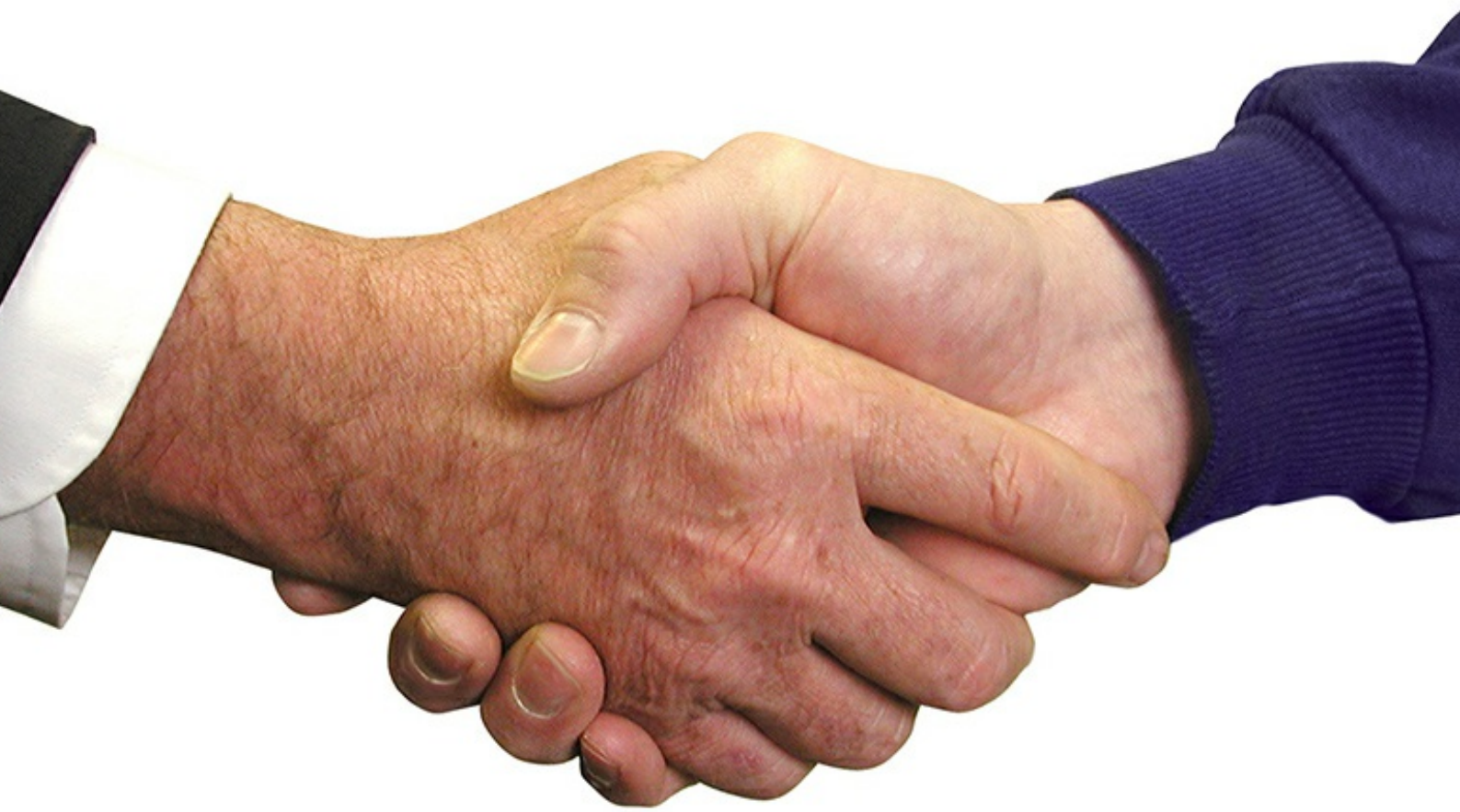
The Seven Deadly Sins of Employment

How to Avoid the Most Common Mistakes Made By Employers

Russell HR Consulting



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Preface

Being an employer these days is somewhat akin to going into battle. Not only do employees have more rights than they've ever had (and therefore cost employers more than ever before), there's considerable economic pressure on employers to ensure that the business survives.

Common complaints from employers include:

"I can't seem to recruit the right people."

"Why does he keep making mistakes?"

"I've told her a hundred times – and she still arrives late!"

"It takes so long to manage someone through the disciplinary process properly!"

"It's quicker to do it myself …."

Getting it wrong and not managing employees so that they perform to their optimum is frustrating, time consuming and expensive.……so what can employers do? Making just a few changes will reduce your risk and help the work flow more easily. Use the information and tips provided in this book will help you manage employees correctly, lawfully and in such a manner that it reduces the risk of being taken to tribunal.

About the author

Kate Russell, BA, barrister, MA is the Managing Director of Russell HR Consulting and the author of this publication. As Metro's HR columnist, she became known to thousands, with her down-to-earth and tactical approach to HR. Kate is a regular guest on Five Live and her articles and opinions have been sought by publications as diverse as The Sunday Times, Real Business and The Washington Post, as well as every major British HR magazine. Her HR blog has been rated third best in the UK. She is the author of several practical employment handbooks and e-books, the highly acclaimed audio update service Law on the Move, as well as a monthly e-newsletter, the latter document neatly combining the useful, topical and the frivolous.

Russell HR Consulting Ltd delivers HR solutions and practical employment law training to a wide variety of industries across the UK. Our team of skilled and experienced HR professionals has developed a reputation for being knowledgeable, robust and commercially aware. We are especially well-versed in the tackling and resolving of tough discipline and grievance matters.

We also specialise in delivering practical employment law training to line managers, business owners and HR professionals, both as in-house, tailor made workshops or open courses. We provide a wide range of practical employment training, enabling new and experienced managers to work in a compliant and ethical fashion, and gain optimum employee output.

At Russell HR consulting we will design and deliver a solution that suits your particular needs, identifying and addressing the issues in the way that best fits your workplace.

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Miscellaneous notes

Statutory limits

Today's statutory limits have not been specified in this book as they go out of date so quickly. You can email info@russellhrconsulting.co.uk for an up-to-date copy of statutory limits.

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Disclaimer

Whilst every effort has been made to ensure that the contents of the book are accurate and up to date, no responsibility will be accepted for any inaccuracies found.

This book should not be taken as a definitive guide or as a stand-alone document on all aspects of employment law. You should therefore seek legal advice where appropriate.

Gender description

For convenience and brevity I have referred to 'he' and 'him' throughout the book. It is intended to refer to both male and female employees.

Chapter 1 Overview of the Ebook

1.1 Introduction

Warren Bennis has quite rightly said that managing people is like herding cats. It's one of the most difficult jobs to do well. There are all sorts of pressures and tensions, usually coming from several different directions.

Employees are expensive. You can compute the cost as £salary + 34% (plus any other benefits or salary increments). It's extremely important to pay attention to each part of the employment life cycle to ensure that you are managing in a fair and lawful fashion and that employees are working at their optimum, most of the time.

I have worked both in operations and HR for over 20 years. Drawn from my experiences across a wide range of industries, there are a number of common mistake 'flashpoints'. This book sets out the main areas where employers go wrong, and provides guidance to help you avoid making those mistakes.

1.2 Recruiting the right person

In most businesses the single biggest cost is its staff. The starting point is getting the right people into the organisation. Many managers are so busy that they give little (if any) time to this important task.

There is no absolute guarantee of success, but all the evidence suggests that a disciplined and systematic approach to the recruitment will achieve better results.

Key elements of an effective recruitment process include:

- Confirming the need for the role and drawing up a person and job specification.
- Identifying the most appropriate search, advertising and selection procedure.
- Planning the recruitment process.
- Requesting information on experience, qualifications and references.
- Acquiring objective evidence of skills and knowledge.
- Making informed decisions based upon careful evaluation of the information gathered.

In this chapter we'll look at how to define what you want and how to go about acquiring it.

1.3 Contracts of employment

Employers must give employees a written statement of the main particulars of employment (terms and conditions of employment) within two months of the beginning of the employment. The statement should include details of pay, hours, holidays, notice period and disciplinary and grievance procedures. While two months may be the limit, it is good sense and good practice to have this prepared as soon as possible.

There are a number of excellent reasons for ensuring that you have a good contract of employment in place.

- Compliance – as an employer you're under a legal duty to provide a written statement of the main terms and conditions of employment within eight weeks of an employee starting work with you.
- Employees know what their rights and responsibilities are and what will happen if things go wrong.
- It means that both you and your employees know what to expect.
- A good contract delivers clarity, transparency, certainty and will help you run your business more effectively.

Setting out the framework for the employment relationship is fundamental. This chapter talks you through the key elements.

1.4 Prevention is better than cure

Most employers make the mistake of assuming that employees understand what they want, without checking and correcting. It's only after the passage of time that problems become apparent.

This chapter tackles the importance of communicating standards to all staff at an early stage. It is good practice to advise prospective employees of key standards at the recruitment stage. If shift work is required, for instance, you should tell the candidate about this at the interview. Standards must be reinforced at induction, on a daily or weekly basis in the workplace and at appraisal.

Unless standards are clearly communicated, checked and evidenced, it can be very difficult to bring about an improvement in employee performance or conduct. The following elements should be present:

- The organisation has a clear set of standards.
- The standards have been communicated to all workers.
- Factual evidence is available which indicates that conduct or performance is below the accepted standard.
- There are clear rules and procedures which outline to all employees how the issue will be dealt with.

