
**XpertHR Podcast**

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Laura Merrylees: Hello and welcome to this week's podcast with me, Laura Merrylees. In this week's feature-length edition podcast, we're discussing some common areas of concern around the termination of employment. We'll be taking a look at disciplinary hearings, something that's relatively commonplace for many employers but that can frequently give rise to some tricky and complicated issues.

We'll also be focusing on two specific areas where unwary employers can fall foul of the law, namely probationary dismissals and automatic unfair dismissal.

I'm delighted to be joined today by two of our updating authors, Max Winthrop and Nicky Stibbs. Max is Partner and Head of the Employment Team at Short Richardson & Forth and is our updating author for the termination of employment chapter. Nicky practised as an employment lawyer for over thirteen years and now works as a freelance employment law writer, and is our updating author for the disciplinary and grievances chapter. Welcome to you both.

So starting with you, Nicky, what is the first thing employers should be thinking about when they're considering whether or not to discipline an employee? [0:01:01.6]

Nicky Stibbs: Well in keeping with the ACAS code, our first consideration's got to be whether the matter can be dealt with informally. But a word of caution. If a possible outcome *is* going to be a disciplinary sanction then we do have to follow a fair and formal process.

Laura Merrylees: Okay, so bearing that in mind, what can HR practitioners do to prepare themselves and make sure that they do in fact properly follow the formal procedure? [0:01:21.6]

Nicky Stibbs: So HR should always familiarise themselves with their own internal policies and procedures. These should reflect the ACAS Code but they may have some additional layers on them, such as specific time periods for carrying out different stages of the procedure.

It's also worth thinking about situations that might create difficulties for the employer. This could be the employee trying to throw the process off-track, such as by raising a grievance or objecting to a particular person being involved in the process.

Laura Merrylees: Yes, and employers often find that an employee raises a grievance during a disciplinary process; it can be a tricky issue and we'll come onto that later.

With regard to the personnel for the disciplinary process, it's important to identify independent persons early on, isn't it? [02:00.0]

Nicky Stibbs: Yes. Identifying somebody early on who's got the appropriate seniority and can be kept to one side as untainted for a later stage in the process can certainly help ensure a fair procedure and avoid delays later on. And the employee may have a legitimate objection to somebody if, for instance, the investigating manager is the employee's supervisor and the employee subsequently alleges that the supervisor has actually condoned the alleged misconduct.

It may also be necessary to bring some specialist knowledge to help understand the issues, for instance if this involves medical practices or complex finance regulations.

Laura Merrylees: I guess it is that planning ahead that can make all the difference to the process, isn't it? So an important point to note is that there are some key differences, though, between an investigation meeting and a disciplinary meeting. Can you just take us through them? [0:02:45.8]

Nicky Stibbs: Sure. It's really crucial that the employer distinguishes between the two. This is an express requirement of the code, as well as being a fundamental element of a fair process.

The investigating manager and the disciplinary manager have very different roles and if they get mixed up, it's quite likely this is going to result in an unfair process.

So turning to the purpose of the investigation meeting, this is purely fact-finding. It's about establishing the employee's side of the story.

On the other hand, the purpose of the disciplinary meeting is then to decide what, if any, sanctions are to be taken against the employee.

Laura Merrylees: Yes, and that is a very important difference. If sanctions are taken on the back of an investigation meeting alone, procedurally employers are likely to fall at the first hurdle, not least because an employee has the statutory right to be accompanied at a disciplinary hearing but not at an investigation hearing. So is it always the case, though, that an employer can refuse an employee the right to be accompanied at an investigation meeting? [0:03:37.6]

Nicky Stibbs: Well so long as it really is an investigatory meeting and no sanction is given or action taken against the employee, then that statutory right to be accompanied won't arise. But a word of caution, there are three areas to look out for here. Firstly, the employer's procedure may give the employee the right to be accompanied. Secondly, if the employee is disabled, depending on the disability it might well be a reasonable adjustment to allow a companion. And finally, if there are any communication difficulties then it might help the fairness of the process if you allow a companion.

Laura Merrylees: Of course. Now you mentioned that the investigation meeting is to establish the facts. So how in-depth does the investigation have to be? [0:04:14.5]

Nicky Stibbs: Well this is often the million-dollar question. It's going to vary depending on case-to-case and it's ultimately a judgement call for the investigating manager. A guiding principle, though, is that any sanction at the disciplinary stage can only be fair if the employer has carried out as much investigation as is reasonable in the circumstances.

