

## Jennifer McCarthy guides readers through the maze of issues around discipline and dismissal of employees

There has been an abundance of new employment legislation over the past few years. Despite the best intentions, employers can unwittingly find themselves falling foul of the complex legislation, which exists to protect their employees. One of the most difficult areas for employers is disciplining and dismissing employees.

The majority of claims to employment tribunals relate to unfair dismissal or discrimination. Clearly employers need to be able to dismiss staff where necessary. However, there is often a very fine line between a fair and unfair dismissal. Furthermore, new statutory disciplinary and grievance procedures were introduced in October 2004 which employers need to be aware of. Failure to adhere to the minimum standards set out in this legislation can lead to unfair dismissal claims with increased amounts of compensation being payable.

### Fair reasons?

There are five reasons for which an employer can legitimately dismiss an employee:

- Capability;
- Misconduct;
- Redundancy;
- Illegality of the contract; or
- 'Some other substantial reason'.

The last category can only be relied on in very exceptional circumstances and the most common reasons for dismissals fall within the first three categories. Dismissing an employee for any other reason than the above can often lead to an automatic unfair dismissal award by an employment tribunal, regardless of the circumstances. This is particularly if the dismissal is discriminatory or because the employee has tried to assert a statutory right.

Even if the employer has a legitimate reason to dismiss an employee, it is crucial that a fair process is followed. If it is not, the dismissal may be deemed to be unfair by an employment tribunal and the employer would be ordered to pay compensation.

Employers often dismiss



troublesome employees on the grounds of redundancy as they consider this to be kinder than putting them through a disciplinary process and dismissing for misconduct. However, this is never advisable because, if that employee were to issue employment tribunal proceedings and it was found that there was no real redundancy situation, that dismissal would be deemed to be unfair.

### Don't discriminate

Discrimination law has been growing significantly over the past few years. It is now unlawful to discriminate against employees (or potential employees in some circumstances) on the following grounds:

- Gender;
- Pregnancy or maternity absence;
- Marital status;
- Race;
- Disability;
- Religion or belief;
- Trade union membership;
- Gender re-assignment;
- Sexual orientation;
- Part-time workers;
- Fixed-term workers.

Dismissing an employee for any of

these reasons would undoubtedly be unfair and there is no cap on the amount of compensation that can be awarded. The law surrounding some of these matters is extremely complex and employers should consider taking advice if they are not sure of their position with any staff that fall into any of the above categories.

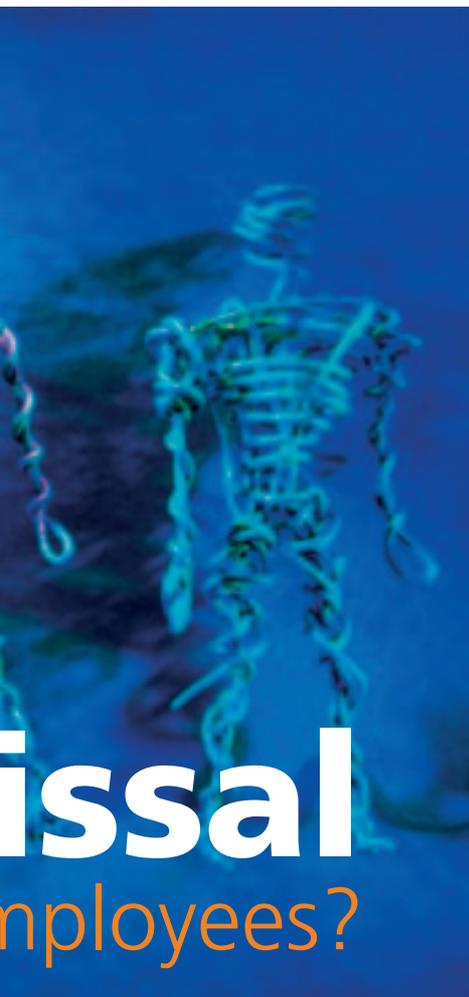
It is expected that legislation will also be introduced in October 2006, which will outlaw age discrimination. This is likely to have a far-reaching effect on many employers.

