CRONER

Croner's CONDUCT AND DISCIPLINE

Wolters Kluwer (UK) Limited
145 London Road
Kingston upon Thames
Surrey KT2 6SR
Tel:020 8547 3333
www.croner.co.uk

Published by
Wolters Kluwer (UK) Limited
145 London Road
Kingston upon Thames
Surrey KT2 6SR
Tel: 020 8247 1175

First published October 2004

ISBN 185524 691 0

Printed by Hobbs The Printers, Southampton.

AUTHORS

Alex Bevan

Alex Bevan is senior partner of Bevans Solicitors, who handles all aspects of employment law, dealing with contentious and non-contentious matters. He is a founder director of ADR Group (one of the two main providers of commercial mediation services and training in the UK with 80 large, national solicitor member firms) and the author of *Alternative Dispute Resolution*, published by Sweet & Maxwell in 1992. He has acted and advised in more than 100 mediations on a wide range of complex commercial and corporate disputes and is ranked by Chambers and Partners as "a guru in employment-related mediations".

Guy Hollebon

Guy Hollebon is a partner and head of employment at Bevans Solicitors with extensive experience of all aspects of employment law. He advises and represents both senior employees and employers on matters including unfair dismissal, breach of contract, equality and discrimination issues, the transfer of undertakings and redundancies. Guy is also an accredited mediator with ADR Group and has acted and mediated in numerous employment disputes. He has also delivered training on employment law issues including disciplinary hearings, sickness absence management, TUPE and the use of mediation to resolve employment disputes.

Samuel Passow

Samuel Passow is a Harvard-educated international financial journalist, crisis management specialist and an experienced mediator. For the past 30 years he has written and lectured extensively on analysing complex negotiations, mediation techniques and how businesses can deal with corporate terrorism. A former head of research for the ADR Group in Bristol, the Centre for Dispute Resolution (CEDR) in London and research associate for the Harvard University Centre for Business and Government, his articles have appeared in *The Wall Street Journal, The New York Times, The Australian, The Financial Times, The Times, The Sunday Times* and *The Guardian*. He has lectured on mediation at the University of Amsterdam law faculty, the Council of Europe, the American Bar Association and the Chartered Institute of Arbitrators in the UK. He co-authored with Alex Bevan and Guy Hollebon *Mediation in the Workplace* published by Wolters Kluwer UK in August 2004.

Bevans Solicitors

Bevans Solicitors is a Bristol-based progressive law firm with a national client base offering specialist advice on a wide range of commercial matters to both businesses and individuals. Bevans, which recently opened a London office, has been acknowledged for its legal expertise in employment law by both the Legal 500 and Chambers and Partners. For further information and contact details please visit *www.bevans.co.uk*.

ABOUT YOUR SMART SERVICE

By purchasing this publication you have exclusive access to a website focusing specifically on the subject of conduct and discipline. You will find continually updated information and tools that will allow you to keep abreast of conduct and discipline matters. Go to *www.croner.co.uk* and using your log in details supplied to you on purchasing this publication log onto the conduct and discipline website. You will be able to read news, access policy and procedure templates, read up on pertinent case law and get the answers to the latest questions being asked on the subject. Using this book as a reference guide in tandem with the regularly updated website will provide you with all the tools that you require to keep ahead of the subject of conduct and discipline.

CONTENTS

Four: Fear

Five: Displacement

Six: Reasonableness

Index

one

INTRODUCTION

DEFINING CONDUCT AND DISCIPLINE

When you think about it, people spend most of their lives either working or sleeping. While some people try to do both at the same time, most recognise that these are two distinct activities, which take up the bulk of daily existence. It is with this in mind that we view employment law as "natural justice". It is as basic and necessary as the air we breathe.

In the common-law-based system in Britain, this natural justice serves as the basis for the "social contract" that defines the way people behave towards each other in a civilised society. This unwritten agreement between all the races, ages, genders and creeds of society is backed up by an array of national legislation, European regulations and legal precedents, which allow people the opportunity to "correct" or "improve" situations, rather than just condemn and punish.

In our experience, most disputes in the workplace result from either misconduct by the employee or the misreading of a situation and/or the mishandling of procedures by the employer. In this discussion of conduct and discipline in the workplace, we hope to help you identify why this misconduct, misreading or mishandling occurs. We intend to help you understand the delicate balance between rights and obligations as set out in law and how natural justice is based on reasonableness. Finally, we aim to create an awareness that human nature leads to conflict in the workplace. These situations cannot be avoided, but their risks can be minimised. We can all take comfort in the words of the Greek poet, Aeschylus, who once wrote: "We are not the first who with the best of intentions have incurred the worst."

Conduct is an emotive issue. It can often be traced to the very essence of the individual. Conduct is personal. Discipline, on the other hand, is a very provocative concept because it constrains the action of the individual for the betterment of the group. Because a company is for all practical purposes a "mini-society", both conduct and discipline can have far-reaching effects on a company's reputation, productivity and, most importantly, its profitability. A typical dictionary definition of the word "discipline" reveals that there is a tremendous range of meaning in the word:

– mental self-training: preparation, development, exercise, training, regulation, etc
– as a system of obedience: synonyms include conduct, regulation, orderliness, restraint, limitation, subordination to rules of conduct, etc.

Considering some of these definitions, it is not surprising that the word "discipline" carries negative connotations. However, among the definitions there are several positive meanings for discipline as opposed to those associated with punishment, retribution and rigid compliance with the rules. It is these positive elements, such as preparation, development and training that are of most interest to people who manage employees. If these aspects of constructive discipline are properly understood, a positive outcome to any application of the disciplinary procedure is far more likely. The opening paragraph of the ACAS Code of Practice on Disciplinary and Grievance Procedures sums this concept up by stating: "Disciplinary rules and procedures help promote orderly employment relations as well as fairness and consistency in the treatment of individuals."

DEFINING CONDUCT AND DISCIPLINE

Getting a grasp of the issues surrounding employment law is not about learning a formula or putting things in the right boxes. As mentioned above, it is about natural justice, which comes about through the concept of empowerment and learning to live with the responsibilities of power.

If employees are to be used to the greatest effect they should be properly trained, directed and motivated. They should be empowered to take on responsibility such that they use their own skills to resolve problems, bringing to the manager only those problems that are beyond their capability, ie, defined by their own knowledge or an operational procedure, or which may have wider ramifications and need a manager to make a decision. In this case, employees should be encouraged to offer options for a solution. If they are already applying a solution they should make the manager aware of it.

Employee empowerment can go a long way towards reducing the number of problems presented to managers and thereby reducing the likelihood of frustration, discontent and other negative feelings that can generate employee grievances. The problems that do not have a simple solution are the ones that justify the existence of the manager. Complex technical problems may require the manager to do some detailed research and thinking, to consult with colleagues, or to make a quick decision for which he or she ultimately will be held to account.

The same can apply to complex problems involving employees. If a manager makes a quick decision that subsequently proves to be a poor one, he or she may find retribution appearing in the form of a deterioration in employee relations. The manager in this position may well gain help from colleagues, especially those in human resource management, but the greatest source of help could well be the manager's own employees and it would be wise to bring them into the arena.

While the answer to the personnel problem may not be apparent, neither may be the problem itself. Therefore a manager should take care to examine the problem thoroughly with the employee. This is likely to bring a number of benefits, including the following:

- The manager will gain a better understanding of the problem. More details may emerge, or it will become apparent that the problem has an underlying cause. Employees may be as intelligent as the manager but may lack the clear sense of perspective necessary to that role. Things that may irritate employees may be caused by something more fundamental and tackling the symptom will fail to remedy the issue.
- Employees will recognise that they are being respected. They will know that the problem is being taken seriously. Therefore, whatever the manager does next, he or she will receive a greater measure of tolerance.

This tolerance should not be played upon, however. The manager should indicate to the employee what he intends to do about the problem. This may be specific action the manager intends to take, or what further exploration will be undertaken, or it may take the form of an instruction the manager gives to the employee.

The response to the employee should ideally include some indication of a time frame. Frequently the issue will not be a first priority for the manager. The employee will be unhappy to hear this because the problem, at that particular time, is the most important issue but the employee will be tolerant if the manager gives an indication of when the problem will be addressed. An honest answer, given clearly with good eye-to-eye contact, is the best way to start any conflict resolution process.

one

Discipline in an employment context follows the guidelines set out in **The Employment Act 2002** and more recently defined in the *Advisory Conciliation and Arbitration Service (ACAS)* Code of Practice on Disciplinary and Grievance Procedures (October 2004). The foundation of this legal framework is built on four main principles:

1. Disciplinary rules and procedures are necessary for promoting orderly employment relations as well as fairness and consistency in the treatment of individuals.
2. Rules and procedures enable organisations to influence the conduct of workers and deal with problems of poor performance and attendance, thereby assisting organisations to operate effectively.
3. Rules set standards of conduct and performance at work. Procedures help ensure that the standards are met and also provide a fair method of dealing with alleged failures to observe them.
4. It is the responsibility of managers at all levels to ensure that the part of the organisation that is within their control operates effectively and that their behaviour towards employees who do not observe standards is fair and consistent.

The codification of "works rules" or company rules outlining accepted standards of behaviour is a sensitive matter because the rules have to reflect custom and practice and be presented in an acceptable manner. Whether starting the exercise of codifying rules for an organisation or reviewing ones that already exist, it may be helpful to look at examples from other companies. However, it is important to remember that every organisation is unique and there may be particular rules that have evolved over time in an informal way, perhaps even in individual departments. It is a good idea to involve all managers and supervisors in discussing the informal rules operating in their areas of responsibility before preparing the first draft. They are in the best position to know exactly how seriously they have treated any breach of such informal rules. It is helpful to rank these breaches into three categories:

1. Minor misconduct meriting an oral warning.
2. More serious misconduct, which will result in written warnings.
3. Gross misconduct, which will usually attract the ultimate penalty of instant dismissal.

Where it is apparent that different standards or degrees of laxity exist among managers, discussions will help considerably to improve consistency throughout the organisation and promote familiarity with the workings of the procedure.

In writing this book, we have approached the subject of conduct and discipline as it applies in employment law through a discussion of what we consider to be the main reasons why many managers get things wrong. The issues we have identified are those of arrogance, complacency, displacement, fear and reasonableness.

ARROGANCE

We start our analysis by looking at the arrogance of power in organisations, which often results in an inability to recognise a problem in the first place or leads to over-reaction when confronted with a situation. This section explains how new regulations to deal with dismissal, discipline and grievance procedures together with a revised ACAS Code of Practice will temper excesses in management behaviour by providing a framework for compliance.

COMPLACENCY

This section draws a distinction between laziness, which is usually a problem found in individual employees, and complacency, which is most commonly a more deep-rooted issue that affects an entire team or sometimes an entire organisation. The section explains how to deal with employees who are lazy. It then looks at problems that arise when the manager is lazy and does not address conduct issues. The section then moves on to consider complacency. In our view, the most common problem associated with complacency is a failure by the employer to have proper rules and procedures covering conduct. The section looks at particular examples of misconduct and explains how they should be handled.

FEAR

This section examines how fear can cause managers to take the easy option and stay within their comfort zone, and not address employee misconduct. We explore the reasons why managers may be afraid to deal with disciplinary issues and we attempt to rationalise those fears in order to overcome them.

DISPLACEMENT

Here, we consider how the displacement of problems within the workplace can cause difficulties when an employee's behaviour is misunderstood and wrongly attributed to another cause. Displacement activity is often a warning sign of a deeper issue and this chapter encourages employers to be aware of it. We also consider the potentially more serious issue of displacement by employers, where organisational restructuring can displace employees and potentially damage a company. A further important feature of this chapter is dishonesty, and we look practically at the procedures for dealing with dishonesty in the workplace. We also consider bullying, which often exhibits displacement features on a more complex level.

REASONABLENESS

At the end of the book, the concept of reasonableness is examined. Because this issue is so central, the start of the chapter covers the legal aspects of this subject. At the end of the section is a guide for managers on what questions to ask themselves, since this subject is not one capable of clear and precise definition but depends upon approach. We go on to talk about the practical issues and areas where employers typically go wrong. Finally, there is a longer case study illustrating some of these problems and pointing to better approaches that may have avoided or lessened the difficulties of a bullying case.

Through the process of brainstorming during our often heated debates over issues of employment law, we have come up with an analogy that we hope you will be able to visualise and/or identify with. Approaching employment issues is like diving off a sinking oil tanker that broke apart in a raging storm, in the middle of the ocean. Once in the water, you are suddenly confronted with a vast expanse of space and you cannot see over the horizon. In the water, you have to plough through a sludgy mixture of oil and water that impedes your progress. The prospects for the future are terrifying. You have to swim to a life raft and propel the raft through the sludge to get to the safety of dry land.

one

In our analogy, the oil tanker is your company, the raging storm is a crisis you may be facing in the workplace, and the ocean is the vast expanse of common law knowledge (contractual law with its accompanying legal precedents spanning hundreds of years). You need to understand the scope of the problem and the oil slick that is made up of statutory rules setting out the procedures for compliance with the law itself. In the far distance is the safety of dry land (stable business environment) but to get there you have to navigate a way through the sludge of oil and water (the various employment laws). The statutory disciplinary and dismissal procedures make up the life raft that must be used to get through the sludge. The overarching concepts of reasonableness and fairness are the oars in the life raft that propel the company through the sludge towards the stable business environment.

We hope this book helps you navigate your way to safety.

SUMMARY

- Discussion of employment law and "natural justice".
- Introduction to the topics of conduct and discipline.
- Defining empowerment and responsibility.
- Overview of the **Employment Act 2002**.
- Introduction to the ACAS Code of Practice (2004).

ARROGANCE

DEFINING ARROGANCE

The human capacity for being arrogant, which the Oxford English Dictionary defines as the "undue assumption of dignity, authority and knowledge", is often the main reason why managers underestimate the complexity and nuances of employment law. As former US President Bill Clinton acknowledged in his autobiography *My Life*, people sometimes abuse the power they have "just because we can". The failure to recognise this in ourselves often results in an inability to recognise a problem, or to react in an inappropriate or disproportional manner when confronted with a situation.

More commonly, "arrogance of power" within the management of an organisation leads to a mindset that fails to fully acknowledge employees' rights, or dismisses out of hand their claims because it believes that it is a rich and powerful organisation and has the stamina to outlast individuals in legal battles.

As a consequence of this arrogance of power, businesses are rapidly and inadvertently encouraging a populist "compensation culture" where the battle cry is: "If there is blame, there is a claim." This is in part fuelled by an anomaly in the legal system, which allows representatives to hunt for business under a "no win, no fee" system — more commonly known as "ambulance chasing". The once highly placed value of personal responsibility is being overshadowed by the ease of the risk-free attitude to "plunder" the system. The bottom line for companies, especially in the private sector, is that this change in culture has dramatically increased the costs of doing business, so reducing profit margins. Ignore it at your own peril.

The facts speak for themselves. The number of employment tribunal applications in 2003 has risen by 17% to 115,042 and is the fastest growing form of litigation in the UK. In part, this is due to increased workplace rights and a greater awareness of, and willingness to use, those rights. It is also because employers may not have appreciated that an employee was feeling so strongly about a particular issue. On a more complex level, employment legislation, and more particularly how it is interpreted, has become increasingly procedural in recent years. There has been a distinct shift by employment tribunals to a culture where procedure is king and justice — if there is such a thing — plays out a submissive closing act.

Presently, two-thirds of all claims made against employers are lodged with the employment tribunal without the employer having any prior knowledge of the grievance. The dismissal and grievance rules set out in the **Employment Act 2002** will not in themselves put an end to this compensation culture, but they will curtail the excesses of frivolous or nuisance claims, which block up the tribunal system and delay access to justice for those who truly deserve it. In addition, employment tribunals will no longer make public the list of applications prior to the hearing. This, hopefully, will draw out the oxygen that fuels the mass marketing of ambulance chasers, thus lessening the temptation for potential claimants.

For businesses, the statutory dismissal and grievance rules should not be seen as "banana skins" meant to catch them out. Instead, they should be viewed as opportunities to modify outdated organisational structures and create a greater dialogue with their workforce. The most powerful

accelerator of productivity is the empowerment of the individual within an organisation. This is where arrogance can be a stumbling block.

The **Employment Act 2002** recognises this shift to procedural law and in fact recalibrates the process by setting out statutory procedures which apply, without exception, to every company in the UK. They must be followed when disciplining or dismissing an employee and when an employee raises a formal grievance. The procedures cover:

– Disciplinary and dismissal procedures (DDPs).
– Grievance procedures (GPs).

They came into force on 1 October 2004.

The DDPs and GPs will apply to all types of dismissal (including conduct, capability, redundancy, retirement and the expiry of a fixed-term contract) and to actions short of dismissal, such as suspension without pay and demotions. (See Chapter 3: *Complacency* for a discussion of conduct and capability).

For many employers, and employees alike, these procedures could easily be seen as just additional hoops to jump through before they can have their day in court.

The new statutory procedures are minimum standards. Following them will not, in itself, prevent an unfair dismissal claim. The Government-funded Advisory Conciliation and Arbitration Service has issued a revised Code of Practice covering disciplinary and grievance procedures and while this is not legally binding, a failure to comply with it when dismissing an employee will more than likely lead to a finding of unfair dismissal. The Code of Practice includes the statutory rules and therefore complying with the ACAS code will satisfy the DDPs and so should also avoid a claim for unfair dismissal.

It is important to remember that the statutory DDPs do not apply to disciplinary warnings and employers should still follow a fair procedure when warning employees. The revised ACAS code sets out a best practice procedure when giving employees warnings.

This section will look in detail firstly at the statutory procedures and then at the ACAS Code of Practice.

STATUTORY PROCEDURES

Employers are already obliged to provide employees with a written statement of their terms and conditions of employment within two months of starting work. Now, this written statement must contain details of the procedure that will be followed if the employee is to be disciplined or dismissed. Alternatively, the written statement must refer the employee to a readily accessible document containing the procedures, for example, a staff handbook.

If an employee is successful in a claim for unfair dismissal or discrimination and as part of that successful claim it becomes apparent that the employer has not provided adequate written particulars, then the tribunal must award a minimum of two weeks' pay and may award four weeks' pay in addition to the compensation for the unfair dismissal or discrimination. A week's pay is currently capped at £270. Employers should review their existing contracts and amend them if appropriate to avoid this. Remember, financial sanctions may be placed on the employer or employee for failing to comply with the statutory procedures before proceedings are begun.

Before embarking on a full discussion on the new dismissal, disciplinary and grievance procedures, it is worth noting that once an application has been filed in an employment tribunal, an offer to both parties will be made to use the services of ACAS. ACAS is an independent third party that assists parties to reach a settlement without the need for a tribunal hearing. This form of conflict resolution is not an adjudication or a trial because the parties reach a settlement using a non-confrontational and confidential process with the assistance of a neutral person. In most cases, this process is handled over the phone by a professionally trained mediator who communicates the viewpoints of the opposing parties and explores possible settlement opportunities.

From 1 October 2004, the new law will apply to most cases including unfair dismissal and claims for equal pay, sex, race and disability discrimination cases and employment rights issues such as protected disclosures (whistleblowing). Once the matter has been issued in the employment tribunal, there is a fixed period of conciliation talks of either 7 or 13 weeks before the matter can be heard finally. This is an attempt by the legislature to encourage more cases to resolve before a decision is imposed.

MEDIATION

Despite the best efforts of a progressive management to approach an employment problem with fairness and reasonableness, there will also be times when ACAS conciliation fails to bridge the gap. However, the law has been designed to allow the parties yet another chance to defuse the conflict and stand back from the abyss of antagonism.

Like conciliation, mediation is conducted by an independent third party neutral. Because the process is more face-to-face than conciliation, it can often address the inherent power imbalance between employee and employer, because both parties have to agree on the selection of the mediator and share in the cost of the process, which, in itself, takes place at a neutral venue. But perhaps most important of all, the power imbalance is addressed in two specific ways. First, the employee can bring along legal representation, who as a professional negotiator is probably in a stronger position and is perhaps more capable of presenting the client's position and assessing the legal strength of the employer's position. Second, the mediator, being neutral, is able to "reality check" the employer's defences with hard, probing questions that the employee could probably not get away with during the statutory procedural process.

How Mediation Works

- Talks are held privately at a neutral venue. The mediator is an independent person who has no ties to either the employer or employee.
- Both parties agree to the choice of the mediator.
- Parties are allowed to bring legal representatives. The mediator initially meets both sides jointly and may then decide to meet the parties separately.
- Confidentiality is guaranteed.
- Statements made or evidence given during the mediation cannot later be used at tribunal.
- The mediator reports back to both parties.
- If the case is not settled, the case can still proceed to the tribunal.

- Costs are shared (but a settlement can lead to the employer agreeing to foot the bill.

The cost implications of dispute resolution are paramount to every manager. By this stage, the employer has engaged the legal services of a solicitor and possibly a barrister. The employer has to factor in that a large part of the legal spend will come at the beginning of the process as the legal team prepares the case for tribunal. The added cost implications the cost of engaging in the mediation process must be weighed against the risk of a further legal spend at the tribunal hearing and the possibility that a tribunal award will exceed the price extracted from a negotiated settlement. More importantly, perhaps, the employer must weigh up the relative costs of engaging in the ongoing bi-lateral negotiation process between solicitors or the one-off opportunity of a multilateral negotiation using an intermediary mediator.

Over 10 years of commercial mediation experience in this country has clearly defined what parties like and don't like about the mediation process. What parties like about mediation can be summed up as follows.

