How To Sack Employees

Without Being Taken To Tribunal

Russell HR Consulting

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Preface

If you manage employees, from time to time discipline and dismissal will be an inevitable part of your work. Employers are under a duty to follow their procedures, make a decision that is sensible and proportionate on the facts and take all mitigating circumstances into account.

Applications to tribunal have increased significantly in recent years. Below is a list of the mistakes that most frequently lead to a finding of unfair dismissal against employers.

- The employee was not given the opportunity to defend himself or put forward his side of the story.
- The employee was not made aware of all of the evidence against him.
- There was no disciplinary hearing.
- The investigation of the alleged misconduct or shortcomings was inadequate.
- An earlier 'warning' was not made explicit.
- The disciplinary procedure was not applied in full.
- The procedure used did not follow the employer's own rules.
- The employer chose not to have a procedure at all for more senior staff and managers.
- The employee was not given a reasonable opportunity to improve performance or conduct.
- Insufficient investigation of the medical background in dismissals on grounds of ill health.
- The employee had not been given an opportunity to comment on medical evidence in a case of ill-health dismissal.

It would be fair to say that these days employers face an increased risk of tribunal claims. While many claims are quite legitimate, there is a significant minority who will put in a claim because they feel wronged (irrespective of the merits of the case) or simply for the hell of it. As managers we need to manage effectively, taking such risks into account. As well as being compliant and fair, we need to be tactical as well.

Follow the guidance given in this book and you will be able to take an employee through the disciplinary procedure, to dismissal if necessary and massively reduce the risk of a tribunal claim.

About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her brand of down-to-earth, tactical HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine and her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries and occupations across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or open courses. We provide a wide range of practical employment training, enabling new and experienced managers to ensure that they work in a compliant and ethical fashion, and gain optimum employee output.

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email pm@russellhrconsulting.co.uk for an up-to-date copy of statutory limits.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

1 Overview of the Ebook

1.1 Introduction

Managing workers is an essential part of a manager's job. Most workers – most of the time – will operate at an acceptable level. Occasionally, someone will fall below that level and it's your job to manage them, either by bringing them back up to the standard required or by taking them through the disciplinary procedure and ultimately dismissing.

Discipline is about helping employees to improve, rather than punishment, and we should never lose sight of that.

Many employers complain that the legal system is stacked against them. While it's fair to say that in most cases employers probably do have to exercise greater reasonableness than employees, it's equally true to say that where they lose a case, employers are often the authors of their own misfortunes.

1.2 The legal framework

The legal framework is found in the statutory ACAS Code of Practice 1 and accompanying non-statutory Guidance.

The statistics provided by ACAS suggest that almost half of the claims made to employment tribunal each year are for unfair dismissal and that ex-employees win just over 40 per cent of those claims. In this chapter we review the key procedural requirements.

1.3 The reasonable employer

If you go to tribunal the judge will consider whether you have behaved reasonably. The test is whether a reasonable employer in the same employment situation would also have done the same as you. This will include (but is not confined to) the following examples.

- Be fair and consistent in your approach.
- Don't rush into a decision. Be considered and reflective.
- Be transparent in your actions and decisions.
- Put yourself in the other person's shoes.
- Take all relevant factors into account.
- Take advice and discuss the issues with the employee.
- Consider all possible alternatives.
- Be able to justify your actions.

1.4 Standards and rules

The single best way to reduce disciplinary problems is to set, communicate and enforce clear standards. If an employee falls short of the required standard, it is virtually impossible to bring about an improvement in his performance or conduct unless the following elements are present.

- The organisation has a clear set of standards.
- The standards have been communicated to all workers.
- Factual evidence is available which indicates that conduct or performance is below the accepted standard.
- There are clear rules and procedures which outline to all employees how the issue will be dealt with.

Where possible, the standards are specific, measurable, achievable, realistic and time-bound (SMART).

1.5 Capability and conduct

Capability and conduct should be treated separately. Capability arises where an employee can't meet your standards and conduct where he won't meet your standards.

Dismissal on grounds of capability will be for one of three reasons:

- Lack of or loss of an essential qualification to do the job.
- Lack of ability or skill – this can be repeated minor incompetence or one serious act of incompetence (poor performance).
- Lack of capability because of ill health.

1.6 First steps

You should not dismiss for a first offence other than gross misconduct, although you can enter the formal discipline process immediately if you consider the matter to be sufficiently serious.

1.7 The investigation

A rigorous investigation should be carried out, preferably by someone other than the person likely to chair any disciplinary hearing. The purpose is to determine whether there is a case to answer.

You should gather up all the relevant evidence. This will also include any mitigating circumstances.

In cases of alleged gross misconduct, consider suspending the employee from work while the facts are fully investigated.

1.8 Preparation for a disciplinary hearing

Before a disciplinary hearing you need to ensure that both you and the employee are properly prepared. The employee should be given full details of the concerns and the evidence on which the concern is based. He should be advised of his right to be accompanied and allowed reasonable time to prepare. If you are chairing the meeting, you also need to familiarise yourself with the case notes and the discipline procedure.

1.9 Handling the disciplinary hearing

A disciplinary hearing should be a discussion of the facts. As the chair of the meeting it is important to ensure that you have fully explored and have a clear understanding of the employee's case. You also need to ensure that you have met all procedural requirements.

1.10 Sanctions

Nobody should be dismissed for a first offence, unless it's an offence that constitutes gross misconduct. In this chapter we consider how we arrive at a decision as to what is an appropriate sanction.

1.11 Appeals

The ACAS Code recommends that you provide an opportunity to appeal against a formal disciplinary penalty up to and including dismissal. Appeals should be dealt with quickly.

Wherever possible it should be heard by a more senior person.

1.12 Grievances raised during the discipline process

It is an employee's right to air a genuine grievance. Every company employing staff, however small, must have a process by which staff can formally raise a grievance to the employer's attention. Employers are under a duty to properly explore grievances in a timely fashion with a view to reaching a suitable resolution. This is true even if the procedure to which the grievance is linked is a disciplinary or capability process.

Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. However, there is no legal obligation to do so.

2 The legal framework

2.1 Introduction

Throughout the 1990s, an average of 50,000 applications were made to employment tribunal each year. In the years immediately following the change of government in 1997, the number of applications rose sharply. Between April 2009 and 2010, claims to tribunal reached record levels of 236,000.

In 1998, the compensatory award (the element designed to put the employee back in the same position he would have been in financially if he had not been unfairly dismissed) increased from a maximum award for unfair dismissal of £12,000 to £50,000. This is index linked and is reviewed every year on 1st February. At the same time, the service qualification required to be able to claim unfair dismissal was reduced to 12 months.

The statistics provided by ACAS suggest that almost half of the claims made are for unfair dismissal and that ex-employees win just over 40 per cent of those claims. The main reason that employers lose at tribunal is the failure to follow their own procedure.

2.2 ACAS Code of Practice 1

The ACAS Code of Practice 1 is intended to provide basic practical guidance to employers, employees and their companions. It sets out principles for handling disciplinary and grievance situations in the workplace. The code does not apply to dismissals due to redundancy or the non-renewal of fixed term contracts on their expiry.

While the Code does not have force of law, it is a statutory code. This means that as well as being the benchmark of best practice for employment tribunals, they are required to have regard to it in considering claims and reaching a conclusion.

One of the significant changes under the Code is that a minor failure to follow procedure does not automatically make a dismissal unfair. There is still provision to allow an adjustment in compensation, up or down, by up to 25 per cent for unreasonable failure by either party to comply with any provision of the Code. So an employer who has unreasonably failed to follow its procedures may face an increase in the compensation it has to pay by up to 25 per cent. Conversely, if an employee has unreasonably failed to follow the guidance set out in the Code, the tribunal can reduce any award it has made by up to 25 per cent.

The Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances. The accompanying Guidance (see 2.5 below) contains sample procedures. The Code and Guidance can be downloaded from the ACAS website (www.acas.org.uk).

2.3 ACAS: fairness

It is important to deal with disciplinary issues fairly. The ACAS Code sets out a number of elements which constitute fairness.

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

Where some kind of formal action is needed, the decision about what is reasonable or justified will depend on the facts in each case. Employment tribunals will take the size and resources of an employer into account when reaching their decisions.

Carry out investigations into potential disciplinary matters as soon as reasonably possible to establish the facts. 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. An investigatory meeting should not by itself result in any disciplinary action.

