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EMPLOYMENT LAW BULLETIN

FEBRUARY 2022

Welcome to Wrigleys' Employment Law Bulletin, February 2022.

Our case law reports this month focus on the issue of employment status and the employment rights which spring from an individual being found to be a worker.

In our first article, we report on the recent decision of the Supreme Court in ***Smith v Pimlico Plumbers*** which considered whether the claimant was entitled to payment in lieu of all unpaid statutory holiday since his contract commenced (whether it was taken or untaken).

We also consider the recent decision of the EAT in ***Waters v The Mote Cricket Club***, which considered whether the claimant, who was required to carry out some work personally, was a worker or was self-employed.

We share with readers this month employment-related articles from our sector-specific teams. Our education team reports on the key legal risks for school employers of high staff turnover and a transient or new workforce. While our family business team summarises the benefits of a transition to employee ownership over sale of the business to a third party.

Our **Wrigleys Essential Employment Guide** this month offers key pointers on how to conduct a disciplinary hearing.

Our upcoming **free Employment Brunch Briefing** which takes place virtually on 5 April 2022 will consider some of the trickier aspects of managing sickness absence. Please click on the link below to register. We hope to see you there!

We are always interested in feedback or suggestions for topics that may be of interest to you, so please do get in touch.

– Alacoque Marvin, Editor **alacoque.marvin@wrigleys.co.uk**

Forthcoming webinars:

Employment Brunch Briefing

Managing your employees on long term sickness absence

5 April 2022 | 10:00 - 11:15

Speaker: *Sue King, partner, and Michael Crowther, solicitor at Wrigleys Solicitors*

Click here for more information or to book

If you would like to catch up on previous webinars, please follow this link.

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"Self-employed contractor" found to be a worker can claim for all unpaid holiday pay on termination

Article published on 17 February 2022

Four-week holiday entitlement carries over where right is denied, whether or not worker takes unpaid leave.

Our regular readers may remember the long-running case of Mr Smith, whose contract with Pimlico Plumbers described him as an independent contractor. After the termination of his contract, Mr Smith brought a number of claims requiring worker status. The Supreme Court determined in 2018 that Mr Smith was a worker and not a self-employed contractor. Our report on this judgment can be found in the June 2018 edition of our Employment Law Bulletin which is available on our website.

Following this decision, an employment tribunal decided Mr Smith's claim for pay for holiday which he had accrued but not taken since August 2005 was out of time. This was on the basis that Mr Smith had not brought his holiday pay claim within 3 months of the last underpayment by the employer (the date on which he should have been paid for a period of leave taken).

Mr Smith argued that the principles of the European Court of Justice (ECJ) case of *King v Sash Window Workshop (2018)* should be applied. In that case, the ECJ held that a worker is entitled on termination to be paid for any accrued annual leave under the Working Time Directive, where the worker has been discouraged from taking holiday because it would have been unpaid. As Mr Smith brought his claim within 3 months of the termination of his contract, he argued that his claim was in time.

The tribunal did not agree and distinguished the case of Mr King. It noted that Mr King's case concerned the right to carry over until termination annual leave that is not taken because an employer fails to remunerate annual leave. Mr Smith, on the other hand, had been able to take and had taken leave, although it was unpaid.

The EAT agreed.

Case details: *Smith v Pimlico Plumbers*

Workers denied the right to paid leave are entitled to bring a claim on termination whether unpaid leave has been taken or not

The Court of Appeal has now allowed Mr Smith's appeal, enabling him to claim for holiday pay stretching back to 2005. Lady Justice Simler made clear that European Union law establishes a "single composite right" to 4 weeks' paid annual leave. A worker who takes unpaid leave when the employer refuses pay for such leave is not exercising the right to paid leave.

The judgment notes that under the Working Time Regulations 1998 (WTR) workers lose the right to statutory leave which is untaken at the end of the leave year. However, it makes clear that the worker will only lose the right if they have actually had the opportunity to take paid leave.

An employer would have to show that it "specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave."

Lady Justice Simler held that Mr Smith's claim was in time because he was denied the opportunity to exercise the right to paid leave throughout his engagement. Pimlico Plumbers had not shown

that it had given Mr Smith the opportunity to take paid leave and encouraged him to do so. The right therefore carried over and accumulated until termination of the contract, at which point Mr Smith was entitled to a payment in respect of the unpaid leave.

