

GUIDANCE ON

THE CONTRACT OF EMPLOYEMENT

What are disciplinary procedures?

Following a fair procedure

Carrying out an investigation

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What are disciplinary procedures?

A disciplinary procedure is a formal way for an employer to deal with an employee's:

i. unacceptable or improper behaviour ('misconduct')

ii. performance ('capability')

Before starting a disciplinary procedure, the employer should first see whether the problem can be resolved in an informal way. This can often be the quickest and easiest solution.

The employer could try solving the issue with their employee by:

i. privately talking with them and any other staff involved

ii. listening to their point of view

iii. agreeing improvements to be made

iv. setting up a training or development plan, if it's a performance issue

Dealing with capability issues

Capability or performance is about an employee's ability to do the job.

Some employers might have a separate procedure for dealing with capability or performance issues that should be based on:

i. support

ii. training

iii. encouragement to improve

Whether the employer deals with the issue under a capability or disciplinary procedure, they must do so fairly.

What counts as misconduct

Misconduct is when an employee's inappropriate behaviour or action breaks workplace rules.

Some misconduct examples include:

i. bullying

ii. harassment

iii. refusing to do work ('insubordination')

iv. being absent without permission (some people call it absent without leave or 'AWOL')

But a workplace might have its own examples.

<u>If misconduct happens outside the workplace</u>

An employee could face disciplinary action for misconduct outside work. For example, where an employee's behaviour in front of external clients reflects badly on the company. It depends on how serious the employer sees the misconduct and whether it could have a bad effect on the business.

It's important the employer carries out a thorough investigation and can show the effect on the business.

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When there is gross misconduct

Some acts count as 'gross misconduct' because they are very serious or have very serious effects.

If an employer finds there has been gross misconduct, they should still carry out an investigation and the full disciplinary procedure. They might then decide on dismissal without notice or payment in lieu of notice.

Examples of gross misconduct in the workplace could include:

i. fraud or theft

ii. physical violence

iii. serious lack of care to their duties or other people ('gross negligence')

iv. serious insubordination, for example refusing to take lawful and reasonable orders from a supervisor

What is seen as gross misconduct can depend on the business, so a workplace might have its own policy or rules with examples.

Following a fair procedure

If the employer has considered trying to resolve the issue informally but feels they need to start a disciplinary procedure, they must tell the employee straight away.

This should be done in writing and should include:

i. sufficient information about the alleged misconduct or poor performance

ii. possible consequences, for example a written warning

The employee should have this information in time to prepare for a disciplinary meeting. The employer must make sure they follow a full and fair procedure throughout. This is for the protection of the employee, the employer and their business.

The importance of following a fair procedure

The Labour Regulating Authority Code of Practice on disciplinary and grievance procedures is the minimum a workplace must follow. An employer may have its own code or policy with some differences that better suits that workplace.

Although the Labour Regulating Authority Code is not the law, if a disciplinary case reaches the Authority to consider unfair dismissal, then it will take into consideration whether the employer has followed the Code in a fair way.

The Code mainly applies to those with employee employment status. But to keep good working relationships, it's a good idea if employers follow the same fair procedure for all workers.

If anything similar has happened before

It's a good idea for employers to check whether the workplace has dealt with a similar situation before. To avoid accusations of unfair treatment, employers should follow the procedure and policy in the same way for each disciplinary case. They should gather evidence and make a decision based on what they know about each case.

Keep talking

It's important throughout the procedure for the employer to keep talking with both the employee being disciplined and any other staff affected.

Clear, regular and confidential communication can help avoid:

i. misunderstandings

ii. a drop in work morale

iii. stress or other mental health issues

iv. further action, for example the employee raising a grievance

v. legal action further down the line

The employer should keep all personal information confidential.

Looking after employees' wellbeing and mental health

Going through a disciplinary procedure can be very stressful, so it's important that employers consider the wellbeing and mental health of their employee.

Looking out for the employee's wellbeing and offering support can help prevent:

i. absence

ii. mental health issues arising

iii. existing mental health issues getting worse

For example, as well as regular communication, the employer could arrange any meetings in a more private and comfortable location if this would help the employee.

