplinary hearing;

   (c) how employers should reach, record and communicate a disciplinary decision; and

   (d) the importance of the appeal stage.

This note is written from the perspective of someone who is acting for an employer in the context of a disciplinary investigation and hearing. It is also intended to focus on the practical steps and issues a lawyer needs to consider when deciding whether a dismissal is likely to be viewed as fair by a tribunal. A lawyer acting for an employee will also need to check whether the employer has taken the requisite steps in order to advise on the strength of a potential unfair dismissal claim.

2. **Procedural Fairness – ACAS Code of Practice on Disciplinary and Grievance Procedures ("ACAS Code of Practice")**

2.1 The ACAS Code of Practice is a statutory code of practice that tribunals are required to take into account in deciding whether a dismissal is procedurally fair. The series of principles that an employer is expected to observe are as follows:

   (a) Act promptly – it is likely to be unfair if an employer waits several weeks before taking disciplinary action in relation to a particular event.

   (b) Establish the facts by investigating thoroughly - particularly when an employer is dealing with allegations of serious misconduct. The employer is required to look not only for evidence to support its own case but evidence to support arguments put forward by the employee as well. The more serious the impact on the employee of a dismissal, the more thorough the investigation will need to be in order for a subsequent dismissal to be fair.

   (c) Inform the employee - the employee has got to know what the case against them is e.g. what they are accused of and the evidence against them.

   (d) Hold a disciplinary hearing at which the employee has the chance to comment on the allegations and give his or her case.

   (e) It is important for an employer to ensure that the employee is accompanied to the hearing if he or she chooses to be – it is a statutory right to be accompanied (by a colleague or a trade union representative) to a hearing that could result in a disciplinary warning. Failing to observe the statutory right could result in a separate penalty and could also make the dismissal unfair (potentially even if statutory right has been observed, as discussed later in this note).

   (f) After hearing and considering all the evidence, the employer should decide on the appropriate action – bearing in mind that dismissal will not be the inevitable outcome.

(g) The employer must notify the employee of their right of appeal against a disciplinary decision and hold an appeal if appropriate.

2.2 In order to expand on these steps a non-statutory ACAS guide, Discipline and Grievances at work (July 2020), accompanies the ACAS Code of Practice. The guide is also supplemented by online advice available on the ACAS website (for example, step by step guidance on investigations). The guide states that procedures should:

(a) be in writing;

(b) be non-discriminatory;

(c) provide for matters to be dealt with promptly;

(d) tell employees what disciplinary action might be taken;

(e) say what levels of management have the authority to take various forms of disciplinary action;

(f) require employees to be informed of the complaints against them and supporting evidence, before a disciplinary hearing;

(g) provide employees with the right to be accompanied at disciplinary hearings;

(h) provide that no employee is dismissed for a first breach of discipline, except for cases of gross misconduct;

(i) require management to investigate fully before disciplinary action is taken;

(j) ensure that employees are given an explanation for any sanction;

(k) allow employees to appeal against a decision;

(l) apply to all employees, irrespective of length of service or status;

(m) ensure that any investigatory period of suspension is with pay. Exceptionally, if suspension is to be without pay, this must be provided for in the employment contract;

(n) ensure that the employee will be heard in good faith – no pre-judgment; and

(o) ensure that where the facts are in dispute, no disciplinary penalty is imposed until the case has been carefully investigated and there is a reasonably held belief that the employee committed the act in question.

2.3 The above may appear obvious but it is surprising how many cases are decided on the basis that a dismissal was procedurally unfair. Generally speaking larger/more sophisticated employers will be held to a higher standard of procedural fairness than those that are smaller and have more limited resources.

3. **Reasons to get it right - Why is it important to deal with disciplinary issues properly?**

3.1 Basic issue – all employees with more than two years' service have the right to bring an unfair dismissal claim. As there is no fee or cost for doing so there is no disincentive to lodging a claim and seeing what happens. The compensatory award is currently capped at £105,707 (from April 2023) with a basic award on top. There may also be a compensation

uplift of up to 25% if the employer does not follow a fair procedure when deciding to dismiss (Ss.207 and 207A Trade Union and Labour Relations (Consolidation) Act 1992).

3.2 But an arguably greater concern is the risk that a failure to follow a fair procedure increases the risk of a tribunal finding that a dismissal was discriminatory or because the employee made a protected disclosure. Failing to follow a fair procedure may make it easier for a tribunal to draw an inference of discrimination, for example. By way of reminder, there is no minimum qualifying period of service for such claims and no cap on compensation.

3.3 Individuals involved in a disciplinary process are not personally liable for an unfair dismissal claim but they could be an individual respondent to a discrimination or a whistleblowing claim. It is becoming increasingly common to see individuals named as respondents, at least in part because this may allow certain claims against the employer that otherwise could not be brought (e.g. whistleblowing detriment claims stemming from a dismissal).

