PUMP COURT
CHAMBERS

Gross Misconduct Dismissals

Standard List of Issues

1. Was the Claimant ('C') dismissed?
    - not usually in issue save in constructive dismissal cases

2. What was the reason or principal reason for the dismissal?
    - burden on the Respondent ('R') to prove it was for a potentially fair reason
    - bear this in mind when drafting disciplinary outcome/dismissal letters

3. Did R genuinely believe that C had committed misconduct?
    - NB: a genuine but mistaken belief will suffice

4. Did R act reasonably in all the circumstances in treating that [misconduct] as a sufficient reason to dismiss C, including in particular whether:

    i) there were reasonable grounds for that belief
    ii) at the time the belief was formed R had carried out a reasonable investigation
    iii) R otherwise acted in a procedurally fair manner, and
    iv) dismissal was within the range of reasonable responses

Reasonableness

The key word is **reasonableness** – this goes to:

- the investigation
- the belief in misconduct
- the decision to dismiss

The reasonableness of all three will often stand or fall by the reasonableness of the investigation, so the investigation is key. Time and effort spent here can make all the difference down the line.

What is a Reasonable Investigation?

The range of reasonable responses test applies to the investigation as well as the sanction, and it is not for the Tribunal to substitute its view as to what is reasonable. Obviously what is reasonable will depend on the circumstances of the case. Put yourself in the employee's shoes – imagine your job is on the line and you believe you are innocent of the allegations against you. What would you want your employer to do by way of investigation?

Start with the ACAS Code and avoid the risk of a 25% uplift. Remember the Code is not in fact that prescriptive. Bear in mind also that Cs often allege procedural issues to be breaches of the Code which aren't.

In respect of disciplinary investigations the Code says:

> *5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

Don't delay. This increases the chance that C will be able to allege that witnesses have colluded in the meantime. Conduct investigation meetings in quick succession and don't tell people in advance why you want to see them or what the allegation is.

You don't have to meet with C as part of the investigation, and you may not want them to know you are investigating. Where the allegation is simple, meeting with C during the investigation risks effectively holding the disciplinary hearing twice. However if you don't speak to C first, you may then have to adjourn a subsequent disciplinary hearing for further investigation if they raises new issues.

> *6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*

This extends to the person who takes the minutes. Try and avoid having the same people involved in more than one stage of the process, otherwise you are open to the suggestion that they have influenced the decision even if they aren't the decision-maker ('DM'). Remember to keep a senior person in reserve for any appeal.

> *7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.*

With reasonableness in mind and subject to your organisation's policies, it is well worth considering whether you want to afford the employee the right to be accompanied at investigation meetings as well.

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Employees will often be very aggrieved about being suspended and the reputational implications at work. Be prepared to justify the decision to suspend with reasons, ideally in writing at the time the suspension is imposed.

Investigations & Procedural Fairness

How much investigation is needed? Factors to consider:

- what is the allegation?
- how serious is the misconduct alleged?
- what is the possible sanction?
- how strong is the *prima facie* case against the employee?
- does the employee accept the misconduct?

In a misconduct case, someone must have made the allegation. Were there other witnesses? Bear in mind these could be customers, suppliers, or members of the public as well as other employees. Is there any other evidence – CCTV, phone recordings, emails? Gather as much relevant and independent evidence as you can. Talk to all the witnesses, including any relevant witnesses that the employee identifies.

Remember you will need an investigating officer, a disciplinary officer and an appeal officer, and these need to be different people. If they are not professional HR staff, make sure they are well briefed on what is expected. Consider a script or outline if necessary. Ask the witnesses the same questions insofar as that is appropriate.

Make the questions open. Remember that the investigation is not looking for evidence of guilt, it is looking to establish what happened. That includes looking for evidence which points to the employee's innocence. Don't put words in a witness' mouth. Don't ask if they saw X misconduct by Y person. Ask them what they saw, who was there, who did what, etc.

Minutes

The minutes of the investigation are usually all the contemporaneous evidence the Tribunal will have to determine reasonableness. Make sure the person taking the minutes can take verbatim notes, ideally typed straight out. If they are hand-written, make sure they are legible. If they are typed up later, keep the original hand-written notes.

The minutes are critical. A lot of time in Tribunal is spent arguing over the accuracy of meeting minutes. Send the person who is interviewed the minutes of the meeting, as soon as possible afterwards, and get them to sign them to confirm they are accurate. If they refuse (as they often will), write to them asking them to set out in writing what they say is inaccurate about those minutes.

Depending on the allegation, you may want to take witness statements from staff. These should be laid out formally, ideally written in their own words, signed with a statement of truth and dated.