Where an employer considers that it is necessary to suspend an employee, the period of suspension should be as brief as possible, and it should be made clear that this suspension is not considered a disciplinary action.

If the investigating officer concludes that there is a disciplinary case to answer, he should write to the employee giving details of the time and venue and advising the employee of his right to be accompanied. This notification should give enough detail about the alleged misconduct or poor performance to enable the employee to properly understand the charges made and to be able to prepare. The letter should set out the possible consequences. Copies of any written evidence, which may include any witness statements, should be provided with the notification.

2.4 ACAS: disciplinary process

The Code sets out the process for disciplinary matters, which is to:

- establish the facts of each case;
- inform the employee of the problem;
- hold a meeting with the employee;
- at that meeting, allow the employee to be accompanied;
- decide on the appropriate action; and
- provide the employee with an opportunity to appeal.

2.5 ACAS Guidance

To accompany the Code, ACAS produced a comprehensive guide to handling workplace disputes. It includes a number of templates to help employers. Unlike the Code, the Guidance is only advisory and tribunals will not have the power to adjust awards on account of any failure to follow the Guidance.

The Guidance is split into disciplinary and grievance sections, and to make it easy to navigate with the Code, is set out with appropriate comments and guidance alongside extracts from the Code.

Key points in the Guidance are:

- To reinforce the emphasis on resolving disputes, the Guidance includes a brief commentary on how mediations operate, and suggestions on when they might be appropriate.
- Sample letters are provided that employers can use as models for dealing with disciplinary and related issues. Those letters include: a notice of a disciplinary meeting, a notice of a final written warning and a letter to a worker's GP to enquire into the cause of a worker's absence.

2.6 Right to be accompanied

Workers have a statutory right to be accompanied by a companion where the disciplinary hearing could result in:

- a formal warning being issued;
- the confirmation of a warning or some other disciplinary action (such as appeal hearings);
- the taking of some other disciplinary action.

The companion may be a work colleague or accredited trade union representative. The companion should be allowed to address the hearing to put and sum up the worker's case, respond on behalf of the worker to any views expressed at the meeting and confer with the worker during the hearing. He does not have the right to answer questions on the worker's behalf, address the hearing if the worker does not wish it or prevent the employer from explaining its case.

To exercise the statutory right to be accompanied, workers must make a reasonable request. What is reasonable will depend on the circumstances of each individual case. It would not normally be reasonable for workers to insist on being accompanied by a companion whose presence would prejudice the hearing, nor would it be reasonable for a worker to ask to be accompanied by a companion from a remote geographical location if someone suitable and willing is available on site. If the companion is not available at the proposed hearing time and the worker suggests another time that is reasonable and falls within five working days of the original time, the hearing must be postponed until the new time proposed by the worker.

You may need to make arrangements for a different type of companion where an employee is disabled and might need additional help to participate in the process and present his case. For example, if an employee is deaf and his first language is British sign language, you may wish to arrange to have a BSL-trained interpreter present.

2.7 Legal representation

There's no statutory right to be accompanied by a legal advisor. Two cases recently suggested that the employee's right to a fair hearing would be compromised by the employer's denial of legal representation. However, in 2011 the Supreme Court reversed this approach in the important case of R (on the application of G) v Governors of X School and Y City Council [2011], and the result is that employees at disciplinary hearings do not have an automatic right to legal representation.

Example

G was a teaching assistant who allegedly kissed a boy of 15. The school took the matter to a disciplinary hearing. G asked to be represented by a solicitor, but was refused. He was dismissed and the governors were obliged to report this to the Independent Safeguarding Authority (ISA) where he would be considered for inclusion on the list of those unsuitable to work with children under the Safeguarding Vulnerable Groups Act 2006.

G issued judicial review proceedings, complaining that denial of legal representation at the initial disciplinary proceedings breached his rights under Article 6 of the European Convention on Human Rights, the right to a fair trial.

He succeeded in the first instance, but on appeal to the Supreme Court, the Court found that Article 6 did not come into play at the initial disciplinary stage. The school was not concerned with G's civil rights, merely his employment. The majority found that the hearing result would not have had a substantial influence on the later decision to place him on the list of people barred from working with children.

Lord Dyson in his lead judgment found that that the civil right in question was G's ability to continue in his profession which involved working with children. Therefore a decision by the ISA to bar him would affect his civil rights and Article 6 would apply to those ISA proceedings. In the view of the Court, it was not the school's function to determine later proceedings concerning G's civil rights. The only function of the school disciplinary panel was to determine whether G should continue to be employed and those proceedings did not have substantial influence over the ISA proceedings. The ISA is an independent body. In making the decision whether to place an individual on the barred list, it must assess fully the facts using its independent discretion. The court also recognised the risks surrounding a decision to require legal representation at disciplinary hearings.

The effect of the Supreme Court's decision is that employees who are subject to ISA approval are no longer able to argue that they have a right to legal representation at disciplinary hearings due to possible subsequent influence on later proceedings.

This decision may also affect employees regulated by other external authorities. The test to be employed will be that of "substantial influence or effect" on subsequent proceedings. Therefore if there is any risk of substantial influence or effect on subsequent proceedings it seems that Article 6 will be engaged, meaning there may well be a right to legal representation at the earlier stage.

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

3 The reasonable employer

3.1 Introduction

There is a fictional legal character known to the tribunals as the Reasonable Employer – you! This is the test against which your behaviour and decisions will be measured. The reasonableness of your response will vary, depending on the situation and the relevant facts. The test is whether a reasonable employer in the same employment situation would also have done the same as you.

Both employer and employee are expected to behave reasonably within the employment contract, but the reality is that as the financially stronger party in an employment contract you will always have to demonstrate a higher level of reasonableness than your employee.

3.2 Characteristics of the reasonable employer

Being the reasonable employer means having to demonstrate a number of skills, characteristics and behaviours. What does this mean?

- Be fair and consistent in your approach.
- Don't rush into a decision. Be considered and reflective.
- Be transparent in your actions and decisions.

- Put yourself in the other person's shoes.
- Take all relevant factors into account.
- Take advice and discuss the issues with the employee.
- Make reasonable adjustments and consider all possible alternatives.
- Be able to justify your actions.
- Keep accurate, objective, contemporaneous records.
- Be courteous, listen and investigate fully.
- Have clear standards. Communicate, monitor and manage them.

3.3 Note taking

It's impossible to sufficiently emphasise the importance of taking clear accurate notes. Notes of formal disciplinary discussions are essential. These will be important if the decision is appealed internally and vital if your employee is dismissed and brings a claim for unfair dismissal. The notes should accurately reflect your employee's explanation and any admissions he might make, the questions put and his responses. They should also create a record of the formalities of the hearing so that there is no doubt that he was advised of all the important issues.

Your records should give details of the nature of any breach of disciplinary rules or unsatisfactory performance, the defence or mitigation put forward, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments. These records should be kept confidential and retained in accordance with the disciplinary procedure and the Data Protection Act 1998, which requires the release of certain data to individuals on their request. Copies of any meeting records should be given to your employee if he requests it, although, in certain circumstances, some information may be withheld, for example, to protect a witness.

4 Standards and rules

4.1 Introduction

The single best way to reduce disciplinary problems is to set clear standards and tell employees what will happen if the standards are not met.

4.2 Standards

A standard is the minimum level of conduct, performance or behaviour acceptable to the company.

As human beings we are not by nature very specific in our conversational speech. We tend to say things like, 'You must be here on time'. And then we're irritated when employees come sauntering in ten or fifteen minutes after the time we mean (but haven't specified).

Don't expect employees to automatically interpret your statements in the way you mean them. We talk very generally, but to get the results you want you must learn to be more precise and detailed. It would be more effective to say 'You must be at your work-station and prepared to start work at 8 am'.

Example

A manager interviewed a female employee about her appalling attendance record. She'd taken about 20 days sickness in a few months. The conversation went something like this:

Manager: 'Doris, your attendance record is unacceptably poor. You've taken 20 days' sick in the last three months. Doris, I want your attendance to improve. If you don't improve I'll have to take you through the disciplinary process for non-attendance and you may ultimately be dismissed. Can we agree on this, Doris?'

Doris: 'I'll do my very best to improve, boss!'

They agreed to meet in another three months. Three months later, they reconvened their meeting. At the second meeting, the manager discovered that she had indeed improved – she had taken a mere 16 days of sickness absence, instead of 20. So he got what he asked for, **not what he wanted**.

