Employee performance and behaviour

CHAPTER 10

CHAPTER OBJECTIVES

When you have completed this chapter you should be aware of and able to describe:

- **the development of disciplinary procedures**
- **how the law supports the use of disciplinary procedures and protects individuals from unfair treatment**
- **the importance of clear rules about conduct**
- **the importance of counselling to the disciplinary process**
- **how to use the disciplinary process to manage different disciplinary problems**
- **the importance of setting clear performance standards for individuals.**

INTRODUCTION

This chapter and the one that follows cover two related topics: discipline and grievance. Although they are to be dealt with separately it is important to recognise that both are a two-way process and concern complaints, real or imagined, by one party against another. Both are covered by a specific Code of Practice, which is examined in detail later in the chapter. However, because of the way that the law has intervened in the disciplinary process (unfair dismissal legislation), disciplinary issues have tended to have a much higher profile within organisations than grievances, which are not as legally regulated.

What is discipline?

Discipline is an emotive word in the context of employment. The dictionary offers several definitions of the word 'discipline', ranging from 'punishment or chastisement' to 'systematic training in obedience'. There is no doubt that discipline at work can be one of the most difficult issues with which a manager has to deal. It brings to the forefront matters relating to an individual's performance, capability and conduct, and in the context of employment, the most appropriate definition to adopt is (Collins Concise Dictionary):

> to improve or attempt to improve the behaviour, orderliness, etc, of by training, conditions or rules.

In this chapter we examine the practices and skills that are required if employee behaviour and performance is to be effectively managed. This includes the principles of discipline-handling, the characteristics of a fair and effective disciplinary procedure, the legal aspects of discipline and dismissal, and the monitoring and evaluation of disciplinary procedures. A fair and effective disciplinary procedure is one that concentrates on improving or changing behaviour, and not one that relies on the principle of punishment.

Management problems with the discipline process

Many managers have a problem with managing employee behaviour and performance because they believe that the methodology available to them – the disciplinary process – is cumbersome and ineffective

or that the law on employment rights is heavily biased in favour of the employee. This can often result in problems being ignored because it is felt that effective action against individual employees either takes too long or is liable to mean an appearance before an employment tribunal at which the employee may well be successful. Many managers share this basic misconception, and it is the responsibility of the employee relations professional to advise and guide their managerial colleagues through what, to many, is a minefield.

Good practice

It is important for managers, at all levels, to appreciate that the effectiveness of the business can be undermined if issues relating to conduct, capability and performance are not handled professionally and consistently, or, even worse, if such matters are ignored altogether. This chapter looks inter alia at the concept of 'good practice' in relation to performance and behaviour at work, at the steps that have to be taken when managers are trying to alter existing behaviour or performance, and at how to ensure that all employees are treated fairly. 'Good practice' is a concept that many managers have difficulty with because it is a term that is difficult to define. In the context of discipline at work it is about acting with just cause, using procedures correctly, acting consistently, following the rules of natural justice – it is all four of those things – and more. It is also about developing those good management habits which ensure that you do follow procedure, you do act consistently and you do take account of the rules of natural justice when taking disciplinary action. Good practice is therefore an important principle. Not only does it help to ensure fairness and consistency but it makes good business sense and can add value.

THE ORIGINS OF DISCIPLINARY PROCEDURES

Up to the beginning of the 1970s employers had almost unlimited power to discipline and dismiss individual employees – and in many instances they were not slow to exercise this power. While it was possible for a dismissed employee to sue for 'wrongful dismissal' under the common law, it was rarely a practical option because of the time and heavy costs involved. The only time that employer power was likely to be restricted was where trade unions were present in the workplace and dismissal procedures were established through the collective bargaining process.

This changed with the Industrial Relations Act 1971. This Act gave individual employees the right, for the first time, to complain to an industrial tribunal that they had been unfairly dismissed. Industrial tribunals themselves had only been established in 1964, and so in 1971 were a relatively new feature of business life. They were renamed employment tribunals with effect from 1 August 1998 by the Employment Rights (Dispute Resolution) Act 1998, and this change has been carried through to all pre-existing enactments. As well as introducing the right not to be unfairly dismissed, the 1971 Act also introduced, in 1972, the Industrial Relations Code of Practice. This brought in the idea that there was a right and a wrong way to deal with issues of discipline. It was subsequently superseded by an ACAS Code of Practice on *Disciplinary Practice and Procedures in Employment*, and this has in turn now been superseded by a Code of Practice on *Disciplinary and Grievance Procedures* (see below).

The 1971 Act was a turning-point in the relationship between employer and employee. The relative informality of the then industrial tribunals and the fact that access to them did not depend on lawyers or money meant that for many employees the threat of dismissal without good reason disappeared or diminished. This does not mean that employees cannot be unfairly dismissed. They can. The law has never removed from management the ability to dismiss who it likes, when it likes, and for whatever reason it likes. All that has happened since 1971 is that where employers are deemed to have acted unreasonably and unfairly in dismissing employees, they can be forced to compensate an individual for the consequences of those actions. Most employers have accepted this legal intervention without serious complaint and seek to manage performance and behaviour issues in as fair a way as possible. Some

clearly do not, and take a cavalier attitude to individual employment rights. Others suffer from a misconception as to what they can do and how the law impacts upon their actions.

THE CURRENT LEGAL POSITION

Up until 1996, the law relating to discipline and dismissal was contained in the Employment Protection (Consolidation) Act 1978. In August of that year the Employment Rights Act 1996 came into force, consolidating provisions contained in the 1978 Act together with provisions of the Wages Act 1986, the Sunday Trading Act 1994 and the Trade Union Reform and Employment Rights Act (TURERA) 1993. The Employment Relations Act 1999 and the Employment Act 2002 have made further changes.

The starting-point for the disciplinary process is to be found in section 1 of the 1996 Act, which deals with an employee's right to a statement of employment particulars. Section 3 of the Act states that any statement of particulars must also specify any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules which is reasonably accessible to the employee. The Employment Act 2002 has now inserted a further requirement that the statement must also include information about any procedures applicable to the taking of disciplinary decisions.

The section goes on to stipulate that the statement of particulars must also specify who an employee can appeal to if he or she is dissatisfied with any disciplinary decision that is made.

Sections 94 to 134 of the Act deal specifically with unfair dismissal and set out

- the legal definition of dismissal
- the specific reasons for which it is fair to dismiss an employee
- the position of shop workers who refuse to work on a Sunday
- the position of trade union officials
- the position of health and safety representatives
- the position of pension trustees.

Fair dismissals

There are three ways in which individuals can be legally dismissed. One: their employment is terminated with or without notice. This is the most common situation and includes circumstances in which somebody is summarily dismissed for gross misconduct or simply given notice of dismissal. Two: they are employed under a fixed-term contract and that contract comes to an end without being renewed. Three: they resign (with or without notice) because of the employer's conduct, a situation more usually known as 'constructive dismissal'. This book is not intended as a legal text and more detail on the meaning and applicability of these three definitions can be found in *Essentials of Employment Law* by David Lewis and Malcolm Sargeant (CIPD, 2004) or in the CIPD Employment Law Service, which has been specifically designed to aid all practitioners with the legal aspects of their work.

Subsection two of section 98 of the Employment Rights Act 1996 defines a number of reasons for which it can be fair to dismiss an employee. These are:

- lack of capability or qualifications
- bad conduct
- redundancy
- breach of a statutory provision.

Dismissals relating to 'capability' (ie poor performance or absence) and 'conduct' (ie poor behaviour), together with 'some other substantial reason' (which is explained below) are probably the most common and have the most links with the disciplinary process. However, to be considered fair reasons for dismissal they have to pass the test of 'reasonableness' set out in section 98 of the Employment Rights Act. This states in subsection 1 that:

> In determining … whether the dismissal of an employee is fair or unfair, it is for the employer to show (a) the reason for the dismissal and (b) that it is either a reason falling within subsection 2 (see above) or that it is for some other substantial reason.

Subsection 4 then goes on to say that:

> the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 that the question shall be determined in accordance with equity and the substantial merits of the case.

The requirement to act reasonably has been central to the operation of unfair dismissal legislation for some considerable time, and one of the acid tests that an employer defending a case at tribunal can be judged on is the quality and fairness of its disciplinary procedures. This concept is supported by the legal validity given to the ACAS Code of Practice on *Disciplinary and Grievance Procedures*, and by the case of *Polkey v A E Dayton Services Ltd* [1987] IRLR 503. In the *Polkey* case the House of Lords effectively stated that failing to follow a proper procedure was unlikely to succeed as an effective defence unless the employer could prove that the outcome would have been no different irrespective of the procedure followed – a prospect that was, according to their lordships, fairly remote.

The Employment Act 2002 has now taken the principle of procedural fairness a step further. It contains a section on dismissal and disciplinary procedures which details how disciplinary matters are to be handled. These procedures – the standard three-step dismissal and disciplinary procedure (see below) – are then referred to in a new section 98A of the Employment Rights Act 1996.

