



March 2015 Update

Welcome to this month's edition of Employment Law update - where we discuss the latest legislation and guidance.

Jeremy Clarkson's disciplinary - wouldn't you love to be a fly on the wall?

Love him or loathe him - just months after apparently receiving a written warning from his employer for misconduct, Jeremy is in trouble again and has brought the wrong kind of publicity upon his employer, the BBC.

It is unlikely there will be another workplace disciplinary hearing in the UK this year that will attract more public and press attention than BBC -v- Jeremy Clarkson.

If the decision is taken to dismiss Jeremy due to his alleged misconduct, then it is likely he will pursue his claim for unfair dismissal at the Employment Tribunal. Although, the maximum compensation available to him from such a claim, not much more than £76,000.00 in addition to any entitlements under his contract or employment, will probably be less than that which Jeremy currently earns from making a single episode of the worldwide hit TV show "Top Gear".

Mr C stands accused of assaulting (read punching) one of the show's producers Oisin Tymon at a hotel in Yorkshire, after a long day's filming. This is a very serious allegation - one which is "akin to criminal misconduct". Assault is a crime, pure and simple. Even if you are famous.

Here is a summary of some of the key messages to pass on to the BBC to consider:

- the seriousness of the charge dictates the level of investigation that the BBC must undertake.
- any unreasonable failure to investigate relevant facts or matters may entitle an Employment Judge to find that any resulting decision to dismiss Mr Clarkson was unfair, contrary to section 98

(4) of the Employment Rights Act 1996

- as such, if dismissal is under consideration, the effectiveness of the investigator's actions in this case will be crucial in determining whether or not the BBC is able to defend itself against a claim of unfair dismissal
- it is essential that the investigation is carried out swiftly to quickly establish which facts are in dispute and which are admitted. Facts that are admitted need no further investigation, facts in dispute must be investigated with great care and in an even handed manner - pursuing all relevant lines of enquiry whether they suggest guilt or innocence on Jeremy's part
- the investigation should be conducted by someone who is a) impartial b) has not been involved in the issue until now and c) will not be involved in any decision making capacity at a later stage of the process.
- The investigator must interview the complainant (assuming this must have been Oisín Tymon - the unfortunate producer who failed to ensure that a piping hot steak was available for Jeremy to consume at his luxury hotel on the evening in question, apparently)
- Next, he should interview Jeremy Clarkson himself (not in a disciplinary hearing but in an investigation meeting) to put Mr Tymon's allegations to Clarkson and so establish which facts are in dispute;
- Only those facts that are disputed by Jeremy need to be investigated and the investigator should take all reasonable steps available to him, in proportion to the seriousness of the charge, to investigate those disputed facts;
- Assuming Jeremy denies that he punched his producer, the investigator will need to interview Hammond, May, any other members of the Crew who were at the hotel that evening and any other witnesses (e.g. the hotel manager, other guests)
- Written notes and statements should be made of all interviews, which the investigator should invite the interviewees to approve and sign.
- The investigator should then consider whether there is any other kind of evidence available for review which could shed some light on the disputed facts e.g. CCTV evidence and the various social media tweets, posts and blogs that were no doubt contemporaneously uploaded to the internet in the immediate aftermath of the alleged crime.
- Importantly, the investigator should also reflect on the background circumstances: seemingly, the starved Mr Clarkson and Crew flew in to the hotel by helicopter after a long day of filming to find (a few glasses of wine later perhaps) that Chef has switched off the oven and had gone home for the night and all that was available to satisfy the celebrity's hunger was a cold plate of nibbles and some soup.
- So, was Mr. Clarkson's judgment that evening clouded by a combination of his hunger and having

downed his alcohol on an empty stomach? If so, who was at fault ? What is the BBC's policy on drinking after work ? Was it in the habit of paying for Mr Clarkson's alcoholic beverages within his routine expense claims ? Why weren't he and his colleagues fed sooner in the day? What else, if anything, provoked JC or others to allegedly clench fists ? These are potentially important contributing factors that need to be weighed in the balance.