What he should have said was something along the lines of 'If you are off work more than three days during the next three months I will talk to you again as part of our formal disciplinary procedure.'

Tip

Explain what success means or what it looks like. Don't be afraid to put a precise number on a requirement (subject to the overriding requirement of reasonableness).

Standards must be communicated to all staff. It is good practice to advise prospective employees of key standards at the recruitment stage. If shift work is required, for instance, you should tell the candidate about this at the interview. Standards must be reinforced at induction, on a daily or weekly basis in the workplace and at appraisal.

Unless an employee is prepared to acknowledge that he was aware of a standard, and there is clear evidence that he is below the standard, there is unlikely to be a successful conclusion. If an employee falls short of the required standard, therefore, it is virtually impossible to bring about an improvement in his performance or conduct unless the following elements are present.

- The organisation has a clear set of standards.
- The standards have been communicated to all workers.
- Factual evidence is available which indicates that conduct or performance is below the accepted standard.
- There are clear rules and procedures which outline to all employees how the issue will be dealt with.

Wherever possible, standards should be specific, measureable, achievable, realistic and time-bound (SMART).

4.3 Rules

The rules are the dos and don'ts of the workplace, and disciplinary rules set the standards for the organisation. They may specify standards in the following areas:

- punctuality;
- attendance;
- performance;
- appearance;
- conduct;
- safety.

Such rules must be clearly communicated to all employees as soon as possible so that everyone knows and understands what is expected from them.

- Rules should be written down, both to ensure employees know what is required of them and to avoid misunderstandings.
- They must be non-discriminatory in content and in application.
- Staff must have access to written rules.

It is a good idea to cover the rules as part of the induction procedure.

Special attention should be given to explaining the rules where work is carried out by young people (in other words those between the ages of 16 and 18 years), by those with little experience of the work, or by staff whose English language skills may be limited.

Disciplinary and grievance rules should be reviewed and updated periodically. Where a ruling has fallen into disuse or has not been applied consistently, inform employees in advance of any agreed changes or reintroduction.

5 Capability and conduct

5.1 Introduction

Capability and conduct should be treated separately. You need to recognise the difference between warning someone for a capability matter and warning him for his conduct. If you fail to distinguish between the two, you are much more likely to run the risk of a successful unfair dismissal application. Some organisations have separate disciplinary procedures for dealing with capability and conduct, but this is a matter of choice for the individual organisation.

This means that where your employee already has a warning for misconduct, and then demonstrates a lack of capability, you should issue him with a first warning for the capability matter, quite separate from the misconduct.

5.2 Capability ('Can't')

Dismissal on grounds of capability will be for one of three reasons:

1. Lack of or loss of an essential qualification to do the job
2. Lack of ability or skill – this can be repeated minor incompetence or one serious act of incompetence (poor performance)
3. Lack of capability because of ill health.

5.3 Qualification

If an employee loses or fails to achieve a qualification necessary to do his job, he may be dismissed on grounds of capability. However, this is not automatically fair and you should not dismiss until you have explored all the alternative ways of trying to accommodate him. So, for example, if a sales representative whose job it is to travel to clients or prospects loses his driver's licence for a year, you should consider the options. Can he work from home or from the office? Can his work be adjusted so that he travels by public transport? Can he have a driver? Can he do another job in the business while his licence is withheld?

5.4 Poor work performance

Under-performance is one the most frequent reasons for discipline and one of the least well handled. It's your job to show that poor performance is the reason for the dismissal and that you reasonably believe your employee is not capable of working to the standard you require. It would not be fair to dismiss for a first breach if the incompetence is minor. It has to be really serious: for example, a life-threatening action or omission.

You must help the employee by doing everything reasonable to help him meet the required standard of performance. This normally takes the form of coaching, re-training, giving a reasonable amount of time to improve (for example, two months rather than two weeks!) and generally supporting the employee. You must warn the employee before dismissal of the consequences of failure to improve.

In deciding whether an employer was reasonable in dismissing for incompetence, it may be relevant to know whether appropriate training was given. Below is an example of minor incompetence.

Example

A woman was dismissed for assembling 471 out of 500 components incorrectly. She claimed this was the way she had been shown how to assemble them. The charge hand denied ever having shown her how to do it. Either way the employer was damned, for either she had been wrongly trained or not trained at all.
Davidson v Kent Meters [1975]

In the following example of a matter of very serious incompetence, it was found to be fair to dismiss in the first instance.

Example

Mr Tailor was a pilot who crash-landed a passenger plane in good flying conditions. Nobody was hurt, but the plane was badly damaged. After a full investigation it was found that Mr Tailor had forgotten to lower the undercarriage. After a disciplinary hearing, he was dismissed for gross incompetence. Mr Tailor complained that as he had an unblemished record he should not have been dismissed for a first offence.

The Court of Appeal upheld the decision to dismiss, saying that in some professions the degree of skill needed was so high and the likely consequences of deviation from that level of skill potentially so serious that it would be fair to dismiss in a first instance.
Alidair v Taylor [1978]

5.5 Ill health

It is fair to dismiss an employee who is no longer capable of working because he is too unwell to do so. If your staff receive company sick pay as a contractual benefit, the dismissal should not become effective until the sick pay is exhausted or paid in lieu. In cases of long-term ill health, you should concentrate on investigating the medical facts and consulting with the affected employee about the available options. In these circumstances, it is not appropriate to go through any lengthy disciplinary or warnings procedure.

Discuss with the employee his current state of health and the likelihood of a return to work within a reasonable period. You need to find out if the employee is likely to be able to return to work within a reasonable time. You can also discuss what alternative work he may be able to do. Gain the employee's permission to talk to his doctor and arrange to obtain a medical opinion. If the doctor is unwilling or unable to give an opinion as to when the employee will be able to return to work, ask for him to be examined by a third party. Always involve and consult the employee at all stages. When you have the medical opinion, and it is still clear that the employee is unlikely to be able to return to work, discuss the steps the company proposes to take with him. If the employee is not likely to return, serve proper notice of termination of employment. Offer the right of appeal against the dismissal.

Example

Mr Daubney had been employed by a local authority since 1959. He was dismissed from his position as Principal Assistant Surveyor. He was aged 56. He had a history of ill health, and at the time of his dismissal had been off sick for five full months.

The employer had written to the District Community Physician and asked him to indicate whether Mr Daubney's ill health was such that he should be retired on the grounds of ill health. The District Community Physician asked another doctor to examine the employee and produce reports. On the basis of this report from a second physician, the District Community Physician wrote to the company stating that Mr Daubney was unfit and should be dismissed. The employers then wrote to Mr Daubney and dismissed him.

Mr Daubney was unfairly dismissed because the employer had completely failed to consult or discuss options with him. It was inappropriate for the employer to ask the District Community Physician to comment on whether he should be retired on grounds of ill health. Doctors are competent to comment on medical matters, but the question of Mr Daubney's dismissal was a management decision.
East Lindsey Council v Daubney [1977]

Since 1995, the Disability Discrimination Act (now subsumed into the Equality Act 2010) has placed an additional obligation upon employers to consider alternatives to dismissal where the ill health is caused through an illness which is defined as a disability. If the employee may be disabled within the definition of the Act, there is a requirement to consider making reasonable adjustments to the work or the workplace.

A person may be disabled if he has a physical or mental impairment which is substantial and exercises a long-term adverse effect on his ability to carry out normal day-to-day activities.

You must consider all the other options apart from dismissal. It may be possible to find an alternative job or change the job content to accommodate the employee's changed requirements.

Some companies have a capability procedure which is distinct from the disciplinary procedure covering conduct.

As an employer, you have to be seen to be considering all the options properly and going through a fair procedure. If you don't, you may end up with an unfair dismissal claim, even if the end result would have been the same anyway, fair procedure or no fair procedure.

5.6 Conduct (Won't')

Dismissal for a reason relating to the conduct of an employee will be fair, provided the procedure is properly followed. Examples of misconduct:

- poor timekeeping;
- poor attendance;

Gross misconduct is a very serious breach of conduct by the employee. It may be an act or an omission, but it is tantamount to a fundamental breach of contract by the employee. Examples of gross misconduct:

- theft;
- fighting, abusive or intimidating behavior;
- consumption of alcohol while on duty.