Standard (three-step) dismissal and disciplinary procedure

Step One
The employer must set down in writing the nature of the employee's conduct, capability or other circumstances that may result in dismissal or disciplinary action, and send a copy of this statement to the employee. The employer must inform the employee of the basis for his/her complaint.

Step Two
The employer must invite the employee to a hearing at a reasonable time and place where the issue can be discussed. The employee must take all reasonable steps to attend. After the meeting, the employer must inform the employee about any decision, and offer the employee the right of appeal.

Step Three
If the employee wishes to appeal, he/she must inform the employer. The employer must invite the employee to attend a further hearing to appeal against the employer's decision, and the final decision must be communicated to the employee. Where possible, a more senior manager should attend the appeal hearing.

The standard dismissal and disciplinary procedure will apply when an employer is contemplating dismissal (including dismissal on grounds of lack of capability, bad conduct, redundancy, non-renewal of a fixed-term contract and retirement). Failure to follow the above procedure when it applies will make any dismissal automatically unfair. For occasions (cases of gross misconduct, for example) on which it is not possible, or appropriate, to follow the standard three-step procedure, there is a modified two-step procedure that must be followed.

Modified (two-step) dismissal procedure

Step One
The employer must set down in writing the nature of the alleged misconduct that has led to the dismissal, the evidence for this decision, and the right to appeal against the decision, and send a copy of this to the employee.

Step Two
If the employee wishes to appeal, he/she must inform the employer. The employer must invite the employee to attend a hearing to appeal against the employer's decision, and the final decision must be communicated to the employee.

These changes are important, and it is vital therefore that employee relations professionals make themselves aware of the provisions of the 2002 Act.

Unfortunately, section 98A(2) then goes on to say that failure to follow a procedure shall not be unreasonable if the employer can show that he/she would have decided to dismiss had a procedure been followed. For some, this makes an important change to the principle established in the *Polkey* case.

Although the Act sets out minimum qualifying periods of employment for the acquisition of employment rights, these limits can be, and have been, changed. For example, on 1 June 1999 the minimum period of continuous service with an employee to qualify for unfair dismissal was reduced from two years to one year. It is always disturbing when we hear, as we do, managers talk of having a free hand to take whatever actions they like during an individual's first months of employment. Making distinctions about how to deal with performance or behaviour issues based on an individual's length of service is to invite the possibility of inconsistency to creep into the process and to lay the organisation open to legal challenge. To avoid this possibility it is prudent for all managers and employee relations professionals to ignore an individual's length of service and treat all disciplinary issues in exactly the same way.

DISCIPLINARY PROCEDURES

ACAS Code

The ACAS Code of Practice on *Disciplinary and Grievance Procedures in Employment* is of significant importance in the management and resolution of disciplinary issues. While breach of the Code of Practice is, in itself, not unlawful, its provisions and impact are central to the understanding of the disciplinary process. The latest edition of the code, which is issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992, came into effect in October 2004. Its importance to the statutory process is very clear, and although a failure to follow any part of the code does not, in itself, make a person or organisation liable to any proceedings, employment tribunals will take the code into account when considering relevant cases. Similarly, the code has also to be taken into account by the arbitrators appointed by ACAS to determine cases brought under the ACAS Arbitration Scheme (see section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992).

Given such a very clear statement of the code's status, and taking into account the statutory underpinning of procedures by the Employment Act 2002, it is a foolish organisation that does not take seriously the need to invest time in ensuring that its own disciplinary procedure and practice are appropriate and meet the minimum requirements set out in the legislation.

Because of the importance that ACAS places on drawing up disciplinary procedures and company rules, it has produced a handbook *Discipline and Grievance at Work* which provides advice on dealing with disciplinary matters. The handbook, which at the time of writing was being revised, is based on the Code of Practice and looks at:

- the need for rules and disciplinary procedures
- handling a disciplinary matter
- holding a disciplinary hearing
- deciding and implementing disciplinary or other action
- the appeals process.

The disciplinary procedure

It has been the case for a number of years that a disciplinary procedure should be set out as follows:

- an oral warning
- followed by a written warning if the required improvement is not forthcoming
- followed by a final written warning if conduct or performance is still unsatisfactory
- and finally, dismissal.

Under this type of procedure, employers routinely recorded 'oral warnings' – but the latest ACAS advice is that discipline ought to fall into two categories: informal and formal. In the informal stage, which aims to replace the oral warning, no record would be kept, thus making it a genuinely 'oral' warning. Only if the oral (the verbal, informal) approach does not work are employers recommended to move into the formal stage. The formal stage, which provides for a written warning or final written warning, ought to be no different from an organisation's existing disciplinary code, but it is important to be aware of the three-step statutory approach to which we referred above.

Once a situation has entered the formal stage of a disciplinary process there are a number of important points to note. Firstly, it is essential that a record be kept of every disciplinary warning issued, and secondly, it is vital to advise individuals how long a warning will remain 'live'. 'Live' in this context indicates the length of time that a particular disciplinary sanction will stay on the record. Live warnings can be taken into account if further disciplinary issues arise, but warnings that have expired cannot. Many organisations will have different time-scales for different levels of warning – for example, a written warning might be live only for six months, whereas a final written warning might be live for 12 months. Finally, it is important that employees are advised of what will happen next if the desired changes to performance or behaviour are not made. One critical point to note at this stage is the rights that individual employees now have under Data Protection legislation. Under the provisions of this legislation, employees have the right to see anything that the employer holds in their personnel file, and this would include any notes made as part of the disciplinary process. It is therefore essential to ensure that a professional approach is taken to the writing of such notes and that they do not contain malicious or defamatory remarks.

The purpose and scope of a disciplinary procedure should be very clear. It should allow all employees to understand what is expected of them in respect of conduct, attendance and job performance, and

set out the rules by which such matters will be governed. The aim is to ensure consistent and fair treatment for all.

To what extent does your organisation's disciplinary procedure meet the criteria of clarity? Does it set out the time that individual warnings will be 'live', and is it capable of ensuring consistent and fair treatment for all employees? You may consider it worth reviewing your procedure against these benchmarks.

Principles underlying disciplinary procedure

When we examine handling discipline, you will note that the only way to ensure consistency is by taking a 'good practice' approach and recognising that a disciplinary procedure is more than just a series of stages. You should also recognise that there are a number of principles that underlie the procedure which are extremely important and help to ensure good personnel management practice. As with the mechanics of the procedure itself, ACAS offers guidance on good disciplinary procedures – which, it says, should:

- be in writing
- specify to whom they apply
- be non-discriminatory
- provide for matters to be dealt with without undue delay
- provide for proceedings, witness statements and records to be kept confidential
- indicate the disciplinary actions that may be taken
- specify the levels of management which have the authority to take the various forms of disciplinary action
- provide for workers to be informed of the complaints against them and, where possible, to see all relevant evidence before any hearing
- provide workers with an opportunity to state their case before decisions are reached
- provide workers with the right to be accompanied
- ensure that, except for gross misconduct, no worker is dismissed for a first breach of discipline
- ensure that disciplinary action is not taken until the case has been carefully investigated
- ensure that workers are given an explanation for any penalty imposed
- provide a right of appeal – normally to a more senior manager – and specify the procedure to be followed.

The right to be accompanied by a shop steward or other trade union official used only to apply to workplaces where there was a recognised union. However, the Employment Relations Act 1999 has now provided all workers with the statutory right to be accompanied at disciplinary and grievance hearings. The right applies where the worker is required or invited by his or her employer to attend certain disciplinary or grievance hearings, and when he or she makes a reasonable request to be so accompanied. In Chapter 3 we examined the concept of 'workers', and how certain employment rights had now been extended to apply to them. This right is one of them – and the statutory right to be accompanied applies to all workers, not just employees working under a contract of employment.

Whether a worker has a statutory right to be accompanied at a disciplinary hearing will depend on the nature of the hearing. When a problem first surfaces, employers often choose to deal with it initially by means of an informal interview or counselling session. So long as the informal interview or counselling session does not result in a formal warning or some other action it is often more appropriate to try to

resolve matters with just the worker and the manager present. Equally, employers should not allow an investigation into the facts surrounding a disciplinary case to extend into a disciplinary hearing. If it becomes clear during the course of the informal or investigative interview that formal disciplinary action may be needed, then the interview should be terminated and a formal hearing convened at which the worker should be afforded the statutory right to be accompanied.

It is important to note that the right to be accompanied applies to every individual, not just union members, and it is of no consequence whether the organisation recognises unions or not.

The statutory right to be accompanied applies specifically to hearings which could result in:

- the administration of a formal warning to a worker by his or her employer (ie a warning, whether about conduct or capability, that will be placed on the worker's record)
- the taking of some other action in respect of a worker by his employer (eg suspension without pay, demotion or dismissal), or
- the confirmation of a warning issued or some other action taken.

