



Fair Dismissal Procedures – A Guide to Avoiding the Pitfalls when Dismissing Employees

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Introduction

The importance of fair procedures in effecting the dismissal of an employee cannot be underestimated. Often employers believe that they have a fair reason to effect a dismissal, but end up being subjected to litigation as a consequence of the procedures that they have employed in conducting the dismissal. A review of cases before the Employment Appeals Tribunal (EAT) in 2014 reiterates this point, and reflects on the fact that there are often substantial shortcomings in the employer's disciplinary process.

The purpose of this Article is to highlight the main obligations imposed upon an employer in effecting a fair dismissal of an employee from a procedural perspective.

Fair Dismissal

Before discussing fair procedures, it must be noted that irrespective of whether fair procedures are applied, if the employer does not have an objectively justifiable reason for dismissing an employee, then the dismissal will be classified as unfair. In short, the Unfair Dismissal Acts 1977-2007 summarise the grounds upon which a dismissal will be presumed to be fair¹. These grounds are as follows:

- (1) Employees Lack of Competence²: It is a fair dismissal to dismiss an employee shown to be incapable, incompetent or lacking the necessary qualifications to perform the tasks he or she was employed to do. In general capability relates to the physical and mental ability of the employee³, competency relates to the performance of the employee and their intellectual ability, skill and knowledge⁴ and qualifications may be professional, technical, occupational or industrial qualifications⁵;

¹ In order to invoke the protection of this legislation the following prerequisites apply: (1) the worker must be an employee – whether full-time, part-time, permanent, temporary, fixed term or specific purpose (and irrespective of the number of hours worked) employed under a contract of service, and (2) at the date of dismissal, the employee must have at least one year's continuous service with the employer – there are three exceptions to this service requirement obligation, namely where an employee is dismissed as a consequence of: (a) pregnancy related matters, (b) trade union activity or (c) the exercise or attempted exercise of their rights under protective legislation.

² Section 6(4)(a) UDA 1977.

³ This ground is often cited where a dismissal arises out of employee absenteeism due to ill health. In *TMC Dairy Products v Connolly (1988) (UD 50/1988)* the dismissal of the claimant who had an atrocious attendance record over the 12-year period he had been employed, and following a fair system of warnings, was classified as fair.

⁴ In *Martynas Erkinas v Rangeland Foods Limited (2012) (UD 1130/2011)* the EAT upheld an earlier Rights Commissioner decision and reiterated that the dismissal based on lack of competency was not unfair as the employee had been sent on a refresher training course to improve his performance, and after this course he

- (2) Employees Misconduct⁶: It is fair to dismiss an employee where their conduct is of such a serious or continuing nature as to amount to gross misconduct⁷;
- (3) Redundancy⁸: Redundancy is classed as a fair reason for dismissal provided it is a genuine redundancy⁹ and the basis for selection is fair¹⁰; and
- (4) Contravention of the Law¹¹: Where the employee is unable to work or continue to work in the position without contravention of a duty or restriction imposed by law, the employer may effect a fair dismissal¹².

Furthermore, when invoking some of these grounds (such as dismissal based on lack of competency, capability or continuous misconduct) the employer is also obligated to: (1) advise the employee of the matter, (2) give the employee the opportunity to rectify the situation – in some instances this may involve training/retraining or monitoring of the worker, (3) warn the employee of the consequences of failing to meet these requirements¹³, and (4) invoke a warning against them if the situation fails to improve. Regarding the warning system, employers should follow their own procedures as set down in the employee's contract or in the employee handbook. At a minimum this procedure should encompass at least one oral warning, followed by a written warning, a final written warning and then a dismissal¹⁴.

Fair Procedures

Where an employee commits an act of gross misconduct or where an employee commits a breach of contract, where the employer has invoked the warning system and a final written warning has been issued, then the employer must employ the proper disciplinary procedures to ensure that any subsequent dismissal is classed as fair. According to the Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 the essential elements of any procedure for dealing with grievance and disciplinary issues are that they be rational and fair,

was advised that there were still difficulties with his performance resulting in another final written warning. He was also warned at this stage that his employment may be terminated if he failed to demonstrate an improvement in performance.