1.5 Keeping records

Most operations people are 'fixers' by nature. They love 'doing', but not writing about it and consider it to be one of the least important part of operating a business. They could not be more wrong. Good record keeping is essential – *essential*! - to successful management.

As well as providing accurate notes for you (or for someone else if you are ill or leave the business), it gives a clear signal to an employee that you are monitoring conduct and performance. Good records help you track progress (or lack of it); they remind you when to follow up, to feedback and to escalate to the next stage. They demonstrate that you have been reasonable and timely in your actions. They are your PR if you ever have to go to tribunal.

I am firmly convinced that having clear and full records has contributed to the very, very small (fewer than five in 15 years) number of tribunal claims our clients have had when they've taken our advice.

1.6 Enforcement

Many managers ask "when do I need to do something about a problem?" The answer is very simple. It should happen immediately. In most cases correction will be informal in nature, but if it's a more serious matter, there's nothing to stop you exploring the matter formally, even if it's a first offence.

If an unfair dismissal claim comes before a tribunal, the court will ask two questions:

- Was the employee dismissed for a fair reason?
- Was the employee dismissed fairly from a procedural point of view?

We consider how to avoid common pitfalls associated with the discipline process in this chapter.

1.7 Sanctions

If a formal sanction is needed, the level and nature must be reasonable or justified. This will depend on all the circumstances of the particular case.

Any disciplinary sanction must be a reasonable and proportionate response to the circumstances of the case. Your decision should fall within the 'reasonable band of responses', developed by the Court of Appeal. This test is still used by the courts today.

> The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view.
> Lord Denning in British Leyland (UK) Ltd v Swift [1981]

1.8 Following procedure

There is a fictitious legal character known to the tribunals as the Reasonable Employer – you! This is the test against which your behaviour and decisions will be measured. The reasonableness of your response will vary, depending on the situation and the relevant facts. The test is whether a reasonable employer in the same employment situation would also have done the same as you.

So you must demonstrate reasonableness at all times. What does this mean?

- Be fair and consistent in your approach.
- Don't rush into a decision. Be considered and reflective.
- Be transparent in your actions and decisions.
- Put yourself in the other person's shoes.
- Take all relevant factors into account.
- Take advice and discuss the issues with the employee.
- Make reasonable adjustments and consider all possible alternatives.
- Be able to justify your actions.
- Keep accurate, objective, contemporaneous records.
- Be courteous, listen and investigate fully.
- Have clear standards. Communicate, monitor and manage them.

Part of being reasonable involves following procedure. Failure to follow their own procedure is the commonest reason for employers losing at tribunal. In this chapter we consider what we have to do to avoid falling foul of procedural requirements.

Chapter 2 Recruiting the right person

2.1 Introduction

People are vital to the success of any organisation. It has been shown repeatedly that poor recruitment practices result in high labour turnover and absenteeism, with a consequent increase in costs. If the right people are recruited in the first place, they are likely to stay, fit into your organisation and work to optimum effect.

If the wrong people are recruited, they will either leave or engage in unsatisfactory behaviours or conduct, which means that you will have to manage them out of the business. This is time consuming and in itself carries risks.

You need to be really rigorous about your recruitment practices. There are a lot of bounty hunters who make it their business to trip up careless recruiters. By this I mean, for example, that it is easy to submit two apparently identical CVs, with one material difference, such as a disability. If you call in the person without the disability for interview but not the person with a disability, it looks as though you are operating a barrier against people with a disability. Always be able to objectively justify why you have, and have not, invited someone to interview.

2.2 Define your recruitment requirement

Decide what sort of person, in terms of personality, would be ideal for the job role. If, for example, the job is working on a production line, you would want someone who prefers a reasonable level of repetition and is comfortable with routine. Someone with the opposite preferences – the type of person who enjoys lots of change and variety and likes to do things in new ways – would be unlikely to stay long in the job.

Once you have decided what qualities the ideal candidate will bring to the job, consider what is essential and what is merely desirable. Many people make the mistake of including in the essential category attributes that are merely desirable. It is only essential if, without that criterion, the candidate simply would not be able to do the job.

2.3 Job description and person specifications

The job description defines the duties in the role the employee will be expected to undertake. The person specification defines the attributes and skills of the person needed to perform those duties. Between them, these two documents can help you objectively analyse the criteria for the job. You can use the job description and person specification to help you write your advertisement, the shortlist and even your interview questions.

A job description describes the tasks and responsibilities that make up the job. It doesn't have to be lengthy or complex (although this will depend on the nature of the job).

A job description would normally include the following:

- Job title
- Summary and purpose of main job role
- Key tasks

Always make sure that the job description includes a catch-all phrase stating that the job holder is required to carry out any other reasonable request by management. While there is an implied duty upon every employee to carry out reasonable management requests, it makes life much easier if you spell it out.

A person specification defines the qualifications, skills, knowledge, experience and qualities of the ideal jobholder. It describes the person needed to fulfill the duties in the job description.

The sorts of things to consider are listed below. Obviously, they will not all apply in every case.

- Physical attributes
- Education
- General intelligence
- Special aptitudes
- Interests
- Personality
- Circumstances

2.4 Avoiding unlawful discrimination

'Discrimination' has almost become a dirty word in recent years, but it's important to keep a sense of perspective. All we mean by 'discrimination' is that we make choices; we are discerning. Do you discriminate when you recruit your staff? Yes! We all do. For example, if I want someone for a driving job, the successful applicant will have to show that he is qualified, legally and medically, to drive. These are reasonable and justifiable selection criteria. Not all discrimination is unlawful or even bad practice.

It is when the selection or exclusion of candidates is based on unlawful and unjustified criteria that we run into trouble. So if you want a van driver, you can ask for a driving licence – but you can't require applicants to be over the age of 25. Insurance is very expensive for drivers below 25, but the cost of insurance alone would not be a justifiable reason for refusing to employ a suitable applicant who is only 23.

You have to be able to justify your selection criteria in objective business terms. Setting unnecessary standards for qualifications, experience or personal qualities may be indirectly discriminatory. If you can't objectively justify criteria, you may face a claim for unlawful discrimination.

Example

A construction company advertised for staff. The job entailed little more than digging holes in the ground. The person specification stated that the jobholder had to be able to read and write fluent English.

An applicant of Asian origin challenged this criterion successfully, arguing that it was indirectly discriminatory on grounds of race and couldn't be objectively justified: the jobholder did not need to be able to read and write fluent English.

2.5 Advertising

If you decide that you need to fill a vacancy, you will have to carry out a broad trawl of available candidates. There is no legal requirement to advertise and sometimes there will be an internal candidate who has already been identified as a suitable person for the job. However, you should show that it is your normal practice to give a range of suitable applicants the opportunity to register their interest with you.

What to include in a job advert

-Job title
-Some information about the job content
-Where it is based and whether there will be any travel
-Salary range
-Essential requirements of job-holder
-How to apply
-Recruitment process to be used
-Timescales

Think carefully about how job seekers will respond to what is in the advert. You want to ensure that the type of people you are looking for will be drawn to the advert, so describe the job in terms that will be attractive to the desired personality type.

Avoid words such as 'youthful outlook', 'junior, 'mature,' or 'senior,' which may indicate that you are looking for people in a particular age group. Saying something like 'this is a junior position in the division' or 'this is a senior position in the company' or using titles, such as 'Junior Sales Clerk' or 'Senior Officer', is probably acceptable because you are simply indicating the position's level in the hierarchy.

You should also avoid some types of descriptive words because it seems that these too may be associated with particular groups. For example, it has been successfully argued that 'enthusiastic', 'energetic' and 'dynamic' are descriptions (allegedly) associated with younger applicants, while 'responsible', 'stable' and 'reliable' (again allegedly) may describe older workers. While commercial reality tells us it is quite nonsensical to consider age groups in that way, you must take into consideration that a description which has not been properly thought through may create a prima facie case of discrimination. If you cannot explain the requirement for an 'energetic' candidate to the satisfaction of an employment tribunal, it can lead to a successful claim being made against you. Remember that you can be taken to tribunal by someone you have never even met. Some people will seek to take advantage of any slips you might make. You need to think through and be able to justify all your requirements every step of the way.

Example

Ms Keane is an experienced accountant in her early 50s. In 2007 she made around 21 online applications for jobs for which she was over-qualified. All the adverts were clearly aimed at recently qualified accountants, involving responsibilities for someone of comparatively limited experience. As soon as she knew that she was not being offered an interview, Ms Keane issued a statutory age questionnaire and then submitted age discrimination claims.

In each case, she had sent in identical CVs and covering letters (which included the same typing and spelling errors), did not follow up any of the applications by telephone, and on the one occasion where she was offered the chance to explore other opportunities, she turned it down. The tribunal concluded that she was not really interested in any of the jobs applied for. It was not satisfied that she had adequately explained why she had applied for jobs for which she was significantly over qualified.

Ms Keane appealed to the EAT on the basis that the age regulations do not state that a job applicant must be genuinely interested in accepting the job applied for. According to the EAT, this was "self evident" and it dismissed the appeal.
Keane v Investigo [2010]

While Ms Keane was unsuccessful, this case serves to remind employers that there are some unscrupulous individuals around. If you receive applications from candidates who appear to be over-qualified for the post, ask additional questions to find out why they are applying for the job.