- It is "interest-based" rather than "rights-based". Parties are able to look for an outcome that may meet a variety of needs beyond just what they are entitled to under the law.
- During mediation a range of settlement options can be discussed, including ones that are not within the power of an employment tribunal, such as agreeing the terms of a reference.
- The discussions are non-binding. You can suggest ideas without being committed to them until you have reached a final agreement.
- You can walk away from the table at any time and without forfeiting any of your legal options.
- Mediation is commonly directed towards the creation of relevant norms rather than conformity to those supported by the formal legal system.
- It can be a cathartic experience offering the opportunity to state a case without constraint.
- Both the process itself and atmosphere at the talks are informal.
- There are no legal technicalities or rules of evidence.
- Mediation allows for a variety of stakeholders in a dispute to come to the negotiation table.
- Correctly used, mediation is a pro-active approach to information sharing about risks, benefits, operational and emotional issues.
- Pro-active mediation can introduce external expertise for such things as fact-finding, independent audits and verification and neutral expert guidance.
- Lawyers like mediation because it gives them an off-the-record chance to assess the strengths of their respective cases.
- Claimants and applicants like mediation because it gives them a chance to participate in the settlement process.
- Defendants and respondents like mediation because they feel that the mediator provides a window to the claimant's way of thinking.

To be fair, there are those who are not enthusiastic about mediation or conciliation because they cannot see what it adds to the normal negotiation process, or that it may indicate to the other side that they have a weak case because they are willing to compromise. There are employers who want to avoid, delay or minimise any payment they might have to make and rely on the tactic that the time and money it takes to get to the tribunal will make the employee abandon the case.

On the other hand, there are employees who are sceptical about the mediation process and who want their day in court. They want justice not compromise and believe they will win.

Most of these emotions are driven by the fear that mediation undermines the validity of their argument and the legitimacy of their claim. Nothing could be further from the truth (for a further discussion see Chapter 4: Fear). The role of the mediator or conciliator is not to sit in judgment and make rulings or awards about claims, but to facilitate an exchange of views and, hopefully, establish a dialogue between parties in a dispute so a settlement can be reached that all parties can live with.

No one really wins in employment litigation. Legal costs are rarely recoverable, hard-earned reputations are damaged, and future prospects for employment are clouded because employees who have sued employers may well carry the stigma with them. Mediators start from the premise that all parties are legitimately at the negotiation table and that all aspects of their argument are entitled to be heard. Their role is to guarantee "air time" so that parties feel that they have had a chance to present their points of view. Mediators are there to make sure that neither side is pressured into settlement. Perhaps more importantly, they are there to make sure parties fully understand the terms and implications of any proposed settlement, because once a settlement is signed, it becomes as binding as any other contract in the eyes of the law. Both employers and employees can take comfort in the knowledge that if mediation proves unsuccessful, and the case goes before the tribunal, mediators cannot be called as witnesses as they are signatories to the confidentiality agreement, which prohibits any information learned during the mediation process from being used as evidence for a tribunal.

Another form of pre-employment tribunal conflict resolution is the more traditional compromise agreement that is arrived at through direct negotiations between solicitors. This allows parties to settle an employment dispute independently, without going through ACAS. A compromise agreement can be reached at any time from the moment an application is lodged and until the tribunal panel makes its ruling.

These alternatives to litigation allow both parties to stand back from the abyss. They allow confidentiality to be respected and reputations maintained. But above all, they are both cost effective and time efficient — which is good management practice. Don't let arrogance get in the way of seeing this.

THE STATUTORY PROCEDURES EXPLAINED

The steps that must be taken are explained below. Each step and action under the procedure must be taken without unreasonable delay. The timings and location of meetings must be reasonable. Meetings must be conducted in a manner that enables both the employer and employee to explain their cases. Does this allow an employee or an employer to argue an entitlement to legal representation at the Step 2 meeting or the Step 3 appeal? We think that this could only be the case where the particular issues were complex and perhaps where there were technical legal arguments that the individual or employer could not reasonably be expected to explain properly.

The regulations and guidance provide no indication of what will be a "reasonable" period of time between Step 1 and the Step 2 meeting. Ultimately this will be a matter for the tribunals to determine (See *Chapter 6* for a further discussion on the concept of reasonableness). Each case will

be different and will depend on factors such as the complexity of the issues surrounding the alleged conduct and how serious the possible consequences are. In general terms, allowing an employee five working days should be reasonable.

Where it is reasonably practicable, a more senior manager than dealt with the Step 2 meeting should run the Step 3 appeal meeting. The modified two-step DDP will be used very infrequently and will apply in cases of serious misconduct leading to dismissal without notice. The regulations do not explain when it will be considered reasonable to dismiss without notice, nor do they explain who decides the reasonableness.

The modified GP is to be used in cases where the employee has already left work, for example, where they have resigned and are claiming constructive dismissal, and the employer was unaware of the grievance before the employment ended or was aware of it but the standard procedure had not been started, or not finished, before the employee's last day of employment. Both parties must agree in writing that the modified procedure should be used.

The modified procedures would also be appropriate in cases where the employee has been subjected to harassment and has not wanted to complain while still employed and so has found another job, resigned and is then raising the harassment, provided that both the employee and the employer agree in writing to use the modified procedure.

The modified DDP does not involve a meeting taking place between the employer and the employee. This is because it is only to be used in the most exceptional cases where the conduct is so serious and blatant that instant dismissal, with no disciplinary hearing, is appropriate. Neither grievance procedure will apply if the subject of the grievance is the employee's dismissal or contemplated dismissal. In this case the employer will follow the DDP and the employee can raise concerns as part of the DDP. In addition, neither grievance procedure will apply if the employee has left work before a grievance procedure was commenced and since leaving it is not reasonably practicable for the employee to provide a Step 1 statement.

STANDARD DISMISSAL AND DISCIPLINARY PROCEDURE

Step 1 — Statement of Grounds for Action and Invitation to Meeting

- The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which led the employer to contemplate dismissing or taking disciplinary action against the employee.
- The employer must send the statement or a copy of it to the employee and invite the employee to attend a meeting to discuss the matter.

Step 2 — Meeting

- The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.
- The meeting must not take place unless:
  - the employer has informed the employee what the basis was for including in the statement under Step 1 the ground or grounds given in it, and
  - the employee has had a reasonable opportunity (see above) to consider making a response to that information.

- The employee must take all reasonable steps to attend the meeting.
- After the meeting, the employer must inform the employee of the decision and notify the employee of the right to appeal against the decision.

Step 3 — Appeal

- If the employee does wish to appeal, he must inform the employer.
- If the employee informs the employer of the wish to appeal, the employer must invite the employee to attend a further meeting.
- The employee must take all reasonable steps to attend the meeting.
- The appeal meeting need not take place before the dismissal or disciplinary action takes effect.
- After the appeal meeting, the employer must inform the employee of the final decision.

MODIFIED DISMISSAL AND DISCIPLINARY PROCEDURE

Step 1 — Statement of Grounds for Action and Invitation to a Meeting

The employer must set out in writing:
- the employee's alleged misconduct that has led to the dismissal
- the basis for thinking at the time of the dismissal that the employee was guilty of the alleged misconduct, and
- the employee's right to appeal against dismissal.

The employer must send the statement, or a copy of it, to the employee.

Step 2 — Appeal

- An employee who does not wish to appeal must inform the employer.
- If the employee informs the employer of the wish to appeal, the employer must invite the employee to attend a meeting.
- The employee must take all reasonable steps to attend the meeting.
- After the appeal meeting the employer must inform the employee of the final decision.

STANDARD GRIEVANCE PROCEDURE

Step 1 — Statement of Grievance

The employee must set out the grievance in writing and send the statement or a copy of it to the employer.

Step 2 — Meeting

- The employer must invite the employee to attend a meeting to discuss the grievance.
- The meeting must not take place unless:
  - the employee has informed the employer what the basis for the grievance was when the statement under Step 1 was made, as above
  - the employer has had a reasonable opportunity (see above) to consider a response to that information.
- The employee must take all reasonable steps to attend the meeting.

- After the meeting the employer must inform the employee of the decision about the grievance and notify the employee of the right to appeal against the decision if the employee is not satisfied.

Step 3 — Appeal

- An employee who does wish to appeal must inform the employer. If the employee informs the employer of the wish to appeal, the employer must invite the employee to attend a further meeting.
- The employee must take all reasonable steps to attend the meeting. After the appeal meeting the employer must inform the employee of the final decision.

MODIFIED GRIEVANCE PROCEDURE

Step 1 — Statement of Grievance

- The employee must set out in writing the grievance, and the basis for it.
- The employee must send the statement, or a copy of it, to the employer.

Step 2 — Response

The employer must set out a response in writing and send the statement, or a copy of it, to the employee.

FAILURE BY AN EMPLOYEE TO COMPLY WITH DDPs AND GPs

Barring of Employment Tribunal Claims

Where an employee is under an obligation to use a statutory GP, a claim to an employment tribunal cannot be made unless the employee has first complied with Step 1 of the GP.

Even when Step 1 has been complied with, an employee must wait 28 days from complying with Step 1 before lodging any tribunal claim. This will not apply where someone who has already left employment raises the grievance.

Reduction in Compensation

If an employee is successful in a claim in the employment tribunal but the statutory DDP or GP had not been completed before the proceedings were begun and the non-completion was caused by the employee not complying with the statutory DDP or GP or not appealing, then the tribunal must reduce any award of compensation by 10-50%.

The reduction is compulsory unless in exceptional circumstances it would be unjust or inequitable.

Case Study 1a

Beta Limited employs Bridget. She has been subjected to sexual harassment by a colleague. She tries to file an application before an employment tribunal. The tribunal bars her claim because she has failed to complied with Step 1 of the GP by not giving Beta a statement of her grievance.

The next time it occurs, Bridget makes a formal complaint and gives the company a Step 1 statement. Beta tries to arrange the Step 2 meeting with Bridget but she refuses to attend 28 days after sending the Step 1 statement. This time her application is successful, and following the hearing, she is awarded £10,000 compensation. However, because she failed to comply with Step 2, the tribunal will reduce Bridget's compensation by 10–50%.

Case Study 1b

Bridget is accused of dishonesty although there is no evidence to support this. Beta Ltd provides a Step 1 statement of grounds for action, arranges a meeting with Bridget and informs her of the decision to dismiss her. Beta then gives Bridget details of the appeal procedure but she declines to appeal. Bridget has more than one year's service and commences an unfair dismissal claim. Although Bridget is successful in her defence, her compensation will be reduced by 10–50% because she failed to appeal with Beta Ltd before her decision to put in an application.

Case Study 1c

Bridget suffers further sexual harassment and decides to leave Beta Ltd because a better job comes up. She does not claim constructive dismissal. A few days after she has left, she raises a formal grievance under the modified procedure for former employees and sends Beta a Step 1 statement. Beta does not respond. Bridget commences employment tribunal proceedings. She is successful in the tribunal claim and is awarded £10,000 compensation. Because Beta Ltd. failed to comply with Step 2 of the modified GP, the compensation to Bridget is increased by 10–50%.

FAILURE BY AN EMPLOYER TO COMPLY WITH DDPs OR GPs

Unfair Dismissal

If an employee is dismissed and the relevant statutory DDP has not been complied with through the fault of the employer, this will amount to unfair dismissal automatically. The employee must still have at least one year's continuous service to claim this. If an employer complies with a statutory DDP, any dismissal may still be unfair, either because the employer's decision to dismiss

was not based on a genuine belief of guilt on reasonable grounds following a reasonable investigation, or the decision did not fall within the range of reasonable responses that a reasonable employer would have made.

If an employer has its own disciplinary procedures that go beyond the limited scope of the statutory DDPs then a failure to follow its own procedures would not be automatically unfair, provided that the statutory procedures had been complied with, as a minimum. For example, an employer's procedures may involve at least two meetings with the employee before a dismissal. In this case, so long as one meeting is held (the Step 2 meeting in the DDP) and the employer can show that it would have decided to dismiss regardless of whether there had been a second meeting, the dismissal will be fair, assuming that there is a substantively fair reason for the dismissal (such as genuine misconduct).

Increase in Compensation

If an employee is successful in a claim in an employment tribunal but the statutory DDP or GP had not been completed before the proceedings were begun and the employer's non-compliance with the statutory DDP or GP caused the non-completion, then the tribunal must increase any award of compensation by 10–50%. The increase is compulsory unless in exceptional circumstances it would be unjust or inequitable.

Case Study 2

Alan has worked for Delta Limited for five years. He is called in to his manager's office one day and told his performance is not up to scratch and he is dismissed with a payment in lieu of notice. Delta has not complied with the statutory DDP and the dismissal is automatically unfair. Additionally, Alan's compensation must be increased by 10–50%, as it was the employer's fault that the DDP was not complied with.

Case Study 3

Ben also works at Delta Ltd. He has been there two years and is now suspected of theft (in this case assume he is guilty) and is given a statement of the grounds for action under Step 1 of the DDP. The company then arranges a meeting under Step 2, and afterwards informs Ben that he is to be dismissed. He will be paid in lieu of his notice entitlement. Ben informs Delta that he wants to appeal. The company does not see any use in this, because Ben was guilty and so refuses to arrange an appeal hearing. Because the DDP has not been followed by Delta, it is automatically unfair dismissal. There may be arguments about the amount of compensation but the dismissal remains unfair.

FURTHER POINTS TO CONSIDER

Cooling-off Period

Once an existing employee makes a Step 1 statement of grievance there is a 28-day bar on going to an employment tribunal. What if the employee had concerns that vital evidence would be destroyed in the 28-day embargo period during which the tribunal could not be involved? The 28-day bar only applies to commencing employment tribunal proceedings. Therefore the employee could seek an emergency injunction to preserve the vital evidence from the High Court.

The above point is an extreme example. In the normal course of events, the 28-day period acts as a "cooling off" period and prevents knee-jerk claims in the tribunal. This cooling-off period may present an opportunity for a clever and progressive employer to use other dispute resolution methods and to allow the parties to talk before they become entrenched in adversarial employment tribunal action.

Time Limit

An employee must commence an employment tribunal claim within three months of a complaint being made. However, the new regulations specify certain situations where the three-month period can be extended to six (see below). The employee will be barred from going to a tribunal if he or she has not complied with an applicable statutory GP. The claim will be struck out only if it is apparent from the application that the GP has not been followed or if the employer raises the argument. There will be a revised tribunal application form that will ask whether the GP has been followed.

If the tribunal does not pick up on the failure by the employee to follow the statutory GP, it may be better for the employer not to raise the issue until the tribunal hearing date. If this is later than six months from the act complained of, the employee's claim cannot proceed and they are outside the time limit for starting fresh proceedings. There are three circumstances where the normal three-month time limit for starting employment tribunal proceedings will be increased to six months. These are as follows.

1. If the employee has complied with Step 1 of the GP before the normal time limit for presenting a tribunal claim and before presenting their claim to the tribunal.
2. If the employee has presented a complaint to a tribunal within the normal time limit but it is rejected because the GP has not been followed or the employee has not waited for the requisite 28 days.
3. Where, at the end of the normal three-month time limit, the employee had reasonable grounds for believing that a DDP was still taking place. For this to apply there must be genuine discussions still taking place between the employer and employee, and at the end of the normal time limit the employee must have had reasonable grounds for believing that a DDP was continuing.

Contractual Rights

In due course the DDPs and GPs will be deemed to be part of all employees' contracts of employment, and a failure to follow them will amount to a breach of contract. Therefore, if they are not followed, any restrictions on working for competitors or taking clients will not be enforceable.

At present, an employee with 11 months and 20 days' service who is dismissed without any procedures having been followed and who is paid in lieu of notice will not be able to commence unfair dismissal procedures as they do not have one year's service. When the new statutory procedures are contractual, that employee may be able to argue that if the contract had been complied with, the procedures would have been followed and by the time this would have been done, the employee would have gone over the one-year service mark.

> In *Virgin Net Limited v Harper* [2003] IRLR 831 an employee was dismissed shortly before the one-year anniversary of the commencement of her employment, without being given her contractual notice period. Had she worked her contractual notice period she would have gone over the one year's service required to claim unfair dismissal. The employee argued that her claim for breach of contract should include damages for the loss of opportunity to claim unfair dismissal on the basis that had the contractual notice been given she would have been able to claim. The Employment Appeal Tribunal overruled an earlier case and held that damages for breach of contract could not include the loss of opportunity to claim unfair dismissal. It seems to us that this case may be tested and overruled when the DDPs and GPs are made contractual.

Constructive Dismissal

Does a failure by an employer to follow the contractual DDPs and GPs amount to a fundamental breach that would entitle the employee to resign and claim constructive dismissal? This is especially important, as a failure by an employer to follow the DDP or GP is automatically unfair. If an employer did not follow the GP procedure, could the employee resign and automatically claim unfair constructive dismissal?

Initially the answer will be no, as the DDP and GPs will not be contractual. However, when the Government decides to deem them incorporated into all contracts of employment we think that a breach would be a breach of a fundamental term of the contract of employment, entitling an employee to resign and claim constructive dismissal. However, we also think that the tribunal would not support an employee who sets out to engineer such a claim and even if they were unfairly dismissed, we think that their own contributory conduct would reduce any compensation dramatically.

Employee Does Not Attend a Step 2 or Step 3 Meeting

If the failure to attend the Step 2 or Step 3 meeting was for a reason that was not reasonably foreseeable at the time the meeting was arranged, the meeting must be re-arranged. Examples that would be reasonably foreseeable would be sudden illness, car breakdown or unexpected childcare arrangements.

The employee will not be penalised for failing to comply with the DDP and the employer is obliged to invite the employee to a further meeting. If the meeting fails for a second time due to unforeseeable reasons neither party will be at fault and the parties will be treated as having complied with the DDP. If the employee fails to attend and gives a reason that could have been foreseen, then they will be at fault and could have any compensation they may be awarded reduced.

The new dismissal, discipline and grievance procedures will place great responsibility on both the employee and employers to pay attention to detail. If you are arrogant and try to cut corners and forget about details, or if you think that the justification for your case is more important than complying with these procedures — then you are very mistaken.

Managers need to focus their attention and critically review all existing employment procedures if they are to land on the right side of the compliance issue. Chapter 3: *Complacency* will discuss this in detail.

THE ACAS CODE OF PRACTICE

The statutory DDPs are minimum standards that must be met before dismissing an employee, otherwise the dismissal will be automatically unfair (as long as the dismissed employee has at least one year's continuous service). It is not enough for employers just to comply with the DDPs, they must also show that they have acted fairly and reasonably in all the circumstances and compliance with the ACAS Code of Practice will, in the main, demonstrate this. It provides an excellent resource for human resources managers when drafting an organisation's disciplinary procedures. It also provides a very useful reminder of best practice to managers dealing with disciplinary issues.

IMPORTANT PROCEDURAL POINTS

There are some fundamental elements of a fair disciplinary procedure that should be highlighted, and there are several areas that managers commonly get wrong when dealing with disciplinary matters.

- It is very important that the manager specifies precisely and clearly the nature of the misconduct alleged against the employee.
- The facts should be established quickly before recollections fade.
- No action (other than perhaps suspension on full pay pending an investigation) should be taken until the facts have been established.
- Minor matters should be dealt with informally.
- If the matter is of a more serious nature, the employee should be informed of the alleged misconduct, invited to a meeting to discuss the misconduct and should be told of their right to be accompanied by a fellow colleague or a trade union representative.
- Sometimes the manager who investigated the case should not hear the disciplinary hearing. This would arise where there is a risk that the investigating manager is in some way biased.
- Having heard the employee's explanation, the manager should adjourn the disciplinary meeting to consider the points made by the employee before deciding what action will be taken. This should demonstrate that the decision was not prejudged and proper consideration was given to the employee's explanations.
- The manager should explain the disciplinary action to the employee, making it clear what improvement is required.
- The employee should be told what would happen if there were a repetition or no improvement.

- The employee should be given a right to appeal against the disciplinary action. The appeal should be heard by another manager who has not been involved in the original investigation/ disciplinary hearing. The usual disciplinary procedure involves:
  - an informal warning
  - a first written warning
  - a final written warning and
  - finally dismissal.

If an employer complies with the minimum statutory DDP but fails to follow the ACAS Code of Practice, this procedural failure may not lead to a finding of unfair dismissal if the employer can show that even if they had complied with the ACAS code the outcome would have been the same.

In *Strouthos v London Underground Limited* [2004] IRLR 636, Michael Strouthos was employed as a tube train driver from April 1982 until February 2002, when he was dismissed for alleged gross misconduct. He was also the secretary of the London Transport Rifle and Pistol Club. Following restrictions on the use of small arms imposed by UK legislation, all shooting matches were held abroad. Until 2001, he used a van belonging to the employers to go on shooting trips.

In April 2001, Mr Strouthos was interviewed by his manager and told that the employer no longer recognised the club. The manager said that he would pay two bills which he had received in relation to the club but that, in future, he would not pay for the hire of the van.

In September 2001, Mr Strouthos used a company vehicle to go shooting in Belgium with four other men. Whilst in Belgium, they purchased a quantity of cigarettes and alcohol. On their return, the goods were impounded by customs officers on suspicion that they were for resale. The vehicle was also impounded. It was returned a month later and no charges were brought against Mr Strouthos or the others. Reports of the incident appeared in two national newspapers.

As a consequence, the employer began disciplinary proceedings against Mr Strouthos. He was charged with gross misconduct in that he took the car and failed to disclose the destination to the duty manager, and then without permission, and the appropriate insurance, took the car to Belgium during which time he used the vehicle for the transportation of alcohol and tobacco, which was deemed by customs officers to be excessive and not for personal use. It was alleged that in doing so, he had damaged London Underground's reputation and brought the company into disrepute. A disciplinary panel found that the charge of gross misconduct was justified and Mr Strouthos was summarily dismissed.

