

How - practically and legally - do you establish "reasonable" grounds from statements where one employee has accused the other of misconduct - one word against another?

Jennifer Cashman, Partner | RDJ LLP

A little bit about me:



Jennifer Cashman
Partner,
Employment Law

E jennifer.cashman@rdj.ie
 T +353 21 4802708

Jennifer is Head of Employment and is also a member of the firm's Healthcare and Cyber and Data Protection Teams. She is nationally regarded for her encyclopaedic knowledge of employment law and is the "go-to" advisor for corporate clients in both the public and private sectors.

Jennifer's key clients include scaling and established Irish companies in a variety of sectors, multinational companies in the technology, pharmaceutical, medical devices and diagnostics sectors and public authorities. Her focus is on working closely with her clients to provide commercial legal advice and practical, commercial solutions for their business.

Strengthening the Team's focus in the medical-technical sector, Jennifer is a member of RDJ's Healthcare Team, acting for clients including pharmaceutical companies, health insurers, numerous medical device companies, and nursing homes. Advice includes regulatory and employment healthcare-specific issues, in respect of which Jennifer represents her clients before the Courts and the WRC/Labour Court.

Jennifer is regularly invited to contribute as a key-note speaker at employment law and HR conferences, events and webinars for CIPD, Legal-Island and White Paper Conference Company Limited. She is a recognised thought-leader on various employment law and HR issues, in particular in the areas of retirement ages and age discrimination.

'Jennifer is consistently a high performer in all matters pertaining to employment law. She is the go-to person for complex legal cases.' – **Chambers Europe (2024)**



<https://www.linkedin.com/in/jennifer-cashman-97403518/>

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Concept of “reasonable belief”

Burden of Proof

Legal Landscape

Practical Example



Overview

Irish Employment Law

“Band of reasonable responses” test - whether an employer’s decision to dismiss an employee was reasonable.

Components of the test;

Reasonable Belief:

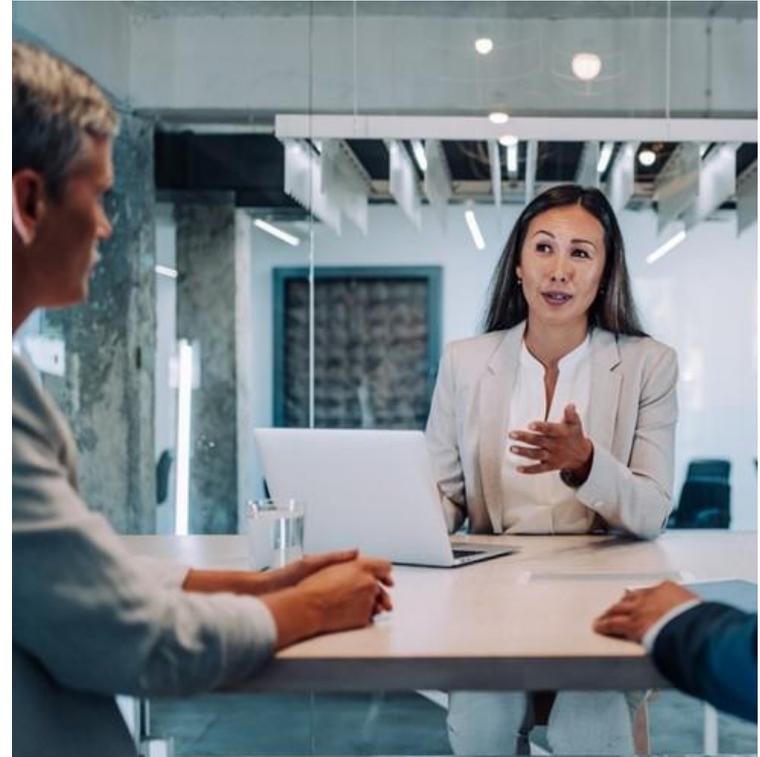
The employer must have a reasonable belief that the employee committed the alleged misconduct.