3.4 Legal risk is not the only concern for clients – tribunal litigation is expensive in financial and management time. There is also the risk of publicity surrounding a case – particularly if discrimination or whistleblowing is also alleged.

3.5 For clients in the financial services sector, there are potential regulatory consequences if they do not investigate and deal adequately with disciplinary issues that have a regulatory overlap. The PRA and FCA have emphasised that they expect employers to take non-financial misconduct seriously[1]. Different issues may arise in other highly regulated sectors. For example, it is common in healthcare settings for staff to be subject to contractual disciplinary procedures. It is also relatively common in that context for an employee to apply to a court for an injunction to prevent an employer from pursuing a disciplinary issue in a way that the employee claims is a breach either of the contractual procedure or of the implied duty of mutual trust and confidence[2].

4. Fair misconduct dismissals

4.1 For the purposes of an unfair dismissal claim, there are two key questions:

(1) Does an employer have a potentially fair reason to dismiss – misconduct is obviously such a reason[3]; and, if so

(2) Has the employer acted reasonably in treating that as sufficient reason to dismiss?

4.2 In misconduct cases, there are various other matters that an employer will have to show to persuade a tribunal that it has acted reasonably:

(a) that the employer (i.e. the disciplinary and appeal managers) genuinely believed that the employee was guilty of misconduct;

(b) that it had reasonable grounds for that belief, having carried out a reasonable investigation; and

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1 See consultation papers published in September 2023 on diversity and inclusion for example

2 See *Ardron v Sussex Partnership NHS Foundation Trust* [2018] EWHC 3157 (QB) for an (ultimately unsuccessful) attempt to obtain an injunction to prevent an employer from pursuing a disciplinary process based on a charge of gross misconduct on the grounds that this would amount to a breach of contract. See also *Burn v Alder Hey Children's NHS Trust* [2021] EWCA Civ 1791 for an application for disclosure based on a contractual disciplinary policy. That case is of interest for the suggestion that there may be an implied term that disciplinary procedures should be conducted fairly, although the point was not decided.

3 S.98(2)(b) Employment Rights Act 1996

(c) that dismissal is within the range of reasonable responses – in other words that a hypothetical reasonable employer could have dismissed for the relevant misconduct. A tribunal is not entitled to substitute its own view of whether dismissal is fair for that of the employer – it has to consider what a hypothetical reasonable employer would have done, recognising that not every employer will react to a particular act of misconduct in the same way.

4.3 If an employer satisfies the tribunal of all of the above, the employer also has to show that the dismissal is procedurally fair – in other words that it was conducted in a way that reflects the employer's own disciplinary procedures and the ACAS Code of Practice.

4.4 It is important to make it clear at the outset – and to ensure that clients understand – that employment law is obviously different from criminal law and different standards apply. Importantly, the employer does not need to be convinced beyond reasonable doubt that an employee has committed the act of misconduct of which they are accused – what is required is that the employer has a reasonable belief on the basis of a reasonable investigation.

5. Investigations – the start of the process

5.1 Thorough investigation is a key requirement of a fair disciplinary process. Applying the test in *British Home Stores Ltd v Burchell* [1980] ICR 303*,* the employer should not act on the basis of mere suspicion: it must have a genuine belief that the employee is guilty, based on reasonable grounds, after having carried out as much investigation into the matter as was reasonable in all the circumstances.

5.2 There are various aspects to this test:

(a) First – not all concerns about conduct will inevitably require a full investigation. If dealing with a relatively minor matter, an employer may in fact decide that it does not need to deal with it through the disciplinary process at all. It may be possible to deal with the issue through an informal discussion, to make the employee aware that there is an issue and what they need to do to correct it. In such a situation, advise clients that it is important to keep a file note, and to tell the employee that, if there is no improvement, further disciplinary action will result but they do not automatically need to deal with every minor infringement as a disciplinary issue.

(b) For more serious misconduct, where disciplinary action is clearly a possibility, the client will need to think about who the correct person is to conduct an investigation. This will depend somewhat on the investigation's purpose and context. If it is a serious allegation, an employer will normally need to appoint an independent person to conduct an investigation and report on whether there is sufficient evidence to indicate that the employee has been guilty of misconduct for disciplinary action to be warranted. The ACAS Code of Practice states that "where practicable, different people should carry out the investigation and disciplinary hearing" – the division of function is an important indicator of impartiality.

(c) A further issue that can arise – again depending on the nature of the misconduct alleged – is whether the employer should suspend the employee pending an investigation. It is important to remember that suspension should not be a knee-jerk reaction to any allegation of misconduct but only invoked where there are serious allegations of misconduct that need to be investigated. The risk of a suspension is that the employee will claim a breach of implied duty of trust and confidence and resign. The employer may also need to consider other actions – particularly where investigating allegations made by one team member against another, it may need

to think about moving an employee to another role on a temporary basis. How far that is appropriate or workable and whether it could give rise to allegations of victimisation depends on the nature of the allegations, the seniority of the respective employees and nature of their roles. However, this may be an alternative to suspension in some cases and clients should be advised on these options.

