

FACT SHEET

DISCIPLINARY PROCEDURES.

This fact sheet sets out how a disciplinary procedure should be conducted by an employer. This is intended as a summary of the issues that may need to be considered and is not intended to be a detailed analysis of the law in this area.

The Acas Code of Practice on Disciplinary and Grievance Procedures gives guidance on carrying out fair procedures for misconduct and poor performance. Unreasonable failure to comply with this Code may render any dismissal unfair and is likely to increase or decrease (depending on who is at fault) the amount of compensation a tribunal may award by up to 25%. The advice in this fact sheet takes account of the key requirements of the Acas Code.

An employer should also ensure that they comply with the company's own internal disciplinary procedure, since failure to do so may also potentially lead to a claim in breach of contract.

This fact sheet contains guidelines as to best practice and a failure to follow procedures set out in this fact sheet strictly will not necessarily lead to a finding that an employer has acted unfairly.

Preliminary considerations

Before instigating disciplinary proceedings an employer should first consider whether or not formal action is in fact required. It may be more appropriate to resolve the matter through informal discussions with the parties concerned.

Suspension

Employers will often suspend employees in relation to an act of misconduct. However, an employer must consider carefully whether the employee needs to be suspended to allow a full investigation to take place. Suspension will usually only be appropriate in cases of serious misconduct or incompetence, where the employee's continued presence in the workplace would render an investigation impossible, or where working relations have broken down and there is no other way of avoiding conflict while the matter is resolved. If the employee is to be suspended, this should be on full pay and a formal letter confirming the terms of the suspension (and a point of contact in the company for the employee) should be sent to the employee. It is advisable for the employer to take a neutral line in the event that colleagues or external clients enquire as to the whereabouts of the employee.

Investigations

Where formal action is to be taken, a fair and balanced investigation should be undertaken by the employer. This should not be carried out by the same person who will hold the disciplinary hearing or any appeal meeting unless it is unavoidable, for example, in a very small business. It may be the employee's line manager but it is often better if it is someone impartial such as a HR manager.

The amount of investigation to be undertaken will depend on the individual

circumstances of the case, but it must be sufficient (a) to enable the Chair of any subsequent disciplinary hearing to form reasonable grounds for believing or disbelieving the allegations against the employee and (b) to enable the case to be put to the employee in a manner that makes it clear what is being alleged. The investigation must be even-handed, and should not simply be a search for evidence against the employee. Evidence in the employee's favour should also be sought.

If the disciplinary proceedings concern poor performance or capability, the investigation may simply be a review of the employee's appraisals and any discussions that have taken place between the line manager and employee. In cases of alleged misconduct, the employer will usually need to interview witnesses including other employees and potentially gather any other relevant evidence.

An investigatory meeting with the employee in question will also usually be required at an early stage. This is important as it may be that there is a simple misunderstanding which can be resolved without the need for a disciplinary hearing. In other cases, the employee under investigation may be able to direct the employer to witnesses or documentary evidence that support their case. An investigatory meeting is not a disciplinary hearing, and so an employee has no statutory right to be accompanied (although the employer's internal procedures may give employees that right).

Any investigatory meetings to interview an employee or other witnesses should be held in private and notes should be taken of the meeting. The investigation must be fair and balanced, so the employer should ensure that any witnesses who may support the employee's version of events are also interviewed, not just witnesses who will support the allegations. In cases of suspected misconduct it is appropriate to remind employees who are being interviewed of their duty of confidentiality.

Following investigation, the employer may decide that no further action is necessary,

in which case the employee should be informed of this decision. However, if matters are to be taken further, there must first be a disciplinary hearing. The investigation alone is not a sufficient legal basis for dismissal or any other sanction. Furthermore, an employer should ensure that there is a clear distinction between investigatory meetings and any disciplinary hearing. On no account should the two meetings be rolled into one

Witnesses who wish to remain anonymous.

If a witness asks to remain anonymous then the employer should explore the reason for this request and any underlying motive. The witness's perceived need for anonymity will need to be balanced against the employee's need to know details of the evidence for and against them.

If there is a need to protect the witness's identity, the employer may take such steps as editing their statement to remove their name and any other information that may identify them. The key issue is that the employee must know the case they have to answer.

Written statement

Following the investigation, if there are sufficient grounds on which to hold a disciplinary hearing, a letter must be sent to the employee by the employer dealing with the following matters:

- (a) The allegations against the employee and the basis for them. Sufficient information about the allegation and its possible consequences must be included to enable the employee to prepare for the hearing.
- (b) All evidence on which the employer intends to rely at the disciplinary hearing, such as witness statements or other documents, must be enclosed with the letter. The employee should be informed whether the employer intends to call witnesses to the meeting or simply

rely on written statements. The employee should also be asked if they wish to submit any evidence or call any witnesses to the hearing.

- (c) The time and place of the disciplinary hearing, which should be reasonable, particularly so as to allow the employee time to prepare.
- (d) The employee's right to be accompanied to the hearing by a trade union representative or a colleague.
- (e) It is advisable for the employer to enquire as to whether the employee has any disability or other special requirements for which reasonable adjustments may need to be made.
- (f) If the employee is facing possible dismissal this must be made clear.
- (g) If the employee has not already been given a copy of the employer's disciplinary procedure, this should be sent with the letter.

Postponement or failure to attend hearing

If an employee fails to attend a disciplinary hearing through unforeseen circumstances such as illness, or wishes to adjourn due to their own or their companion's unavailability, a further meeting should be arranged within a reasonable timescale.

