Disciplinary Hearings

In the July issue of our newsletter 'Keeping in Touch' we set out our views on how individuals should be invited to a disciplinary hearing. Setting out the invitation to a disciplinary hearing properly is often the first hurdle that the employer falls at as regards fair procedures. The issue of a disciplinary hearing itself is the part of the disciplinary process employers are most likely to fall foul of the principles of fair procedures.

Fair procedures in the Unfair Dismissal legislation.

Section 6 (7) of the Unfair Dismissal Act as amended states that in determining whether the dismissal is fair or unfair the Tribunal of body hearing a case may have regard to
(A) the reasonableness or otherwise of the conduct of the employer in relation to the dismissal, and (b) the extend, if any, of the compliance or failure in comply with the employer in relation to the employee to the disciplinary procedures or the provisions of the Code of Practice on Disciplinary and Grievance Procedures (Industrial Relations Act 1990) (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000.

Any Tribunal will firstly look at the employer's own disciplinary procedures and then at the Code of Practice. The reason for this is that if the employer's own procedures are more extensive or place a higher bar on the employer they are the procedures which must be applied.

Are there any standard rules?

As was set out by McCracken J in Tierney -v- An Post where (1999) E.L.R. 65 it was held "there is no fixed standard of natural justice which lays down that certain specific matters must be complied with. The protection to be afforded to a person whose conduct is being investigated will vary according to the circumstances".

There are some general principles however:

1) The employee should have received details of the charges in writing and the basic fact alleged to constitute the matter which is to be dealt as a part of disciplinary process.
2) Copies of all witness statements or investigation reports or any other document which may be relied on in the investigation along with anything which the employer has or came to the employer's attention during the investigation which may be in favour of the employee must be furnished to the employee.
3) The employee should be aware of the procedures which are to be followed. This means that they should be given a copy of the company disciplinary procedure or advised in writing what procedures are going to apply. It is useful at the start of any disciplinary process that the foreseen hearing the disciplinary hearing will go through the process and answer any questions which the employee may have relating to the process.
4) The employee must be allowed to be represented. We have covered this issue in our previous guide on "Inviting an employee to a disciplinary hearing".
5) The employee should have been informed at sufficient time to enable the employee to prepare a defence.
6) At the hearing employee should be able to (a) hear the evidence against him/her, (b) challenged the evidence in cross examination if necessary, and (c) present his/her evidence.
7) The employee is entitled to natural justice. There are two fundamental principles of the natural justice which apply to any decision making which affects the employee namely:

a) The decision maker must not be a judge in his/her own calls.
b) Anyone who may be adverse the effect by a decision must have the opportunity to hear the case against him/her and the opportunity to present his/her side of the case.

What is fair?

The employer must follow any agreed disciplinary procedure in the employment contract or any collective agreement. The employer must insure that these procedures are fair. What is fair will be effectively the employer's procedures or the Code of Practice and Grievance and Disciplinary procedures whichever is more beneficial the employee.

The procedures to be adopted regarding the evidence on other matters will depend on:

a) the circumstances of the case
b) the nature of the enquiry
c) the rules under which the decision maker is acting
d) the subject matter
e) the reason for the dismissal
f) the consequences of the decision for the employee, and
g) in some cases the circumstances of the particular employee may be relevant.

It is important for employers as part of any disciplinary process to consider the circumstances of the particular employee. The employee must always be given an opportunity to give forward their side of the case and any mitigating factors. For example if an employee has been employed for a number of years and suddenly start arriving late and leaving early every day or being absent from their work station for unusually long periods of time the employer may need to ascertain, as part as the disciplinary process, is there any personal reason or medical reason that this sudden change of behaviour has taken place.

What is reasonable?
Any Tribunal will judge the fairness of the procedures from the stand point of what the employer could reasonably have been expected to do.

A Tribunal may not substitute their own decision for that of the employer. It is not a matter for the Tribunal to ask themselves what they themselves would have done in a similar situation. It is to determine whether the employer was reasonable in the circumstances. If a Tribunal determines that even though an employer may have not dismissed the employee but that it was reasonable that the employer did so then the actions of the employer will be reasonable. There is a band of reasonable behaviour.

This is why it is so important in any disciplinary hearing that everything is recorded and that the reason for any disciplinary action whether it is a warning or a dismissal is recorded and the reason why it was recorded. It is useful for the employer to record whether is a dismissal why dismissal was decided upon rather than for example a

final written warning. A Tribunal will invariably take note of what was written and recorded at the time rather than afterwards.

What should happen once the disciplinary hearing finishes?

Once the disciplinary hearing finishes the employee should be furnish with a copy of the notes of the disciplinary hearing. They should be given an opportunity to review the notes. They should be given an opportunity to make any comments on the notes or correction that they believe should be made. This does not mean that those corrections have to be made but they must be given the opportunity of making them.

Some employers seek to have the notes read over immediately after the meeting and to get the employee to sign same. It is far better practice that the employee is given a copy of the notes. They should preferably be given at the end of the meeting. The employee should then be furnished by letter, and by this we mean recorded delivery, with the full copy of the notes along with the letter confirming their right to make any comments in relation to the notes giving the time limit for this to be done. The employee should also be given the opportunity to make any observations in relation to any matters which occurred during the disciplinary process. They should be given a reasonable period of time to respond. A period of 5 to 7 days is not unreasonable.

Fair procedures in different types of organisations.