After live warnings expire

Although it is to be hoped that any disciplinary problems within an organisation can be resolved at the earliest opportunity, and without recourse to all levels of the procedure, the world of work is not so simple. Many managers complain that having given an individual an oral warning or, in some cases, having got all the way through to final written warning stage, the problem to which the disciplinary action related resurfaces as soon as the warning ceases to be 'live'. It is then assumed, mistakenly, that the whole process must begin again.

This is not so – and three points must be considered. Firstly, for what length of time do warnings stay live? If it is for too short a time, you run the risk of only achieving short-term changes in behaviour . . . yet on the other hand you do not want it to be too long. A sanction that remains on an employee's record for an excessive period of time relative to the original breach of discipline can act as a demotivating influence. Secondly, has the warning been too narrow? Very often it makes more sense to issue a warning in such a way that an employee is left in no doubt that 'any further breaches of the company rules will result in further disciplinary action'. The ACAS Code of Practice makes it clear that the procedure may be implemented at any stage. If you have an employee against whom you constantly have to invoke the disciplinary procedure, or the offence is serious but does not amount to gross misconduct, then it may be appropriate to begin with a written rather than an oral warning. In extreme cases, a final written warning could be appropriate.

Gross misconduct

Before leaving procedural requirements it is necessary to examine what gross misconduct means. You will have noted above that according to the ACAS principles it is permissible to dismiss an individual without notice if he or she has committed an act of gross misconduct. Gross misconduct can be notoriously difficult to define and often difficult to prove, and ACAS very helpfully provides a list of actions that would normally fall into this category. These are:

- theft
- fraud
- deliberate falsification of records
- fighting

- assault on another person
- deliberate damage to company property
- serious incapability through alcohol or under the influence of illegal drugs
- serious negligence
- injury or damage
- serious acts of insubordination.

While that is quite an extensive list, it is also notable for its lack of clarity. For example, what is an act of serious insubordination? Would it cover the refusal to carry out instructions received from a supervisor? What is serious negligence, or serious incapability through alcohol?

The potential difficulties caused by this lack of clarity mean that whatever procedure you establish, it reflects the organisation's structure and culture: the norms and beliefs within which an organisation functions. This is where the writing of clear company rules is so important. Not only do such rules help to distinguish between ordinary and gross misconduct but they provide employees with clear guidelines on what is acceptable in the workplace, in terms of both behaviour and performance.

How sure are you, that your organisation's procedure is working as it should? What criteria would you use to assess whether it is or is not?

RULES IN EMPLOYMENT

Rules should be written for the benefit of both employer and employee. Their purpose should be to define and make clear exactly what standards of behaviour are expected in the workplace. Typically, rules cover the following areas:

- time-keeping
- absence
- health and safety
- misconduct
- the use of company facilities
- confidentiality
- discrimination.

There are some (including ACAS) who would argue that rules about poor performance should also be included, but there are practical difficulties about writing rules in respect of poor performance. Individuals need to know what is expected of them with regard to performance, but this ought to be done through a clearly written job description that sets out their prime tasks and responsibilities and how their performance will be measured. Clearly, if rules relating to behaviour are broken and, as a consequence, performance is impaired – for example, drunkenness – it is easy to see a link between poor performance and rule-breaking, and that the disciplinary procedure might be used to correct the problem.

But if someone is simply not competent to carry out the tasks for which he or she has been employed, it is hard to see what sort of rule has been broken, notwithstanding the fact that the disciplinary procedure may be used as a means of correcting the problem. This, however, is a minor point. The important point is to ensure that the following principles are followed whatever rules are established:

- They are clear.
- They cannot be misinterpreted.
- They are able to distinguish between ordinary misconduct and gross misconduct.

However, notwithstanding the difficulties in writing rules about performance, many companies now include a section on (in)capability within their disciplinary procedures. Although many procedures content themselves with identifying the various procedural stages and a definition of 'gross misconduct', others are including sections such as in the following example.

CAPABILITY

We recognise that during your employment with us your capability to carry out your duties may vary. This can be for a number of reasons, the most common ones bring that either the job changes over a period of time and you have difficulty adapting to the changes, or you change (most commonly because of health reasons).

Job changes

a) If the nature of your job changes and we have concerns regarding your capability, we will make every effort to ensure that you understand the level of performance expected of you and that you receive adequate training and supervision. This will be done in an informal manner in the first instance and you will be given time to improve.

b) If your standard of performance is still not adequate, you will be warned, in writing, that a failure to improve and to maintain the performance required will lead to disciplinary action. If this were to happen, the principles set out in paragraph 2 above will apply. We will also consider a transfer to more suitable work if possible.

c) If we cannot transfer you to more suitable work and there is still no improvement after you have received appropriate warnings, you will be issued with a final warning that you will be dismissed unless the required standard of performance is achieved and maintained.

Personal circumstances

a) Personal circumstances may arise in the future which do not prevent you from attending work but which prevent you from carrying out your normal duties (eg a lack of dexterity or general ill health). If such a situation arises, we will normally need to have details of your medical diagnosis and prognosis so that we have the benefit of expert advice. Under normal circumstances this can be most easily obtained by asking your own doctor for a medical report. Your permission is needed before we can obtain such a report and we will expect you to co-operate in this matter should the need arise. When we have obtained as much information as possible regarding your condition, and after consultation with you, a decision will be made as to whether any adjustments need to be made in order for you to continue in your current role or, where circumstances permit, a more suitable role should be found for you.

b) There may also be personal circumstances which prevent you from attending work, either for a prolonged period or periods or for frequent short periods. Under these circumstances we will need to know when we can expect your attendance record to reach an acceptable level, and again this can usually be most easily obtained by asking your own doctor for a medical report. When we have obtained as much information as possible regarding your condition, and after consultation with you, a decision will be made as to whether any adjustments need to be made in order for you to continue in your current role or whether, if circumstances permit, a more suitable role should be found for you.

The importance of clear rules

Failure to be clear and failing to make a proper distinction between types of misconduct has caused many organisations to suffer losses at employment tribunals. It is no good having a very clear procedure, laying down the type and number of warnings that an individual should receive, if the rules that are being applied are imprecise or do not reflect the attitudes and requirements of the particular business. As Edwards (1994; page 563) says:

> How people expect to behave depends as much on day-to-day understanding as on formal rules. Workplaces may have identical rule-books, but in one it may be accepted practice to leave early near holidays; in another, on Fridays; in a third, when a relatively lenient supervisor is in charge; and so on.

There is also a need to ensure that rules reflect current industrial practice, as is illustrated by the following case (*Denco v Joinson* [1991] IRLR 63). The applicant, who was a union representative, had been dismissed for gross misconduct for gaining unauthorised access to his employer's computer system. He had gained access to a part of the system that would normally be inaccessible to him by using another employee's password. In his defence it was argued that 'he had only been playing around' with the system, and that there had been no intent to obtain information to which he was not entitled. Furthermore, that while he might have been doing something wrong, it was not 'gross misconduct' and could have been covered by a disciplinary warning. In upholding the dismissal for gross misconduct the Employment Appeal Tribunal (EAT) stated:

> The industrial members are clear in their view that in this modern industrial world if an employee deliberately uses an unauthorised password in order to enter or to attempt to enter a computer known to contain information to which he is not entitled, then that of itself is gross misconduct which *prima facie* will attract summary dismissal, although there may be some exceptional circumstances in which such a response might be held unreasonable.

In essence the EAT were making the same point that had been made some years earlier in *C A Parsons & Co Ltd v McLaughlin* (1978) IRLR 65 – that some things should be so obvious that it ought not to be necessary to have a rule forbidding it. However, for the avoidance of doubt, the EAT went on to say in the *Denco* case that:

> It is desirable, however, that management should make it abundantly clear to the workforce that interfering with computers will carry severe penalties. Rules concerning access to and use of computers should be reduced to writing and left near the computers for reference.

While the comments of the Employment Appeal Tribunal about certain things being obvious may seem perfectly reasonable, it should be remembered that employers have an absolute duty to demonstrate that they have acted reasonably when they dismiss somebody. In *Denco*, the EAT acknowledged that there might be circumstances in which an employer's particular response might be 'unreasonable' even about something which is supposedly obvious. The message is very clear. If something is not allowed, say so, and spell out the consequences of breaching the rule. Because technology, or the ownership of businesses, can change, what may have been acceptable once may now be frowned on. A classic example is Information Technology which, since the *Denco* case in 1991, has moved forward at a remarkable pace. Nowhere is this more evident than in the case of Internet access and the use of e-mail where personal use is difficult and time-consuming to monitor, but which if inappropriately used can bring an organisation into serious disrepute.

This has caused many organisations to rethink their policies on computer use and recognise that clear guidance must be given to employees. The following extract from an 'IT policy' is one example.

IT RESOURCES POLICY (extract)

Please read this document carefully.

Failure to comply with this policy may not only result in disciplinary proceedings (including summary dismissal for acts of gross misconduct) but may also result in criminal and/or civil liability for you and/or the Company. Breaches of those rules shown below will be considered by the firm to be acts of gross misconduct.