Your procedure must list the offences you consider to be gross misconduct in your organisation.

6 First steps

6.1 Introduction

The purpose of discipline is to encourage employees to meet your standards. As a manager it is your right and duty to provide timely and supportive guidance where an employee falls short of the necessary standards. So if an employee is in breach of a relatively minor rule, you should counsel him to improve. The key issue here is to talk to him as soon as a rule or standard has been breached. If you act promptly now, you will probably save time and effort later on. Have one or two informal discussions. If there is no improvement at that point, move to the formal procedure.

6.2 How to handle an informal discussion

This is an informal discussion, so there is no need to write in advance or offer a companion. Hold the meeting in private.

- Explain that it is an informal discussion and that you have some concerns.
- Say that even though it is informal it will be noted.
- Point out the actual performance of the employee, give examples and go through the evidence.
- Explain the work standard required.
- Ask for an explanation.
- Offer help, support, encouragement and training, as appropriate.
- Agree an action plan for improvement.
- Advise of the consequences of failure to meet the required standard: in other words an escalation to the first formal stage of the disciplinary process.
- Set a timescale and dates for review.
- Make notes of the conversation. Give a copy of agreed actions to the employee. There is no need to write a formal letter with a copy to HR because this is an informal discussion.

At the review date, one of three things will have happened.

He has met and maintained the standard. Say that you are very pleased that he has done so, and there will be no need for any further action at this stage. Keep up the good work and you'll be keeping an eye on his progress!

He has largely met and maintained the standard, but isn't quite there. In this case you might want to extend the review period by another month to give him time to demonstrate 100% compliance. Only do this once. If he has not met the standard at the end of that time, move to the formal process.

Thirdly, he has not met the standard. Unless there are clear mitigating reasons, move straight to the formal process.

6.3 Informavl v formal discussions

Informal	Formal
• One-to-one– no right to be accompanied	• Right to be accompanied offered
• No notice of meeting	• Advance written notice
• No prior information provided	• Outline of the reason for meeting
• Diary note kept in the supervisor's file	• Documented confirmation of any warning, copy kept on personal file
• No formal warning, only advice to help employee improve	• Disciplinary penalty may be imposed
• No set duration or review period	• Where sanction awarded, right to appeal must be offered
	• Warnings lapse after set time

6.4 Tips

You can call this conversation 'counselling', 'coaching', 'advice', 'guidance', or a 'chat'. But steer away from calling it a warning. If you use the word 'warning', there is a risk that you move straight into the realms of the formal procedure, with all the additional procedural requirements that entails.

You should only use the informal process once or twice. If you keep having 'chats' it's not working!

Similarly, only use the informal route where the matters are fairly minor in nature. In more serious cases, use the formal procedure immediately.

During the review period, meet with the employee every four-six weeks to provide feedback.

If the employee blatantly ignores the guidance you have provided, meet with him once and say that you could move to the formal discipline process at this stage. However, as the reasonable employer, you are giving him a chance to get this right. If he continues to fail to meet the standard you reserve the right to move to the formal discipline process at once.

What happens if you want to have an informal corrective conversation and the employee screams loudly for a companion or representative to be with him? It's quite easy …. Say that this is an informal conversation and just as there will be no question of any sort of disciplinary sanction as a result, there is no right to be accompanied either. If he insists, say that you will write to him to set up a formal disciplinary hearing. In other words, don't allow yourself to be blackmailed. The only exception I would make to this rule is when the employee is a young person (below the age of 18); who speaks English as a second language; or who has a disability which could impact on his ability to understand and participate fully in the process.

7 The investigation

7.1 Introduction

If you know (or think you know) that there is a disciplinary problem, you must carry out an investigation to collect, collate and review the relevant facts. The investigation is not part of the formal disciplinary process. Ideally, the investigation should be carried out by someone other than the person likely to chair any disciplinary hearing, although this is not always possible, especially in small firms. It's not a legal requirement to do so, but in the event of a claim you are likely to be criticized by the employment tribunal if you do not.

7.2 How to carry out an investigation

You are required to consider all the relevant facts. Sometimes this is as quick and easy as looking at some clock cards. In other cases you have to interview the employee under suspicion, talk to witnesses, review emails, and other documentary records. The aim is to establish whether or not there is a case to answer on a balance of probabilities. This is the civil burden of proof (see 7.7 below). Note that you are not trying to prove that the employee has done something wrong; rather you are trying to establish the facts and that includes taking any mitigating circumstances into account.

Carry out the investigation promptly to find out all the relevant facts before memory fades. Include anything the employee wishes to say. If, in serious cases, there are witnesses, take statements from them at the earliest opportunity. Make sure the statements are written, dated and signed. Everyone should be clear precisely what the complaint is.

7.3 Investigation checklist

When reviewing a particular situation, the following issues should be considered (not all of this will be relevant to every disciplinary investigation).

- What is the employee alleged to have done or failed to do?
- What are the particular circumstances? What happened? When did it happen? Who was involved? Where did the incident occur? Local/environmental conditions?
- What was the nature of the job being done by the employee?
- Was this his normal job?
- How old is the employee?
- How long has he been in service?
- How long has the employee been in the present job?
- Has the job changed in any way recently?
- Has the employee been counselled about his performance before? Was this recorded?
- Do you have details of the employee's past disciplinary history? Are there any current warnings?
- Are there any mitigating circumstances?
- Were there any witnesses?
- Have witness statements been collected?
- What is the training record of the employee?

- Do you have an induction checklist?
- Do you have the employment contract/terms/offer letter?
- What is the job description?
- Was any injury or damage caused by misconduct?
- What normally happens? Does custom and practice apply?
- Are the standards reasonable and clear? Have they been communicated to the workforce? Can you prove they were aware of the standard required?
- Has the employee got an up-to-date copy of the disciplinary procedure?

7.4 What happens when the facts are not in dispute?

Although in a few rare cases an admission will negate the need for an investigation, it's always good practice to investigate as thoroughly as possible to gain the best possible understanding.

Example

Nena Okoro was employed as an assistant catering manager, with 17 years of unblemished service. There was a long standing history of practical joking between Ms Okoro and her manager, Mr Cannon. When the unit at which she worked was presented with an iPod Nano as a corporate gift, Miss Okoro asked Mr Cannon, if she could take it home. He refused, but Ms Okoro took it anyway. Mr Cannon discovered that the iPod was missing and asked about it, but Miss Okoro would only say that she knew where it was and that she knew who had taken it. Two weeks later, she admitted that she had taken the gift as a joke and returned it unopened.

In light of Miss Okoro's admission, her employer, Compass Group, did not investigate and proceeded to a disciplinary hearing. Miss Okoro was dismissed for gross misconduct because she had removed company property without permission and Compass Group considered this theft. An employment tribunal decided that Miss Okoro's dismissal was unfair.

The law requires that employers carry out 'as much investigation as was reasonable in the circumstances of the case'. It also states that just because certain behaviour could be categorised as gross misconduct, this does not mean that dismissal will always be reasonable.

The EAT upheld the tribunal's decision. As Compass Group had not investigated Miss Okoro's contention that she had taken the iPod as a practical joke, it could not be said that she had committed theft.
Compass Group v Okoro [2009]

The court said that in some cases an employee's admission of guilt will be enough and no further investigation is necessary. This will be relatively rare. In most cases, further investigation will be required.

You should be rigorous in your investigation. Guidance is given in a three-part test laid down in British Home Stores v Burchill [1980]:

- Do you have a reasonable belief that the employee is guilty?

- Do you have reasonable grounds for that belief?
- Have you carried out as much investigation as is reasonable in the circumstances?

If a staff member charged with or convicted of an offence refuses to cooperate with the investigation, don't be deterred from taking action. He should be advised in writing that unless further information is provided, a disciplinary decision will be taken on the basis of the information available. This could result in dismissal.

7.5 Witnesses

In some cases it will be necessary to take statements from witnesses. Take the statements as soon as possible after the events, while the facts are still clear in the minds of witnesses. Include only information on what the witness directly saw, experienced or heard: for example, 'I saw Jane running away'. Exclude hearsay evidence, such as 'John told me that he saw Jane running away'.

Ask the witness to name or describe any other persons who were present and might have witnessed the incident(s). Ask the witness to describe what happened, but do not include the witnesses' opinion on how persons involved in the event were thinking or feeling (for example, 'x was standing by the door and talking very quickly' is OK, but not 'x was very nervous and seemed anxious to get away').

