



ELA Introduction to Employment Law

Disciplinary Process

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ELA – Disciplinary Process

- ACAS Code of practice
- The Investigation
- The Disciplinary Hearing

Managing a disciplinary process

- Why a fair process is important
- Initial stages – investigations
- Conducting the hearing
 - Including problem areas
- Reaching and communicating the decision
- Appeals



ACAS Code of
Practice and why it
matters

Procedural fairness – ACAS Code of Practice

Deal with issues promptly



Establish the facts



Inform the employee



Hold meeting to discuss



Right to be accompanied



Appropriate action



Right of appeal

Reasons to get it right

- Unfair dismissal claim – and uplift for procedural fairness (ACAS code)
- Increased risk of discrimination/whistleblowing claim
 - Uncapped liability and no service requirement
- Personal individual liability for discrimination/whistleblowing claim
 - Claims against senior employees a growing trend

Reasons to get it right

- Management time and legal costs of dealing with tribunal claim
- Potential regulatory consequences for clients in the financial services sector
 - Increasing regulatory focus on non-financial misconduct
- More likely to see contractual disciplinary procedures in some sectors than others (eg healthcare)

Fair misconduct dismissals

Employer believes
that the employee
was guilty of
misconduct

Has reasonable
grounds for that
belief

Carried out a
reasonable
investigation

Dismissal is
within range of
reasonable
responses

Procedurally fair
(ACAS code and
internal policies)

Employment law
vs criminal law



Investigation

Investigations – the legal framework

- Reasonable investigation, within the range of reasonable responses
 - *British Home Stores Ltd v Burchell* [1978]
 - *Sainsbury's Supermarkets plc v Hitt* [2003]
- Does not have to be exhaustive examination of every point raised by employee but reasonable overall
 - *Shrestha v Genesis Housing Association* [2015]

Investigations – the legal framework

- The more serious the charges or their implications, the more rigorous the investigation needed
 - *A v B* [2003]; *Salford Royal NHS Foundation Trust v Roldan* [2010]
- Gravity of consequences for employee will inform the nature and scope of a reasonable investigation
 - *Turner v East Midlands Trains Ltd* [2012]

The start of the process

- Is there conduct that needs to be investigated?
 - Or just a need for an informal discussion
- Who will conduct the investigation and what is its purpose?
 - Dealing with allegations against multiple employees
 - Increasingly common to appoint external investigator in appropriate cases
- Is suspension or other action necessary/appropriate?

The start of the process

- Police involvement?
- If dealing with certified staff, also need to consider regulatory implications
 - Conduct rule breaches
 - Recent PRA/ FCA confirmation that non-financial misconduct can be a conduct rule breach

Investigation

- Make sure investigation properly scoped
 - Are the allegations clear?
 - What does "reasonable" look like?

Investigation

- Preparation vital
 - Who will give evidence and about what? How to deal with reluctant witnesses?
 - Ask for a copy of the disciplinary policy
 - How will evidence be gathered – monitoring of emails, covert surveillance?
 - Criminal proceedings
 - Should employee be accompanied?
 - How much notice and how much information?
 - Tone of meeting – not a cross examination and not pre-judged
 - Record keeping

Investigation reports

- Should cover
 - Facts
 - Process
 - Findings and basis for them

Investigation reports

- Is it the investigator's role to draw conclusions?
- How much input can/should HR have?
- Employee will normally have to be given investigation report in subsequent proceedings
 - Unlikely in most cases for report to be privileged



The Hearing

Preparing for the hearing

- Who should hold the disciplinary hearing?
- Advise manager to read ACAS Code and internal policies in advance
 - Likely to be asked about them if have to give evidence

Preparing for the hearing

- Check that employee will be given all necessary information
 - Investigatory report, documents, witness statements, any other evidence relied on (e.g. photographs, recordings)
- Employer should frame allegations as precisely as possible
- Role of HR – normally guidance, not decisions

The hearing

- Employer should approach with open mind
 - Look for evidence that supports individual's case as well as evidence that supports the allegations
 - Does employee want to rely on additional documents or call witnesses?
 - Ask open questions
 - Emphasise need for confidentiality – all parties

The hearing

- Employee has a right to be accompanied
 - Colleague or union representative; sensible for employer to confirm at beginning that employee does not want to be accompanied
 - Handling postponement requests
 - Refusal could be unfair even though statutory requirements met
 - Consider whether duty to make reasonable adjustments applies

The hearing

- Explain the allegations and allow individual/representative to put their case
 - Potentially including questioning witnesses
- If further investigation required, adjourn and re-convene
- Even if no further investigation – take time to consider decision

Potential problem areas

- Document creation and control
 - Remember that ALL documents created during process are generally disclosable
 - Including email trails
- Separating the wheat from the chaff
 - What is relevant to the disciplinary issue you are considering

More potential problem areas

- "But everyone does it"
 - Can you take a stand against one individual?
 - The role of consistency in ensuring a dismissal is fair/non-discriminatory
- Anonymous evidence
 - Balance interests of accused and informant

More potential problem areas

- Employee goes off sick pending disciplinary hearing – dealing with requests for postponement
 - Can you/should you press ahead anyway?
- Grievance raised during the disciplinary process
 - Suspend disciplinary or combine the two?

Taking a decision

- On balance of probabilities, has employee committed misconduct of which accused?
 - Does not have to be beyond reasonable doubt
- Dealing with direct conflicts of evidence
 - Is it more likely than not that it happened? What corroborating evidence is there?

Taking a decision

- What are the options?
 - Is a formal sanction required at all?
 - Verbal, first or final written warnings and if so, how long they last

Taking a decision

- What is the appropriate sanction?
 - Is it misconduct or gross misconduct? What does disciplinary policy say?
 - Length of service and disciplinary record
 - Is a lesser sanction sufficient?
- Remember test – could a reasonable employer impose that sanction

Taking a decision

- Record outcome and reasons for it
 - Disciplinary manager's decision – not that of HR
 - Important to explain what factors have been taken into account
- Advise employee of outcome and of right to appeal
 - In person or in writing?

Taking a decision

- Other internal recommendations if case has wider implications?
- Financial services clients: Consider need for regulatory report and/or remuneration adjustment

Appeal hearings

- Similar principles to initial disciplinary hearing
- More senior manager to hear
- Review or re-hearing?

Appeal hearings

- May need further investigation
 - And make sure employee has a chance to comment on outcome of investigation
- Could reasonable employer have come to that decision?
- Should not increase sanction without specific power to do so
- Will normally (although not inevitably) be unfair to reopen a completed disciplinary process