Business and non-business use of the firm's IT resources
The Company's IT resources, including but not limited to computer hardware, software, telephones, fax machines, voicemail, e-mail, intranet and Internet access (the 'IT Resources'), are intended primarily to assist you to conduct the Company's business in accordance with your duties as an employee of the Company.

You may make reasonable personal use of the Company's IT Resources provided that:

- you do so in your own time and it does not materially affect the amount of time you and your colleagues devote to your or their duties respectively.
- it does not interfere with or adversely affect the Company's business and/or reputation, and
- is in accordance with this policy.

You may use the IT resources in your own time for reasonable non-business purposes, but please note that you have no legal right to do so under the terms of your employment or otherwise. In any event, your use of the IT resources (whether for personal or business use) may be monitored. Use of the IT resources for non-business use remains subject to the Company's discretion and rules and regulations, and may be withdrawn by the Company on a temporary or permanent basis at any time.

Use of the Company's IT resources
Whether you use the IT resources for business or for personal use, there are things you must NOT DO and things that you MUST DO. These are listed below: . . .

As we stated above, there are a number of variables – such as technological developments – in the drafting of company rules, and the prudent employee relations professional will ensure that in his or her organisation they are the subject of regular monitoring so that they properly reflect the organisation's current values and requirements.

The need to be clear about the behavioural standards that are expected in any workplace, and the sanctions that will be applied for non-compliance, is particularly important in distinguishing between gross and ordinary misconduct. Frequently, organisations commit the error of making vague statements in their company rules to the effect that certain actions *may* be treated as gross misconduct or that the failure to do something *could* leave an individual liable to disciplinary action. For example, many rules on theft that we have seen simply state that 'Theft may be considered to be gross misconduct.'

This sort of wording can only leave room for doubt and confusion. If an employee stole a large sum of money from the company, there is little doubt that he or she would be charged with gross misconduct and, if the allegation was proved, dismissed without notice. What, though, would happen if the alleged theft were of items of company stationery or spare parts for machinery? Would every manager treat the

matter as one of gross misconduct and dismiss, or would the value of the items taken be a consideration? Employee relations professionals must be aware of these potential contradictions when helping to frame rules that govern the employment relationship. If it is normal practice to turn a blind eye to the misappropriation of items like stationery, then this can cause problems when someone is accused of a more serious theft. We have already highlighted the importance of discipline being applied fairly and consistently. Company discipline can certainly be questioned if different managers are given the opportunity to apply different standards to the same actions. Allowing different managers to take a different view about the seriousness of certain acts of theft brings inconsistency into the process. It could prove very costly at an employment tribunal. One way to avoid this problem is to make positive statements – for example, that all theft will be treated as gross misconduct.

A better rule on theft might be:

> Theft: stealing from the company, its suppliers or fellow employees is unacceptable, whatever the value or amount involved, and will be treated as gross misconduct.

Using this style of wording should help to ensure that every employee in the organisation knows the consequences of any dishonest action on his or her part. Ensuring that managers apply the sanction consistently is another problem, and one we will deal with later in the chapter.

How often are the rules in your organisation reviewed, and when were they last updated? Do you know whether different standards apply to the application of the rules?

Theft, whatever standards different organisations might apply, is usually associated in the public mind with gross misconduct, notwithstanding the problems of definition that we have just outlined. The distinction between gross misconduct and other serious infractions of the rules can often be harder to identify. The first thing to acknowledge is that no clear distinction exists, but it is possible to apply common sense to the issue. For example, it is easy to understand that a serious assault on another person ought to be treated as gross misconduct, whereas poor time-keeping would not. While a consistent failure to observe time-keeping standards might ultimately lead to dismissal, the two offences clearly initially evoke different outcomes – namely, immediate dismissal in the first case and normally a verbal warning in the second. Perhaps one way in which a distinction might be drawn, therefore, is by reference to the expected outcome of the disciplinary process and to the relationship of trust that ought to exist between employer and employee.

Although not wishing here to explore the wider issues relating to the contract of employment, it is implied in every contract that for an employment relationship to be maintained there has to be mutual trust and confidence between employer and employee. When issues of discipline arise, that relationship is damaged. One of the purposes of disciplinary action is to bring about a change in behaviour, and if the offence is one of poor time-keeping, there is usually no question of a total breakdown of trust and the expected outcome of disciplinary action is of improved time-keeping and a rebuilding of the relationship. If the cause of the disciplinary action was a serious assault on another employee, perhaps a manager, however, a disciplinary sanction might bring about a change in behaviour or ensure that the offence is not repeated, but there is a high probability that the relationship of mutual trust and confidence might be damaged beyond repair, and it might be impossible for the employment relationship to be maintained.

HANDLING DISCIPLINARY ISSUES

The way in which managers and employee relations professionals approach disciplinary issues will be subtly different, depending on the nature of the problem. Most organisations will have some form of

disciplinary procedure, and probably some company rules, but the use and application of the procedure may vary from company to company and from manager to manager. In some organisations disciplinary action is very rarely taken, either because standards are clear and accepted by employees or standards are vague and applied haphazardly. In others standards are maintained by an over-reliance on automatic procedures, which usually acts as a demotivating influence on the workforce.

The purpose of disciplinary procedures, according to the ACAS Code, should be to promote

> orderly employment relations as well as fairness and consistency in the treatment of individuals. They enable organisations to influence the conduct of workers and deal with problems of poor performance and attendance, thereby assisting organisations to operate effectively.

The principles of fairness and consistency are at the heart of 'good practice', and the aim of all managers should be to handle disciplinary issues in as fair and equitable a way as is possible. They should do this because it represents 'good practice' in terms of management skill, not just because of the influence of the law. If managers are only concerned with legal compliance, they will not be as effective as those who are driven by the need to operate 'good practice'. The law on unfair dismissal is now so ingrained into the fabric of the workplace that only by maintaining such standards does it cease to become an issue. Good managers have nothing to fear from the laws relating to individual employment rights. That is not to say the law should be ignored, but neither should it be feared. In an ideal world managers would act in such a way that they avoided accusations of unfair treatment. But this is not an ideal world and even the best managers can find themselves defending their actions before an employment tribunal – and this is why it is important for the concept of 'good practice' to become part of an organisation's ethos.

Not only does this allow the organisation to demonstrate consistent and fair treatment for all, but ensures that it meets its absolute duty to act reasonably, as set out in section 98(4)(a) of the Employment Rights Act 1996. Furthermore, such an approach not only makes good business sense, it fits the concept of 'natural justice' that is so important in handling disciplinary issues.

The 1996 Act identifies the reasons for fairly dismissing an employee as (poor) conduct, (lack of) capability and 'some other substantial reason', and all of these would require the implementation of a disciplinary process in order for any action taken to be reasonable. However, before reaching for the disciplinary procedure, a good manager will consider whether some other route would be even more appropriate. Maintaining good standards of discipline within an organisation is not just about applying the rules or operating the procedure. It is about the ability to achieve standards of performance and behaviour without using the 'big stick'. One way this might be done, and to avoid becoming embroiled in the disciplinary process, is counselling, which could provide the required change in behaviour without making the individual concerned feel he or she was some kind of dissident.

Counselling

Counselling is more than simply offering help and advice. It is helping, in a non-threatening way, an individual to come to terms with a particular problem. The problem may be about performance, about time-keeping, about drug or alcohol abuse, or about another employee – for example, an accusation of sexual harassment. Counselling an employee, whatever the nature of the problem, needs careful preparation. In a situation involving the abuse of a drug or alcohol, managers may have the necessary skills to carry out such a sensitive task, but even if they conclude that specialist help is required, they can still help to bring the problem out into the open. In other cases, provided the problem is approached in a systematic way, this type of intervention may avoid disciplinary action.

One example of where counselling might be an appropriate first step would be in respect of an allegation of sexual harassment or bullying. Provided the complainant has not suffered any physical assault and, most importantly, that the complainant is happy for the matter to be handled in an informal way, counselling can be very helpful – not only to the alleged harasser but also to the victim. Without wishing to minimise or condone what can be a very serious problem in some workplaces, it can often be the case that the alleged harasser or bully does not realise that his or her behaviour or actions are causing offence or fear. Sitting down with individuals and explaining to them that some of their words or actions are causing distress to another employee can often be very effective. However, it is important not to leave it there but to monitor the situation and ensure that the behavioural change is permanent, and that the complainant is satisfied with the action taken and the eventual outcome. If not, you may find yourself dealing with a formal grievance or even a claim for constructive dismissal.

Does your organisation's disciplinary code say anything about equal opportunities or discrimination? Is there, for example, a clear rule that says sexual harassment or racial discrimination will not be tolerated? Do you have a Code of Practice that gives guidance on how to manage these sorts of problems?