An employment tribunal held that the dismissal was unfair. The tribunal decided that the employers did not have reasonable grounds for their belief that the fact that Mr Strouthos was stopped by customs and the car impounded amounted to gross misconduct and brought the company into disrepute, when no charges were ultimately brought against him. The tribunal regarded the remaining matters, the use of the car without permission, travelling without the appropriate insurance and failing to disclose his destination, as insufficient to justify the summary dismissal of an employee with 20 years' service and no relevant previous warnings.

The Employment Appeal Tribunal (EAT) allowed the employer's appeal against that decision. The EAT decided that, on the tribunal's finding of facts, Mr Strouthos had behaved

dishonestly and that this constituted a breach of trust. The EAT thought that the dismissal was fair and within the band of reasonable responses.

The Court of Appeal restored the decision of the employment tribunal. They decided that the employers did not act reasonably in treating the applicant's conduct in using a company vehicle to travel abroad without permission, travelling without the appropriate insurance and failing to disclose his destination as gross misconduct justifying summary dismissal. The EAT had been mistaken in deciding that the tribunal had in effect found that the applicant had behaved dishonestly and that this, as a matter of law, constituted a breach of trust which obliged the tribunal to conclude that the dismissal was fair.

The Court of Appeal emphasised that employees should only be found guilty of the offence with which they have been charged. It is a basic proposition of natural justice and reasonableness, whether in criminal or disciplinary proceedings, that the charge against defendants or employees facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge. Care must be taken with the framing of a disciplinary charge and the circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited. Where care has clearly been taken to frame a charge formally (in the sense that there is a formal disciplinary procedure to follow) and put it formally to an employee, the normal result must be that it is only matters charged which can form the basis for a dismissal.

In the present case, the degree of dishonesty and misconduct found by the employers in the course of their disciplinary proceedings was not such that the employment tribunal was disentitled from finding that dismissal was outside the range of the employer's reasonable responses. Importantly in this case the charge against the applicant did not allege that he had acted dishonestly. It was not alleged that he had taken the vehicle without permission, only that he had taken it abroad without permission. Nor did the disciplinary panel make any finding that he had been dishonest.

Furthermore, the Court of Appeal stated that in reaching its decision, the employment tribunal was entitled to take into account the fact that the applicant had been employed for 20 years with no relevant previous warnings. Length of service is a factor that can properly be considered in deciding whether the reaction of an employer to an employee's conduct is an appropriate one.

Over time, arrogance that goes unchecked can develop from a personal trait of one senior executive into the mainstream of a corporate culture and can erode the effectiveness of the entire management. At worst, it can lead to a disregard for the law

Managers who arrogantly fail to take heed of the new employment disciplinary and grievance procedures are cautioned with the warning of the 17th century French nobleman, the Duke François de La Rochefoucauld who once noted: "There is nothing so tragic as the untimely death of a beautiful theory at the hands of a brutal gang of facts."

Summary

- Definition of arrogance as both a personal trait and an organisational mindset.
- How arrogance of power can breed a compensation culture.

- Discussion of new statutory procedures regarding disciplinary and dismissal actions by employers.
- Discussion of new statutory procedures regarding grievances by employees.
- How mediation can be employed in employment disputes.

COMPLACENCY

DEFINING COMPLACENCY

Mistakes happen and problems arise when people are complacent or lazy and simply do not do a job properly and to the best of their abilities. There is, however a difference between laziness and complacency. Laziness is associated with individuals, while complacency is an organisational issue. These two concepts will be explored separately.

LAZINESS

When an employee is lazy in carrying out tasks it should in all likelihood lead to disciplinary action. Managers should ensure that laziness on the part of an employee is addressed and dealt with. In our experience, managers too often ignore the issue (perhaps they are too lazy themselves to be bothered to deal with it). A manager may see one member of staff who is always taking longer breaks, leaving early and not contributing as much as the rest of the team, yet think that it is too much hassle to try and address it : what good will it do? The answer is that a failure to deal with a lazy employee at an early stage could prove costly on a number of grounds.

First, it may cause the manager a real problem if they belatedly try to address it. There have been many cases where nothing was done about a lazy employee; laziness has always been tolerated and accepted. One day, usually following a change in senior management or during an efficiency drive, the senior management team will identify the lazy employee and will tell his or her line manager to deal with the problem. The line manager is then faced with a problem. It will almost certainly be unfair to dismiss the person without giving him or her warnings and an opportunity to improve. On the other hand, if they suddenly warn the employee they will then face the argument from the employee that it has never caused a problem before and they are now being victimised. Either way it will filter back to senior management that the manager has not dealt with the problem swiftly and effectively.

Second, a lazy member of the team who is not disciplined will destabilise the cohesion in the team. If one member of staff does less work, always leaves earlier yet gets paid the same and does not get disciplined, why shouldn't all his colleagues do exactly the same? Why should colleagues work extra hours to cover for them? At worst, the failure to deal with one lazy team member has led to there now being two, three or four lazy team members with a massive drop in overall efficiency. At best, even if the other team members keep working in a dedicated way, the failure to address the problem has fostered a sense of unfairness and resentment among colleagues and a lack of respect for the team manager.

In most cases it will not be fair for a lazy employee to be dismissed without first having been warned. Managers should use the disciplinary process to try to encourage the employee to improve.

It is important though that managers consider carefully whether something done (or more likely not done) by the employee is really a conduct issue or whether it crosses the boundary into a capability issue. The manager should be asking whether there is an underlying lack of training or something else which is causing the employee to perform below par. By addressing the lazy

employee at an early stage, the manager can also determine whether it is an isolated case or whether there is a fundamental problem such as a lack of strong leadership or a lack of motivation. Different procedures and different considerations apply to capability issues and a failure to correctly identify the underlying issue could lead to a finding of unfair dismissal if the wrong procedure is used to dismiss the employee.

In looking at how to deal with a lazy employee so far, it has been assumed that the manager will be able to recognise that there is a problem that needs to be addressed. In many cases the manager will be too lazy to even notice that there is a problem. A well-conducted appraisal interview carried out at least once a year, but ideally more frequently, can help to identify employee laziness or feelings of frustration, give the manager the opportunity to recognise the latent talents within employees and take steps to realise them. This is not to say that the manager has an obligation to develop the full potential of every employee — that is a matter for corporate human resources policy. However, the appraisal is an opportunity for relieving tensions in the workplace. As a skilled interviewer, the appraising manager should be able to coax out personal frustrations in a safe way. Sometimes, the simple fact that the employee realises he has real needs will be enough to remove the unidentified source of grievance. Sometimes, the exercise will cause the employee subsequently to leave, in which case the manager or organisation must balance the loss of the employee with the recognition that a lazy element or a potentially dangerous grievance has been removed from the organisation.

Frequently, however, the manager is able to help employees to become motivated and to develop uncovered talents by encouraging them to undertake training (either at their own or the company's expense), by broadening their experience and by enabling them to take on additional responsibilities. The appraisal interview should not be viewed as a process for criticising the past. Instead, it should be used primarily as an important tool for preparing both parties to deal with the future.

COMPLACENCY

Having looked at lazy employees and lazy managers who cannot be bothered to deal with them, now comes the issue of complacency. Among staff, complacency is not normally isolated to one person. It tends to affect an entire team or even whole organisations. The causes may be multifarious: perhaps the team or organisation has achieved its goals; perhaps the goals have been set too far out of reach; perhaps there are no clearly defined targets or goals. While on the face of it there are many causes of complacency among staff, there are usually the same underlying causes, namely a lack of motivation and a lack of effective leadership from managers. It is beyond the scope of this book to look at how managers should use motivational techniques; however, managers should deal with a lazy employee as it may reveal a more deep-rooted issue that requires attention.

Of more importance to the smooth-running of an organisation is complacency among managers. A manager may feel that having climbed the slippery slope and reached the holy grail of "manager" they have achieved their personal goals. In our experience it is more common for complacency to set in after a number of years as a manager. As human beings we can always strive to achieve more and to better ourselves. However, we often forget this and sit back and relax. How

often have we heard the phrase "if it ain't broke don't fix it"? What this doesn't take into account is the need to constantly refine and service "it" to ensure that "it" does not break down. This does not mean a complete overhaul but does mean constant attention and work.

In the employment context, this is when problems arise. A manager who is complacent will think that things have always run smoothly, so why should they do anything different now? This attitude amongst managers or owners of businesses is very worrying and will usually lead to significant problems.

The common problems associated with complacency among managers include the following.

- A failure to have proper employment contracts in place. Often this is a failure to review and update existing contracts.
- Not having clearly drafted and relevant rules of conduct.
- A failure to deal with conduct issues. Sometimes managers are too lazy to do anything or sometimes they are complacent and think that they know best and therefore will not do anything about an employee's conduct.
- Failing to record and document the issue and the action taken properly. So often there are cases where the organisation has implemented proper rules and procedures, the manager has realised that an issue of conduct needs to be addressed and has done so but has failed to document what he or she has done.

As is explained elsewhere in this book, it is impossible to prevent employment tribunal claims; a manager can only reduce the likelihood of a claim being brought at all and reduce the risk of losing a claim if one is brought. If a manager deals with an issue he or she must not be too lazy/complacent to document what was done — it could become vital at the stage of a tribunal claim.

If a claim is brought then the organisation will need to be able to prove that it did act fairly and reasonably. There have been many cases where the employee's recollection of events is very different from the recollection of the manager. By making and retaining detailed and contemporaneous notes of meetings and outcomes, the manager will be able to provide an employment tribunal with evidence that events happened as he described them and not as the ex-employee claimed.

The rest of this chapter will examine examples of managerial mistakes that are commonly caused by complacency. It will also look at some specific areas of misconduct that often cause problems for managers when dealing with them. The case study below focuses on conduct and capability.

Case Study 4

Larry Lazy works for a clock-making business, On Time Limited, as a factory assembly operative. He often jokes that if he were managing director the company would be called No Time, as this is his standard response to managers when things go wrong or when he has not done what he was told to do. He has been getting away with things for three years. A new manager, Ellen Eager, comes in and realises that Larry's production output is significantly lower than the other assembly operatives.

Ellen considers how she should address the issue. She realises that there could be a whole number of reasons why Larry's output is below average: he could be lazy, he might not understand what he is supposed to do or have the necessary skills to do it or he might have a medical condition that affects his ability to do the job.

Ellen holds an initial investigation meeting with Larry. She tells him that his output is the lowest in the assembly department and asks him what the reason for this is. Larry, true to form, replies that he has no time in the day to do any more. Ellen asks why this is, she wonders whether Larry has other duties that she is not aware of — he says no. She asks whether Larry feels he understands what he has to do and has the skills to do it — he says that he does. She then asks Larry whether there is any training that would help him improve his output — he says no, he just doesn't have any time to do any more work in the day. After considering matters, Ellen feels that something must be done. She convenes a disciplinary meeting in accordance with the ACAS Code of Practice. At the meeting she explains to Larry that his output needs to improve significantly. She makes it clear what level is required and offers assistance with achieving that improvement. She tells Larry that he will be given a first written warning and the matter will be reviewed after a month to see whether his output has increased. If it has not, he will be given a final written warning and a further month to improve. If there is still no improvement he will be dismissed.

The above case study demonstrates how difficult it can be to separate these factors. The outcome demonstrates that the disciplinary policy can be used to address what could have been a mixed conduct/capability issue but what was ultimately a conduct-related issue. If it transpired that Larry had not had proper training on using machines then a warning at that stage would probably have been too harsh and unreasonable — he should have been given the proper training as part of the informal counselling stage.

Larry's case also demonstrates that laziness on the part of employees needs to be addressed and resolved in order that the business or organisation can operate efficiently. There can also be complacency and laziness on the part of employers and managers, which can be ultimately very damaging to a business.

THE NEED FOR PROPER DOCUMENTATION

The most common problem which arises when managers are complacent is that there are no proper and up-to-date employment documents in place. In our experience many employment tribunal cases are lost by employers because they never got round to updating, or sometimes even drafting, contracts of employment and clear rules and policies.

There may also be the mistaken belief among managers that by having no contracts of employment in place, their staff have no rights. This could not be further from the truth. In fact, the contract and other documentation gives the employer the chance to make it clear what rights and duties the staff have; the employer can say exactly what staff can and cannot do (within reason of course). The importance of the contract, and policies and procedures is plain. They help to avoid disputes and allow managers to tell staff what sort of behaviour is unacceptable. However, because of its important nature, it is vital that the paperwork is right for your business. Contracts should be tailored to fit your business. Section 1 of the **Employment Rights Act 1996** sets out compulsory details that must be given to all employees within two months of their start date.

1. Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.
2. The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.
3. The statement shall contain particulars of:
   (a) the names of the employer and employee
   (b) the date when the employment began, and
   (c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer that counts towards that period).
4. The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of:
   (a) the scale or rate of remuneration or the method of calculating remuneration
   (b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals)
   (c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours)
   (d) any terms and conditions relating to any of the following:
      (i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated)
      (ii) incapacity for work due to sickness or injury, including any provision for sick pay, and
      (iii) pensions and pension schemes
   (e) the length of notice that the employee is obliged to give and entitled to receive to terminate his or her contract of employment
   (f) the title of the job that the employee is employed to do or a brief description of the work for which he or she is employed
   (g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end

(h) either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer
(i) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and
(j) where the employee is required to work outside the United Kingdom for a period of more than one month:
    (i) the period for which he or she is to work outside the United Kingdom
    (ii) the currency in which remuneration is to be paid while he or she is working outside the United Kingdom
    (iii) any additional remuneration payable to him or her, and any benefits to be provided to or in respect of him or her, by reason of his or her being required to
    (iv) work outside the United Kingdom, and any terms and conditions relating to his or her return to the United Kingdom.

The three-step statutory Disciplinary and Dismissal Procedure (DDP) and the three-step Grievance Procedure (GP) have been addressed in Chapter 2: *Arrogance*. The Statement of Terms and Conditions must also contain details of these procedures. If an employee is successful in a claim before the employment tribunal for, among other things, unfair dismissal or sex, race or disability discrimination, then additional compensation of between two and four weeks' pay (based on the statutory limit for a week's pay) will be awarded if a proper statement of terms has not been given.

Employers should take the time to get the documentation correct from the start of the employment relationship. The following are common problems that can easily be avoided:

- Prospective employers should not make erroneous or misleading statements about the job or its terms and conditions at any stage during the recruitment process. As a safety net, the contract could include an "entire agreement" clause which states that the written contract contains the entire agreement between the parties and that any earlier statements or representations have been cancelled.
- When making a job offer in writing, employers should outline the terms and conditions of employment and give sufficient information to enable the recipient to decide to accept the job.
- If references have not been taken up at the time of making the offer, the offer should be expressed as conditional on the employer receiving satisfactory references.
- Clauses in a contract must not be so widely drawn as to be meaningless.
- Contract terms that withhold employees' statutory rights are illegal. Such terms may make the rest of the agreement null and void.
- Employers should be aware that unilateral changes to contracts of employment will constitute breach of contract. An employer may wish to reserve the right to amend or vary the terms of the contract provided that any such changes are notified to the employee within a reasonable period (say one month before the new terms take effect).
- If an employer wishes to suspend an employee, there must be a contractual right to do so. The disciplinary procedure should have a specific contractual right to suspend an employee on full pay pending a disciplinary investigation.
- The employer should also have a clearly drafted staff handbook. This should set out the rules of employment that the employer expects the employees to meet. The staff handbook should be

tailored to the individual business or organisation. In our experience employers cannot cover every possible situation in the staff handbook but they should think about areas that are relevant to them. For example, a building firm is unlikely to need a detailed e-mail and Internet policy as employee will not have access to such technology.

The staff handbook and the rules laid down in it do not normally form part of the contract of employment, but are guidelines for how the employer will treat certain situations. An employer should follow these guidelines; if an employer fails to do so, then this will not be a breach of contract, although it may well indicate an unfair dismissal. By not making the policies contractual, there is a greater flexibility for the employer to deal with each situation on its individual merits. For example, in a small business, it will be almost impossible to lay down rules for when staff can change their hours to more flexible working practices as this will depend on factors such as the condition and needs of the business and the general economy at that time. A non-contractual flexible working policy will not be prescriptive and can allow for the needs of the business to be accommodated. The actual policies will vary depending on the nature of the business but it is common to include policies on:

- disciplinary and grievance procedures (over and above the new statutory DDP and GP described in Chapter 2: *Arrogance*)
- equal opportunities
- harassment
- electronic mail and Internet use
- whistleblowing
- parental leave and pay: maternity, paternity and adoption
- flexible working
- mobile telephone use
- company car
- telephone use
- dress code
- benefit schemes/bonus scheme rules
- health and safety
- Data Protection Act
- staff expenses.

A good staff handbook will reflect the ethos and style of a particular organisation and consolidate its values. It is also central to effective communication between employer and employee, in terms of both conditions of employment and wider business matters and rules. Once the rules are made clear, staff will know that failure to follow them will lead to a disciplinary sanction and this may be dismissal. It will be much easier for an employer to dismiss an employee for a first breach of discipline if there is a rule stating that a breach will lead to dismissal.

Staff handbook information should be updated at appropriate intervals to ensure that the handbook remains accurate and useful.

The ACAS Code of Practice suggests that rules commonly cover:

- bad behaviour, such as fighting or drunkenness
- unsatisfactory work performance

- harassment or victimisation
- misuse of company facilities (for example e-mail and the website)
- poor timekeeping
- unauthorised absences
- repeated or serious failure to follow instructions.

The ACAS Code of Practice also suggests the following examples of gross misconduct:

- theft or fraud
- physical violence or bullying
- deliberate and serious damage to property
- serious misuse of an organisation's property or name
- deliberately accessing websites containing pornographic, offensive or obscene material serious insubordination
- unlawful discrimination or harassment
- bringing the organisation into serious disrepute
- serious incapability at work brought on by alcohol or illegal drugs
- causing loss, damage or injury through serious negligence
- a serious breach of health and safety rules
- a serious breach of confidence.

A staff handbook may be used as a resource for trainers and mentors during the induction period and beyond. It is best practice to delay any training on the staff handbook for a period of time, because new employees will understand the significance of certain content better as their understanding of the organisation grows.

Consideration should be given to whether the staff handbook is to be contractual. If it is contractual then an employee has an expectation that the rules and procedures in the handbook will be followed. If the employer fails to follow the handbook the employee can claim damages for breach of contract. The case study below looks at the changes of a contractual staff handbook.

Case Study 5

Bill Bright works for Alpha Limited. He has been there for five months and regularly fails to clock in and out. His manager suspects that Bright is leaving early and coming in late and wants to get rid of him. He speaks with the human resources manager, Chris Caughtout, who advises that Bright does not have the one year's service necessary to bring an unfair dismissal claim and suggests that they dismiss him straight away and give him a payment in lieu of notice. Caughtout holds a brief meeting with Bright and explains that as a result of the failure to stick to company rules Bright is being sacked.

Bright looks at his company documentation and notices that the disciplinary policy and procedure is contractual. He brings an employment tribunal claim for breach of contract arguing that the contractual disciplinary policy should have been followed before dismissing him and that if it had been it would have taken three months to have been completed (based on time to investigate, give him a first warning initially, then a final written warning and only then dismissing him). Bright succeeds at the employment tribunal and is awarded a further three months' salary.

The staff handbook should not be contractual and this should be expressly stated. There may be certain clauses that a company would want to have contractual effect but these can be stated to be contractual. For example, as stated above, a disciplinary policy and procedure should contain a contractual right for the employer to suspend the employee on full pay while investigating matters. There might also be a need for a contractual right to suspend without pay and/or demote as a form of punishment.

There may also be one-off or infrequent incidents which do not justify inclusion in the staff handbook but on which the employer would want to set out its policy. This can be done by producing a one-off rule or policy which can be circulated to all staff. By tailoring such rules to a particular business and by specifying what will happen if the rule is broken, employers will be able to control staff conduct and take appropriate action if there are breaches.

Case Study 6a

It is a month before the World Cup and the nation is starting to go football crazy — the papers are changing their predictions more often than the players change their shirts; the manager will either be a national hero or more likely vilified and ridiculed; "metatarsal" is a word that everyone is suddenly familiar with following an injury to the team's captain; and a bad song with a gaggle of footballers wives screeching the chorus is number one in the pop charts. Lacklustreshire Council employs 5,000 staff in total. It has a dedicated human resources department in which Percy Nell works.

At a recent HR meeting Percy flagged up the fast approaching World Cup and pointed out that with the time difference, some matches were being played during the day UK time. Staff would want to watch the England games. It was agreed that the staff canteen and social club would have a big screen showing the games. Staff would be allowed an extra hour for the lunch break to enable them to watch England matches, as long as they made the time up within three days. Percy suggested that a policy should be drawn up to cover this and he was given the task of doing it.

The policy set out clearly that two hours could be used to watch games and that it had to be made up. Staff who did not want to watch the football could take an extended break as well on the same terms. Staff who were not English could take an equivalent time off to watch the football team of their country but no one could argue dual allegiances!

The policy was clearly drafted and sent to all staff (see below). It was also displayed on staff noticeboards. Everyone knew what was acceptable and what could and could not be done … or so Percy thought.