(d) Criminal proceedings? The employer's investigation may be subject to delay where the alleged misconduct is also the subject of a police inquiry. However, tribunals will not necessarily regard this as a valid excuse for a delay in completing the disciplinary procedure. This will depend on the individual circumstances of the case. Where criminal proceedings are pending, inquiries may be hampered (e.g. if the employee is reluctant to discuss the incident). In *Ali v Sovereign Buses (London) Ltd EAT 0274/06* the EAT reviewed the authorities on the issue and concluded there is no hard and fast rule as to what an employer should do when deciding whether to press ahead with disciplinary proceedings when there is a criminal trial pending. It will depend on the circumstances of the case.

(e) When advising regulated clients – remember that where dealing with certified staff, the employer may have to balance competing interests between dealing with disciplinary issues promptly/fairly and not compromising its regulatory position. This will vary from case to case depending on the seriousness of the allegations and how they came to light, but it may be necessary to suspend the disciplinary process pending a compliance investigation. A lawyer will also need to consider with the client whether there is any obligation to notify regulators, particularly where an employee's honesty and integrity is called into question by the allegations.

6. Investigation: scoping and planning

6.1 At the outset of an investigation it is important to be clear about what the allegations are. If the allegations are not sufficiently clear this will make it difficult to decide what evidence to gather, which witnesses to interview etc. Clear and specific allegations help keep the investigation focussed, on track and reduce the risk of allegations surfacing at a later stage that derail what has already been done.

6.2 What does a "reasonable" investigation look like in a particular case?

(a) In *A v B* [2003] IRLR 405, the EAT stated that the gravity of the charges and the potential effect on an employee will be relevant when considering what is expected of a reasonable investigation. Serious criminal allegations must always be investigated and the investigator should put as much focus on evidence that may point towards innocence as on that which point towards guilt. The EAT accepted that the standard of reasonableness will always be high where dismissal is a likely consequence.

(b) In *Salford Royal NHS Foundation Trust v Roldan* [2010] ICR 1457 – the employee, a nurse who was dismissed for gross misconduct, faced criminal charges and the risk of deportation. The Court considered that the threat of deportation, which might have resulted from a dismissal, was equally as deserving of careful investigation as the potential criminal charges the employee faced. The potentially serious adverse consequences that dismissal would have had on the employee reinforced the tribunal's finding that procedural errors meant that the dismissal was unfair.

(c) What amounts to a "reasonable investigation" is a question of proportionality, which comes back to the severity of the initial allegations – if what is complained of is

relatively low-level; a more truncated investigation is likely to be reasonable. The point was reiterated in *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, which observed that a heightened standard will apply where the potential adverse consequences for the employee are particularly grave. The range of reasonable responses test applies to investigations as well as the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588).

(d) However, there is no need to "leave no stone unturned", particularly in circumstances which are unlikely to result in dismissal, even if they could result in a less serious disciplinary sanction. In *Shrestha v Genesis Housing Association* [2015] EWCA Civ 94, the Court of Appeal confirmed that it was too narrow an approach to say that every line of defence put forward by an employee had to be investigated unless it was manifestly false or unarguable. But a much more thorough investigation is going to be needed where the possible consequences for an alleged perpetrator are particularly significant – e.g. where it threatens not just their job but their career. So, for example, if allegations could have implications for someone's fitness and propriety to perform a regulated role in the financial services industry going forwards, a higher standard of investigation is likely to be needed.

6.3 Planning

(a) Decide who will conduct the investigation. As noted, this should normally be someone different from the person who would conduct any disciplinary hearing. It is becoming increasingly common to appoint an external investigator where serious allegations have been made against senior employees.

(b) Consider what evidence is required and who will provide it.

(c) Ask for a copy of the employer's disciplinary policy to ensure that procedural requirements and timescales are met.

(d) Witness interviews are the obvious and most common route of fact gathering in an investigation.

(e) Dealing with a reluctant witness? Witnesses may be hesitant to disclose their names or involvement in the disciplinary process. When dealing with reluctant witnesses employers should reassure employees that their involvement and matters relating to the investigation will be kept as confidential as possible, but employers should be advised against guaranteeing confidentiality. Witness statements will need to be disclosed to the employee facing allegations of misconduct as part of a fair process and whilst it may possible to anonymise the identity of witnesses, doing so can undermine the strength of the evidence and open the process up to challenge from the employee.

(f) Monitoring of emails or surveillance may also be necessary – clients should be advised that any situation involving covert monitoring will require a data protection impact assessment to be carried out and will normally be justified only where criminal activity or gross misconduct is suspected[4]. The employer will need to be able to articulate and document its justification for monitoring and the safeguards adopted (namely which lawful basis for processing is relied upon to carry out the monitoring, an assessment of the necessity and proportionality of the monitoring, the risks for individuals and measures implemented to reduce those risks). There

[4] See the ICO's guidance on employee monitoring (October 2023)

is also potential for arguments that an individual's Art. 8 right to private life has been infringed, or that evidence obtained as a result of surveillance should not be admitted as evidence – as a general rule clients should be advised that covert surveillance should be used only in exceptional circumstances and should not include locations or communications that employees would reasonably expect to be private, such as personal emails.