Laura Merrylees: So what sort of issues should the investigator be looking at, for example? [0:04:35.8]

Nicky Stibbs: The investigating manager needs to consider whether there are any additional lines of enquiry to explore, any further evidence that needs to be obtained to either prove or disprove the allegations against the employee. This could include CCTV footage, email records or speaking to other witnesses.

Needless to say, the employer's got to be even-handed and seek out that relevant evidence, regardless of whether it's in the employer's favour or not.

Laura Merrylees: And what about previous warnings? Are they relevant during the investigation process? [0:05:03.0]

Nicky Stibbs: Yes. It's going to be worth the investigating manager's worthwhile to get hold of the personnel file. They could be looking at relevant issues such as previous warnings or recent appraisals. And it's also worth mentioning again that any language or disability issues need to be thought about to ensure that these don't adversely affect the fairness of the process.

Laura Merrylees: Yes, we'll be coming back to prior warnings in a moment.

Okay, so when the investigation is complete, the employer might decide to proceed with a disciplinary hearing. Now it's very important for the employer to warn the employee of the possible consequences of a disciplinary hearing, isn't it? [0:05:33.9]

Nicky Stibbs: Yes, absolutely. The employee really does need to know and understand the seriousness of the allegations against him or her. Warning the employee of the possible consequences is essential to the fairness of the procedure, otherwise any sanctions are likely to be perceived as unfair.

Further, failure to warn the employee could be a breach of the ACAS Code and could result in an up-lift of up to 25% to damages at tribunal.

Laura Merrylees: And I know this is something that's been occupying HR minds because of a couple of cases in this area recently. What role do HR take in that disciplinary process? [0:06:03.4]

Nicky Stibbs: HR practitioners really do need to be clear about the extent of their role. A couple of appeal tribunal cases in the last year or so actually made waves by warning HR against exercising undue influence, and these are the cases of Ramphal v the Department for Transport and Dronsfield v the University of Reading.

Laura Merrylees: And what do those cases mean for HR? [0:06:23.3]

Nicky Stibbs: Well in practice this means that the investigation report *has* to be the product of the investigating manager. So HR can advise on the law, procedure, process and even how similar cases have been dealt with in the past, but the real no-go areas are the factual findings and the investigating manager's culpability.

It's also worth bearing in mind that if there is an employment tribunal claim, any different versions of the report and those written communications that have gone between HR and the investigating manager will be disclosable as part of that procedure.

Laura Merrylees: Yes, and of course HR may well be a witness at the tribunal. If that's the case, they're going to have to explain their involvement also.

Now you mentioned earlier that tricky issue where employers often find that an employee raises a grievance in the middle of a disciplinary process. How should an employer deal with that? [0:07:07.6]

Nicky Stibbs: The employer's going to want to avoid delays and is also going to want to avoid the grievance process de-railing the disciplinary process, but the employee does have a right to redress and failure to deal appropriately with a grievance could in fact be a breach of the mutual duty of trust and confidence. Potentially this could allow the employee to resign and then claim constructive unfair dismissal, as well as being a breach of the ACAS Code on grievances.

And what's more is that the employer's approach to the grievance could in fact affect the fairness of the disciplinary process. So for example, if the grievance raises issues that are relevant to the disciplinary process, we don't want to just ignore those.

Laura Merrylees: Yes, and actually the ACAS Code gives employers some leeway as to how to deal with this sort of situation, doesn't it? [0:07:48.4]

Nicky Stibbs: Yes it does. So if we look at the ACAS code, all it states is that an employer may suspend the disciplinary process to hear the grievance or it can run the two concurrently. Somewhat surprisingly there's no further help from the non-statutory guidance that supports the code.

The employment appeals tribunal held in Jinadu and Docklands Buses that there is no strict legal obligation to suspend the disciplinary process. However, that's not the end of the story. So our first question to ask is, 'Is the grievance related to the disciplinary process?' If not, there's no need to suspend the disciplinary process. But if it is related to the disciplinary process then it may well need to be incorporated into the disciplinary process where appropriate. So this could be, for example, if the subject matter of the grievance relates to the employee's mitigation in the disciplinary.

