

**In a disciplinary investigation, if your role is to advise but not alter decisions, what do you do when an investigating manager's recommendations for further action are just wrong or don't fit the allegations.....?**

Paul Strelitz - Barrister

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#WPREDUN

Dear Grandma.....



## A view from a lawyer's eye

- ▶ ET likely to apply legal framework
  - i. s.98(4) ERA 1996
  - ii. s.201 TULR(C)A 1992 and the ACAS Code on Disciplinary and Grievance Procedures

## (i) s.98(4) ERA 1996

- ▶ ...whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
  - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.

## The three factors to be considered under s.98(4)

- i. The size and administrative resources of the employer's undertaking
  - n.b. *Henderson v Granville Tours Ltd* [1982] IRLR 494 EAT;
- ii. Any relevant Code of Practice; and
- iii. The effect of the Human Rights Act 1998

## ACAS Code of Practice

- ▶ *Lock v Cardiff Railway Co Ltd [1998] IRLR 358*
  - ET's must have regard to it, even if not mentioned by advocates
  
- ▶ s.207A(2) TULR(C)A 1992 uplift if failure to apply
  - Increase any award by up to 25%
  - *Holmes v Qinetiq Limited [2016] IRLR* – limited to internal procedures relating to disciplinary situations that inc. misconduct or poor performance

## So what does the ACAS code require?

- ▶ What is known as ‘*a trilogy of safeguards*’ :
  - A warning procedure,
  - A chance to state a case; and
  - A right of appeal

## Relevant parts of Code for this talk

### ▶ Para. 5

- Carry out “*necessary investigations of potential disciplinary matters without unreasonable delay*”

### ▶ Para. 6

- Different people should carry out investigation and hearing

### ▶ Para. 7

- Investigatory meeting should not by itself result in a discipl. Hearing

### ▶ Para. 9

- Notify employee with sufficient information and provide written ev.

## Further generally relevant criteria

- ▶ An employer need only investigate and reach a decision within a band of reasonable responses
  - *Tayeh v Barchester Healthcare Ltd [2013] IRLR 387*
- ▶ An employer need not embark upon an adversarial investigation of the evidence
  - *Linfood Cash and Carry Ltd v Thompson [1989] IRLR 235*
- ▶ More is expected of an employer where allegations of misconduct and the consequences for employee are particularly serious
  - *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721*

## So back to the original question

- ▶ *“In a disciplinary investigation, if your role is to advise but not alter decisions, what do you do when an investigating manager's recommendations for further action are just wrong or don't fit the allegations?”*
- ▶ If you benefit from the protection of privilege – lay it on thick
- ▶ If your advice is not protected by privilege –
  - Don't put it in writing; and
  - Have regard to how it will sound if it comes out at an ET

## An important 'side note' to the main question

- i. Take care when providing HR advice on a disciplinary process
  - *Chhabra v West London Mental Health NHS Trust* - in particular paragraph 37 of the judgment of Lord Hope JSC
  - Followed in the case of *Ramphal v Department for Transport UKEAT/0352/14/DA*
  
- ii. Never forget to consult the relevant employment documentation (contract of employment/service agreement/employee handbook etc.)

Thank you for listening

**Not everyone can naturally conduct an  
investigatory interview without being  
inflammatory**

Thank you

**Paul Strelitz**

[Paul.Strelitz@Hardwicke.co.uk](mailto:Paul.Strelitz@Hardwicke.co.uk)

0207 242 2523