(g) It may also be acceptable for the employer to rely on witness statements and related information obtained from the police in the course of a police investigation. Whether it is reasonable for an employer to rely upon the police investigation or is required to carry out a further investigation of its own will depend on the facts of the individual case. Remember – the test is whether the investigation that was carried out was reasonable in all the circumstances, not whether a further investigation could have been carried out.

(h) Offering the employee the right to be accompanied to an investigation meeting is not a legal requirement but it may be good practice to do so. You should also check the employer's policy to see if it includes a right to be accompanied. Depending on the circumstances, it may be a reasonable adjustment to allow an employee with a disability to be accompanied.

(i) How much notice of any investigation meeting will be given? This decision needs to balance the need not to look as though the employer is "bouncing" the employee into investigation (making the process unfair) with the need not to prejudice the investigation.

(j) It is important to remember that investigation is not disciplinary action in itself – the investigation needs to look for evidence that supports the employee's case as well as evidence that indicates that there may have been wrong doing. It should not be conducted as a cross examination.

7. Investigation reports

7.1 Record keeping is important to demonstrate thoroughness of the process. However, an investigation does not necessarily have to be recorded in a written log or report to be "reasonable" (*Now Motor Retailing Ltd v Mulvihill* EAT 0052/15) although large employers will almost certainly keep a written record. However, the ACAS guide suggests that records should be kept of the complaint against the employee, the employee's defence, findings made and actions taken, the reason for actions taken, whether an appeal was lodged, the outcome of the appeal, any grievances raised during the disciplinary procedure, subsequent developments and notes of formal meetings, so creating a comprehensive investigation report is good practice and will be one way to show that the investigation was reasonable.

7.2 Practical tips for clients on how to compile an investigation report at the end of the process include:

(a) It goes without saying that all evidence should be reviewed before a conclusion is reached.

(b) The investigation report should set out clearly the facts found and process followed, including, if relevant, whether there is a disciplinary case to answer.

(c) The report should not stray into conclusions if that is not the investigator's role. The purpose of the investigation is normally simply to assess whether there is a case to answer.

(d) Bear in mind that HR/manager involvement in the process may be seen to influence the investigation and render a subsequent dismissal unfair – HR involvement should generally be limited to process issues, not to the substance of the report and findings. Similar issues arise at the decision stage – HR should not be seen to interfere with the disciplinary manager's decision. The Supreme Court in *Chhabra v West London Mental Health NHS Trust* [2013] UKSC 80 held that an employer had acted in breach of an employee's implied contractual right to a fair process, as well as an express undertaking, where a human resources manager had unduly influenced a case investigator's report. The EAT in that case stressed that whilst an investigating manager is entitled to seek advice from HR, such advice must be limited to questions of law, procedure and process. HR must avoid trying to stray into areas of culpability or the appropriate sanction, except in so far as the advice addresses issues of consistency[5]. The EAT decision in *Dronsfield v The University of Reading* (UKEAT/0255/18) dealt with involvement that fell the right side of the line. In that case, an in-house lawyer had suggested amendments to an investigation report. However, her advice was that the report should not set out evaluative conclusions on whether the employee's actions amounted to an abuse of power as that was a matter that should be left to the disciplinary panel. That did not render the process unfair.

(e) The employee will generally have to be given a copy of the investigation report as part of any disciplinary process, and this is something to bear in mind when the report is drafted[6].

8. Preparing for the hearing

8.1 Assuming the investigation has been completed and disciplinary action is necessary, there are various steps to think about when preparing for the disciplinary hearing:

(a) Decide who the appropriate person is to be responsible for the disciplinary process. This may be the employee's line manager, but where serious misconduct is alleged it may need to be someone more senior. The employer's disciplinary policy may specify what level of management needs to hear particular types of claim. The manager should not have been involved in the investigation to ensure that they can approach the issue with an open mind.

(b) Make sure that the client is familiar with the ACAS Code of Practice and its internal disciplinary procedure. You should ask for a copy of the disciplinary policy to check for any specific procedural requirements. Advise HR to ensure that the disciplinary manager is familiar with these polices in advance of the hearing.

