For all your business needs

Trust Sintons

Business | Personal & Family | Healthcare

Sintons LLP, The Cube, Barrack Road, Newcastle upon Tyne, NE4 6DB

Sintons LLP is authorised and regulated by the Solicitors Regulation Authority.
Your speakers

**Keith Land**
*Title:* Partner  
*Tel:* 0191 226 4892

**Angela Carver**
*Title:* Associate  
*Tel:* 0191 226 7824
Your speakers

Ailsa Hobson
Title: Associate
Tel: 0191 226 3705

Catherine Hope
Title: Associate
Tel: 0191 226 3801
Investigation and Suspension
Investigation

• Substantive and Procedural Fairness
  – A dismissal for misconduct will only be fair if, at the time of dismissal:
    • the employer believed the employee to be guilty of misconduct
    • it had reasonable grounds for believing that the employee was guilty of that misconduct
    • at the time that it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances

(British Home Stores Limited v Burchell [1978] IRLR 379.) – Burchell test
Investigation - Pitfall

• Jumping to conclusions
  – you have established “obvious guilt” and are now looking at evidence to support that theory
  – is this likely to give a fair and reasonable outcome?

• Example case:
  – you witness an employee taking money from the cash register and putting it in his pocket
  – before speaking to him you collate evidence of other witnesses to the act then invite him to a disciplinary hearing to provide his version of events
Investigation - Pointers

• Carrying out an investigation
  – take a neutral line for enquiries
  • consider evidence that supports as well weakens the case – fair and balanced
  – open mind - there could be a perfectly plausible explanation
  – unanswered questions– don’t limit the allegations
  – investigate sufficiently to ensure that the substance of the allegations are clear to enable a meaningful response
  – take ownership of the fact find – cross examination
  – make conclusions – apply mitigating factors
  – recommendations – disciplinary action?
Investigation - Pitfall

• Anonymity/confidentiality
  – the reluctant witness or the witness who will only provide information if they are given an assurance of anonymity

• Example case:
  – anonymous written complaint received among other formal complaints
  – two scenarios
    • employer does not discover witness identity
    • employer does discover witness identity but a request for anonymity is made based on fear of reprisal by the employee under investigation
Investigation - Pointers

• Total anonymity
  – motives of the informant - genuine
  – investigation – how do you test the evidence?

• Request for anonymity?
  – motives of the informant/reason for the request
  – band of reasonable responses – balancing act between need for anonymity and need for employee to know details of the case against him – disadvantaged? (Surrey County Council v Henderson UKEAT/0326/05)
  – seniority of the informant

  – *Linfood Cash & Carry Limited v Thompson [1989] IRLR 235*
Investigation - Pointers

• Assurance of confidentiality?
  – cannot guarantee
  – disclosure obligations in court and tribunal proceedings
  – duty of confidentiality to the party under investigation but no set rule on duty to witnesses providing information.

  • *Shinwari v Vue Entertainment Ltd UK EAT/0394/14*
Suspension - Pitfall

• Suspension – necessity or just preference?
  – Breach of trust and confidence

• Example case:
  – two employees involved in a minor physical altercation
  – one more senior that the other but based on different sites
  – the more senior member of staff is suspended pending investigation
  – one week later the other employee goes on sick leave
Suspension - Pointers

• Suspension
  – Usually only appropriate
    • in cases of serious misconduct or incompetence
    • where the employee's continued presence in the workplace would render an investigation impossible
    • where working relations have broken down and there is no other way of avoiding conflict while the matter is resolved
    • consider safeguarding
  – Right must be exercised on reasonable grounds – consider alternatives and avoid knee jerk reaction
  – Short a period as possible - *Camden and Islington Mental Health and Social Care Trust v Atkinson* UKEAT/0058/07
  – Not a form of punishment
The Disciplinary Hearing
Initial Considerations for the Chair

• Do you need to/should you commence formal action?
• Have you made the decision that there is a case to answer?
• Have you consulted your disciplinary procedure/do you have one?
• Are you aware of the ACAS code 1 on disciplinary and grievances?
Pitfall – Not framing the Allegations

The content of the allegations will frame the disciplinary hearing and how the outcome is drafted.