If an employee persistently seeks to postpone the meeting or fails to attend without good reason then it may be possible for the employer to take a decision in the employee's absence. An employer should carefully consider the reason for a requested postponement and any other relevant circumstances. If the employee is unwell, consideration can be given to conducting a disciplinary hearing at or near their home or by telephone, or postponing until a medical certificate has been obtained to give a better picture of the likely prognosis. An employer should balance the need to treat the employee fairly and the need to ensure that

necessary business decisions are not postponed indefinitely.

Disciplinary hearing

The hearing should be held at a reasonable time and place, in a private meeting room during the employee's normal working hours. Sufficient time should be allowed between sending the letter and the meeting itself for the employee to consider the allegations and the evidence sent with the letter, and to prepare their case for the hearing. The length of this period will depend on the nature of the allegations and the complexity of the case but in most cases a period of 3 to 5 working days will be appropriate. Reasons for any further delay should be explained to the employee by the employer.

The disciplinary hearing should ideally be conducted by a single manager or a panel with one individual appointed as the Chair. The Chair should not have been involved in the investigation whether as an investigator or witness. In more complex matters it may also be appropriate to have a member of the HR department present in an advisory capacity.

There should also be someone present who can make notes of the hearing. They should ideally not have been previously involved. The employee should be provided with a copy of these notes following the disciplinary hearing.

At the start of the hearing, the Chair should introduce those present, explain the purpose of the meeting and, if the employee is unaccompanied, remind them again of their right to be accompanied.

The Chair should ask if the employee is satisfied with the arrangements for the hearing, and has received, read and understood all the necessary documents, including the disciplinary procedure, any report of the investigation, and the witness statements. The employee should then be taken carefully through the allegations that have been made and all relevant evidence.

The employee should then be given the opportunity to make any representations,

ask questions and produce or discuss documentary evidence in reply.

The employer does not have to call all relevant witnesses to the hearing. The matter can be dealt with by witness statements alone if the employee has not asked for witnesses to be called. However, the employee should usually be allowed to call relevant witnesses to the hearing if they wish. The law does not generally require the Chair to allow court-room style cross-examination of witnesses. The employee should be allowed to raise points in response to anything a witness has said.

The employee's representative can make statements and ask questions on the employee's behalf. The representative will not be permitted to answer questions that have been put to the employee directly, although they may confer privately with the employee before any reply is given.

An employee or witnesses may be under significant stress as a result of the hearing. The Chair should be sensitive to this and, if necessary, make sensible use of adjournments for "time out".

Once the employee has presented their case the Chair should summarise the information put forward on both sides and request any necessary clarification from the employee.

Adjourning the hearing

When all parties have presented their case and there are no further questions, the hearing should then be adjourned for the Chair to consider what the employee has said. Issues that have been raised by the employee may require further investigation and witnesses may need to be re-interviewed if they have not been present to give evidence at the hearing. If this is the case then the employee should be given a chance to respond to any new findings at a reconvened hearing. If new information has come to light then this should be given to the employee in writing, with sufficient time to consider it before the reconvened hearing.

If a decision is given at the end of the meeting without any adjournment for consideration this could be an indication that the matter has been pre-judged.

The length of any adjournment will depend on the complexity of the issues to be considered and whether further investigation is needed. The employer should give the employee an indication of how long it is likely to be before the meeting is reconvened. If the adjournment is only for a short period it may be appropriate for the Chair to ask the employee to remain in the meeting room whilst they consider their decision. However, in most cases it will be sensible to adjourn at least until the following day for full consideration of the decision.

The decision

When considering the appropriate sanction to apply to an employee who is found to be 'guilty' of misconduct, the employer must give careful consideration to other alternatives to dismissal. For example, demotion, redeployment or a final written warning may be more appropriate. Final warnings should not be used oppressively, for example, for relatively minor misconduct where the punishment is out of proportion to the offence. An employer must have usually given an employee at least two written warnings before deciding to dismiss an employee.

It is appropriate for an employer to consider what sanctions have been imposed on other employees for similar conduct and to take account of any 'live' warnings on the employee's personnel file. 'Spent' warnings should not be taken into account.

Except in cases of gross misconduct, employees should not be dismissed without any prior warning. Otherwise, it is usual to give two warnings (a first written warning and a final written warning) before dismissal.

Once the Chair has reached a decision, the meeting should ideally, though not necessarily, be reconvened and the decision explained to the employee. The

decision must be given in writing in any event.

The employee should be advised of the sanction, the reasons for imposing it and the fact that they have a right to submit a written appeal. If a warning is imposed, the length of the warning should be given, and the consequences of any further misconduct or failure to improve must be made clear. Instructions on how to appeal should also be provided, including the name of the person to whom the appeal must be submitted and the timescale for appeal. Five working days is generally considered reasonable but there is no specific time limit in the Acas Code of Practice.

Employees have the same right to be accompanied at an appeal hearing as at a disciplinary hearing, and should be informed of this fact in writing.

Appeal

So far as possible any appeal should be heard or chaired by someone who has not been previously involved. Ideally, they should be more senior than the Chair of the disciplinary hearing and, where possible, outside their direct reporting line.

The manager conducting the appeal should have access to the evidence compiled during the investigation and copies of the notes from the disciplinary meeting. However, they should not confer with the initial decision-maker before the appeal meeting, as this may lead to a biased view being taken before the employee has presented their arguments.

There is no set format for the appeal, but the employee is allowed adequate opportunity to present their arguments. The person chairing it should aim to be as impartial as possible. If the original hearing was procedurally flawed, the appeal should be conducted as a full rehearing of all the evidence. In other cases, it may be acceptable to simply review the original decision based on the paperwork and any representations the employee may make.

Lees Solicitors LLP provide this fact sheet free of charge.

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