Reasonable Grounds:

The employer must have reasonable grounds for this belief, based on the evidence available at the time.

Reasonable Investigation:

The employer must have conducted a reasonable investigation into the allegations before making the decision to dismiss.



Getting Started

Getting Started

First step is the **policy** under which complaint is being made.

1. Grievance Policy?
2. Dignity at Work Policy?
3. Protected Disclosures Policy?



What do the accusations cover?

- Which **internal policy** is being invoked – Grievance; Dignity at Work; Protected Disclosures?
- Policy will determine the process to be followed.
- Likely that a HR fact gathering **or** finding investigation will be required to address the accusations made.
- An investigation is a **fact-gathering/finding exercise** to collect all the relevant information to enable an informed decision to be made about any further action to be taken.

“One word against another”

- Burden of proof in workplace investigations is “on the balance of probabilities”.
- Event is more likely to have happened than not.
- Civil standard of proof – lower than the criminal standard of “beyond a reasonable doubt”.
- **Separate disciplinary process** to determine sanction, if any.



“One word against another”

- **Immediate action** may be appropriate depending on nature of the complaint.
- Should the Respondent to the complaint be **suspended?**
- Should the **parties be separated** if suspension not being invoked?
- **EAP service** – remind both employees of the existence of EAP and contact.



Legal Landscape

General Legal Principles

Fair Procedures

Section 6 (7) of the Unfair Dismissal Act states that in determining whether the dismissal is fair or unfair it has regard to:

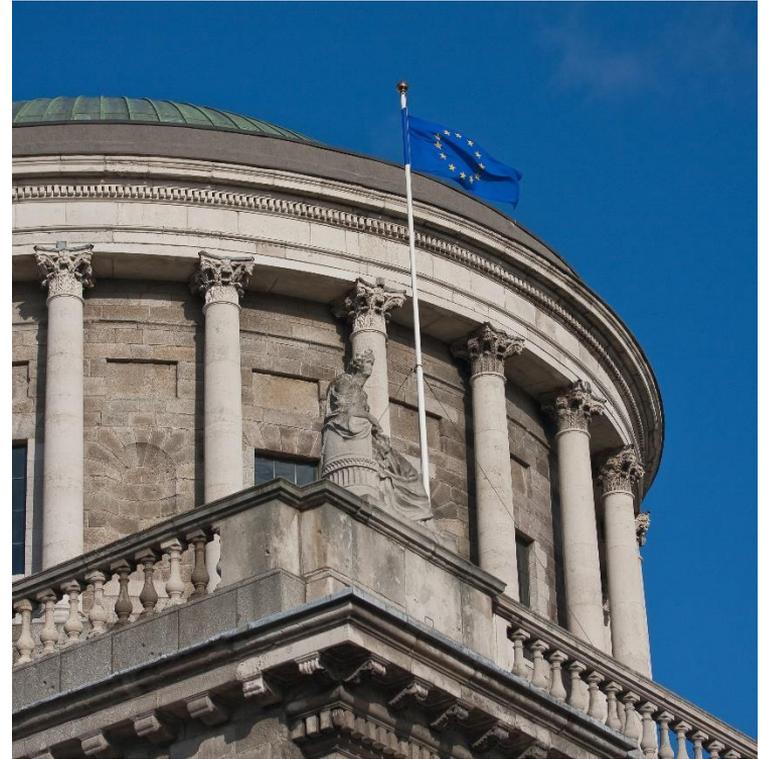
- a) The reasonableness or otherwise of the conduct of the employer in relation to the dismissal, and
- b) The extent, if any, of the compliance or failure to comply by the employer with their disciplinary procedures (given under section 14 (1)) or the provisions of the Code of Practice on Disciplinary and Grievance Procedures.