⁵ In *Ponnampalam v Mid Western Health Board (1979)*, a doctor, who failed to obtain authorisation from Board na n'Ospideal (Hospital Board) in relation to his qualifications, pursuant to the Health Act 1970, could not be legally retained in employment and was deemed to have been fairly dismissed.

⁶ Section 6(4)(b).

⁷ In *Burtchaell v Premier Recruitment International t/a Premier Group (2002)* (UD 1290/2002) the claimant was deemed to have been fairly dismissed for serious misconduct arising from a breach of his employers internet/email usage policy, as the employee had consented to the policy and was fully aware of the consequences of a breach.

⁸ Section 6(4)(c).

⁹ In *Tom Mulligan v J2 Global (Ireland) Limited (2010)* (UD 1369/2008) the EAT awarded €175,000 to the claimant, the former manager of the respondent software company, who was deemed to have been unfairly dismissed based on the fact that his redundancy was not legitimate. The EAT believed that his transfer following a takeover was a "device or contrivance to bring about the claimant's redundancy" and that the whole redundancy situation had been engineered by the respondent because of the size of the claimants salary.

¹⁰ In *Fox v Des Kelly Carpets Ltd (1992)* (UD 106/91) the respondent employer was estopped from using alleged misconduct as a reason for selection for redundancy, since the employment of Fox continued after the said alleged misconduct.

¹¹ Section 6(4)(d).

¹² This ground is often invoked where the employee has not obtained a proper work permit or authorisation from a regulatory body – or where such authorisation is revoked. In the UK case of *Bouchaala v Trust House Forte Hotels Ltd (1980)* IRLR 382 the Tribunal found that a genuine but mistaken belief that the employment of the claimant, a Tunisian national, was in breach of immigration rules, was sufficient to justify dismissal, even though to continue the employment would not in fact have been such a breach.

¹³ In this regard the warning should be clear and unambiguous – isolated passing comments regarding details of work performance cannot be regarded as sufficient.

¹⁴ SI/146/2000 – Industrial relations Act, 1990 Order, 2000.

that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available.

In *McAvoy v McArdle Transport Limited (2008)*¹⁵ the EAT awarded €3,600 for unfair dismissal to a truck driver who was dismissed after being under the influence of alcohol because his employers had not followed fair procedures.

Similarly, in *Kelly v Dundalk FC (2010)* the complainant was awarded €40,000 in compensation after the EAT found that she had been unfairly dismissed from her role as commercial manager by Dundalk FC. The Tribunal came to the conclusion that the club: *"failed to implement any fair procedure in dismissing the claimant the respondent had not given the claimant any relevant contract of employment ... [and the] claimant was dismissed by reason of the ending of the personal relationship between her and one of the directors."*

More recently, in *Myles Cummins v Bernard Keane Limited (2014)*¹⁶ the EAT awarded €12,500 for unfair dismissal¹⁷ to a butcher who was suspected of stealing meat and possibly money from his employer and was, subsequently, dismissed for taking waste meat and bones home for his dogs, after he had been told not to. According to the Tribunal:

"... there was a total absence of fair process, in circumstances where no evidence was adduced of any fair or reasonable procedures to deal with disciplinary issues leading up to and including the dismissal of the claimant."

In particular, the following principles of natural justice should be adhered to when contemplating a dismissal:

- A. **The employer has to write to the employee requesting a formal disciplinary meeting. The letter should give a brief summary as to why the disciplinary meeting is being held and should state that the outcome of the disciplinary process may be the dismissal of the employee.**

In *G4S Secure Solutions (Ireland) Limited v Eric Onourah (2012)*¹⁸, the EAT made a determination of an unfair dismissal and awarded the employee €5000 in compensation arising from serious flaws being present throughout the disciplinary and appeal procedures. In particular, the Tribunal criticised the fact that the employee did not receive any written notification as to the charges laid against him.

In *John Casey Limited and A Worker (2005)*¹⁹, the claimant was called into the office and was summarily dismissed by the management. The management at this meeting made a number of allegations about her work performance and produced a list of errors, which they stated had been brought to her notice. They also asserted that she had been warned on a number of occasions about her shortcomings in relation to her job. However, the Labour Court found that: *"it is not acceptable for the company to send for an individual without indicating the seriousness of the meeting and then to summarily dismiss the person"*. The Court ordered that the employer pay the claimant €20,000 in compensation.

