

II. THE DISCIPLINARY PROCEDURE & ITS APPLICATION IN PRACTICE

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THE AIMS

- Dismissal for Good & Sufficient Cause: the Law and Beyond
- Transparency
- Clarity & Certainty
- Redress
- Corrective Mechanism
- Proportionality & Reasonableness

THE AIMS: NATURAL JUSTICE

- Principles of Natural Justice: Impartiality & Fairness
- Gonzi -vs- Malta Drydocks Corporation (Case 2859/LC Industrial Tribunal 14/04/2015): Boards and tribunals having characteristics and functions to pass judgment must, when exercising any such characteristics and functions, follow the principles of natural justice

THE ADAPTATION

- No Written Laws on the Disciplinary Procedures
- Relativity: Nature of Work, Size & Resources
- Identifying the appropriate & best-suited Disciplinary Procedure



THE DRAFTING

- No Written Laws on Disciplinary Procedures
- Difficulties Encountered
- What to look at: Sources & Guides
- Importance of the having the right Drafting Skills
- Setting out the Shortcomings and Misconduct, the Procedure, the Rights and the Outcomes / Consequences (Disciplinary Action)

THE NEXT STEP (OR NOT?)

- Following conclusion of Investigation
- However independently from the Investigation
- Based on the Investigation's outcome
- Determine whether to proceed to the Next Step: the Disciplinary Process
- End result: Informal vs Formal Action

THE DISCIPLINARY PROCESS: THE LAUNCH

- Set in motion following Investigation, unless determined that uncalled-for
- Refer to Disciplinary Procedure: Internal Discussions on the Investigation's outcome
- Issue Notice to Employee
- To include: Identification of Wrongdoing, Time, Date & Place of Meeting / Hearing, any Previous Shortcoming & Misconduct & Action that may be taken upon Conclusion



THE PRE-MEETING / HEARING BASICS

- Principle of Natural Justice: Fairness
- Sufficient time accorded to prepare feedback / defence following Letter of Invitation
- Disclosure of Investigation findings
- Informing of rights, such as to be represented
- May emerge from Collective Agreements
- Representative may be a person from the trade union or a lawyer, but not just

THE SUSPENSION

- Unless suspended before or during Investigation;
Timing
- Should only be resorted to as a result of serious misconduct
- Issue Letter of Suspension
- To include: reason for suspension, expected duration, reminder re continuous engagement obligations, rights, prohibition from contacting other employees or others involved, no salary deductions

THE ADJUDICATORS

- Relativity: Work, Size & Resources
- Single adjudicator or Disciplinary Board?
- Composition
- Principle of Natural Justice: Impartiality
- Investigator not adjudicator, adjudicator not investigator

THE DISCIPLINARY PROCESS MEETING / HEARING

- Ideally During Working Hours, Away from the Workplace
- Rigorous adherence to the Disciplinary Procedure throughout the Disciplinary Process
- Witnesses, if any, may be called up again
- Should not be exploited in the event of a pre-existing inclination to dismiss employee
- Unfair dismissal weaponises employee with legal remedies

THE DECISION

- Rigorous adherence to the Disciplinary Procedure
- Principle of Natural Justice: Fairness
- Proportionality: No Action, Warning, Dismissal
- Issue Decision Notice to Employee
- To include: action taken, reasons for the determination

THE INFORMAL ACTION

- Appropriateness of Informal Action:
- Employee misconduct leading to minimal consequences
- New employees settling in at the new workplace environment, new work
- Employee's misconduct is unusual, for instance going through personal issues
- Resolved with: a chat, or ideally record in writing; an explanatory email



THE FORMAL ACTION

- Appropriateness of Formal Action:
- Refer to Disciplinary Procedures
- Where applicable: effective date of decision implementation, duration *purgatory* period to address shortcomings, duration of such period, date of review, previous shortcomings, misconduct and the action taken, consequences for persistence of shortcoming, misconduct



THE APPEAL

- Relativity: Nature of Work, Size & Resources
- Principle of Natural Justice: Impartiality
- Investigators and Adjudicators at First Stage should not be Adjudicators at Second Stage of the Determination of Disciplinary Action

THE STRUCTURE

- The Disciplinary Procedure should set the internal structure vis-a-vis the Disciplinary Process to provide the employee with further clarity:
- Sole Adjudicator or Disciplinary Board
- First Stage (Action)
- Second Stage (Appeal)
- Any external adjudicators



THE PROs

- Employer sets standard to be adhered to by its employees
- Employees aware of consequences:
- Establishment of what actions and, or omissions amounting to Shortcomings & Misconduct
- Establishment of Applicable Action as a result
- Guides employees as to what is expected from them
- Provides aggrieved employees with an established internal system of redress
- Provides employee undergoing a disciplinary process with clear knowledge of the Disciplinary Procedure subject to



THE CONs

- As a result of poorly drafted manual or poor adaption of a pre-prepared template
- As a result of non-adherence to set Disciplinary Procedure
- As a result of exploiting the established system with other intentions

THE DISREGARD

- Why bother with having a Disciplinary Procedure in place? If:
- Must be followed rigorously
- Non-adherence may result in an undesirable outcome for the employer, more so before Industrial Tribunal, Court
- Employer's discretion in selecting the disciplinary procedure and disciplinary action on a case by case basis is self-restricted, if not completely eliminated
- Employer may prefer to exercise arbitrary powers

THE DISREGARD'S RESULT

- An undesirable outcome for the employer, more so before Industrial Tribunal, Court, nonetheless
- Should not be seen as self-restrictive measures set by the employer but rather offering employees transparency, accountability for their actions and, or omissions and opportunities to correct their shortcomings and misconduct
- Within an established and predetermined framework: the Disciplinary Procedure
- Arbitrariness is nonetheless curtailed in Industrial and Employment Relations and applicable legislation



THE EMPLOYEE'S DISSATISFACTION

- An employee may nonetheless challenge any action taken by the employer before the Industrial Tribunal
- The chairperson would be an external person who would be (re-)reviewing the case, most likely from its inception
- Importance of record-keeping throughout



THANK YOU

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