

## Gross misconduct - frequently asked questions

Below are some frequently asked questions (FAQs) about gross misconduct. Although these FAQs highlight some key issues relating to Employment law, they are not comprehensive and the answers should not be treated as a substitute for seeking professional advice on a specific issue.

### Q: What is gross misconduct?

A: Conduct so bad that it destroys the employer/employee relationship, and merits instant dismissal without notice or pay in lieu of notice.

### Q: What counts as gross misconduct?

A: Most employers would identify intoxication (whether from drink or drugs), fighting or other physical abuse, indecent behaviour, theft, dishonesty, sabotage, serious breaches of health and safety rules and gross insubordination as examples of gross misconduct. You might want to specify other offences, depending on the nature of your business: for example, accepting bribes, offering bribes, downloading pornography, using personal software (with the risk of importing viruses), misusing confidential information or setting up a competing business.

When dealing with an employee under the influence of alcohol or drugs caution should be exercised. If the employee is an alcoholic or drug addict then this should be dealt with as a capability issue and not as gross misconduct in the first instance.

### Q: Does this mean I can decide for myself what conduct merits instant dismissal?

A: To a limited degree. But instant dismissal

is a very severe penalty and if the employee takes you to an Employment Tribunal, you would have to be able to demonstrate that your decision:

- would be one that a reasonable employer would have made; and
- was itself both fair and reasonable in the circumstances.

You would also have to show that the offence was so wrong that dismissal was an appropriate sanction. It is always advisable to list the offences which merit instant dismissal in the disciplinary policy — though you should make it plain that the list is not exhaustive.

### Q: What would a tribunal consider in deciding whether a dismissal for gross misconduct was fair and reasonable?

A: A range of factors, including for instance:

- did you have a genuine belief in the employee's guilt;
- was it reasonable to hold this belief as a result of your investigation;
- how thoroughly did you investigate the alleged offence; was the employee given all of the information that had been gathered as part of the investigation;
- did you give the employee an opportunity to state his (or her) case;
- were they entitled to be accompanied by a work colleague or trade union representative;
- did you hold a disciplinary hearing, chaired by someone who was impartial;
- did you warn the employee they were to attend a disciplinary hearing;

#### Head Office

3 Lonsdale Gardens  
Tunbridge Wells  
Kent TN1 1NX  
T 01892 510000  
F 01892 549884

#### Thames Gateway

The Old Rectory  
St. Mary's Road  
Greenhithe  
Kent DA9 9AS  
T 01322 623700  
F 01322 623701

## Gross misconduct - frequently asked questions (continued)

- did you give them time to prepare for the disciplinary hearing;
- was the offence gross misconduct, as set out in your disciplinary procedures and was the employee aware of the penalty that could be imposed as a result of that misconduct;
- were there mitigating circumstances or other facts that should have been taken into account, e.g. health or domestic problems, provocation or ignorance;
- were alternatives to dismissal considered;
- to what extent was a similar penalty invoked in similar cases; and
- was the employee informed of his right of appeal and given an opportunity to appeal against the decision to dismiss?

### **Q: Do we have to ensure our response to misconduct is consistent?**

A: It is important to be consistent in taking disciplinary action, but it may be that there are strong mitigating circumstances in one case that are not there in another. So you need to investigate all the circumstances thoroughly and consider them carefully. If you sack one employee for an offence which, in another, merits only a written or verbal warning, you need to be able to justify your decision to impose a more severe penalty in the one case than the other. Otherwise you could face allegations of unfairness and discrimination. So keep written records of why you did what you did.

Two cases illustrate other factors tribunals take into account when considering the issue of consistency. In one, five employees committed similar disciplinary offences, for which only one was dismissed. Why? Because he had previously received a final

written warning for the same offence, which had only just expired. The Employment Tribunal found that the dismissal had been unfair and although the Employment Appeals Tribunal acknowledged the merits of the employer's case, it agreed. If a warning had expired, it said, a Tribunal was 'obliged, and not merely entitled' to ignore it.