In the recent case of *Linda Magill v Tomkins Limited (in receivership) t/a The Grand Hotel (2014)*²⁰ the EAT awarded the claimant €20,000 for unfair dismissal. The claimant had been employed as a head housekeeper and she was dismissed without warning because of a series of complaints against her, despite the fact that she had not been informed of these complaints. The

¹⁵ UD 1356/2008.

¹⁶ UD 2000/2011.

¹⁷ They also awarded €4,850 for lack of notice in accordance with the provisions of the Minimum Notice and Terms of Employment Acts 1973-2005.

¹⁸ UD 279/2011.

¹⁹ CD/05/596.

²⁰ UD 1665/2012.

EAT determined that: “... she was denied due process and, indeed, any process, was not given any details of the complaint against her and had no opportunity to defend herself. Instead, the termination of her employment was presented to her as a *fait accompli* ...”

Similarly, in *Edel Heffernan v Pfizer Nutritionals (2014)*²¹ the EAT awarded €20,000 for unfair dismissal to a night shift warehouse operative who was dismissed after eight bags of skim milk powder went missing on her shift, while she was suffering a blackout due to the amount of alcohol she had consumed before starting work. The EAT made the award on the basis that: “... no notes of the disciplinary meetings were proffered on behalf of the respondent and at no point in the process was it spelled out in writing to the employee that her continued employment was in jeopardy.”

B. The employee has the right to be represented by an appropriate person at this disciplinary meeting.

In effect this means that the employee has the right to be represented by a person of their own choice. This may be a colleague, friend or in some instances a trade union representative – as outlined in the employee’s contract or the employee handbook. The representative may speak on behalf of the employee at this meeting, if the employee desires it. According to the EAT in *Lorraine Fitzpatrick v Dunnes Stores (2014)*²²:

“In cases of ... misconduct an employer must conduct a thorough investigation of all the relevant circumstances ... where the employee [is] informed of the action being considered and given a full opportunity with [an] accompanying work colleague to present his/her case.”

Whether the employee has the right to bring legal representation to a disciplinary meeting has proved a contentious issue before the Irish Courts.

In *O’Neill v Iarnród Éireann (1991)*²³ the Supreme Court held that the failure of the employer to allow the employee legal representation did not breach the rules of natural justice.

In contrast in *Gallagher v The Revenue Commissioners (1991)*²⁴ the plaintiff was suspended from duty on the grounds that he had been guilty of grave misconduct warranting disciplinary action relating to certain events. He was subsequently informed that he was not entitled to be legally represented at the hearing. He applied for an injunction restraining his employers from holding any enquiry until his rights were clarified by the Court. The High Court held that Mr. Gallagher was entitled to legal representation at the oral hearing on the basis that the numerous serious charges which he faced could result in his dismissal and it would be inconsistent to deny him such representation.

Likewise, in *Burns and Hartigan v Governor of Castlereagh Prison (2005)*²⁵, the High Court found that due to the gravity of the sanction that faced the employees, a legal representative should be allowed at disciplinary hearings. In this instant, the employees were not faced with dismissal but demotion.

Despite these cases it cannot be taken as settled in law that legal representation should be allowed in all cases – each case must be adjudicated on its own merits.

C. The employee should be given an opportunity to respond fully to any allegations or complaints against them, and have that reply and any other arguments or submissions listened to and evaluated before a decision is taken to dismiss them²⁶.

²¹UD 2439/2011.

²²UD 196/2012.

²³2 ELR 1.

²⁴2 IR 370.

²⁵IEHC 76.

²⁶This right is based on the legal maxim of *Audi Alterem Partem*.

In *Alana Miley v Up To My Eyes (2014)*²⁷ the EAT awarded €2,000 for unfair dismissal to an eye lash and eye brow beautician who was dismissed for offering free or discounted treatments to family, friends and other clients. Despite the fact that these actions would constitute gross misconduct, the Tribunal classified the dismissal as unfair: *“as the claimant was not informed she was at risk of being terminated and was not given the opportunity to respond or consider two items of which the respondent placed reliance on in deciding to terminate her employment ...”*.