Laura Merrylees: Okay. Now turning to another common issue, to what extent can past warnings be taken into account? There have been some tribunal cases recently on the employer's reliance on past warnings when they're considering the appropriate disciplinary sanction. In what way could an employer come unstuck when they're relying on a past warning, though? [0:08:54.0]

Nicky Stibbs: Well in the case of Way v Spectrum Care, the employer was caught out by relying on a live past warning, which the employee alleged was given in bad faith. So even though the employee hadn't exercised his right to appeal against that earlier warning, according to the employment appeal tribunal, the employer should not have relied upon it.

Laura Merrylees: And why was that? [0:09:11.9]

Nicky Stibbs: Well in this case the employee's allegation of bad faith related to the disciplining manager having had a conflict of interest in the earlier disciplinary process. He said that his manager can condoned his behaviour and then he subsequently received the warning. He also went on to allege that his employer discouraged him from exercising his right to appeal against the warning.

So the message from this is that employers do need to be cautious in relying on a past warning if the employee suddenly raises concerns about that earlier warning. Any concerns about the soundness or fairness of the earlier warning do need to be investigated and considered before the employer could safely rely upon it.

Laura Merrylees: And if a warning has expired, the employer can't rely on it at all, can it? [0:09:50.8]

Nicky Stibbs: That's correct. However, following the case of Airbus v Webb, it may be acceptable for an employer to at least be influenced not to exercise leniency when considering its response to the employee's subsequent misconduct.

So for example, if the employer could fairly dismiss an employee or just give a final written warning for something like a serious breach of its email policy, it may well be reasonable to decide not to be lenient but instead to dismiss the employee because the employee had been given a previous warning for a similar behaviour.

Laura Merrylees: Okay, that's interesting. So an expired warning can't therefore be relied upon in its own right, but it could still form part of the overall decision-making background. I guess an example would be that an employee tries to plead that they didn't know anything about the wrongdoing that they were accused of, but from an earlier warning you could see that they'd been warned of the consequences and had full awareness.

Turning to appeals now, what's an employer's starting point when dealing with an appeal against a disciplinary sanction? [0:10:45.9]

Nicky Stibbs: Well as ever, the employer needs to check the policy and procedure for any specific requirements and the Court of Appeal in Taylor v OCS Group Ltd suggests employers shouldn't get hung up on the differences between 'review' and 'rehearing'.

Laura Merrylees: Okay, so what points should an employer look at? [0:11:01.0]

Nicky Stibbs: Well generally speaking, the appeal will involve considering the employee's grounds of appeal, evidence that came out through the investigation, and those notes that were taken at the disciplinary

meeting. So the person hearing the appeal needs to satisfy him or herself that a fair procedure was followed. If any new, relevant evidence comes to light at appeal, by and large this should be considered and the employee should be given the opportunity to comment on it.

Finally, if there were significant procedural failings in an earlier stage of the process, it may be necessary to do a full re-run of the earlier hearing to correct earlier failings.

Laura Merrylees: Yes, and that's interesting, isn't it, as there was the recent case of Khan v Stripestar Ltd, which was about procedural failings, where the EAT gave some guidance on how far an appeal can go towards rectifying any shortcomings in the disciplinary process. Can you just tell us a little bit more about that case? [0:11:49.1]

Nicky Stibbs: Of course. The EAT made it clear there was no limit on the shortcomings in the disciplinary process that an appeal could not cure.

So this was a case of an employee being sacked after a very brief disciplinary meeting, and that initial process was wholly inadequate. So when the manager came to hear the appeal, he decided to adjourn the appeal and carry out a thorough investigation himself. The appeal was subsequently dismissed and the individual brought a claim at tribunal. Finally, the EAT held that the dismissal was, in fact, fair overall.

Laura Merrylees: And that's hugely helpful to employers, isn't it really, that there is that opportunity to put it right on appeal?

Well thanks very much indeed, Nicky. There is a lot of useful material here for our listeners to take on board.

Now turning to you, Max, we're going to talk about probationary dismissals but also more generally the risks that can arise when you're looking to dismiss someone with less than two year's employment – and that's of course the qualifying period to bring an unfair dismissal claim. So just kicking off with probationary periods, it's quite common for employers to have a probationary period for a new employee, but does it mean that the employer doesn't have to follow a disciplinary procedure for an employee on probation? [0:12:51.2]

Max Winthrop: Well it depends. The starting point here is, as usual, to look at the contract of employment. So logically, if an employer's got an elaborate disciplinary or dismissal procedure, it may want only to apply that procedure after an employee's completed the probationary period. But contracts of employment don't always exclude probationary employees from such a procedure, so if the contract gives the right to a full-scale hearing from day one in a disciplinary case, then the procedure could well apply, even if that employee is on probation.

