

Committee: Establishment Committee	Date: 16 th September 2016
Subject: Corporation's Disciplinary Procedure	Public
Report of: Joint report of the Comptroller and City Solicitor, the Director of Human Resources	For Decision

Summary

At its last meeting some members of the Committee sought reassurance that the Corporation's Disciplinary Procedure was fit for purpose. This report seeks to provide that reassurance.

1. Recommendations

Members consider the report and give such instructions to officers as they consider appropriate.

2. The Legal Context

The relationship between employer and employee is essentially a contractual one upon which a range of statutory rights and duties have been superimposed. At common law an employer may dismiss an employee by giving the requisite notice and without the need for adequate reasons. However, a failure to give adequate notice gives rise to a claim for wrongful dismissal.

Since 1971 qualifying employees have, over and above their contractual rights, the right not to be unfairly dismissed. This right is currently enshrined in the Employment Rights Act 1996 ("ERA") and in order to qualify employees need to have two years continuous employment with their employer.

In simple terms, an employer who dismisses an employee without good reason and/or without following a fair procedure lays itself open to a claim for unfair dismissal in the Employment Tribunal. When such a claim is brought the employer bears the burden of proof to establish the reason for the dismissal (see below). The Tribunal will then decide whether the dismissal was fair in all the circumstances i.e. whether the reason for the dismissal and the process followed was fair in all the circumstances. If the dismissal is held to be unfair the employer can be ordered to re-engage, reinstate or pay compensation to the claimant. An employer may refuse to re-engage/reinstate but must pay increased compensation if it does so.

In order for a dismissal to be fair, it must fall into one of the categories of potentially fair dismissals set out in the ERA. The potentially acceptable reasons are:-

- (a) Reasons related to capability or qualifications of the employee
- (b) Reasons related to the conduct of the employee
- (c) That the employee was redundant

- (d) That it would be unlawful for the employee to continue to work in that position
- (e) Some other substantial reason such as to justify dismissal

Dismissal for a reason other than the above will be unfair and there are a number of dismissals which are deemed to be automatically unfair e.g. those due to union membership, for asserting statutory rights, and pregnancy.

The Tribunal will determine not only whether the employer had reasonable grounds for dismissing the employee but also whether it adopted a fair procedure in dismissing him. The Tribunal cannot substitute its view for that of the employer but instead must decide whether the decision to dismiss is in the range of reasonable responses an employer might make in the circumstances. This test includes the procedure followed. Whether or not a procedural error is sufficient to undermine the fairness of a dismissal is a question for the Tribunal. Not every procedural error will do so and the fairness of the procedure as a whole should be looked at alongside the other relevant factors.

Disciplinary proceedings are largely concerned with the conduct or misconduct of employees. Capability and grievance issues are dealt with under different procedures although serious incapability can become a disciplinary issue e.g. negligence in the performance of duties or a failure to follow reasonable instructions.

3. The ACAS Code of Practice

ACAS (Advisory Conciliation and Arbitration Service) has the power to issue Codes of Practice to give practical guidance for the promoting the improvement of industrial relations. Code of Practice No 1 deals with disciplinary and grievance procedures ("Code of Practice on Disciplinary and Grievance Procedures" (March 2015) available at www.acas.org.uk). Breach of the Code does not itself render a person liable to proceedings. However, Tribunals take into account the Code and "a failure to follow a procedure prescribed in the Code may lead to the conclusion that a dismissal was unfair, which, if that procedure had been followed would have been held to have been fair".

Furthermore, where a Tribunal is satisfied that there was an unreasonable failure to comply with the Code by either the employer or the employee it can increase or decrease any compensation awarded by up to 25%

At the heart of the Code is the requirement for fair and transparent procedures, central to which are the following principles:-

- Employers and employees should raise and deal with issues promptly and without unreasonable delay and act consistently.
- Employers should carry out any necessary investigations to establish facts.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before decisions are made.

- Employers should allow employees to be accompanied at formal disciplinary and grievance meetings.
- Employers should allow an employee to appeal against any formal decision.

These principles, and the specific guidance set out in the Code are incorporated into the Corporation's Disciplinary Procedure. Thus a failure to follow the Code and the Disciplinary Procedure can result in a potentially unfair dismissal.

