

## XpertHR Weekly Podcast

Original XpertHR podcast: 22 May 2015

- CLIO SPRINGER:** Hello and welcome to XpertHR Weekly with me, Clio Springer. This week we go back to basics with a look at the disciplinary process in the context of dismissals, and in particular the importance of ensuring that managers comply with the organisation's own disciplinary procedure. We discuss a recent case in which the disciplining panel failed properly to apply the employer's procedure and how this impacted on its defence in the ensuing unfair dismissal claim.
- I'm joined by Employment Law Editor, Fiona Cumming, who wrote up the case. Hello, Fiona.
- FIONA CUMING:** Hello, Clio.
- CLIO SPRINGER:** Well first of all, while many employers will already have a well-established and agreed disciplinary procedure, I suppose it goes without saying that the next thing an employer needs to get right is to make sure that the managers who carry out the disciplinary proceedings know what's involved and what they need to do. And this is particularly the case where dismissal is a possibility.
- FIONA CUMING:** Yes, it's crucial. And as you've mentioned, I'm going to talk about a recent case where the importance of this was really emphasised, and the case is a useful reminder that managers making disciplinary decisions really must understand the rules and the procedures that they are applying, because if they don't understand them properly then there's a real risk that they will misapply the procedure.
- So before holding a disciplinary meeting, the disciplinary manager must be familiar with their own procedure to make sure that any action they take is actually allowed under that procedure. And of course they also need to be familiar with the Acas Code of Practice on disciplinary procedures, as well as, of course, the Acas guide itself.
- CLIO SPRINGER:** Okay, so can you just remind us, then, of the significance of the Acas Code? [0:01:37.5]
- FIONA CUMING:** Yes. Well the code sets out the principles for handling disciplinary situations in the workplace. Now failure to follow the code doesn't

of itself make an employer liable, but employment tribunals are required to take it into account when considering procedural issues. And it also has an effect on the level of a compensatory award, as tribunals can increase that by up to 25% if they find an unreasonable failure by the employer to comply with the code, and equally they can adjust it downwards by up to 25% if there's an unreasonable failure by the employee to comply with it.

- CLIO SPRINGER: So it all really comes down to reasonableness? [0:02:13.5]
- FIONA CUMING: Yes, absolutely. With reasonableness, it's important not just for the purposes of the code, but also in respect of any dismissal because for a dismissal to be fair, the employer must show that it acted reasonably in all the circumstances of the case and the circumstances do include a requirement that an employer must adopt a fair procedure before it takes a decision to dismiss.
- CLIO SPRINGER: And following the Acas Code, then, will help to demonstrate that reasonableness? [0:02:38.7]
- FIONA CUMING: Absolutely.
- CLIO SPRINGER: Okay, so can you give a couple of examples of the types of traps that employers tend to fall into when going through a dismissal process? [0:02:46.4]
- FIONA CUMING: Yeah. I'll probably give the two most common examples, and this is where an employee complains that the disciplinary sanction that he was given was too harsh or wasn't appropriate in the circumstances. And another problematic area can be where there's confusion over what was the actual reason for the dismissal.
- CLIO SPRINGER: Okay, well if we look at disciplinary sanctions first, what should disciplinary managers consider before deciding on any disciplinary penalty? [0:03:11.6]
- FIONA CUMING: Well the first thing they really must do is to look at their organisation's own disciplinary rules, really to get guidance on what the appropriate penalty would be for the type of misconduct or unsatisfactory performance that's under consideration. And then managers should consider what type of penalty has been imposed in the cases in the past, and this would involve also checking the employee's disciplinary record, his or her general work record, their position (you know, their level of seniority or not), and also their length of service.
- CLIO SPRINGER: And are there any other matters that they should be taking into account? [0:03:45.1]