(c) Make sure an employee has been invited to the hearing in accordance with the procedure and given the necessary evidence e.g. a copy of the investigation report, statements taken from the employee and other employees, and any other documents or evidence on which the employer is relying. It is worth checking to

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5 See also *Ramphal v Department of Transport* [2015] IRLR 985

6 In the context of a grievance investigation report, *University of Dundee v Chakraborty* [2022] EAT 150 found that the original version of a report amended following legal advice was not subject to litigation or legal advice privilege. The subsequent Court of Session decision ([2023] CSIH 22) concluded that any privilege that existed would in any event have been waived.

make sure that this has happened and that the employee has had sufficient time to read them. If not, the employer should consider delaying the hearing, because of the risk of an unfair dismissal claim even if the hearing itself is conducted procedurally fairly. Particularly where a disciplinary situation is particularly document-heavy, the employer may need to allow more time before the hearing than it normally would[7].

(d) Make sure the employee has been informed that they can produce documents or witnesses as part of the disciplinary process and have been advised of their right to be accompanied.

(e) On a similar point, ensure that the employee knows the allegations they are expected to meet as clearly as possible. If the employer is accusing the employee of dishonesty, it should say so. If dismissal is a possible outcome, make sure the employee knows this.

(f) What is the role of HR? It is normally to provide guidance and support on the process, but as noted, it is not generally to take a decision or seek to influence the disciplinary manager's decision.

9. The hearing

9.1 A key part of the role for the disciplinary manager is clearly the conduct of the disciplinary hearing itself. There are various things to consider in relation to the way in which the hearing is handled and whether this gives a picture of a fair or an unfair dismissal:

(a) The disciplinary hearing is not an interrogation and it is not a cross-examination of the employee. The manager should not come into the hearing with a closed mind – it is important that they do not do or say anything that indicates that the employer has already decided that the employee has committed misconduct, or that a decision has already been taken that dismissal is the appropriate outcome.

(b) The role of the disciplinary manager is to sift the evidence and come to a conclusion – this includes looking for evidence that supports the employee's case or that undermines the allegations of misconduct, as well as evidence that supports them.

(c) They should ask open not closed questions – e.g. "what happened next?" not "that is when you hit him, isn't it?"

(d) Make sure that everyone present understands the need for confidentiality – obviously that will include the employee and any representative, but also any witnesses that either party are relying on. Confidentiality is also important at the investigation stage – see the decision in *Piepenbrock v London School of Economics* [2018] EWHC 2572 QBD for an example of an (unsuccessful) personal injury claim stemming from the way in which misconduct allegations had become common knowledge because the individual making a complaint about the claimant's behaviour had not been warned about the need for confidentiality.

(e) Check at the outset that the employee understands that they have a right to be accompanied to the hearing by either a colleague or a trade union representative if they do not have someone with them. If they say they do want to be accompanied, it may be necessary to postpone the hearing in accordance with the statutory

[7] See *Linwood v BBC* (Case No 2204901/2013) for an example of a case in which the disclosure of a large number of documents and emails to the employee shortly before a hearing was a factor in making his subsequent dismissal unfair

procedure – a key element of a fair procedure is that employee has a right to be accompanied and this is also a statutory right[8]. Refusing to postpone a disciplinary hearing to allow an employee to be accompanied may make a dismissal unfair, even if the employer is not required to re-arrange the hearing under the statutory procedure (*Talon Engineering Ltd v Smith* (UKEAT/0236/17/BA)). Anecdotally we have noticed an increasing trend in employees asking to be accompanied by a member of family or a friend; it is worth reminding your clients whilst they are free to consider this type of request the statutory right is limited to being accompanied by a colleague or a trade union representative. When dealing with an employee with a disability, allowing them to be accompanied by a friend or relative may be a reasonable adjustment.

(f) The role of the representative is not to answer questions on the employee's behalf, but they are allowed to make statements, put the employee's case and sum up and confer with the employee during the hearing. ACAS guidance encourages allowing the companion to participate as fully as possible in the process.

9.2 At the outset of the hearing, the disciplinary manager should explain the allegations being made and allow the employee to address them. It is obviously sensible to make that discussion as structured as possible to ensure that each allegation is addressed and that the employee has every opportunity to put their case in response. That could include calling witnesses that they think can give evidence that will exonerate them. If an employee requests the presence of a witness and has not notified HR of this in advance, a postponement may be necessary. The employer should not seek to limit the employee's ability to put their case – it is crucial that they have the chance to say everything in their defence that they want to.

9.3 Once the employee has had an opportunity to explain their case, the disciplinary manager will need to consider whether anything they have said requires further investigation. This may indicate that there are documents that have not been looked at as part of the investigation, or potential witnesses that have not been interviewed. In that case the disciplinary manager may decide that they cannot reach a decision until that further investigation has been carried out, in which case they will need to adjourn the hearing and re-convene once the further investigation is complete. It is important to advise a client to make sure that the employee gets the outcome of any further investigation in advance so they have a chance to comment on it at the re-convened disciplinary hearing. But as noted, the duty on the employer is to carry out a reasonable investigation – not necessarily to investigate every single line of defence an employee puts forward.

9.4 Even if a disciplinary manager decides that no further investigation is necessary, it is often sensible not to take an immediate decision on what disciplinary action to take. It runs the risk of giving the impression that an issue has been pre-judged if the manager does not take time to reflect upon the hearing and reach a decision.