Spink v Express Foods Ltd [1990] IRLR 320 (EAT)

"It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case."
Not framing the allegations cont....

- The employee needs to appreciate the severity of the allegations and the possible consequences.
- The employee needs to know that they are "fighting for their job".
- However - EAT in **Buzolli v Food Partners Ltd UKEAT/0317/12**
Pointers

• Be clear and concise;
• What evidence do you have;
• Is it gross misconduct;
• Could a finding of fault result in a dismissal;
• If you are challenging integrity, ensure you put this;
• Collective allegations – where it can go wrong

“You are invited to a disciplinary hearing regarding the allegation that on multiple dates in June 2020, money went missing from the safe, if this allegation is founded, you could be dismissed.”
Break the allegations down

1. On the 2 June 2020, you incorrectly recorded the money in the safe at the end of your shift to be banked the following day;
2. On the 2 June 2020, you did not report a deficit of £500 in the safe to your Manager;
3. The theft of £500 from the safe;
4. In failing to report the deficit of £500 on the 2 June 2020, you failed to follow the financial procedures policy which is attached to the letter;
5. In failing to record the deficit of £500 on the 2 June 2020, you failed to follow the discrepancies in banking policy which is attached to this letter;

A breach of any of the above allegations is classed as gross misconduct under our policy, attached to this letter and if upheld could result in summary dismissal.
Case and Recent Example

*Celebi v Scolarest Compass Group UK & Ireland Ltd*

UKEAT/2010/0032

- The employer informed Ms Celebi by letter that it was investigating the "loss of £3,000 cash".
- A letter requested her attendance at a disciplinary hearing concerning incorrect "reporting of stock figures" and "following of financial procedures" and "discrepancies in banking".
- The employer dismissed her by letter for the reasons set out in the invite to the disciplinary meeting.
- Ms Celebi brought a claim for unfair dismissal.
- The employer's chief witness gave evidence that the reason for dismissal was a "reasonable belief that the Claimant had stolen the £3,000".
Pitfall – Decision in the absence of the employee

Employers and employees (and their companions) should make every effort to attend a disciplinary hearing

(paragraph 1, 2 ACAS)
Pointers

• It is good practice to re-arrange first meeting

• if persistently unable or unwilling to attend without good cause the chair should make a decision on the evidence available, taking into account:
  – seriousness of the allegations
  – disciplinary record, work record, position and length of service
  – medical opinion
  – how similar cases have been dealt with - internal procedures
  – the reason for non attendance and whether consideration can be given to other methods of holding the hearing such as submissions, skype
Pointers- Ill Health

• A common problem is the employee absenting themselves by reason of ill-health, frequently citing stress as the cause.

• You then have two conflicting priorities.

  1. the need to ensure that matters are dealt with speedily, particularly if it is a serious case in which other employees' interests are involved.

  2. the employee may genuinely not be well enough to attend a hearing.
Pointers – ill health

• Wait
• Agree to the employee bringing a friend or family member
• Telephone hearing
• Neutral place or location nearer the employee's home address
• Written submissions
• Hold the hearing in the employee’s absence if the above fail
• Seek Medical Advice OH or GP*
*access to medical reports act 1998
• Caution with disability

*Recent example
Pitfall – Not offering the right to accompaniment

Statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- a formal warning being issued; or
- the taking of some other disciplinary action
- the confirmation of a warning or some other disciplinary action

Employment Relations Act 1999 s10

1 (a) required or invited by his employer to attend a disciplinary or grievance hearing, and

1 (b) reasonably requests to be accompanied at the hearing.