SAMPLE POLICY: LACKLUSTRE COUNCIL'S WORLD CUP POLICY

The Council recognises that some World Cup matches will take place during normal working hours and that staff may want to watch those. To avoid staff taking unauthorised absence or disturbing others by listening to games on the radio the Council will allow staff to watch games provided the terms of this policy are adhered to.

1. The Council will provide a large screen in the canteen to show matches. Staff watching games must not disturb or interfere with the work of those who have chosen not to watch the games.
2. Staff will be allowed to take a two-hour lunch break to watch matches. This is made up of your normal one-hour lunch break plus an additional hour.
3. The additional hour must be made up within three days of the match. In the event that time is not made up the Council may deduct this time from your next wages and you will not be entitled to an additional hour to watch future games.
4. Staff are only allowed to watch the matches of the one national team that they support. Allegiances may not be changed mid-tournament!
5. Staff who do not want to watch matches may take an extended break on the days when their national team are playing and may use that extended break for any lawful purpose that they choose. The extra time must be made up.
6. In the event that this concession is abused the Council may stop all staff watching matches. Do not abuse the right, because others will suffer.
7. Alcohol must not be consumed during matches. Staff caught drinking or under the influence of alcohol or drugs will be disciplined and may be dismissed.
8. Remember that you are still at work and the Council's normal policies and rules continue to apply. A failure to comply with this or any other policy will lead to disciplinary action being taken against you. In particular, staff are reminded of the Council's policies on discrimination and harassment at work
9. The Council hopes that staff enjoy the World Cup and hopes that the best team wins.

SPECIFIC CONDUCT ISSUES

The following case studies provide some examples of misconduct that commonly occur and which, in our experience, often cause managers difficulties. These are not exhaustive. In all the instances the employer's staff handbook should provide a basis to address the problems as it should be tailored to reflect the individual business or organisation. A manager or an organisation that is complacent may not have thought about or dealt with these issues in the staff handbook. As explained above, it is not necessary for a staff handbook to cover every single conduct issue that might arise. However, if there are particular issues that will affect a business or organisation then a clear policy on that issue will make it much easier to dismiss an employee for the first breach of the policy.

Case Study 6b

During the first game of the World Cup, Rick Nohope was getting increasingly wound up while watching the game on the screen provided by Lacklustreshire Council. He had brought in his own cans of lager and had drunk four before the kick-off. He was starting to make offensive comments about the opposition players and the more he drank, the louder these became.

Lacklustreshire Council has a policy on not drinking at work. Rick should have been disciplined in accordance with the policy. The disciplinary sanction would have to be reasonable (see Chapter 6: *Reasonableness*). If Rick was responsible for operating machinery or his being drunk could endanger the health and safety of fellow staff or the public, dismissal would be a fair sanction in most instances.

DRUGS AND ALCOHOL

Drugs are treated in much the same way as alcohol. Endangering the safety of others is very serious and an employer is likely to be reasonable in dismissing an employee even for a first offence as long as the employer has a clear policy specifying this. One problem that often arises is alcohol or drug taking outside of work. Each example will depend on the individual circumstances. However, tribunals have made it clear that dismissal will usually only be fair if the off-duty conduct adversely affects relationships with other employees, clients or customers, or in some way damages the reputation of the employer.

FOUL AND ABUSIVE LANGUAGE

In *Weir v Stephen Alans Jewellers* EAT 550/97 a manager of a jeweller's shop went out of the shop one afternoon to watch a football match in a pub. He returned, having drunk three or four pints of beer, and failed to complete his work properly or lock up the shop. His dismissal was found to be fair in view of the nature of the business he managed and his breach of the implied term of trust and confidence.

Case Study 6c

Nothing was done to stop Rick's drinking and the sight of another opposition player getting a free kick by play-acting prompted Rick to shout a string of obscenities at the screen and storm out of the room. After the initial shock had subsided and Percy, who is a little deaf, had established the exact vocabulary with which Rick had made known his personal opinion of the referee's judgment, Rick's conduct had to be addressed.

An investigation was undertaken by the Council and a disciplinary hearing was convened. Percy established that Rick had received the Council's policy on watching the World Cup matches where it stated that the Council's other policies contained in the staff handbook would continue to apply. He specifically pointed to the section which stated "no drinking during working hours, no using of threatening, abusive or offensive language or conduct at work to fellow colleagues, or members of the public". Rick admitted that he had got carried away but as it was a special occasion, he felt he should be let off. Percy considered the evidence and concluded that Rick's conduct was in clear breach of the policies. The policy on threatening and abusive conduct expressly stated that a failure to follow it would be treated very seriously and could lead to dismissal.

Rick was dismissed. He was not happy about this. He believed that the World Cup was a special occasion and he was not really working, so he took a complaint for unfair dismissal to the employment tribunal. The tribunal found that the dismissal was fair. Laclustreshire Council had clear and precise policies in place outlawing the very type of behaviour that Rick had indulged in. Rick knew what was expected of him and was fully aware that he could be dismissed. The decision to dismiss was within the band of reasonable responses (see Chapter 6: *Reasonableness*).

E-MAIL AND INTERNET MISUSE

Some employers will not allow any e-mail or Internet use by employees, others will outlaw misuse. The policy should make it clear what is acceptable use and what is unacceptable and should also make it clear that downloading offensive, illegal or pornographic content is unacceptable and will lead to disciplinary action being taken, which may involve dismissal. It is important to specify the likely sanction as this can act as a first warning and if an employee does breach the rule the employer will find it easier to justify dismissal without warnings.

When drafting the policy it is important that it complies with the **Data Protection Act 1998** and the Code of Practice on Monitoring at Work. Broadly speaking, to ensure compliance the code should state that e-mail, Internet and telephone use may be monitored and should state the purpose of such monitoring, eg, monitoring will occur to enable the employer to ascertain the amount of personal use of the e-mail/Internet/telephone and also to ensure that the content of e-mail/websites is not in breach of this policy.

As society's use and view of the Internet widens, then so does the employment tribunals' view on the level of acceptable use in the workplace.

Case Study 6d

Back at Lacklustreshire Council, the World Cup is going well, England have won their second game despite getting off to a disappointing start. As the mood of the nation rises, so too does the star striker, or at least there are pictures on the World Wide Web of him rising to the occasion and scoring off the pitch. Gaby Gossip has always had a soft spot for the footballer in question and trawls the Web to find the pictures. Having downloaded them she sends them to the other girls she works with thinking they will all see the funny side. Unfortunately, Prunella Prude does not and she complains to Percy in the human resources department that Gaby has spent all morning looking on the Web for disgusting and offensive images. Having investigated the matter properly, Percy calls Gaby to a disciplinary hearing. He refers to the Council's policy on e-mail and Internet use which makes it clear that Gaby's actions are a blatant breach and dismisses her in accordance with the policy. Percy thinks how easy it is for him to sack people as the Council has such good policies that he can rely on. If he keeps going like this he will be the only one left soon!

Gaby does not leave quietly. She is angry that she has been singled out for dismissal when the men in her department would regularly send e-mails showing much worse things. In fact, that very morning that she sent her e-mail, her colleague Jack Ladd had sent all the men in the department an e-mail with a dirty joke and an equally dirty photo attached. Everyone knew this, but Jack was not disciplined. The more she thought about it the more examples she came up with of other people sending offensive e-mails and none of them had been disciplined, let alone dismissed.

Gaby took the issue to an employment tribunal and brought out the evidence of how others sent even more offensive e-mails and Lacklustreshire did nothing to stop it. The employment tribunal thought it highly relevant that others had not been disciplined and found that Gaby's dismissal was unfair. They thought that her conduct merited a disciplinary sanction and also thought that it would not have been unreasonable to have dismissed her were it not for the fact that despite having the paperwork, the reality of the situation was that such e-mails were always tolerated.

The above case study demonstrates the need to apply the disciplinary rules fairly and consistently. In our experience, many managers are too lazy to do this and often turn a blind eye to misconduct. The effect of this is that it cancels out the hard work of preparing the rules in the first place and makes them virtually unenforceable and meaningless.

In *Parr v Derwentside District Council (Newcastle upon Tyne Employment Tribunal,* 23/3/98, a local authority dismissed an employee when it discovered he had been accessing pornographic material on the Web at work. He admitted he had done so, but claimed it was "by

mistake" and that he was only returning to the websites out of his concern that children might gain access. His employers did not believe him and dismissed him. The dismissal was held to be fair by the tribunal, as there had been a full investigation and the employee was guilty of violating an established code of conduct.

MISCONDUCT AWAY FROM WORK

Case Study 6e

Percy is pleased that there is a seven-day break until the next England game as things have been a little too hectic for his liking recently. Enjoying a moment or two's relaxation, Percy puts his feet up on his desk, leans back in his chair and settles down with his newspaper and latte. Within a few minutes he is on his feet, apoplectic with rage. There, under a headline of "England fans run riot" is a colour picture of his assistant bare-chested, with his England shirt tied round his head and a vicious snarl forming on his lips as he thrusts the leg of a wooden table into a policeman's already bloody face.

Percy knew that Dave Dangerous was going to watch a few games with his pals but didn't know he was a hooligan. Percy decided that Dave would be dismissed instantly but with everything that had been going on he thought he better take some advice before he acted too hastily. He called Laura Goodlawyer, the Council's external employment law expert. Laura was pleased that he had called as it meant he had remembered something from her recent training course for managers on how to deal with conduct issues. She had stressed the fact that managers were primarily responsible for addressing conduct matters with their staff but had also made the point that managers should not feel alone and isolated and should, where necessary, take appropriate legal advice.

Laura advised Percy that as a general rule, employees' private lives are their own concern. However, some forms of behaviour occurring away from work (such as violence, dishonesty and sexual impropriety) may constitute misconduct and could put an employee's job in jeopardy. Such behaviour can damage the employer's business in a number of ways. The incident may attract damaging publicity to their organisation, it may call into question the suitability of the employee to remain in a particular job and it might result in friction with other employees.

An employer who decides to dismiss an employee for misconduct outside of the workplace may use the "conduct" ground within s.98(2)b of the **Employment Rights Act 1996** or the "some other substantial reason" ground within s.98(1)b of the same Act as a defence to an unfair dismissal claim. The employer needs to be able to show that the behaviour in question actually took place and that this has seriously damaged the working relationship between the employer and the employee.

Case Study 6e (continued)

The ACAS Code of Practice on discipline, practice and procedures urges caution where employees are either charged, remanded in custody or convicted of criminal offences. It states that employees should not be automatically dismissed from their jobs in such situations, although, of course, much depends on the circumstances. However, while it may be good policy for an employer to wait until an employee is convicted before deciding to dismiss, it is possible to dismiss immediately where the employer has gained a reasonable belief in guilt, having carried out a reasonable investigation into the facts. The employer's required standard of proof is only "on the balance of probabilities", as compared to the criminal standard of proof which is "beyond reasonable doubt".

Based on this, Percy and Laura agreed that a disciplinary hearing would be convened on Dave's first day back at work. The intention is to dismiss Dave.

The above case study demonstrates how misconduct committed away from work that could bring the employer into disrepute can be a fair reason to dismiss an employee. Based on this, Lacklustreshire Council should be able to fairly dismiss Dave.

In *McLaren v National Coal Board* [1988] ICR 370 during the miner's strike of the late 1980s, a miner was charged with assaulting a fellow employee and his employers made the decision to dismiss him if he was convicted. The miner pleaded guilty on a technicality — that he had threatened violence (which is technically an assault) but maintained that there had been no physical contact. His employers dismissed him and this was found to be unfair on the grounds that they had not given him an opportunity to explain his conviction and if they had done so and he had been allowed to explain the guilty plea on a technicality, they might not have dismissed him.

Note: This case was lost because the employer in this instance did not investigate properly. If they had done so, the dismissal could well have been held to be fair.)

In *Post Office v Liddiard* [2001] EWCA Civ 940, Mr Liddiard was employed as a coder in the Post Office and worked nights. He commenced his employment in 1986 and had a good record of employment. In 1998, following riots involving English football hooligans attending the World Cup, Mr Liddiard was arrested and convicted in France of offences amounting to football hooliganism. He was sentenced to 40 days in prison. Following the violence in France, there was widespread condemnation by the Prime Minister and the press of those involved in the violence. Mr Liddiard was identified in a national newspaper as being a Post Office employee and being involved. The Post Office suspended Mr Liddiard pending disciplinary proceedings, alleging gross misconduct that brought the Post Office into disrepute.

Mr Liddiard was dismissed in January 1999 and issued proceedings claiming unfair dismissal. The employment tribunal took into account the fact that Mr Liddiard had had an excellent employment record, the incident for which he had been convicted in France had no relation to his employment and that he was employed within the Post Office and not in contact with the public. The tribunal also took into account the fact that the proceedings in France had

a number of anomalies, that the manager who had dismissed him had admitted that he had been influenced by the press involvement, that Mr Liddiard had no previous convictions, and, although convicted, had denied the offences. On those grounds, the tribunal found that Mr Liddiard had been unfairly dismissed.

Note: The matter eventually reached the Court of Appeal who confirmed that the correct question was whether the decision to dismiss fell within the band of reasonable responses (see Chapter: *Displacement*) and the case was sent back to the employment tribunal to re-determine the case applying the correct test.)

DISCRIMINATION AND HARASSMENT

An organisation should not tolerate discrimination on any grounds. In particular, an organisation will be held responsible for acts of discrimination committed by its employees on the grounds of sex, race, disability, sexuality, religion or belief. The purpose of this book is not to look at discrimination and how to avoid it, but rather will focus on the disciplinary action that should be taken against the perpetrators of discrimination.

If an organisation fails to deal with an issue such as discrimination quickly and decisively it will leave itself open to claims that it tolerates and indeed encourages discriminatory conduct. As was seen when looking at a failure to deal with laziness among employees, a failure to deal with the perpetrator of discriminatory conduct will affect the team or the organisation as a whole because it will affect internal morale and will diminish confidence in the management.

It is vital to have an equal opportunities policy. This is important to stop discriminatory conduct in the first place. It will also assist an organisation to avoid liability for the acts of its employees if it can show that it took reasonable steps to prevent the person committing the discriminatory act. The equal opportunity policy should also make it clear that the employer will treat discrimination seriously and disciplinary action will be taken against perpetrators.

As well as discrimination and having an equal opportunities policy, employers should make it clear that harassment will not be tolerated. Harassment can be defined as inappropriate behaviour, actions, comments or physical contact that is objectionable or causes offence. It is unwanted conduct that is offensive to the recipient or which violates the recipient's dignity. Harassment creates an intimidating, hostile, degrading, humiliating or offensive environment for the recipient. Employers are under a duty of care to safeguard the welfare of their employees. Harassment should be seen as a form of misconduct to which the employer's disciplinary procedures are applicable.

The employer's policy on harassment should spell out the fact that harassment in the work context is unacceptable and employees should be given examples of the types of behaviour that can constitute harassment. While the commonest forms of workplace harassment involve sexual and racial harassment, there may be a range of different types of unacceptable conduct.

Case Study 6f

England have progressed through to the final of the World Cup. The nation holds its breath and the country slowly grinds to a halt as World Cup fever grips every man, woman and child. Everyone, that is, except for Percy Nell at Lacklustreshire Council.

Percy is, to be quite honest, glad that the World Cup will come to an end by lunchtime today. He has never known so many personnel problems arise over just a few weeks and he has been telling anyone who will listen that he feels as if he is an example in an HR text book.

England are due to play the African champions in the final. It feels as if the whole of Lacklustreshire Council has been crammed into the staff canteen and social club to watch the game.

The whistle blows and Percy closes his eyes and prays that nothing more goes wrong. In fact, everything seems to go remarkably well. England cruise to a two-goal lead in the first half and spirits are high but not wild. Mid-way through the second half, England concede a goal from a corner and then, with five minutes left, they concede an equaliser. Extra time is tense and then, in what seems to be the collective groan of the entire country, the game goes to penalties. It all comes down to the last penalty. If the England goalkeeper saves it, England win the World Cup. Silence descends on the canteen. Just as the African player runs up to kick the ball a lonely voice screams from the back "Miss it, you black bastard." Before Percy could even think about the disciplinary action that would be taken against the culprit, he was swept up in the emotion of the moment as the last penalty shot cannoned wide off the post, giving England the cup.

After the celebrations had subsided, Percy carried out a thorough investigation into the racist comment that was made. He had received a number of complaints about the comment from black and ethnic minority staff and he knew that he would have to act decisively. He identified the perpetrator and a disciplinary hearing was held.

This time things were easy for Lacklustreshire Council as Percy had drafted a clear policy on discrimination and harassment, which made it clear that any racist comments would be treated seriously and would amount to gross misconduct. The perpetrator was dismissed for gross misconduct and Percy knew that the Council could not be at risk of an unfair dismissal finding because of the clearly drafted policy.

The above case study is perhaps a little simplistic, yet there are still cases where blatantly racist or sexist comments are made. Managers must not be too lazy or complacent to deal with such cases. Otherwise, a very unhealthy culture will develop in the organisation. Moreover, an employee who has been subjected to discriminatory conduct is, in our experience, much more likely to pursue a claim against the organisation if they feel that the organisation has in some way tolerated or acquiesced in such conduct.

UNAUTHORISED ABSENCE

Case Study 6g

The case of Dave Dangerous took an unexpected turn on the day of the World Cup final when he called in sick, as he had done on several occasions during the semi-final round. Percy is sure that Dave has been pulling a fast one to spend more time at the World Cup. However, Percy is not sure how to go about dealing with this.

There have been numerous cases of employees "swinging the lead" and while each one has specific facts the following points are generally relevant.

- Care must be taken to ensure there is no genuine medical complaint. We would suggest that the employee is asked to give their consent for the employer to obtain a medical report either from the employee's GP or better still from an occupational health doctor.
- If consent is withheld then a further request should be made stating that a refusal to comply with the lawful and reasonable request could lead to dismissal.
- If there is a genuine medical complaint then the matter should be dealt with in accordance with the sickness absence policy.
- If there is a reasonable suspicion that the employee is malingering then the employer should have evidence of this. Statements from colleagues indicating that they saw an employee with a bad back cavorting in a nightclub would suffice.

In exceptional cases it may be justifiable to use covert monitoring of an employee, as in *Case Study 7* below. One route would be to use a private investigator. If this is considered, it should be approved by senior management and only used where there is suspected criminal activity or similar serious malpractice. If a private investigator is used, the contract between the company and the investigator should compel the investigator to collect information in accordance with the Data Protection Act.

Case Study 7

Gamma & Co employs a senior sales manager, Mel Inger. She has been off sick with a bad back for two weeks. Gamma has heard a rumour that Mel is thinking of setting up in competition with them and she is making arrangements for this while off "sick". Despite many promises, Mel has not delivered the lucrative contracts that she has been negotiating. To make matters worse, she has not contacted the managing director, Richard Rich, to tell him about her sickness. This is a breach of the sickness absence policy.

Gamma's managers have serious concerns that their trade secrets and confidential information are being used by Mel to start her own business. They are also very worried that she could steal their clients. To compound matters, Mel is paid a high salary despite not bringing in any new business and is entitled to six months' full pay. They have tried to contact her but her mobile diverts to voice-mail and she has not responded to letters asking for a meeting.

Gamma's directors want to dismiss Mel. They could go down a number of different routes to try to achieve this: a capability route (no new business has been generated); a failure to act in accordance with the terms of the sickness absence policy; a failure to obey lawful and reasonable instructions (to contact them); unauthorised absence.

Gamma needs to be clear of the reason for dismissal. The failures to call the MD and to contact the company are unlikely to be sufficiently serious as to justify dismissal. The capability route will not happen instantly (Gamma will need to warn Mel, give her an opportunity to improve her performance, provide assistance in this regard, give her a final written warning and if there is still no improvement only then can they dismiss.) The best chance for a swift dismissal is for unauthorised absence but they must have evidence of this. The directors decide to use the services of an investigator. The investigator follows Mel who has no obvious signs of a bad back (she has spoken to a colleague and said she is in so much pain she cannot even make a cup of tea). Mel drives for two hours and meets a client of Gamma in a motorway service station.

A Gamma manager makes contact with Mel and asks about her health. She says she is still in a lot of pain. They ask whether she has been able to do any work and she says not. Based on the investigator's evidence, Mel is dismissed.

Mel claims unfair dismissal and at the employment tribunal argues that the use of a private investigator was a breach of her human rights and right to privacy. The tribunal members point out the serious nature of the allegations (that Mel was stealing Gamma's business and therefore in breach of her contract of employment) and the fact that ultimately the evidence was highly relevant as it showed that Mel was not ill and they conclude that the dismissal was fair.

GROSS MISCONDUCT

Gross misconduct is conduct that is sufficiently grave or serious as to justify dismissal of the employee without warning, even for a first offence, although this would be a last resort. Essentially, by committing an act of gross misconduct the employee is viewed as being in breach of his or her contract of employment. Gross misconduct is not defined in the ACAS Code of Practice and employers should draw up a list containing examples of behaviour that constitute gross misconduct in their own organisation. If this is done, employers should specify that the list is not exhaustive and that there may be other acts that, although not specifically mentioned, can still constitute gross misconduct. For example, in *Dietman v London Borough of Brent* [1988] ICR 842 CA the council had given the employee a written statement which included the following paragraphs.

> "Gross misconduct is misconduct of such a nature that the [council] is justified in no longer tolerating the continued presence at the place of work of the employee who commits an offence of gross misconduct. Examples of offences of gross misconduct which have led to the dismissal of local authority employees include: unauthorised removal of the [council's] property, offences of dishonesty, sexual offences, sexual misconduct at work, fighting, physical assault, falsification of time sheets, subsistence and expense claims, etc, theft, malicious damage to property. This list is neither exclusive nor exhaustive and in addition, there may be other offences of a similar gravity that would constitute gross misconduct."