As an appendix to the judgment, the Court of Appeal has suggested that the following words are read into Regulation 13 of the WTR:

"Where in any leave year an employer (i) fails to recognise a worker's right to paid annual leave and (ii) cannot show that it provides a facility for the taking of such leave, the worker shall be entitled to carry forward any leave which is taken but unpaid, and/or which is not taken, into subsequent leave years."

Implications for employers

The key significance of this decision is for organisations engaging with individuals who are expressed to be self-employed contractors or consultants, but who may be found to be workers at a later date, and who have been denied the right to paid annual leave. (See our article from February 2021 for further detail on worker status: Supreme Court confirms that Uber drivers are workers after denying appeal which is available from our website.) Where arrangements with these individuals are long-standing, employers could find that they are facing claims for very significant amounts. It is reported that Mr Smith's claim for historic holiday pay is in the region of £70,000.

Claims for holiday pay are most commonly brought in the employment tribunal as claims for unlawful deduction from wages. Such claims must be brought within 3 months of the deduction (the date of the incorrect payment), or the last in a series of deductions. The Deduction from Wages (Limitation) Regulations 2014 set a 2-year limit on the arrears which can be claimed due to a series of deductions. This considerably reduces the risk to employers facing claims for holiday pay where there is a series of deductions.

However, it is important to note that the decision in Mr Smith's case means that workers who have been denied the right to paid leave can bring a claim for all of their unpaid holiday pay on termination, whether or not they have actually taken unpaid leave. This will not be a claim in relation to a series of deductions, but one single deduction crystallising on termination.

This case only applies where the claimant has been denied the right to paid leave altogether. It will not apply where the claimant has received holiday pay but been underpaid for it. It also applies only to the 4-week "Euro leave" under the Working Time Directive and Regulation 13 WTR. It does not apply to the additional 1.6 weeks' paid leave under Regulation 13A WTR.

It is possible that this judgment will be appealed.

The exit of the UK from the European Union does not impact on this decision, as the fundamental rights or principles of the European Union law underpinning the right to 4 weeks' paid leave are retained in UK law. That is not to say that the Government might not bring forward legislation impacting on these rights in future.

Cricket club groundsman required to provide personal service was self-employed

Article published on 28 February 2022

Claimant was in business on his own account and not entitled to holiday pay or notice pay.

There have been a number of high profile cases dealing with employment status and associated rights in the last few years. Not least of these is the long-running case of *Smith v Pimlico Plumbers*,

on which we recently reported the latest Supreme Court judgment: Self-employed contractor found to be a worker can claim for all unpaid holiday pay on termination (available from our website).

Key questions for courts and tribunals in these cases include the following, based on the statutory definition of a "worker":

- Whether the individual undertakes under the contract to perform work personally (rather than being able to send a substitute to carry out the work); and if so
- Whether the other party to the contract is a client or customer of a profession or business undertaking carried on by the individual.

Employment status is a fact-dependent question, and the courts must consider the whole picture, including the written contract and the reality of the working arrangements. Case law on this question focuses on the extent to which the individual is controlled on a day to day basis by the purported employer and integrated into its organisation. It also considers whether the contract includes mutuality of obligation: an obligation on the employer to provide work and an obligation on the individual to accept it when offered. Having a requirement for a minimum number of hours' work each week will be one factor weighing against self-employment.

Many recent cases have determined that the claimant had worker status, even though the contract expressly stated otherwise. This can also be the case where the individual is providing their services through their own company. See for example our case report from September 2019: Can someone who is paid through their own limited company be a worker or employee? (available from our website).

By contrast, a recent case heard in the EAT upheld an employment tribunal decision that an individual was not a worker or employee and was not entitled to paid holiday or statutory minimum notice on termination, even though the contract required him to carry out some of the work personally.

Case details: *Waters v The Mote Cricket Club*

The claimant, Mr Waters, had a long association with the Mote Cricket Club, as player, member, committee member and volunteer. He occasionally carried out paid casual work for the club, assisting the directly employed groundsman.

Mr Waters set up his own business, Green Hand Gardens (GHG), in 2011 and took out a shorthold tenancy on property at the club to store his equipment and from where he carried on his business. GHG carried out gardening work and maintained a cricket pitch for another club.