4. The Disciplinary Procedure

A copy of the Disciplinary Procedure is attached at Appendix 1 it was formally reviewed and approved by the Establishment Committee on **(1 February 2015)** and has been further reviewed by the Comptroller and City Solicitor and the Director of Human Resources for the purposes of this report.

It should also be noted that that the Disciplinary Procedure is in day to day use by managers, HR professionals and lawyers, and its application subject to scrutiny by employees who are the subject of disciplinary action, together with their trade union and legal advisers where engaged. It is also regularly tested in the crucible of Employment Tribunal proceedings.

It will be seen that the Corporation's Disciplinary Procedure contains all the necessary elements from the ACAS code, including an initial informal approach where appropriate, a fact finding/investigation stage including meeting with the employee as part of the investigation, a separate disciplinary meeting with full disclosure of the management case in advance, an independent appeal process and allowing the employee to be accompanied by a trade union representative or colleague at the key stages.

The disciplinary hearing itself follows a conventional procedure – management present their case and call any witnesses, the employee has the opportunity to ask questions of management and their witnesses, the employee presents their case and calls any witnesses, management has the opportunity to ask questions of the employee and their witnesses, finally first management then the employee sums up and the hearing officer considers their decision in private. Appeal hearings follow a similar pattern, but with the employee going first and summing up last.

The disciplinary and appeal hearings are not courts and strict procedural rules and rules of evidence do not apply. The overriding aim is to enable both sides to have a fair and equal, but proportionate, opportunity to state their case.

The Corporation's Disciplinary Procedure therefore complies with the ACAS Code.

5. Practical Considerations

It should be remembered that applying the Disciplinary Procedure in practice can be demanding in terms of the time, expertise and resilience required from the managers involved and their advisers. Cases which cannot, in ACAS parlance, be resolved

informally, with “a quiet word” can often escalate into confrontation, particularly where dismissal is a likely outcome and the employee is seeking to defend their livelihood and career. Counter-allegations such as whistleblowing and discrimination, which must be taken seriously, are a frequent response to disciplinary proceedings and this can make employment disputes very personal, with jobs, reputations and careers potentially at stake, to all the participants and this can affect judgment and personal relationships in a way that other work matters do not.

At the same time, such cases are not so common that all managers can be expected to have significant skill and experience in dealing with them and therefore managers need to rely on extensive support from HR professionals and lawyers. For example, some managers have professional backgrounds which better equip them to investigate and present a case to a tribunal or determine such a case than others, for whom the experience and required skills can be entirely novel.

Challenges therefore tend to centre on ensuring that each step of the procedure is properly, thoroughly and objectively, yet proportionately, undertaken. For example, a common problem is a badly behaved employee which management have failed to deal with over a period who commits an act that becomes “the straw that breaks the camel’s back”. This can result in what may be, on the isolated facts, an over-reaction by management which cannot be justified in terms of the Disciplinary Procedure.

Thus it is vital not only to have and follow a disciplinary procedure which is compliant with the ACAS Code, but also to have effective and timely HR and legal support for managers.

6. The Corporation’s Employment Tribunal Record.

Since 2010 the Corporation has had no substantive challenges to the Disciplinary Process itself although there have been various challenges to the application of the process in particular cases. In only two cases has a Tribunal found unfair dismissal against the Corporation and these were both minor failings (one involved delay in invoking the procedure and the other a failure to give the employee the management case the required period before the disciplinary hearing). A third case was settled on the merits due to a number of defects how the case was handled and the decision itself.

Employment Tribunal cases and settlements are regularly reported to the Committee.

7. Conclusion

Given the above, the Comptroller and City Solicitor and the Director of Human Resources are of the opinion that the Disciplinary Procedure and the HR and legal advice and support network which under pins it are appropriate, fit for purpose and compliant with the Acas Code. However, officers need to continue to ensure that lessons are learned from individual cases and the day to day challenge of ensuring that the Procedure is properly, fairly and consistently managed in individual cases is met.

Appendices

1. Appendix 1 – Disciplinary Procedure
2. Appendix 2 – Disciplinary Hearing Format
3. Appendix 3 – Appeal Hearing Format

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