Notwithstanding this, there will always be a reservoir of staff misconduct which may justify the employee's dismissal and in *Distillers Co (Bottling Services) Ltd v Gardner* [1982] IRLR 47 it was stated that: "… a catalogue of offences which carry the potential sanction of dismissal contained in company rules may occasionally be useful in assessing the quality of an offence but it does not follow that no offence which does not fall within it can ever merit dismissal. "

According to the 1995 IDS survey, the offences most commonly listed by employers as acts of gross misconduct, in order of incidence are:

- assault
- fraud
- sexual harassment
- indecent conduct
- serious health and safety breaches
- alcohol/drugs misuse
- helping competitors/unauthorised disclosure of information
- tampering with time-recording equipment
- incidents leading to criminal convictions.

An employer is entitled to view violence by staff as compromising health and safety at the workplace and this is especially relevant where an incident takes place near machinery or involves or distracts those in control of machinery. Under the **Health and Safety at Work Act 1974**, employees are under a duty to do nothing to endanger themselves or their colleagues by their behaviour at the workplace. Employers might be viewed as negligent if they appoint an individual with a known propensity for violent and aggressive behaviour. This can include a previous history of off-duty (as well as work-related) violent conduct. Pre-employment checks can go some way

towards revealing an individual's violent profile through the disclosure of unspent criminal convictions for violent offences. The presence of such an individual at work may also have an unsettling effect on staff, who might fear that they are liable to be threatened or attacked. Such a member of staff could not be regarded as a "competent" appointment in the context of health and safety legislation. Employers should make it clear to all staff that intimidating, threatening or harassing behaviour by one employee towards an-other is considered unacceptable and may constitute a breach of the company's harassment or bullying code and that such misconduct will render the perpetrator liable to summary dismissal. Special training is required to ensure that those staff with a supervisory or security function at work must behave in a responsible fashion when exercising that role. Employers can be vicariously liable for the behaviour of their staff when they are acting in the course of their employment. Therefore, a company could also be sued for compensation if an over-zealous security officer assaulted a fellow employee who was suspected of stealing from the premises.

The following are examples of real cases involving some of the examples of gross misconduct set out in the ACAS Code of Practice.

THEFT

In *Moore v C & A Modes* [1981] IRLR 71A C&A manager, who had worked at the company for 20 years, was believed to be shoplifting at a nearby shop. The dismissal was held to be fair because the employee, when knowing of the harm to a retailer that shoplifting can do, had committed the act regardless, and must therefore have been indifferent to the needs of her employer and it was therefore considered risky to retain her in employment.

In *Franxhi v Focus Management Consultants Ltd* (unreported) ET 29/7/99 the applicant, Mrs Franxhi, worked as a personal assistant to the directors of the respondent management consultant firm from June 1996 to July 1998. The respondent was a small, intimate firm which depended to a high degree on trust and easy, personal relationships. In early 1998, the applicant informed the respondent of her pregnancy and she was encouraged to be flexible in her working arrangements. A telephone line was installed in her house so that she could work more from there. Two incidents followed shortly afterwards involving the applicant using the respondent's stamps for her personal postage and not paying for them. This resulted in her receiving a final written warning following a disciplinary meeting. Less than three weeks later she was suspended for her extensive use of the Internet during working hours for the purposes of booking a holiday. She had lied when initially confronted about the matter and following a further disciplinary meeting was dismissed for misconduct by the respondent. The applicant alleged that her dismissal was due to her pregnancy. The employment tribunal found that she had committed an act of misconduct as she had disregarded instructions to pay for her own postage whilst boasting to her juniors that free postage was a perk of the job, and her use of the Internet was more than the occasional fleeting one that might conceivably have been regarded as open to everyone. The tribunal considered that she must have known that her use was not acceptable to the company and her dismissal was reasonably justified. However, her misconduct did not justify dismissal without notice when set against her total service.

This case was heard in 1999 when use of the Internet at work was still a relatively new concept. Nowadays, an employment tribunal would be unlikely to reach the same decision unless the company had a clear policy covering unacceptable levels of use. It is also important that employers and managers are not selective in adhering to the policy.

SERIOUS INSUBORDINATION

In *Farnborough v Governors of Edinburgh College of Art* [1974] IRLR 245 a college lecturer objected to a reorganisation of teaching duties, becoming uncooperative and argumentative with the head of the college and attempting to involve students in the dispute. The college dismissed him without a warning, arguing that it would have been futile to go through the full complaints procedure. Although the lecturer said he would have stopped being disruptive had he received a warning, the tribunal held that a warning would have made no difference to his conduct and so held the dismissal to be fair.

SERIOUS BREACH OF HEALTH AND SAFETY RULES

In *Martin v Yorkshire Imperial Metals Ltd* [1978] IRLR 440 an employment tribunal decided an employer had acted fairly in dismissing an employee who had tied down a lever on an automatic lathe in a factory, so circumventing an important safety device. Although this did not necessarily breach the employer's rules, the conduct endangered the health and safety of all other workers.

Summary

- Defined as both an individual trait (laziness) and as an organisation issue.
- Possible outcomes of failing to have a proper employment contract.
- Possible outcomes of failing to have clearly drafted and relevant rules of conduct.
- The benefits and limitations of staff handbooks.
- A closer look at the following conduct issues: alcohol and drug abuse, foul and abusive language, e-mail and Internet misuse, misconduct away from work, discrimination, harassment, and unauthorised absence and malingering.

FEAR

DEFINING FEAR

Fear is an emotion that most managers regularly feel but few actually admit to doing so, even to themselves. There is a perception that the best managers are those who are tough and uncompromising; they know the answers to everything and fear no-one. Fear is equated with weakness and weakness leads to failure. In fact, fear is an emotion that can have both positive and negative effects on managers and the decisions they make when dealing with issues concerning conduct.

On a positive level, fear or apprehension can act as a warning bell in a manager's mind. If a manager is not comfortable with a decision or a proposed decision, then he should revisit it, look at it objectively and consider whether he has missed something.

Being fearful of taking a particular decision can also be an indicator that the manager does not have the necessary knowledge or expertise to make the decision and should take specialist advice. Too often managers see themselves as the only person who can deal with an issue. It is true to say that managers have the initial responsibility to identify problems and to try and deal with them, but they should not see themselves as isolated and without support.

In larger organisations there will be a human resources or personnel department that can be consulted. The organisation may have access to specialist legal advice by way of a telephone help line or the issue may justify taking legal advice at an early stage rather than acting hastily and then paying for the consequences later. All too often, lawyers are consulted about cases when it is too late — decisions have already been taken and bad procedures followed. If, as a manager, you are unsure about a step, take advice early on when there is still time to make changes and put things right.

The negative aspect of fear in a manager is that it inhibits the manager from acting. At worst, it may mean that nothing is done at all to address misconduct.

One of the most common problems is fear on the part of a manager to deal with a problem. Other parts of this book have looked at reasons why managers may make mistakes when dealing with misconduct and have addressed concepts such as arrogance and complacency. Arrogance and complacency can seem exciting and sexy reasons why mistakes happen and indeed managers reading this book may feel quite proud that they are arrogant and probably feel that, after years of hard toil to get where they are, they have every reason to be arrogant or complacent. Of those managers, many will actually be kidding themselves into believing that their failures to address conduct issues among their team were for these so-called "exciting" failures. Managers may be fearful of dealing with a disciplinary issue for many reasons, among them are the following.

- They may fear how their peers will look at them if they get it wrong.
- They may fear how the team will react to them if they are seen as too disciplinarian.
- They may fear having an employment tribunal claim brought against the company and having to justify their decisions.
- They may fear a backlash from more senior management if they get it wrong or highlight a problem that they shouldn't.

DEFINING FEAR

Fear can induce complacency, or inertia, which means that nothing is done. Employees' behaviour is left unchecked and the manager stays in his or her comfort zone.

As has been explained throughout this book, failing to deal with a conduct issue allows the problem to take root and escalate, so it becomes much harder to address the problem in the future.

Managers, as individuals, can be averse to taking risks, but management as an organisational practice is not risk-free. Conflict in the workplace cannot be avoided, but it can be managed. It is important for managers to recognise and to understand that they can never avoid an employment tribunal claim from being lodged. As long as they are in compliance with the statutory disciplinary and dismissal procedures (DDPs) and grievance procedures (GPs), anyone is free to apply to a tribunal and no legal representation is required. However, a manager, and indeed an entire organisation, can take steps to reduce the likelihood of a claim being brought in the first place and can also minimise the risk of any claim succeeding. It is also important to bear in mind the underlying concept in all disciplinary matters, namely reasonableness (which is covered in detail in the final chapter). The law recognises that in any given situation there will be no single right way of dealing with the matter and allows the manager a band of reasonable responses into which the decision must fall in order to avoid a finding of unfairness.

In short, a manager should not worry about tribunal claims being brought, but should concentrate instead on getting the procedure right and imposing a sanction that is fair, so that any claims that may be brought will ultimately be unsuccessful. It does not matter if the manager in the next office would have dealt with the matter differently, as long as the outcome falls within this band of reasonable responses.

The starting point for dealing with managerial fear is for the organisation to have clearly drafted employment documentation (see Chapter 3: *Complacency*). It will then be transparent to staff what they can and cannot do, and what disciplinary action will be taken against them if they break the rules. This can help mitigate the fear of being seen as autocratic or as an over-officious disciplinarian. The manager can make it clear that he is simply enforcing the rules of the organisation. Once the ground rules are set, a manager should make sure that he follows the disciplinary procedure of the organisation. By doing this a manager will be reducing further the risk of acting unfairly.

The above represents the "norm" of how to reduce risk and consequently reduce fear on the part of the manager about getting it wrong; however, as is so often the way, sometimes the rules have to be ignored. There will occasionally be cases where a manager realises that a member of staff's conduct is having a destabilising effect on the organisation but also realises that there is not enough evidence against them to take any action or that the conduct is not serious enough as to justify dismissal without warnings. In these instances managers should weigh up the risks of a tribunal claim against the benefits to the organisation of taking swift and decisive action. It must be stressed that this is not advocating acting unfairly in every case, but there are times when, for the good of the organisation, a commercial and pragmatic view has to be taken.

In these cases there are ways in which the risks can still be reduced. The most common is for the employer to try and negotiate a compromise agreement with the employee.

COMPROMISE AGREEMENTS

A compromise agreement is a legally binding agreement to settle an employment dispute. In its simplest form the employee is paid a sum of money and in return is prevented from pursuing employment tribunal action against an employee.

Before we look in more detail at the drafting of compromise agreements we shall look at the basic settlement deal that needs to be struck at the outset. There is no hidden magic or even logic in reaching a figure to settle at — it is purely a matter of negotiation. The negotiations should be expressed as being without prejudice to avoid details being brought up in later court or employment tribunal proceedings if a settlement cannot be reached. The employer should also state that the offer is made without any admission of liability or wrongdoing.

Typically the employer will take as a starting point the notice entitlement and add a little extra to this or pay the notice as a gross sum without deduction of tax. Employers should bear in mind that if an employee is successful in a claim for unfair dismissal the compensation will be based on the employee's loss. Therefore an employee who has been treated monstrously but who walks into another job on the same or higher salary will have a low value claim. This is important to bear in mind when discussing settlement figures with employees as they frequently feel that they should be compensated for the manner of their treatment.

Employers should take financial advice before committing to make payments in lieu of notice gross. Ordinarily an employer is obliged to deduct PAYE and National Insurance contributions from sums due to employees and if you get it wrong the Revenue treat the gross sum paid to the employee as the amount after deductions and you end up paying more tax than you ordinarily would do. It is also common for there to be a clause in the compromise agreement which states that the employee will be responsible for any tax that may be due.

It is also worth bearing in mind that an employer can offer more than just a monetary settlement. The offer of a clean reference making no mention of alleged wrongdoing can be a vital part of getting the employee's agreement to the deal. However, employers should take care that they do not provide a reference that is misleading to a future employer. For example, if an employee is dismissed for dishonesty and a reference states that there is no reason to doubt his or her honesty and integrity, the provider of the reference would be at risk of being sued should the new employer discover the real reason why the employee left this employment. In our experience the safest option for an employer is to provide a bare factual reference which confines itself to job title, description of duties and dates of employment.

Once the basic terms have been reached the agreement itself will need to be drawn up. There are specific legal requirements that must be fulfilled in order for a compromise agreement to be legally binding. It is normally best for the agreement to be drawn up by a lawyer to avoid pitfalls.

In addition to the basic terms of settlement it is common for the agreement to contain confidentiality clauses preventing the employee from revealing the terms of settlement, or possibly even the fact of settlement. The employer may wish to include a clause preventing employees from

making any derogatory or defamatory comments about it and perhaps imposing restrictions on employees poaching clients or customers after they have left.

In order to be legally binding the employee must take independent legal advice from a suitably qualified lawyer or trade union representative. It is normal for the employer to make a contribution towards employees' legal costs, typically say £250 plus VAT.

Many employers baulk at the thought of paying off an employee, however they should consider the commercial benefits of a compromise agreement.

- You get the outcome sought (ie the employee leaving) regardless of whether the conduct justifies a dismissal and without having to go through a potentially time consuming process of warnings.
- You avoid any employment tribunal claim which could disrupt your business and be a drain on resources.
- It is a quick resolution to the problem.
- With suitable confidentiality clauses you avoid any adverse publicity.
- Overall you are buying certainty.

In these cases the employee will be faced with a choice between staying and being put through a disciplinary procedure, which will, almost certainly, ultimately lead to dismissal and a black mark on their employment history, or having a clean break at an early stage, getting a lump sum and, perhaps more importantly, a clean reference. For an organisation, the extra costs of paying a lump sum will often be significantly cheaper than going through a lengthy disciplinary procedure during which the organisation is being affected by the employee's misconduct.

The rest of this chapter will look at examples of when a manager may fear taking disciplinary action to address a conduct issue.

CONDUCT ISSUES THAT MAKE MANAGERS FEAR

GRASPING THE NETTLE

Case Study 8a

Claire Cautious works for Massive plc as an operations manager. Massive is a large organisation that runs retail outlets at airports and employs more than 7,000 staff. Claire is responsible for 100 members of staff in her business unit and has direct line management responsibility for 10 staff. She has been in this post for six months having been internally promoted. She is highly intelligent and ambitious but has limited experience of management and HR issues.

Ray Reckless is the manager of one of the retail outlets at an airport. As the manager he is ultimately responsible for ensuring that things run smoothly at the outlet. As well as Reckless there are five other staff working there. Reckless sees himself as something of a maverick — he has been in retail management for 15 years and believes that his way is the best way.

One of Reckless's tasks is to ensure that duty-free goods are properly recorded and accounted for each week so that Massive does not pay too much or too little VAT. Reckless has never been one for forms and figures and he has delegated the responsibility for this to his assistant, Sarah Shady. Once a week Shady gives him a spreadsheet of figures showing which goods sold were duty free and which were not. Reckless signs this to confirm it is correct. He never checks the figures.

Cautious receives the forms and is responsible for collating the data. She notes that Reckless's outlet always has a large proportion of duty-free sales. As part of her new management role, Cautious thinks it would be useful to go to the outlets and spend a few days in each, meeting staff and getting a feel for how the outlets operate and whether there are any differences.

Massive's corporate culture does not like individuality and strongly encourages uniformity. When Cautious is at Reckless's outlet she is surprised that the majority of sales are to UK residents and are not duty-free. She makes a mental note of this and at the end of the week when the VAT return forms come in she looks carefully at the figures. Once again, the data show that 85% of sales were free of duty.

Case Study 8a (continued)

Cautious is worried about this and calls in the accounts department to investigate the issue. Following a detailed investigation it transpires that sales are being recorded as duty-free when in fact VAT had been paid by the customers. The VAT element was then skimmed off and was not being paid to the Inland Revenue.

Cautious was extremely concerned about this because it meant that somebody was stealing money from the business and the business was committing a fraud on the Inland Revenue.

Cautious called a meeting with Reckless at which she explained the information that she had and asked him for his comments. Reckless was unaware of the problems and explained that he had not dealt with the VAT accounting but had delegated it to Shady. He admitted that he signed off the VAT forms without looking at them and without checking them through. Cautious said that there would need to be a full disciplinary investigation into the matter and Reckless could face a disciplinary hearing. She then suspended Reckless on full pay in accordance with his contract while the investigation took place. When Cautious asked about Shady, Reckless said that she had resigned the week before and left immediately.

The investigation revealed that VAT had not been properly accounted for. It confirmed that Reckless, as the manager of the retail outlet, was responsible for the VAT forms and had failed in his role as manager in not checking them. The investigation also identified 20 other duties that Reckless did not do himself, which he should have done. Reckless vehemently denied knowing about the VAT problem and put the blame on to Shady. He said that he had always followed this procedure and had never had any problems before and he suggested that perhaps Cautious was being a little too officious — Shady had gone and so the problem would not recur and in any event he, Reckless, had done nothing wrong.

Cautious looked at the investigation report and witness statements and considered whether Reckless should face a disciplinary hearing. Cautious was unsure what to do — on the one hand it seemed that Reckless had disregarded all the company rules and had failed in his role as a manager. On the other hand, Reckless had been with Massive for longer than she had been and no one else had questioned his way of working. Furthermore, because Shady had left the problem has gone away. Cautious decided not to take the matter forward.

In the above case study, Cautious was afraid of taking any action against Reckless. She could see that the case against Reckless was not straightforward and took the easy way out of not pursuing it. In our experience, disciplinary and conduct matters are rarely straightforward.

If an employee is caught red-handed stealing money, are they really going to deny it and fight a disciplinary hearing? Usually they will accept that they have been caught out and will leave to spare themselves embarrassment. Once these "easy" type cases have been sifted out, what are left are all the hard cases where there are no easy answers and no single right outcomes.

Cautious should have grasped the nettle and disciplined Reckless. Even if Reckless avoided being dismissed he would have been given a clear warning to improve his conduct otherwise next time he would be dismissed. It would also have sent a clear sign to the other team members that the rules had to be followed and that Cautious was not an easy touch. Now look at the same case again, but this time note what happens when Cautious does take disciplinary action against Reckless.

Case Study 8b

Cautious convenes a disciplinary hearing in accordance with Massive's procedures. She involves HR in the process and takes the advice given at each stage. Reckless continues to argue that it was Shady who was at fault. He acknowledges that it was his ultimately responsibility to check the figures but says that it will not happen again because Shady has left.

Cautious adjourns the hearing to consider her decision. She concludes that Reckless has displayed a complete lack of regard for the company's processes and rules — the company handbook explains that managers must complete the VAT forms and gives examples of how properly completed forms should look. The handbook also states that the ultimate responsibility for getting it right rests with the manager and a failure to comply with the rules will lead to disciplinary action being taken and may lead to dismissal.

As a result of his failure to undertake his duties as a manager, Shady, the employee he supervised, has stolen in excess of £10,000 over a two-year period and if the Revenue investigates, then the company will have to account for this to the Revenue. This means there is a potential loss (excluding any Inland Revenue fines or penalties) to the company of £20,000. On top of this there were numerous other failures by Reckless to manage the shop properly.

Cautious concludes that because of the serious loss suffered by the company, the length of time over which failures by Reckless continued and the numerous management failings by Reckless, the appropriate outcome is to dismiss him for gross misconduct. Cautious refers to the company disciplinary procedure, which states that gross misconduct includes serious negligence causing loss and also covers serious breaches of trust. Cautious considers whether a lesser penalty would be appropriate but concludes that because of the failings on the part of Reckless, the company could not place its trust in him as a manager and in fact could not trust him in any position.

Feeling bullish, Cautious dismisses Reckless for gross misconduct. The HR department supports this decision.

The next day, Cautious is discussing Reckless's case with a colleague, who comments that he would not have dismissed Reckless but would have given him a final written warning. Suddenly Cautious is filled with a sense of dread. If she has got it wrong, the company will be dragged through an employment tribunal and be humiliated, and it will be her that is then sacked. After a sleepless night Cautious arrives in work early to find a letter from Reckless appealing against the decision to dismiss. Her heart sinks still further.

At 11 am she is called to a meeting with HR. The managing director has been made aware of the case and has asked HR to look into the case further and to let him know what the appropriate outcome should have been. The MD has said that Cautious should hear the appeal because she knows the case inside-out. HR and Cautious remain of the view that Reckless should have been dismissed but have a slight sense of doubt. They decide to take legal advice before the appeal hearing and if they have misjudged the situation, they can rectify this at the appeal. The company lawyer, Prashant Perfect is called in.

Case Study 8b (continued)

Perfect advises that the question an employment tribunal would ask is whether the decision to dismiss fell within the band of reasonable responses. He explains that just because someone else would have warned Reckless does not mean that the decision to dismiss was unfair. Perfect concludes that overall Reckless's failures were numerous and have caused significant loss to the company.

Perfect says that he cannot guarantee a claim will not be brought against the company, but if it is, then he thinks there are strong arguments that it was a fair and reasonable decision to dismiss. He also advises that Cautious should not hear the appeal because she was responsible for the original decision. Perfect advises that the MD or another senior manager who has not been involved in the case should hear the appeal.

At the appeal hearing, Cautious presents the company's case and maintains that the conduct justified dismissal. Reckless argues that he should have been given another chance but cannot dispute that he has failed to comply with his responsibilities as a manager. The finance director, who is hearing the appeal, does not allow the appeal and upholds the dismissal.