9.5 For the same reason it is obviously important not to prepare the decision document in advance. That sounds obvious but there have been cases involving large employers where draft dismissal letters were prepared in advance and this was sufficient to make a dismissal unfair[9].

10. The hearing – potential problem areas

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[8] Note that the employer is not entitled to reject an employee's chosen companion provided that they are a fellow worker, trade union representative or official (*Toal v GB Oils Ltd* (UKEAT/0569/12))

[9] See for example *Royal Bank of Scotland v O'Doherty* UKEAT/0489/12/RN

10.1 There are a few problem areas that crop up in the context of a disciplinary hearing/ procedure with reasonable frequency.

10.2 When advising on a disciplinary procedure, remind clients to be extremely careful about creating documents relating to the procedure. They should be aware that all notes, file notes, and other documents will potentially have to be disclosed if the matter goes to tribunal. That includes email correspondence between the disciplinary manager and HR or other managers, although correspondence with lawyers will attract legal advice privilege[10]. It is also very common for an employee to make a subject access request under the GDPR to get early disclosure of documents and in practice not very much an employer can do to prevent this – so be aware of the risk of creating documents that give the employee a damaging "smoking gun" in subsequent proceedings.

10.3 Clients may face a situation where the employee accepts that they have committed the misconduct in question but their defence is that others have done the same thing but without any disciplinary consequences. It is important to be able to show that the disciplinary manager has investigated those allegations to see if other people have committed the misconduct in question. If they have, the manager needs to be able to explain why they have not been subject to disciplinary action – why are their case(s) different from those of this employee? If it is impossible to explain why the other cases are different, a tribunal is likely to find that a dismissal is unfair. It is a fundamental principle of natural justice that similar acts of misconduct should be treated in the same way. Lack of consistency also gives rise to a significant risk of a discrimination claim if the employee has a protected characteristic not shared by the employees who have not been disciplined, or a successful whistleblowing claim if the dismissed employee can show that they have made a protected disclosure. In those cases it may be better to issue a warning instead of dismissing, and to make it clear to all employees that future incidents of similar behaviour will be treated as warranting dismissal.

10.4 A few other "problem" issues that employers might have to consider include:

(a) Knowing how to deal with a situation where some of the evidence the employer relies upon has been given on an anonymous basis. This does not necessarily undermine its credibility, but an employer would need to show that they have balanced the perceived need for anonymity with the importance of the individual's right to know the case against him, and considered why there was a need for evidence to be given anonymously (such as a genuine fear of reprisals)[11].

(b) What happens if an employee goes off sick pending a disciplinary hearing? The appropriate response will often depend on the seriousness of the allegations and the reasons why the individual is off sick. If the evidence of misconduct is pretty strong and it is sufficiently serious to warrant dismissal, an employer may choose to allow a couple of postponements but then proceed with the hearing, allowing the employee to make written representations if they do not want to/cannot attend. There is a risk that a dismissal could be unfair but the employer would have arguments that any compensation should be reduced to reflect the employee's contributory conduct. That would be a much higher risk course of action if an employee has a pre-existing medical condition such as depression, because the risk of a disability discrimination claim is much higher in those circumstances. Also bear in mind, where it is known that an employee has a disability the employer

[10] See *Trentside Manor Care Ltd v Raphael* [2022] EAT 37 for confirmation that advice given by a non-legally qualified adviser did not attract legal advice privilege, even though it was supervised by a qualified lawyer

[11] See cases such as *Surrey County Council v Henderson* (EAT/0326/05) and *Ramsey v Walkers Snack Foods Ltd* [2004] IRLR 754

should consider whether any reasonable adjustments to the disciplinary process are required.

(c) It is also reasonably common for an employee to raise a grievance during a disciplinary process – for example, against their line manager for bullying or harassment, although less common in relation to disciplinary allegations than in poor performance scenarios. The employer will need to decide whether to suspend the disciplinary hearing to allow a grievance process to take its course, or whether it is possible simply to consider the allegations as part of the disciplinary process. It really depends how serious and credible the allegations are and an employer is likely to want to take legal advice in this situation.

11. Taking a decision

11.1 After the hearing and any follow up investigation is complete, the employer needs to decide what the appropriate sanction is (if any) to impose.

11.2 In deciding whether disciplinary action is appropriate and, if so, what form it should take, the ACAS guide that accompanies the ACAS Code of Practice suggests employers consider:

(a) whether the rules of the organisation indicate what the likely penalty will be as a result of the particular misconduct;

(b) the penalty imposed in similar cases in the past;

(c) whether standards of other employees are acceptable, and whether this employee is not being unfairly singled out;

(d) the employee's disciplinary record, general work record, work experience, length of service and position;

(e) any special circumstances which might make it appropriate to adjust the severity of the penalty;

(f) whether the proposed penalty is reasonable in all the circumstances; and

(g) whether any training, additional support or adjustments to the work are necessary.

