

# **DISMISSALS IN THE CIVIL SERVICE – GOOD PRACTICE PRINCIPLES APPLIED BY THE CIVIL SERVICE APPEAL BOARD**

## **Introduction**

1. These notes are intended for all who are involved in dismissal proceedings in the Civil Service. They highlight some of the key aspects to which the Civil Service Appeal Board (CSAB) has regard when considering appeals against dismissal. Whilst no note can cover every circumstance that might be relevant to the Board's consideration of an appeal, this note sets out some key principles for the benefit of those who attend hearings at the Board.

## **Modus Operandi**

2. In cases of dismissal, whether on disciplinary, inefficiency or failed probation grounds, the Board considers the following aspects:-

- (a) Procedures
- (b) Substantive Issue
- (c) Consistency
- (d) Proportionality

### (a) Procedures

The Board has to be satisfied that relevant procedures, laid down in Departmental and Agency Codes and Guidance, have been followed satisfactorily.

The Employment Act 2002 (Dispute Resolution) Regulations 2004 brought into effect, from 1 October 2004, the provisions in the Employment Act 2002 which sets out minimum statutory dismissal and disciplinary procedures. These apply where the employer first contemplates dismissing or taking such action against an employee on or after that date. Failure to follow the statutory procedures, which apply to all dismissals, will mean that under these Regulations the Board or an Employment Tribunal must find the decision automatically unfair. The procedure involves three stages:-

### **Stage 1**

The employer must set out in writing the employee's alleged conduct or characteristics or other circumstances which led them to contemplate dismissing or taking action against the employee.

The employer must send a copy of the above statement to the employee and invite him or her to attend a meeting to discuss the matter.

## **Stage 2**

The meeting must take place before the action is taken and must not take place unless:-

- the employer has informed the employee about the reasons for the meeting; and
- the employee has had a reasonable opportunity to consider his/her response to that information.

On his/her part, the employee must take all reasonable steps to attend the meeting at which he/she may be accompanied.

After the meeting, the employer must inform the employee of his decision and notify him or her of the right to appeal against the decision if he or she is not satisfied with it.

## **Stage 3**

If the employee wishes to appeal, he/she must inform the employer.

The appeal meeting need not take place before the dismissal takes effect.

If the employee informs the employer of his/her wish to appeal, the employer must extend an invitation to attend a further meeting at which the employee may be accompanied.

The employee must take all reasonable steps to attend the meeting.

When reasonably practicable, the appeal should be dealt with by a more senior official than the one who dealt with the disciplinary hearing.

After the appeal meeting, the employer must inform the employee of the final decision.

There is a modified two stage procedure for use in special circumstances involving gross misconduct, when summary dismissal has taken place. The Board recommends that reference is made to the ACAS Code of Practice for further details with regard to the new dismissal and disciplinary procedures.

It is possible that, even if the new statutory dismissal and disciplinary procedures have been followed, other procedural shortcomings could justify the dismissal being found procedurally unfair, in accordance with the principles established in the case of *Polkey vs A E Dayton Services Ltd*.

In cases of discipline/ misconduct:-

- have the individuals been informed, in writing, of the specific charges being laid against them?
- have they been advised of their representational rights at fact finding and disciplinary interviews (work colleague, trade union representative)?

- have they been provided with copies of notes/minutes taken at fact finding and disciplinary interviews and given an opportunity to comment?
- have they been told of their right of internal appeal, following a decision to dismiss?
- have they been advised that dismissal could be a consequence of disciplinary action?
- are the rules and regulations clear enough and is there a process in place to ensure the effective communication of relevant policies and procedures?

Serious procedural shortcomings can arise when Departments and Agencies deal with inefficiency cases and the following points should be noted.

In cases of dismissals for inefficiency on the grounds of unsatisfactory performance:-

- have the individuals been told precisely what their shortcomings are and what has to be done and over what timescale, to try to put matters right?
- have they been advised that if a satisfactory level of performance is not achieved, dismissal could be a consequence?
- have appropriate targets been set for monitoring periods and have notes been kept of monitoring meetings?
- has appropriate remedial training been arranged and undertaken?