Reckless consults a lawyer with a view to bringing an employment tribunal claim for unfair dismissal. He has no money and wants a "no-win-no-fee" deal. The lawyer advises him that the dismissal will be very difficult to challenge as it probably was a reasonable outcome and the correct procedure was followed. He says that he will not take the case on a no-win-no-fee basis. Reckless does not claim.

Back at Massive, Cautious is congratulated by the MD for taking a brave but reasonable decision. He says that since the Reckless case, all the outlet managers have pulled their socks up and the company's performance has improved three-fold. He says that he wishes there were more senior managers like Cautious — reasonable and fair but prepared to make difficult decisions.

The revisited case study shows the importance for a manager to overcome fear. By taking a brave decision Cautious improved the business. Had she ducked the issue the company would still be losing money and under-performing because of inefficient managers. It also demonstrates that Cautious was right to have some doubts about the appeal because the company was going to get the procedure wrong and this would have led to a finding of automatic unfair dismissal under the statutory DDPs. By taking qualified legal advice, Massive was able to get the procedures right and avoid a claim.

DIFFICULT CHOICES

Case Study 9a

William Wood is human resources manager at a British subsidiary of the American company Pulp-U-Like Inc. The American management board has implemented an aggressive reorganisation of the UK operation, which has meant that Wood has had to carry out numerous redundancies in the past six months. The American management do not understand the degree of protection afforded to UK employees and Wood has often cautioned them against the proposed course of action that the parent company wants to adopt.

One of the high-flying managers in the UK operation is Eddie Edge. Edge has made significant amounts of profit for Pulp-U-Like. He also gets on very well with the staff and is seen as "one of the boys". Having closed a significant piece of business, Edge invites the 20 staff who are on-site to the pub at lunch time at 1pm to celebrate. Most staff stay for a drink or two and gradually disperse. By 2 pm only Edge and Nick Nasty remain in the pub. They have each consumed four pints of lager and agree to carry on drinking. At 3pm the two men stagger back to work.

The first person they see is the young, attractive, female receptionist. Both Edge and Nasty lean across the reception desk and make lewd comments to the receptionist while looking down her top. She makes her excuses and leaves, then goes to see Wood to tell him about it. She is very distraught and upset.

Wood reassures the receptionist that the company takes issues of sexual harassment very seriously and he will investigate her complaints. He goes to speak to Edge and Nasty and finds them both to be sitting at their desks drunk. He immediately sends them both home and arranges a disciplinary investigation hearing for Monday morning.

Within two hours of sending them home Wood is called by the UK MD. He has heard about the problem and wants to know the details. Wood gives him all the information that he has and explains that the company staff handbook contains a section on being drunk at work, which expressly states that such behaviour will be lead to disciplinary action and possibly dismissal. Wood also explains about the harassment policy and the fact that harassment may lead to dismissal as well. He thinks both men should be dismissed.

The MD says that he does not want Edge sacked because he makes the company a lot of money and that the US management would not look favourable on him if he were to lose such a high revenue earner. Nasty, on the other hand, has been a troublemaker before, a rather ordinary revenue earner and the MD is more than happy to get rid of him. Wood reflects on his conversation with the MD over the weekend. He is worried because, subject to what the individuals say, he thinks that both should be sacked, but he is fearful that his decision will not be supported by the company and, in fact, he may be sacked because he makes an unpopular choice.

It can be seen from the above scenario that Wood has a very difficult choice to make. This could go in one of a number of possible ways.

Case Study 9b: Outcome 1 (Fear Wins)

Having thought about the MD's comments, Wood meets with the two men on the Monday morning. Wood interviews them both separately and he then informs Nasty that there will be a disciplinary hearing. Wood convenes the hearing in accordance with the ACAS code and the company's procedures. He dismisses Nasty for breaching the policy on alcohol at work and for harassing the receptionist. Wood takes no action against Edge. The outcome of this is that Nasty takes the company to an employment tribunal claiming unfair dismissal. His case is that even though he was in breach of the policy he was not treated the same as Edge and he was in some way victimised. He succeeds in his claim for unfair dismissal although the tribunal reduce his compensation because of his conduct.

The receptionist is unhappy that the company has not taken action against Edge because she feels he was the instigator of the harassment. She resigns and claims constructive unfair dismissal because the company failed to address her concerns properly. She also claims sex discrimination for the behaviour of Edge and Nasty. She wins both cases and is awarded £30,000 in compensation.

Edge carries on behaving badly and his actions lead to two more tribunal claims being brought against the company. These cost the company significant amounts of money in terms of management time in dealing with the claims. Because of the bad experiences in the tribunal the company settles both cases and pay off the claimants.

The US company is not happy at the costs incurred in dealing with the claims and paying compensation. It looks into matters and is shocked that Edge was not disciplined and dismissed. The US chief executive demands that Edge is immediately dismissed. Wood and the UK MD have to explain in a video conference that this is not possible because no action was taken against him at the time of the various incidents and if they try and do something at this late stage he will be able to sue the company for unfair dismissal. They have to wait for Edge to do something else and unless it is gross misconduct have to go through the lengthy process of warnings before they can dismiss him.

Case Study 9c — Outcome 2 (No Fear)

Wood thinks about things over the weekend and decides that both Edge and Nasty have to be interviewed. Depending on their explanations, both need to be disciplined and most likely dismissed. This is what happens and both men are sacked for gross misconduct. The receptionist is happy that the company has acted responsibly. She returns to work and does not sue. Edge and Nasty send solicitor's letters trying to engineer a pay-off but the company refers to the staff handbook, which both Edge and Nasty had signed to say they had read, understood and agreed the contents. Nothing further is heard from either man.

In Outcome 1, Wood was worried that if he sacked Edge he might be sacked himself, or placed in

a position where he had no option but to resign because he was not supported by senior management. As can be seen in the No Fear outcome, Wood's fear, though understandable, was overcome because he was relying on the proper procedures. As Wood acted in accordance with the staff handbook and company rules, if the company did not support him or sacked him, he would have had a strong case for unfair dismissal. In actual fact, the US management were very supportive, because they did not want to be seen as a company that condoned such bad behaviour.

If a manager is worried about malpractice or widespread corruption within an organisation then he should raise this and should blow the whistle. There is not enough space in this book to cover whistle-blowing in detail; however, many managers do not take disciplinary action because they fear that it will rebound on them and, having identified a deep-rooted problem, they will be dismissed. UK law protects whistle-blowers from being dismissed or subjected to detriment because they raise genuine and legitimate concerns in good faith. This protection should be enough to overcome any fears on the part of the manager.

In *Patricia Mackinnon v (1) Bromley Appointments.com Ltd (2) Human Resource Group plc (3) John Parkinson* (2004) ET 12/3/204 the managing director of Bromley Appointments.com Ltd acted as a consultant for Human Resource Group plc. The chairman, director and majority shareholder of both companies made a number of unwanted sexual advances to her over a period of seven months, which occasioned other events such as a reduction in salary, a formal reprimand, suspension from work on the grounds of gross misconduct and a period of ill-health in the form of stress. She instigated the grievance procedure in relation to the conduct of the chairman but it was not investigated properly. She resigned and claimed constructive dismissal. An employment tribunal held that the chairman's conduct had amounted to sexual harassment, and that as a direct consequence of this both companies were liable for sex discrimination. The breaches of the implied term of trust and confidence supported the tribunal's finding that the dismissal was unfair.

In *M Parkins v Sodexho Ltd* [2002] IRLR 109 Mr Parkins was dismissed after he "blew the whistle" and raised a health and safety matter with his employers, namely that there was inadequate supervision on the site where he worked in the evenings. He had alleged that this gave rise to a breach of contract. The Employment Appeals Tribunal held that Mr Parkins' complaint amounted to a "protected disclosure" under the **Public Interest Disclosure Act 1998**.

In the above case, EAT decided that there was insufficient evidence to go on to decide whether or not Mr Parkins' dismissal was therefore unfair. However, if the circumstances had been different there could well have been a finding of unfair dismissal and the case illustrates the point make earlier, that employees are protected in law from being subjected to detriment or unfair treatment as a result of raising concerns about misconduct by employers. This is all the more relevant to managers discovering potentially more serious misconduct than in the above case. It is also worth

noting that, if in doubt, under the Act an employee may safely discuss his concerns with a solicitor before taking any action.

Summary

- Fear as a common problem most managers face.
- How fear inhibits managers from confronting situations and/or following procedures.
- Understanding what constitutes gross misconduct.
- Brokering compromise agreements and where they are appropriate.

DISPLACEMENT

DEFINING DISPLACEMENT

One of the most common occurrences of bad management is the practice of displacement. To displace means "to shift from its place or to oust from its place and occupy it instead". Displacement is the act of displacing. A straightforward use of this term is to describe a person's job as being displaced by, say, new technology. Another use is when one employee displaces another because they are better or more favoured. A slightly more complex meaning is to describe the shifting of blame or responsibility from one person or group to another.

A further meaning that applies to human and animal psychology is the sort of activity that can be characterised by a cat that is unsure whether to fight or run; instead it displays a third unrelated behaviour, such as grooming. This normal activity can be calming and reassuring. Likewise, humans under stress can exhibit behaviour that seems unrelated to the stress but on closer analysis may result from it. An example is the case of the employee who is always chatting to colleagues. This could be just garrulousness, but it may be because the person is being pressed beyond their level of competence and the stress needs some form of release.

Since things are not always what they seem to be, a good manager of people has to be alert and sensitive to where displacement activity is occurring. Otherwise, an investigation into a problem arising from poor conduct may lead to false conclusions and then on to actions that are unreasonable and not justified. In the final chapter on *Reasonableness* the consequences this may have for an employer are discussed.

AN ORGANISATION'S RESPONSIBILITY

Case Study 10

Mike Manager is a high-flying executive working for an international engineering group. He travels all over Europe and has a demanding and challenging job with long hours. However, performance in his division, measured in productivity terms, is flagging.

Mike and his company's director of human resources, Jo Joyless, fly to Madrid for a three-day business trip. Jo notices that on the last day on the trip, Mike spends a ridiculous amount of money, about £1000, on trivial tourist knickknacks, sometimes buying three or four of the same thing.

Quite separately, senior managers notice that Mike is regularly losing his temper with subordinates without any apparent justification and contrary to his normally calm and reasonable demeanour. They do not say anything about this to Jo or to the chief executive.

Soon after the trip to Madrid, Mike goes on long-term sick leave, having suffered a nervous breakdown. The chief executive and board directors decide to terminate Mike's employment and select a performance-related reason. On his return from sick leave, he is sacked. This gives rise to very serious problems, with Mike having a potentially huge claim against his ex-employers arising out of the long-term depressive illness that followed these events.

DEFINING DISPLACEMENT

The end of the case study shows that all was not as it seemed to be. Had the company been more alert and communication between senior managers better, it is possible that the clear displacement activity of the buying spree could have been linked to the unusually aggressive behaviour. The stress might have been managed to the extent that a major claim could have been avoided. Had the different elements been identified early on through an effective investigation, Mike's consultation with a local psychiatric hospital might well have been discovered and sensible steps put in place to lessen his workload and increase his support. There is, after all, a duty on employers to provide a safe working environment.

Clearly, a manager cannot be expected to be a behavioural psychologist, but increasingly employers are likely to be held responsible for psychiatric illness or even simple stress. Early warnings can make things a lot less complicated for all concerned: the employee gets better more quickly, there is no claim against the company and, perhaps just as importantly, the balance and morale of the workforce is maintained. A "dislocated" individual does double damage to other employees by putting extra work pressure on others and lowering the overall confidence of the workplace.

Management means assuming responsibility and setting the right examples. Too often, inexperienced, arrogant, greedy or lazy managers try to blame other employees, exonerating their own actions or inactions. This frequently coincides with a corporate culture that tolerates bullying, and possibly also sexual harassment, racial, gender and/or age discrimination. Elements of arrogance and laziness combine to create this culture.

Case Study 11

Charlie Charming is a very successful financial advisor working for a national group, Commission plc, at its branch in Richtown. Charming has a large and profitable list of clients, some of whom go back a number of years and pre-date his arrival at Commission. Whatever the legal position, he sees these long-standing contacts very much as his clients and central to his career. Part of his success is due to the fact that he is gentle and personable as well as being an able financial professional. Head office in another city decides the branch Charming works from needs better management. This is because overall the Richtown branch is not profitable. The previous manager ran off with the chairman's wife after fiddling the management figures to make things look better. Despite there being rich pickings in a city where there is old wealth, the other consultants lack initiative and can't meet their targets. Things need improving.

Worried about the Richtown branch, the directors of Commission decide to send in an aggressive employee, Peter Pushy, to manage the branch. Pushy is actually less senior than Charming but without consultation the directors — in a panic — have put him in a position and with considerable powers.

Pushy decides to take over Charming's client list. First, he undermines the advisor by ordering him about in front of other employees in a way that belittles Charming. He then asks to meet some of Charming's bigger clients and at once takes over client relations with no further reference to Charming. Finally, and without consent, he writes to all the clients making it clear that he is in charge of their accounts. In this way he improves his log credit and reduces that of Charming. The blame for poor branch performance is being displaced and, quite unfairly, Charming is being lumped with the other less-able consultants as an underperformer.

The above case study illustrates that senior managers can make a laudable decision to prevent part of a business deteriorating — here to put in an energetic branch manager — but if they are not careful a greater harm can occur, namely the loss of an effective employee. For as sure as big financial companies like to make money, there is almost certainty that Charming will resign and with him he will take a lot of his loyal clients.

In this case, Charming, who got on well with his line manager, John, in Commission's head office, did mention the problems to John but did not make a formal grievance. The problem for Charming is that if he claims against Commission for constructive dismissal, it might be questionable whether, in light of the fact that he made no grievance before resigning, the company's behaviour was bad enough to justify resigning.

It may well be that since 1 October 2004, when the **Employment Act 2002** came into force, a situation like this could lead to complications under the new grievance procedures (GPs). For, under the Act, an employee who does not follow the GPs will not be allowed to bring an employment tribunal claim. For a full guide to these procedures see the discussion in Chapter 2: *Arrogance*.

Case Study 11 (continued)

Under the legislation, there is a modified grievance procedure, which applies after termination. A point here for managers to beware is that under this modified procedure, the employee claiming constructive dismissal may put his grievance in by letter, to which managers must respond in writing. It is possible that a busy manager might not consult anyone in the legal department before penning the response. If there is then an employment tribunal claim, the formal and legal response of the employer may be restricted to the written grievance response.

Therefore, it is vital in a grievance situation to consider whether there are legal implications and how the letter or statement in response should be framed. It is not an infrequent occurrence that an employer will ultimately at tribunal wish to argue from another standpoint: either the behaviour alleged by the employee did not happen, or did not happen as claimed, or advance the real reason why the employee was treated as he was, say incapacity. Under **The Employment Tribunals (Constitution and Rules Procedure) Regulation 2004** (SI 2004/861), which came into force on 1 October 2004, new tribunal rules took effect, so that getting things wrong at the start may greatly limit scope in any later legal proceedings.

DISHONESTY

Dishonesty at work is one of the many aspects of employee conduct and, of course, it amounts to misconduct, often justifying dismissal. Any dismissal should be both fair (not unfair dismissal) and contractually justified (not wrongful dismissal: in other words not dismissal with inadequate notice or in breach of contractual disciplinary procedures).

Dishonesty is an area where displacement frequently occurs. This is because the villain needs to cover his tracks and will be likely to do things and carry out dishonest acts in circumstances where two or more people fall into the frame of suspicion. In one case, there were three operators of a cash till and the shortages occurred at times when at least two of the three were on duty, masking the true identity of the thief. In addition the thief, when challenged, told plausible lies suggesting that the other person was implicated in the dishonesty.

In another situation, an accounts manager was frequently stealing from his professional services employer, including taking client funds. He knew how to carry out his activities to throw off suspicion (another displacement). However, he had to contend with the non-executive finance director and the auditors. He had a strategy for this. Over time, he told all sorts of lies to these people suggesting that the managing director of the business was treating him badly and drawing too much from the business by way of expenses. At the same time he ingratiated himself with other members of staff who were associated with accounts. When he was finally flushed out, the natural response of the accountants and others was: “Can it really be true? He was so agreeable and though he didn’t seem very competent, he certainly didn’t seem to be a crook.” In reality, he was a professional thief and lasted as long as he did because of these displacement activities. Fortunately, he was sent to prison for two years.

In some instances, the facts are clear, the dishonesty and villain are apparent and then quick decisive action is necessary — and warranted by employment law. Other cases require much more care and alertness, partly, because of this displacement tendency.

UNFAIR DISMISSAL AND WRONGFUL DISMISSAL

Normally, employment tribunals test the fairness or otherwise of a dismissal decision by looking at the facts known to the employer at the time of dismissal. This contrasts with wrongful dismissal where after-acquired knowledge can make the dismissal justified in contract or common law. This chapter is primarily concerned with unfair dismissal and a manager has to look carefully at what evidence there is when sacking someone. A manager cannot rely on a hunch, say, that new material will be revealed when the company accountants trawl through the figures at the end of next month.

Wrongful dismissal is easier when there is a suspected theft but it is not possible to prove it. Here, a manager can simply dismiss on notice, or, more likely and to keep the employee away from the business, will pay the notice money "in lieu of notice". By doing this there will be no breach of contract giving rise to claim for wrongful dismissal.

WHAT IS WRONGFUL DISMISSAL?

Wrongful dismissal is a dismissal in breach of contract, eg, without sufficient notice or in contravention of the contractual disciplinary procedure.

A dismissal without notice or pay in lieu of notice may not be wrongful if the employee was guilty of gross misconduct entitling the employer to dismiss without notice. Offences of dishonesty against an employer (eg, theft or fraud) will generally amount to gross misconduct, even when the amounts taken are relatively small — in one case as little as £3 justified summary dismissal for deliberate fraud.

Nonetheless, even where the employer reserves in the contract the right to dismiss summarily for offences of dishonesty, there may be question marks as to whether particular conduct is "dishonest" or not.

In *John Lewis plc v Coyne* [2001] IRLR 139 the dismissal of an employee for using an employer's telephones for personal calls was unfair because the employer failed to investigate how serious the misconduct was. A two-stage test was required to determine if the conduct was dishonest:

- according to the ordinary standards of reasonable (see final chapter on *Reasonableness*) and honest people, was what was done dishonest?
- must the person concerned have realised that, by those standards, his actions were dishonest?

In the John Lewis decision summarised here, the employer should have investigated whether the employee had previously been warned about telephone use and whether such use had been condoned in the past. Invoking disciplinary procedures almost immediately was held to be inappropriate and the dismissal was found to be unfair.

Although wrongful dismissal claims can be avoided by dismissing with notice or with a payment in lieu of notice, such dismissals may still be unfair.

Re-instatement

Where an employee is found to have been unfairly dismissed following allegations of misconduct that the employer genuinely believed were true, re-instatement will only rarely be ordered by a tribunal.

STEPS TO TAKE TO AVOID UNFAIR DISMISSALS

The employer has to establish that the dismissal was for a potentially fair reason. Clearly, misconduct can amount to such a reason. Thereafter, an employment tribunal must be satisfied that the employer acted reasonably in all the circumstances in treating that reason as sufficient. (The tribunal should not substitute its views for those of the employer in deciding whether dismissal was within the band of reasonable responses to the conduct alleged).

The employer must have:

- a genuine belief
- on reasonable grounds and
- have found, after reasonable investigation, that the employee was, on the balance of probabilities, guilty of misconduct meriting dismissal

These tests and the "band or range of reasonable responses" are looked at in more detail in the chapter on *Reasonableness*.

These requirements bring a manager into the arena of reasonableness, where a fair and sufficient investigation must take place and the final decision taken must be answerable to the question: "Is the decision one that can be considered as falling inside that band or range of reasonable responses by an employer?" Therefore, when a manager carries out a reasonable investigation and genuinely believes that the employee is guilty of misconduct, but does not base that belief on reasonable grounds (because the evidence of misconduct is shaky), then there is a risk of an unfair dismissal.

As stated elsewhere in this book, it is strongly recommended that managers should look at and comply with the ACAS Code of Practice on *Disciplinary and Grievance Procedures* published in September 2004, which took effect on 1 October 2004 (see the *Conduct and Discipline* website). This document contains guidance on both the statutory disciplinary and grievance procedures (as from 1 October 2004) but also — and vitally — gives what amounts to a reasonable way to deal with all these matters as an employer.

The problem in the workplace is that there is not a rule or case for every type of problem a manager might face. Therefore, reliance has to be placed on the fair and reasonable foundations of employment law. It is hard to define these ideas in a legal or exhaustive way but as with the astute earthman describing an elephant to a Martian: "It is hard to describe but you'll know it when you see one." Most people have inbuilt systems that help them to recognise automatically fairness and unfairness and some would say these concepts are genetically programmed into us for sociological reasons.

The Investigation

A first step in any investigation is to decide who should carry it out. This may be obvious or constrained by the limited number of people available, but in an ideal world it is a good idea to have someone who is outside the relevant line management to ensure that other irrelevant factors such as dislike or prejudice do not creep in to distort the decision.

A separate file should be kept to provide written evidence of the investigation, which may well prove useful if the case progresses to an employment tribunal and helpful in any settlement negotiations. Do be aware that keeping a file in this way may amount to processing data under the **Data Protection Act 1998** and data about dishonesty is sensitive personal data in respect of which the subject's consent is normally required for processing. Certainly the giving of a reference to a third party can amount to processing and great care should be given when informing third parties unless there is clear evidence of dishonesty such as a written admission or a conviction in a criminal court.