- FIONA CUMING: Well as always, each case always needs to be looked at in its own particular circumstances, so this means that similar misconduct or capability issues, they don't always merit the exact same disciplinary action, and this means that an employer must consider any mitigating circumstances.
- CLIO SPRINGER: And could you give us some examples, then, of the type of mitigating circumstances that employers ought to be considering? [0:04:08.3]
- FIONA CUMING: It could be matters relating to, say, the employee's health, or they might be having domestic problems. Or indeed whether the behaviour in question arose because the employee had been provoked. Or if it was a rule that had been breached, whether or not the organisation had actually brought that rule to the employee's attention.
- CLIO SPRINGER: Okay, and turning to the other example you gave, of a potential failing when carrying out a dismissal and confusion over the reason for the dismissal... [0:04:35.0]
- FIONA CUMING: Sometimes employers struggle to categorise the type of behaviour which has given rise to the allegation, and they can be unsure as to whether or not it's actually a conduct or a capability issue, or indeed whether it's a matter of misconduct or gross misconduct.
- CLIO SPRINGER: And why does it matter that you get the label 'conduct' or 'capability' right? Why is that important? [0:04:55.5]
- FIONA CUMING: Well because this will determine the procedure to be followed and if an employee is dismissed for the wrong reason, then it can make the dismissal unfair.
- CLIO SPRINGER: Okay, so can you remind us, then, in very general terms, what the distinction is between 'conduct' and 'capability'? [0:05:10.1]
- FIONA CUMING: Of course. Well capability – or rather, I suppose, lack of capability – that's where no matter how hard an employee is trying, he or she is just simply unable to perform the job to the standard required by the employer. If an employee fails to come up to the required standard, say as the result of his or her own carelessness, negligence or lack of effort, then that can be regarded as misconduct because such behaviour is, to some extent, within the employee's control. And of course misconduct could be a breach of a company rule or a policy.
- CLIO SPRINGER: And then moving onto the distinction between 'misconduct' and 'gross misconduct'? [0:05:47.7]
- FIONA CUMING: I guess that here it's the perfect example of why it is important for disciplinary managers to be familiar with their disciplinary rules and

procedures, and this is because it's up to each organisation, really, to define what type of conduct it regards as 'misconduct' and 'gross misconduct' and of course to ensure that they communicate this clearly to all the employees in the disciplinary policy.

But gross misconduct, well that's always going to be conduct which is so serious, or that it's got such serious consequences, that it may call for dismissal without notice for a first offence.

CLIO SPRINGER: So effectively summary dismissal? [0:06:23.3]

FIONA CUMING: Absolutely.

CLIO SPRINGER: Okay. So an employer should make clear in its policies and rules what types of behaviour will be regarded as gross misconduct, entitling it to summarily dismiss without notice? [0:08:33.1]

FIONA CUMING: Yes, Clio.

CLIO SPRINGER: And is there a legal definition of 'misconduct'? [0:06:36.3]

FIONA CUMING: No, and there's no legal list either, of the types of behaviour that may be regarded as misconduct. Because here, much actually depends on the type of business operated by the employer. And a range of circumstances, such as the kind of work performed. So for example, a catering organisation, that will have strict rules in its policy regarding the handling of food because they'll need to comply with their responsibilities under the food safety legislation. And equally, publicans will be mindful of the licensing laws.

CLIO SPRINGER: Okay, well we've discussed why it's important for disciplinary managers to be familiar with their disciplinary policies and I think this leads us to the case that we mentioned earlier. [0:07:16.0]

FIONA CUMING: Indeed. And this is the case of Thomson v. Imperial College Healthcare NHS Trust and as we've discussed, well it will highlight how important it is for a disciplinary manager to know exactly what they are doing.

CLIO SPRINGER: Okay, so can you give us a little bit of background to the case, then? [0:07:31.8]

FIONA CUMING: Yes. Well Dr Thomson was employed as a consultant neonatologist and in March 2012 she received a first written warning for bullying behaviour. Very shortly afterwards the trust had to investigate three further allegations of bullying which had been made against her by members of staff.

