



# What counts as being fair and not fair at the investigatory stage?

**- Just what is fair enough when it comes to the Tribunal?**

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# Legal Framework

- Section 98 ERA 1996
- (1) In determining for the purposes of this Part **whether the dismissal of an employee is fair or unfair**, it is for the employer to show—
  - (a) **the reason** ... for the dismissal
- (2) A reason falls within this subsection if it [...]
  - (b) **relates to the conduct** of the employee

## s.98(4) ERA 1996

- ...whether the dismissal is fair or unfair—
- (a) depends on whether in the circumstances (including the **size and administrative resources** of the employer's undertaking) the employer **acted reasonably or unreasonably** [...]
- (b) shall be determined in accordance with **equity and the substantial merits** of the case.

# “Acting Reasonably” = Fair Procedure!

- **“Band of Reasonable Responses”**
  - *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17
  - Applies to Procedure (*Whitbread plc v Hall* [2001] ICR 699)
- Specifically applies to the **investigation stage** of a ‘conduct’ dismissal.
  - *Cossington v C2C Rail Ltd* (2013) UKEAT/0053/13/BA
  - *British Homes Stores v Burchell* [1980] ICR 303

# ACAS Code of Practice (1)

- *Lock v Cardiff Railway Co Ltd [1998] IRLR 358*
  - ETs must have regard to it, even if not mentioned by advocates
- *UPS Ltd v Harrison (2012) UKEAT/0038/11/RN*
  - Have regard to internal procedures
- Neither the Code nor an internal policy is exhaustive or determinative, but breach of either is highly probative.

## ACAS Code of Practice (2)

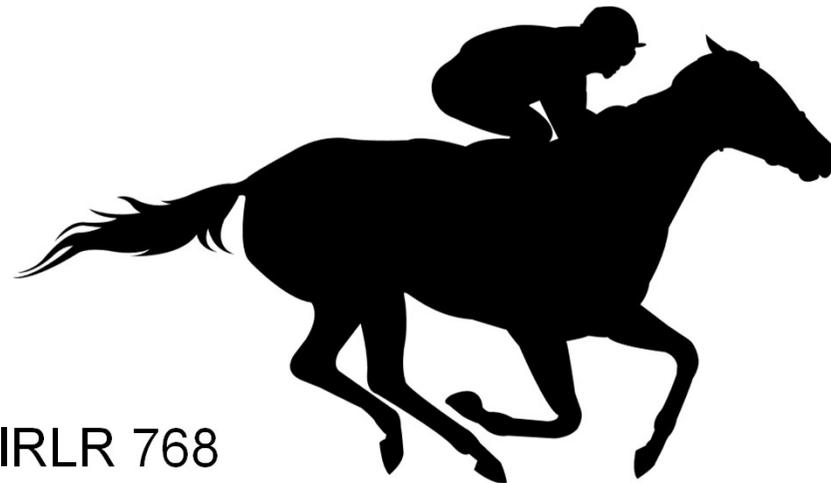
- Para. 5: Investigate without delay
- Para. 6: Investigator not same as chair of disc. hearing
- Para. 7: No decision before disciplinary hearing
- Para. 9: Inform Employee in writing, with evidence
- Para. 13-17: Right to be Accompanied
- Para. 26-29: Right of Appeal

# Guidance from the Cases

- Independent Decision Maker
  - *Slater v Leicestershire Health Authority* [1989] IRLR 16
- ‘Heightened Scrutiny’ in cases of serious misconduct
  - *A v B* [2003] IRLR 405
  - *R(G) v Governors of X School* [2010] 1 WLR 2218
- ‘Reasonable’ investigation into any stated defence
  - *Shresta v Genesis Housing* [2015] EWCA Civ 94
  - *Ball v First Essex Buses Limited* [2018] ET/3201435/2017

## Examples from Practice

- Cashier at Betting Shop located in racecourse
  - Circumstantial statistical evidence
  - CCTV
  - Covert Surveillance
    - *Swansea v Gayle* [2013] IRLR 768



## Examples from Practice (2)

- Schoolteacher with Diabetes Absent from Classes
  - Impact of disability on the investigation process
  - Dealing with material handed over during disciplinary hearing
  - Need to find and interview ‘defence’ witnesses



# Don't Fall Asleep!

- *UCATT v Dooley* (2013) UKEAT/0346/12JOJ!



# Thank you! Any questions?

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