Checklist for taking a witness statement

- Put the statement in context. Ask the witness to say who he is, giving the date and time of the incident.

- Record the witness' own words.
- Write the statement in the first person.
- It can be useful to ask the witness to give estimates as to distance from the events described, establish how clearly the witness could see/hear events and find out about lighting or weather conditions (as appropriate).
- It may be useful to ask the witness to draw a diagram.
- Read the statement back to the witness and offer the opportunity to amend.
- Ask the witness to date and sign the statement.

7.6 Anonymous witnesses

In the ideal world witnesses will be clearly identified. Where there are real concerns about intimidation or reprisals, it is possible to allow witnesses to give evidence anonymously.

Example

Walkers Snack Foods had a crisp factory in Peterlee. The factory was situated in a close-knit community and had a history of poor industrial relations. Employees who cooperated with the management had suffered intimidation.

In August 2001, Walkers ran a promotion in which £5 or £20 notes were added into one in ten packets by a security firm working on site. Employees were told that the theft of the sachets would be regarded as gross misconduct resulting in summary dismissal.

In September, several employees alleged that thefts of the sachets containing the money were taking place. Because of the difficulty in the past with gaining shop floor cooperation, the company allowed anonymous deposits of information via a telephone hotline. A number of employees gave evidence and they all requested anonymity.

The HR manager drafted a number of anonymous witness statements. She asked questions to verify the evidence. The disciplining officer did not interview the witnesses and the company did not provide the witness statement to Mr Ramsey and his co-accused before the hearings because of the risk of identification. At the hearing, Mr Ramsey and his colleagues were shown copies of the statements and allowed to discuss them with their representatives.

After the hearing, the HR Manager obtained replies from the witnesses to questions asked by the accused. Mr Ramsey and his colleagues were dismissed and complained to an employment tribunal. The tribunal took the view that in the light of the genuine fear of reprisals the procedure was not unfair. Ramsey v Walkers Snack Foods [2004]

Guidelines for anonymous witnesses were set out by the EAT in Linford Cash and Carry Ltd v Thomson 1989.

- Informants' statements should be reduced to writing.
- In taking statements, it is important to note the date, time and place of each observation or incident, the informant's opportunity to observe clearly and accurately, circumstantial evidence (such as knowledge of a system), the reason for the informant's presence or any memorable small details; and whether the informant had any reason to fabricate evidence.
- Further investigation should take place, it being desirable to acquire supporting evidence.
- Tactful enquiries into the character and background of the informant would be advisable.
- If the disciplinary process is to continue, the responsible member of management should personally interview the informant and decide what weight is to be given to his evidence.
- The informant's written statement, anonymised if necessary, should be made available to the employee and his companion
- If the employee raises an issue at the disciplinary hearing, it may be necessary for the disciplining officer to adjourn to further question the witness.

7.7 Burden of proof

In employment law, the legal burden of proof is the balance of probabilities. This means that you should consider on balance whether it is more likely than not that the worker has done (or has not done) that which is alleged.

You don't have to prove that the employee is guilty beyond reasonable doubt (the criminal burden of proof).

7.8 Suspension

In cases of alleged gross misconduct, consider suspending the employee from work while the facts are fully investigated. You might take action to suspend if there is a risk of harm to person, property or the business. Suspension must be with full pay.

Suspension should only be used where it is really necessary to do so and it should be for as short a time as is reasonably possible. This may involve cases where any of the activities listed below are suspected:

- physical violence;
- harassment (sex, race, disability);
- fighting;
- fraud or theft.

When suspending an employee, make it clear that this is part of the investigation process and that he is under a duty to make himself available to assist in the investigation during all normal working hours. Staff who are suspended still have the right to be accompanied at a formal hearing.

It is extremely common for employers to suspend automatically if there is an allegation of gross misconduct. However, such action must be carefully thought through and suspension should be the last resort, in other words where there is no other option.

Example

In 2000, the Court of Appeal awarded a residential care worker substantial damages from her employers following an inappropriate suspension from work pending an investigation into allegations of abuse.

The investigation concerned a very disturbed child who had learning difficulties and a history of family abuse. During therapy sessions, the child had made remarks which could have been interpreted as allegations of abuse. As a result, an investigation was carried out and Ms Gogay was suspended for the duration. There is provision in the Children Act for the employer to suspend where there are allegations of abuse.

After an investigation lasting a month, the employer concluded that there was no case for Ms Gogay to answer. However, as a result of the suspension, she had suffered a severe psychiatric reaction. The medical evidence was clear that the suspension was a substantial cause of this reaction. There was no pre-existing psychiatric history.

Ms Gogay brought a case based upon a breach of her contract of employment, and in particular the implied terms of trust and confidence.

The court found that suspending someone in these circumstances, particularly with the allegations made in the suspension letter, were calculated to destroy the trust and confidence between employer and employee and would, therefore, justify a claim for breach of contract unless the employers could, for their part, lawfully justify their actions.

There were two significant failures on the part of the council. Firstly, they had suspended before carrying out preliminary investigations to ascertain if there was a case to answer. The suspension commenced at the beginning of the investigation process and was held to be a 'knee jerk reaction'.

Secondly, no realistic consideration was given to alternative employment during the period of the initial investigation. The court held that they did not believe that no alternative duties could be found during this period.
Gogay v Hertfordshire County Council [2000]

There is no right to be accompanied at an investigation meeting.

Example

Mr Skiggs worked as a guard for SWT and was the subject of a grievance by another employee who alleged that he was spreading rumours of a relationship between her and another employee. He was suspended and later called to an investigation meeting to discuss the grievance. Mr Skiggs insisted that he would not attend unless he was allowed representation. The employer told him that as the meeting was only intended to be an investigatory interview – not a disciplinary hearing – the entitlement to a companion did not arise.

Mr Skiggs complained to the tribunal, arguing that although not convened as a disciplinary hearing, the meeting nevertheless fell within the definition of a 'disciplinary hearing', especially in light of his previous disciplinary record (which included receipt of a final warning).

The court disagreed and said that they were satisfied that the 'investigatory interview' had begun, and had always remained, a factual inquiry. It was irrelevant that the interview may have led to formal disciplinary proceedings at a later stage. Accordingly, his appeal was dismissed.
Skiggs v South West Trains [2005]

The only exception I would make to this rule is when the employee is a young person (below the age of 18); who speaks English as a second language; or who has a disability which could impact on his ability to understand and participate fully in the process.

8 Preparation for a disciplinary hearing

8.1 Introduction

If after completing the investigation, the investigating officer concludes that there is a case to answer, he will write to set up a disciplinary hearing. It is important that the employee who is alleged to have breached workplace standards is given sufficient information and time to be able to prepare his defence. The investigating officer should:

- write to the employee, giving details of the complaint against him, a copy of the disciplinary procedure, and details of the time and place of the disciplinary interview. Be precise about the nature of your concern and give evidence supporting your view, including witness statements;
- remind him of his right to be accompanied by a work-based colleague or a trade union representative;
- book a suitable meeting room;
- arrange with another manager or a human resources advisor to be present to take notes.

8.2 Preparing to chair the hearing

The person responsible for chairing the disciplinary meeting also has to ensure that he is fullprepared.

- Collate the evidence.
- Prepare possible questions.
- Consider possible answers.
- Familiarise himself with the disciplinary process.
- Advise witnesses where they may be called.
- If the employee has any special needs – for example, is disabled or has a poor understanding of English – arrange facilities to enable him to fully participate in the meeting.

Check that the worker has had enough time to prepare. The time is not laid down by the law, but will depend on your own procedure and the complexity of the matter. It's a good idea to check with the worker a day or so before the meeting to confirm that he is ready to go ahead.

8.3 Right to be accompanied

Both employees and workers have a legal right, during formal disciplinary and grievance hearings, to be accompanied by a workplace colleague or a union representative. The right to be accompanied must be offered to employees, but they can choose to waive this right if they wish.

An employee can choose to be accompanied by a union representative even where the union is not recognised by the employer.

Ensure that your procedures restrict this right to the named companions listed above.

A companion has the right to:

- help the worker prepare for a meeting;
- ask questions;
- make representations on behalf of the worker;
- make notes and act as a witness;
- sum up the worker's case;
- ask for an adjournment where new material emerges;
- not suffer less favourable treatment because he has acted as a companion.