In cases of dismissal for inefficiency on the grounds of unsatisfactory attendance:-

- when frequent intermittent absence is the trigger for action, have warnings been issued at the appropriate times and in the correct sequence, including reference to the possibility of dismissal if attendance levels do not improve?
- when long term absence is the trigger for action, have sufficient efforts been made by management to keep in touch with the individual; have attempts been made to involve Welfare and the Occupational Health Advisers?
- has due regard been taken of the advice given by the Occupational Health Advisers in respect, for example, of making reasonable adjustments within the workplace to facilitate a return?
- have avenues to facilitate a return to work been explored, for example, a phased return to work, part time working, work in a different location?
- in cases of long term, absence, have the individuals been given due notice of the intention to dismiss and the opportunity to make representations?

In cases of dismissals for failure of probation:-

- have timescales for the submission of interim and final reports been respected?

- have individuals been advised, where appropriate, of shortcomings in attendance, conduct and performance and told that if a satisfactory standard is not attained, dismissal could be a consequence?
- In all cases procedural good practice dictates that Departments and Agencies should deal with the disciplinary and inefficiency procedures as expeditiously as possible. Failure to do so, particularly when timescales are laid down in Departmental and Agency procedures could render the dismissal procedurally unfair, particularly if it can be demonstrated to the Board that the delay itself has been to the material detriment of the individual.

(b) Substantive Issue

There are three points for consideration under this heading:-

- in disciplinary/misconduct cases, has there been a reasonable investigation?
- in all cases, has the individual been treated fairly and reasonably?

In disciplinary/misconduct cases as far as the investigation is concerned, there is a significant employment law test case to be taken into account (*British Home Stores vs Burchell* – EAT, Court of Appeal 1980). The employer must genuinely believe, on the balance of probabilities, that the employee is guilty; there must be reasonable grounds to sustain that belief and as much investigation into the matter as was reasonable in the circumstances, must have been carried out.

- was evidence taken from witnesses, including those who could provide evidence in support of the employee?
- was all relevant evidence obtained and considered?
- was the evidence evaluated on the basis of the balance of probabilities test?
- was the investigating officer sufficiently independent?

(c) Consistency

- have similar penalties been imposed in similar cases (Discipline) ?
- have similar outcomes arisen in similar cases (Inefficiency?)
- Decision Makers should acquaint themselves with penalties imposed/ outcomes in similar cases, to ensure a degree of consistency.

(d) Proportionality

Was dismissal reasonable in the circumstances of the case?

- in cases of discipline, should a lesser penalty have been considered?

- in cases of performance inefficiency was downgrading considered, or a change of duties/ line manager before proceeding to dismissal?
- in cases of attendance inefficiency, was a change of duties or location considered? Were reasonable adjustments properly considered and, in the cases of long term absentees, a phased return to the workplace proposed before proceeding to dismissal?
- in all cases, has sufficient account been taken of mitigating circumstances? The Decision Maker should take into account an individual's general performance, attendance record and conduct, together with any mitigating circumstances, before reaching their conclusion.

It is important that the reasons for dismissal are explained fully in writing to the individual.

### **3. Payment of Compensation under the Civil Service Compensation Scheme in cases of dismissal for inefficiency of attendance**

The attention of all Departments and Agencies is drawn to the Cabinet Office's guidance in this regard, Personnel information Note (PIN) 40.

In cases of long term sickness, where staff have been absent for a long period and whose absence can no longer be covered or tolerated ( but whose condition is not considered appropriate for medical retirement), full compensation would normally be payable where evidence exists or can be obtained to show that the inability to attend is beyond the control of the individual.

In cases where individuals have frequent sick absences for short periods due either to a specific illness or to an apparently poor level of general health, they might qualify for the payment of compensation where management is satisfied as to the nature and severity of the illness (es) concerned and that the members of staff have done everything within their power, or made some effort to alleviate the problem.

### **4. Payment of Compensation under the Civil Service Compensation Scheme in cases of dismissal for inefficiency of performance**

Appropriate guidance for the payment of compensation for dismissals in this category is to be found in the Cabinet Office's note – Personnel Information Note (PIN 40).

***Individuals dismissed for having failed to satisfy the probation requirements on grounds of unsatisfactory attendance or performance are ineligible for consideration of compensation under the Civil Service Compensation Scheme.***

5. It is recommended that Departments and Agencies familiarise themselves with the content of some of the ACAS publications, in particular the ACAS Code of Practice. This can be found at:-

[www.acas.org.uk](http://www.acas.org.uk)

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