

Guide to handling disciplinary issues

HUMAN RESOURCES

This note provides practical guidance on how properly to deal with discipline and misconduct in the workplace to ensure that any legal risk to your business is minimised, in particular, to reduce the risk of claims of unfair dismissal and wrongful dismissal.

Introduction

First instances of minor misconduct may be best dealt with informally, particularly if the employee otherwise has a clean record. However, where the suspected misconduct is more serious, or the employee has been dealt with informally in the past, formal disciplinary action will be appropriate.

When undertaking any formal disciplinary process, you should ensure that you implement your own disciplinary procedure (if you have one). If you do not have a disciplinary procedure, you should ensure that you introduce one and brief all employees on it. A template disciplinary procedure is available <here>.

In any event you should ensure that you follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (available at: <http://www.acas.org.uk/media/pdf/f/m/Acas-Code-of-Practice-1-on-disciplinary-and-grievance-procedures.pdf>).

The ACAS Code

The key principles of the ACAS Code are:

- Investigate the issues
- Inform the employee of the issues in writing
- Hold a disciplinary meeting
- The employee has a statutory right to bring a fellow worker or a trade union representative to the meeting
- Inform the employee of the decision in writing
- Give the employee the right of appeal

Investigation

- The requirement for an investigation to take place prior to any disciplinary action, even if it is merely a warning, is critical ensure that the disciplinary action is fair.
- Investigations should be conducted as soon as possible, before memories fade and evidence is destroyed.
- The amount of investigation required will depend on the individual circumstances of the case. The key is to ensure that the relevant avenues of enquiry have been followed up in order to ascertain the relevant facts.
- All witnesses to the alleged misconduct should be interviewed, including witnesses who support the employee's case. Keep written notes of your interviews.

- Consideration also needs to be given to whether any physical evidence is required, including electronic evidence such as CCTV, emails, phone records, texts, social media and so on. The type of physical evidence required will depend on the circumstances. Do employees have a right to privacy when using social media?
- Make sure the investigation is fair and reasonable. You should hear both sides of the story and make sure you also look for evidence which could point to innocence, as well as to guilt. Approach the matter with an open mind.
- Once you have exhausted the lines of enquiry and have all of the available facts, you can then decide whether to drop the matter, deal with it informally or arrange for it be handled formally.

Informing the employee of the issues in writing

- It is a requirement for a fair procedure that the employee is informed precisely of the allegations against them, in writing.
- The allegations set the agenda for the subsequent disciplinary hearing. The letter should set out clearly and concisely the act of misconduct the employee has been accused of – the “who, when, where, what, how” of the alleged misconduct.
- Ensure that the employee is provided, in advance of the disciplinary meeting, with copies of all of the evidence gathered during the investigation.

The disciplinary meeting

- At the start of the disciplinary meeting, explain the allegation against the employee and go through all of the evidence that has been gathered.
- Allow the employee to state their case, ask questions, present other evidence and call any relevant witnesses. Likewise ask the employee any questions you have about the matter.
- Ensure you keep an open mind – do not make your decision until you have heard everything that the employee has to say. It is better to adjourn and review all of the evidence before giving your decision.
- If any further investigation is required as a result of issues raised during the meeting, the meeting should be adjourned to allow that to take place. The employee should be given the chance to respond to any additional findings at a reconvened meeting. Any new evidence obtained should be provided to the employee in advance of the re-convened meeting.

The decision

- It will be unfair to dismiss an employee for a first instance of misconduct, unless their actions are so serious that it amounts to gross misconduct (i.e. very serious misconduct).
- If the misconduct is of a minor nature and does not trigger a live final warning given to the employee for previous misconduct, any dismissal is likely to be unfair.
- The ACAS Code recommends that employees should usually be given at least one chance to improve (in other words, a first written warning) before a final written warning is given. You should not take into account any expired disciplinary warnings when reaching your decision.

- If the misconduct triggers a previous final warning and/or is by itself an act of gross misconduct, when considering whether to dismiss the employee, always consider any particular mitigating circumstances that suggest that some lesser form of punishment than dismissal might be appropriate: for example long service, a clean disciplinary record or underlying personal issues that have caused the employee to act out of character
- If your decision is to issue the employee with a first or final written warning, your letter confirming the decision should:
 - State the level of warning, for example, first written warning or final written warning.
 - Clearly state the period that any warning is to remain in force.
 - Explain the possible consequences of any further misconduct.
- If you intend to extend the length of the warning if the employee's conduct does not improve sufficiently this must be made clear.
- It is good practice for all decisions to include a summary of the allegations, the key evidence, and the reasons for finding the employee guilty. Where the employee is dismissed, an explanation should be given as to why dismissal was considered appropriate.

Right of appeal

- Employees should always be advised of their right to appeal in any outcome letter.
- If the employee appeals, hold an appeal hearing and confirm the outcome in writing
- The appeal should be dealt with impartially and wherever possible, by a manager who has not previously been involved in the case and who is more senior than the person responsible for making the decision in the first instance.

This article is not intended to constitute a definitive, up-to-date, or complete statement of the law, nor is any part of it intended to constitute legal advice for any specific situation. You should take specific advice when dealing with specific situations and jurisdictions outside England & Wales.

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