



XpertHR Podcast

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- Susan Dennehy: Hello and welcome to this week's podcast with me, Susan Dennehy. This week we're taking a look at misconduct dismissals, where the dismissal takes place after a series of warnings.
- With me today is Stephen Simpson, Principal Employment Law Editor at XpertHR, who will be using a recent case to illustrate how employers can handle a series of minor incidents, which in this case culminated in a fair dismissal. Hello Stephen.
- Stephen Simpson: Hi Sue.
- Susan Dennehy: What types of misconduct are we talking about here? [0:00:35.7]
- Stephen Simpson: So we could give a scale of bad behaviour at work, from the most minor thing, like an employee taking some stationery, to something that's probably at the opposite end of the scale – say, physically attacking a colleague. We're talking about incidents really that are somewhere in the middle of that scale.
- Susan Dennehy: So what might be characterised as minor misconduct? [0:00:51.8]
- Stephen Simpson: So things that are maybe serious enough for the employer to have to do something about it but not serious enough to constitute gross misconduct justifying dismissal.
- Susan Dennehy: Can you give us an example? [0:01:01.0]
- Stephen Simpson: A lot of these cases are going to revolve around somebody who's maybe seen as difficult to work with or has a temper and flies off the handle easily but never really goes that step too far that means that they commit gross misconduct. So you could have an employee where there's been a number of incidents in team meetings or with their manager or where they're frequently getting into arguments with people, and it might perhaps involve swearing or mild insults. So we can have a look at an example shortly.
- Susan Dennehy: What are the key issues for employers when this happens? [0:01:27.8]
- Stephen Simpson: So first really, making sure that the employee knows that they're doing something wrong. And secondly, dealing with the issue informally, where possible. And then thirdly, issuing a series of warnings so that the employee can improve their behaviour. And then fourthly, dismissing as a last resort. So there are the four key things, I think.

Susan Dennehy: And taking those in turn, why is it so important for the employee to be made aware of their behaviour? [0:01:48.4]

Stephen Simpson: Well especially with this type of behaviour where it's somewhere in the middle of the scale, it's vital because the employee may not even be aware they're doing anything wrong. For example, one person's lively discussion or expression of an opinion, or strong opinion, could be seen by others as a fully blown argument. So inform the employee if they're upsetting others.

Susan Dennehy: Well that could be quite a difficult conversation. How should an employer go about doing that? [0:02:09.7]

Stephen Simpson: So it'll likely involve the employee's manager, pulling the employee to one side and simply pointing out that the employee is doing something inappropriate. That manager might point out where the employee is breaking the rule and ask them not to repeat the behaviour. In a lot of cases, the employee may be surprised that someone's made a complaint.

Susan Dennehy: And would HR be involved at that stage? [0:02:29.2]

Stephen Simpson: Really it's unlikely at that stage. That's the sort of thing that managers should be trained to deal with informally themselves in the first instance. It's a good idea for the manager to keep a brief record of those discussions. The record could show the date and time of the meeting, set out briefly what was discussed, and record the fact that there was no formal action taken.

Susan Dennehy: And why is it a good idea to do that? [0:02:48.3]

Stephen Simpson: Well if it does eventually become necessary to take formal action, it's very helpful to know when the problem was first identified and when the employee was first alerted to the inappropriateness of the behaviour.

Susan Dennehy: And is the advice then that workplace incidents should be dealt with informally wherever possible? [0:03:02.1]

Stephen Simpson: As I'm sure all listeners will know by experience, it's always better to deal with things informally before they get out of hand. The Acas code states as much pretty early on. In fact, in the foreword to the code it recommends informal resolutions to workplace problems where possible.

Susan Dennehy: But what if the employee keeps committing minor misconduct? [0:03:18.8]

Stephen Simpson: Then it may be necessary to move on to a formal warning if things don't improve.

Susan Dennehy: And what might a series of warnings look like? [0:03:25.3]

Stephen Simpson: So formal discussions are in effect. There may be a formal verbal warning and if that doesn't work, a first written warning, and if that doesn't work then a final written warning. So three stages is very typical.

Susan Dennehy: And does it always have to be three stages? [0:03:37.7]

Stephen Simpson: No, it's really just an example. For example, there may be cases of more serious misconduct where it's appropriate just to go straight to a final written warning.

