Misconduct and Dismissal in Northern Ireland

The Legislation

1] Article 130 of the **Employment Rights (NI) Order 1996** states that in determining whether the dismissal is fair or unfair it is for the employer to show the reason for the dismissal. One of the reasons which allows any employer to dismiss an employee fairly can relate to the conduct of the said employee [Article 130(2)(c) of the 1996 Order].

Article 130 (4) of the Employment Rights (NI) Order 1996 then goes on to state that having given a proper reason for dismissal (in this instance the conduct of the employee) the question of whether the dismissal is fair/unfair:

i) depends of the whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

ii) shall be determined in accordance with the substantial merits of the case

For a dismissal to be fair it must therefore be procedural and substantially fair.

Article 130A (2) of the Employment Rights (NI) Order 1996 states:

Subject to paragraph (1), failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure.

2] Schedule 1 of the **Employment (NI) Order 2003** sets out the statutory dismissal and disciplinary procedures. Failure to adhere to any element of this procedures will lead to a finding of automatic unfair dismissal

3 Step Process

1. Sending of the statement of grounds for action and invitation to a meeting
2. The meeting
3. The Appeal

3] Labour Relations Agency Code of Practice (Disciplinary and Grievance Procedures)

While a failure to follow this code does not make an employer liable to proceedings it may be a factor for consideration by a Tribunal in determining whether there has been procedural and substantial fairness.

Disciplinary Process

1] The process is activated by the alleged conduct of the employee

2] Employer disciplinary code of conduct and the necessity to adhere to same.

- is the code of conduct up to date and reflect good practice?

- an express/implied term and condition of the contract of employment between employer and employee

3] Choice of investigating officer and the disciplinary hearing/ disciplinary appeal hearing personnel (if required)

- necessity not to be connected to the alleged misconduct
- training in the exercise of the disciplinary process
- experience in the exercise of a previous disciplinary process
- seniority of the staff chosen for each stage of the disciplinary process
- removal of any potential bias towards the employee

4] Role of Human Resources

- usually to advise on process and procedural fairness

- not to determine the guilt of an employee and/or the sanction to be imposed

5] Investigation of the Alleged Misconduct

- Interview of employee and any relevant witnesses
- Gathering of documentary/photographic evidence/ CCTV

Preparation of an investigation report which may include recommendation that the employee facing specified disciplinary charges

6] Suspension

Does the alleged misconduct warrant suspension?

Harassment/ physical fighting/ removal or use of confidential information.

Is there an alternative to suspension (e.g. transfer to an alternative location)?

Important to follow any suspension policy contained in the disciplinary code of conduct.

Inform the employee of the suspension in writing highlighting the necessity for same and the fact that the act of suspension is only a precautionary measure and not a disciplinary sanction.

Necessity to review suspension on a regular basis.

7] Sending of the statement of grounds for action and invitation to a meeting (Step 1 statement)

This statement should:

- set out the disciplinary charges to be faced by the employee

- inform the employee that if the charges are established that such conduct may be classified as gross misconduct and could lead to dismissal
- inform the employee that he is entitled to be accompanied at the

disciplinary hearing by a fellow employee or trade union official (**Article 12 Employment Relations (NI) Order 1999**)
- indicate the time, date and location of the meeting (the employee should be given sufficient time to prepare for the disciplinary hearing)

Enclosed with this statement should be a copy of any investigation report, witness statements or notes taken at the investigation stage and all other documentary and other evidence upon which the employer will rely on at the disciplinary hearing

8] Disciplinary Hearing (Step 2 Meeting)

Depending on the size and administrative resources of the employer and the nature of the charges faced by the employee

- the disciplinary will normally be made up of one person
- the disciplinary panel may request the investigating officer to present the case or may simply review the evidence and question the employee
- the employee must be given every opportunity to state his/her case

General view is that there is no right of cross-examination of a witness by the employee during the disciplinary process **(Ulsterbus Limited -v- Henderson [1989] 251).** However it could be argued that in **exceptional** circumstances cross-examination should be allowed where the decision to dismiss turns on a crucial issue of fact which is the subject of conflicting evidence.