If the employee raises a grievance

If the employee raises a grievance during the disciplinary procedure, the employer can pause the disciplinary and deal with the grievance first. It might be appropriate to deal with both at the same time if the grievance and disciplinary cases are related. See the chapter on dealing with workplace grievances in this document

If the employee wants to resign

The employee might feel they want to resign or 'jump before they're pushed' when they are facing a disciplinary. This could risk the employee later claiming 'constructive dismissal' before the Labour Regulating Authority. They can usually only do this if they have worked for the organisation for 1 year or more. The employer should try and talk through any concerns with the employee and encourage them to complete the disciplinary procedure first.

Following a fair procedure

An employee:

i) usually has an employment contract from their employer, formed when they accept the job;
ii) tends to be provided regular work by their employer;
iii) is employed to do the work personally; and
iv) must do the work

Just because the employer has not provided a statement of employment particulars does not mean the person working is not an employee. Some people may still be employees even if they have traditionally be seen as self-employed, for example fishermen.

There is a detailed definition of employee within the Employment Rights Ordinance, 2010

Carrying out an investigation

The employer must carry out an investigation to get as much information as they reasonably can about their employee's alleged misconduct or poor performance.

See the guidance for carrying out an investigation on the Labour Regulating Authority website

The disciplinary hearing

Where the investigation shows the employee has a case to answer, the employer should ask them to a disciplinary meeting or 'hearing'.

Preparing for the hearing

The hearing should be held as soon as possible after the investigation, while giving reasonable time for the employee to prepare.

In good time before the hearing, the employer should put in writing to the employee:

i. the alleged misconduct or performance issue

ii. any evidence from the investigation

iii. any other information they plan to talk about

iv. the date, time and location of the hearing

v. information on the employee's right to be accompanied to the hearing

vi. the possible outcomes

Employers can access letter templates for giving an employee notice of a disciplinary meeting on the Labour Regulating Authority website

The employee can also bring evidence to the hearing, for example emails, to show and talk about.

The right to be accompanied

It is good practice to allow an employee or worker to bring a relevant person ('companion') with them to a disciplinary hearing. The employee should tell their employer as soon as possible who they want to be their companion so arrangements can be made in good time.

Who the employee can bring with them

The employee should be allowed to choose their companion from one of the following:

i. a work colleague

ii. a member of the employee representative committee or similar (if any)

Employers should make reasonable adjustments for disabled employees. This might mean allowing someone else to attend, for example a support worker or someone with knowledge of the disability and its effects in addition to, or in place of, the companion.

Employers may also allow companions who do not fall within the above categories. For example, some employment contracts might allow for a professional support body, partner, spouse or legal representative.

What happens in a disciplinary hearing

The hearing is the chance for both the employer and the employee to state their case. The employer, employee and employee's companion should make every effort to attend.

The employer should:

i. explain the employee's alleged misconduct or performance issue

ii. go through the evidence

iii. make sure someone takes notes

The employee should be given the chance to:

i. set out their case

ii. answer any allegations

iii. ask questions

iv. show evidence

v. call relevant witnesses (with good notice)

vi. respond to any information given by witnesses

The employee's companion should be allowed to:

i. set out the employee's case

ii. speak for the employee

iii. talk with the employee during the hearing

iv. take notes

<u>At the end of the hearing</u>

It's a good idea for the employer to take some time after the hearing to consider the case carefully before making a decision.

The employer should:

i. tell the employee what happens next and give a timeframe

ii. take a written confidential record of the hearing

<u>If the employee is absent or off sick</u>

If the employee is absent or off sick for the disciplinary hearing, the employer should pause the disciplinary procedure until they return to work.

If the employee still says they cannot attend or if they go on extended sick leave, the employer should see if it would help to make other arrangements. For example, if the employee is off with stress and is worried about coming to the workplace, they could hold the meeting somewhere else.

If the employee still refuses to or cannot meet, the employer will need to look at the case and come to a reasonable decision.