11.3 Remember, the employer does not have to be convinced beyond reasonable doubt that the employee has committed misconduct. It just has to have a reasonable belief that the employee has committed misconduct, after a reasonable investigation. It can decide the issue on the balance of probabilities.

11.4 Often clients are faced with a situation where it is one person's word against another's. At the moment, this arises particularly frequently in the context of sexual harassment claims where one person claims harassment and the person accused denies everything. Employers often think it is impossible to reach a decision in that context but they still have to consider whether it is more likely than not that the misconduct occurred. They should take all the relevant evidence into account when reaching that decision, including documents (or text messages for example) that may be of assistance when coming to a conclusion. That could also include matters such as the demeanour of the witnesses as that can be relevant when deciding whether the employer thought they were telling the truth. All of these factors are relevant to whether the employer had a reasonable belief in the employee's guilt, provided that they can be articulated.

11.5 If an employer has a reasonable belief that the employee has committed misconduct, it will need to decide on an appropriate sanction. Some sanction is likely to be appropriate if it concludes that misconduct has occurred, although there may be mitigating factors that lead the employer to decide not to impose a sanction at all (e.g. if the employer is satisfied that others are implicated in the relevant behaviour, they may decide that general re-training is required rather than a warning or dismissal). That is only likely to be the case where relatively low-level misconduct is concerned.

11.6 If a formal disciplinary sanction is warranted, then the client needs to decide what that is. There are a range of options under the disciplinary procedure for clients to consider and dismissal is not necessarily the appropriate sanction in every case. Sanctions other than dismissal could include transfers, demotions, suspension without pay or loss of seniority or pay increments as well as formal warnings. With the exception of warnings these sanctions should only be imposed if provided for in the employee's contract or with the employee's agreement.

11.7 If the misconduct is not "gross misconduct" (i.e. particularly serious conduct that goes to the heart of the employment relationship), dismissal is unlikely to be appropriate for a first offence. The more serious the misconduct, the more likely it is that dismissal will be an appropriate response. But it is possible to take account of an employee's conduct as a whole, so dismissal may be justified even if no single act of misconduct amounts to gross misconduct. See for example the case of *Hodgson v Menzies Aviation (UK) Ltd* (UKEAT/165/18) in which a member of airport ground staff was dismissed for taking an unauthorised break, and for turning up on stand to meet a plane late and without the appropriate equipment. Here, none of the incidents amounted to gross misconduct but, when the employee's conduct was taken as a whole (including his attitude during the disciplinary procedure), the employer was justified in regarding his conduct as justifying dismissal.

11.8 The client's disciplinary procedure will usually contain examples of what will be regarded as misconduct/gross misconduct. It is important to make sure that you've looked at this and thought about what type of misconduct you are dealing with in advance. A disciplinary procedure is not expected to contain a comprehensive list of all the different types of behaviour that could be misconduct or gross misconduct. However, it will not normally be fair to dismiss an employee for conduct that they did not appreciate and could not reasonably have been expected to appreciate might attract dismissal for a single occurrence (*Hewston v OFSTED* [2023] EAT 109) – if an employer regards certain behaviour as gross misconduct where this would not be obvious, it should make this clear in its disciplinary procedure.

11.9 Employers should also have regard to an employee's length of service and previous disciplinary record when deciding the appropriate sanction.

11.10 In *Wincanton Group plc v Stone* [2013] ICR D6, EAT, Mr Justice Langstaff summarised the general principles to be applied by tribunals as to the relevance of earlier warnings when determining the fairness of a dismissal:

(a) the tribunal should take into account earlier warnings issued in good faith;

(b) if the tribunal considers that a warning was issued in bad faith, it will not be valid and cannot be relied upon by the employer to justify any subsequent dismissal;

(c) where a warning was issued in good faith, the tribunal should take account of any relevant proceedings, such as internal appeals, that may affect the validity of the warning, and give them such weight as it considers appropriate;

(d) the tribunal may not "go behind" a valid warning to hold that it should not have been issued or that a 'lesser category' of warning should have been issued;

(e) the tribunal will not be going behind the warning where it takes into account the factual circumstances giving rise to it. There may be a considerable difference between the circumstances giving rise to the first warning and those considered later. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way;

(f) the tribunal may also take account of the employer's treatment of other employees since the warning was issued. This may show that an employer has subsequently been more or less lenient in similar circumstances; and

(g) the tribunal must remember that a final written warning always implies, subject only to any contractual terms to the contrary, that any subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur.

11.11 Where dealing with a very long-serving employee, who has an unblemished disciplinary record, it will be more difficult to persuade a tribunal that a dismissal is fair. See, for example, *Newbound v Thames Water* [2015] EWCA Civ 677 in which the Court of Appeal decided that the fact that the employee had 34 years' service and a clean record was a significant factor for the tribunal to take into account in assessing the fairness of a dismissal for a serious health and safety breach.