It was once common to see advertisements specifying a number of years' experience. With the advent of age discrimination, that has all but disappeared, as asking for a particular number of years of experience tends to favour older workers.

In most cases, it will be better to ask for a particular type of experience. For example, it might be better to ask that candidates can demonstrate a record of 'successful sales experience in a number of different settings' rather than '10 years' sales experience.'

2.6 Health screening

The Equality Act 2010 substantially reduced the circumstances in which pre-employment health screening can be used. The law now says that an employer must not ask about the health of a candidate before offering work to the candidate.

The effect of the change means that any health screening should generally take place after an offer has been made (on a conditional or unconditional basis). This prohibition also applies to questions asked by an occupational health advisor on behalf of the company.

Once the job offer has been made, any questions should be appropriate and relevant to the job applied for and they should not be excessive in their probing. It would therefore be acceptable to ask about back and joint problems if a job involved some degree of lifting that could not be mechanised. Where it becomes apparent that the candidate has a disability, the employer will have to consider taking such reasonable adjustments as it can to enable the employee to continue in work. A failure to do so may lead to a complaint that the employer has not made reasonable adjustments as required by the legislation.

Information collected about health, both physical and mental, is covered by the Data Protection Act 1998 and express written permission must be given by the data subject to allow you to collect and process it.

2.7 The selection process

Decide how you want candidates to supply their information. There is an increasing range of choices, including CV format on paper or on-line applications with additional supporting documentation. You may decide that you want to use tests or psychometric testing as part of the selection process and you need to consider what will be appropriate.

Application forms can be designed to collect the exact data you require, so the form rather than the candidate determines what information is included. It is also much easier to compare information submitted by candidates when it is all in a standard format. Candidate data is covered by the Data Protection Act, so if you do use application forms, make sure that you include a section which says that the candidate permits you to collect and process his data for the purposes of recruitment and employment. This should be signed and dated by the candidate.

The interview process is one of the least reliable in predicting future success in a job (approximately 33 per cent!), but it continues to be the most widely-used method, because it's relatively cheap and quick. In some cases short telephone interviews can be the most effective way of establishing initial facts about a candidate.

You can improve your chances of recruiting the right person at interview by testing a candidate's suitability. Tests that relate directly to the type of work to be undertaken can increase your knowledge about a candidate's skills and abilities.

When you invite candidates to come for an interview, make sure that you accommodate any special requirements they may have, where this is reasonably possible. Failure to do so may be a failure to make reasonable adjustments for someone with a disability.

When selecting a candidate, always keep in mind that you may be asked for feedback. If you can't justify the reasons for having rejected a candidate to yourself, it will be far harder to do so to the unsuccessful candidate. Always bear in mind that if you haven't probed for information on a particular subject, you can't assume one way or another whether the candidate has a particular quality or skill.

When you short-list candidates for interview, use the job description and person specification to reach an objective conclusion. You may have to justify your decision. An applicant has three months within which to bring a claim to tribunal, so keep a record of your short-list decisions for at least four months. To compare findings it can be helpful to set out the evidence demonstrated in a table, as follows.

Example of a short list table

Taking our delivery driver as an example, let's list the essential characteristics.

Selection criteria/ Evidence available	C1	C2	C3
Basic literacy	Y	Y	Y
Driving licence	Y	?	N
Basic numeracy	Y	Y	Y

You can immediately see that it would be worth seeing candidate 1, you would have to ask a question of candidate 2 about his driving licence before seeing him. Candidate 3 lacks a basic requirement and there's no point in calling him in.

2.8 Face to face for the first time

An interview is a fact-finding exercise. Prepare your questions and tests, where used, to probe and examine candidates' skills and knowledge against essential criteria. Don't necessarily expect a fully trained candidate to emerge. This is relatively rare; what you're looking for is good 'raw material', which can be trained to meet your requirements.

An interview needs to be structured, as this helps both you and your interviewee. The opening and closing phases will be brief, but they are important.

As a rough guide, you should aim to talk for no more than 40 per cent of the time throughout the interview. Make full notes of your questions and the answers. Make sure your notes are objective and accurate.

Keep detailed records of what the candidate says. Take your time and write down each answer after he has finished speaking. Don't try to do everything at once. Note that the Data Protection Act allows candidates to ask to see your interview notes, so make sure your notes are accurate and objective. Do not write notes like "black woman, nice smile". It really doesn't matter what colour she is.

During the interview, avoid making promises that can't be kept – they may be legally binding.

Stage 1: Introduce yourself and then outline the format of the interview. Tell the candidate what to expect, how long the interview will last, what you want of him and what you will tell him.

Tell him that you will be taking notes so that you can keep an accurate record of what he has said in the interview.

Build rapport. A good way to do this is to look at the candidate details you have in front of you and pick out the things that naturally interest you so that you can talk about them.

Stage 2: Gather information systematically. Question the candidate in a methodical way and thoroughly probe the competencies and personality traits you have decided to explore. Do not finish questioning until you have got the information you want.

You might find it useful to ask behavioural questions. These require the candidate to describe specific past situations where he may have used the behaviour you are trying to assess.

Example

Tell me about a time you had to deal with a customer who had received poor service elsewhere and assumed that you would offer the same poor level of service.

You can probe past behaviour to find out if the candidate has had the opportunity to acquire skills, his approach to using the skills and look for evidence that he was successful in using the skills. Follow up these questions with open questions to get a full picture.

Some useful questions

What impression did you form of that technique?
Tell me about your present job.
Why did you decide to leave that job?
How would you describe your relations with outside contractors?
What experience do you have of XYZ activity? Describe that to me.
What do you most enjoy about your present job?
What do you like least about your present job?
Tell me about a time when you did XYZ. How did you feel about that?

Control the interview. Remember you are in charge. If the candidate is not going into enough detail, ask him to expand on what is being said. If he is talking too much, ask him just to give you the important points.

Stage 3: Do a final question check. Look through your notes and do not finish the interview until you have asked all the questions you planned.

Tell the candidate what the next stage of the process is and when he will be hearing from you.

Allow for any final questions. Thank the candidate and say goodbye.

2.9 Common mistakes at interview

One reason why so many interviews yield relatively poor results is that it is all too easy for the interviewer to fall into one of several traps.

We all have preferences in terms of appearance and behaviour and it's easy to be disproportionately affected by these. But note that these minor things don't mean that the candidate can't do the job. The types of thing that interviewers may recoil from include, baseball caps, scruffy clothing or trainers, too much perfume/make up/jewellery. There are many more! Recognise and put aside your personal preferences and concentrate objectively on the relevant facts.

Some employers delay their recruitment activities until they're really desperate for staff. This often means that the employer will accept a deviation away from the requirements of the person specification. In fact, they will accept almost anyone with a pulse to do the job. Inevitably, serious mistakes occur when you are in this frame of mind. Plan your diary properly to avoid making this mistake.

Human beings tend to draw conclusions based on a variety of things, including racial stereotypes. One of my former bosses was convinced that a strong handshake meant that the person was a good leader. There is no evidence that a strong (or weak) handshake means anything of the sort. Collect all the relevant facts presented by a candidate and compare them to the criteria for the job.

People are drawn to people like themselves. We feel rapport and a sense of sameness with others with whom we share certain similarities. Just because a candidate supports the same football team as you, plays golf or has children at the same school does not mean that they're the right person for the job. Collect all the relevant facts presented by a candidate and compare them to the criteria for the job.

Many interviewers pride themselves on their ability to judge a candidate immediately. All you really know about someone after 30 seconds is how they look and sound. You don't know anything about their ability to do the job. Keep questioning to gather objective evidence.

2.10 Testing

Many employers use tests to assess skills and aptitudes. This can be very useful for gaining additional information about candidates. However, use appropriate tests and ensure that they are relevant to the job. Where you use psychometric tests, they must be administered and interpreted by a qualified person.

Ensure you offer support to applicants who have a visual impairment or other disability that may adversely affect their performance.

Example

Mr Paterson joined the police force in 1983. He had reached a senior level before being diagnosed with dyslexia in 2004. This was sufficiently severe to be regarded as a disability. In the course of a promotion examination he complained that because he wasn't given additional time to complete the paper, he was placed at a disadvantage compared to other candidates who did not suffer from dyslexia.

The EAT found that taking an examination could be considered to be a normal day-to-day activity. It said that employers should interpret 'normal day-to-day activities' widely and include activities which are relevant to participation in professional life, and not just more mundane 'daily' tasks such as shopping, cooking and cleaning.
Paterson v Commissioner of Police of the Metropolis (Metropolitan Police) [2007]

NB The Paterson case was heard under the old Disability Discrimination Act 1995. The rules about 'day-to-day activities' were slightly different to those now followed under the Equality Act 2010. However, the decision would be the same.

It may be appropriate to use translated versions of a test in the case of candidates for whom English is a second language.

2.11 After the interview

Keep records of interviews for up to four months. They can be evidence if you go to tribunal. Following the interviews, send out rejection letters to unsuccessful applicants as soon as possible. Arrange second interviews (if appropriate) and invite applicants to attend. Alternatively, send out a job offer and take up references.

2.12 References

If you are recruiting, always take up references. They're a useful way of checking information given in a candidate's CV or application form and can give you advance warning of potential problems.

Your offer letter should stipulate that the offer is conditional upon the receipt of references that are satisfactory to the company.