Normally witnesses should be interviewed and, if there is time, should sign witness statements. This shows there has been a reasonable and proper investigation. Make any witness statements available to the employee. If this is not done, it does not automatically make the investigation unfair, but providing statements saves a lot of argument and avoids the allegation that there was unfairness. Do note that some witnesses will insist on anonymity and this may have to be respected to get the evidence needed. Once again, this does not automatically mean an unfair process.

Take a view as to the weight to be attached to any evidence. The investigating manager should try to work out if the witness has a reason to carry out displacement himself. After deciding that the witness is probably not lying, the manager will have to weigh up how much importance to attach to the evidence and preferably get corroboration.

The contents of the anonymous (and possibly unsigned) witness statement should be presented to the employee, with omissions if necessary to protect anonymity. The response of the employee under suspicion can then be put to the witness.

Having conducted a fair and reasonable investigation, the manager will need to consider whether the matter should proceed to a disciplinary hearing or whether there is in fact no case to answer.

If there is a case to answer, it will be necessary to hold a disciplinary hearing and if there is an adverse finding, allow an appeal. Remember that, since 1 October 2004, not to allow an appeal will be a breach of the relevant statutory procedure and, subject to one year's continuous service on the part of the employee, amount to an automatically unfair dismissal.

When faced with a serious dishonesty issue, perhaps something that affects a whole department or division, it can be sensible to bring in outside investigation experts rather than call the police at once or do the investigation as a company. This is because managers probably do not have the expertise to do a good job and, even if there was the expertise, the diversion of time and effort can be expensive. The alternative is to go to the police but they are usually heavily engaged.

Once the hired expert has made a report, this can be given to the police who will take the case to court. Alternatively, there is a strong dossier to give to lawyers in the event of an unfair dismissal claim.

Practical Issues

It may be unwise to dismiss automatically if an employee is charged with a criminal offence. It may depend on a number of factors such as whether there has been a guilty plea or whether other staff are prepared to tolerate the employee (in one case there was a charge of accessing paedophile pornography and it was impossible for the employee to return to work because of the hostility of

others). Even if the employee has pleaded guilty to a criminal charge, if the employer has carried a reasonable investigation and reached a conclusion that falls within the band of reasonable responses as outlined earlier, then a dismissal may still be unfair.

Consideration should be given to suspending the employee pending trial. Check that the company does have the right to suspend without pay; otherwise the employee must be paid. It may be possible to transfer the person to another job but this brings its own difficulties.

One important area is the case of multiple suspects. Here, it is possible to dismiss all the suspects if the three tests of reasonable investigation, genuine belief and reasonable grounds are met in relation to all the suspects and it is impossible to be more precise than the suspect group.

Another important area is the question of dishonesty outside the workplace. It is established that non-work conduct can lead to disciplinary action and dismissal. In a recent case, a solicitor who was seen drunk in town after work was dismissed as bringing the employer into disrepute. The key here is to look at a range of factors. First, the behaviour must either damage the business or undermine vital trust between the parties. A solicitor or bank employee might be sacked fairly whereas the same criteria might not apply to a labourer who is not in a position of trust. Next, the manager must look at the length of service and seniority of the employee — a single offence by an employee with long service might not warrant dismissal. The more senior the employee, the more likely it is that dismissal will be justified.

Protection

Finally in this chapter, employment law protects the employee. However, the law is also available to protect the employer. Sometimes, urgent action is needed to protect financial assets or confidential information. It may be necessary to press ahead with an injunction without going through any procedural steps at all — even if this technically amounts to repudiatory behaviour that would also be found to be unfair. Commercial decisions need to be made to protect the business and risks weighed against each other. Sometimes employment law has to take a back seat.

DISPLACEMENT ACTIVITIES

The case study below discusses an area manager in the retail sector systematically using the displacement technique and seriously damaging the job and potentially the career of another more junior branch manager by putting the blame for discrepancies and branch non-compliance upon the latter. The area manager then invoked the company disciplinary policies and procedures and had the branch manager suspended. The disciplinary process was flawed and unfair. The employee resigned and claimed constructive unfair dismissal and threw in for good measure a whistle-blowing claim since he had, during the investigation, made a "protected disclosure" asserting clearly and in detail how the manager had distorted the truth. The company paid damages in excess of £50,000.

Case Study 12a

Brian Bandit is the area manager of a national chain of domestic product retail stores, Top Line. The culture and organisation of the company is such that he is able to exercise tight control of the stores he manages in his territory, Badlands. He has wide powers of appointment and transfer of branch managers in his area. This power gives him the kind of patronage once enjoyed by kings or barons. Cross him at your peril, because if he wants he can raise disciplinary charges, investigate them himself and then make the final decision.

Paul Paragon is a branch manager in the adjoining area of Mediocre. He has risen through the ranks on hard work and efficiency. He is honest. He gets the chance of running the store at Dodgy City in Badlands. Sadly, he has no idea of the virus of dishonesty thriving there.

As well as having friends on the board of directors, Bandit has a crew of hangers-on, including other Badlands branch managers and some branch sales and accounts staff. There is an area-wide system of falsifying applications for credit as this raises "log credit" and hence bonuses, with Bandit getting the jackpot with override payments on each branch. The credit applications come with extra "points" for the bonus system as the associated insurance premiums normally raise the overall revenue from the transaction.

Bandit arranges for Paragon to move to Dodgy City and take over from one of the acolytes, Benn. Shortly after his arrival, Paragon discovers a false application when the customer complains about something else and says she never asked for credit. Before he can get to the bottom of this, and out of the blue, there is a branch audit. A list of serious deficiencies in the transactions ledger is thrown at Paragon by Bandit himself. Paragon is suspended and an investigation is set in motion, conducted by Bandit. Paragon is intelligent and he takes photocopies of documents that may exonerate him. He analyses these and consults Wyatt, who is an honest manager in Straightforward, the best-performing area of Top Line. He too is certain there has been serious wrongdoing in Badlands, supported — if not initiated — by Bandit. Paragon prepares a file of documents and supporting arguments. During a four-month investigation he shows the file to Bandit and another senior Top Line director who takes part in one meeting. This is followed by a disciplinary hearing, though only after Paragon has two months of doctor-diagnosed stress (while on suspension) causing the hearing to be adjourned several times. Both at the investigation and in the disciplinary hearing, Paragon clearly displays his evidence and contends Bandit has been in breach of company policy over credit applications and has been benefiting from the breaches, which are dishonest and fraudulent.

Case Study 12a (continued)

This is a protected disclosure under the **Public Interest Disclosure Act 1998** (PIDA). The outcome of the disciplinary hearing chaired by Bandit is that Paragon is given a final written warning. Paragon appeals and is turned down. He resigns, claims unfair dismissal and makes a claim under PIDA for unlimited compensation. He says that he has been treated detrimentally as a result of his disclosure and the detriment is the disciplinary finding.

After three months of employment tribunal litigation and expensive disclosure of documents, the case is settled with a large sum of compensation and a clear reference being given to Paragon. He has, however, suffered months of anguish and he and his family are still embittered. Top Line does not appear to have learned from the incident.

Case Study 12b: Alternative Scenario

The facts are the same to the point where Bandit raises the result of the branch audit with Paragon.

In a parallel universe, Top Line has a policy in line with natural justice that no-one should be a judge in his own cause. Obviously, Bandit is area manager for Badlands and had control of former manager Benn, the new incumbent Paragon and the Dodgy City branch at all relevant times. It is apparent to anyone with a brain that Bandit has a vested interest in blaming Paragon and so should not be the investigator, and still less the chair, of the disciplinary meeting. The law supports this approach and in a decided case it was found that being both investigator and judge was likely to be outside the bounds of fairness.

The HR director asks her assistant to investigate and, because there is one discrepancy within the Paragon period at Dodgy City, there is a disciplinary hearing, which she chairs. Paragon is cleared of any wrongdoing and offered an ex gratia compensation sum, which he accepts, and then moves on to a good branch in the Straightforward area.

Bandit is arrested by the police. (Earlier sections in this chapter give a guide as to how he should be dealt with.) Bandit's acolytes resign en masse and the Badlands area is given to Wyatt.

The above case study poses tricky problems for an HR manager. It may be clear that things are going wrong, but a manager might feel forced into following a flawed process and making a bad decision because of the pressure from senior management. In this situation, Bandit had friends among the company's directors.

Also, when serious displacement activity is undertaken, the perpetrator usually arranges for what might be called ancillary or collateral damage. An example would be to arrange for an acolyte to complain of bullying in an unrelated incident. Thus, there is a degree of prejudice before the process starts.

Another important point is that the DDPs and GPs are a basic requirement. Compliance with them still leaves wide tracts of ground open to potential unfair dismissal and other claims.

A manager still has to measure everything by the fair and reasonable yardstick. However, there is a lot of case law that can help with this judging process, and also the ACAS Code of Practice is very helpful.

BULLYING

Bullying at work causes a considerable amount of stress-related absenteeism. Bullying can be characterised as targeted and persistent, offensive, intimidating, malicious or insulting behaviour; and defined as an abuse or misuse of power intended to undermine, humiliate, denigrate or injure the recipient.

Bullying can give rise to complaints of unfair dismissal, discrimination and harassment. Employers may be vicariously liable for the acts of their employees during the course of their employment, even if they have no knowledge of employees' acts and have not approved them.

The connection between bullying and stress can sometimes give rise to costly claims for personal injury or raised awards of compensation.

Bullying can increase staff turnover, thereby increasing costs for an organisation. Employers should consider the development of a policy on bullying and consult with those who will be affected by its introduction, including employees and relevant trade union representatives.

Employers' Duties

Employers have a duty to:

- ensure that the working environment is safe and without risks to health
- ensure the workplace is free of discrimination and harassment.

Employees' Duties

Employees have a duty:

- not to bully other people
- to co-operate with their employers to enable the employers to comply with their legal duties
- take reasonable care for the health and safety of themselves and others.

Examples of what may be considered bullying are provided below for guidance purposes. For practical purposes, complainants often define bullying as something that is unwelcome, unwarranted, targeted and persistent, and causes a detrimental effect.

Bullying may include repeated occurrences of the following behaviour or actions targeted at individuals or groups:

- constant criticism, fault-finding or undermining
- being excluded, marginalised or isolated
- being treated differently from everyone else
- being threatened, shouted at or humiliated
- either being over-burdened with work or denied work
- being set unreasonable targets and deadlines
- having authority removed but responsibility increased

- denial of annual leave, sickness or compassionate leave
- unjustified disciplinary action
- being forced into early or ill-health retirement
- distorting or misrepresenting actions.

Bullying can give rise to complaints of unfair dismissal, discrimination and sometimes harassment and victimisation.

Bullying differs from harassment and discrimination in that the focus is not so much based on gender, race or disability, but more often based on the competence or alleged lack of competence of the bullied person.

Extreme cases of bullying are usually quite easy to spot and it is often "grey" areas that cause problems. For example, one person's "bullying" can be another's "firm management". In the Displacement case study above concerning Brian Bandit this is a central theme.

Bullying and harassment sometimes do not take place in face-to-face situations. They may also occur in written communications, electronic mail, phone calls and automatic supervision methods, such as the computer recording of downtime from work or the number of calls handled, if these are not applied to all workers. Many people who claim to have been bullied say it has affected their health, causing stress and depression. It is this connection between bullying and stress that gives rise to potentially costly claims for personal injury.

Why Employers Need to Take Action

Bullying is not only unacceptable on moral grounds but may, if unchecked or badly handled, create serious problems for an organisation including:

- poor morale
- loss of respect for managers and supervisors
- poor performance
- lost productivity.

Employers must make it clear that on no account will bullying be tolerated within their organisation. Chapter 3: *Complacency* gives advice on how to manage this type of conduct by senior employees.

STRESS

Bullying in the workplace can naturally give rise to stress and this in turn can mean potential personal injury claims against employers. The effects of stress can be:

- mental
- physical
- behavioural or psychological

Symptoms can include:

- anxiety
- sleeplessness
- tearfulness
- anger
- irritability

- headaches
- skin
- problems
- depression
- poor concentration and memory
- sweating, panic attacks
- obsessiveness
- isolation
- low self-confidence
- suicidal thoughts
- indecision
- alcoholism
- mental breakdown
- heart disease.

The effects are of course not just limited to the employee. Effects for employers can include:

- an increase in absence levels
- an increase in sick pay costs
- an increase in staff turnover
- a decrease in efficiency
- a decrease in quality
- employee relations problems
- resignations
- damage to the company reputation
- tribunal and other court cases.

Personal Injury Claims

The case establishing stress as a potential personal injury issue was *Walker v Northumberland County Council*. This case established that the risk of mental damage could not be excluded from the scope of an employer's duty.

> In *Walker v Northumberland County Council* [1995] IRLR 35 a social services officer made a claim in negligence against his employer for failing to take reasonable steps to avoid exposing him to a workload which endangered his health. He had previously suffered a nervous breakdown through his duties as team leader of a group investigating child abuse cases. His employer had promised him an assistant but had never provided one and he went on to suffer a second nervous breakdown, forcing him to retire aged 50. It was held that there was no logical reason why the risk of psychiatric damage should be excluded from the scope of an employment. In continuing to employ Mr Walker but failing to provide an assistant after the first nervous breakdown the council had acted unreasonably and breached their duty of care.

For a personal injury claim to succeed, the employee has to overcome a number of hurdles:

- the employer must owe the employee a duty of care
- the employer must be in breach of that duty
- the employee must suffer an injury

- the employer's breach must have caused the injury
- it must have been reasonably foreseeable on the part of the employer that injury to the employee would result from the breach of duty.

Health And Safety At Work Act Claims

The **Health and Safety at Work Act 1974** (HSWA) requires an employer to take reasonably practicable measures to ensure the health, safety and welfare of its employees and others sharing the workplace.

The **Management of Health and Safety at Work Regulations 1992** (MHSW) impose an obligation on employers to carry out a risk analysis of the workplace and put in place appropriate preventive and protective measures to keep employees safe from harm. Breaches of the HSWA and/or MHSW regulations can result in criminal prosecution.

Breach of contract or unfair dismissal claims

Failure by employers to deal with stress and bullying-related issues may result in a fundamental breach of an implied term of an employee's contract. Such implied terms include the following duties:

- to keep employees safe from harm
- to maintain reasonable working hours
- to provide support and assistance to maintain trust and confidence between the employer and the employee.

Where an employee has unfair dismissal rights, if the employee can establish that the employer has fundamentally breached his or her contract, he or she may resign and claim constructive dismissal.

DISCRIMINATION CLAIMS

Where bullying is based on gender, sexual orientation, ethnic origin, disability, or religion or belief, such bullying may amount to discrimination under the Race Relations Act, Sex Discrimination Act, Employment Equality (Sexual Orientation) Regulations, Disability Discrimination Act or Employment Equality (Religion or Belief) Regulations. Employers will be vicariously liable for the acts of their employees during the course of their employment, even if they have no knowledge of the employees' acts and have not approved them.

Intentional Harassment Claims

The **Public Order Act 1986** (as amended) created an offence of intentional harassment. A person is guilty of an offence if, with an intent to cause a person harassment, alarm or distress, he or she uses threatening or insulting words or behaviour, or disorderly behaviour displays any writing, sign or other visible representation which is threatening or insulting.

Protection from Harassment Claims

The **Protection from Harassment Act 1997** makes it an offence for an individual to pursue a course of conduct which amounts to harassment of another he or she knows or ought to know amounts to harassment of the other.

The person whose conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the same.

DEVELOPING A FORMAL POLICY

Employers should consider developing a formal policy in consultation with those who will be affected by its introduction, including any relevant trade union representatives. The policy could include:

- a definition and explanation of bullying
- a statement of commitment from senior management
- acknowledgement that bullying and harassment may be problems in any organisation
- a clear statement that bullying and harassment will not be tolerated
- examples of unacceptable behaviour
- a statement that bullying and harassment may be treated as disciplinary offences.

The policy could then give details of the:

- procedures to be taken if bullying is experienced
- who to contact if bullying is experienced
- steps the organisation will take to prevent bullying and harassment
- responsibilities of supervisors and managers
- confidentiality and protection provided to the complainant
- investigation procedures, including timescales for action
- disciplinary procedures, including timescales for action
- counselling and support available
- training available to managers
- protection provided from unfounded allegations implementation, review and monitoring of the policy.

Investigating Bullying

An employer should investigate the complaint promptly, objectively and to relevant timescales within the bullying procedure. The complainant must be assured of confidentiality. In some cases matters may be rectified informally. The individual may:

– choose to do this themselves
– need support from personnel, a manager, an employee representative, or a counsellor.

In *Wigan Borough Council v Davies* [1979] IRLR 127, Miss Davies was a 'third in charge' in an old people's home. There was a dispute in the home between the warden and the care assistants and after an inquiry it was found that Miss Davies was not supporting the care assistants as she should. The Council decided to transfer all the care assistants and Miss Davies from the home, but the union blocked the transfer of the care assistants and there was no other practical post for Miss Davies than to remain at the home. It was agreed that the Council would support Miss Davies and see that she was able to work without disruption and harassment from the care assistants. However, this arrangement did not work. The care assistants refused to speak to Miss Davies or co-operate with her. The employer took no steps to rectify the situation. Miss Davies resigned and claimed constructive dismissal. It was held

that the Council was in breach of the expressed term to provide reasonable support and the implied contractual term to the same effect, and that Miss Davies had been constructively dismissed.

Counselling Bullying

Counselling can play a vital role in complaints about bullying and harassment by providing:
– a confidential avenue for an informal approach
– the opportunity to resolve the complaint without need for any formal action.
Counselling can be particularly useful where investigation shows no cause for disciplinary action, or where doubt is cast on the validity of the complaint. Counselling helps support the person accused as well as the complainant.

Formal Disciplinary Measures

Where an informal resolution is not possible, the employer may decide that the matter is a disciplinary issue that needs to be dealt with formally by the organisation's disciplinary procedure. As with any disciplinary problem it is important to follow a fair procedure. In the case of a complaint of bullying or harassment there must be fairness to both the complainant and the person accused.

Suspension

In cases which appear to involve serious misconduct, it may be necessary to suspend the alleged bully/harasser for a short period while the case is being investigated.

This suspension should normally be with pay.

A long suspension, even with pay, should be exceptional as these in themselves may amount to disciplinary penalties. Do not transfer the person making the complaint unless they ask for such a move.

Unfounded Allegations

There may be cases where somebody makes an unfounded allegation of bullying and/or harassment for malicious reasons. These cases should also be investigated and dealt with fairly and objectively under the disciplinary procedure.

Training

Employers should ensure that all employees receive training and information in the policy and procedures of the bullying policy, including what will happen to those employees who do not adhere to it.

Employers may also want to consider training for all employees in diversity issues.

Summary

- The common practice of shifting the blame and responsibility on to others.
- Conducting an investigation.
- Dealing with dishonesty.

- Bullying and stress in the workplace.
- Defining wrongful dismissal and unfair dismissal.

REASONABLENESS

DEFINING REASONABLENESS

The field of unfair dismissal law and practice and also others areas such as wrongful dismissal (breach of contract arising from termination without proper notice or in breach of a contractual procedure) or the "statutory torts" (such as race, sex and disability discrimination) are strongly influenced by the notion of behaving reasonably.

So, an employer considering dismissing someone not only has to have one of the grounds justifying dismissal, for example, conduct or redundancy, but also has to behave in a reasonable way towards the employee. There is therefore a twin hurdle to overcome in avoiding claims.

In the area of conduct and discipline the notion appears again with emphasis and underpins the "need to behave reasonably" as well as having a reason. This means the investigation has to be carried out reasonably and the decision reached after that investigation had to be a reasonable one in the circumstances (after a fair meeting). This is sometimes known as the "twin test". Get one part wrong and, even if there are good grounds to dismiss, there will be the risk of an adverse finding in any tribunal. For example, in the case of a labourer who has recklessly left sharp and dangerous metal stakes in the ground next to a pavement when doing a job for a local authority, there is a clear case for dismissal. However, if surrounding circumstances are ignored, such as length of service or that another employee might be argued to have had a supervisory role, a tribunal may find against the employer.

The case of *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 developed the notion of the range of responses of a reasonable employer as the underlying test that Employment Tribunals will use to determine whether a dismissal is fair or not. Looked at overall, did the decision fall within this "reasonable range"?

> In *Iceland Frozen Foods v Jones* [1982] IRLR 439, Mr Jones was a night shift foreman at a warehouse belonging to his employers. He was dismissed after the warehouse office was found unlocked one morning, and a much smaller amount of work than normal done. The Industrial Tribunal held that the dismissal was unfair, but made this decision on failure to follow correct procedure alone and did not consider whether the dismissal fell within the range of reasonable responses. In view of this the Employment Appeals Tribunal allowed the company's appeal against the Tribunal's decision and remitted it to a differently constituted Industrial Tribunal for a re-hearing.

In a sense this is like the elephant problem referred to in Chapter 3: *Displacement*: "Difficult to describe accurately and in detail but you should know it when you see one." The difficulty lies in the many situations and nuances that arise in the workplace. One set of facts can give rise to two outcomes when background factors come into play. For example, a dismissal might be fair if the

employee is trained in a specific area but not if he has been thrown in at the deep end, regardless of the objective result of his failures.

STATUTE LAW

Statute law deals with fairness and reasonableness under the **Employment Rights Act 1996**. Section 94(1) of the Act establishes an employee's basic right not to be unfairly dismissed.