The companion does not have the right to speak in the place of the worker, although you may well find that union representatives take that approach. You should encourage the worker to give his own version of events so that you can ask probing questions and gather as much information about the matter as possible.

9 Chairing the disciplinary hearing

9.1 Introduction

A disciplinary hearing should be a discussion of the facts, not an argument about them. Try to discover whether there are any special circumstances that should be taken into account.

Examine the conduct or performance that is under discussion and explore the gap between the current level of performance/ conduct and the required level. Where possible, reinforce your argument with some evidence to support your views.

Allow the employee to reply to the allegations. Take representations from the companion, if he wishes to make them. Once you have heard all the evidence, adjourn. Carefully consider and weigh the evidence before you decide on any disciplinary action. Ensure that your decision is in line with your policy and procedure and that it is consistent with previous similar situations.

If you decide to issue some form of disciplinary penalty, confirm your decision in writing and tell the employee about the appeals process. He needs to know how to appeal, to whom to appeal and the timescale within which he should submit the appeal.

9.2 Disciplinary hearing checklist

- Introduce the parties, if they don't know each other.
- Explain the roles of the parties.
- Ask the worker to confirm that he is ready to go ahead.
- If he is not accompanied, remind him of his right.
- Go through each matter, probing the worker's answers.
- Give the worker a full opportunity to put his views.
- Ask the companion for his input.
- When you have reached the end of a particular point, ask the worker if he has anything else that he would like to tell you that you have not asked about.
- When you have finished exploring the matters, ask the worker to confirm whether he feels he has had a fair hearing.
- Ask your note taker to go through all the notes with the worker and companion. Make any amendments there and then. Ask the worker to sign and date each page. Advise that you are happy to provide a copy.
- Adjourn to consider what has been said to you.
- Decide on your action and advise it to the worker.
- Confirm the decision in writing.

9.3 Employee's failure to attend

Sometimes employees fail to attend a disciplinary hearing. There has been a noticeable trend recently for employees facing the disciplinary process to go sick with stress. If your employee doesn't attend the hearing, either through sickness or for some other reason, write to him rescheduling the date for the meeting. Ask him to confirm his attendance. If he fails to attend the next meeting, write again, rescheduling the meeting. This time add that if he fails to attend on the third occasion you will proceed in his absence. Remind him that if he is unable to attend himself you will accept written representations from him or he may send his companion to speak on his behalf.

If he fails to attend without good reason on the third occasion, hold the disciplinary hearing in his absence and work with the information that you have available to you. Write to the employee, informing him of your decision and offering an appeal where a disciplinary penalty has been imposed.

However, to be procedurally fair, a disciplinary process will almost always require an employee faced with serious allegations to be given the chance to put his side of the case across before a decision is reached. This still applies even if the employer believes the employee is attempting to evade a disciplinary hearing by saying he is too stressed to attend. You have to exercise patience and a considered approach to ensure that such a dismissal is fair. Where someone has submitted medical notes saying that they are too unwell to come to work, it can sometimes be a delaying tactic by the employee. It's helpful to hold a welfare meeting so you can make a lay person's assessment of the employee's likely ability to participate in the disciplinary process. You can feed this information, together with the circumstances to your occupational health advisor and say that you are very willing to make any reasonable adjustments to enable the employee to attend and ask for guidance. If you are not satisfied with the doctor's report you can get another opinion. Provided it is not perverse to do so, where there are conflicting reports you are entitled to make a choice as to which opinion you prefer to take.

Example

Ms Nadal was subject to disciplinary proceedings after a colleague made a written complaint about bullying behaviour. Following the complaint, she was absent from work and sent in medical certificates, citing stress and anxiety.

Over the following weeks, the employer corresponded with Ms Nadal in an attempt to set up a disciplinary hearing. Initially, she indicated that she would be well enough to attend a hearing after a few weeks, but dates arranged for a hearing were followed by sick notes from her GP stating that she would be too ill to attend. As an alternative, the employer invited her to make written representations.

While this process was ongoing, MsNadal and her employer continued to negotiate the terms of a compromise agreement, which related to a separate issue predating the complaint. The employer also received information that although she was signed off with stress/anxiety, she had, in the intervening period, been offered a position with another employer, and was due to start there very shortly. The employer notified Ms Nadal that it would only postpone the disciplinary hearing by one more day. It concluded that despite the GP's sick notes, she was well enough to attend.
Ms Nadal requested another postponement, pointing out that she was due to see her GP the following day. The employer refused and the hearing went ahead in her absence. She was subsequently dismissed for conduct reasons.

The EAT agreed that Ms Nadal had been unfairly dismissed. For a dismissal to be procedurally fair the employee must be given a chance to state his case. This is particularly so where they face serious accusations and the GP has said they are unfit to attend – even if the employer receives information which causes it to doubt that the employee is genuinely too ill to attend.
William Hicks & Partners v Nadal [2005]

9.4 Possible pitfalls

Good intentions are not enough – the best way to avoid making an expensive mistake is to rigorously follow the correct procedures.

9.4.1 Resignation before a disciplinary hearing

It often happens that a manager who is about to take an employee through the disciplinary process suggests that the employee should resign rather than face dismissal. This may be very well intentioned: for example, to save the employee the embarrassment of being dismissed. Don't do it. Your job is to apply the disciplinary procedure. To circumvent it, even if it's for the best of reasons, can lead you to a constructive dismissal claim.

If an employee resigns of his own volition rather than face the disciplinary process, he is entitled to do so.

9.4.2 Resignations during the hearing

Once the disciplinary process has started, you should carry it through. Occasionally an employee going through the hearing will conclude that he's likely to be dismissed and will ask to resign. Adopt the Magnus Magnusson approach ('I've started so I'll finish...') and complete the hearing process.

The risk here is that if you allow a resignation in these circumstances, the employee may claim duress later and thus constructive dismissal. The risk is increased if you are chairing the meeting by yourself.

It's important for everyone concerned that the rules are known to everyone, are crystal clear and are consistently and fairly applied.

9.4.3 Custom and practice

It's important for everyone concerned that the rules are known to everyone, are crystal clear and are consistently and fairly applied. Some terms and conditions of employment become established because they have become an accepted way of doing things for some time. They are often not written down, but are widely adopted and can form part of the employment contract.

For a term to be regarded as 'custom and practice', it must be:

- reasonable – it must be approved by a court or tribunal;
- certain – it must be able to be defined precisely;
- notorious – it must be long-established and well known;
- not inconsistent with an express term or some other implied term of the contract;
- necessary to give business efficacy to the performance of the contract.

Custom and practice is usually associated with matters such as the custom of early finishing on Fridays, but it can arise in discipline too.

Example

A Christian charitable housing association always tried to give their staff one last chance when applying the disciplinary process. Over the years, they had formed the habit of giving not just a Final Written Warning, which was part of the disciplinary procedure, but a Final, Final Written Warning, which was not.

A new manager arrived at one site and eventually dismissed a black woman, B, who at that stage was on a Final Written Warning. The manager was not aware of the practice of issuing Final, Final Written Warnings. B claimed that she'd been unlawfully discriminated against on grounds of her colour because she was treated less favourably than her white colleagues. The case was settled out of court with the association accepting liability and making appropriate compensation.

9.4.4 How many final warnings?

You would think that a final warning would mean just that – one warning and the next step is dismissal. Many companies fall into the trap of giving repeat final written warnings. This tends to happen when they are short staffed and feel that they can't afford to lose people.

It doesn't work as a strategy (that staff member is still failing to meet your standards) and everyone else becomes complacent about the way you apply your process. If your procedure works on the Three Strikes basis and you keep giving final warnings, at what point do you dismiss? How can an employee with five written warnings distinguish between five and six final written warnings? He may be able to argue that he was unfairly dismissed because he's had all these final written warnings and never been dismissed. What's different this time? It's a fair comment.

10 Sanctions

10.1 Introduction

If a formal sanction is needed, the level and nature must be reasonable or justified. This will depend on all the circumstances of the particular case.

10.2 Is the sanction a 'reasonable response'?

Make sure that any disciplinary sanction is a reasonable response to the circumstances of the case. Your decision should fall within the 'reasonable band of responses'. Although developed by the Court of Appeal in 1981 it is still the test used by the courts today. Below is Lord Denning's definition of the test.