Under the Data Protection Act, employees are not able to demand copies of personal references given by their current employer, but they can ask the recipient of the reference for a copy. As a general rule, if an employee asks to see a reference, you should allow him to do so, but without allowing the name of the provider to be seen.

If showing the reference to the employee would allow him to identify a third person as the provider of the information and this third person has not given permission to the disclosure, you can withhold the reference.

Example reference request

Name of candidate:

Job title: Final salary:

The above applicant states that he worked for your company between [date] and [date] as a [job title].

Would you confirm that this was so. If there is any discrepancy in the information, please advise us of the correct position.

Final salary:

Reason he/she left employment:

Number of days of sickness absence in last three years. Please show reasons for sickness absence:

Were there any disciplinary warnings live on his/her file at the termination of employment? If so please give brief details:

Was the employee the subject of disciplinary proceedings at the time he/she left the company:

	Satisfactory	Unsatisfactory
Relationships with staff/ third parties		
Timekeeping		

[Where applicable] Please give his/her last appraisal rating, indicating where it falls on your scale:

Name (please print)

Signature

Position Date

Chapter 3 Contracts of Employment

3.1 Introduction

Contracts of employment are the foundation on which the employment relationship is built. The contract itself may come from a variety of sources, some written, some verbal. They can be very useful for setting out the rights and responsibilities of both parties. The Employment Rights Act 1996 also requires employers to give employees a written statement of the main terms of their employment within two months of the beginning of the employment. The matters to be covered in the statement are listed in the Act and include details of pay, hours, holidays, notice period and disciplinary and grievance procedures. These are the minimum and you can add more if you wish. While two months may be the limit, it is obvious good sense and good practice to have this prepared as soon as possible.

3.2 What are the benefits of having a properly drafted statement?

Many small employers don't have their own terms and conditions. They usually 'lift' the words from a family member's contract of employment and top and tail it with the name of their company. Then they think they're compliant. They usually don't understand what they've done, the significance of a contract or appreciate the need to review it on a regular basis.

There are a number of excellent reasons for ensuring that you have a good contract of employment in place.

- Compliance – as an employer you're under a legal duty to provide a written statement of the main terms and conditions of employment within eight weeks of an employee starting work with you.
- Employees know what their rights and responsibilities are and what will happen if things go wrong.
- It provides protection for both parties.
- It means that both you and your employees know what to expect.
- A good contract delivers clarity, transparency, certainty and will help you run your business more effectively.

Do make sure that your written statements are reviewed about every three years. There's no legal requirement to do so, but it is very likely that the requirements of your business will have changed in that time and it will certainly be the case that technology and social customs have changed. These have an impact on your work environment and should be reflected in the contract.

One obvious cause of the need to review statements is that new technology brings advantages to our businesses, but it also brings risks. We have to identify and manage the risks and communicate our requirements to our employees.

Example

In 1999, Norwich Union were sued for libel and had to pay £450,000 in damages. Libel is a written untruth causing damage to the reputation of an individual or company. This came about because a Norwich Union employee sent an email suggesting that a competitor, Western Provident Association, was in financial difficulties and under investigation by the DTI. This was an untrue statement. Norwich Union had no email policy. They hadn't identified and attempted to manage the risks. As a result they were liable for the employee's inaccurate email and had to pay substantial damages.

3.3 Who should have a set of terms of employment?

Employees are entitled to have terms of employment. 'Employees' are defined as people who have and are bound by a contract of employment. Employees work under a contract of service. Workers in the wider sense (for example, agency workers) work under a contract for services.

Statutory employment rights are minimum terms. Employer and employee are free to agree better terms between themselves in a contract of employment or collective agreement. When the terms of a contract of employment are broken, either the employee or the employer may have grounds to make a complaint of breach of contract to the tribunal or court.

If you fail to provide an employee with a set of written terms of employment, or a complete or accurate statement or notification of a change to the written statement, the employee can complain to tribunal. The tribunal will award minimum compensation of two weeks' pay (based on the statutory cap used in the calculation of redundancy at that time) and may increase it to four weeks if it considers it just and equitable to do so.

3.4 What must be included in the written statement?

The statement of written particulars is divided into two parts. The items in the first part must all be included in one document. These are:

- the names of the employer and employee;
- the date of commencement of employment;
- the date when continuous employment began;
- the scale or rate of remuneration or the method of calculation;
- the intervals at which remuneration is paid;
- terms relating to hours of work including any provisions relating to normal hours if any;
- holiday and accrued holiday pay including any entitlement to bank holidays and accrued holiday pay on termination of employment, in sufficient detail to enable precise calculation of the sums;
- job title or brief job description; and
- place of work or if there is none this must be indicated and the address of the employer included.

The other information, as follows, can be delivered separately. These are:

- terms relating to sickness and injury terms, if any;
- any pension terms (contracting out certificate details if contracted out), although this does not apply if the pension scheme is a statutory one and the pension body or authority has to provide the information;
- length of notice to be given by each party;
- expected length of temporary employment (includes fixed-term and time-limited contracts);
- collective agreements affecting the contract if any;
- where the employee is to work abroad for more than one month, the terms relating to working abroad, including the period of work outside the UK, currency of remuneration whilst abroad, any additional remuneration and benefits and any terms relating to his or her return;

- a note:
- specifying any disciplinary rules applicable to the employee or referring the employee to the provisions of a document specifying such rules that isreasonably accessible to the employee;
- specifying any procedure applicable to the taking of disciplinary decisions relating to the employee, or to a decision to dismiss the employee, or referring the employee to the provisions of a document specifying such a procedure that is reasonably accessible to the employee;
- specifying the person to whom the employee can apply if dissatisfied with any disciplinary decision relating to him or her or any decision to dismiss him or her and the manner in which any such application should be made;
- specifying the person to whom the employee can apply for the purpose of seeking redress of any grievance relating to his or her employment and the manner in which any such application should be made;

- where there are further steps, explaining these or referring to the provisions of a document that gives an explanation and is reasonably accessible.

- It should be noted that this does not apply to rules, disciplinary decisions, decisions to dismiss, grievances or procedures relating to health and safety at work.

Failure to provide a written statement of the terms of employment can now attract a financial penalty. An employee can apply to an employment tribunal, which will determine what the particulars should be and order that the employer supply them to the employee.

You can include additional matters in your written particulars. In particular, I recommend that you include guidance in the following areas:

- dress code;
- personal mobile phones;
- dignity at work policy;
- internet and email policy;
- social media usage policy.

3.5 Terms of the agreement

The terms of the contract are fixed when the parties enter into the contract, even if they have not negotiated all the terms or confirmed them in writing.

The agreement must be sufficiently precise to enable the key terms to be identified.

Because the terms are fixed at this stage you will need to take care in the following instances:

- Where a formal contract is to be issued at a later date, the initial contract should provide that the parties agree that it will be replaced by a formal contract at a later date.
- Where it is known that new contract terms are to be introduced, the contract should provide that the employee will be employed on these new terms when they are introduced.
- Where there is a considerable gap between the date of acceptance and the date of commencement of employment (such as when offering employment to undergraduates) and there is the possibility that terms may have changed, the employment could be offered on the terms prevailing for that position at the date of commencement of work.
- Where the employer issues a written statement of particulars after work has started, the particulars must reflect the terms as at the date of agreement.

Once the parties have entered the contract the terms can only be changed if the contract allows for the change or both parties agree to it.

3.6 Implied terms

In addition to the express terms in the written statement, i.e. the terms which are written down or specifically agreed, other terms may also exist in a contract. These may be terms which are not written or even agreed, but are an understood part of the contractual arrangement. These are known as implied terms. For example, an employee is under a duty to give personal service and both employer and employee are under a duty to behave reasonably.

In some cases an implied term can over-ride an express term.

Example

In the following case, there was an express mobility clause in the contract allowing the bank to move employees anywhere in the UK. Mr Akhtar was asked to move from Leeds to the Birmingham branch of the bank. His employer gave him six days in which to effect the move.

While Mr Akhtar accepted this mobility clause as an express term of his contract, he asked for three months' notice to move, as he had to sell his house and his wife was ill. The bank unfair dismissal on the grounds that in requiring him to make such a move in six days the bank was behaving wholly unreasonably and was therefore in breach of its implied duty to behave reasonably.
United Bank v Akhtar [1989]

If there is no express agreement the court or tribunal may imply a term. This could be based on:

- the conduct of the parties;
- a custom in the workplace, trade or area of employment or the region of employment;
- a custom implied at common law; or
- the fact that the court or tribunal believes that the parties would have agreed to the term had it been put to them.

3.7 Incorporated terms

If the contract refers to another document, it is incorporated, which means it forms part of the contract. So a reference to a company policy, collective agreement or employee handbook will incorporate the relevant document into the contract or the offer letter, provided the wording makes this clear.

Incorporated terms are express terms so make sure you are clear in the contract exactly what is incorporated. If, for example, the contract refers to a company handbook, an employment tribunal may see the whole handbook as contractual. It would therefore be wise to identify exactly which parts of the handbook are incorporated into the contract of employment and which are not.

Employer and employee are generally free to agree terms and conditions of employment and these expressly-agreed terms will usually prevail unless the law intervenes to override or vary contradictory terms. For example, if the National Minimum Wage rate changes and as a result an employee's hourly rate falls below that specified by Parliament, the statute will have the effect of implying the new National Minimum Wage rate into the employee's individual contract.