### Legislate

It is a legal requirement for employers to provide employees with a written statement of the main terms of employment. Despite this, many employers never get round to issuing staff with written contracts.

Not only are these written statements a legal requirement, but they can also be very useful for both parties in determining the rights and responsibilities of the employment relationship.

It is now also a legal requirement for all employers to have written disciplinary and grievance procedures in place with a minimum basic procedure to be followed (see below). However, it would be preferable to



ensure that the procedure is comprehensive as this will give the employer more protection against employment tribunal claims should they find themselves having to dismiss a member of staff.

Many employers find that, in addition to the minimum requirements as set out by law, a detailed staff handbook is also invaluable. This can contain as much information and as many policies as the employer considers necessary for the smooth running of their business. Again, this can prove invaluable as a tool for ensuring that staff are aware of their rights and responsibilities.

Once these policies and procedures are in place, it is important that all staff are aware of them and that managers follow them.

#### **Be firm...**

Most employers and managers do not like having to discipline staff, particularly when the matter relates to minor misconduct or incapability. However, it is important that any issues with staff are handled swiftly and efficiently. A common mistake for employers to make is to let the behaviour continue and then suddenly dismiss the employee at the point that they can't tolerate it any longer. This is

likely to amount to an unfair dismissal, as the employee will not have had adequate notice that his/her behaviour is unacceptable and thus no sufficient opportunity to improve their ways.

It is also important that all employees are treated consistently. Again, it can be tempting to turn a blind eye to inappropriate behaviour of some employees and not others for a variety of reasons. However, a lack of consistency in dealing with employees could lead an employment tribunal to conclude that any dismissal of a subsequent employee is unfair.

#### **...But fair**

Having said that, it won't necessarily always be the case that, having gone through a disciplinary process, two employees would receive the same sanction for the same 'offence'. Before deciding any disciplinary sanction it is important for the employer to seriously consider any mitigating factors put forward by the employee. These may be issues such as their previous disciplinary record; their length of service; and the reasons put forward for their behaviour.

#### **Adopt a fair process**

By law, employers must now follow a minimum three-step procedure when dismissing or contemplating dismissing staff:

1. Employers should firstly write to the employee in question setting out the issues and inviting them to a meeting/disciplinary hearing.
2. The meeting/hearing must then take place giving the employee the opportunity to comment on the issues involved.
3. The employee must then be given the opportunity to appeal against any decision.

This process is the minimum legal requirement. In reality many employers may follow a more comprehensive process. Where this process is being followed in the context of a disciplinary hearing, the following should also be noted.

If the misconduct is minor or the issue relates to capability, an informal discussion with the employee may be all that is required. If this does not resolve the issue, employers should then go through a formal disciplinary process. Where appropriate, the employee should be given enough time and assistance to amend their behaviour before the next stage of

the disciplinary process is reached.

Employees attending a disciplinary hearing are entitled to be accompanied by a work place colleague or trade union representative. Therefore, the letter inviting them to a disciplinary hearing should make this clear. They should have full details of the allegations against them in order that they can properly address the issues at the hearing. Employers should carry out a proper investigation before the hearing and also provide details of these investigations to the employee before the hearing.

Any points put forward by the employee at the hearing should be considered properly and fully. It may be necessary to adjourn the hearing to do this properly.

The disciplinary procedure should allow a range of sanctions, from an informal warning, to dismissal in more serious cases. The sanction should properly reflect the 'offence'. Once a disciplinary sanction has been decided, this should be confirmed in writing to the employee, along with details of how they can appeal. Again, as much information as possible should be given to the employee.

#### **Conclusion**

Clearly this article has not covered every eventuality. Therefore, any employer who is uncertain is urged to take advice before dismissing an employee.

There is never any guarantee that an employer can avoid an unfair dismissal claim, no matter what the reason for the dismissal, or how fair the process. However, if a fair and logical process is followed and the employer ultimately dismisses the employee in question, this dismissal is more likely to be deemed fair.



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