The procedures which any Tribunal would expect to be applied are not standard. What is expected in a small company where an employer may have four or five employees and what is expected in a company with over a hundred employees will vary. What is expected of small employer who may not have a HR facility as oppose to a large organisation which would be expected to have appropriate HR specialities will to the large extent determine how Tribunals will require disciplinary hearings to be held. A small employer with four or five employees where the employer is the sole shareholder or owner of the business may not enable a situation where a person totally unfamiliar and completely independent from the investigation is going to hear the disciplinary hearing. In such small organisations the employer must act in an impartial and objective manner as is

reasonably possible. In larger organisations with a number of senior managers to would be expected that a senior manager not part of the process would hear the case.

Saying is the basic principle which must be applied at all times is that fair procedures will always be applied.

How can an employer protect themselves?

1. Before any disciplinary action is commenced whether by way of an invitation to a disciplinary hearing or starting a disciplinary hearing appropriate advice from an employment lawyer or a HR Professional who understands this area of law should always be obtained.
2. There is an old saying "act in haste, repent at ease" and it is very relevant in disciplinary matters. No disciplinary process should be commenced and no disciplinary action should ever be taken by an employer without having given themselves 24 hours minimum to think about what should be done. Reacting to some form of misconduct by an employee rather than thinking about it before reacting often lands employers in an Unfair Dismissal claim which they lose because fair procedures where not applied.
3. At all stages employees must be given all evidence against them and must be given a right to challenge the evidence.
4. The employee must at stages be given a right to be represented and a right to defend themselves and to challenge any evidence against them.
5. Whether the employee will be entitled to legal representation or not will depend on the particular circumstances of the particular disciplinary matter that is being considered. If dismissal is a possible outcome of any disciplinary process then an employer must seriously consider allowing the employee an opportunity to be legally represented. At a very minimum the employee must be allowed to be represented by a fellow employee or Trade Union representative. In a small employment the employer may reasonable consider that the employee might be entitled to bring a friend as the employee may find it difficult to get a fellow employee to represent them.

6. No action should be taken of the disciplinary nature until such time as an employee has been able to respond of the notes of the disciplinary hearing and put forward any further defence or other mitigating factors which they want the employer take into account.

Failing to Follow Fair Procedures

Where an employer fails to follow fair procedures Tribunal in Ireland to date have tended to hold that the dismissal is unfair. Of course even where no fair procedures were applied the Tribunals have consistently looked at the actions of the employee as to whether they have contributed to the dismissal. There have been cases where the Tribunal has held because of the action of the employee, even though the procedures were unfair, that the employee had contributed 100% to their own dismissal.

It should however be remembered that the Tribunal can direct that the employee is reengaged or reinstated or can award up to two years wages and this is a huge liability for an employer who unfairly dismisses an employee.

Employer invariably lose Unfair Dismissal cases and end up paying compensation not because the employee should not have been dismissed but because fair procedures were not applied.

What is the Benefit of Applying Fair Procedures

The benefit of applying fair procedures is that even if a Tribunal determines that while fair procedures were applied if the Tribunal had been hearing matters they would have applied a lesser penalty than dismissal. The Tribunal must look to see whether the action of the employer in the circumstances was reasonable. This does not mean that they would have agreed with that form of action taken by the employer but whether it was “reasonable”. If they determine that it was reasonable and the employer followed fair procedures then the employee is not entitled to compensation. Even if the employee in an Unfair Dismissal case can show that they did nothing wrong or that they had a valid and legitimate excuse for what was done if the employer can show that fair procedures were applied and that all matters put before then were reasonably taken account of or even that

the employee did not put forward this particular defence having been given every opportunity to do so the employer may still end up in a situation where the Tribunal will hold that the dismissal was fair.

Conclusion

Employers invariably lose Unfair Dismissal cases because fair procedures were not followed.

Why does this happen?

In our experience this happens because legal/HR/IR advice from experienced professionals was not obtained before the dismissal procedure was put in place and/or in a worst case scenario before the dismissal took effect.

Employers lose Unfair Dismissal cases because they do not have a disciplinary procedure, or the disciplinary procedure is defective, and in many cases not following their own dismissal procedures and/or the Code of Practice on Grievance and Disciplinary Procedures. This is why appropriate specialist advice is required.

For an employee who was earning €25,000 per annum an Unfair Dismissal claim against the employer can cost them up to €50,000 in wages. Even if they do not ultimately end up with such an award if the employer has to defend a case in a Tribunal they have a much better chance of winning the case if they got appropriate advice in advance of commencing any disciplinary procedures. Defending cases involves getting professional advisors. That costs. If the employer is a company and an award is made of over €10,000 if it is not paid up firstly the employer can end up after the 1st of October in a situation where failure to pay will be an offence in itself and secondly the employee can bring an application to wind up the company. In the case of an individual if the award is over €7000 the employee can apply to have the employer declared bankrupt. That can be the end of the employers business. If the employer holds out until the proceedings issue to wind up the company or to make them bankrupt they not only have to pay the compensation but the Court fees to the employees' lawyers for having brought the claim to that length.

Employers should always be aware that in Unfair Dismissal cases employees invariably win the issue as to whether the dismissal was fair or unfair on procedures. The conduct of the employee then only relates to the level of compensation which must be paid.

***In contentious cases a Solicitor may not charge fees or expenses or other charges as a proportion or percentage of any award or settlement.**