Terms may also be incorporated into the contract by reference to other documents: for example, collective agreements between an employer and a recognised trade union. A term may be implied from a custom in the workplace or a custom in the trade or region. Workplace customs may be based on collective agreements.

Example

In one case the Court of Appeal held that an employer that made enhanced redundancy payments according to an agreed policy for a number of years created a custom and practice from which it could be inferred that the employer intended to be contractually bound to make those payments.
Albion Automotive Ltd v Walker & others [2002]

3.8 Variation of contract

There are several ways in which an existing contract may be varied.

3.8.1 Variation by mutual agreement

Most changes take place by mutual consent. It is always sensible to obtain express agreement, in other words documented evidence that the employee has agreed to the change. Where a contract has been varied, confirmation of the varied term or terms must be confirmed in writing within four weeks of the effective date of the variation.

In some cases, agreement can be implied if the employer proposes a change and the employee carries out the job under the changed conditions without complaint. However, there can be problems with this, especially where the terms are not immediately effective. It is still advisable to try and obtain written agreement. Don't assume that silence denotes consent. If the term being varied has not been tested and is not agreed in writing you don't know (until you try) what will happen. The mere passage of time does not mean that an untested term has been accepted.

Example

Ms Aparau was a checkout supervisor at the Wood Green branch of the Bejam Group. Her contract of employment with Bejam contained no place of work or express mobility clause. She moved voluntarily from Wood Green to Whetstone (a distance of around four miles), for about six months for Bejam, before returning to Wood Green.

The Bejam Group was sold to Iceland. When Iceland took over the store, it issued new written employment contracts to all Bejam staff. These new contracts stated not only the branch where the employee would normally work, but also "*You may be required to move to a different location at any time*".

Ms Aparau did not return the signed duplicate set of the new terms, and mentioned informally to a supervisor that she was unhappy with the new contract. She never complained formally. The matter was not explored. From April 1989 to July 1990 Ms Aparau continued to work at the store. During this time a difficult working relationship developed with her store manager. After an argument, a senior manager ordered her to transfer to another store. This was at East Finchley, about two miles away. She refused to move to the other store, resigned and then claimed unfair dismissal using the constructive dismissal option.

Agreeing with her, the EAT said it was wrong to reason that the length of time during which she had not objected to the new mobility clause was significant. There was no express mobility clause in respect of Ms Aparau's employment, and such a term could properly be implied.
Aparau v Iceland Frozen Food Stores [1996]

3.8.2 Variation by collective agreement

Where an employer negotiates with a recognised union or other body that represents the interests of the workforce, the variation could become incorporated within the individual contract of employment either by an express provision or by implication or custom and practice.

The outcome of collective agreements should be expressly incorporated into contracts and this can be achieved by inserting wording which indicates that employees are employed on the basis of any national or local agreements currently in force.

3.8.3 Variation by flexibility clause

Some contracts of employment contain a clause giving the employer the right to vary the terms of the contract. They may, for example, relate to an employee's rate of pay, working hours, place or conditions of employment.

However, this does not give you carte blanche to make any changes you want. Even with such a clause, the changes are confined to those of a minor, non-fundamental type.

3.8.4 Variation by incorporation

If legislation is passed with requirements that exceed those of the existing contract, the new statutory terms will automatically replace the contractual terms. A typical example is the National Minimum Wage, which gave employees and workers the right to a minimum hourly rate of pay.

3.8.5 Variation by dismissal and re-engagement

This operates where there is no consent and change can only be achieved by the employer terminating the existing contract and offering to re-engage the employee on different terms. This is not a course to be recommended as there is the strong possibility of any unfair dismissal claim succeeding.

Example

In the early 1980s, Rupert Murdoch wanted to move his newspaper print works from Fleet Street to Wapping. The workforce was still heavily unionised and they refused to move voluntarily, so he dismissed them and recruited new staff. They picketed the new workplace for months and it was an acrimonious and highly public dispute.

3.8.6 Variation by custom and practice

Some terms and conditions of employment become established because things have been this way for a period of time. They are often not written down but rapidly become accepted. An example might be going home early on Fridays.

Chapter 4 Prevention is better than cure

4.1 Introduction

The starting point in achieving optimum efficiency and few problems from employees is to tell them clearly what is required and to provide such support as is necessary to help them to achieve it.

Part of a manager's role is to monitor performance and conduct and (this is the bit most people struggle with) to tell employees what will happen if the standards are not met.

4.2 Standards

A standard is the minimum level of conduct, performance or behaviour acceptable to the company. You have to learn to express standards in clear, precise and measureable terms. If you won't or can't, you'll find that employees misinterpret (genuinely or maliciously) what you're saying. It can be very frustrating!

As human beings we are not by nature very specific in our conversational speech. We tend to say things like, 'You must be here on time.' And then we're irritated when employees come sauntering in ten or fifteen minutes after the time we mean (but haven't specified). Don't expect employees to automatically interpret your statements in the way you mean them. We talk very generally, but to get the results you want you must learn to be more precise and detailed. It would be more effective to say 'You must be at your work-station and prepared to start work at 8am.'

Subject to the over-riding requirement of reasonableness, be as precise as you can about what you want.

4.3 Your requirements have to be clear

If you are not clear about what you want, don't be surprised if employees don't deliver exactly as you would wish. The duty is on you as the employer to be clear. If your communication lacks clarity and you take steps to dismiss an erring employee, you may find that the dismissal is unfair.

Example

Mr Reid was a Maintenance man/ Caretaker who was caught drinking a pint of lager shandy at a health club during working hours.

His employer's policies had fairly typical wording classing 'being under the influence of alcohol' during working hours as an act of gross misconduct (*disciplinary policy*) and the 'consumption of alcohol or being under the influence of alcohol by an employee while performing Company business or in the workplace' as prohibited and which could lead to 'discharge' even for a first offence (*alcohol and drug policy*). The latter did not classify the consumption of alcohol as gross misconduct. It also confused matters by saying that the consumption of alcohol during working hours when outside the workplace and not undertaking employment duties was not prohibited.

Mr Reid was summoned to a disciplinary hearing for 'being under the influence of alcohol during working hours' and was provided with a copy of the employer's disciplinary policy. He was not however provided with a copy of the alcohol and drug policy.

At the hearing Mr Reid accepted that he should not have been drinking which suggested that he knew of the employer's policy on alcohol consumption. He was summarily dismissed for consuming any amount of alcohol during the working day. In the letter confirming the dismissal the employer stated two reasons for dismissal: consuming alcohol during the working day; and being under the influence of alcohol during working hours. Mr Reid was at this point provided with the alcohol and drug policy. Mr Reid appealed to the employer saying that he was not under the influence of alcohol. The internal appeal was dismissed as he had consumed alcohol during working hours.

The EAT found that the employer's policies were confusing, even to the officers tasked with enforcing them. The alcohol and drug policy alone referred to consumption of alcohol and that policy was not provided to Mr Reid until after the dismissal. The employer had failed to establish at the disciplinary hearing that Mr Reid was under the influence of alcohol. Further it found that the employer's policies were confusing and Mr Reid's admission during the hearing did not point to knowledge of the policy as that did not prohibit all drinking during working hours.
Liberty Living plc v Reid [2011]

In order to clearly communicate standards, an employer must show:

- That it has clear policies.
- That the policies do not conflict with each other.
- That the policies have been published and employees are aware of the policies and the consequences of any breach.
- That its managers are aware of the policies and have been trained on them.
- Ideally that it holds evidence that employees are aware of the policies, for example, signed acknowledgement slips.

4.4 Rules

The rules are the dos and don'ts of the workplace, and disciplinary rules set the standards for the organisation. They may specify standards in the following areas:

- punctuality;
- attendance;
- performance;
- appearance;
- conduct;
- safety.

Such rules must be clearly communicated to all employees as soon as possible so that everyone knows and understands what is expected from them.

Rules should be written down, both to ensure employees know what is required of them and to avoid misunderstandings. They must be non-discriminatory in content and in application and staff must have access to written rules.

Example

Mrs Mallidi, a postal worker of Indian origin, was asked to take a written aptitude test in order to remain in employment, when a number of comparable white employees were given temporary or permanent contracts without having to take a test. When she complained of racial discrimination to her employer, the management failed to investigate the matter seriously. The employment tribunal found this failure to address legitimate complaints to be direct discrimination on grounds of race. She had received 'less favourable treatment' than her white counterparts and was awarded £19,757.19 in damages.
Mallidi v Post Office [2000]

Disciplinary and grievance rules should be reviewed and updated periodically. Where a ruling has fallen into disuse or has not been applied consistently, inform employees in advance of any agreed changes or reintroduction.

4.5 Timing and recording

Explain important requirements to people at the very earliest stage – recruitment. It is much better to cover a matter that may be difficult or contentious (shift work and uniform are frequent examples) before you make a job offer. Standards must be communicated to all staff.

Once someone has started work, go through all the key standards at induction. Make sure you keep a record of what has been covered and obtain a signature from the employee as evidence that he has been taken through the main points.

Reinforce standards on a daily or weekly basis in the workplace and at appraisal.

Special attention should be given to explaining the rules where work is carried out by young people (in other words, those between the ages of 16 and 18 years), by those with little experience of the work, or by staff whose English language skills may be limited.

Chapter 5 Keeping Records

5.1 Introduction

Some people have perfect memories. But for the rest of us there are notebooks.

