

## Conducting Disciplinary Investigations

**22 November 2018**

Peter Norbury, Consultant



## Scope

- Focusing on disciplinary investigations not those relating to grievances raised by employees.
- Beware. If grievances raised by employees are not properly investigated they can prove a great source of difficulty for employers.

## Who should do the investigation?

Choose the right person to do the investigation

- the right skills and experience
- where they fit in the structure

Remember in any potential disciplinary dismissal you will need to have:

- an Investigating Officer,
- a Dismissing Officer and
- another senior employee available to hear an appeal.

Take this into account when determining who should conduct the investigation.

## ACAS Guidance

- There is an ACAS booklet “Conducting Workplace Investigations”.
- *“The Role of an investigator is to be fair and objective so that they can establish the essential facts of the matter and reach a conclusion on what did or did not happen. An investigator should do this by looking for evidence that supports the allegation and evidence that contradicts it.”*

*In potential disciplinary matters, it is not an investigator’s role to prove the guilt of any party but to investigate if there is a case to answer”.*

## Different Disciplinary Situations

- The kinds of cases that can be investigated will have differing challenges:-
  - Misconduct
  - Capability
  - Bullying and Harrassment

## Police Involvement

- There will be situations where the matters under investigation may involve potential criminal acts by the employee.
- It is usually the case that the Police will insist that if they are investigating a potential crime, the employer should not continue with its disciplinary investigation.

## **Bullying and Harrassment**

- An investigation can be significantly more difficult when there are allegations of bullying and harassment particularly if the harassment is focused on one of the protected characteristics.
- Need to deal with such matters with sensitivity and balancing the interests of the subject of the complaint with those of the complainant.

Some employers have a different procedure to deal with harassment and bullying rather than rely on the Disciplinary and Grievance Procedure.

## Investigation Report

- In cases where dismissal is the likely outcome, it is advisable to have a formal Investigation Report prepared.
- Any Investigation Report must be prepared carefully as it may be subject to rigorous scrutiny if the dismissal results in a Tribunal hearing.

## The Test

– s.98(4) Employment Rights Act 1996

*“The determination of the question 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 Test (cont)

It is important to understand that if the issue relates to a potential conduct dismissal then the evidential standard required is whether on the “balance of probabilities” the employee was guilty of misconduct, not that it is “beyond reasonable doubt”.

## The Case Law – British Home Stores Limited v Burchell

- BHS v Burchell (1978) EAT
- In a conduct dismissal the employer in order to fairly dismiss needs to show:
  - Reasonable belief in the guilt of the employee;
  - Reasonable grounds upon which to have that belief;
  - At the point when the employer formed the belief that the employee was guilty it had carried out as much investigation as was reasonable in all the circumstances of the case.

## The Case Law

- The most recent decision focusing on the impact of an investigation on the fairness of dismissal is the EAT decision in *Hargreaves v Manchester Grammar School* reported last month.

Key cases referred to are:

- *AvB (2003) EAT*
- *Salford Royal NHS Foundation Trust v Roldon (2010) C of A*
- *Crawford and another v Suffolk Mental Health Partnership Trust (2012) C of A*

## The Case Law - AvB

- AvB case is about a Social Worker and a vulnerable child. The EAT stressed that in cases where the consequences of dismissal could be career changing for the employee there needs to be:
  - *"A careful and conscientious investigation"*; and
  - *"An even-handed approach"*.

The EAT went on to say:

*"It is no answer for an employer to say that even if the investigation had been reasonable it would have made no difference to the decision"*.

## The Case Law – Salford Royal NHS Foundation Trust v Roldon

- What was said by the EAT in AvB was then approved by the Court of Appeal in *Salford Royal NHS Foundation Trust v Roldon*.
- A nurse dismissed for ill-treating a patient, who would have been at risk of deportation.

## The Case Law – Crawford and another v Suffolk Mental Health

- *Crawford and another v Suffolk Mental Health Partnership Trust* involved an allegation that employees had tied a patient to a chair. There was a risk to the employees' reputation and their ability to carry on working in their chosen profession of carer if found guilty of misconduct.
- Where the matter has serious consequences, what will amount to be a fair procedure is very different from 'the norm'.

## The Case Law – Hargreaves v Manchester Grammar School

- In the very recent Manchester Grammar School case, the EAT stated: *"The decision (of the ET) had to be tested against the particularly stringent standards applicable in cases such as this"*.
- The ET's decision that *"a reasonable investigation has been carried out and a reasonable process followed by the Respondent; it had approached the process with an open mind and had properly taken account of the relevant evidence"* was accepted by the EAT.

## The Key Issue – Hargeaves v M.G.S. (cont)

- In the course of the investigation a number of witnesses were interviewed. The employee, his representative and the Disciplinary Panel were not made aware of all of the interviews and in particular interviews with individuals who were in the vicinity of the incident who said that they saw nothing.
- The EAT accepted the ET's finding that: *"It was within the reasonable range (of responses) to decide not to inform the Claimant and the Disciplinary Panel about the interviews with those who had seen nothing"*

# Questions?



EVERSHEDS  
SUTHERLAND

**Peter Norbury**

Consultant

[peternorbury@eversheds.com](mailto:peternorbury@eversheds.com)

Eversheds Sutherland  
Eversheds House  
70 Great Bridgewater Street  
Manchester M1 5ES

**[eversheds-sutherland.com](http://eversheds-sutherland.com)**

This information pack is intended as a guide only. Whilst the information it contains is believed to be correct, it is not a substitute for appropriate legal advice. Eversheds Sutherland (International) LLP can take no responsibility for actions taken based on the information contained in this pack.

© Eversheds Sutherland 2017. All rights reserved.

MAN\_002-#8080273