Disciplinary Action: Penalties, Procedures and Pitfalls

By Craig Rothwell

Many employers might be surprised to know that, in addition to the right to claim unfair dismissal, the Employment Act 2000 introduced the right for employees to claim that they have been unfairly disciplined. This wide protection for employees means that employers must think carefully and act fairly before taking any disciplinary action against members of their workforce. Otherwise an employee could make a complaint to the Labour Relations Officer / Inspector and, if the Inspector is not able to resolve the situation, take the matter further to the Employment Tribunal.

What general guidelines should an employer follow to avoid this situation? First, the disciplinary action taken, whether it be a written warning, final written warning or suspension, should be able to be justified as 'reasonable'. Secondly, the procedure involved to arrive at this outcome should be fair. In theory, these two aspects should go hand-in-hand as the fairer the disciplinary procedure, the better informed to make a reasonable decision the employer will be. In practice, daft decisions are not always prevented by a scrupulously fair procedure.

A Reasonable Penalty

Various factors need to be considered in assessing what is a reasonable penalty. These include the nature of the employee's conduct and the damage caused by it, the duties and terms of the employee's contract, their length of service, previous conduct, the employee's circumstances, and how the employer has disciplined others in similar situations.

How should an employer approach these factors? Obviously, the more serious the conduct and greater the damage caused by it, the harsher the penalty imposed can be and still be 'reasonable'. Similarly, if an employee contravenes one of their key duties or terms of their contract, then a harsher penalty may be appropriate. Taking another example, an employer would be expected to be more lenient to a long service employee with a good record than someone who has just joined.

The factor of an employee's circumstances means that an employee's explanation for their conduct should be considered e.g. a missed appointment at work explained by a family emergency or, less justifiable, placing an IOU contrary to company policy due to temporary financial difficulties. Finally, it is very important that an employer needs to be consistent. A verbal warning to one employee followed by a written warning to another employee for practically the same offence months later, will make it more difficult to justify the reasonableness of the harsher penalty.

A Fair Procedure

At its absolute minimum, a fair procedure means that employees should be given a chance to explain themselves before any decision to discipline is made.

Ideally, this should be done in the form of a hearing/ meeting between the employer and employee. The representative of the employer should be (as far as possible) someone not closely involved in the circumstances leading to the possible disciplinary action e.g. the manager subjected to the alleged curses of an employee should not be holding the meeting.

At the meeting, the purpose of it should be explained to the employee and he or she should be informed of the allegations against them. The evidence should then be indicated either in writing or by calling witnesses. The employee should then be allowed to ask questions, call their own witnesses and put forward their own arguments before any decision is made.

As a matter of good practice, it is usually better to split the above meeting into two parts to avoid the obvious (and proper) request by an employee that they would

like time to consider their response to the allegations against them before proceeding with the meeting. Hence it is useful if the allegations and (if available) written evidence against them can be given to the employee at this first brief meeting. This will then enable the employee to consider and prepare their response in time for the second meeting a few days later.

After this second meeting, the employer should then adjourn to consider their decision properly. (A decision given immediately after hearing the employee's response only encourages an employee to believe that their employer was merely 'going through the motions'.) A right of appeal should then be provided to the employee.

Employers most often 'trip up' when the issue seems very clearcut. If it is, then it does not take long to have this confirmed in a fair manner by hearing the explanation (if any) of the employee as well as listening to any mitigating circumstances.

With the Employment Act 2000 recognising its importance, procedure is now ignored at every employer's peril. For example, should any dispute come before the Employment Tribunal, it is unlikely that the Tribunal will warm to the employer who argues that even if a fair procedure had been followed, the resulting disciplinary action would have been exactly the same. Such a failing of procedure may allow a very undeserving employee in the employer's eyes to a 'technical' win and some compensation.

This article contains information of a general nature and should not be relied upon as a substitute for professional legal advice given with respect to a particular factual situation.

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