The employer could look at:

i. any rules their workplace has for dealing with failure to attend disciplinary meetings

ii. how their workplace dealt with similar cases in the past

iii. the seriousness of the disciplinary issue

iv. the employee's disciplinary record, general work record, work experience, position and length of service

v. getting a medical opinion on whether the employee is fit to attend the meeting (with the employee's permission)

If the employer reaches a decision, they should tell the employee in writing and tell them of their right of appeal

Deciding on the disciplinary outcome

After following a fair disciplinary procedure, the employer should decide on the best outcome based on:

i. the findings from the investigation and meetings

ii. what is fair and reasonable

iii. what their workplace has done in any similar cases before

Each workplace might have its own versions of disciplinary outcomes. They should be written in your workplace's disciplinary policy or guidelines.

For a disciplinary outcome that's not a dismissal, it's a good idea for the employer to give the employee specific goals and timeframes for improvements.

Telling the employee

The employer should tell the employee of the outcome as soon as possible and in writing.

There is a letter templates for a giving disciplinary outcome on the Labour Regulating Authority website

If the employee's conduct or performance has not improved in the timeframe set, the employer should repeat the disciplinary procedure until improvements are made or until dismissal is the only fair and reasonable option.

When no action is needed

When it's decided there was no misconduct or performance issue, the employer should end the disciplinary procedure.

To make sure there is no bad feeling, the employer should talk privately with the employee and any other staff who knew the disciplinary procedure was happening. They should make clear there is no longer anything to worry about and should help the employee get back to work as normal. It's a good idea for the employer to keep a note of how they carried out the procedure for future reference.

Informal warning

If the misconduct or performance issue was found to be small and not serious, the employer might just have an informal talk with the employee. A workplace might call it a 'verbal warning'.

It's a good idea for the employer to still keep a confidential written record of informal or verbal warnings for future reference.

Written warnings

A written warning is a formal warning that the employer can give the employee at the end of the disciplinary procedure.

A first or final written warning should say:

i. what the misconduct or performance issue is

ii. the changes needed, with a timescale

iii. what could happen if the changes are not made

iv. what could happen if there is further misconduct or no improvement to performance

v. how long the warning will stay in place

vi. in performance cases, any support or training the employer will provide

A first written warning is normally the first step an employer will take when misconduct or poor performance is confirmed.

The employer can give a final written warning if, within a set timeframe, the employee either:

repeats or commits another misconduct

does not improve performance

In cases of serious misconduct or poor performance, the employer does not have to give a first written warning and can instead go straight to a final written warning. For example, where the employee's actions have, or could, cause serious harm to the business.

If an employee does not meet the requirements of their final written warning in the timeframe set, it could lead to dismissal. The employer should make this clear to the employee.

Taking other disciplinary action

The employer might look at other disciplinary action depending on the seriousness of the misconduct or performance issue.

For example, instead of dismissal, the employer could decide to move the employee to a less responsible role ('demotion').

Employers must first check what the employment contract allows and discuss it fully with the employee. The employee can have their chosen companion or representative with them for this.

Dismissal

The employer might end the employee's contract ('dismissal') in either of these cases:

i. gross misconduct

ii. the disciplinary procedure has had to be repeated and the employee previously had a final written warning

Dismissal should only be decided by a manager who has the authority to do so. The workplace must have a policy on this.

The employee should be told as soon as possible:

i. the reasons for the dismissal

ii. the date the employment contract will end

iii. the notice period

iv. their right of appeal

To avoid the risk of an 'unfair dismissal' claim, the employer should always follow a full and fair

disciplinary procedure before deciding on dismissal.

The employee's right of appeal

The employer should offer the employee the right of appeal.

This is so the employee can raise an appeal if they feel:

i. the outcome is too severe

ii. any stage of the disciplinary procedure was wrong or unfair

After the disciplinary procedure

Talking to staff

The disciplinary outcome and details must remain confidential. However, where appropriate, it can be a good idea for the employer to talk privately with any staff who knew the disciplinary procedure was happening.

This can help avoid any negative effects on the business, for example:

i. bad feeling

ii. gossip

iii. bullying

iv. low work morale

Keeping a record

No matter what the outcome, it's a good idea for employers to keep a written record of all disciplinary cases to help with any questions or similar cases in the future.

Records should be:

i. confidential

ii. only be kept for as long as necessary

References after disciplinary action

An employer does not have to provide a reference but when they do they must be:

i. fair

ii. accurate

iii. consistent with others

This means the reference might have to give information about the employee's disciplinary outcome.