Following the employed groundsman's departure, the club engaged a contractor, but this arrangement was short-lived. GHG then entered a contract with the club. The contract set out in detail requirements for the upkeep of club's cricket pitches. As well as some off-season work, the contract required GHG to provide a minimum of 60 hours' work per week from March to October each year, and for Mr Waters personally to work for 40 of these weekly hours. The club's equipment was to be used in the first instance, and GHG equipment only with club authorisation. GHG was to submit monthly invoices for an agreed fixed amount. Additional hours were not remunerated.

During the contract, Mr Waters expressed his discontent with the terms of the contract and asked that the requirement for work to be carried out personally be reduced. He also asked the club to take him on as an employee rather than a contractor. The club gave notice to terminate the contract just over two years after it commenced.

Mr Waters brought claims to an employment tribunal for holiday pay and notice pay, and sought to amend his claim to include a claim for unfair dismissal. At a preliminary hearing, an employment tribunal found that Mr Waters was not a worker or an employee and so dismissed his claims. On

appeal, the EAT agreed.

The EAT noted that the tribunal had carefully considered the requirement on the claimant to carry out work personally under the contract, as this was a factor weighing against self-employment status. However, it made clear that a person will not meet the statutory definition of a worker if they are obliged to carry out work personally, but the other party to the contract is in the position of a client or customer of their business.

The tribunal had made several findings which indicated that the club was a customer of GHG:

- the claimant was not under any control or supervision as to how and when he performed the work;
- he was expected from time to time to provide his own equipment;
- the claimant was already running a business of a similar kind and the work which he engaged to perform for the club could be incorporated within that business (turnover for the business was in the region of £40,000 per annum, which included £22,000 from the club);
- the claimant was not integrated into the club's organisation;
- there was a requirement of personal service, but the claimant was clearly expected to provide someone else to perform the additional work;
- the claimant did in fact engage others to provide work under the contract;
- there was no evidence that the club ever checked that the claimant was in fact carrying out the minimum hours; and
- the claimant was able to carry out work for others and wished to reduce his personal commitment so that he could increase these opportunities.

In the light of these findings, the tribunal concluded that Mr Waters was self-employed as the club was "genuinely a customer or client of the claimant's business, albeit a very significant one".

Comment

Given the fact-dependent nature of decisions on employment status, it is helpful to note the factors the tribunal took into account when deciding against worker status in this case.

When entering into contracts with self-employed individuals, it is important to appreciate that a requirement to provide personal service can strongly indicate worker status. For this reason, parties entering such contracts will often avoid a requirement for personal service, including a substitution clause which allows the individual to send someone else to carry out the work when they are unwilling or unable to do so. They may also avoid stating any minimum working time requirement and focus instead on the level of service, tasks or project which must be completed.

However, as the EAT highlighted in this case, a requirement for an individual to perform work personally can be a feature of a contract for services, as long as the relationship between the parties is found to be one of contractor and customer. In assessing whether the individual is genuinely in business in their own account, a tribunal will consider factors such as whether they have bargaining power over the contractual terms, whether they market their services to others or carry out work for others, and whether they take a financial risk in the arrangement.

There are significant risks in mislabelling a worker or employee contract as self-employment and organisations should take professional advice at the outset to mitigate these risks. The risks include unbudgeted demands for unpaid PAYE, National Insurance Contributions, enforcement action relating to pension auto-enrolment, and employment tribunal claims relating, for example, to statutory paid holiday, working time and rest breaks, statutory sick pay, National Minimum Wage, notice pay and unfair dismissal.

School staffing and the risks of the revolving door

Article published on 8 February 2022

What are the legal risks of high staff turnover and reliance on agency staff in schools?

School employers have reported a higher level of staff turnover in recent years. Coupled with this, high levels of staff absence, particularly since the start of the Covid pandemic are an ongoing concern. This has led many schools to rely on an increased number of transitory staff, including agency supply staff. In this article, we consider the employment law considerations for school employers facing these staffing challenges.

This article focuses on employment law issues, but in doing so it is important not to lose sight of the disruption caused to the quality of education by high staff turnover.

Crisis – what crisis?