It's quite impossible to sufficiently emphasise the importance of taking clear accurate notes. We are all so busy these days that unless we keep full and accurate notes of conversations with employees we won't stand a prayer of remembering what we've said to whom and when – and what they have said in response. I am reputed to have a memory like an elephant – accurate, detailed and extremely inconvenient for those transgressing in some way; but the secret to my success is a big stack of notebooks!

5.2 Benefits of keeping good records

If you keep accurate notes, made at the time of the discussion (or soon afterwards), you will have a valuable management tool, which provides an audit trail. You will also develop a very useful reputation for being on top of things and difficult to fool. If you note things at once, it gives a message to employees that you are taking things seriously.

You will find that your notes prompt you to take follow up action. If you note things that go well, in addition to things that are not going so well, you can demonstrate that you are taking a balanced and proportionate approach. This in turn can be used as evidence in your performance appraisal meetings. Collecting evidence to discuss is always a bugbear for managers.

Your notes should always be courteous and helpful in tone. Notes are your PR if you go to tribunal. They can help to dissuade bodies like the Citizens Advice Bureau or solicitors from guiding potential claimants to take action against you if it's quite clear that you have discharged all your responsibilities in a reasonable way. Never miss an opportunity to point out how reasonable and helpful you are!

5.3 What sort of thing should be noted?

Make your notes in a bound notepad. Write in ink and start each page with a date and record the names of the parties to the conversation. This shows that you made a note at the time – or soon afterwards. In the case of informal guidance conversations, I tend to refer to the fact that I have given a copy of my notes to the employee.

Note everything! By this I mean:

- Questions and answers at selection interviews.
- Induction and workplace training – get a signature and date.
- Informal guidance.
- Formal discipline.
- Grievances.
- Any part of the redundancy process.
- Performance appraisal.
- Contract matters and changes in contract, including a pay rise.

With informal coaching or correction, get a signature from the employee if possible, acknowledging that the conversation has taken place. It's not essential and the notes will still be useful, even if the employee refuses. Make sure that the tone of your records is objective, proportionate and accurate. Stick to the facts and don't make derogatory remarks. In a situation where you offer help and support to an employee, note that fact.

Notes of formal disciplinary discussions are essential. These will be important if the decision is appealed internally and vital if your employee is dismissed and brings a claim for unfair dismissal. The notes should accurately reflect your employee's explanation and any admissions he might make, the questions put and his responses. They should also create a record of the formalities of the hearing so that there is no doubt that he was advised of all the important issues.

Your records should give details of the nature of any breach of disciplinary rules or unsatisfactory performance, the defence or mitigation put forward, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments. These records should be kept confidential and retained in accordance with the disciplinary procedure and the Data Protection Act 1998, which requires the release of certain data to individuals on their request. Copies of any meeting records should be given to your employee if he requests it, although, in certain circumstances, some information may be withheld, for example, to protect a witness.

5.4 How long should I keep records?

By law you must keep certain records for a set period of time. However, it is a good idea to keep records for six years (five in Scotland) to cover the time limit for bringing any civil legal action against you, including national minimum wage claims and contractual claims.

Type of record	Statutory retention period
Workplace accidents	Three years after date of last entry. There are specific rules on recording incidents involving hazardous substances.
Payroll	Three years after the end of the tax year they relate to
Statutory maternity, adoption and paternity pay	Three years after the end of the tax year they relate to
Statutory sick pay	Three years after the end of the tax year they relate to
Working time	Two years from date on which they were made
National minimum wage	Three years after the end of the pay reference period following the one that the records cover
Retirement benefits schemes – notifiable events, eg relating to incapacity	Six years from the end of the scheme year in which the event took place
Type of record	**Recommended retention period**
Application forms/interview notes for unsuccessful candidates	One year
Health and safety consultations	Permanently
Parental leave	Five years from birth/adoption, or until child is 18 if disabled
Pensioners' records	12 years after benefit ceases
Disciplinary, working time and training	Six years after employment ceases
Redundancy details	Six years from date of redundancy
Information on senior executives	Permanently for historical purposes
Trade union agreements	Ten years after ceasing to be effective
Minutes of trustee/work council meetings	Permanently
Documents proving the right to work in the UK	Two years after employment ceases

Keep records which relate to workplace accidents in case of later litigation.

5.5 Data protection

The Data Protection Act 1998 governs the use of personal data held about an individual by businesses and other organisations. The data you hold about employees is covered by the Act.

The Act requires organisations to comply with the following principles to ensure that data is:

- fairly and lawfully processed;
- processed for limited purposes;
- adequate, relevant and not excessive;
- accurate;

- not kept for longer than is necessary;
- processed in line with your rights;
- secure;
- not transferred to countries outside the EU without adequate protection.

You should tell employees if personal data is being held about them and how their information will be used. In the chapter on recruitment I referred to obtaining prospective employees' permission to collect, process and store data for the purposes of recruitment and possible employment.

The Data Protection Act covers computerised records and some paper records, providing they are held in a relevant filing system which must be well-structured or have some sort of system.

Sensitive personal data (for example, information about an employee's health, racial or ethnic origins, religion or belief, sexual orientation or criminal history) may not be held on an employee's personal file without his written consent.

You may also retain information relating to an employee's expired disciplinary warnings, although as one of the data protection principles is to ensure that data is not kept for longer than is necessary, you should review whether the information should still be kept. There's very little case law on this, so take a pragmatic approach. Where a warning has expired without further transgression, I tend to update the file to say that the warning is now to be disregarded. After several years, I may remove the warning if it is for a minor matter, though I will note the fact that a warning (now expired) was once given, when and for what, because it is part of the historical record. I keep details of serious disciplinary matters on file.

Chapter 6 Enforcement

6.1 Introduction

One of the fundamental requirements of being a reasonable employer is dealing with dips in performance or conduct at an early stage. Most managers have to achieve results through the activities of their team. It is your responsibility (and your right) to provide guidance and correction. If an employee is in breach of a relatively minor rule, you should counsel him to improve. The key issue here is to talk to him as soon as a rule or standard has been breached. If you act promptly now, you will probably save time and effort later on. The purpose of discipline is correction rather than punishment – at least in the first instance

6.2 Dealing with problems informally

If an employee is in breach of a relatively minor rule, you should counsel him to improve. The key issue here is to talk to him as soon as a rule or standard has been breached. If you act promptly now, you will probably save time and effort later on. Have one or two informal discussions. If there is no improvement at that point, move to the formal procedure.

This is an informal discussion, so there is no need to write in advance or offer a companion. Hold the meeting in private.

- Explain that it is an informal discussion and that you have some concerns.
- Point out the actual performance of the employee and go through the evidence.
- Explain the work standard required.
- Ask for an explanation.
- Offer help, support, encouragement and training, as appropriate.
- Agree an action plan for improvement, setting out what success looks like.
- Advise of the consequences of failure to meet the required standard: in other words an escalation to the first formal stage of the disciplinary process.
- Set a timescale and dates for review.
- Make notes of the conversation. Give a copy of agreed actions to the employee. There is no need to write a formal letter with a copy to HR because this is an informal discussion.

Only have one or two informal conversations. If there's no improvement, start to take the employee through the formal disciplinary process.

Avoid using the phrase 'informal warning'. If you introduce the word 'warning' into the conversation, you're into the realms of formal process, with all the procedural whistles and flutes that that entails.

6.3 Taking formal action

If the employee does not improve, or if the matter is more serious, consider taking formal action.

Before a disciplinary interview, the necessary groundwork must be completed.

If you know (or think you know) that there is a disciplinary problem, you must carry out an investigation to collect, collate and review the relevant facts. The investigation is not part of the formal disciplinary process. Ideally, the investigation should be carried out by someone other than the person likely to chair any disciplinary hearing, although this is not always possible, especially in small firms. It's not a legal requirement to do so.

Carry out the investigation promptly to find out all the relevant facts before memory fades. Include anything the employee wishes to say. If, in serious cases, there are witnesses, take statements from them at the earliest opportunity. Make sure the statements are written, dated and signed. Everyone should be clear precisely what the complaint is.

Example

One of our clients recently dismissed an employee, John, who was often late for work. Over the last year, John had suffered a bereavement in his family. The employer had been very supportive, allowing John time off to work flexibly to come to terms with his loss. But times are hard and it was important that once the initial problems were sorted out that John put the requisite effort into work and attended on time. He did not do so. After an initial conversation where John did not respond positively, the employer decided to escalate matters to the formal process. The decision was taken to dismiss him. John had less than a year's service and didn't fall into one of the exceptions, so he appealed against his dismissal alleging that he had been subjected to discrimination connected with his depression (which he asserted was a disability). Discrimination doesn't need any service qualification. To establish a case of discrimination in the first instance the employee has to prove facts which in the absence of any reasonable explanation could be construed as discrimination. If the employee can do that, the burden of proof passes to the employer for an explanation. In this case the issue was that John had attended for work late and the lateness was not for a reason connected with his depression. He did not establish facts which could be construed as discrimination and his argument was not successful.

6.4 Conduct or capability?

Before you start any form of correction, be clear about the nature of the problem.

Is it conduct, i.e., the employee chooses not to meet your reasonable standards; or is it capability, i.e., the employee can't meet your standards.

Examples of misconduct include poor timekeeping and failure to adhere to the Company's dress code (both of which are usually considered to be minor misconduct), through to serious misconduct and gross misconduct, such as fighting at work.

Capability includes poor work performance, failure to acquire or loss of an essential qualification or ill health.