Laura Merrylees: Okay, so employers need to watch out that an employee on probation may well have a contractual right to a disciplinary process. What about the ACAS Code of guidance here on disciplinary matters?

Does that also apply or can employers disregard it for employees on probation? [0:13:33.4]

Max Winthrop: Well the Code itself doesn't distinguish between new employees who might be on probation and longer-serving employees. So you could say it applies to all employees. But don't forget, the ACAS Code is kind of parasitic on existing employment rights. So if, for example, we're dealing with a dismissal of an employee on probation, where that employee has no right to bring a claim for unfair dismissal, employers are not going to be penalised for their failure to follow the Code.

Laura Merrylees: Okay, so it seems that employers don't necessarily have to follow the Code for probationary employees, but it's not quite as simple as that, is it? Employers still need to think about a fair procedure for reasons other than unfair dismissal, don't they? [0:14:09.6]

Max Winthrop: Yes, that's correct. Even if they're not required to follow a disciplinary process, they should still follow a fair procedure in dealing with somebody on probation, or indeed an employee of less than two years' service, to protect themselves. Employees can still bring tribunal complaints.

Laura Merrylees: And that's quite an important point because the two years' service is crucial, of course, to being able to bring a claim of unfair dismissal, as we mentioned earlier. But employees can still bring many other types of tribunal complaint that don't need the two years' service period, and I'm sure most of our listeners will know that there's no minimum service requirement to claim discrimination, for example. What sort of other complaints do employers need to watch out for? [0:14:43.8]

Max Winthrop: Well there are quite a lengthy host of rights that exist without any qualifying period, including automatic dismissals. There are a range of statutory rights that don't need a qualifying period, such as protection with regard to membership or non-membership of a trade union, health and safety matters, various rights in connection with parenthood and whistleblowing.

Laura Merrylees: And you mentioned there automatic unfair dismissal. Can you just remind us what is specifically meant by 'automatic unfair dismissal'? [0:15:10.7]

Max Winthrop: Yes, of course. There are certain statutory rights that are given protection whereby an employee's dismissal based on the assertion of those rights won't be potentially unfair or need a two-year qualifying period, but they're actually treated as automatically unfair.

Laura Merrylees: So how does automatic unfair dismissal differ from the ordinary right not to be unfairly dismissed? [0:15:30.3]

Max Winthrop: The employer cannot provide a defence for breaking the various rights that are given the additional protection of automatic unfair dismissal. So even if the employer may think they have a logical reason for their actions, if the dismissal falls under the statutory unfair dismissal categories, there will be no defence to that claim.

Laura Merrylees: And automatic unfair dismissal can also attract more severe financial penalties for the employer, can't it? [0:15:52.5]

Max Winthrop: Yes, that's right. In an automatically unfair dismissal there may be a minimum basic award, currently £5,853, and in some cases the maximum compensatory award can be dis-applied, for example in whistleblowing complaints.

Laura Merrylees: Okay. So within your experience, what are the common reasons where these types of complaint arise? [0:16:11.9]

Max Winthrop: Well there are family-related reasons such as pregnancy, taking maternity leave, adoption leave or shared parental leave. And then we've got those rights under the Working Time Regulations. And we've got whistleblowing, taking action to enforce rights to be paid the national minimum wage. And then trade union membership and activities.

Laura Merrylees: Yes, and sometimes in these areas an employer could also inadvertently fall foul when dismissing a probationary employee because the employee might then construct an argument that dismissal was because he or she sought to enforce a statutory right. [0:16:42.6]

Max Winthrop: Yes, that's correct. Now it's going to be relatively clear when an employer is at risk from potential findings of automatically unfair dismissal. I don't think many people listening to this broadcast will be unaware of the dangers of dismissal in the immediate aftermath of a TUPE transfer or during or after someone's return from maternity leave. I suppose in a way it's right to emphasise again the importance of keeping up-to-date, so for example, do your policies and practice reflect the full extent of current family-related leave provisions? Have you disseminated all you need to do when it comes to understanding Working Time Regulations or Minimum Wage Regulations? And obviously, it's really important to stress than an employer shouldn't discipline an employee in relation to the statutory rights.