CLIO SPRINGER: And did this investigation lead to a disciplinary hearing? [0:07:35.5]

FIONA CUMING: Yes it did. Dr Thomson attended one and it was chaired by Dr Palazzo, a consultant anaesthetist. Now he had the required level

of seniority under the Trust's disciplinary policy, because this was a case concerning a fellow consultant, and Dr Palazzo, he didn't accept the mitigating reasons that Dr Thomson put forward, and his decision was that she would be summarily dismissed.

Dr Thomson appealed. That was unsuccessful, and she subsequently brought claims for unfair dismissal and disability discrimination in the employment tribunal.

CLIO SPRINGER: Okay, well for the purposes of our discussion today, it's probably most helpful if we focus on the unfair dismissal claim. So what was the tribunal's view on that? [0:08:33.0]

FIONA CUMING: Well the tribunal, it began first by considering the fairness of the process leading to the dismissal. And it found that Dr Palazzo had actually never conducted a disciplinary hearing before and he hadn't received any training in so doing. And the tribunal thought that the fact that Dr Palazzo was senior enough to chair a hearing wasn't itself sufficient because the tribunal said that fairness doesn't really depend on a box-ticking approach to procedures, but on a fair hearing. And in the tribunal's view, fairness required at the very least that the decision-maker be someone with experience and ability, commensurate to the circumstances of the case.

CLIO SPRINGER: So the tribunal found the process was unfair, then? [0:09:14.5]

FIONA CUMING: Yes it did. And having established that, the tribunal then moved onto consider whether the dismissal was substantively unfair. Now it took into account that Dr Palazzo had not thought that the three incidents either individually or taken together amounted to gross misconduct and he'd actually taken a decision to dismiss by taking into account the first written warning that Dr Thomson had received, and the tribunal found that this was contrary to the Trust's own disciplinary policy.

CLIO SPRINGER: And what did that policy say? [0:09:46.9]

FIONA CUMING: Well the policy said that the Trust was only able to dismiss for conduct that of itself fell short of amounting to gross misconduct if the employee had received a previous final written warning, and in this case Dr Thomson had actually only received a first written warning.

CLIO SPRINGER: So the tribunal found that the dismissal was also substantively unfair? [0:10:06.7]

FIONA CUMING: Yes. And the tribunal found that Dr Palazzo had actually departed radically from the Trust's disciplinary procedure and that his reasoning was 'fatally flawed and quite impermissible.' In short, in misinterpreting and misapplying the procedure, the tribunal thought

that Dr Palazzo had reached a decision which no decision-maker reasonably applying the Trust's disciplinary procedures could possibly have reached.

- CLIO SPRINGER: And was that the end of the case or was there an appeal? [0:10:35.3]
- FIONA CUMING: Well the tribunal hadn't found in Dr Thomson's favour in respect of her second claim, and this was her disability discrimination one. So she appealed that part of the decision and then the Trust cross-appealed the tribunal's finding of unfair dismissal.
- CLIO SPRINGER: Okay, well let's stick with the dismissal issue. Was that cross-appeal successful? [0:10:55.2]
- FIONA CUMING: No. The EAT dismissed it and it did so in actually quite resolute terms, and it found the tribunal's decision was unimpeachable. They said the tribunal had applied the law correctly and they'd been entitled to find that the absence of training or experience of Dr Palazzo was something that directly affected the fairness of the disciplinary proceedings.
- CLIO SPRINGER: Okay, so Fiona, what practical points can we take away from this case, then? [0:11:20.5]
- FIONA CUMING: Well, if you're an employer it's a reminder that you really must consider carefully who you are appointing to conduct a disciplinary hearing and, well, the fact that the disciplinary manager's at the appropriate seniority level is of course important, but it's not sufficient of itself, as you'll need to be confident that the disciplinary manager...well basically, he or she knows what they're doing.
- CLIO SPRINGER: Okay. But presumably the inexperience of a disciplinary manager and the lack of training will not of itself make a dismissal unfair? [0:11:52.1]
- FIONA CUMING: No, but if a manager fails to apply the employer's disciplinary policy properly, then it will do so.
- CLIO SPRINGER: And of course this case does show the importance of training on the disciplinary procedure. [0:12:02.0]
- FIONA CUMING: Absolutely.
- CLIO SPRINGER: And this case also raised another issue that employers have to grapple with, didn't it? [0:12:06.8]
- FIONA CUMING: Yes. And if you're an employer, you will be familiar with this problem. It's what to do when an employee raises a grievance during the disciplinary process. In this case, Dr Thomson had an

