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No. 64

HR Broadcast – Disciplinary investigations and the role of advisers

Where a disciplinary procedure leads to the dismissal of an employee there is a risk that the employee will claim that the dismissal is unfair. The employee may make a claim to the employment tribunal for compensation.

The tribunal may reach a conclusion that the dismissal in all the circumstances was unfair on the following bases:

1. That the sanction of dismissal itself was unreasonable in the circumstances, or
2. that the procedure adopted leading to the dismissal was unfair.

Employers more often than not fail on the second category. In other words they have a perfectly good reason for dismissing but they adopt a procedure which is not fair.

The ACAS Code of Practice on Disciplinary and Grievance procedures makes it clear that the facts of each case must be established and this will involve an investigation before management decides whether there is sufficient information to warrant disciplinary proceedings.

The Code of Practice recognises that in some cases the investigatory stage will involve the collation of evidence for use at a disciplinary hearing and there may be no purpose in holding a separate investigatory meeting with the employee. Our view is, that if there is any doubt, hold the investigatory meeting with the employee and put the facts as discovered to that person to hear what they have to say. That cannot be wrong. In the light of that meeting decide whether there is a plausible answer or whether the matter should proceed to a disciplinary hearing.

There is no statutory right for an employee to have a companion at an investigatory meeting, unlike the disciplinary hearing, but your own contractual procedures may provide for this.

The Code states that in misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearings. In many organisations this could prove difficult particularly when you also have to consider the possibility of an appeal and a separate chairman who should not have been involved either in the investigation or the disciplinary hearings.

Many organisations reserve the right to make use of external advisers and this may be simply to advise on the law and procedure but may go further. External advisers may be instructed to carry out the investigation stage and to report.

This is where there may be serious complications and the risk of an unfair procedure.

For example in a recent case involving the Department of Transport a manager investigated issues involving expenses claims. He sought advice from his own internal HR Department (but it could just as easily been an external adviser).

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The manager formed an opinion that a final written warning would be appropriate, but the HR Department encouraged a finding of gross misconduct and dismissal. The end result was that the Employment Appeal Tribunal concluded that this was an unfair procedure. The adviser had overstepped the mark and had effectively made the decision which should have been made by the chair of the disciplinary hearing.

We recognise that there is often a fine dividing line between obtaining advice from an adviser about the range of options available and allowing the adviser to make the decision.

This is particularly important where an employer decides to instruct an external investigator. The clearest brief must be given to that investigator and that should include investigating and reporting on the facts. The investigator should not stray into recommending action. The action is a matter for the chair of the disciplinary hearing who will have considered the report but, crucially, will also have heard the employee provide his or her explanation for the circumstances.

The instructions should also make it clear that the report will be disclosed to the employee. If the investigator is also being asked to make recommendations about improved systems then such comments should be completely separate from the report itself.

Where there is conflicting evidence there is nothing inappropriate in the investigator forming a view as to the preferable view but that should be based on the evidence. It is a fact finding exercise.

Having heard all of the evidence the chair or the panel dealing with the disciplinary hearing may well want to seek some legal advice on the range of options open to them but, again, the decision must be theirs.

What amounts to a fair procedure will vary depending on the size and resources of any organisation. Tribunals understand this point but will expect any size employer to adopt the fairest possible system in the circumstances.

Recognising that there must be a thorough investigation first and that the investigator generally should not also be the decision maker is of vital importance.