Many schools and trusts were facing a staffing crisis in certain subjects and at certain management levels in the years before the Covid pandemic. The drivers for high turnover of teaching staff are many and varied. A House of Commons Library Briefing Paper from November 2021 Teacher recruitment and retention in England provides a useful overview of some of the longer-term issues impacting on teacher recruitment and retention. Unsustainable workload, government policy and a lack of support from leadership top the list of reasons given by those leaving the profession. Unsurprisingly, teaching staff mobility between schools is more likely where staff are younger, on fixed term contracts, and are not in leadership positions. Schools in deprived areas are more likely to lose staff to other schools.

The Covid pandemic may initially have put a damper on staff mobility, but it seems now that some Covid-related factors, such as the so-called "Great Resignation" and higher levels of long-term absence are now putting further pressure on school staffing.

Supporting your stalwarts

Good induction, management, on-going support and appraisal are key to establishing and developing a happy and high-performing staff team. This can be a real challenge for established staff and leaders where colleagues are new and/or transitory. And this in turn increases the risks of employment law claims.

It can be easy to overlook the impact, particularly on your long-serving senior and middle managers of an ever-changing and piecemeal staff team. These demands can lead to complex grievances, conflict between staff, work-related stress and long-term absences. Pro-active support for these lynch-pins in your team is vital to reduce the risk of them burning out, moving on, and/or raising formal grievances and claims. Staff with two years' service could resign and bring a constructive unfair dismissal claim if they consider that the demands upon them were so unreasonable that they were in breach of contract.

Legal risks from staff with less than two years' service

It is a popular myth that staff who do not have two years' service cannot bring employment tribunal claims. Schools with high staff turnover should be aware that there are a number of claims which can be brought before that point.

Unfair dismissal claims based on "blowing the whistle", raising health and safety issues, trade union membership, or statutory rights such as exercising the right to be accompanied to meetings can all be brought without two years' service.

The usual cap on compensation for unfair dismissal claims of one year's gross salary does not apply when an employee is found to have been dismissed for raising health and safety issues or for whistleblowing.

Claims can also be brought before two years' service in relation to:

- statutory rest breaks, working hours and holidays;
- unfavourable treatment because of fixed-term employee status;
- unfavourable treatment because of part-time worker status; and
- other statutory rights such as family-related and flexible working request rights.

Discrimination claims based on a protected characteristic such as sex, age, race, religion, sexual orientation or disability can be brought by employees, workers, agency workers, job applicants and former staff, regardless of length of service. Schools should be alert to the fact that compensation awards for such a claim are not capped and can include injury to feelings awards.

Can you be sure an employee has less than two years' service?

It is not always obvious when an employee has accrued two years' service. The general rule is that a break in employment of at least "a week ending with a Saturday" will break continuity of service. However, if there is a "temporary cessation of work" (for example where a teacher is not employed over the Summer holiday) continuity of service is very unlikely to be broken.

It is also important to consider the impact of the Redundancy Payments (Continuity of Employment in Local Government, etc.) (Modification) Order 1999 which means that staff who have moved from a local authority school or another academy trust will bring with them their length of service for the purpose of calculating redundancy pay.

The risks of using fixed-term contracts

Many schools routinely employ new recruits, especially NQTs, on fixed-term contracts in the first instance. Where turnover is high, this can mean managing a significant number of fixed-term contracts.

Support and appraisal of staff on fixed-term / probationary contracts is a crucial tool in managing performance and making an informed and reasonable decision about whether to terminate or renew the contract. It is not uncommon for the demands of this process to be overtaken with the day-to-day hecticness of school life and for the end of the fixed-term to come around with no paper-trail of performance management to support a decision to terminate. A lack of supporting evidence for termination on capability, performance or conduct grounds will increase the risk of claims relating to ending the contract.

Schools should be alert to the termination provisions in their fixed-term contracts and ensure that notice is properly given in line with the contract. Some fixed-term contracts can be poorly drafted and do not include a mechanism for early termination. Schools who terminate before the end date could then find they are facing claims for unpaid wages to the end of the contractual term.

If the written fixed-term contract is not renewed but employment continues, it is likely that the contract will be found to have become permanent. Schools should ensure they have a good administrative system which ensures that fixed-term contracts are reviewed in good time before notice must be given and that new contracts are issued where relevant.