Who can the Companion be?
Pointers

- Insert the right to be accompanied into all precedent letters;
- Consider someone outside of a certified trade union representative or work colleague;
- Be reasonable;
- The Companion does not run the show.
Right to be accompanied

The role of the companion is limited to the following:

- addressing the panel
- putting the worker's case
- summing up
- responding on the worker's behalf to any view expressed at the hearing
- conferring with the worker.

*there is no right to answer questions on behalf of the worker address the hearing contrary to the worker's express wishes, or act in a way that prevents the employer explaining its case or prevents any other person making a contribution to it*
Pointers for the invite letter

• The outcome of the investigation
• The allegations (para 9 ACAS)
• The right to be accompanied (para 10 ACAS)
• The arrangements for the hearing
  – where
  – when
  – who will hear it
  – adjustments
• The copies of all documents and relevant policies (para 12 ACAS)
Disciplinary hearing - Pitfall

• New evidence comes to light after the invitation to the disciplinary hearing is sent out

• Case example:

  *Uddin v London Borough of Ealing UKEAT/0165/19*
  - Knowledge/conduct of a person other than the person deciding to dismiss could be relevant to fairness of dismissal, both in relation to the tribunal’s consideration of the reason for dismissal and its consideration of fairness
  - where someone responsible for the investigation does not share a material fact with the decision maker this could be regarded as relevant to the tribunal’s decision in relation to fairness.
Disciplinary hearing - Pointers

• Keep evidence under review

• Ensure any new information that comes to light subsequently, which is relevant to the investigation and decision, is taken into account by the decision maker

• Share the information with the employee
Disciplinary hearing - Pitfall

- An employee raises a grievance after the invitation to the hearing is sent, or at the hearing

- Case example:

  Jinadu v Docklands Buses Ltd + others UKEAT/0434/14
  - it was appropriate for the employer to not put disciplinary proceedings on hold while it dealt with an employee’s grievance.
Disciplinary hearing - Pointers

• ‘Where an employee raises a grievance during a disciplinary process the...process may be temporarily suspended...to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.’ (Paragraph 46, Acas Code)

• Consider the content of the grievance in detail - will it have bearing on fairness of outcome? Is the employee challenging impartiality/integrity of investigation/alleging evidence is incomplete? If so, it is more likely to be appropriate to tackle these issues before proceeding.

• If the grievance is part of employee’s defence it will be appropriate to hear this at the disciplinary hearing.
Disciplinary hearing - Pitfall

• You receive a specific request for attendance of a witness at the hearing...

• Case example:

  Lewis v Governing Body of Tai’rgwaith Primary School ET1601441/18

  – While it was not open to employer to force the attendance of witnesses who had left employment it was not beyond it to encourage the attendance of relevant witnesses.
Disciplinary hearing - Pointers

• Tread carefully when dealing with requests for the attendance of witnesses

• Where there are differences in available evidence, or allegations are likely to be career ending if proven, reasonable efforts should be made to secure the attendance of witnesses at hearings
The Outcome
Disciplinary outcome - Pitfall

• When you are faced with conflicting evidence you conclude that a witness has no reason to lie...

• Case example:

  *Salford Royal NHS Foundation Trust v Roldan [2010]*  
  *EWCA Civ 522*

  - An employer faced with a conflict of evidence does not always have to decide whether “it believes” or “disbelieves” one person over another
Disciplinary Outcome - Pointers

• Don’t make assumptions

• Question the reliability of evidence - do any elements need further enquiry?

• Review the evidence from an outside perspective
Disciplinary outcome - Pitfall

• Failing to communicate a decision to an employee appropriately

• Acas Code:
  - ‘After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing’ (paragraph 18)
  - Further detail on content - paragraphs 21 - 22

• Section 92(1) Employment Rights Act 1996
  - Employees with 2 years’ service have the right, on request, to a written statement of reasons for dismissal
Disciplinary outcome - Pointers

*Crucial evidence in the employment tribunal*

- Clearly set out the allegations, the findings in relation to each allegation, the factual basis, and the reasons for the decision - is this all backed up? Is employee aware of all the allegations?
- Confirm any previous warnings and whether they have been taken into account
- Confirm details of warning or dismissal given (e.g. length of warning, termination date etc.) and where any warning will be stored.
- If dismissal - confirm any details for monies due and payment details
- Provide instruction as to appeal
Disciplinary outcome - Pitfall

• Using warnings oppressively...