Similarly, if the problem concerns poor performance, 'good practice' would be to discuss the problem with the employee concerned rather than go straight into the disciplinary procedure. The first step would be to speak to the employee in private, explaining what aspects of performance were falling short of the desired standard and, most importantly, what actions were required by the employee to put matters right. The golden rule to remember is to set clear standards. If employees do not know what is expected of them, how can they deliver the performance that is required? Another step in this process might be to consider whether some additional training might be an option. All of this might be best dealt with under a formal appraisal scheme, if one exists within the organisation.

The formal approach

However, if after following the counselling route there are still complaints of harassment, or the quality of work being carried out still falls below standard, it may then be necessary to begin disciplinary proceedings. Again it is important to remember the principle of 'good practice'. The operation of the disciplinary procedure can often lead to managerial disenchantment because of the claim that 'it takes too long'. This is where the employee relations professional has a clear duty to advise and guide management colleagues. Because starting down the disciplinary path can, ultimately, lead to a dismissal, it is important to remember the requirement that in taking a decision to dismiss somebody you should act reasonably and in accordance with natural justice.

It is easy to understand the frustration a line manager might feel if the disciplinary process takes too long, but it is the employer who is in control of the process and can determine the timings. The question of fairness relates not to how long the process takes, but to the quality of the procedures followed. For example, say you had an experienced employee who was responsible for carrying out a very important task within the organisation and which had serious cost implications if it were not carried out efficiently. If the task was not being performed satisfactorily, the amount of time you could allow the employee to improve his or her performance would be limited. Alternatively, if the employee was inexperienced and performing a task that was less cost-sensitive and important, the time allowed for improvement should be longer.

It is also necessary to consider how long the substandard performance has been allowed to continue unchallenged, because it may be the case that a previous manager was prepared to accept a lower standard of performance. What is important in either of these scenarios is that the employee is made aware of the standard that is required and understands the importance of achieving that standard in

whatever time-scale is agreed. Under the ACAS Code it is acceptable to miss out stages in the procedure, and this may be the more obvious solution if the consequences of the poor performance are so serious.

USING THE DISCIPLINARY PROCEDURE

Whatever the nature of the problem, once the decision has been taken to invoke the formal disciplinary procedure, it is important to ensure that its application cannot be challenged. The following guidelines, which are broken down into two stages, help to ensure a consistent and fair approach.

Preparing for the disciplinary hearing

Now that the Employment Act 2002 sets out minimum procedural standards for the conduct of dismissal and disciplinary meetings the preparatory process becomes particularly important. There are various steps that must be taken in preparing to conduct a disciplinary interview, and a number of points to consider – some of which are a statutory requirement:

1 Prepare carefully and ensure that the person conducting the disciplinary hearing has all the facts. This sounds straightforward, but it is not always possible to obtain all the facts. Frequently, the evidence of alleged misconduct is no more that circumstantial, particularly in cases involving theft. However, the guiding principle is to ensure that a thorough investigation takes place and that whatever facts are available are presented – including, where appropriate, written witness statements. Sometimes people will ask to remain anonymous when providing information during a disciplinary investigation, and this has to be treated with a great deal of care. If possible, seek some form of corroborative evidence and try to check whether the anonymous informant's motives are genuine.

2 Ensure that the employee knows what the nature of the complaint is. This again sounds straightforward, but is often the point at which things begin to go wrong. For example, it would not be sufficient to tell an employee that he or she is to attend a disciplinary hearing in respect of poor performance. He or she must be provided with sufficient detail in order to be able to prepare an adequate defence and so that the employer can demonstrate that it has met the statutory requirements set out in the procedure outlined above.

3 Arrange a suitable time and place for the interview. This would seem to be obvious but, as with so many things in employee relations, what may seem obvious to the specialist is not always apparent to the busy line manager. There is a tendency for managers to arrange meetings within their own offices where the potential for being interrupted is more pronounced or privacy less easily guaranteed. It is also important to remember that the employee might request an alternative date to the one suggested, particularly if the chosen companion or trade union official cannot attend.

4 Ensure that the employee knows the procedure to be followed. Simply because an individual was provided with a copy of the disciplinary code when he or she commenced employment does not imply that he or she knows the procedure to be followed. It is always wise to provide people with a new copy of the disciplinary procedure – not least because there may have been amendments since they received their original version.

5 Advise the employee of the right to be accompanied (see above). Where individuals work in a unionised environment this tends to be automatic, with an invitation to attend the meeting sent directly to the appropriate union official. However, in non-unionised environments people are not always sure who would be an appropriate person to accompany them, or whether they want to be accompanied at all. As a matter of good practice it is wise to encourage somebody to be accompanied, but a decision against it has to be respected. When that does happen, the fact that the employee wishes to attend the disciplinary interview alone should be recorded.

6 Enquire if there are any mitigating circumstances. What is or is not a mitigating circumstance will be dictated by each case. It is not for the employer to identify matters of mitigation, but it is

important to ask the employee who is facing a disciplinary sanction whether there are any particular circumstances that might account for his or her actions. Whether an individual manager accepts what may seem to be no more than excuses is a question of fact determined by individual circumstances. For example, an employee with a bad time-keeping record might be excused if he or she was having to care for a sick relative before attending work, whereas another employee might put forward a less acceptable excuse, such as a broken alarm clock.

7 Are you being consistent? This is where the employee relations professional can provide invaluable assistance to the line manager. Most line managers deal very rarely with disciplinary issues and may not be aware of previous actions or approaches that have been taken in respect of disciplinary issues. The employee relations professional can provide the advice and information that ensures a consistent approach.

8 Consider explanations. This is not the same as mitigating circumstances or excuses. This is the opportunity that you must give to an employee to explain his or her acts or omissions. For example, if the hearing was about poor performance, the employee might want to point out factors that have inhibited performance but which might not be immediately apparent to the line manager conducting the hearing. There may be issues around the quality of training received or the quality of instructions given.

9 Allow the employee time to prepare his or her case. The question here is how much time. It is important that issues of discipline are dealt with speedily once an employee has been advised of the complaint against him or her, but it is important for the employee not to feel unfairly pressured in putting together any defence that he or she may have.

10 Ensure that personnel records, etc, are available. This covers more than basic information about the individual and includes records relating to any previous disciplinary warnings, attendance, performance appraisals, etc.

11 Where possible, be accompanied. It is very unwise for a manager to conduct a disciplinary interview alone because of the possible need to corroborate what was said at some future time. It also helps to rebut any allegations of bullying or intimidation that may be made by a disgruntled employee.

12 Try to ensure the attendance of witnesses. This should not be a problem if the people concerned are in your employ, but can prove difficult when they are outsiders.

The importance of careful preparation cannot be stressed too strongly, for it is at this stage that things often go wrong. Where tribunals, for example, often express concern is in the preliminary stages of the disciplinary process. Employers are often criticised for failing to give sufficient information to the employee about the nature of the complaint against him or her. We have certainly found examples of employers who have deliberately withheld information to prevent employees from constructing plausible explanations for their conduct or actions. While this was never acceptable, it is clearly in breach of the statutory procedure and must not be allowed.

The disciplinary interview

Good preparation helps the second part of the process – conducting the actual disciplinary interview. There are a number of points to remember at this stage:

1 Introduce those present – not just on grounds of courtesy, but because an employee facing a possible sanction is entitled to know who is going to be involved in any decision. In a small workplace this may be unnecessary, but it can be important in larger establishments.

2 Explain the purpose of the interview and how it will be conducted. This builds on the need to ensure that the employee fully understands the nature of the complaint against him or her and the

procedure to be followed. As with any hearing, however informal, what it is for, what the possible outcomes are, and the method by which it is to be conducted are important prerequisites for demonstrating that natural justice has been adhered to. If it is apparent that, for whatever reason, the employer does not fully understand the nature of the complaint against him or her, you must halt proceedings until they are clear – even if this means postponing to another day.

3 Set out precisely the nature of the complaint and outline the case by briefly going through the evidence. This may seem like overkill, but it is important to ensure that there are no misunderstandings. It is important to ensure that the employee and his or her representative, if there is one, are given copies of any witness statements and afforded a proper opportunity to read them.

4 Give the employee the right to reply. Put simply: no right of reply, no natural justice.

5 Allow time for general questioning, cross-examination of witnesses, etc. If this did not happen, it would be difficult to persuade a tribunal that the test of reasonableness had been achieved.

6 No matter how carefully you prepare, or how well you are conducting a disciplinary hearing, things may not always proceed smoothly. People can get upset or angry and the whole process become very emotional. In such circumstances it might be advisable to adjourn and reconvene at a later date. If this happens, it is important to make it clear to the employee that the issue cannot be avoided and a hearing must be held.

7 Sum up. There is a need to be clear about what conclusions have been reached and what decisions are to be made, and for this reason it is better to adjourn so that a properly considered decision can be made. One of the biggest handicaps the employee relations specialist can face is the manager who pre-judges. It is not uncommon to be asked to assist at a hearing where the manager wishes to administer a particular, predetermined, type of warning. It is the job of the professional adviser to counsel against this approach.

Careful preparation and a well-conducted interview are not guarantees that individuals will not complain of unfairness, but they are essential if the test of reasonableness is to be satisfied.