At the conclusion of the disciplinary hearing the panel may wish to interview existing and/or additional witnesses or gather further documentary evidence. If this takes place the employee must be given the opportunity to consider and the opportunity to respond to same.

The disciplinary panel must consider all of the evidence prior to reaching its decision on each disciplinary charge. If the employee has
been found guilty then the disciplinary panel must consider all possible sanctions that are open to them (eg. final written warning, demotion,

dismissal with or without notice) and any relevant mitigating factors (e.g. length of service, disciplinary record, admission of guilt, apology)

The decision statement should be sent as soon as possible to the employee setting out the findings of the disciplinary panel and reasons for same and highlighting the sanction to be imposed. The statement should identify any mitigating factors considered by the employer and inform the employee of his right to an appeal of the stated decision.

9] Appeal Meeting (Step 3)

If the employee has exercised the right of appeal then the employer must inform same of the time, date and location of the appeal hearing and again inform the employee of his/her right to be accompanied at this meeting.

The employee should be provided with any new documentary or other evidence prior to this meeting.

The disciplinary appeal hearing should be conducted by a panel who were not associated with the events of the alleged misconduct and who were not involved in the investigation or disciplinary hearing elements of the disciplinary process.

As at the initial disciplinary hearing the employee must be given every opportunity to present his/her appeal.

Again, it is open to the disciplinary appeal panel to interview existing and/or additional witnesses or gather further documentary evidence. If this takes place the employee must be given the opportunity to consider and the opportunity to respond to same.

Again, the disciplinary appeal panel must consider all of the evidence and the issues raised by the employee at appeal and determine whether the findings and sanction imposed on the employee are fair.

The appeal hearing can remedy any procedural defects which may have taken place at the disciplinary hearing stage as long at the disciplinary appeal hearing is a complete rehearing of all of the issues.

Finally, the appeal decision statement should be sent as soon as possible to the employee setting out the findings of the disciplinary appeal panel and reasons for same and confirming the sanction to be imposed. The statement should identify any mitigating factors considered by the employer.

This ends the disciplinary process.

10] Necessity of the employer to:

- have regard to equality legislation eg. making reasonable adjustments for for a disabled employee facing a disciplinary procedure

- be conscious that some foreign employees may difficulty in reading/speaking english and assistance should be provided where this is the case

- be aware of the possibility and use of covert recordings. If relevant to the issue before the Tribunal then such recording are admissible as evidence. Employers may wish to ensure that all recording devises are turned off.

1 [16] The manner in which the tribunal should approach that task has been considered by this court in Dobbin v Citybus Ltd [2008] NICA 42. Since there was no dispute between the parties in relation to the relevant law I consider that it is only necessary to set out the relevant passage from the judgment of Higgins LJ.

"[48]…The equivalent provision in England and Wales to Article 130 is Section 98 of the Employment Rights Act 1996 which followed equivalent provisions contained in Section 57 of the Employment Protection (Consolidation) Act 1978. [49]

The correct approach to section 57 (and the later provisions) was settled in two principal cases - *British Homes Stores v Burchell* [1980] ICR 303 and *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 – and explained and refined principally in the judgments of Mummery LJ in two further cases - *Foley v Post Office* and *HSBC Bank Plc (formerly Midland Bank Plc) v Madden* reported at [2000] ICR 1283 (two appeals heard together) and *J Sainsbury v Hitt* [2003] ICR 111. [50] In *Iceland Frozen Foods* Browne-Wilkinson J offered the following guidance – 'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the [Employment Protection Consolidation) Act 1978] is as follows: (1) the starting point should always be the words of section 57(3) themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.' [51] To that may be added the remarks of Arnold J in *British Homes Stores* where in the context of a misconduct case he stated - 'What the tribunal have to

decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure," as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter "beyond reasonable doubt." The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion'."