11.12 The client should consider whether a lesser sanction be an appropriate response to the conduct and be able to explain why it is not. This will help to demonstrate that a decision to dismiss falls within the range of reasonable responses.

12. Notifying the employee

12.1 Once a decision is taken, the reasons for it will need to be documented properly.

12.2 Normally the disciplinary manager will be the decision taker. The decision document will be the key document that will be before the tribunal because it explains the employer's thought processes in deciding to dismiss. So, the client needs to make sure that it is as full as possible and accurate; it will be difficult to argue before a tribunal that other factors were relevant to the decision to dismiss if these are not reflected in the decision document. The decision document should set out the employer's reasons for thinking that it has carried out a reasonable investigation and that dismissal was a reasonable response to the misconduct.

12.3 The employer will then need to advise the employee of the decision. It also needs to make sure that the employee is told about their right to appeal and how to go about this. The right to appeal is a key part of a fair procedure.

12.4 The disciplinary manager may also want to consider whether there are any other recommendations that they wish to make. For example, an investigation into a particular employee's behaviour may reveal that similar conduct is happening elsewhere, or that rules are not properly understood or applied. This may indicate a need for training of either managers or other employees to reduce the risk of the behaviour being repeated. These

points would not typically be recorded as part of the disciplinary decision but may need to be followed up by the client internally.

12.5 If the employee holds a senior manager/certification role in the financial services context, the client also needs to decide whether it needs to make a regulatory report (if it has not already done so) or whether there is a basis for adjusting the employee's remuneration because of their conduct. Again, that will probably not form part of the disciplinary procedure but is a point to be aware of.

13. Appeal Hearings

13.1 Appeal hearings are an important part of procedural fairness[12] but are not very different in scope to the disciplinary hearing itself. The right to appeal applies to all disciplinary hearings that end in disciplinary action, not just those that result in dismissal. A refusal to allow an employee to appeal at any stage of the procedure could lead to uplift in any compensation award under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

13.2 The appeal needs to be heard by someone more senior than the disciplinary manager, to ensure that have the necessary authority to overturn the disciplinary decision if appropriate. They also need, as far as possible, not to have had earlier involvement with the case, to ensure that they come to it with an open mind as part of the natural justice requirement. So, if an individual has had previous engagement with the issues, it is unlikely to be appropriate to hear the appeal. The position may of course be different in very small employers where it is difficult to identify someone who has not been involved at an earlier stage.

13.3 The client should consider what format of appeal hearing to adopt, in terms of whether it is a review of the disciplinary manager's decision (i.e. to check that they have followed the procedure and not taken obviously irrelevant factors into account in reaching their decision) or a complete rehearing. The advantage of a full rehearing is that it can correct errors that have crept in to the process at the earlier stage – so a fair appeal hearing may make a dismissal fair, even if there were procedural deficiencies at an earlier stage.

13.4 Remember that, if the appeal is a re-hearing, there may need to be a further investigation stage if the employee is making new points. If so, the client will need to adjourn the appeal hearing while the investigation takes place and allow the employee a chance to comment on the outcome of the further investigation.

13.5 Ultimately, the person hearing the appeal needs to keep in mind that the key point is still whether a reasonable employer could have taken the decision to dismiss. The penalty on appeal should not be increased unless the employer has a clear contractual right to do so[13]. Having such a right may also be inconsistent with a fair disciplinary procedure, because it acts as a disincentive to appealing. As a result it is very uncommon to see a right to increase the sanction on appeal and the ACAS guidance says that "an appeal must never be used as an opportunity to punish the employee for appealing the original decision, and it should not result in any increase in penalty as this may deter individuals from appealing".

14. Re-opening disciplinary proceedings

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[12] It will be extremely unusual for a dismissal to be fair if an employer has refused an employee a right of appeal, although *Moore v Phoenix Product Development* UKEAT/0070/20 is one such case (albeit in the context of an SOSR dismissal) where a tribunal was entitled to find that an appeal would have been futile

[13] See *McMillan v Airedale NHS Foundation Trust* [2014] EWCA Civ 1031 for an example of a case in which it was a breach of contract to increase a penalty on appeal

14.1 As a general rule, it will often be unfair to re-open a concluded disciplinary process that results in an employee receiving a warning if the re-opened process results in the employee's dismissal. However, there is no rule of law preventing an employer from doing so[14]. The more recent decision in *Lyfar-Cisse v Western Sussex University Hospitals NHS Foundation Trust* [2022] EAT 193 confirms that the test in such cases remains whether the dismissal is within the range of reasonable responses, which is likely to depend on the reasons why the proceedings were reopened. Re-opening a previously concluded disciplinary process is an unusual step that has to be justified, but on the facts of the case, including a change of leadership and a critical CQC report, the claimant's dismissal was fair.

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[14] Christou v London Borough of Haringey [2013] EWCA Civ 178