

Performance

ARTHUR COX

E X P E C T E X C E L L E N C E

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Health and Safety Group briefing

## Do as you are told! Health and Safety and Workplace Discipline

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*This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.*

### Discipline in the Workplace

Discipline in the workplace is the means by which employers address behavioural issues and non-compliance with company policies and procedures. Disciplinary procedures set out the stages and processes the employer will follow in relation to alleged shortcomings of an employee. Generally, disciplinary procedures are progressive allowing for informal warnings leading to written warnings and ultimately to dismissal.

The Labour Relations Commission published a *Code of Practice on Grievance and Disciplinary Procedures* in 2000 (S.I No. 146 of 2000). The main purpose of this Code of Practice is to provide guidance to employers, employees and their representatives on the general principles which apply in the operation of grievance and disciplinary procedures. This Code is not legally binding but sets the basic standards which are expected from workplace disciplinary rules.

### Fair Procedures

The importance of fair procedures is underlined by *section 5(b) of the Unfair Dismissals (Amendment) Act 1993* in the following terms: in determining if a dismissal is unfair regard should be had for (a) the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal and (b) to the extent (if any) of the compliance or failure to comply by the employer, in relation to the employee, with any agreed procedures. Employees should be informed about the disciplinary procedures operating in the workplace. Procedures should be clear and transparent.

The level of fair procedures that are required will depend on the nature of the allegations and the possible consequences. The higher the stakes for the employee the higher the standards that will be required.

The general principles of natural justice and fair procedures include:

- » that details of any allegation or complaint are put to the employee concerned;
- » that the employee is given the opportunity to respond fully to any such allegations;
- » that the employee concerned is given the opportunity to avail of the right to be represented (by work colleague, union representative or possibly legally);
- » that the employee concerned has the right to a fair and impartial determination of the issues concerned; and
- » that the employee is afforded a right to an internal appeal against an adverse finding made and/or sanction imposed.

### Employee Discipline and Health and Safety

Section 13 of the *Safety, Health and Welfare at Work Act 2005* (the “2005 Act”) imposes a range of duties on employees. Under section 13 of the 2005 Act, employees have a duty to refrain from improper conduct liable to harm the safety, health or welfare of persons at work. More and more prosecutions are being taken by the Director of Public Prosecution (on behalf of the Health and Safety Authority) against employees under section 13.

The first such prosecution under section 13 of the 2005 Act was in the case of *The People (DPP) v Delaney*. Mr. Delaney was prosecuted after a fatal accident in which another employee was crushed between the mast of a forklift truck and shelving in a storage area of a manufacturing plant. Mr. Delaney was not trained to drive fork lift trucks and was not authorised by his employer to do so. Mr. Delaney pleaded guilty to failing to take reasonable care to ensure so far as is reasonable practicable, his own safety and that of other persons affected by his actions (section 13 of the 2005 Act). Mr. Delaney was fined €2,000.

Where an employee carries out an authorised act (as was the case in *Delaney*) endangering himself or another employee it is both appropriate and necessary that internal disciplinary action is taken against the employees (independent of any criminal investigation that may be taking place). Employers should have a Health and Safety Policy in place which should provide that failure to comply with safety procedures, rules and policies may lead to disciplinary action.

It is essential that employers adhere to their own policies and the general principles of natural justice in disciplining employees. The implications of failing to apply procedures fairly can be seen in *Flynn v BOD Vehicle Support Services Ltd*. In this case before the Employment Appeals Tribunal, the employee (Mr. Flynn) was a motor mechanic who had been injured at work while carrying out an unauthorised ‘nixer’.

The managing director of the employer told the Tribunal that all staff had been issued with safety handbooks and a safety pack, and that Mr. Flynn knew that mixers were unauthorised and that his actions jeopardised the company’s future insurance. The employer suspended Mr. Flynn without pay, and subsequently dismissed on the grounds of gross misconduct. While the Tribunal agreed with the employer’s assertion that the employee’s behaviour amounted to gross misconduct and that he “contributed significantly” to his own dismissal, they held that the employer did not apply fair procedures in the disciplinary process as:

- » the claimant was not notified that he was facing a disciplinary process that included the possibility of dismissal;
- » a formal hearing was not carried out; and
- » the letter of dismissal did not offer the mechanic an appeal against the dismissal decision.

The Tribunal also held it was not reasonable to suspend the claimant without pay, and awarded him €3,550 for unfair dismissal.

By way of contrast, in the case of *Kelly –v- Iretex Packaging Limited* the employee was dismissed following allegations that he had set off a firework (during the course of his employment). The Company produced packaging and paper and the incident posed a serious risk to the safety of employees, stock and equipment. In this case there was a direct conflict of evidence between the employee and the employer. The employee at all times denied that he was responsible for setting off the firework. He did admit that he has previously had a firework at work. It was adduced in evidence that Mr. Kelly was the only employee absent from his work station at the time the firework was set off.

The employee said that at the time the firework was set off he was in the yard because he was going to get a phone number from a person due to be out there on the bus. The employee used this as an excuse during the course of the hearing but never mentioned it during the course of the investigation. Evidence was also given at the Tribunal that the employee was seen walking in the opposite direction to the bus when the supervisor saw him in the yard. It was accepted that the firework had to have been set off in the yard and the employer took the view that if there was

someone else in the yard then the employee in question would have seen that person. The employee had given evidence that he did not see anyone else in the yard on the night in question. The Employment Appeals Tribunal found that the employer had reasonable grounds for its belief that the employee was guilty of the alleged gross misconduct. The Tribunal stated that it reached its conclusions on a number of grounds:

- » firstly, it was reasonable for the employer to accept the Manager's information about the events leading up to the incident;
- » secondly, it is reasonable for the employer to reject the employee's explanation for his absence from his work station around the time of the incident; and
- » thirdly, given the steps that had to be taken to set the incident in motion and the employee's presence in the yard it is reasonable to believe that had there been another person in the yard the employee would have noticed him or her.

The Tribunal held that given the nature of the wrongdoing and the flammable nature of the goods being produced in the factory that the summary dismissal was not disproportionate in this case and the employee's claim failed.

### Conclusion

It is appropriate to take disciplinary action against employees in circumstances where they have failed to comply with Company Policy and their statutory duties under the 2005 Act.

Employers should always adhere to their own Policies in investigating allegations, conducting disciplinary hearings and imposing sanctions.

As can be seen from Flynn, if fair procedures are not applied a dismissal is likely to be deemed unfair irrespective of the employees contribution to such dismissal.

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