MISCONDUCT DURING EMPLOYMENT

There are two distinct perpetrators of misconduct: the persistent rule-breaker and the individual who commits an act of gross misconduct. In most instances, dealing with the persistent rule-breaker is relatively straightforward, provided that the disciplinary code is applied in a sensible and equitable manner. Assuming that it has been possible to go through some form of counselling with the employee, but the required change in behaviour has not been forthcoming, it is likely that the only alternative is to begin the disciplinary process. The likely first step would be a verbal or written warning, followed, if necessary, by the subsequent stages in the procedure, leading ultimately to dismissal.

Although the dismissal of an employee is never an easy task for a manager, it can – if the steps outlined above are followed – be a relatively straightforward process. Furthermore, individuals who are dismissed for persistent infringements of the rules, for which they have had a series of warnings and the opportunity to appeal, rarely go to employment tribunals. It is difficult for an individual to claim that the employer acted unreasonably when he or she has been given a number of opportunities to modify his or her actions. The only complaint that an individual might have in such circumstances is that the procedure itself was unfair or had been applied contrary to the rules of natural justice. This could happen if some people were disciplined for breaches of the rules and others were not.

Imagine that your organisation had dismissed somebody for bad time-keeping and unauthorised absences, and the employee had challenged this in an employment tribunal. What evidence would you need to present in support of your organisation's action?

Gross misconduct

Gross misconduct, on the other hand, presents totally different problems for the manager. Earlier, some of the issues surrounding the concept of gross misconduct were examined, as was the need to be absolutely clear what breaches of the rules *will* mean, as opposed to *might* mean. For the manager who is called upon to deal with a case of alleged gross misconduct it is vitally important that all procedural steps are strictly adhered to, because mistakes can be costly. For obvious reasons managers are often under extreme pressure to resolve matters quickly. This is not just because it is much fairer to the accused individual that the matter is resolved, but because other colleagues may have already pre-judged the outcome. Pressure cannot always be avoided, but it is necessary that in such circumstances the requirement to prepare properly and conduct a fair hearing are not forgotten.

Some cases of gross misconduct are very clear-cut, and the employee concerned either admits the offence or there are sufficient witnesses to confirm that the alleged offence was committed by the employee in question. In such cases the first decision for the employer is to decide whether to treat the matter as gross misconduct, for which the penalty is summary dismissal without notice or pay in lieu of notice, or to take a more lenient line Such decisions are made easier if the company rules are clear and unambiguous about what constitutes gross misconduct. But in our experience, many cases of gross misconduct are not clear-cut and managers are very unsure about how to deal with them. Some of the cases in which we have been asked to assist include suspected theft of goods or money, suspicion of tampering with time-recording devices, suspected false expense claims or seeking payment of sick pay while fit for work. One reason why managers can be unsure about such offences is that some of them could lead to criminal charges being laid against the employee or employees concerned.

One way to approach this very sensitive issue is by ensuring that the 'Burchell rules' are applied. These rules relate to a case that was decided in 1978 involving an incident of alleged theft (*British Home Stores v Burchell* [1978] IRLR 379). The specific facts of the case are not particularly important, but it is significant because of the test of reasonableness that flowed from it. The Burchell test states that where an employee is suspected of a dismissable offence, an employer must show that:

- the reason for dismissal was *bona fide* and not a pretext
- the belief that the employee committed the offence was based on reasonable grounds – that is, that on the evidence before them, the employer was entitled to say that it was more probable that the employee did, in fact, commit the offence than that he or she did not
- the belief was based on a reasonable investigation in the circumstances – that the employer's investigation took place before the employee was dismissed and included an opportunity for the employee to offer an explanation.

The implications of the Burchell test

Let us look at this test in a little more detail and try to relate it to events as they might take place in the working environment. Take the example of a suspected fraudulent expense claim. The first part of Burchell says that the reason for dismissal must be *bona fide* and not a pretext. This means not using the alleged offence as a convenient means of dismissing an employee whose 'face no longer fits' or who has a history of misconduct on which no previous action has been taken. The second and third parts of Burchell relate to the employer's belief in the employee's guilt and to the standards of the investigation carried out. As Lewis and Sargeant (2004; page 159) state:

> The question to be determined is not whether, by an objective standard, the employer's belief that the employee was guilty of the misconduct was well-founded but whether the employer believed that the employee was guilty and was entitled so to believe having regard to the investigation conducted.

Using the Burchell test in the case of a suspected fraudulent expense claim, the employer would have to be very diligent in assembling the evidence. What guidelines were laid down for the benefit of those allowed to claim expenses? What expenses had been accepted in the past? Were the same standards applied consistently to all staff? Had any other employee made a similar claim in the past without challenge? Assembling such an array of evidence is only likely to happen if there is a thorough investigation – but this is only the first part of the process: the employee is also entitled to offer an explanation. What do you do if the explanation is linked to the lack of guidelines about what is and is not claimable?

While the findings in the *Parsons* case (see above) – that some things are so obvious that they do not need a rule – is relevant, the seniority of the employee concerned might also be relevant. A 'reasonable' belief that a senior employee who regularly claimed expenses was acting dishonestly might be easier to demonstrate than a situation in which a junior employee was claiming expenses for the first time. We acknowledged above the uncertainties that sometimes can be encountered when the possibility of criminal proceedings is on the agenda. A question we are often asked is, can we dismiss somebody if we have asked the police to investigate with a view to prosecution? The short answer is 'yes' – provided that the Burchell test is followed. Quite properly, the burden of proof placed on an employer in such circumstances is totally different from the burden of proof imposed by the criminal justice system. In a criminal trial the prosecution must prove 'beyond all reasonable doubt' that an offence was committed. This is entirely reasonable when an individual's liberty is at risk – and it is why, under the Burchell test, you can dismiss somebody 'fairly' for dishonesty who might be found 'not guilty' in a criminal trial.

LACK OF CAPABILITY

This is the second of the fair reasons for dismissing an employee, and we must consider it under two sub-categories – firstly, lack of capability that is linked to an employee's inability to do the job, leading to unacceptably poor performance; and secondly, lack of capability that relates to an individual's inability to do the job because of poor health or sickness.

Poor performance

Advising a line manager who has a member of his or her team delivering less than adequate performance is very common for the employee relations specialist. Very often the initial step in this advisory role is persuading the line manager not to take precipitate action. It is not unusual for the personnel professional to be told by a manager that a particular employee is 'useless', and that the manager needs 'help to get rid of' him or her. Persuading a line manager not to launch into a formal disciplinary process without considering what other options are open is very important. Earlier, we looked at the question of counselling and noted that in the event of an ultimate dismissal, an employment tribunal would want to satisfy itself that the dismissed employee knew what standards were expected of him or her and that he or she had been given an opportunity to achieve those standards, and that all this had happened before any formal disciplinary procedures had begun. Another option might be the provision of alternative work for the employee concerned if he or she had demonstrated incapability at the present tasks.

Whatever options are taken, the employee is entitled, on grounds of fairness, to be told exactly what is required of him or her: what standards have been set and the time-scale in which he or she is expected to achieve them. During the period of time that an individual is being given to reach the desired standards, a good manager ensures that the employee is kept informed of his or her progress. This again is the operation of the principle of 'best practice' or good management habits.

One important point to remember in looking at capability is the obligations placed on employers by the Disability Discrimination Act 1995, the principal purpose of which is to protect disabled people from discrimination in the field of employment, and this issue is dealt with below.

Managing absence

This can be one of the most emotive issues that any manager has to face, and must at all times be handled with sensitivity by managers. There is always scope for disputes to arise in this difficult area, and it is important that the employee relations professional makes himself or herself aware of all the circumstances in which absences can occur – and where these involve legal rights, must ensure that he or she understands the scope of such rights. Time off work for domestic emergencies is one example.

Absence from work can occur for a number of reasons. Some – like holiday, bereavement or paternity leave – is normally arranged in advance and causes minimum disruption to the employing organisation. The absences that cause disruption within any organisation are those that are unplanned, because the employee concerned is sick, has simply failed to turn up for work or has experienced a domestic emergency. In so far as the second reason is concerned, it would be normal to treat this as a breach of the rules on unauthorised absence and deal with it as a case of misconduct.

One reason for unauthorised absence could be that an employee has failed to return from a authorised absence – say, a holiday – at the due time. Individuals returning late from holiday has become a much more widespread problem in recent years owing to the increase in overseas travel. For most individuals who return to work late in such circumstances the fault lies with delayed air flights or other travel problems. For some employers the disruption caused by a late return from holiday is minimal and they may treat it as no more than an irritation. But for others, particularly at a time of the year when large numbers of people are on holiday, the disruption caused can be very serious. Notwithstanding the fact that the cause of the problem (a late flight) was outside the employee's control, the employer might take the view that steps could have been taken to minimise the disruption – for example, an explanatory telephone call. Whether disciplinary action is taken in such circumstances will clearly rest on the facts of each individual case, but in any event action should follow the guidance given above for preparing and conducting a disciplinary interview, particularly in respect of mitigating circumstances and other explanations.