It's not always easy to determine whether a matter is conduct or capability. However, the more you investigate, the closer you are likely to get to the truth.

6.5 Witnesses

In some cases it will be necessary to take statements from witnesses. Take the statements as soon as possible after the events, while the facts are still clear in the minds of witnesses. Include only information on what the witness directly saw, experienced or heard: for example, 'I saw Jane running away'. Exclude hearsay evidence, such as 'John told me that he saw Jane running away'.

Ask the witness to name or describe any other persons who were present and might have witnessed the incident(s). Ask the witness to describe what happened, but do not include the witnesses' opinion on how persons involved in the event were thinking or feeling (for example, 'x was standing by the door and talking very quickly' is OK, but not 'x was very nervous and seemed anxious to get away').

6.6 Burden of proof

In employment law, the legal burden of proof is the balance of probabilities. This means that you should consider on balance whether it is more likely than not that the worker has done (or has not done) that which is alleged. You don't have to prove that the employee is guilty beyond reasonable doubt (the criminal burden of proof).

6.7 Suspension

In cases of alleged gross misconduct, consider suspending the employee from work while the facts are fully investigated. You might take action to suspend if there is a risk of harm to person, property or the business. Suspension must be with full pay.

Suspension should only be used where it is really necessary to do so and it should be for as short a time as is reasonably possible.

When suspending an employee, make it clear that this is part of the investigation process and that he is under a duty to make himself available to assist in the investigation during all normal working hours. Staff who are suspended still have the right to be accompanied at a formal hearing.

6.8 Right to be accompanied

Both employees and workers have a legal right, during formal disciplinary and grievance hearings, to be accompanied by a workplace colleague or a union representative. The right to be accompanied must be offered to employees, but they can choose to waive this right if they wish.

A companion has the right to:

- help the worker prepare for a meeting;
- ask questions;

- make representations on behalf of the worker;
- make notes and act as a witness;
- sum up the worker's case;
- ask for an adjournment where new material emerges;
- not suffer less favourable treatment because he has acted as a companion.

The companion does not have the right to speak in the place of the worker, although you may well find that union representatives take that approach. You should encourage the worker to give his own version of events so that you can ask probing questions and gather as much information about the matter as possible.

6.9 Preparing for a disciplinary hearing – investigating officer

Once the investigating officer is satisfied there's a case to answer, he should write to the employee to set up the hearing.

- Write to the employee, giving details of the complaint against him, a copy of the disciplinary procedure, and details of the time and place of the disciplinary interview. Be precise about the nature of your concern and give evidence supporting your view, including witness statements.
- Remind him of his right to be accompanied by a work-based colleague or a trade union representative.
- Book a suitable meeting room.
- Arrange with another manager or a human resources advisor to be present to take notes.

Give the worker reasonable time to prepare. The time is not laid down by the law, but will depend on your own procedure and the complexity of the matter. I usually give at least two working days. It's a good idea to check with the worker a day or so before the meeting to confirm that he will be ready to go ahead.

6.10 Preparing for a disciplinary hearing – discipline officer

You should also make the following preparations:

- Collate your evidence.
- Prepare possible questions.
- Consider possible answers.
- Familiarise yourself with the disciplinary process.
- Advise witnesses where they may be called.
- If the employee has any special needs – for example, is disabled or has a poor understanding of English – arrange facilities to enable him to fully participate in the meeting.

6.11 Handling discipline hearings

A disciplinary hearing should be a discussion of the facts, not an argument about them. Try to discover whether there are any special circumstances that should be taken into account.

Examine the conduct or performance that is under discussion and explore the gap between the current level of performance/conduct and the required level. Where possible, reinforce your argument with some evidence to support your views.

Allow the employee to reply to the allegations.

Take representations from the companion, if he wishes to make them.

Once you have heard all the evidence, adjourn. Carefully consider and weigh the evidence before you decide on any disciplinary action. The matters to be considered in reaching a conclusion about a sanction are considered in the next chapter. Ensure that your decision is in line with your policy and procedure and that it is consistent with previous similar situations.

If you decide to issue some form of disciplinary penalty, confirm your decision in writing and tell the employee about the appeals process. He needs to know how to appeal, to whom to appeal and the timescale within which he should submit the appeal.

Where appropriate, develop an action plan for improvement. Give a copy to the employee.

Chapter 7 Sanctions

7.1 Introduction

If the disciplining officer has reached an honest belief in the employee's misconduct based on reasonable grounds, then it may be appropriate to award a disciplinary sanction.

It is important that the disciplinary action taken is proportionate to the misconduct which has occurred so before deciding whether to impose a disciplinary sanction and what sanction to impose (e.g. first warning, final warning, dismissal), the disciplining officer should consider carefully all the background to the case, including what the employee did; the impact of his actions; any action previously taken in similar cases; and the employee's former disciplinary record.

7.2 Let the punishment fit the crime

If a formal sanction is needed, the level and nature must be reasonable or justified. This will depend on all the circumstances of the particular case. If the facts are disputed, you have to decide on the balance of probability which version of events is true. A balance of probabilities doesn't mean that you have to have proof beyond reasonable doubt. All it means is that on balance the reasonable manager would reach the conclusion you did.

Make sure that any disciplinary sanction is a reasonable response to the circumstances of the case. Your decision should fall within the 'reasonable band of responses'. This test was developed by the Court of Appeal in 1981, but it is still the test used by the courts today.

> The correct test is: was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view; another quite reasonably take a different view.
> Lord Denning in British Leyland (UK) Ltd v Swift [1981]

Lord Denning's judgment recognises that employers will have a range of responses to an employee's conduct or capability and these responses are likely to vary from employer to employer. An employment tribunal should not substitute its own view, but must consider whether the employer's response in the circumstances falls within the band of reasonable responses.

There is a risk of a constructive unfair dismissal claim where a sanction falls short of dismissal, but is still too heavy.

Example

Ms Sheridan had been employed by Stanley Cole for five years and had never been subjected to any disciplinary action in that time. In April 2000 she left the office without permission for around 90 minutes, distressed after an altercation with a colleague. When she returned she spoke to her line manager who, seeing that she was still distressed, told her to go home.

She was subsequently called to a disciplinary meeting and as a result she was given a final written warning for unauthorised absence. Her appeal against the warning was rejected and a month later she resigned from her job. Ms Sheridan claimed that she had been unfairly constructively dismissed by the imposition of the final warning. The EAT agreed, finding that the imposition of such a disproportionate penalty for a relatively minor incident amounted to a fundamental breach of contract by the employer entitling Mrs Sheridan to resign.
Stanley Cole (Wainfleet) Ltd v Sheridan [2003]

7.3 Exercise caution if in doubt

Err on the side of caution if in doubt. For example, if you are faced with a situation where a misconduct issue comes down to one employee's word over another's, give the accused the benefit of the doubt, especially if he has a previous good record and long service.

Example

Ms Roldan, a Filipino nurse, was recruited from Singapore. After four years in employment with the Trust, a healthcare assistant, Ms Denton, made a complaint that Ms Roldan had mistreated a patient and she was suspended pending a disciplinary investigation. She was told only that a serious complaint had been made against her. During the investigation, Ms Denton was interviewed and completed an incident report. Ms Roldan and her supervisor were also interviewed. After hearing the evidence, the disciplinary panel dismissed Ms Roldan for gross misconduct. The panel stated that it accepted Ms Denton's evidence and preferred it to Ms Roldan's evidence, which it found to be unreliable and at times inconsistent. The Trust heard an appeal but this was rejected, meaning that Ms Roldan was summarily dismissed for gross misconduct. As a result of this she lost her work permit and therefore her right to work in the UK and was also the subject of a criminal investigation by the police.

The court found that the dismissal was unfair. It said that, because of the serious consequences for Ms Roldan, the employer had to be particularly even-handed in its investigation. It criticised the disciplinary panel's preference for Ms Denton's evidence, which was purely on the basis that it could not see any reason why she should lie. It also said that the panel should have cast its net wider to find other witnesses to Ms Roldan's alleged actions and that she should have been informed at an earlier stage of the exact nature of the allegations made against her.
Salford Royal NHS Foundation Trust v Roldan [2010]

7.4 Deciding on a sanction

It is usual for two or three warnings to be given before dismissal is contemplated. The courts – quite rightly - take the view that it is an extremely serious matter to deprive a person of his livelihood, so you are expected to give plenty of time for the employee to improve.

Dismissal is, of course, the ultimate sanction and an act of last resort. If you dismiss an employee on the grounds of either misconduct or poor work performance, the onus is on you to show that this is the real reason for the dismissal.

So before deciding on any disciplinary penalty, consider:

- The seriousness of the offence, and whether the procedure gives guidance.
- The penalty imposed in similar cases in the past.
- The individual's disciplinary record and general service.
- Any mitigating circumstances.
- Whether the proposed penalty is reasonable in all the circumstances.
- Any current warnings for related offences.

There are several potential levels; of sanction. These are:

- oral warning;
- written warning;
- final written warning;
- dismissal/demotion;
- summary dismissal.

Many employers now adopt a two-stage warning approach.

- first warning, often for six months
- final warning, often for twelve months.

The law does not lay down the length of time during which warnings will remain live. That's the choice of the individual organisation, but it is subject to the over-riding requirement of reasonableness.

