Disciplinary procedures are a challenging area for both an employer and an employee. This is particularly so for pharmacists who must observe the highest behavioural and regulatory standards. In this article, Barry Reynolds and Sinead Egan of DAC Beachcroft Solicitors discuss the implications of a recent Supreme Court decision in relation to the Ruffley v Board of Management of St Anne’s School case.

This throws up employment law issues and a recent High Court decision, Ruffley v Board of Management of St Anne’s School, suggested that disciplinary processes present serious risks of bullying claims. If standards slip, performance and disciplinary processes may become inevitable. Those processes present challenges for all persons involved. Managers may have an awareness of some of the business risks but may be relatively unfamiliar with the area. The individual employee subjected to the process may well seek to defend their position. In this era of increased vigilance of bullying and increased focus

1. Ruffley v Board of Management of St Anne’s School, Supreme Court appeal number: 2016 no 000024
on employee wellbeing, some of the key questions include:

- Can “bullying” occur when an employer seeks to enforce compliance with its rules and standards?
- Can employees recover damages for the stresses arising from those processes?

It is essential that pharmacy businesses are aware of the risks arising from such processes. Equally, from the employee standpoint, it must be clear what options are available when internal processes go wrong. Unfair processes are often challenged in the Workplace Relations Commission, for example, through the Unfair Dismissals Acts. However, challenges may also be brought to the higher courts, albeit in more limited circumstances.

In a recent case, in the childcare sector, an employee had alleged that the disciplinary process constituted workplace bullying. The High Court agreed. It made a huge damages award in the amount of €255,276.

It is no wonder that the case became high profile. That award was then overturned by a higher court and readers may be familiar with that decision from the ‘Managing conduct and performance – the breaking point for bullying cases’ article (IPU Review, May 2016), which summarised the key takeaways. This article is an update following consideration of the matter by Ireland’s highest judicial authority, the Supreme Court, issued on 26 May 2017.

Background

The Supreme Court was asked to determine whether or not elements of a disciplinary process had constituted bullying. It was alleged that the employer, in breach of child protection protocol, had locked the door to a sensory room for special needs children. The ensuing disciplinary process was argued to have fallen short of the standards of fairness and to have included elements which were belittling and humiliating.

The award by the High Court had been premised on a finding that Ms Ruffley was subjected to repeated inappropriate behaviour during an unfair disciplinary process resulting in a psychiatric injury. The disciplinary process was flawed and had “unfairly damaged” Ms Ruffley. It “wholly undermined” her “dignity at work”.

The Appeal

The Supreme Court has now confirmed that, while the process to which Ms Ruffley had been subjected was unfair, it did not constitute bullying. There was no suggestion of any of the core hallmarks of bullying, such as “personally offensive behaviour . . . ridicule, personal antagonism or exclusion from a group . . . making disparaging remarks, or repeated requests to do menial or impossible . . . tasks”.

The test for bullying, which the Court indicated to be a high bar for an employee to overcome, was not in dispute in the case, and is in summary:

1. Repeated behaviour;
2. Inappropriate behaviour; and
3. Behaviour reasonably capable of undermining dignity at work.

In clarifying the test, the Court indicated that the conduct must be repeated. It is not enough that it consists of a number of incidents. It must be inappropriate. In other words, it must not merely be wrong, inappropriate or even offensive. It must be capable of being reasonably regarded as undermining the individual’s right to dignity at work.

The Court was of the view that what is required is not necessarily unlawful behaviour, as in an unfair disciplinary procedure, but behaviour which is “inappropriate at a human level” and will be limited to conduct that can be described as “outrageous, unacceptable and exceeding all bounds tolerated by decent society”.

The Court pointed out that facts will be viewed objectively using a standard of reasonableness, as opposed to being looked at from the employee’s perspective. It is clear that when looking at such facts, they are generally measured by the standards of “ordinary robustness”, which employees are expected to have.

The Court found in this case that there was “little doubt” that the disciplinary process engaged in was flawed and that the disciplinary sanction could well have been challenged if other kinds of cases had been brought. This did not mean, however, that the conduct complained of amounted to bullying.

The behaviour of the employer in how it ran the disciplinary process, in breach of fair procedures, was found to be “strange”, “odd” and “difficult to understand”, but not malicious.

The Court referred to the need to balance the protection of individuals from intolerable behaviour, with the legitimate need of employers to investigate disciplinary matters where necessary.

What does this case mean in terms of risks and how to mitigate them?

The case provides some reassurance for employers that a flawed process will not of itself constitute bullying and that an employee will have to satisfy a high threshold in order to win a claim for bullying arising from internal procedures. It does not, however, provide any basis to depart from caution. Employers must not conduct disciplinary processes unfairly. Necessary disciplinary proceedings, conducted under a fair process, are unlikely to be found to be bullying. That said, while not appropriate on the facts of this case, a
claim of bullying could be successful in the context of a disciplinary process, for example, if it were established that the process was instituted maliciously or to victimise an employee. Employees are entitled to expect that they will not be exposed to conduct which could cause psychiatric injury. While business owners and managers should not be deterred from taking necessary disciplinary action against staff, they must be cognisant of their duty to protect employees from conduct or matters likely to cause mental distress.

Employers may also face other claims from employees who have been subjected to disciplinary processes and possibly dismissed.

Claims to the Workplace Relations Commission
These can include claims for harassment (being a separate concept from bullying under the Employment Equality Acts) or Unfair Dismissal. Fairness in procedures is crucial in any process in which an employee has been accused of misconduct.

Court Claims
Employees can, in limited circumstances, seek to challenge, or even prevent, disciplinary processes, for example, on the basis of procedural flaws. The Supreme Court was of the opinion that Ms Ruffley may have been successful in such proceedings. There is a risk that these kinds of cases will increase in some circumstances as an alternative route to a bullying case. As pointed out in our last article on this subject, such cases are decided on different criteria and are less likely to be covered by insurance.

Measured and demonstrably fair processes are designed to minimise risk. Risks can be managed through:

- Setting clear standards;
- Taking a corrective approach (where appropriate);
- Keeping an open mind during internal procedures;
- Ensuring that relevant training and guidance are sought; and
- By complying with essential standards of fairness.

Pharmacists will be familiar with the IPU’s dispute resolution processes and general guidance documents. If the dispute cannot be avoided or resolved, then each of the parties will wish to present as having behaved as reasonably as possible during the internal processes. The Supreme Court held that the disciplinary process, though flawed and unfair, was at the margins of, and did not amount to, bullying. It must be said that these questions are often complex and it is recommended to seek advice. The fact of disagreement on some of the issues in our courts illustrates the complexity of this area.

The Supreme Court decision came following approximately six years of dispute and considerable cost. This underlines that the best means of managing risk is to, as far as possible, exclude it in the first place.

Barry Reynolds recently presented at the DAC Beachcroft/IPU Risk Mitigation event on 25 May 2017. Barry Reynolds (breynolds@dacbeachcroft.com) and Sinead Egan (segan@dacbeachcroft.com) of DAC Beachcroft Solicitors (01 231 9600) are specialists in employment law. DAC Beachcroft, a global law firm, is a recognised market leader in healthcare law.

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