However, in most establishments the most widespread cause of absence from work is sickness or alleged sickness, and although it would be wholly unreasonable to treat a case of genuine sickness as a disciplinary matter, incapacity for work on health grounds can be a fair reason for dismissing an employee. For this reason the way in which an employer deals with health-related absences is very important.

Sickness absence

Dealing with sickness absence can be a minefield for any manager, but for the employee relations specialist who is expected to give clear and timely advice, it is even more so. Estimates of the cost to the UK economy of sickness absence currently hover around the £11 billion level, and absence really has therefore to be managed effectively. Unauthorised absence is usually a disciplinary matter, but most absences do not fall into this category. They are recorded as sickness. Without wishing to suggest that any employee deliberately seeks to be untruthful, notifying the employer of 'sickness' remains the most common reason for absence from work, and although the overwhelming majority of employees have minimal periods of sickness absence, most organisations nonetheless have individual staff whose sickness record is poor. Such people can consistently accumulate as many as 25–30 sick days per annum, through a mix of 'flu', 'migraine' and 'stomach upsets'. The British Airways dispute in the summer of 2004 centred on the company's determination to 'do something about rising sickness rates' and the unions' determination that this should not be linked to improvements in pay.

The second CIPD annual survey into employee absence, published in 2001, exposed high levels of

'hidden absence' among employees and found that up to a third of absences were not considered genuine. With employees taking an average of three days off per annum, the survey puts the annual cost of sickness absence at £487 per employee. Not surprisingly, 94 per cent of the survey respondents described sickness absence as a 'very significant business burden'. By the time of the 2004 survey (see the CIPD website www.cipd.co.uk) the annual cost of sickness absence had risen to £567 per employee per annum with absence levels at 4 per cent, or 9.1 working days per employee. One response the survey identified is that three quarters of employers had introduced changes to their policies on absence management over a two-year period.

In order to manage such a problem effectively, the starting-point has to be adequate record-keeping, and ACAS advise that 'records showing lateness and the duration of and reason for all spells of absence should be kept to help monitor absence levels'. Such records enable a manager to substantiate whether a problem of persistent absence is real or imagined. All too often the employee relations specialist who is asked for advice is expected to work with insufficient data. Managing absence is not just about applying rules or following procedure, it is about addressing problems of persistent absence quickly and acting consistently. This sends out a clear and unambiguous message to all employees that absence is regarded as a serious matter.

But how do you act rigorously and at the same time retain fairness and consistency? The most effective way is through the return-to-work interview. This has been shown to be the most effective method of controlling sickness absence. The employer demonstrates that absence matters, that it has noticed the employee's absence, and that it cares.

In their booklet *Discipline and Grievance at Work*, ACAS set out guidelines for handling frequent and persistent short-term absences which support the principle of the return-to-work interview and help to ensure a consistency of approach. Factors that must be taken into account are:

- Absences should be investigated promptly and the employee asked to give an explanation.
- Where there is no medical advice to support frequent self-certified absences, the employee should be asked to consult a doctor to establish whether medical treatment is necessary and whether the underlying reason for absence is work-related.
- If after investigation it appears that there were no good reasons for the absences, the matter should be dealt with under the disciplinary procedure.
- Where absences arise from temporary domestic problems, the employer in deciding appropriate action should consider whether an improvement in attendance is likely. It is also important to consider whether any of the absences should, or could, have been covered by the Maternity and Parental Leave (time off for dependants in an emergency) Regulations 1999. These regulations are discussed in more detail below.
- In all cases the employee should be told what improvement is expected and warned of the likely consequences if unwarranted absences continue.
- If there is no improvement, the employee's age, length of service, performance, the likelihood of a change in attendance, the availability of suitable alternative work and the effect of past and future absences on the business should all be taken into account on deciding appropriate action.

Persistent absence

Frequent short-term absences can be very difficult to manage and can be the cause of serious conflict between employees. When one individual within a work group is constantly absent, it is usually his or her colleagues who suffer. This is because they have to take on additional duties or alter their hours at short

notice. It is they, not the management, who are inconvenienced and they are entitled to expect that their employer will do something to manage the problem.

Where doubt still remains about the nature of the illness, injury or disability, the employee can be asked if he or she is prepared to be examined by an independent doctor to be appointed by the company. Normally – unless there is some form of contractual provision which allows for this – an employee cannot be compelled to attend. However, with the growth of occupational sick pay schemes, many organisations have overcome this problem by building compulsion into their scheme rules. Very often, advising an employee that such an examination is required if attendance does not improve is sufficient to resolve the problem. Complications can arise when the injury or illness which necessitates the persistent short-term absences is genuine. It could never be reasonable to discipline individuals in such circumstances – but it can be fair to dismiss the employee concerned. When such a situation does arise it is absolutely imperative that a careful process of assessment and examination is carried out. This would include obtaining a comprehensive medical report setting out full details of the individual's capacity to work and the consideration of other options – part-time work, reduced hours, alternative work, etc.

All of the above makes good sense and is consistent with the principle of managing absence with a 'good practice' ethos. However, employee relations professionals must consider what other methods they can use for managing absence. These might include the introduction of flexitime and annual hours schemes so that employees could manage domestic commitments without resorting to 'taking a day off sick'. In short, employers might consider how they can become more family-friendly.

Long-term absence

The section above dealt with the persistent short-term absentee and noted that although some absences might not be genuine, many were. A similar problem arises in respect of employees whose absence is long-term. It is reasonable to presume that the majority of long-term absences are also genuine and would certainly be covered by some form of medical certification. Nevertheless, they still have to be managed, and again ACAS provides guidance. In their view, it is important that:

- The employee should be contacted periodically and [the employee] should maintain regular contact with the employer.
- The employee should be advised if employment is at risk.
- The employee should be asked if he/she will consent to his/her own doctor being contacted and be clearly informed of the employee's right to refuse consent, to see the report and to request amendments to it.
- The employee's doctor should be asked if the employee will be able to return to work, and the nature of the work that he or she will be capable of carrying out.
- On the basis of the report received, the employer should consider whether alternative work is available.
- Employers are not expected to create special jobs, nor are they expected to be medical experts. They should simply take action on the basis of the medical evidence.
- As with other absences, the possibility of an independent medical examination should be considered.
- Where an employee refuses to co-operate in providing medical evidence, he or she should be told, in writing, that a decision will have to be taken on the basis of what information is available, and that the decision may result in dismissal.
- Where the employee's job can no longer be kept open and no suitable alternative is available, the employee should be informed of the likelihood of dismissal.

This last point can be very emotive. Where you are dealing with an employee who has long service, has an exemplary work record, and is genuinely suffering from a serious illness or has been left unable to work by a serious illness, telling him or her that he or she is likely to lose the job can be very difficult – not only because the employer is genuine concerned about the impact of such a decision but because the employer is concerned about the possibility of legal action for unfair dismissal being taken against him or her.

In cases where illness or injury is obvious and the medical prognosis reasonably clear, following the ACAS guidelines will help ensure that the decisions made will stand up to external scrutiny. But what happens when the injury or illness is not so obvious? Bad backs and stress are two examples that spring to mind. Because the words 'stress' and 'backache' are used so loosely – even by doctors on medical certificates – an employer must deal with these cases both carefully and critically. The way forward may only emerge over time. Often both employer and employee will have to wait for many weeks, if not months, for further medical investigations to be carried out before the appropriate form of action can be decided. For personnel professionals this can be a difficult time. They are often under pressure from line manager colleagues to support a premature decision to dismiss so that a replacement can be recruited. The effective employee relations professional who has developed his or her influencing skills will be able to persuade colleagues that acting precipitately is not in the best interests of the organisation.

Disabilities and absence

It is possible that individuals who have contracted a serious illness, have suffered a serious injury or are suffering from 'stress' will be deemed to be suffering from a disability. So, whereas the above sections may contain useful advice in dealing with many types of absence, what happens if the reason for the absence is in respect of a disability covered by the Disability Discrimination Act (DDA)?

As part of the protection provided by the DDA, employers may have to make 'reasonable adjustments' to employment arrangements – and in the context of managing absence, section 4(2)(d) of the Act states that 'it is unlawful for an employer to discriminate against disabled persons by dismissing them or subjecting them to any other detriment'. Because the Act applies equally to existing employees as well as to new recruits, employers should be careful of initiating action in respect of employees with a permanent health problem without paying due regard to the legislation. Section 6(1) of the Act states that an employer has a duty to make 'reasonable adjustments' if an employee is disadvantaged either by the physical features of the workplace or by the arrangements for the work itself. The Code of Practice which accompanies the Act lists a number of 'reasonable adjustments' that an employer might have to consider. These could include:

- making adjustments to premises
- allocating some of the disabled person's duties to another person
- transferring the person to fill an existing vacancy
- altering the person's working hours
- assigning the person to a different place of work
- allowing the person to be absent during working hours for rehabilitation, assessment or treatment
- giving the person, or arranging for them to be given, training
- acquiring or modifying equipment
- modifying instructions or reference manuals
- modifying procedures for testing or assessment

- providing a reader or interpreter
- providing supervision.