> The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view.
> Lord Denning, British Leyland (UK) Ltd v Swift [1981]

10.3 Make the right to dismiss very clear

There have been some surprising decisions as to what constitutes a reasonable response. Case law has usually agreed that theft amounts to serious misconduct justifying dismissal, but in a few cases some decisions have suggested that where the amount stolen is very small it may be unfair to dismiss in those circumstances.

The case of Tesco Stores Ltd v Othman-Khalid, (over the page), gives some comfort. You should make sure that your disciplinary procedure specifies that an employee who steals will be dismissed, even if the intrinsic value is very small. The case does not go so far as to establish the principle that dismissal for theft will always be fair. However, given the circumstances of this particular case, it is a strong indication that an employment tribunal will need exceptionally strong mitigating circumstances before finding that a dismissal for theft is unfair.

Example

Mr Othman-Khalid worked alone at nights in one of Tesco's petrol stations. He was caught on a video camera stealing a packet of ten cigarettes from a bag of damaged stock which was due to be returned to the manufacturer. At the subsequent disciplinary investigation he denied the theft and claimed that he had sold the cigarettes to a customer.

He was subsequently dismissed for gross misconduct and complained of unfair dismissal. The court upheld Tesco's decision. Theft was a potentially fair reason and the dismissal fell within the band of reasonable responses for an employer. It was irrelevant that some employers would not have dismissed the employee in these circumstances.

Although the employer was large and the amount involved small, the employer was entitled to take the theft very seriously.
Tesco Stores Ltd v Othman-Khalid [2001]

It is usual for two or three warnings to be given before dismissal is contemplated. The courts take the view that it is an extremely serious matter to deprive a person of his livelihood, so you are expected to give plenty of time for the employee to improve.

Dismissal is, of course, the ultimate sanction and an act of last resort. If you dismiss an employee on the grounds of either misconduct or poor work performance, the onus is on you to show that this is the real reason for the dismissal.

10.4 Factors to consider in reaching a decision

Before deciding on any disciplinary penalty, consider all the relevant factors. Here are some points to consider, but remember that each case will turn on its own facts and there may be other points not listed here.

- The seriousness of the offence, and whether the procedure gives guidance.
- The penalty imposed in similar cases in the past.
- The individual's disciplinary record and general service.
- Any mitigating circumstances (length of service, co-operation with disciplinary process, remorse shown).
- Whether the proposed penalty is reasonable in all the circumstances.
- Any current warnings for related offences.

There are several potential levels of sanction. These are:

- oral warning (though at Russell HR Consulting we don't use these at all any more);
- written warning;
- final written warning;
- dismissal/demotion;
- summary dismissal.

Many employers now adopt a two-stage warning approach.

1. First warning, often for six months
2. Final warning, often for twelve months.
3. Dismissal

Remember that any disciplinary sanction has to be reasonable and justifiable. If you feel that the case has not been substantiated; that the employee has demonstrated acceptable mitigating circumstances; or that for some reason it would not be appropriate to award a disciplinary sanction, then do not apply any sanction.

The law does not lay down the length of time during which warnings will remain live. That's the choice of the individual organisation, but it is subject to the over-riding requirement of reasonableness.

The Data Protection Act 1998 gives employees the right to see disciplinary notes held on their personal file, though they will not be automatically entitled to access third-party witness statements if to do so would reveal the identity of the witness. The witness would have to give permission.

10.5 Totting up

Employees may be dismissed for the totting up of repeated minor offences or a single act of gross misconduct. 'Totting up' is the term used for taking a live sanction into account when making a decision about a further breach of standards. You can only tot up like with like, in other words, conduct with conduct or poor performance with poor performance.

Example

John receives a first warning for poor time keeping, which is minor misconduct. During the time that warning is live he is warned again for inappropriate use of company equipment, another act of minor misconduct. At this stage, you can replace his first stage warning with a final warning.

If he offends again on a misconduct matter while this final warning is live the next stage will be dismissal.

If the next issue is a poor performance issue, John will receive a first warning for capability. Note that many organisations still only increase the level of sanction when the misconduct is the same. For example, John receives a first warning for poor time keeping, which is minor misconduct.

During the time that warning is live he is warned again for inappropriate use of company equipment, another act of minor misconduct. He receives a second first warning. The first of the two warnings will only be escalated if he re-offends on time keeping while the first warning relating to time keeping is still live. Both methods of totting up are legally acceptable, however it's wise to make clear in your procedure what method you use.

You should not dismiss for a first offence other than gross misconduct.

Note that plunging into formal warnings too early or giving an unduly harsh warning may be counter-productive and in one case was even found to be constructive dismissal.

Example

Ms Sheridan had worked for her employer for five years and had never been given any formal warnings. One day she had a heated discussion with a colleague. She felt so drained and upset that she left the office for 90 minutes. She was entitled to a 30-minute lunch break. On her return, her supervisor saw that she was still very upset and sent her home. The company disciplined her for her unauthorised absence and issued a final written warning. Ms Sheridan resigned, claiming constructive dismissal. The court agreed with her that the penalty was unduly onerous in this case.
Stanley Cole (Wainfleet) Ltd v Sheriden [2003]

10.6 Expired warnings

In deciding what action to take, it is reasonable to consider the employee's track record. However, you cannot use an expired warning to give a heavier sanction than you otherwise would. The general rule is set out in Diosynth v Thomson.

Example

Diosynth chiefly produced raw chemicals and had an extensive safety training programme, which Mr Thomson had attended. He was taught, among other things, the safety risks of failure to follow a process known as 'inerting'. The company made clear that omitting the process was a serious breach of the company's safety rules.

In July 2000 Mr Thomson was disciplined for failing to inert a vessel and received a 12-month written warning. He was told that any further failure to inert would result in disciplinary action. The warning was not specified as a final warning.

Following a fatal explosion at the plant in November 2001, it emerged that Mr Thomson had breached the procedure three more times in October and November 2001, and had falsified some documentation. Some 17 other employees were found to be guilty of the same charge. All the employees involved were taken through a disciplinary process. Only Mr Thomson was dismissed. Although the warning had expired by then, the company said it had lost confidence in T and that he obviously could not be trusted to follow the safety rules. He complained successfully that he had been unfairly dismissed.

The company argued that the key question was not whether the warning had expired but whether it had acted reasonably in all the circumstances. Mr Thomson argued that it was unfair for the company to rely on the previous written warning to take more severe disciplinary action than it would otherwise have taken. He said that he was entitled to believe that the company was genuine when it said that the warning would expire in 12 months.

The Court of Session agreed with him. It pointed to the ACAS code of practice which states that a warning that is not subject to a time limit would normally be inconsistent with good practice.

Although this warning was for a fixed period, the company had acted as though it was still in force at his second disciplinary hearing. Mr. Thomson had been entitled to assume that it would expire after 12 months. The company had acted unreasonably when it tried to extend the effect of the warning beyond that period.

Diosynth Ltd v Thomson [2006]

As we know, each case turns on its own facts. A different conclusion was reached by the Court of Appeal in the next case. The facts are very similar to Diosynth. However, the distinguishing feature is that Airbus made it quite clear that Mr Webb's extra-curricular activities while at work were considered to be gross misconduct. Irrespective of what else is happening with the employee's disciplinary record, an employer can dismiss for a first instance of gross misconduct if it is satisfied that the case is substantiated. There is no question of totting up.

Example

Mr Webb was dismissed because he had been found washing his car when he should have been working. The company considered this to be gross misconduct and dismissed him summarily. He was reinstated on appeal and the sanction downgraded to a final warning which remained live for 12 months. Mr Webb was advised that if he re-offended he would be taken through the formal procedure.

12 months and three weeks later, Mr Webb was found watching TV with four other employees when they should have been working. Following an investigation and a disciplinary hearing Mr Webb was dismissed summarily. The other employees who were also not working when they should have been were given a final written warning.

Mr Webb complained that he had been unfairly dismissed and that Airbus must have relied on an expired warning.

The Court of Appeal found that he had been fairly dismissed. Diosynth was a case where the expired warning 'tipped the balance in favour of dismissal', as the other factors taken together would not have justified dismissal. In those circumstances the expired warning was part of the set of facts that operated in the employer's decision to dismiss. As the warning had ceased to have effect, it was not reasonable for the employer to rely on it as the deciding reason for the dismissal. In this case, the employer had decided to dismiss Mr Webb principally because his offence fell into the category of gross misconduct and it can be fair to dismiss for an act of gross misconduct. His colleagues could have been dismissed, but the sanction was downgraded because of their previous good track records.
Airbus UK Ltd v Webb [2008]

10.7 Formal warnings

You need to clearly explain what the warning means, how long it will remain live on the file and what will happen if there is a repetition of the offence (or any other offence). Tell the employee verbally of your decision (even if your decision is to take no further action) and follow it up in writing.