outstanding grievance and she argued that the Trust should have dealt with her grievance before progressing the disciplinary process. The tribunal disagreed and they said that there may be cases where procedural unfairness will result from a decision by an employer to complete the disciplinary process while a grievance is pending, but this is not one of them. And they made this finding on the basis that the tribunal found the disciplinary charges unrelated to the substance of Dr Thomson's grievance.

CLIO SPRINGER: And what was the Employment Appeal Tribunal's view on this? [0:12:49.6]

FIONA CUMING: Well the EAT didn't actually consider this point because they didn't need to, as they'd already found that the Trust had adopted an unfair procedure. However, helpfully though, the EAT has considered this very point in a recent case.

CLIO SPRINGER: Okay, so can you tell us a little bit about that case. Which case was it? [0:13:05.5]

FIONA CUMING: Well this was the case of Jinadu v Docklands Buses Ltd.

CLIO SPRINGER: And what was the background to that case? [0:13:12.6]

FIONA CUMING: Ms Jinadu was employed as a bus driver and Docklands became concerned about her driving skills and it asked her to attend a training centre for a driving assessment. She refused to attend, even though she was given more than one opportunity to reconsider her position, and as a result she was subjected to disciplinary proceedings and in the course of that process she made a number of allegations against her managers. But despite her grievances, Docklands pressed ahead with a disciplinary process and Ms Jinadu was dismissed for gross misconduct. And she appealed and the appeal wasn't successful and she brought a claim for unfair dismissal.

CLIO SPRINGER: And what was the tribunal's decision in this case? [0:13:54.6]

FIONA CUMING: Well the tribunal dismissed her claim and she appealed to the EAT. Now one of the grounds of her appeal was that the disciplinary proceedings should have been suspended to allow her grievances to be investigated properly.

CLIO SPRINGER: Okay, and did the EAT find in her favour on that ground? [0:14:10.5]

FIONA CUMING: No it didn't. It actually dismissed this ground very swiftly and it merited only one brief sentence in its decision. The EAT found that Docklands was not obliged to put the disciplinary investigation on hold until they had dealt with Ms Jinadu's grievances.

CLIO SPRINGER: Okay, so what can employers take from this decision? [0:14:30.5]

FIONA CUMING: Well the EAT's finding, it gives some reassurance to employers when they're faced with this knotty issue of what to do when an employee raises a grievance during disciplinary proceedings and the EAT's finding, although it is a very brief one, it shows that a dismissal will not necessarily be unfair if an employer presses ahead with disciplinary proceedings without resolving the grievance first. But this is with the caveat, of course, that each case is going to depend on its own particular facts and employers will need to be responsive to circumstances that suggest that suspending the disciplinary process to investigate a grievance would indeed be the fair and reasonable thing to do so.

CLIO SPRINGER: Thanks very much for that, Fiona.

FIONA CUMING: Thank you, Clio.

CLIO SPRINGER: You can read a write-up of both of the cases we talked about today in the Law Report tool on XpertHR. The first case we discussed highlighted the importance of organisations ensuring that managers who will be conducting disciplinary hearings receive proper training. There's a line manager briefing on employee misconduct on XpertHR, with an accompanying PowerPoint presentation which you can use for training purposes.

And that brings us to the end this week's *XpertHR Weekly*, which you've been listening to with me, Clio Springer. We'll be back next Friday, but until then it's goodbye from us.