



XpertHR Podcast

Original XpertHR podcast: 21 January 2016

- Susan Dennehy: Hello and welcome to this week's podcast with me, Susan Dennehy. Frequent absences and poor timekeeping are a source of irritation for employers. In a recent case before the employment tribunal, an employer had decided that enough was enough and dismissed their employee. To discuss the outcome of that case and poor timekeeping generally is senior employment law editor Susie Munro. Good morning, Susie.
- Susie Munroe: Hi, Sue.
- Susan Dennehy: Before discussing the case, shall we start by looking at the issue of poor timekeeping generally? If an employee is late because they frequently oversleep, for example, the employer might feel more justified in starting a disciplinary investigation than if there's a reason that's out of the employee's control. So what if an employee's late because of public transport delays, for example? How far should the employer be expected to tolerate lateness like that? [0:00:53.2]
- Susie Munroe: Well, no matter how organised an employee tries to be, there's always going to be some times when they're going to be late for work because of reasons outside their control. So, it might be unusually bad traffic or cancelled trains, and realistically employers might have to accommodate occasional late arrivals that are outside of the employee's control. Depending on the nature of the business, some employers can be more flexible in their approach to timekeeping. So if an employee has a role where it's not time-critical, it doesn't make a difference when the work gets done, it might be possible for the employer to allow the employee to just make up the time at the end of the day and it might not necessarily be seen as a disciplinary issue if somebody is occasionally late for work. It's really going to depend on the culture of the business.
- Susan Dennehy: And you mentioned there the role of the employee. Wouldn't a lot depend on their role? [0:01:45.3]
- Susie Munroe: Yes, so the position's going to be different for somebody if they've got to be there for client meetings or if there's going to be nobody to answer the phone if they're late. Also, if they're a keyholder, obviously they've got to be there on time to open up.
- Susan Dennehy: An employer may be able to accommodate occasional lateness, but if it happens frequently it may cause operational difficulties for the employer. [0:02:05.3]

Susie Munroe: Yes. So, employers are entitled to address lateness as a serious issue, even where the employee could argue that it's not really his or her own fault, if it was outside of their control. Ultimately, it is for the employee to make arrangements to get to work on time. But it does depend on the nature of the business and the employee's role. The important thing is that each employee knows the approach that the employer is taking and that they know the consequences of any lateness. So they have to be made aware if it is going to be a disciplinary issue.

Susan Dennehy: So having a policy in place will be important and applying it consistently is important, as always. We'll be looking at this in more detail in a moment when we look at the recent tribunal case I mentioned at the beginning, that included difficulty with public transport. A tricky area for employers is where an employee's timekeeping is affected by health issues. What should an employer do in that situation? [0:02:57.3]

Susie Munroe: So, the starting point is always going to be to discuss it with the employee to see if there is an underlying reason for the lateness that's connected to the employee's health. If a health issue is preventing the employee from being able to get to work on time, then it's possible that that is a disability under the Equality Act, so the employer might have a duty to make reasonable adjustments. So a reasonable adjustment might be to adjust the employee's start time or to allow flexibility or adjusting their role so that it's not essential that they turn up at a particular time if that's difficult because of their disability or health issues. So basically it would mean not applying the disciplinary policy strictly to the employee's timekeeping.

But even if the employee isn't disabled within the meaning of the Equality Act so, for example, if the health condition does cause them problems but it's not a long-term condition, then again the employer should discuss it with the employee and they can still consider making temporary adjustments so that the employee isn't necessarily expected to keep to the same timekeeping standards as if they didn't have the health problems.

Susan Dennehy: And how about the role of flexible working? [0:04:08.9]

Susie Munroe: Adding an element of flexibility to the working pattern could be a reasonable adjustment but it might be that the employee themselves makes a request for flexible working, for a later start time for example. If it's a statutory request then the employer has to consider it, if the employee's got the required service, but the employer can turn down a request if there are business reasons within the statutory framework. So, for example, if it would affect the employer's ability to meet customer demand if the employee had a different start time, then that would be one of the reasons for turning it down. But it's definitely something to consider if there is an underlying reason for the lateness that could be addressed by an adjustment to the working pattern, then that might be the answer.