Your employee should be in no doubt about what action is being taken under the disciplinary procedure. He must also be very clear about what he has to do to avoid further disciplinary action, and by when. Your letter should include all the key points.

- What was included in the discussions.
- Any agreements or admissions.
- The disciplinary penalty, if any, and its duration.
- The reason for the decision.
- The actions being taken as a result of that decision.
- The specific improvement required of the employee, if being warned, not dismissed.
- The review period.
- The right to appeal.

Note that difficulties can sometimes arise for employers where they wish to communicate a dismissal to an employee who is absent from the workplace (for example, because of sickness or absence without leave).

10.8 Date of dismissal

If you decide to dismiss it is important to specify the date of termination of employment. An employee who has been dismissed and wants to make a complaint to an employment tribunal has three months from the effective date of termination to do so. A lack of clarity about the actual termination date can lead to arguments about whether an employee's claim is in time. It's always best to communicate the decision and its implications face to face or on the phone.

10.9 Dismissal by letter

If you communicate a decision to dismiss by letter, what is the effective date of termination? The date the letter was written or posted? The date it arrived or was signed for? No, it's neither of these. The effective date of termination is when the dismissed employee reads the letter. That can be up to a week after it's been delivered.

Example

Miss Barratt had attended a disciplinary hearing on a Tuesday and was told she could expect to receive a letter concerning possible dismissal a few days later. The letter was sent recorded delivery and arrived at her home on Thursday, but was signed for by someone else, as Miss Barratt was away. She did not return home until the Sunday night and did not ask about the letter or open it until Monday morning. The Supreme Court agreed that the effective date of termination was the Monday.
Gisda v Barret [2008]

This case concerned whether the employer's tribunal claim was out of time. However it is also particularly relevant to the dismissal of employees who have close to one year's service or who are absent due to illness. Especially where time is of the essence, employers should consider alternative methods of communicating the dismissal to the employee, such as communicating in person, personal delivery or, in extreme cases, perhaps even text message, to confirm that the letter has arrived.

There was no suggestion that the employee had gone away deliberately to avoid receiving the letter. Miss Barratt was under no obligation to ask over the phone about the contents of the letter while she was away. The decision would probably have been different had the tribunal found that she had been deliberately evading receipt of the letter.

The lesson to take on board is that if it is important to the employer that it has a definite date for dismissal then communication of the dismissal person to person will be the best option.

10.10 Improvement

The purpose of discipline is improvement. Generalities don't work; you must specify exactly what improvements you expect to see. If you say that you're only making 35 widgets an hour and everyone else is making 50 widgets an hour and we need an improvement, don't be surprised if the widget-making increases to 37 an hour. You've got what you asked for but not what you wanted.

There are various ways of specifying what's needed, as the following examples illustrate.

- Percentages or ratios – 'Your current absence rate is 22 per cent; the company target is 8 per cent.'
- Frequency of occurrence – 'You are to hold a weekly team meeting in order to improve communication in your section.'
- Averages – 'You must achieve an average of 75 per cent of monthly sales target within three months. This will be reviewed on a monthly basis for the duration of this warning.'
- Time – 'You must respond to call-outs within one hour in future.'
- Zero tolerance – 'Any further conduct of this nature will result in further disciplinary action being taken.'
- Company standard – 'You must achieve the sales target set and agreed at national levels.'

11 Appeals

11.1 Introduction

The opportunity to appeal against a disciplinary decision is essential to natural justice. The ACAS Code recommends that you provide an opportunity to appeal against a formal disciplinary penalty up to and including dismissal. Appeals may be raised for various reasons: for example, the discovery of new evidence, undue harshness or inconsistency of the penalty. It is also an opportunity to correct defects in the original disciplinary procedure.

11.2 Appeal procedure

A good appeals procedure should include the following provisions.

- The time within which the appeal should be lodged should be specified – the ACAS code recommends five working days.
- Appeals should be dealt with quickly.
- The employee should be advised of his right to be accompanied at the appeal hearing.
- The procedure should provide for the appeal to be heard by someone senior in authority to the person who took the disciplinary decision. If possible, whoever hears the appeal should not have been involved at the earlier stage.
- The procedure should specify what action may be taken by those hearing the appeal.

- The employee, or his representative, should be allowed the opportunity to comment on any new evidence arising during the appeal before any decision is taken.

Within small firms, it is often difficult to identify someone with higher authority than the person who took the original disciplinary decision to hear the appeal. In this case, your disciplinary procedure can provide for an independent third party to be nominated.

11.3 Hearing an appeal

Beforehand ensure that:

- the employee knows when and where it is to be held;
- he is aware of his right to be accompanied;
- the relevant records and notes of the original hearing are available.

At the hearing, keep to the following procedure.

1. Introduce those present to each other, explaining their function.
2. Explain the purpose of the hearing, how it will be conducted, and the powers held by the person hearing the appeal.
3. Ask the staff member why he is appealing against the disciplinary penalty.
4. Listen carefully to any new evidence that has been introduced, and give the staff member the opportunity to comment.
5. Once the relevant issues have been thoroughly explored, summarise the facts.
6. Adjourn to consider the decision. You should not be afraid to overturn a previous decision if it becomes apparent that it was not soundly based.
7. Inform your employee of the results of the appeal and the reasons for the decision and confirm it in writing. Make it clear, if this is the case, that this decision is final.

12 Grievances raised during the discipline process

12.1 Introduction

The ACAS Code describes grievances as 'concerns, problems or complaints that employees raise with their employers'.

It is an employee's right to air a genuine grievance. Every company employing staff, however small, must have a process by which staff can formally raise a grievance to the employer's attention. Raising a grievance does not automatically entitle staff to have their own way, but any member of staff is entitled to be sure that a grievance issue will be properly examined and considered.

Employers are under a duty to properly explore grievances in a timely fashion with a view to reaching a suitable resolution. This is true even if the procedure to which the grievance is linked is a disciplinary or capability process – for example if the employee complains that he has been bullied by the manager who has initiated disciplinary proceedings against him. Unless the grievance throws doubt on whether or not that process can be conducted fairly, the employer can tell the employee that the substance of the grievance will be discussed in the context of the disciplinary or capability hearing. When that process has been completed, you can deal with any outstanding grievances raised by the employee under the company's grievance procedure.

12.2 Overlapping discipline and grievances

Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. However, there is no legal obligation to do so.

Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

Example

Mr and Mrs Marshall managed a pub that was owned by Samuel Smith (the Brewery). The pub industry was facing economic difficulties at the time, so to cut costs, the Brewery reduced the hours of the staff (other than the managers) working at the pub from 84 hours to 45 hours per week in total.

The Marshalls were not happy about the decision and raised a grievance. The outcome was that staffing hours should be reduced to 52 hours, with immediate effect. The Brewery pointed out to Marshalls that their management agreement stated that the staffing hours could be altered at the absolute discretion of the Brewery. Mr and Mrs Marshall appealed against the outcome of the grievance. They did not reduce staffing hours, despite a number of requests to do so.

In the period before the appeal meeting they were once again told to reduce the staffing hours, and reminded that they were breaching the management agreement, which gave the Brewery the right to take disciplinary action against them. The Marshalls ignored this and kept the staffing hours at 84 hours per week, causing additional expense to the Brewery.

The Brewery started disciplinary proceedings. Mr and Mrs Marshall refused to attend the disciplinary hearing because of the outstanding grievance (the appeal meeting had not been held at that stage). In their absence, the Brewery took the decision to dismiss them.

The Marshalls complained that they had been unfairly dismissed but the Employment Appeal Tribunal disagreed. It said that there was no provision in the disciplinary procedure stating that disciplinary procedures should be suspended until a grievance appeal about the same matter had been dealt with. There is nothing in the ACAS code to suggest this either. In addition, the Marshalls could have raised the issues they would have raised in the grievance appeal hearing at the disciplinary hearing.
Samuel Smith Old Brewery (Tadcaster) v Mr and Mrs Marshall [2010]