Thereafter, s.98 of the Act sets down rules that an employer should be aware of when contemplating the dismissal of an employee. These are analogous to the principles established by the case of Iceland Frozen Foods cited earlier — although the statute does not override the common law precedent. In short, the Act requires employers to show a reason for the dismissal of an employee that falls within the scope of s.98(2). Section 98(4) requires that an employer must have "acted reasonably" in reaching the decision to dismiss an employee.

The "band of reasonable responses" test developed by Iceland Frozen Foods does not feature in the Act. However, this is a legally binding precedent developed by common law and must therefore be construed alongside the statutory law.

The Act then goes on to set out in detail unfair dismissal law relating to:

- pregnant employees (s.99)
- health and safety (s.100)
- shop workers and betting workers refusing Sunday work (s.101)
- trustees of occupational pension schemes (s.102)
- employee representatives (s.103)
- issues involving the enforcement or infringement of statutory rights (s.104)
- redundancy (s.105)
- replacements (s.106)
- pressure on an employer to dismiss unfairly (s.107).

It is worth noting under the last section that the law does not allow for pressure from industrial action of any kind exercised upon an employer to dismiss an employee to be an acceptable reason for dismissal. Pressure from another source such as a manufacturer telling a car distributor to sack his sales manager can amount to some other substantial reason (SOSR) and can be a fair reason to dismiss.

REASONABLENESS IN PRACTICE

Identifying exactly what is reasonable and what is not is a difficult task and the legal cases do not always run in the same direction. There are some guidelines though. In looking at these guidelines the law does not always favour the employee and some of the factors below work in favour of the employer.

An employment tribunal will not substitute its own view for that of the employer. This is very important because it means the tribunal will be looking at the issue as if through the eyes of the employer. Could another hypothetical reasonable employer have behaved in a similar way? It matters not that the tribunal members feel they would not have sacked on the facts in question.

It is vital therefore to be able to show reasonableness and the following matters are taken into account.

THE SIZE AND RESOURCES OF THE EMPLOYER'S UNDERTAKING

This might affect whether it is possible to offer alternative employment to someone who loses his licence and is in a job that requires driving; it might affect the extent to which it is possible to implement a detailed disciplinary procedure and who is able to sit on an appeal. In a small family company it is hard to get a completely independent line manager to chair an appeal.

There is a tendency in employment law for smaller businesses to be treated in the same way as larger organisations (for example, the exemption for small employers from disability discrimination legislation has been removed) and the attitude of tribunals in unfair dismissal claims when assessing reasonableness may shift in this area too and make greater demands on these businesses. Nevertheless, the well-established principle that size makes a difference will not disappear.

However, this is unlikely to be a significant argument in defence for branches or sub-divisions of larger companies. Individually, these units may face resource problems like those of small businesses but overall the employer has the capacity to overcome the difficulty and should do so. Of course, the reality is that these resource problems do present problems and this is what can lead to poor decisions being made. Progressive senior managers should be alert, discuss these issues with local management and provide support. This support should not simply be in the form of manuals and "steps to follow". Ideally, it should be a telephone help line available round the clock for sensible and practical human resources and legal advice.

CODES OF PRACTICE AND POLICIES

It is very important to be familiar with all aspects of the ACAS Code because deviation from it is likely to fall outside the band of reasonable responses. Managers must also be familiar with the real meaning and effect of their own codes and policies. For example, are all managers, including senior managers and board directors, complying with codes of conduct on harassment, bullying and discrimination? The recent case involving Cantor Fitzgerald International (see below) was one where the president of the company was frequently using foul language to an employee. In such situations it is incumbent on sensible managers to tackle what will normally be a breach of company policy and this is so even where the person at fault is very senior.

A manager may have good reason to fear what such an influential offender could do, but Chapter 4: *Fear* should provide some help with this problem. However, this is not at all easy. A manager would have protection under whistle-blowing law but that is draconian to invoke. It should be possible to consult and get the support of senior managers who are not tainted by the adverse behaviour, but even they may be fearful of risking their careers. Ultimately, a manager has the remedy of moving to another company with a better culture. If a manager is in a harsh, unthinking environment, he should tread carefully and keep the escape parachute handy.

In *Steven Horkulak v Cantor Fitzgerald International* [2003] EWHC 1918 (QB), the employee was the senior managing director of Cantor Fitzgerald International, reporting directly to the chief executive officer. He resigned from the company and claimed constructive dismissal by his employer due to the chief executive officer's behaviour — frequently swearing and shouting

at him — which severely undermined the senior managing director's role and status, breaching the implied term of trust and confidence in his contract of employment. The court found, inter alia, that the use of abusive language could undermine an employment contract and that the level of rebuke did not in this case reflect the level of failing of the employee. He was awarded damages for loss of salary and bonus.

PROCEDURAL FACTORS

If a statutory step is missed, the dismissal will be automatically unfair (provided the employee has one year's continuous service). Missing out on any step in procedures ending up short of dismissal will be risky because the employee may seek to argue fundamental breach of contract and constructive dismissal. At the moment, the DDPs and GPs are not contractual (unless a business makes them so). This may change and the failure to follow an important step may, taken with other, non-procedural actions, add up to a pattern of behaviour giving rise to a claim for constructive dismissal.

There will normally be procedures in place that go beyond the statutory ones and it is in this area that a failure can contribute to a finding that a company has not been reasonable. This is an area lawyers and judges have argued about for years and the point is known as the "Polkey" point or argument after the case below.

The law is diluted by the **Employment Act 2002**. The relationship between the statutory procedures, your own and the ACAS procedures and fair dismissal works as follows.

1. Where an employee has been dismissed and the employer has not complied with the relevant statutory DDP, such a dismissal will be automatically unfair.
2. If it is the case that the DDP has been complied with but the employer's procedure was not otherwise reasonable (e.g. not in accordance with ACAS or the employer's handbook) then the dismissal will only be fair if the employer can demonstrate:
   (a) that if he had followed this reasonable procedure it would have made no difference; and
   (b) that other than this breach of procedure, the dismissal is substantively fair.

You have to be very sure the procedural breach is not going to make a difference to the fairness of the dismissal. That could be so in a clear cut case of say theft. Many other cases are not straightforward and we strongly recommend careful adherence to all relevant procedures.

In *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, Mr Polkey was made redundant by his employers without warning and in doing so, his employers had completely disregarded the provisions of the Industrial Relations Code of Practice. The Court of Appeal held that even if the correct procedure had been followed, Mr Polkey would still have been dismissed and this meant the dismissal was deemed to be fair. However, the House of Lords disagreed and found that a dismissal was not necessarily fair if the procedural failures made no difference to the dismissal decision. As a result of the House of Lords decision, a failure to follow the procedure will usually lead to a finding of unfair dismissal, however, compensation will be reduced significantly or even to nil if the overall outcome would not have changed had a fair procedure been followed.

In *Dan Kien Tran v Greenwich Vietnam Community Project* unreported, EAT 5/4/2001, an employee was dismissed after his employer investigated allegations of misconduct made

against him and found some of the charges proved. The employee complained that he had been unfairly dismissed. The tribunal noted that the employer had no appeal procedure, but found that this was not required by law and it did not render the employee's dismissal procedurally unfair. They also held that the dismissal was reasonable on the grounds that the employer had a reasonable belief in the misconduct of this employee which were based on reasonable grounds after a proper investigation.

LENGTH OF SERVICE

Length of service is an important factor when there is a conflict of evidence or where a sanction short of dismissal is a potential alternative outcome. A tribunal may expect an organisation to take into account such length of service and in the absence of other factors give such an employee the benefit of the doubt. This would not be expected for examples of gross misconduct.

Earlier in this chapter, the case of a labourer leaving dangerous pieces of metal in the ground beside a pavement was mentioned. In that case, the client, a local authority, was horrified to find that a ratepayer had cut her leg. The contracting company employer apologised profusely and paid out some damages. Turning to the employee labourer, the contractor held an investigation and hearing and dismissed him. There were procedural defects that might have been overcome because this was a grave error by the employee, but he had been employed for 20 years and this factor led the company to settle rather than fight the ensuing unfair dismissal action.

CONSISTENCY

Consistency can be a telling factor in any legal or judicial situation and particularly in employment, which is so reliant on fairness. Inconsistency arises in two primary ways:

- first, treating an employee differently from others of a similar type and position
- second, treating an employee leniently for a period and then — perhaps because of a new management regime — treating the same person more harshly.

An example of inconsistency might be the case of Rick at Lacklustreshire Council in Chapter 3: *Complacency*. Here is a man who behaves in breach of clear policy statements on drinking and abusive behaviour. If Rick's colleague Peter also drinks and hurls abuse at the referee while watching the football match at work, then he should be treated in the same way as Rick. Not to do so is to leave the Rick dismissal vulnerable to an unfairness argument, sometimes called the "disparity argument"

All is not gloom though. The higher courts have said that the cases need to be truly similar for the disparity argument to apply. If in the above case Peter quietly had a lager while others were sipping tea and did not make any noise other than groaning when England did badly, and others did too, then the employer would have a rational basis for distinguishing between the two cases and not dismissing Peter. Remember that a tribunal must look through the employer's eyes and if a manager has carefully distinguished between the two cases in a fair or even merely rational way, he is likely to succeed against Rick's disparity argument.

The employer is able to take all sorts of things into account in one case that do not apply in another, even though the facts may be similar. There may be mitigating factors at home, the employee not dismissed may show repentance that suggests repetition is unlikely, or there may be a big difference in terms of length of service.

THE IMPORTANCE OF REASONABLENESS

Case Study 13

A publican, Joe, became secretary and treasurer of the Fight or Flight District Darts League. Its chairman, Doug, was a recently retired chartered accountant. About a year after Joe took up his position, Doug's home team, the Dog and Duck, raised a complaint that the quarterly accounts of the league did not accurately reflect the contributions (cash) made by the Dog and Duck. These were checked when Doug discovered a cash shortfall after a local derby match.

As an accountant, Doug then looked into matters and discovered that two other teams had similar misgivings. He set up a special sub-committee and made himself chair. The committee sat for two months and produced an interim report indicating that there were widespread inaccuracies in the accounts and that the facts pointed to Joe deliberately falsifying accounts, documents and vouchers. Up until that point nobody had been interviewed. There were two other people, Mike and Will, who handled accounts under Joe but his role was to check all transactions and reconcile cash with the bank account. The committee decided without further investigation into Mike and Will that Joe had a case to answer.

They interviewed him at his home one afternoon, arriving without warning. Joe had just finished a session at his pub and was tired. He looked surprised at being visited by three men in grey suits but co-operated fully with them. As a result of this investigation he was suspended and a disciplinary hearing took place, chaired by Doug. No written statements had been taken by the committee leading up to this hearing.

At the hearing Doug not only presided but also gave evidence about the interim report and the earlier investigation. He persuaded the other panel members that the absence of a clear explanation by Doug was enough to dismiss him.

At a subsequent tribunal, the unfair dismissal claim was upheld and the league paid out damages. The losses did cease but Mike and Will also left the employment of the league at the same time and the real story never came out.

In the above case study Doug did not act in a way that was even-handed. He is in effect a witness to the original misconduct. He has seen Joe but not questioned Mike and Will. Also, by conducting the investigation, giving evidence and chairing the dismissal hearing he is acting as "judge in his own cause".

It is unfair to turn up unannounced. Joe is unprepared and tired. When something as important as honesty and reputation is at stake, fairness dictates that a reasonable opportunity to answer the charges be given. In this case it was not. It is not sensible to fail to interview others who might be implicated.

It is also not sensible to give no warning to Joe — apart from the fact that it is a procedural breach making a claim likely — because in matters of financial detail accurate recall is unlikely without some preparation and a review of data and figures. The resultant statement is unreliable. It cannot be safe to rely on it as evidence of guilt or innocence.

In each of these instances, it is likely that a tribunal would decide Doug had been unreasonable.

Case Study 14a

Experienced is a manager working in the civilian department dealing with human resources for the Beserkshire Constabulary (BC). She has been there for 20 years. She has reporting to her a junior employee, Mediocre, who works in the administration of employee benefits for the force. Experienced reports to a middle-ranking serving officer, Inspector Daft. Experienced is very good at her job and — if a little demanding — is thought of by most as fair. She is popular with a number of staff.

Experienced feels that Mediocre is not up to the job and is making so many mistakes that something serious might occur with police or civilian staff benefits. Mediocre is not very competent but has been crafty enough to hold onto his job for many years.

There is a rapid turnover of managers at Daft's level, leaving a bit of a management void. Experienced is frustrated when managers above her fail to address the problem of Mediocre's performance, despite her informal discussions with Daft's predecessor, Dopey. She plans to deal with the matter at her next appraisal, which is due in six months. In the meantime, she is sometimes curt with Mediocre and makes no bones about his mediocrity. This is occasionally in front of colleagues. On one occasion, she responds to his question "Am I in the right job?" with "You might be happier in transport." She does explain the deficiencies in his work and tell him how to put things right. Mediocre is genuinely distressed by the way Experienced is treating him but instead of raising a grievance directly with her, he goes to a friend in another force who suggests that notes be taken of occurrences that are upsetting or undermining. At the back of their minds is the appraisal in July. Mediocre had mentioned the problem to Dopey but expressly told him not to raise it with Daft. Dopey failed to make any notes and did not tell Daft when he took over the department.

The force's policy on disciplinary and grievance expressly stresses that wherever possible matters should be dealt with informally and speedily. Sadly, this is ignored.

Quite separately from all of this, Experienced feels that her new manual on best practice is not being supported by Daft who sets about redrafting it himself, despite a lack of technical HR knowledge.

Months pass and the problem does not get better. July comes and the appraisal approaches. Mediocre goes to Daft and makes a complaint. Daft tells Experienced but instead of trying to resolve the conflict informally or even by mediation, he takes the formal line. He plans to bring in a force investigator. He does not discuss the case with Experienced or hear her side. What he fails to do is manage the situation in the office while the investigation proceeds. Tension is high as the two parties to the problem sit next to each other and there are sharp words.

Mediocre is aggrieved that Experienced only sends e-mails and no longer speaks to him.

Mediocre makes a second victimisation complaint and Experienced is suspended on full pay, again without any discussion with her.

These problems are not easy to address, but Daft believes in sticking fast to the rule book. In doing this, and ignoring the practicalities of the situation, he is missing the bigger picture, and heading

inadvertently towards unreasonableness. Being bookwise without being streetsmart could get Daft into trouble.

Case Study 14b

Over the following months the investigator takes three statements from Mediocre but they are not consistent with each other and do not reflect the notes taken during the period leading to the complaint. Experienced is not seen for five months after suspension. Even she is beginning to lose track of the precise details of what went on. A full disciplinary hearing with witnesses is set for March. Everyone is deeply concerned and some people are very stressed by the whole episode. The police force faces a quandary:

- they face the time and costs of a public hearing
- someone's reputation will be at stake
- uphold the complaint by Mediocre and they may have to sack an effective manager
- experience may than claim unfair dismissal
- find for the manager and Mediocre may claim constructive unfair dismissal
- staff morale is low and the absence of a good manager affects efficiency in the force.

This is a case, and this is not uncommon, where a manager is frustrated by an employees failure to perform and the employee feels bullied. The responsibility rests fairly and squarely with senior managers to solve the problem. They have made a number of errors. Above all, they have failed to look beyond the step-by-step approach. They have stuck to the letter of HR processes but ignored the spirit of fairness and reasonableness. Perhaps this is due to fear of stepping outside the box.

Dopey knew there was something up. He should have taken fuller details from Mediocre and said that he was going to raise this with Experienced. He or Daft should then have tackled the matter informally and firmly. They should have told both people that the force would not tolerate personality clashes that affected operational efficiency and morale. They should have explored the potential for training with Mediocre and possibly considered a transfer. They should have made it clear to Experienced that the way to deal with poor performance is not by direct action but through established procedures.

Daft might have tried to deflect a formal complaint, once it was raised, by mediating. If unsuccessful, he certainly ought to have listened to Experienced for her side of the story. He was not behaving consistently by listening to Mediocre but ignoring Experienced. Neither was he even-handed.

Then he was at fault for not managing the situation in the office. He could well have organised a temporary change of desk and/or routine to keep the two apart. He should have ensured that they were not left to their own devices.

Suspension took place without Experienced being able to have her say and similar comments apply. Also, as a long-standing employee, suspension is a drastic step to take and may be deemed unreasonable.

The investigation was too slow and the statements inconsistent.

All may be put right at the disciplinary hearing but then Mediocre may be aggrieved.

A more informal approach at an earlier stage would have been far better. Mediation could well have resulted in a better outcome for all parties concerned. The future holds more hearings and potential litigation. If dismissal follows, the force will at the very least have to apply the DDPs in managing that dismissal.

This case illustrates a lot of common problems in the field of conduct and discipline at work. Perhaps the most fundamental is that managers have read the letter of the law but not the spirit. And that spirit is fairness and reasonableness. Here, there may be an argument that each step taken by management could on one view be justified in accordance with the force's disciplinary procedures, but looked at overall, there has been unfairness and the test of reasonableness has not been met.

Experienced was not given the chance to put things right; neither the employee nor senior management had given her any warning. When Experienced is told months later, she is left in charge of the employee with no guidance as to how to manage Mediocre, while at the same time, her manager, Daft, should have given Experienced firm guidelines to avoid further problems even if separation was not practical (or fair). Experienced was never asked to give her version of events properly before being suspended. The full investigation into this matter happened five months too late.

THE DISCIPLINARY DECISION

The following is an extract from a real County Council's grievance and disciplinary policy, which illustrates how to combine the correct procedural steps with the necessary qualities of reasonableness and fairness.

For a disciplinary decision to be fair, the answer to all of these questions should be "yes". The questions should be taken in two stages.

Is the Allegation of Misconduct Found?

Has there been as much investigation as is reasonable in the circumstances?
Have I paid sufficient regard to any explanation put forward by or on behalf of the employee?
Do I genuinely believe that the employee has committed the misconduct as alleged?

If the Misconduct is Found, What Disciplinary Sanction Should be Applied?

Is the misconduct sufficiently serious to justify the disciplinary decision I am contemplating?
Have I regard to any mitigating circumstances put forward by or on behalf of the employee and any response to these by management's representative if any?
Is the decision within the band of reasonable responses of a reasonable employer in all the circumstances?

REASONABLENESS, CONDUCT AND DISCIPLINE

Looking at this topic in a common sense way — another phrase similar to reasonable — consider the words thrown up by a thesaurus check on the word reasonable:

sensible	level-headed	acceptable
rational	sound	satisfactory
logical	even-handed	moderate
practical	equitable	fair
realistic		

These are all words with a similar ring to them. They do not all mean exactly the same thing but in looking at whether a manager's behaviour is a reasonable response to the actions of or a grievance by an employee, it may help to consider the words to see if they, or some of them, can truthfully be applied to a course of action that has been decided upon. If the antonym or opposite word flashes up, then this should be a warning signal and a manager must reconsider.

Reasonableness pervades the entire topic of conduct and discipline. Too often managers mistakenly search for the right answer when dealing with misconduct. This is not how employment law approaches the issue — employment law, and consequently tribunals, recognise that in any given situation there will be different ways of dealing with the misconduct and one manager may warn where another would dismiss. Both are right so long as they are acting fairly and reasonably. It is also worth making the point that what constitutes reasonableness in the eyes of an employment tribunal will change over time as society's views and morals change.

THE PHILOSOPHER'S GUIDE TO REASONABLENESS

Philosophers have long debated the Cartesian concept of man, in which the human body is a machine and only becomes a person when it is infused with a soul. Gilbert Ryle coined the phrase "the ghost in the machine" to describe this relationship.

When dealing with conduct and discipline issues in the workplace we discover a similar relationship between the rules and facts, and the spirit of reasonableness. The tangible rules set down by statutory and common law plus the facts of the individual situation in hand, form the structure and moving parts of the machine. We might then see the esoteric concept of reasonableness as the ghost in this machine. The ghost and the machine need not operate symmetrically, but there must be some coherent conversation between them for the whole to work successfully.

It is not possible for the law to provide exactly for every situation and, as we have seen, instead each case will be judged not only using the applicable law but also on the individual facts and reasonableness. While this may seem to make life difficult when dealing with problematic workplace issues — the answer cannot be simply looked up in a book — the complexity of this approach reflects the potential complexity of employment disputes. In this way it favours employers because it does not prejudge individual situations from a general set of rules. It allows for complexity and variety.

The requirement to be reasonable in practice means that managers must endeavour to be objective and open-minded. Objectivity is an important point where reasonableness is concerned. It can of course be difficult to be objective about a situation which may be affecting the whole or parts of your company, and where you may have your own private views. While you need to be armed with knowledge of the legal requirements, you also need to be informed of all the relevant individual facts and all the different perspectives of the people involved. You need to be able to consider the potential consequences of different courses of action for the relevant individuals and

for the company. And while you are doing all this, you need to be able to stand back and keep the bigger picture in view. Look to the ghost of reasonableness for guidance on how to operate the unwieldy machine.

What this is saying is that a manager has to be very sure that the procedural breach is not going to make a difference to the fairness of the dismissal. That could be so in a clear-cut case of, say, theft. As we have seen in many other cases things are not straightforward and organisations are strongly recommended to adhere carefully to all relevant procedures.

The unifying theme throughout this book is that managers must address conduct issues. By highlighting common reasons why they often fail to do this, we hope that progressive managers will take a critical look at themselves and identify aspects of their management skills that have room for improvement.

Summary

- How statute law defines fairness and reasonableness.
- Looking at the band of reasonable responses.
- The employment tribunal process and the employer's response.
- Questions managers should ask themselves in determining fairness.
- The spirit of fairness and reasonableness.

INDEX

index

index