Employers must have a fair reason to terminate employment, and this includes fixed-term contracts. The reason might be redundancy where there is a decreased need for employees to carry out a particular kind of work, or "some other substantial reason" such as the return of the substantive post-holder or the end of a specific project. Staff who bring automatic unfair dismissal

claims will argue that the reason for their dismissal was an unlawful reason. It can be difficult for an employer to defend such a claim where the reason for the dismissal is unclear or undocumented.

Fixed-term employees have protections under the Fixed Term Employee Regulations. A claim could arise, for example, where an employee has been selected for redundancy on the basis of their fixed-term status (for example where permanent staff were not included in the redundancy pool).

Legal obligations of schools hiring agency supply staff

High staff absence rates over the last few months, along with longer-term recruitment and retention issues, have also led many schools to rely more heavily on agency staff. Although these staff are not direct employees of the school, local authority or academy trust, there are key obligations on the "hirer" in these arrangements. Understanding your obligations under the Agency Workers Regulations from the outset can help to limit claims arising.

The two key rights of agency workers which schools and trusts should be aware of are:

- The right to the same pay and basic working conditions as equivalent directly employed staff after a twelve-week qualifying period; and
- Access to collective facilities and to information about employment vacancies from day one.

Liability for a failure to provide the same pay and conditions as a permanent member of staff after twelve weeks falls on both the agency and the hirer to the extent that they are responsible.

Schools and trusts should ensure that they provide information to the agency about the pay and conditions of comparator staff so that the relevant terms and conditions apply from week thirteen.

In addition, there are statutory rules about responding to a formal request from the agency worker for information relating to an alleged breach of agency worker rights. Agency workers can also claim that the hirer has subjected them to a detriment for some reason connected to their agency worker rights. For example, where a decision to end the assignment is alleged to be because the agency worker asserted their rights under the Agency Worker Regulations.

When does an agency worker reach 12 weeks?

To complete the qualifying period, the agency worker must work in the same role with the same hirer for twelve continuous calendar weeks. The twelve-week period includes any weeks where the worker has carried out work for the hirer. It will not include weeks where they carry out no work for the hirer. Breaks in service of less than six weeks will not break continuity. The clock will also be paused where the agency worker is on sickness absence for a period of up to 28 weeks. If a tribunal determines that an assignment has been deliberately structured to avoid the twelve-week right, an additional award of up to £5,000 can be made.

Importantly, where the hirer is an academy trust, the twelve-week period could include weeks where the agency worker was deployed in different schools across the trust. Central monitoring of agency worker deployment will therefore be required to ensure compliance with the Agency Workers Regulations.

Proactive management will reduce the risks

School employers can reduce the risk of grievances and claims by ensuring that managers are well trained, supported by the central team, and broadly understand the rights of staff working under different kinds of contracts. Strong proactive management and administration will enable school employers to plan ahead, enable the sharing of necessary information, and act in a timely fashion in line with the contract in question.

Is employee ownership a viable alternative to family succession?

Article published on 9 February 2022

A look at why a transition to employee ownership may be preferable to a third-party sale, if family succession isn't a viable option.

If succession planning for your family business no longer looks capable of keeping the business in the family, most people would automatically consider that their only option (other than to close down the business) is to sell to a third-party.

This is often not the most desirable of outcomes, as it can usually involve a competitor or a corporate investor acquiring the shares in the company, or the assets of the business, and merging it into their wider structure. This can result in a loss of the ethos and culture of the company, together with a loss of long-term staff as a result of the merging of the two businesses. We have also seen anecdotal evidence to show that the process of selling to a commercial third-party can often be fraught, and sometimes unpleasant – and does not necessarily protect the long-term future of the business.

Owners who are willing to perhaps realise the value they have built up in the business over a longer period, or who are most focussed on protecting the culture and ethos of the business, and the long-term success of the business and security for the employees, can consider an employee ownership transition instead.

The move to employee ownership sees the employees take on ownership of the company. There are three main structures used, which are:

1. 100% trust ownership;
2. direct ownership of shares by individual employees; and
3. a hybrid model with a trust holding the majority, and some direct share ownership by specific employees.

The most common form is the 100% owned trust structure, as this is the simplest and cheapest to set up and, if it relates to an existing business where the owners are retiring or setting up their succession plan, has capital gains tax advantages for the outgoing owners.