In the other, a member of staff who had missed a critical deadline was dismissed, even though another member of staff was still employed, despite missing critical deadlines on three previous occasions. In this case an Employment Tribunal found that the dismissal was unfair because of the inconsistency. But the Employment Appeals Tribunal disagreed: the over-riding question, it said, was whether the dismissal was reasonable, not whether or not it was consistent.

### **Q: I thought instant dismissal meant sacking someone on the spot, and that was that?**

A: No. If you sack someone without undertaking a proper investigation, informing the employee of the issues in writing, holding a disciplinary hearing, giving the employee (accompanied by a companion) the opportunity to put his (or her) case, informing the employee of your decision in writing, and — if the decision is to dismiss — giving the employee an opportunity to appeal, you will lay yourself wide open to being sued in an Employment Tribunal or the civil courts.

Before 6 April 2009, employers had to follow a statutory minimum procedure set by law. Since 6 April 2009 this has been replaced with a slightly more flexible approach. Employers should now follow the Advisory Conciliation and Arbitration

## Gross misconduct - frequently asked questions (continued)

Service ("ACAS") code of practice for disciplinary procedures, failure to follow this code can still cause a tribunal to increase awards of compensation by up to 25%. You should also check whether you have any additional procedures in your contracts of employment which should be followed.

**Q: Should we spell out what we would consider to be gross misconduct in the employee's terms and conditions?**

A: You should give examples in the disciplinary policy of what you would consider to be gross misconduct (but state that the list is not exhaustive). In areas where it is possible for employees to assume that they are only committing a minor misdemeanour, or even no misdemeanour at all — for example, use of personal software in work computers — you must ensure that they are aware of the consequences, if you would treat it as gross misconduct. If an ex-employee can reasonably argue that they were sacked for doing something they had no reason to suppose was a sackable offence, you may lose at an Employment Tribunal.

**Q: If an employee has done something which counts as gross misconduct, what procedure should I adopt?**

A: In any disciplinary situation, whether the employee has done something which may be misconduct or gross misconduct, you should follow the disciplinary procedures set out by ACAS.

- You should first limit the damage. For example, if it is someone who has come in drunk, it may be necessary to remove them from the premises, especially if they are in charge of machinery.

Generally speaking, however, the employee should remain at work, or (if you have the contractual right) be suspended on full pay, pending an investigation.

- Carry out an investigation. Are you certain it was drunkenness, rather than a medical condition? If it was drunkenness, was it self-induced, or is there any possibility that someone had spiked their drink?
- If you have not already done so, you may decide at this stage to suspend the offending employee (on full pay) while the investigation and disciplinary process continues. Any suspension should be as brief as possible and you should make it clear to the employee that the suspension is, in itself, not a form of disciplinary action.
- Interview all relevant witnesses, including the employee.
- If the investigation suggests that disciplinary action is warranted, call a disciplinary hearing. You should give the employee notice of the meeting in writing. The notice should set out the time and place of the meeting as well as explaining that the employee has the right to bring a fellow worker or trade union representative to the meeting.
- Make sure the employee is well aware of the allegations against him before he attends the meeting. You should put the case against him in writing and include details of possible consequences. Any written evidence such as witness statements should also be given to the employee before the meeting to allow him to respond to all the allegations.

