



# Unfair dismissal – procedural fairness

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Almost one year after we [blogged](#) about the need for procedural fairness in a dismissal, we're back on the topic again with another case which has recently hit the press. This time, the Liverpool Community Health NHS Trust has been unsuccessful in defending an unfair dismissal claim against them, on the basis that their dismissal process was flawed.

The first consideration in an unfair dismissal case is whether the employer had a fair reason for dismissal. There are five potentially fair reasons for dismissal: conduct, capability or qualifications, redundancy, breach of a statutory duty or obligation and "some other substantive reason" (a catch-all for anything which doesn't fit under the other four headings!). It is quite common for the reason for dismissal to fall under more than one heading (often both capability and conduct cross over) and if this is the case, the employer must show the principal reason for dismissal.

In the recent case of [Molloy v Liverpool Community Health NHS Trust](#), Ms Malloy was dismissed from her employment after the Trust discovered she was topping up her income by appearing in x-rated movies. It is

alleged a colleague brought the details of Ms Molloy's extra-curricular activities to the Trust's attention and threatened to go to the press if she was not dismissed. There were also allegations of her breaching the Trust's social media policy. The Trust concluded that Ms Molloy's actions brought them into disrepute and suspended her.

We recently blogged about [misconduct outside of work](#) and how this can still go on to affect employment and it is quite well established, especially in cases involving social media, how disciplining or dismissing employees for their outside conduct is acceptable if it brings (or could bring) the employer into disrepute.

Once the reason for dismissal has been established, an employer must go on to follow a fair process. Unfortunately for the Trust, this is where they came unstuck.

A fair process will involve both procedural fairness and substantive fairness. Procedural fairness includes following a disciplinary policy and the ACAS Code of Practice (which is hopefully mirrored by the employer's policy). The basics of procedural fairness however are that the employee should know the case against them, as well as that dismissal is a potential outcome of the process, they should be allowed to make representations, be accompanied at disciplinary meetings and almost always be given a right of appeal.

Substantive fairness looks at whether the employer's decision fell within a band of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted. The Tribunal is not allowed to substitute their own view and determine whether they would have done things differently, but look at whether the employer's own investigation and decision were reasonable.

It has not been reported where the Trust fell down in their process when dealing with Ms Molloy, although it is stated that Judge commented "*no proper disciplinary procedure was undertaken*". It has been suggested that Ms Molloy was told to "*resign or be sacked*". By placing Ms Molloy on suspension, it would appear as if the Trust at least started the correct procedure, however they clearly didn't follow it through.

In addition to being procedurally unfair and therefore resulting in a finding of unfair dismissal, a failure to follow the ACAS Code of Practice can also result in an uplift to a Claimant's compensation of up to 25%. On the other hand though, if an employer can successfully argue that had the procedural failings not occurred, the eventual outcome would be the same and there would have been a fair dismissal, a Tribunal can award a reduction to a Claimant's compensation (known as a *Polkey* reduction). In some cases, this compensation can be reduced by 100%.

In Ms Molloy's case, it is reported she was claiming nearly £90,000, however the Tribunal applied a reduction and she was awarded just £1,891 (which may also include her Tribunal fees of £1,200). Handing down the Judgment, the Judge commented that had Ms Molloy been taken through a proper process, there was "*very little or no doubt that she would have been dismissed for bringing the Trust into disrepute*".

This case acts as another reminder to employers to ensure they follow a correct procedure from beginning to

end as even one minor procedural error could result in a finding of unfair dismissal against them.

For advice and assistance with any stage of a disciplinary or dismissal, please contact [Kevin Barnett](#) or another member of [LA's Employment and HR Team](#) who would be happy to assist.