

Misconduct

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An Insight into Misconduct

The Employment Rights Act 1996 contains just five potentially fair reasons for dismissal, and conduct is one of them. However claims for unfair dismissal can only be pursued by employees with two years' complete service – before that you are generally able to dismiss without the reprisal of an unfair dismissal claim.

An employer dismissing for conduct has to be able to show that it held a genuine belief as to the employee's misconduct. Another important feature of a fair dismissal for conduct reasons is carrying out a fair process.



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The leading case for determining whether a misconduct dismissal is fair is *British Home Stores Ltd v Burchell* [1978] IRLR 379. To avoid memorising this you can impress everyone with your superior knowledge and refer to it as the Burchell test. The Burchell test established that a misconduct dismissal is fair if the employer meets all of the following at the time of dismissal:

- It believes that the employee is guilty of misconduct.
- It has reasonable grounds for that belief.
- It has carried out a reasonable investigation.

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Dismissal for conduct reasons commonly occurs in the context of gross misconduct – an act so heinous that it justifies immediate dismissal, without any prior warning and (usually) without entitlement to notice or notice pay. However, dismissal can also take place following a series of less serious acts of misconduct, where the employee has received a number of warnings and ultimately their chances run out. In those scenarios, there is no need for any of the acts to amount to gross misconduct.

It can sometimes be difficult to determine whether an act does qualify as gross misconduct, and there is no easy answer to this. Some things are quite obviously gross misconduct: violence, theft or fraud, for example. Other situations will be more difficult to call. Even in situations where it seems obvious at first glance, the importance of a thorough and fair investigation and disciplinary process cannot be stressed enough.

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EXAMPLE

Let's say a party organiser walks in on one of their employees eating the cake destined for a party taking place that day, it's too late to organise another cake, and the party is ruined. The client complains, refuses to pay and the reputation of the company's party organising skills is destroyed. The act of the employee could be classed as theft (for example) and constitute grounds for gross misconduct. However, on further investigation the employer discovers that their employee is diabetic and was about to go into hypoglycaemic shock – the cake was the only thing to hand to prevent this from happening. The cake eating is no longer an act which could justify dismissal.



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A fair disciplinary process will typically involve:

- **An investigation** – this should be reasonably thorough. Speak to all relevant individuals, review any documentary evidence and consider whether there might be any other useful evidence, like CCTV footage.
- **A written invitation to a hearing** - if the investigation determines that there is a case to answer the employee should be invited in writing to a hearing. They should be provided in advance with a copy of all of the evidence you are relying on, and given enough time to consider it before the hearing.
- **A disciplinary hearing** – the employee should be given the right to be accompanied to the hearing. The hearing should be carried out by someone other than the person who conducted the investigation. It's always advisable to have a second person present to take notes. No decisions should be made at the hearing – it's an opportunity to discuss the allegations and evidence and listen to the employee's side of the story.
- **Further investigation** – if necessary, carry out any further investigation resulting from the hearing. If none is required, give a reasonable amount of time to considering the evidence and the representations made by the employee before reaching a decision.
- **A written decision** – once your mind is made up, put the employee out of their misery. A warning should indicate how long it will remain on the employee's file for before it is disregarded for future disciplinary purposes. A dismissal should make very clear when it takes effect and what payments, if any, the employee will receive. The decision should also make the reasons clear with sufficient explanation in the event of an adverse outcome.
- **Right of appeal** – a fair process must include the right of appeal. The appeal should be heard by someone so far uninvolved in the process, and ideally more senior than the person who made the original decision. It's important therefore to plan at the outset who are the best people within your business to handle each stage of the process, and keep someone suitable in reserve for the appeal stage.

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The Consequences

If you find yourself unlucky enough to be at the receiving end of an unfair dismissal claim, take comfort from the fact that there is a cap on compensation. The cap as at April 2019 is £86,444 or one year's salary, whichever is lower.

Another factor to bear in mind in conduct cases in particular, is that even if there is a finding of unfair dismissal, compensation can be reduced by up to 100% due to the concept of contributory conduct. This is relevant even if the Tribunal finds that it was a substantive unfair dismissal, i.e. that you failed to meet the test of the dismissal being reasonable.

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The Consequences

EXAMPLE

Our party organisers above dismiss an employee for gross misconduct because she added Nutella to a cake she knew needed to be nut free. The Tribunal finds that regardless of the facts of the matter, and the employer's belief in the employee's misconduct, dismissal was too harsh. When it comes to considering the amount of compensation due to the employee the Tribunal could reduce the award by up to 100% bearing in mind the employee's conduct – had she paid more attention and not added Nutella to a nut-free cake, then she would never have ended up in this position. In other words, her conduct contributed to her dismissal so, even though it was unfair, she takes some of the blame which is reflected by a reduction in the award.

Note that a contributory conduct argument can be used alongside the Polkey reduction (mentioned in our Outset.insight - Performance Management).

If you would like more advice regarding misconduct, get in touch for a friendly and informal chat today.

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