We will not go into detail of the differences between these structures here, but you can find more information on these on our website here, and our previous articles here and here.

There are advantages for the outgoing founder in that, should certain conditions be met, then no capital gains tax is payable on the sale of the shares to the employee ownership trust. Employees are also able to see a benefit as an income tax-free bonus (although do note that NI contributions remain payable) is able to be paid by the operating company to employees in each financial year (up to £3,600 per annum) if the employee ownership trust holds at least 51% of its shares.

Following a transition to employee-ownership a trading company will continue to be run by the directors and its senior management. There may be a need to recruit new managers before the change if the outgoing owner is no longer wanting to be a part of the business. In some cases some of the owners may stay on for a short period to help with the transition or even continue as before but with more accountability to the employees). Managers should be committed to greater transparency and will hopefully obtain greater engagement from employees who become more invested in the success of the business. This is what allows employee owned businesses to continue to grow in strength, whilst maintaining their culture and rewarding employees, after the founder has moved on.

The Employee Ownership Association, together with their research partner Ownership at Work, has conducted research over the course of the recent pandemic and this has provided evidence to show that employee owned businesses may be more resilient than other companies, as it *"shows a business model uniquely equipped to cope with the challenges of the pandemic – companies that are resilient, agile and capable of rapid change; thanks to shared ownership and reward, high levels of employee commitment, and deep roots in their communities ".*

Wrigleys Essential Employment Guide – The Disciplinary Process

Article published on 14 February 2022

How do you conduct a disciplinary hearing?

In this article, we look at key considerations around how to conduct a disciplinary hearing.

By the time a hearing has been organised, the employer will have determined that there is a misconduct case to answer.

The purpose of the hearing is to allow all of the available evidence to be weighed in order to reach a fair and reasonable decision. Employers also need to take care with how the hearing is conducted to ensure the hearing itself is fair.

The burden of proof for upholding allegations at a disciplinary hearing is on the balance of probabilities – in other words, it only has to be more likely than not that the allegation is true – and it is at the hearing where the employer decides whether or not that burden of proof is met.

1. Who attends the hearing?

At a disciplinary hearing then any of the following may attend:

- The hearing will be presided over by someone usually called either the chair or hearing manager. Sometimes, a hearing panel of three or more people will preside over the hearing. Ultimately, it will be for the chair, manager, or a decision of the majority of the panel, which decides whether any allegation is proved (or upheld) on the balance of probabilities.
- There will often be a note-taker to take accurate minutes or notes of the hearing. This person will usually be a part of the employer's HR team, but may be another employee or even someone external.
- It is considered best practice for the investigation manager to be present so that they can explain the investigation report findings and answer any questions about the investigation which may come up.

Where the employer is a small organisation, the chair, notetaker and investigation manager may be the same person. Although this is not ideal, it is recognised that not all employers have the resources to fully separate out these roles. Smaller employers may wish to consider appointing, for example an HR consultant as, an external investigator or even an external decision maker but these are not required; the requirement remains that whoever undertakes these important roles does so fairly.

- Also attending the hearing will be the employee who is alleged to have committed misconduct and their representative. The representative is usually either a trade union representative or colleague of the employee accused of misconduct, but may, on occasion, be a close friend or family member if a union rep or colleague is not available or appropriate.

Very rarely are employees represented by solicitors or barristers – this is usually only where the

allegations being proven true could result in a professional effectively being barred from working again (e.g. where a doctor faces being struck off for malpractice by the General Medical Council).

- Depending on the evidence to be presented, witnesses may also attend the hearing. Often this will not be necessary as a thorough investigation should ensure any relevant witness evidence has been collected and is considered. Written witness evidence can be used. There is no 'right' to call witnesses so that their evidence can be questioned at the hearing; it will be for the chair of the meeting (in agreement with any panel) to determine whether they will need to speak direct with any witness in the case of any issue arising around their evidence.

On occasion the employee will not show up at the hearing. With planning this should be known in advance, with a reasonable explanation given and alternative arrangement made, including rescheduling the hearing. If the employee simply does not show, the employer must make enquiries and, if this is the first occasion of non-appearance it is likely that the meeting will need to be rescheduled. If this is a rescheduled hearing (following previous non-attendance or agreed rearranging) then the employee should have received a warning that the meeting may go ahead in their absence, in which case it can do so.