The Data Protection Act gives employees the right to see disciplinary notes held on their personal file, though they will not be automatically entitled to access third-party witness statements if to do so would reveal the identity of the witness. The witness would have to give permission

7.5 Totting up

Employees may be dismissed for the totting up of repeated minor offences or a single act of gross misconduct. 'Totting up' is the term used for taking a live sanction into account when making a decision about a further breach of standards. You can only tot up like with like, in other words, conduct with conduct or poor performance with poor performance.

Example

John receives a first warning for poor time keeping, which is minor misconduct.

During the time that warning is live he is warned again for inappropriate use of company equipment, another act of minor misconduct. At this stage, you can replace his first stage warning with a final warning.

If he offends again on a misconduct matter while this final warning is live the next stage will be dismissal.

If the next issue is a poor performance issue, John will receive a first warning for capability.

If you use this approach, make sure that your procedure clearly sets out the process. Note that many organisations still only increase the level of sanction when the misconduct is exactly the same.

Example

John receives a first warning for poor time keeping, which is minor misconduct.

During the time that warning is live he is warned again for inappropriate use of company equipment, another act of minor misconduct. He receives a second first warning.

The first of the two warnings will only be escalated if he re-offends on time keeping while the first warning relating to time keeping is still live.

You should not dismiss for a first offence other than gross misconduct.

7.6 Expired warnings should be disregarded

In deciding what action to take, it is reasonable to consider the employee's track record. However, you cannot use an expired warning to give a heavier sanction than you otherwise would.

Example

Diosynth chiefly produced raw chemicals and had an extensive safety training programme, which Mr Thomson had attended. He was taught, among other things, the safety risks of failure to follow a process known as 'inerting'. The company made clear that omitting the process was an act of gross misconduct.

In July 2000 Mr Thomson was disciplined for failing to inert a vessel and received a 12-month written warning. He was told that any further failure to inert would result in disciplinary action. The warning was not specified as a final warning. Following a fatal explosion at the plant in November 2001, it emerged that Mr Thomson had breached the procedure three more times in October and November 2001, and had falsified some documentation. Some 17 other employees were found to be guilty of the same charge. All the employees involved were taken through a disciplinary process. Only Mr Thomson was dismissed.

Although the warning had expired by then, the company said it had lost confidence in Mr Thomson and that he obviously could not be trusted to follow the safety rules. Mr Thomson complained successfully that he had been unfairly dismissed. The company argued that the key question was not whether the warning had expired but whether it had acted reasonably in all the circumstances. Mr Thomson argued that it was unfair for the company to rely on the previous written warning to take more severe disciplinary action than it would otherwise have taken. He said that he was entitled to believe that the company was genuine when it said that the warning would expire in 12 months.

The Court of Session agreed with him. It pointed to the ACAS code of practice which states that a warning that is not subject to a time limit would normally be inconsistent with good practice. Although this warning was for a fixed period, the company had acted as though it was still in force at his second disciplinary hearing. Mr Thomson had been entitled to assume that it would expire after 12 months. The company had acted unreasonably when it tried to extend the effect of the warning beyond that period.
Diosynth Ltd v Thomson [2006]

However, an employer can dismiss for a first instance of gross misconduct.

Example

Mr Webb was dismissed because he had been found washing his car when he should have been working. The company considered this to be gross misconduct and dismissed him summarily. He was reinstated on appeal and the sanction downgraded to a final warning which remained live for 12 months. Mr Webb was advised that if re-offended he would be taken through the formal procedure.

12 months and three weeks later, Mr Webb was found watching TV with four other employees when they should have been working. Following an investigation and a disciplinary hearing Mr Webb was dismissed summarily. The other employees who were also not working when they should have been were given a final written warning. Mr Webb complained that he had been unfairly dismissed and that Airbus must have relied on an expired warning.

The Court of Appeal found that he had been fairly dismissed, distinguishing it from the *Diosynth* decision. In this case, the employer had decided to dismiss Mr Webb principally because his offence fell into the category of gross misconduct and it can be fair to dismiss for an act of gross misconduct. His colleagues could have been dismissed, but the sanction was downgraded because of their previous good track records.
Airbus UK Ltd v Webb [2008]

7.7 What to include in a formal warnings

You need to clearly explain what the warning means, how long it will remain live on the file and what will happen if there is a repetition of the offence (or any other offence). Tell the employee verbally of your decision (even if your decision is to take no further action) and follow it up in writing.

Your employee should be in no doubt about what action is being taken under the disciplinary procedure. He must also be very clear about what he has to do to avoid further disciplinary action, and by when. Your letter should include

- What was included in the discussions.
- Any agreements or admissions.
- The disciplinary penalty, if any and its duration.
- The reason for the decision.
- The actions being taken as a result of that decision.
- The specific improvement required of the employee, if being warned, not dismissed.
- The review period.
- The right to appeal.

Chapter 8 Following Procedure

8.1 Introduction

Managing employees successfully is hard work. There's no doubt about it (and some employees seem to do everything they can to make that work harder!). However, forewarned is forearmed and in this chapter we identify the areas where employers experience problems at tribunal.

8.2 The most common mistakes

There are a number of areas where employers can slip up. Some of these have been mentioned in earlier chapters. These are the most common mistakes:

- The employee was not given the opportunity to defend himself or put forward his side of the story.
- The employee was not made aware of all of the evidence against him.
- There was no disciplinary hearing.
- The investigation of the alleged misconduct or shortcomings was inadequate.
- An earlier 'warning' was not made explicit.
- The disciplinary procedure was not applied in full.
- The procedure used did not follow the employer's own rules.
- The employer chose not to have a procedure at all for more senior staff and managers.
- The employee was not given a reasonable opportunity to improve performance or conduct.

- Insufficient investigation of the medical background in dismissals on grounds of ill health.
- The employee had not been given an opportunity to comment on medical evidence in a case of ill-health dismissal.

8.3 The importance of following procedure

The single most common reason for employers losing at employment tribunal is a failure to follow its own procedure.

If an employment tribunal is considering a case of unfair dismissal it will ask two questions:

- Has the employee been dismissed for a fair reason?
- Has the employee been dismissed fairly from a procedural point of view?

If the procedure is seriously flawed, the tribunal are likely to make a finding of unfair dismissal.

Example

Ms Henshaw had worked in a tanning salon for five years. Standard procedure was that new customers had to fill in a self-analysis form to determine how many minutes they could spend on a sunbed. They would then be given information on the dangers of using sunbeds. This leaflet contained a disclaimer, which was a regulatory requirement for the salon's licence and a requirement of its insurers. Ms Henshaw did not ask a new customer to fill out a form, something that she admitted she knew she was supposed to do. She said that it was a 'one-off incident', that it was a slow day during which she felt tired and lethargic, and that the customer seemed to know what she wanted. Brenda Shirley, a director of the company, asked her daughter, Linda Shirley (a former director of the company), to carry out an investigation, after which Ms Henshaw was suspended.

At a further investigatory meeting, attended by both of the Ms Shirleys and Ms Pepper (Ms Henshaw's line manager) Ms Pepper complained that Ms Henshaw had harassed her about the allegations made against her and that Ms Henshaw's boyfriend had been unpleasant when he came to collect her wages during her suspension. Ms Henshaw was invited to a disciplinary hearing and was charged with a failure to comply with the company's procedures. Linda Shirley chaired the discipline meeting and dismissed Ms Henshaw for gross misconduct. Ms Henshaw complained that she had been unfairly dismissed.

The employment tribunal agreed, finding that the company had breached the ACAS Code of Practice and its own disciplinary procedure by having Linda Shirley undertake both the investigation and disciplinary hearing. The company had a potentially fair reason for dismissing Ms Henshaw, but it had wrongly taken into account Ms Henshaw's alleged 'bad attitude', which she had never been formally warned about. In addition, the tribunal thought that the employer had inappropriately taken into account the poor behaviour of Ms Henshaw's boyfriend, rather than concentrating on the matter in hand (her alleged misconduct). However, Ms Henshaw had contributed to her dismissal. She knew the importance of requiring customers to fill in the necessary paperwork. Her tiredness on the day in question was not an excuse. Her compensation was therefore reduced to zero.
Henshaw v. Touch Tanning Ltd [2009]

8.4 Small procedural errors may be allowed

We have seen that the tribunals are very rigorous about following procedure (and rightly so). Employers should always stick to the letter of their procedure.

However, the ACAS Code, which was introduced in 2009, says that if a small procedural error occurs it will not automatically make the dismissal unfair. Note that this does not mean that the dismissal is fair; simply that the dismissal is not automatically found to be unfair.

8.5 The reasonable employer

There is a fictitious legal character known to the tribunals as the Reasonable Employer and this is the standard against which your behaviour and decisions will be measured. The reasonableness of your response will vary, depending on the situation and the relevant facts. The test is whether a reasonable employer in the same employment situation would also have done the same as you.

So you must demonstrate reasonableness at all times. What does this mean?

- Be fair and consistent in your approach.
- Don't rush into a decision. Be considered and reflective.
- Be transparent in your actions and decisions.
- Put yourself in the other person's shoes.
- Take all relevant factors into account.
- Take advice and discuss the issues with the employee.
- Make reasonable adjustments and consider all possible alternatives.
- Be able to justify your actions.
- Keep accurate, objective, contemporaneous records.
- Be courteous, listen and investigate fully.
- Have clear standards. Communicate, monitor and manage them.
- Follow your own procedures.
- Give the benefit of the doubt to employees where appropriate.