Susan Dennehy: Why do employers commonly go wrong with warnings? [0:03:48.2]

Stephen Simpson: So it can be tempting for the employer to go straight to a warning without following the correct procedure. There should be an investigation looking at the surrounding circumstances, the allegation should be put to the employee and there should be a disciplinary hearing with the right to be accompanied, even if the highest sanction that could come out the hearing is a warning.

Susan Dennehy: Is there anything else? [0:04:04.4]

Stephen Simpson: So the content of the warning should be clear by that I mean it should be clear how the employee's behaviour needs to improve, with a clear length of time for the warning to last. I think one year is fairly typical for warnings to last for. Perhaps most importantly, it should be made clear to the employee what will happen if there's further misconduct, for example if the employee's already on a final written warning, it should be made clear to them that the next stage is dismissal. And of course the employee should be allowed to appeal against the warning.

Susan Dennehy: So the ultimate outcome could be dismissal? [0:04:32.2]

Stephen Simpson: Yes, if following a series of formal warnings the employee's misconduct continues, the employer may be able to dismiss the employee fairly if, of course, it follows a correct procedure, with an investigation, disciplinary hearing and opportunity to appeal.

Susan Dennehy: Now I know that you have an example for us from recent case law. Can you tell us a bit about that case? [0:04:50.0]

Stephen Simpson: Yes. So we've just reported a first instance decision in a case called *Cogman v Stannah Stairlifts*. Although the case isn't binding, it's quite a neat example of how one employer dealt with this situation. The employer was faced with the employee committing a number of separate instances of misconduct, none of which in isolation were enough to justify dismissal.

Susan Dennehy: And what were the three incidents? [0:05:09.5]

Stephen Simpson: The first involved the claimant getting into an argument with a canteen assistant to whom he was verbally abusive. Apparently he got angry over the poor standard of the salad. The incident was investigated and he was given a first written warning after a disciplinary hearing. The warning was to stay live for one year and he was warned of the consequences of further misconduct.

Susan Dennehy: And what about the second incident? [0:05:30.8]

Stephen Simpson: Three or four months later he allegedly threatened a colleague during an argument. He in fact threatened to flatten the colleague and that was witnessed by someone else, and he was given a final written

warning then to remain on his file for one year and instructed that further misconduct during this period could result in dismissal.

Susan Dennehy: And how about the third incident? [0:05:47.7]

Stephen Simpson: So five or six months after that he was accused of aggressive and animated behaviour at a business briefing. Apparently there was a new policy banning mobile phone and headphone use during machinery operation and he was very upset about this new rule.

Susan Dennehy: And what did he actually do at the meeting? [0:06:02.5]

Stephen Simpson: So he was alleged to have called the decision 'fascist', talked over others and refused to be interrupted, ignored attempts to calm him down and eventually walked out of the meeting. After investigation he was dismissed and that decision was confirmed on appeal. The management took a pretty dim view of his actions, although a number of colleagues did defend him and attempted to play down the incident. And the claimant said that he was simply stating his opinion about the new rule.

Susan Dennehy: So he was dismissed and he claimed unfair dismissal? [0:06:28.2]

Stephen Simpson: Yes, he claimed unfair dismissal but that was pretty easily rejected by the employment tribunal.

Susan Dennehy: And on what basis did the employment tribunal reject his claim? [0:06:36.0]

Stephen Simpson: So the key was that the tribunal concluded that the warning was justified and appropriate and that the employer had followed a fair procedure. There was a detailed enough investigation, the employee was warned at various stages and both the disciplinary hearings and the appeal hearings were properly conducted.

Susan Dennehy: So all in all then, a model approach from the employer? [0:06:52.3]

Stephen Simpson: Yes, it's a really good example for employers to look at, because I think it's a textbook approach to dealing with someone who commits a series of more minor indiscretions that combine to lead to a fair dismissal.

Susan Dennehy: Thank you very much for that, Stephen.

Stephen Simpson: Thanks, Sue.

Susan Dennehy: There are more resources on our website, including the case report in the law report section that Stephen's just mentioned. There's also a line manager briefing on misconduct and a section on misconduct in the unfair dismissal section in the employment law manual. And of course, lots of FAQs.

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.