

Dismissal for HR Conference

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

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Talk aims

- To give an understanding of the legal test applied to establish “reasonable grounds” where one employee has accused the other of misconduct
- Understand how the legal test has been applied by the Tribunal in some case law examples

Section 98(4) of the Employment Rights Act 1996

Legal framework

- S98(4) provides:
- *"...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."*

This requires an employer to adopt a fair procedure before taking the decision to dismiss. Fair procedure includes having a fair investigation process.

How much investigation do you need to carry out to establish “reasonable grounds”?

Starting Point:

- The legal test is set out in BHS v Burchell [1978]!
- ACAS Code of Practice on Disciplinary and Grievance Procedures
- Consider your own disciplinary procedure



Establishing “reasonable grounds” – the legal test

BHS v Burchell [1978] IRLR 379, EAT

Held:

- Employers need only carry out a reasonable investigation
- The tribunal had wrongly substituted its own decision for that of the employer.

The three stage test

1. Genuine belief
2. Based on “reasonable grounds”
3. Following “reasonable investigation”

NB. Evidential standard is balance of probabilities – NOT criminal standard (i.e beyond all reasonable doubt)

What does a reasonable investigation entail?

- Must hold an investigation as is “*reasonable in all the circumstances*” which is judged by reference to the “*band of reasonable responses*” – (Sainsbury’s Supermarkets –v- Hitt)
- The more serious the allegation the more investigation you need to undertake particularly where it compromises an individual’s ability to work in their chosen field.

ACAS Code of Practice

Conflicting evidence

*“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.” (Page 31.)*

Case Law Examples

One person's word against the other

Sellers v The British Council ET/2203365/2019

The employment tribunal noted the importance of seeking corroborative evidence in cases of disputed conduct. For any **investigation** to be reasonable, the investigator should:

- seek to identify and obtain any contemporaneous evidence that may be available and shed light on what happened, including any evidence that is obviously missing.
- the investigator should avoid taking too narrow a view of the allegations meaning that relevant surrounding circumstances are overlooked.
- These surrounding circumstances may take on greater importance where conduct is disputed and help an investigator to identify what other potential evidence may exist.

One person's word against another

Swan v The Governing Body of Our Lady and St John Catholic College

- The Claimant was invited to a disciplinary hearing to answer allegations of bullying and intimidation of a colleague, disruption, undermining two colleagues, harassment, dishonesty relating to her abilities and inappropriate usage of school IT and equipment.
- She was subsequently dismissed for gross misconduct for bullying, lying and inappropriate conduct including unauthorised use of IT.
- The Claimant brought a claim, amongst other things, for unfair dismissal in that a reasonable investigation had not been carried out by the employer.

Swan v The Governing Body of Our Lady and St John Catholic College

Held

- The Claimant's claim for unfair dismissal was successful
- The ET found that the Employer failed to carry out a reasonable investigation
- Judge Feeney said:
 - If it was one person's word against another, the employer always believed the person other than the claimant
 - It was not even-handed as the Employer did not follow up any lines of enquiry which might exonerate the claimant other than listening to her evidence
 - They took the part of the management side's witnesses at every opportunity
 - The Employer failed to justify his conclusions when questioned by the Claimant's union representative and there was further extensive evidence that should have been heard.
 - The investigation was 'inadequate and there was insufficient evidence to reach the conclusion the panel reached'.
- NB. You do not necessarily need to investigate all evidence but just what is **reasonable.**

A case study

Reasonable investigations

Reasonable investigations

Case study

- A is contracted to work 6 hours per day at a petrol station. One night, he is accused of theft.
- A's employer obtains witness statements from two of A's colleagues who say they saw him commit theft
- A says that if his employer views the CCTV during the shift they will see that A did not commit theft
- A's employer does not think it is necessary to view the CCTV given that they have two witness statements so dismisses him for gross misconduct

Question: Has a reasonable investigation been carried out?

Yes

No

Reasonable investigations

Case study

Answer

- No – a reasonable investigation has not been carried out
- Even though two witness statements had been obtained, it is not unreasonable to expect the employer to watch six hours of CCTV footage
- Theft is an extremely serious allegation which can potentially result in criminal charges
- The reasonable employer would have been expected to carry out a more thorough investigation and as such did not fall within the band of reasonable responses
- A claim for unfair dismissal would likely succeed

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.
- 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".



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