Consider whether you want to record meetings. There are time and cost implications to this. Transcripts (ideally third party) will need to be prepared if they are to be used at at Tribunal, and should be available at an early stage to be sent to the employee. Make sure you can rely on the staff conducting the meetings to stay on message, otherwise a recording can be a double-edged sword.

Investigation Report

The purpose of an investigation is to decide whether there is a case to answer. Ensure that the investigating officer produces an investigation report showing how that decision has been arrived at. This will then inform the disciplinary invitation letter. This does not have to be detailed, but should cover:

- what allegation(s) the investigator was asked to investigate
- which witnesses were spoken to, when, and what their evidence was
- what other documents or evidence was considered
- reference to the disciplinary procedure being applied
- the reasons why the investigator decided that there was a case to answer

Framing the Charge

The disciplinary invitation letter is a very important document. Do not overlook it – it contains the disciplinary charge and sets the parameters for everything that follows. The Court of Appeal in *Strouthos v London Underground Ltd* [2004] IRLR 636 stressed the importance of how the disciplinary charge is framed:

> *An employee should only be found guilty of the offence with which he has been charged. It is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or the employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge. Care must be taken with the framing of a disciplinary charge and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. Where care has*

> *clearly been taken to frame a charge formally and put it formally to an employee, the normal result must be that it is only matters charged which can form the basis for a dismissal.* [Headnote]

Make sure it is obvious from the disciplinary invitation letter precisely what the person is accused of doing and why. This is also part of the ACAS Code, so failure here risks an uplift:

> *9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

In warning about the possible consequences, don't make the outcome sound like a foregone conclusion. At this stage the allegation is at its highest 'potential gross misconduct'.

Ensure the employee is given copies of the investigation minutes and the investigation report if appropriate, together with any witness statements. Make sure the hearing is held without unreasonable delay, offer them the right to be accompanied and the the opportunity to call any relevant witnesses.

It may be helpful to both sides to allow the employee to put in written submissions – apart from anything else this helps to identify the actual issues at the time.

The Disciplinary Hearing

Ensure the person conducing the hearing is of sufficient seniority and has the authority to dismiss if necessary. Make sure they haven't been involved previously – either in the process, or in the events themselves. This may be difficult for smaller employers but it is vital to ensuring a procedurally fair dismissal.

All the same points about minutes apply to the disciplinary hearing as to the investigation.

Adjourn to consider the decision. This is vital not only to the employee's perception of a fair hearing, but to ensure that the DM can record the reasons for the decision – **both** the decision on guilt or innocence in respect of the allegations **and** the decision on sanction. The DM should record any findings of fact they have made in coming to their decision.

The Band of Reasonable Responses

The test is a broad one, but dismissal for gross misconduct can still be outside the range of reasonable responses, so make it easier for the Tribunal to find in your favour. Ensure that the dismissal letter spells out what findings of fact have been made, which allegations have been upheld and which have not, and why in both cases. Set out precisely why the DM considers that dismissal is appropriate in this case, make clear what alternatives to dismissal were considered and why they were rejected.

This is especially important where there are relevant considerations like long service, or a clean disciplinary record (or both), which will inevitably be raised on appeal and at a subsequent Tribunal. The letter should pre-empt this by showing that the DM has considered these issues, what weight has been given to them, and why. Consider whether the employee admitted the offence and showed remorse, together with any provocation or relevant background issues such as stress.

Having a contemporaneous record of the DM's reasons for the decision is far preferable to putting this information in a witness statement two years later or, worse, finding that the relevant person has left R's employment by the time the case comes to Tribunal and can't (or won't) give evidence.

Appeal

The appeal is your chance to cure any procedural failings at earlier stages, so don't squander it. Consider whether to hold a complete re-hearing or to address the points raised by the employee, and make sure these are clearly understood. If the employee says the hearing was 'unfair', what was unfair about it and why? Either way ensure the appeal outcome letter sets out what approach has been taken and why.

Ensure the independent appeal officer has all the documents that were available to the original DM. If the employee raises issues which warrant further investigation then adjourn to investigate. The same points about adjourning and recording the reasons for the decision apply equally to the appeal – don't just rubber-stamp the original decision.

Summary

- Reasonableness is your watchword
- The investigation is key
- Verbatim minutes are highly desirable
- Get the employee to sign the minutes
- Frame the disciplinary charge precisely
- Make sure the employee knows the allegation against them

- Ensure the employee has seen the evidence
- Record the reasons for the decisions at the time
  - both on guilt/innocence **and** sanction
- Make sure the disciplinary and appeal outcome letters explain:
  - what the decision is
  - why it has been taken
  - why dismissal is appropriate
  - what alternatives were considered

None of these things will prevent a claim being brought, but they will unquestionably make defending a claim a lot easier.

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