SI 146 – Getting Fair Procedures in the Disciplinary Process Right

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- Large body of case law issued by the Workplace Relations Commission since January 2025
- Same common mistakes being made
- Obligation is well defined in the Unfair Dismissals Act 1977 and SI 146 2000 Code on Grievance and Disciplinary Procedures ("SI 146")

THE UNFAIR DISMISSALS ACT 1977

TWO STEP TEST:

1. What are the substantial grounds that justify the sanction imposed – competence, conduct, redundancy or a restriction under statute

2. Was the decision reasonable and was it arrived at through a fair procedure – throughout the investigation process **and** the disciplinary process

ANTHONY KERR – 2011

"So clear indeed, is the importance now placed on procedural fairness that it seems in certain cases to eclipse the grievance or disciplinary issue giving rise to the instigation of the procedure in the first place…..The entire case becomes an argument based on fair procedures and not the allegation itself".

ANTHONY KERR – 2011

"It is not surprising that employers with neither an understanding of abstract legal procedures, nor the inclination to study them, become frustrated with the proposition that they should take time and spend money on what might seem to be simply the long way round to inevitable dismissal. But it is the very essence and purpose of fair procedures to safeguard and ensure that shortcuts are not taken and that outcomes which might seem desirable in terms of time and money do not form the basis upon which workers lose their jobs. Fair procedures are often based on nothing more than common sense. An employer should be able to stand over any given procedure and have no fear of accountability."

WHAT IS REASONABLE AND FAIR

I. An employers own local investigation and disciplinary policy

II. SI 146

LOCAL POLICIES

- ✓Must be in writing
- ✓Presented to employees when they start employment
- ✓In a format and language that is easily understood
- ✓Collectively agreed with the Trade Union
- ✓Must comply with the principles set out in SI 146 – SI 146 will take precedence

SI 146 CODE OF PRACTICE

Procedures are objectively rational and fair
Procedures are reviewed and updated periodically
Procedures contain various stages for escalation
Different personnel are utilised for different stages
The details and sources of the complaint are put to the employee in writing
Employees are allowed to fully respond to the complaints
Employees are allowed to question any witnesses
Employee's have the right to be represented by a colleague or Trade Union rep

SI 146 CODE OF PRACTICE

There is a fair and impartial determination of the allegations
The allegations are fairly examined and processed
Attempts should be made to resolve the matter on an informal basis
Disciplinary sanctions should be progressive and proportionate
Sanctions should not be applied indefinitely
An appeals mechanism should be available

IN PRACTICE – STAGE 1

1. The complaint should be provided to the Respondent in writing - signed and dated
2. The Respondent should be given time to consider this complaint and to seek advice
3. It should be made clear what policy was breached and a copy provided
4. An investigator should be appointed and should not be conflicted
5. The investigator should draft an agreed TOR with the Respondent's representative
6. The TOR should make clear the parameters of what is being investigated

IN PRACTICE – STAGE 2

1. Meetings should be held with the Complainant and the witnesses first
2. All evidence and minutes should be shared with the Respondent in advance
3. The Respondent is entitled to representation
4. The Respondent has the right to cross examine the Complainant and the witnesses
5. Draft report should be shared with the Respondent and other parties

IN PRACTICE – STAGE 3

1. If Report finds against the Respondent, disciplinary stage commences
2. Separate unconflicted personnel to be appointed to hear disciplinary stage
3. Must rely on report provided to them so vital that this report is correct
4. Proportional sanction must be applied – context important
5. Sanction should not be kept on Respondent's file indefinitely
6. Respondent should be provided with a right to appeal

THINGS TO REMEMBER

- It's a fact finding investigation, not a moral judgment
- Employers should keep an open mind despite what they hear
- Document, document, document – Complaints should be in writing, keep your own notes and ask for the minutes
- Advance notice of meetings should be given, but investigation should still move efficiently
- Proportionality should be applied based on the Respondent's entire employment history
- Employer should always be crystal clear – no ambiguity

THINGS TO REMEMBER

- Remember to look at the policies before you start
- Ensure the polices are compliant with SI 146
- Don't just focus on the severity of the allegation
- Engage in the nuance of the situation and the contextual background
- Don't forget that fair procedures apply at every stage (investigation and disciplinary)
- Remember – if the investigation is flawed, its all flawed