Conduct Dismissals

The seminar included a review of the basis upon which staff can be dismissed for misconduct, the ACAS Code of Practice and an overview of the process for carrying out a fair disciplinary procedure.

Dismissing Staff

Employees generally have a right not to be unfairly dismissed, subject to the requirement of having one year’s continuous service. N.B One year’s continuous service will include an employee’s statutory notice period of one week.

An employer can dismiss an employee, provided there is a fair reason for the dismissal. There are six categories of fair reason that will be acceptable for these purposes: conduct, capability, redundancy, retirement, some other substantial reason and statutory illegality.

Under section 98(2)(b) of the Employment Rights Act 1996, it is potentially fair for an employee to dismiss an employee for misconduct, which may be either a single act of serious misconduct or a series of acts that are less serious.

Examples of conduct that could constitute gross or serious misconduct include: disobeying reasonable orders, breach of certain terms of the employment contract (including breach of duties of good faith and mutual trust and confidence), theft or dishonesty, violence at work and disclosure of confidential information.

Examples of conduct that could constitute less serious misconduct include: poor time-keeping, time wasting, unauthorised absence, swearing and minor breaches of policy or contract.

Examples of misconduct and gross misconduct are usually found within employment contracts or staff handbooks. It is important that employers take care when labelling certain types of conduct as either misconduct or gross misconduct and also make it clear that any such examples are not exhaustive.

In order to establish that a genuine conduct dismissal has taken place, an employer must be able to show:

- at the time of the dismissal, it genuinely believed the employee to be guilty of misconduct;
- it had reasonable grounds for believing that the employee was guilty of that misconduct;
- at the time that it formed that belief on those grounds, it carried out as much investigation as was reasonable in the circumstances
- that dismissal fell within the range of reasonable responses available to the employer in the circumstances (British Home Stores v Burchell [1978])

ACAS Code of Practice – Disciplinary and Grievance Procedures

The ACAS Code is intended to help employers and employees deal effectively with issues of alleged misconduct or poor performance in the workplace. When deciding whether an employee has been unfairly dismissed for misconduct or poor performance, an employment tribunal will:

- consider whether the employer has followed a fair procedure; and
- take account of any relevant provisions of the ACAS Code when considering whether the employer has acted reasonably or not.

It is important to follow the ACAS Code because it can potentially help avoid an unfair dismissal claim and alternatively it can affect the level of compensation, should an employee bring a successful unfair dismissal claim.

Where an unfair dismissal claim is successful and either the employer or the employee have unreasonably failed to follow the ACAS Code a tribunal can make an upwards or downwards adjustment to the level of compensation awarded by up to 25%.

Additionally, if an employee has been found to be unfairly dismissed, purely because his employer has failed to follow a fair disciplinary procedure, any resulting compensation award could be reduced (by
up to 100%) to reflect the fact that the dismissal would have occurred in any event, even if a fair procedure had been followed (a ‘Polkey’ reduction).

The ACAS Code applies to disciplinary situations in the workplace, including misconduct and poor performance and excludes redundancy dismissals and non-renewal of fixed term contracts. The Code applies to all disciplinary sanctions, including formal warnings, suspensions on full pay and dismissals, but excludes informal verbal warnings.

**Fair Disciplinary Procedures**

The key principle of a fair disciplinary procedure is for an employer to act consistently towards its employees and reasonably in the process followed.

This should include:

- **Investigation.** This should be carried out without delay to establish the facts of the case and ideally would involve holding an investigatory meeting with the employee before proceeding to any disciplinary hearing. In the alternative, it would involve collating evidence for use at any disciplinary hearing. Should an employer consider it necessary to suspend the employee on full pay, it should keep the suspension period as brief as possible and make it clear that the suspension itself is not considered disciplinary action.

- **Inform the employee of the problem.** The employer should notify the employee in writing and provide information about the alleged misconduct and its possible consequences, to enable the employee to prepare a response for the disciplinary hearing. The employer should also provide copies of any written evidence and advise the employee of their right to be accompanied at the meeting by a work colleague or a union representative.

- **Hold a meeting with the employee to discuss the problem.** This should be conducted without delay, but allowing the employee reasonable time in which to prepare their case. Fair procedure entails allowing the employee to set out their case and respond to any allegations made against them. The employee should be given a reasonable opportunity to ask questions, present evidence and potentially call relevant witnesses. Ideally the meeting/hearing should be heard by a manager who was not involved with the alleged incident or the investigation.

- **Decide on appropriate action.** A fair disciplinary procedure involves making a considered decision after the meeting in relation to whether or not disciplinary or any other action is justified. A good tip is for an employer to ensure that it adjourns to consider all of the evidence before making its decision. The Employer should inform the employee of the decision in writing. In the decision letter the employer should inform the employee as soon possible of the reasons for the dismissal, the date on which their employment contract will end and the appropriate period of notice (if any) and their right of appeal.

- **Provide employees with an opportunity to appeal.** If the employee believes that the disciplinary action taken against them is wrong or unjust they should be provided with the right of appeal against the decision. Where possible, the appeal should be heard by a manager who has not previously been involved in the case and is more senior than the person who the previous decision, so that the appeal is dealt with impartially. Employees have the statutory right to be accompanied at appeal hearings. As with disciplinary hearings, you should inform employees in writing of the results of the appeal hearing as soon as possible.

When deciding whether or not the dismissal is within the reasonable range of responses available, it is a good idea for the employer to consider the employee’s previous disciplinary record and an employer may also consider whether the act of misconduct is so serious in itself (e.g. theft, fraud, physical violence, gross negligence or serious insubordination) that it should result in a dismissal without notice for a first offence.