## Gross misconduct - frequently asked questions (continued)

- Ensure that the disciplinary hearing will be conducted by an objective and impartial person who has not been involved in the investigation.
  - At the meeting you should explain the allegations and go through the evidence. You should then give the employee the opportunity to put their case forward. You should also allow them to ask questions, present their own evidence and call any relevant witnesses.
  - If the employee raises any issues in his defence that need further investigation, adjourn the hearing. This may involve interviewing new witnesses, re-interviewing existing witnesses or checking documents.
  - Make sure there is a record of the proceedings in case you need to refer to it in making your decision, and in case you need to produce it as evidence for an Employment Tribunal. Have someone take notes.
  - Adjourn the hearing to consider your decision. Do not make an instant decision, otherwise it might look as though you had already made up your mind.
  - Consider mitigating circumstances such as the employee's previous disciplinary record before reaching a decision.
  - Write to the employee explaining your decision and setting out your reasons. Explain that the employee has a right to appeal your decision.
  - If the employee decides to appeal, they should do so in writing specifying the grounds of their appeal.
  - The appeal should then be heard without delay, and once again the employee has the right to bring a companion. Ideally, the appeal should be dealt with by a more senior manager than attended the first meeting.
  - After the appeal write to the employee again, setting out your decision and your reasons.
- Q: If we have to sack someone for gross misconduct, should we give pay in lieu of notice?**
- A: No. The point of gross misconduct is that it is conduct so bad that you are justified in dismissing the employee instantly (subject to having followed a disciplinary procedure). If you give them notice — or pay in lieu of notice — you may weaken your case.
- Q: If an employee who has been sacked for gross misconduct tries to sue us, what will they be suing for?**
- A: The employee may have the following claims:
- unfair dismissal, assuming that they have been with you for more than a year. If they have not been with you for a year, but think they can prove that the sacking was due to discrimination or any of the 'inadmissible' reasons for which a year's service is not required they can still sue you for discrimination and/or unfair dismissal;
  - wrongful dismissal (normally for pay in lieu of notice) in an Employment Tribunal, regardless of their length of service. Alternatively if they are highly paid they may sue you for wrongful dismissal in the civil courts, as the Employment Tribunal is only able to award damages of up to £25,000 for breach of contract / wrongful dismissal claims.

## Gross misconduct - frequently asked questions (continued)

### Q: Can we be sued by a fixed term contract employee whom we have sacked for gross misconduct?

A: Yes. Depending on the circumstances, they may be able to sue you for:

- unfair dismissal, assuming that they have been with you for more than a year. Otherwise they cannot, unless they think they can prove that the sacking was due to discrimination or any of the 'inadmissible' reasons where a year's service is not required in which case they can still sue for unfair dismissal and/or discrimination;
- breach of the fixed term contract (i.e. for damages representing their loss during the remainder of the contract term or in relation to any shorter notice period referred to in the contract).

### Q: How long will it take for a case to come to the Employment Tribunal?

A: Usually up to six months from the date of filing the claim. But it may be a shorter period, or much longer, depending on the Employment Tribunal which is dealing with and hearing the case as well as the complexity of the case.

### Q: How much is it likely to cost us to defend such a case?

A: That depends on the complexity of the case. The cost is very unlikely to be below £10,000, and may be double that figure. Depending on the complexity of the case, and your geographical location, it could even be three or even four times as much.

Do not forget that costs would not only

include the fees to any external advisers, but also the loss of productive activity by company employees involved in defending any claim.

### Q: Would we do better just to pay the offending employee to go away?

A: That depends on how good your case is, and the message you wish to give to other employees. Sometimes commercial reality will suggest that it is more cost effective to settle out of court, on a 'nuisance value' basis. Pursuing 'the principle' will cost money; but on the other hand it will send a powerful message to other employees who might otherwise be tempted into launching frivolous or vexatious legal action. If you decide to settle, take legal advice on how to record the agreement. Your legal advisor or ACAS will be able to assist with this.

### Q: If we are sued, what sort of evidence do we need to be able to present to defend our case?

A: You would need to be able to present:

- all relevant documentary evidence: for example, letters you have written to the employee; copies of written warnings; notes on any incriminating evidence; documents relied upon during the disciplinary process; notes on any investigatory or disciplinary hearings; witness statements taken during the investigation; and any documents relating to any appeal;
- witnesses: depending on the nature of the complaint you may need to call people who saw what happened; the person who carried out the investigation; the person who chaired the disciplinary

## Gross misconduct - frequently asked questions (continued)

hearing and took the decision to dismiss;  
the person who chaired the appeal  
hearing.

For further information, please contact Nick  
Hobden on 01892 510000 or by e-mail at  
[nick.hobden@ts-p.co.uk](mailto:nick.hobden@ts-p.co.uk).

© Thomson Snell & Passmore All Rights Reserved