Susan Dennehy: And looking at procedures for dealing with late arrivals, different employers are going to have different approaches to how formal these will be, aren't they? [0:05:00.5]

- Susie Munroe: Yes. So, some businesses will have a clocking in and out system. So those employers will know exactly when people are arriving. They'll know if somebody is just a few seconds late. Others might only start to record arrival times if they've noticed that there's an issue with particular employees. But the important thing is to have procedures in place and practices in place to enable lateness to be dealt with consistently. So keeping records and having an informal word with any employee who's got a certain number of incidents of lateness can help avoid employees thinking that they're being unfairly singled out. And it might help to have a policy to require employees to telephone in if they know that they are going to be late, and that can help to discourage lateness. It just makes it clear that employees are expected to make an effort to be on time and that it is seen as being important.
- Susan Dennehy: A big concern for some employers is that they've turned a blind eye to employees being late over a period of time and it's going to be much more difficult for them to take action at a later stage if it does become a problem. What should employers do in that situation? [0:06:05.8]
- Susie Munroe: Yes. So, if an employer wants to enforce a strict timekeeping policy, then it's important to deal with any timekeeping issues informally to begin with, to avoid them escalating or to avoid it being seen as being acceptable to be a little bit late.
- Susan Dennehy: What's the best way to approach that informal conversation? [0:06:24.1]
- Susie Munroe: So even though it's an informal conversation, it's important that the employer makes sure that they're speaking to the employee in private and they should be really aware of the kind of language that they're using. So avoid generalisations like, 'You're always late.' It's easier to have records to actually refer to, so having records can make the conversation easier. You can point out patterns, if you can show that they're more likely to be late on a particular day of the week and you can show that there is actually a genuine problem rather than the employee getting the impression that they may be being picked on unfairly.
- Susan Dennehy: As you say, having instances of lateness to show to the employee will show the employee that you are actually monitoring the situation and it's not just a general sense of disapproval with them. [0:07:07.7]
- Susie Munroe: Yeah, it shows that timekeeping is an important issue for the organisation and that monitoring is taking place, if you've got those records to refer to. And also referring to the organisation's policy on timekeeping can help with that kind of conversation, as long as you can see that the policy is being applied consistently. So employers should use open questions to establish if there's an underlying reason for the lateness and actually listen to what the employee says to see if there is actually something that can be done to help the employee get to work on time. Ask the employee if he or she can think of anything that he or she could do to improve the attendance levels. And importantly, even though it's an informal conversation, the employer needs to keep a record of the conversation in case things don't improve and there is more formal action in the future.

Susan Dennehy: As you say, it may be necessary to move on to take formal action in those sort of circumstances. [0:08:01.7]

Susie Munroe: Yes, if the problem persists and it's not enough just to talk to the employee informally. It's important not to miss out stages in the disciplinary procedure. Even if it's clear that the employee has been seriously late on a number of occasions and that's on record, you still need to go through the stages. So, first of all, carry out a disciplinary investigation, and that might involve establishing all of the instances of lateness, looking at the reasons that the employee has given, checking the previous disciplinary record to see if he or she has got any existing warnings, and the manager should consider if there are any mitigating circumstances that he or she is aware of. Importantly, the employer, or whoever's doing the investigation, needs to make sure that they're acting in line with any policies and procedures within the organisation on timekeeping.

Susan Dennehy: And if having investigated the situation, if the conclusion is that a disciplinary hearing is required, can you tell us what that would involve? [0:08:58.4]

Susie Munroe: Yes, so a disciplinary hearing would involve putting the details of the lateness record to the employee, giving him or her the opportunity to explain any reasons for the lateness or mitigating circumstances. So you may have already gone through this informally with the employee, but it's important not to miss out the formal hearing stage of the procedure and to really listen to the employee's side of things. And then after the hearing, the employer should decide whether or not disciplinary action is actually warranted, taking into account any mitigating circumstances. And again it's important to apply the particular disciplinary policy, whether that sets out what the particular action should be. So, it might be that the outcome would be a formal written warning, if there aren't any previous warnings on the employee's file.

Susan Dennehy: And what form should that formal warning take? [0:09:48.9]

Susie Munroe: Again, it depends on the organisation's own disciplinary procedure. That might set out the format for such a warning. And it's always important to follow the organisation's own rules. But generally it should set out the level of improvement that's required. So it might be that the employee will be required to have no more instances of lateness within a particular period or no more than a certain number of instances of lateness. And it should set out the consequences if that improvement isn't made. So that would be that the next stage of the disciplinary procedure would be triggered. And it should set out the period of time during which that warning will remain live for disciplinary purposes. And then once the warning has been given, it's important that the employer gives the employee the right to appeal.

Susan Dennehy: If the employee's still late for work, say if he or she is still affected by public transport delays, can the employee be dismissed? [0:10:41.1]

Susie Munroe: So, dismissal should be the last resort. The employer has to give the employee time to improve and support if there are any underlying causes that can be addressed. But yes, if a fair procedure has been

followed and the problem persists, then the question will be, 'Is it reasonable in all the circumstances to dismiss the employee because of his or her lateness?' So there would be a potentially fair reason for dismissal that would be the employee's conduct, ie his or her lateness.

