



CONDUCT DISMISSALS

Brian Butler, GCMA Health & Safety and Employment Adviser, writes that conduct dismissal is the most likely employee dismissal the golf club manager will have to handle.

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The most common dismissal that a golf club manager is likely to be confronted with is the dismissal of an employee for misconduct.

The legal principles on conduct dismissals were set out 35 years ago in *British Home Stores Ltd v Burchell 1978*, which have been upheld ever since by Employment Tribunals and Employment Appeal Tribunals.

The legal principles for conduct dismissals are as follows:

1. It is for the employer to show a potentially fair reason for dismissal.
2. The employer must satisfy the Tribunal of a genuine belief in the alleged misconduct.
3. For further questions as to whether the employer had reasonable grounds for that belief based on a reasonable investigation, go to the fairness questions under section 98(4) of the Employment Rights Act 1996. Questions relating to fairness are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party.
4. The questions of procedural fairness and reasonableness of the sanction, ie dismissal imposed by the employer, are to be determined by reference to the range of reasonable responses test.

The above legal principles are consistent with the alteration of the burden of proof which was brought into effect by section 6 of the Employment Act 1980. There is no burden on the employer to prove that there were reasonable grounds for his genuine belief in the guilt of the employee, nor does the employer have to prove that he carried out a reasonable investigation. The Tribunal will assess the facts relating to these questions and, without substituting their views as to how they would have acted had they been the employer, decide whether the grounds put forward by the club were reasonable to sustain that belief.

The following is a checklist that a golf club manager should ask in relation to cases of misconduct that have led, or could lead, to the dismissal of an employee.

1. What was the reason for the employee’s dismissal?

The burden of proof rests on the club to show that the employee was dismissed for a potentially fair reason. Potential fair reasons include misconduct, capability, redundancy, in breach of statutory duty and Some Other Substantial Reason (SOSR).

There are situations where selecting the reason for dismissal might not be straightforward. The misconduct of an employee can often be accompanied by the employee’s underperformance. The Employment Rights Act allows for this by stating that if there is more than one reason for dismissal, the employer must decide the principle reason for the dismissal.

2. Did the club have a reasonable suspicion amounting to a belief in the guilt of the employee’s misconduct?

The Tribunal would expect the club not only to have identified the potentially fair reason for dismissal, ie misconduct, but also it had a genuine belief in the employee’s alleged misconduct.

3. If so, did the club have reasonable grounds to sustain that belief?

Having established that the club has identified a potentially fair reason for the dismissal of the employee, ie misconduct, and that it had a genuine belief in the employee’s alleged misconduct, it is for the Tribunal to judge whether the dismissal was fair or unfair.

Although the club will have to explain why it genuinely believed in the employee’s guilt, it is for the Tribunal to decide whether the grounds put forward by the club were reasonable to sustain that belief.

4. Did the club carry out as much investigation as was reasonable in the circumstances of the particular case?

Although the club will have to give evidence of how it investigated the alleged misconduct of the employee, it is for the Tribunal to judge whether the investigation was reasonable by applying the objective standards of the reasonable employer. The task for the Tribunal is not to ask itself whether there were any more investigations which the club could have carried out or whether it would have carried out the investigation differently, but whether in all the circumstances and looking at matters objectively, the investigation carried out by the club was a reasonable approach. That question may, in a particular case, be answered in the negative because the Tribunal finds that no reasonable employer would have failed to investigate some matters which were highly relevant to the case. The Tribunal is not seeking absolute proof, ie beyond reasonable doubt in the employee’s guilt that would be required in a criminal court, but is concerned with a lower level of proof, ie on the balance of probabilities.

5. If so, was the disciplinary procedure conducted by the club fair?

The Tribunal must apply the objective standards of the reasonable employer to all aspects of the question whether an employee was fairly and reasonably dismissed. This includes whether the procedure conducted by the club was fair.

Tribunals expect employers to follow the ACAS Code of Practice in misconduct cases involving a disciplinary procedure, and can adjust any awards made in relevant cases by

up to 25 per cent for unreasonable failure by employer or employee to comply with any provision of the Code.

6. If so, did the sanction of dismissal for the reason given by the club fall within the range of reasonable responses open to the club?

It is now accepted law that Tribunals must not approach the reasonableness or unreasonableness of a dismissal by reference to their own judgement of what they would have done had they been the employer. Their function is to determine whether in the particular circumstances of each case the decision of dismissal falls within the ‘the band of reasonable responses test’ and therefore the dismissal is fair; if the dismissal falls outside the ‘the band of reasonable responses test’ it is unfair.

This article will hopefully dispel the common misconception that Tribunals can find that a dismissal is fair or unfair by asking whether they would have managed the dismissal of an employee differently. If the Tribunal decides that they agree with how the club has managed the dismissal, the dismissal will be declared fair, and if they do not agree they can substitute their views for that of the club and declare the dismissal unfair.

The role of a Tribunal is to apply the objective standards of the reasonable employer. In cases that have led or could lead to a dismissal of an employee for gross misconduct, the overriding concern of the golf club manager is whether the actions and decisions taken by the club have been reasonable and consistent with what a hypothetical reasonable employer would have done in all the circumstances.

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Brian Butler can be contacted on the GCMA Helpline: 01432 761663.