• Case example:

*Alexander Russell plc v Holness EAT/677/93*

- employer may be in breach of implied term of mutual trust and confidence
Disciplinary outcome - Pointers

- Acas Code - recommends that employers should usually be given at least one chance to improve (in other words, a warning) before a final written warning is given (paragraph 19).
- Have a clear staged warning structure in a disciplinary procedure
- Moving straight to final written warnings will only be appropriate for serious misconduct e.g. where an employee’s actions have, or could, cause serious harm to the organisation
The Appeal
The Appeal

• ACAS Code of Practice affords the right of appeal if the employee feels:
  – the disciplinary outcome was too severe
  – any part of the disciplinary procedure was wrong or unfair
  – there is new evidence to show

• Failure to appeal before submitting an application to the ET for unfair dismissal
  – ET may reduce any compensatory award by up to 25% if:
    • if failure to appeal was unreasonable
    • just and equitable in all the circumstances
Appeal - Pitfall

• Review or rehearing and changing the sanction?

• Example case:
  – Employee submits generic appeal stating that she wishes to appeal against the decision to dismiss her.
  – When asked she provides grounds of appeal she states that the disciplinary chair:
    • failed to adequately consider the mitigating evidence in respect of one allegation
    • there were procedural irregularities
Appeal - Pointers

- Ensure grounds of appeal are clear
  - if not, ask for details
  - if they relate to singular allegations only – review those matters only based on the available evidence only
  - if they relate to procedural irregularities, there should be a rehearing - *Taylor v OCS Group Ltd [2006] IRLR 613*

- Sanction
  - uphold
  - reinstatement – vanishing dismissals
  - contractual right to demote? If not, is this an option?
    - *BBC v Beckett [1983] IRLR 43 & Roberts v West Coast Trains Ltd [2004] IRLR 788*
Appeal Pitfall

• New evidence or allegations come to light
  – related
  – unrelated

• Example case:
  – Employee dismissed for conduct. On appeal:
    • new evidence is discovered by the appeal chair that was not considered at disciplinary
    • a new allegation comes to light that would give rise to GMC dismissal
Appeal - Pointer

• New evidence
  – employee opportunity to consider?
  – cannot maintain a decision on facts only known at disciplinary
  – evidence must be considered in justifying a dismissal (even if the evidence available at the disciplinary hearing would not have justified it) – even in a review hearing - *Arriva North West & Wales v Colebourn UKEAT/0439/05*

• New allegations
  – ET can only consider new evidence when assessing fairness of the original reason for dismissal – not a new reason
A Common Pitfall - Waiting on criminal charges

• The burden of proof in criminal and employment matters is different
  – beyond reasonable doubt V reasonable believe

• Example case:
  – employee has been stealing from his employer by engaging a consultant to undertake work on the company’s behalf
  – employee is the consultant and accepting payment
  – police are notified and investigation commences – can the internal investigation also commence?
Waiting on Criminal Charges - Pointers

• Consider

  -- *Ali v Sovereign Buses (London) Ltd UKEAT/0274/06*:
  • practically to wait
  • size and nature of the employer's business/number of employees
  • provision made in the terms of employment
  • employee must be given the opportunity respond
  • no rule that, once employee charged with a criminal offence, an employer cannot dismiss him if the employee is advised to say nothing until the trial
  • where the employer only learns of a problem when the police advise that they are bringing charges against an employee, the employer should still undertake an investigation.

  -- *North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387*
Contact us

Keith Land

Title: Partner
Tel: 0191 226 4892
Thank you