Statutory Obligation

- There is a legal obligation for all employers to have formal disciplinary procedures in place and to communicate these to employees. 14(1) Unfair Dismissal Acts 1977-2007.
- SI 146/2000 Code of Practice on Grievance and Disciplinary Procedures.
- Code of Practice – not legally binding but highly persuasive before the Courts and Tribunals as to best practice in a disciplinary situation.

Statutory Obligation

- Employees have a constitutional right and an implied contractual right to natural justice and fair procedures.
- Supreme Court case of *Re Haughey* in 1971.
- Article 40.3 of the Irish Constitution is a guarantee to the citizen of basic fairness of procedures.
- These protections, known as “*Re Haughey* rights” are implied in each contract of employment.



Frizelle v New Ross Credit Union Ltd, [1997] IEHC

“Where a question of unfair dismissal is in issue, there are certain matters which must be established to support the decision to terminate employment for misconduct:

The complaint must be a bona fide complaint unrelated to any other agenda of the Complainant.

Where the Complainant is a person or body of intermediate authority, it should state the complaint, factually, clearly and fairly without any innuendo or hidden inference or conclusion.”



Frizelle v New Ross Credit Union Ltd, [1997] IEHC

The employee should be interviewed, and his version noted and furnished to the deciding authority contemporaneously with the complaint and again without comment.

The decision of the deciding authority should be based on the balance of probabilities flowing from factual evidence and in the light of the explanation offered.

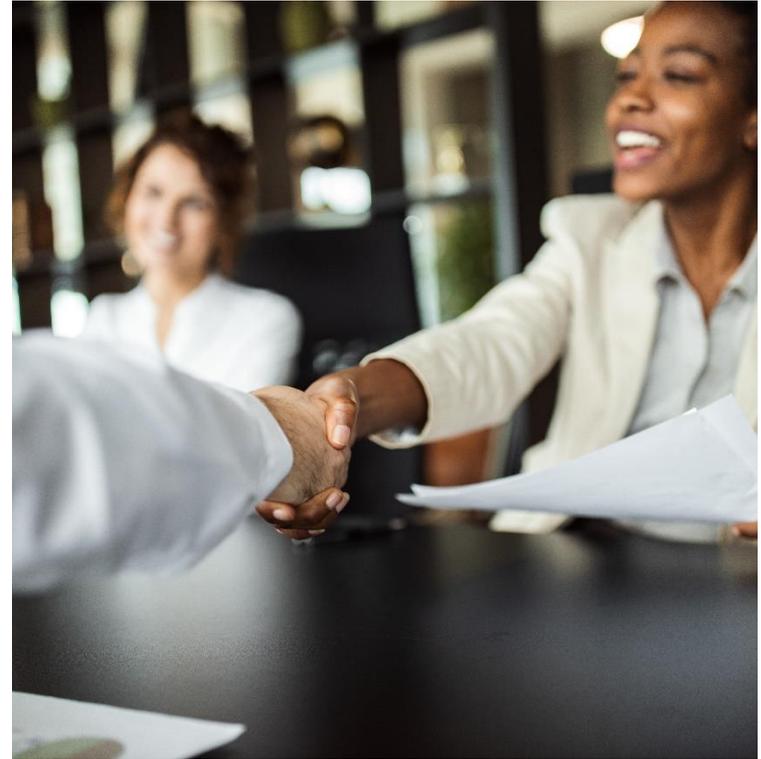
The actual decision, as to whether a dismissal should follow, should be a decision proportionate to the gravity of the complaint, and of the gravity and effect of dismissal on the employee.

Put very simply, the principles of natural justice must be unequivocally applied.



Code of Practice

- The Code of Practice on Grievance and Disciplinary Procedures (the Code) - https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/cop3/
- Defines best practice for the handling of grievance and disciplinary proceedings by employers.
- The Code is designed to ensure that any disciplinary procedures are fair and rational.
- The basis for any disciplinary proceedings are made clear to the employee concerned.
- As well as any possible penalties and the internal appeal procedure.