Clearly, employers will not have to make 'reasonable adjustments' in respect of all 'sick' employees – only those who fit the Act's definition of disability. A 'disabled' person is a person with 'a physical or mental impairment which has a substantial and long-term adverse effect on [the] ability to carry out normal day-to-day activities' (section 1). This chapter is about discipline and not disability, but employee relations specialists must be aware that the disability legislation imposes challenges that must be taken into account when managing absence. Most importantly, it must be remembered that dismissal of a disabled employee is automatically unfair and on that basis will almost certainly be impossible to defend.

Absence and domestic emergencies

The Employment Relations Act 1999 amended the Employment Rights Act 1996 to provide employees with a right to take a reasonable amount of time off work to deal with unexpected or sudden emergencies. For example:

- if a dependant falls ill, or has been injured or assaulted
- when a dependant is having a baby (this does not include taking time off after the birth of a child)
- to make longer-term care arrangements for a dependant who is ill or injured
- to deal with the death of a dependant
- to deal with a disruption in care arrangements for a dependant
- to deal with an incident involving an employee's child during school hours.

The details of the time off right are contained in the Maternity and Parental Leave (time off for dependants in an emergency) Regulations 1999 and set out the circumstances in which an employee can use the provisions, and how the employee can, if necessary, enforce his or her rights. Essentially, the emergency for which an employee is claiming time off must involve a dependant of his or hers. A 'dependant' is the husband, wife, child or parent of the employee. The term can also include someone who lives in the same household as the employee – for example, a partner or elderly relative. It does not include tenants or boarders.

Neither the number of times an employee can be absent from work nor the length of the time off that can be taken is specified in the Regulations, but in most cases no more than one or two days should be sufficient to deal with the problem. The fact that the right is unpaid is, in most circumstances, going to limit the length of the absence anyway.

However, like any right it is open to abuse, by both unscrupulous employers or by employees acting in bad faith. Where an employee believes that he or she has suffered a detriment, or in extreme cases, been dismissed in seeking to take time off, he or she has the right to apply to an employment tribunal. If an employer believes that the right is being abused, he or she should deal with the situation according to the normal disciplinary procedures.

In the context of employee relations, however, this right could offer an opportunity to the employer. In Chapter 2 we declared that it was important for the employee relations professional to see the law as more than an object of compliance – that some rights could be seen as a minimum standard that could be enhanced by a progressive employer and that the pro-active employee relations professional can provide the evidence to support such an enhancement. And we said above that in order to reduce some

absences, employers might have to develop more family-friendly policies. The right to time off for domestic emergencies could be the springboard for the development of such a policy.

Some other substantial reason

One other fair reason for dismissal set out in the 1996 Employment Rights Act, and that we need to consider, is 'some other substantial reason'. This concept was introduced into the legislation 'so as to give tribunals the discretion to accept as a fair reason for dismissal something that would not conveniently fit into any of the other categories' (Lewis and Sargeant, 2004; page 161). Dismissals for 'some other substantial reason' have, as they point out, been upheld in respect of employees who have been sentenced to a term of imprisonment, employees who cannot get on with each other, or where there are problems between an individual and one of the organisation's customers. Interestingly, the cases which Lewis and Sargeant quote all relate to the 1970s and 1980s – which might indicate that businesses are now less reliant on this rather vague concept. It is certainly the case that the more professional employee relations specialists, recognising that such issues and conflicts do arise, have amended their disciplinary procedures accordingly, and many organisations will have a rule relating to general conduct which may be worded in the following way:

> Any conduct detrimental to the interests of the company, its relations with the public, its customers and suppliers, damaging to its public image or offensive to other employees in the company, shall be a disciplinary offence.

It is easy to see how such a rule could be used to deal with any of the examples cited by Lewis and Sargeant. In the context of managing discipline, it is a much more systematic route. Some other substantial reason can, to the non-lawyer, be a rather vague concept, whereas being able to proceed against an individual for a breach of a specific rule is much clearer to everybody involved.

APPEALS

Every disciplinary procedure must contain an appeals process – otherwise, it is almost impossible to demonstrate that the organisation has acted reasonably, within the law. In common with every other aspect of the disciplinary process, it is important to ensure fairness and consistency within an appeals procedure which should provide for appeals to be dealt with as quickly as possible. An employee should be able to appeal at every stage of the disciplinary process, and common sense dictates that any appeal should be heard by someone who is senior to the person imposing the disciplinary sanction. This will not always be possible, particularly in smaller organisations, but if the person hearing the appeal is the same as the person who imposed the original sanction, then ACAS advises that the person should hear the appeal and act as impartially as possible. In essence, an appeal in these circumstances is going to be no more than a review of the original decision, but perhaps in a calmer and more objective manner.

As with the original disciplinary hearing, an appeal falls into two parts – action prior to the appeal, and the actual hearing itself. Before any appeal hearing the employee should be told what the arrangements are and what his or her rights under the procedure are. At the same time it is important to obtain, and read, any relevant documentation. At the appeal hearing the appellant should be told its purpose, how it will be conducted and what decisions the person or persons hearing the appeal are able to make. Any new evidence must be considered and all relevant issues properly examined. Although appeals are not regarded as an opportunity to seek a more sympathetic assessment of the issue in question, it is equally true that appeals are not routinely dismissed. Overturning a bad or unjust decision is just as important as confirming a fair decision. It is an effective way of signalling to employees that all disciplinary issues will be dealt with consistently and objectively.

Many organisations fall into the trap of using their grievance procedure in place of a proper appeals process. This is to be avoided wherever possible. The grievance procedure should be reserved for resolving problems arising from employment, and is covered in the next chapter. Finally, not only should appeals be dealt with in a timely fashion, the procedure should specify time-limits within which appeals should be lodged.

SUMMARY

In this chapter we have explained why managing employee performance and behaviour is such a key area. We have looked at the origins of disciplinary procedures and how they have developed over time. We have also provided an outline of the current legal position, but it is important to remember that this is not a legal text and it is important to check legal facts each time a performance or behaviour problem arises, because the law is constantly evolving.

Poor management of performance and behaviour can create employee relations problems, and we therefore make no apology for the stress placed on the importance of best practice and the need to act professionally. We have tried to reflect the realities of managing these issues within an organisational context, because discussions that we have had with managers from a whole range of organisations show that they can cause major employee relations problems – because breaches of rules are either ignored or treated with differing degrees of seriousness by different managers.

There is also an overwhelming business case for the effective management of employee performance and behaviour. More and more organisations are recognising the value that can be added by involving employees in the business and gaining their commitment to organisational objectives. Assuming that this is a trend that most organisations would wish to see continuing, an employee relations climate that recognises the rights and responsibilities of both parties to the employment relationship is absolutely vital.

Key points

- A fair and effective disciplinary procedure is one that concentrates in improving or changing behaviour, and not one that relies on the principle of punishment.
- There must always be a just cause for disciplinary action, whether it is misconduct, inability to perform the job in a satisfactory manner or some other reason.
- Good practice is an important principle because it helps to ensure fairness and consistency.
- The statement of particulars of employment must specify any disciplinary rules applicable to the employee, and must also include information about any procedures applicable to the taking of disciplinary decisions.
- There is a need for clear and unambiguous rules within the workplace, and both procedures and rules should be regularly monitored.
- It is important to discuss performance and behavioural problems with the employee (counselling) before using the disciplinary procedures.
- Disciplinary interviews should be prepared for thoroughly, and disciplinary interviews conducted in a professional manner.
- Employees are entitled to know the cause of complaints against them, entitled to representation, entitled to challenge evidence, and entitled to a right of appeal.
- Managing absence should be a priority for any organisation and appropriate policies established for the purpose.

FURTHER READING

ADVISORY, CONCILIATION AND ARBITRATION SERVICE (2001) *Discipline and Grievance at Work: The ACAS advisory handbook*. London, ACAS.

ADVISORY, CONCILIATION AND ARBITRATION SERVICE (2004) *Disciplinary and Grievance Procedures: The ACAS code of practice*. London, ACAS.

CIPD Employment Law Service

CIPD (2004) *Employee Absence: A survey of management policy and practice*.

EDWARDS P. (1994) Discipline and the creation of order, in K. Sisson (ed.) *Personnel Management: A comprehensive guide to theory and practice in Britain*. Oxford, Blackwell.

Employment Act 2002.

Employment Act 2002 (Dispute Resolution) Regulations 2004.

Employment Relations Act 1999.

Employment Rights Act 1996.

Employment Rights (Dispute Resolution) Act 1998.

LEWIS D. and SARGEANT M. (2004) *Essentials of Employment Law*. London, Chartered Institute of Personnel and Development.

Trade Union and Labour Relations (Consolidation) Act 1992.