- Only after all these investigative steps have been carried out with due care and attention, should the investigator stand back and decide whether to recommend to their superiors that there is a case for JC to answer at a disciplinary hearing
- Don't make any hasty public decisions that could cause a reasonable man to believe that there may be an element of pre-decision to the disciplinary process, such as making it known to the public that there will be no more episodes of Top Gear for the foreseeable future!
- Oh yes, try to keep the fact of the investigation and possible disciplinary action against your employee confidential - oops - too late!

Let's hope the BBC followed the steps above, as it seems it felt sufficiently confident to announce that it will be writing to JC to tell him that he needs to attend a disciplinary hearing. Of course, that decision to convene a hearing could only have been taken fairly and reasonably once the investigator has completed their post investigation report.

Whoever it was who carried out that investigation (and was able to complete all steps in less than a few days of the event itself) is either one brilliant operator - quicker at their job than JC is at driving or just perhaps, they have missed off a few corners with their investigation. One has to wonder who will be more anxious about the forthcoming hearing, Jeremy or the poor unfortunate souls at the BBC who are asked to handle this process in the public eye and decide Jeremy's fate.

A couple of final thoughts:

1. Surely Jeremy won't be able to resist tweeting from inside his disciplinary hearing?
2. Who will be his companion at the hearing? I am secretly hoping it will be his mate David Cameron....smuggled in to the room dressed as The Stig.
3. If Jeremy is dismissed and brings a claim of unfair dismissal - surely he would represent himself at the Employment Tribunal. It's hard to imagine that a man with his self-confidence would think that any mere lawyer would do a better job than he could of cross-examining his would-be-then former employers!

Employers: If you have a disciplinary issue, make sure you conduct a reasonable investigation to establish the facts and take statement before deciding if there is sufficient evidence to call a disciplinary hearing. Call us for guidance.

New Rules on the Right to have a Companion Present at Disciplinary or Grievance hearings.

On 11 March 2015, ACAS published a revised Code of Practice on Disciplinary and Grievance Procedures. The revisions to the code relate solely to the choice of a companion at a disciplinary or grievance hearing, and have been made to reflect Employment Appeal Tribunal rulings on how the right to be accompanied ought to be exercised.

It is now clear that an employee has an absolute right to be accompanied by any willing companion who is a fellow worker, a trade union representative, or an official employed by a trade union.

While the new code encourages workers to make sensible choices about their companions, the key point is that the employer no longer has the right to refuse to allow the chosen companion into the hearing on the grounds that the choice made is unsuitable for some reason, such as potential prejudice to the hearing or logistical difficulties.

Although the ACAS code still retains the statement that requests to be accompanied must be reasonable, case law indicates that only the request to be accompanied must be reasonable, not the choice of companion.

Employers: there have been a great deal of discussion about the choice of companion and this change makes it clear that employers cannot no longer refuse the employees choice of companion if they think the person is unsuitable of situated too far away.

Unpaid Director and Shareholder is found to be an employee

The Court of Appeal has upheld the Tribunal's decision that a director and shareholder was an employee and a worker within the meaning of the Employment Rights Act 1996. This was notwithstanding the fact that the director had performed part-time work for the company without pay for over three years. The fact that the parties had not expressly agreed a term about pay did not mean that there was no contract between them.

The Court said it was open to the Tribunal to imply a term that the director would be paid a reasonable rate from a reasonable starting date in order to give business reality to the arrangements between them. Whilst a contract may be created expressly or by implication, so too it may be formed partly expressly and partly by implication. It was not fatal that the three parties in the business had failed to expressly agree a term concerning pay. It held that the Claimant was both an employee and a worker. He was entitled to pursue his claims for constructive unfair dismissal and unlawful deductions from wages.

Employment Law Support advice includes:

- Company Handbooks
- Contracts of Employment
- Self Employed /Fixed Term Contracts
- Disciplinary & Grievance Procedures
- Training Agreement
- Discrimination including Age, Disability, Race and Sex
- Flexible Working
- Termination of Employment
- Managing Sickness
- Managing Redundancy
- Policies, Practice and Procedure
- Maternity and Paternity regulations
- TUPE
- HR consultancy

QUESTIONS?

As always, should you have any questions or comments please [e-mail us](mailto:enquiries@employmentlawsupport.co.uk) at enquiries@employmentlawsupport.co.uk

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