The Code



That employee grievances are fairly examined and processed



That details of any allegations or complaints are put to the employee concerned



That the employee concerned is given the opportunity to respond fully to any such allegations or complaints



That the employee concerned is given the opportunity to avail of the right to be represented during the procedure



That the employee concerned has the right to a fair and impartial determination of the issues concerned, considering any representations made by, or on behalf of, the employee and any other relevant or appropriate evidence, factors, circumstances

The Code

- **Code of Practice** on the Prevention and Resolution of **Bullying** at Work 2021.
- **Code of Practice** on **Sexual Harassment and Harassment** at Work 2022.
- The provisions of these codes are admissible in evidence before a court, the WRC and the Labour Court.
- Data Protection Commission - *Data Protection in the Workplace: Employer Guidance* in April 2023.
- Employer's own Disciplinary Policy or other relevant policies and procedures.

Doyle v Ailso Commercial Limited [2008] IEHC 445

- Not the function of the Courts to substitute itself for the employer and to make its own decision on the merits of the employer's decision to dismiss.
- It is the function of the Courts and Tribunals to decide whether the investigation is reasonable in the circumstances and whether the decision to dismiss is, in light of the results of that investigation, a reasonable response.



The Investigation

The Investigation

Choice of Investigator is very important – may be appropriate to appoint external

The more independent the investigator – the better

Rare that there will not be some supporting documentation available

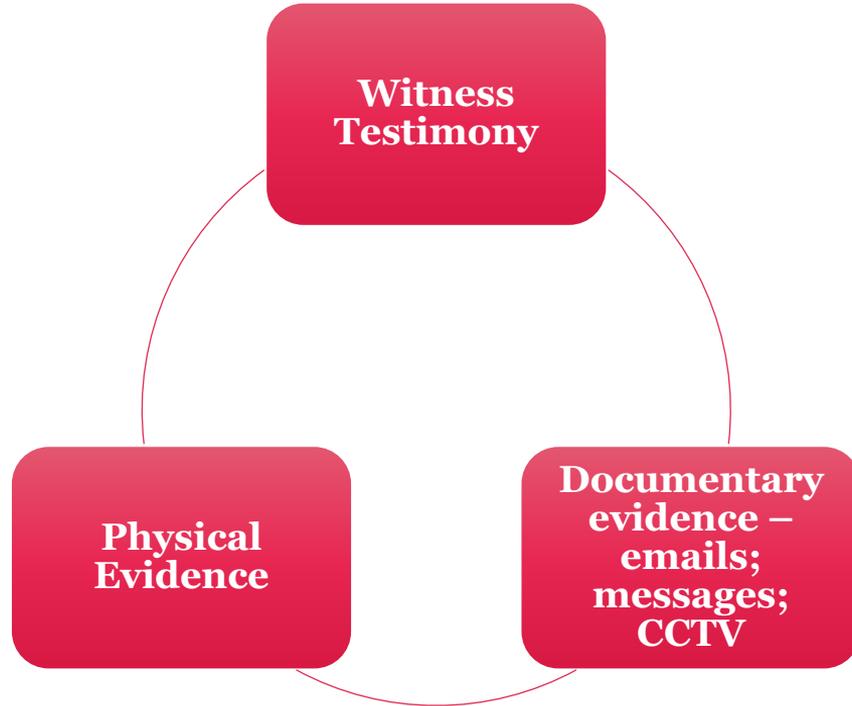
Credibility assessments will be key – consistency in statements; demeanour and potential motives for dishonesty

Document reasoning based on the balance of probabilities

ACAS Code of Practice

“An investigator should endeavour to reach conclusions about what did or did not happen, even when evidence is contested or contradictory. In these circumstances an investigator will need to decide whether, on the balance of probabilities, they could justifiably prefer one version of the matter over another and explain why. Unlike criminal law, an investigator conducting an employment investigation does not have to find proof beyond all reasonable doubt that the matter took place. An investigator only needs to decide that on the balance of probabilities an incident is more likely to have occurred than not.”