Now although we talked earlier about how the ACAS Code is kind of parasitic on other rights, putting aside the actual provision that there is no kind of way of enforcing that unless there's another claim, one of the benefits of a disciplinary process, is that it will highlight if an employee is thinking about bringing one of these automatically unfair dismissal rights into play.

Laura Merrylees: Yes, and they are all crucial to ensuring that you don't, as you say, inadvertently end up on the wrong side of a claim.

Earlier with Nicky we spoke about an employee's right to be accompanied. Just so our listeners are clear, Max, employees on probation still have the right to be accompanied to a disciplinary hearing, don't they? [0:17:59.0]

Max Winthrop: Yes, that's right. It's interesting thinking about the right to be accompanied. It's rather kind of tucked away in Section 10 of the Employment Relations Act 1999. So what that says is that an employer must permit a worker to be accompanied at a disciplinary hearing where the employee or worker reasonably requests it.

Laura Merrylees: Okay, and this Section 10 right was in fact actually tested, wasn't it, in the employment tribunal in the case of Collins v ILC Manchester. What happened in that case? [0:18:24.3]

Max Winthrop: In this particular case, Mr Collins's employers decided that he had to go. They did this fairly early on. He'd only been there about two months or so, so that was before he'd completed his probationary period. So what they did, they called him into a meeting and there was no prior warning. Now Mr Collins obviously knew something was up and he requested his right to be accompanied at that meeting, but they said, 'No, it's not necessary.' But despite that, they then went on and terminated his employment. They said that there were issues of timekeeping, attitude, lack of commitment, this sort of thing, and so terminated him with immediate effect, with one week's pay in lieu of notice.

Laura Merrylees: Right, okay, and although Mr Collins didn't have the required length of service to complain about unfair dismissal, he did still make a complaint to an employment tribunal about the right to be accompanied under Section 10, didn't he? So what happened there at the tribunal? [0:19:11.7]

Max Winthrop: Well the main issue there was actually the failure to allow Mr Collins to have his representative at the meeting. So the employers tried to argue that what happened didn't fall within the scope of Section 10. They used a rather disingenuous argument to say that because they'd already made their mind up before he came in for the meeting – made their mind up to dismiss him – this wasn't a meeting which could result in using the words of the statue -a formal warning or taking some other action.

Now perhaps not surprisingly, the tribunal did not find that argument to be attractive. In fact, they found that as an argument it would actually override the whole purpose of Section 10.

So they looked at earlier cases but they said they weren't relevant. They were about redundancy, which is not actually covered by the Section 10 rights.

Laura Merrylees: I believe that the tribunal also specifically said that it didn't matter that the claimant was in a probationary period? [0:19:59.0]

Max Winthrop: Yes, that's right. The tribunal specifically found as well that the fact that the claimant was in probation was just completely not relevant. They went on to find that the probationary period had nothing to do with the statutory definition of a disciplinary hearing, and interestingly it went on to award one week's pay. Now the tribunal could have awarded up to two week's pay. In this case they actually took into account the fact that Mr Collins had relatively short service with the company, and rather unusually, although they denied him a representative, they had actually given him a full right to appeal the decision itself.

Laura Merrylees: So there was some factors to take into account there when they were looking at the level of award. The take-away is just don't assume that an employee doesn't have the right to be accompanied because they're in a probationary period or indeed they have less than two

years' service. As a rule of thumb, it would be far safer to allow them the right to be accompanied.

But Max, we've been talking about issues employers need to look out for when they're dismissing employees who don't have the right to claim unfair dismissal, but clearly there are going to be situations where it just doesn't work out with an employee and an employer is going to find themselves in a position where they're going to have to dismiss during a probationary period. It is right that an employer can still dismiss, can't they? [0:21:05.7]

Max Winthrop: Absolutely, but do just bear in mind the procedural points that we've been discussing.

Laura Merrylees: Okay, well thank you very much indeed, Max. That was a great overview of an area where it's not difficult for employers to come unstuck.

And of course a special thanks to both of our speakers today, Nicky Stibbs and Max Winthrop, for joining us for this special feature-length podcast.

You'll find plenty of information on the topics that we've covered today and more in our Employment Law Manual, which you can find under the Tools tab on the site.

That brings us to the end of this week's podcast, which you've been listening to with me, Laura Merrylees. We're back again next Friday but until then it's goodbye from us.