2. The setting

Meetings can take place remotely as well as in person, but it is important that if doing so the equipment has been tested and will withstand the process. As with face-to-face meetings, some consideration needs to be given to when and where the meeting will take place, with a view to making it as accessible as possible by all those taking part, including any appropriate reasonable adjustments to take account of any relevant disability.

Any in-person hearing room must be in a quiet area where disruptions are avoided and privacy can be maintained. A break-out area may be required, to allow an employee the opportunity to speak with their representative, or companion, in private or to take a break should the need arise.

3. The procedure of a hearing

We recommend that the chair, manager or panel open the hearing by introducing everyone who is present and explaining their roles. It is then a good idea for the chair to set out what the complaint is against the employee and for the chair to confirm what the highest sanction is if it is upheld (for example, allegations of theft or dishonesty may amount to gross misconduct which, if proven, may result in immediate dismissal without pay in lieu of notice).

It should be made clear that the employee will be able to challenge evidence and present their own case. If they are accompanied by a colleague or trade union representative it should be made clear the companion can assist the employee in this but cannot answer questions on the employee's behalf.

Before getting into the detail of the hearing, it is a good idea for the chair to check the employee has received copies of all the evidence, including the investigation report and witness statements, and that they have read them before proceeding. If the employee has not read them, it is worth the chair considering allowing the employee reasonable time to do so.

From this stage the hearing will then consider evidence. Depending on the nature and complexity of the allegations, it may be most useful to go through the timeline of events first to establish key events and witnesses before more detailed evidence is considered. An employer should ask questions with the aim of establishing all facts, allowing the employee to explain their alleged misconduct or unsatisfactory performance. An employer should keep their approach formal and polite and encourage the employee to speak freely to establish the facts.

4. Employee's reply

The employee accused of misconduct should be allowed to put forward their own case and answer any allegations made. They should be permitted to ask questions and present their own evidence and witnesses.

Incorporating the employee's evidence can be one of the more tricky aspects of the hearing. For example, it may or may not be better to allow the employee to respond to each event and issue in turn, or it may be more helpful to allow the investigation manager to set out all of their evidence first and allow the employee to present their case after, with the chair asking follow-up questions to test evidence on key areas of difference.

Practically speaking, the vast majority of employees will not have pages and pages of documents or witness evidence and will likely spend much of the hearing trying to find problems and discrepancies in the evidence against them.

If the meeting is proceeding in the employee's absence it is of great importance that the chair, or panel, is able to evidence that they have taken account of any written representations which have been received from the employer and have given appropriate challenge to the evidence presented against the employee.

5. Summation and adjournment

On occasion it is necessary to adjourn the meeting before all the evidence has been heard. This may be to allow time-out, e.g. for short break to allow the employee to have a private discussion with their representative or companion, or something longer from a matter of hours, days or even weeks, for example where a hearing may run into another day, or to allow the chair (or panel) to make separate enquiry into any issue that has arisen.

Long adjournments should best be avoided if possible, and could reflect badly on the employers investigation and strength of their case. Issues arising can include unfairness in the delay in resolving matters, as time passes individual recollections may change, and the potential for allegations of bias where the chair or panel members may be perceived to have contact (and communications about the disciplinary matter) with the employer.

When all of the evidence has been presented and discussed, the chair should summarise the key points. This stage helps all parties to be focus on what the allegations are and what the key pieces of evidence both for and against them is. The chair should check whether the employee has anything further to say.

It is not always necessary for the chair to adjourn the hearing before making a decision, though best practice is for the chair to do so for at least a short time to ensure they cover off everything before coming to a decision. It is also a good idea for the chair to remove themselves from the room or ask other participants to do so, so that they can consider the evidence privately.

In complex cases the disciplinary hearing will be adjourned for the chair, or panel, to consider the evidence before coming to a decision. The chair will tell the employee that they will write with the outcome and their reasons within a set time period.

By conducting a hearing along the lines set out above, an employer will be better able to evidence that they clearly set out the hearing to the employee and allowed both sides' arguments to be heard when coming to a decision. This in turn will help to show a fair decision was arrived at. We will consider how employers can take steps to ensure the decision and applied outcome are fair, as well as how any appeal should be handled, in our next article in this series.

For further guidance, see Acas guidance: Discipline and Grievances at work.

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