In relation to responding to allegations it is imperative as part of any fair disciplinary process that the employee has sight of each and every piece of evidence the employer has sight of, regardless of the employer's views on its evidential value. In *Trevor Murtagh v TLC Health Services Ltd (2014)*²⁸ the claimant was denied access to the CCTV footage, until close to the end of the process, on the grounds that it “showed nothing”. The Tribunal determined that: *“... the very fact that it showed nothing could have been used by the claimant as a defence.”* Furthermore, statements exonerating the claimant, a nursing home chef who was allegedly seen by colleagues²⁹ being rude about an elderly resident and ignoring another were also not provided to the claimant. According to the Tribunal:

“... To disregard those statements exonerating the claimant and to rely only on those accusing the claimant is a fundamental breach of claimant's right to fair procedure. What is even more alarming is that the respondent placed no importance on the fact that two of the statements, relied on by the respondent, accusing the claimant, were made by individuals who were not present at all. That too is a fundamental breach of the claimant's right to fair procedures.”

D. The employee has the right to an impartial and fair hearing – with no bias or pre-judgment.

In this regard employers should consider two issues. Firstly, whether the persons conducting the disciplinary hearing are qualified to do so, and secondly, whether the persons conducting the disciplinary hearing are objective and impartial.

In *David Fox v National Gallery of Ireland (2014)*³⁰ the EAT awarded €25,000 for unfair dismissal to a senior attendant and trade union representative who was dismissed for gross misconduct as a consequence of sending security sensitive information about his workplace by non-secure email, while helping a former colleague prepare a submission for the Rights Commissioner Service. The Tribunal determined that: *“...the respondent was defective in the procedures used or adopted to terminate the claimant's employment – the investigation was carried out by the librarian [who] had had not done any investigation or fact finding previously ... [there appeared no reason] as to why the claimant's line manager was not given the task of fact finding.”*

In *Aisthorpe v Marx Childcare Direct Ltd (2011)*³¹ the employee was dismissed from her position as a child care worker, following allegations that she had hit a child – although no record of any such incidents were recorded in the employer's daily diaries. The employee appealed the decision of her dismissal. The appeal was heard by the owner and the decision upheld by the owner. The Tribunal classified the dismissal as unfair as they were satisfied that the employer had not followed fair procedures due to the fact that the same parties were involved at the investigation stage, disciplinary and appeal stage. According to the Tribunal the employer breached the principle of *nemo iudex in causa sua* (no man may be a judge in his own cause) and awarded the claimant €46,800 in compensation.

E. The penalty imposed must be fair and proportionate to the employee's breach.

²⁷ UD 1498/2012.

²⁸ UDA 425/2012.

²⁹ The primary complaint was brought by the ex-girlfriend of the claimant, who was employed in the same nursing home.

³⁰ UD 950/2012.

³¹ UD 341/2010.

In *Wilo Pumps and SIPTU*³², reinstatement was recommended by the Labour Court who found “that dismissal was too severe a sanction” and that the period in which the employees were not employed be considered suspension without pay. This case dealt with the dismissal of four individuals for clocking violations where the individuals were either absent from the company premises while clocked in, and then clocked out by other employees or were involved in the clocking out of their colleagues.

In *Michael McCrann v Marks & Spencer Ireland Limited (2014)*³³ the EAT awarded €13,000 for unfair dismissal to a sales assistant with six years’ service who was dismissed after CCTV showed him ‘hiding’ children’s sales items behind non-sale items and later buying them as a gift for a relative. The Tribunal stated that: “... it is clear that it was open to the decision makers to consider sanctions other than dismissal in regard to the alleged breach of the ordering and reservation policy for all sale goods. However no other sanction was considered. The sanction of dismissal was disproportionate to the alleged actions of the claimant and was contrary to fairness and natural justice.”

In *Noel Farrell v Kepak Group (Meat Division) t/a Kepak Longford (2014)*³⁴ the EAT awarded €25,000 for unfair dismissal to a meat plant employee who was dismissed for taking holidays without permission and for making inconsistent statements about his fitness to work, after the company videoed him gardening outside the workplace. The rationale for this determination was that the sanction imposed by the respondent was disproportionate and unreasonable in the circumstances.