Susan Dennehy: Now we're going to look at a recent employment tribunal decision that shows one employer's approach to dealing with a persistently late employee, *Ghartey and Royal Museums Greenwich*. Can you tell us the background to that case? [0:11:22.3]

Susie Munroe: So, this was an employment tribunal decision, not a decision of the higher courts, so it doesn't set a precedent. But it's a useful example of how a tribunal approached the question of whether or not a dismissal for persistent lateness was fair. So, Mr Ghartey was a long-serving employee, he'd been there for over twenty years. He was a visitor assistant at the museum, and guidelines were issued for that particular role that set out detailed requirements regarding attendance and timekeeping. Attendance was said to be a key performance indicator and staff were made aware that they had to be ready for duty at 9.30am for a daily briefing and that if they arrived after 9.30am they would be recorded as late. There was a policy in place that they should call into the office by 9.15am if they were running late. So there were lots of procedures in place and it was made clear that timekeeping was important for this particular role. And the tribunal accepted that these daily briefings were a very important part of the effective running of the gallery.

Susan Dennehy: In that case, the employer had to change the order of the roster if staff weren't there for the entire briefing in the morning, so it was inconvenient for the employer in those circumstances. [0:12:32.2]

Susie Munroe: Yes. I think in the case it said that that might be a possibility that they would have to change the roster. So yeah, the basic point is that the employees knew that it was important and there were good reasons for requiring the employees to be there for 9.30am. So Mr Ghartey changed his routine. He used to drive to work but he changed to getting public transport on his GP's advice because of his angina, and his new journey involved getting either three buses and the Docklands Light Railway or four buses. So there was no doubt that it was a difficult journey and there was always room for all kinds of delays.

So, before beginning disciplinary action, the employer spoke to Mr Ghartey informally and formally about his lateness and he was aware that lateness could lead to disciplinary action.

Susan Dennehy: So his lateness did lead to disciplinary action in this case. What kind of procedure did the employer follow? [0:13:24.7]

Susie Munroe: There were issues with his lateness and sickness absence and other absence reporting issues. So there were informal meetings about his high levels of sickness absence and unauthorised absence. Then he was written to about his lateness and he was told that his timekeeping would be monitored and disciplinary action would be taken if there wasn't any improvement. There was then a first written warning about

unauthorised absence and the following year there was another disciplinary hearing about absence reporting and he was given a final written warning. Soon after the final warning there was a drive in the organisation on late attendance, and that resulted in another disciplinary meeting about his lateness and Mr Gharthey was then dismissed, taking into account that he was already on a final warning.

Susan Dennehy: Now the employee in that case did have angina and he had some sort of issue with his back as well. We've already discussed where there's an issue with a claimant's health. Was this a case where the claimant's health was a cause of his lateness? Should the employer have made any reasonable adjustments? [0:14:26.7]

Susie Munroe: Mr Gharthey did initially put in a claim for disability discrimination but that was dropped so that wasn't addressed by the tribunal. At the appeal against his dismissal he had claimed that some of the instances of lateness were caused by his angina, but he'd previously confirmed in a disciplinary meeting that the angina was irrelevant to his lateness. So the employer hadn't got an occupational health assessment. But the tribunal held that that didn't make the dismissal unfair. The tribunal found that the employee was unconvincing when he raised his health issues only at the appeal stage.

Susan Dennehy: So it was reasonable for the employer to dismiss in the circumstances? [0:15:04.2]

Susie Munroe: Yes. So, the tribunal ran through its reasons for finding that it was reasonable for the employer to dismiss in these particular circumstances, and it's a useful reminder of the basics for a fair dismissal. So the tribunal's reasons were that: the claimant knew that lateness could lead to disciplinary action, and that's always going to be important; there had been a significant number of late attendances; he had a first written and a final written warning on his record; the tribunal found that a fair procedure had been used throughout; and also that the dismissing managing and the appeal manager had both handled the proceedings in an impartial way.

The tribunal did mention that there was only one instance of lateness on Mr Gharthey's part after he'd been given the final written warning, and the tribunal said that this seemed harsh but that it wasn't enough to make the dismissal unfair.

Susan Dennehy: Thank you very much, Susie, for that very thorough look at poor timekeeping. That brings us to the end of this week's podcast, which you've been listening to with me, Susan Dennehy. We're back again next Friday but until then, it's goodbye from us.