Gather Additional Evidence



Evaluate Credibility

1. Consistency of statements
2. Demeanour and behaviour
3. Past Behaviour

Apply the **balance of probabilities standard**
– what is more likely than not to have occurred?



Practical Example

Practical Example

She Said – on-going performance issues with his work. Has to monitor work closely and provide consistent but constructive feedback.

He Said – from the time he started, her management style is overbearing. She is passive aggressive and makes nasty and unprofessional comments to him. Confidence has been severely impacted and mental health is suffering.

Each of them is credible and sincere



How to Approach in Practice

Look at the wider evidence.

What evidence would you expect to have?

Expect some witnesses?

Does the absence of witnesses lend support to her version?

Create a timeline – if he waited to complain – why?

Is there performance related docs – how does it fit with timeline?

Does she have docs relating to his performance – if not, why not?

Why did he not tell anyone?

Did she tell HR/her line manager?

How to Approach in Practice

- Does it make sense – is it logical?
- Probe for details – if there were meetings, where are the notes?
- Her overall approach to similar meetings with other employees?
- Evasive? Helpful? Direct?
- Technology – emails; text messages; IMs?
- Tone and content of exchanges around the dates of alleged inappropriate behaviour?



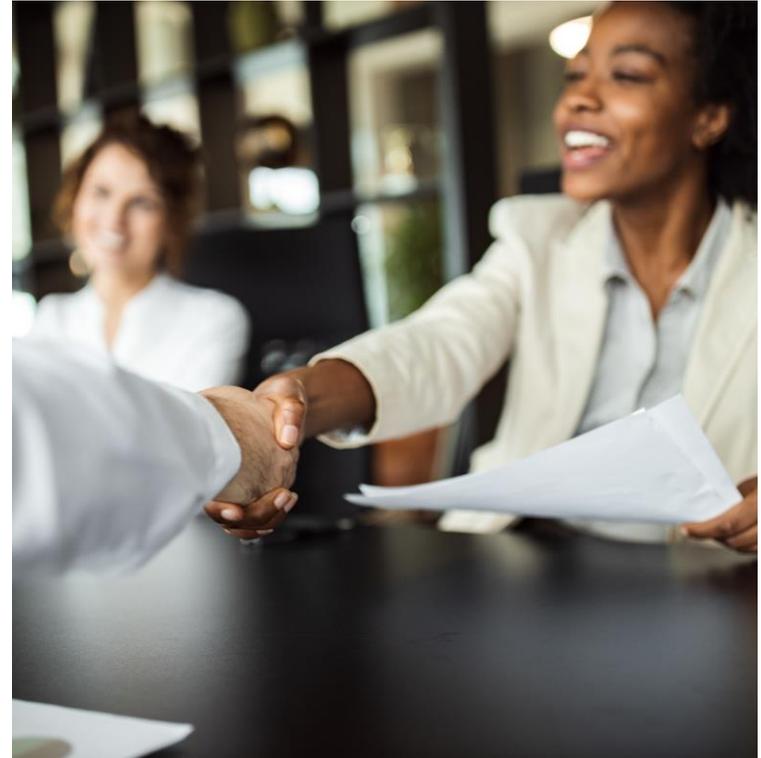
Summary

- How do you establish "reasonable" grounds from statements where one employee has accused the other of misconduct - one word against another?
- You must show a genuine belief, based on reasonable grounds, following reasonable investigation.
- Evidential standard is balance of probabilities **NOT** criminal standard of proof.



Summary

- Tribunal must not substitute its own decision for that of the employer.
- Get corroborating evidence where possible.
- Tribunal must decide if employer's decision fell within the “band of reasonable responses”.



www.rdj.ie
info@rdj.ie

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**Thank you for your time.
Any questions?**

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