Similarly, in *Lorraine Fitzpatrick v Dunnes Stores (2014)*³⁵ the EAT awarded €13,500 for unfair dismissal to a cashier who was dismissed after she sold alcohol to an underage customer who was part of a Garda test purchase operation. This award was despite the fact that the claimant had regular training sessions regarding this issue (the most recent being a month prior to her dismissal) and she had signed a declaration which included the line that a breach would incur a sanction “up to and including dismissal”. The basis for this decision was the: “lack of proportionality [in] the decision to dismiss given the circumstances of the case and the personal background of the claimant with 12 years of service ... there was [inadequate] assessment or consideration of other sanctions given the background of long service.”

In *Janet Mooney v Oxigen Environmental (2014)*³⁶ the EAT awarded €12,500 for unfair dismissal to a customer service representative who was dismissed for gross misconduct after she used inappropriate language in phone calls to colleagues in an open plan office and kept a customer on hold for five minutes while she spoke to a colleague. According to the Tribunal:

“There is no doubt that the claimant, in verbally expressing herself at work, used expletives and offensive language which was unacceptable to some of her listeners. This scenario cannot be condoned ... [nonetheless] an employer is obliged to apply fair procedures and act reasonably when sanctioning an employee for any misdemeanour ... [as] the claimant had an unblemished record [and] there was no evidence that there was an investigation or a suspension in this matter ... a clear warning would have sufficed for this first offence and on the face of it the sanction of dismissal was disproportionate.”

F. The employee should be afforded the right of appeal any decision to dismiss³⁷.

³² CD 05/172.

³³ UD 3/2013.

³⁴ UD 1202/2013.

³⁵ UD 196/2012.

³⁶ UD 1525/2012.

³⁷ Although this is not a requirement of natural justice, it is good employment practice. In this regard the appeal should be heard by a person not previously involved in the process – as per *Aisthorpe v Marx Childcare Direct Ltd (2011)* discussed above.

In *Cathal Crilly v Vinmoe Traders Limited (2014)*³⁸ the EAT awarded €4,000 for unfair dismissal to a fairground operator who was dismissed for gross misconduct for repeatedly using his mobile phone while operating rides. The claimant stated that he had not been informed of a written warning in early August 2012 for using his mobile phone while operating a ride – he was then given a written warning for the same offence in February 2013. The letter informed the claimant that the use of phones whilst operating a ride was considered gross misconduct which would lead to dismissal if it occurred again. Following another incident alleged improper use of a mobile phone in February 2013 the claimant was called to a disciplinary hearing on 15th February 2013 and dismissed. At the disciplinary meeting he asked to see the CCTV footage, but was told it was not there, neither was the floor manager present (who made the allegation against him) so he could not question her. The Tribunal noted that there were procedural deficits present in the process engaged which rendered his dismissal invalid, and in particular criticised the fact that he did not appeal the dismissal as he had not been notified that he had two weeks to appeal.

The same conclusion was reached in *Lorraine Fitzpatrick v Dunnes Stores (2014)*³⁹ based on the fact that there was no evidence as to the appeal process. This fact was also given weight in *Janet Mooney v Oxigen Environmental (2014)*⁴⁰ wherein her appeal letter against the decision to dismiss her was not responded to.

Conclusion

In the interest of reducing exposure to successful litigation based on allegations of unfair dismissal, it is imperative that employers follow correct disciplinary procedures, which provide natural justice and due process to the employee. Both management and employees should be trained in these procedures and they should be clearly outlined in both employee contracts and the employee handbook. Pursuant to Section 7(1) of the Unfair Dismissals Act 1977, failure to adopt fair procedures will expose employers to sanctions such as reinstatement, re-engagement as well as statutory compensation⁴¹. The cost of such litigation can be burdensome and by adopting fair procedures it can easily be avoided.

³⁸ UD 759/2013.

³⁹ UD 196/2012.

⁴⁰ UD 1525/2012.

⁴¹ Not exceeding in amount 104 weeks remuneration in respect of any financial loss incurred and attributable to the dismissal – and not exceeding 4 weeks remuneration where there is no evidence of financial loss.