

## **Disciplinary and dismissal guidelines**

### **Overview**

1. If an employer has taken disciplinary action against an employee, and such action is challenged, the employer will need to demonstrate that the decision was justifiable. This issue is determined objectively, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all of the circumstances at the time of the action.
2. This puts the onus on an employer to have both acted fairly in terms of the substance of the decision and to have also followed a fair process.
3. The key to complying with this obligation is to carry out a thorough investigation where there are allegations of wrongdoing or poor performance, and consult with the employee.
4. This article sets out the fundamental principles of a fair disciplinary process. It is not intended to replace legal advice for a particular situation.

### **Disciplinary performance**

5. There are two instances when an employer may consider taking disciplinary action against an employee, namely when dealing with a non-performing employee, or in cases of misconduct.
6. The Courts have emphasised that the object in dealing with a non-performing employee should be to assist him or her to meet the standard of performance required, and not just to use a disciplinary process to focus on dismissing that person.
7. A preliminary issue will be whether or not the standards of performance required of that employee are fair. If the employee has been given duties beyond his or her ability or has been overworked, options such as counseling, retraining and redeployment should be considered before commencing a disciplinary process.
8. Misconduct relates to the behaviour of the employee whilst on the job and can occur in many ways, including by way of breach of an express term of the employment agreement, failure to obey a lawful and reasonable instruction, insubordination, absenteeism or lateness, offensive language or behaviour, dishonesty, assault or other forms of violence, conflict of interest, and bringing the employer into disrepute.

9. In terms of process, where an employment agreement sets out a disciplinary procedure or where there are internal rules or policies that specify how performance issues are to be dealt with, these procedures should be followed. Otherwise, a basic procedure is set out below. It is strongly recommended that advice be taken, particularly prior to a dismissal decision.

### **Investigation**

10. The first step is to commence an investigation and establish whether there is any substance to the performance or misconduct concerns. If necessary, data should be collected and other staff spoken to. Staff should be asked to provide written statements of what they have observed.

### **First meeting**

11. If the preliminary investigation establishes that there is substance to the concerns, a disciplinary process should follow which further investigates the allegations by seeking the employee's input, view of the facts, or explanation. A first meeting should be set up with the employee to discuss the issues. The employee should be given advance notice of the meeting and of the detail of the concerns that are to be discussed. This may include copies of statements from other employees, where misconduct is alleged. Around 24-48 hours notice is appropriate and the employee should be told that he or she is entitled to bring a representative or support person to the meeting. The employee should further be advised of the possible outcome of the meeting, whether that be a warning, final warning or dismissal. All of this information should be given to the employee in writing.
12. The meeting should be attended by the representative of the employer who will be making the decision and by a witness who will take notes. The employee should be told of the employer's concerns (as set out in the letter) and the employee given an opportunity to respond. It may be necessary to adjourn the meeting or reconvene the next day so that the employer can consider the employee's response and investigate further if new relevant information is provided by the employee.
13. Where further enquiries are required, the person involved in making the final decision to dismiss or discipline should carry out those enquiries, rather than relying on reports from others, where possible. The employer is obliged to ensure that the relevant facts are obtained by questioning all persons involved. Where further evidence is obtained, it should be put to the employee and his or her representative for a response.

14. The employer should consider carefully any explanation and information provided by the employee before making a decision as to whether the allegations are established. The level of proof required is the balance of probabilities ie that it is more likely than not that the allegations are established. When the meeting is reconvened, the employer should notify the employee of the employer's conclusion. The employer should then indicate what penalty the employer considers appropriate, and seek the employee's input into the proposed penalty. A further adjournment may be necessary to consider the employee's input, prior to a final decision being made and implemented. Penalty decisions need to take into account all relevant circumstances. These will include the seriousness of the situation, the employee's position, their length of service, and any explanation they have given.

### **Summary dismissal**

15. In cases of serious misconduct a summary (instant) dismissal may be justified. There is no precise definition of serious misconduct and it very much depends on the circumstances. Examples of cases where summary dismissal has been held to be justified include theft from the employer, fraud against the employer, assault, deliberate disobedience, gross insubordination and dishonesty. The employment agreement may record what is agreed to be serious misconduct. The issue will always be whether or not summary dismissal is what a fair and reasonable employer would implement in all of the circumstances.

### **First warning**

16. For a first or minor offence, a first warning should be issued. This may be given as a verbal warning but in any event should be recorded in writing and copied to the employee. This warning should state the standard of conduct/performance required of the employee, how the employee has failed to meet that standard and what steps the employee needs to take to meet that standard in future. The warning should clearly state that if there is no improvement, further disciplinary action may follow, which may include a final warning or termination of employment.
17. A fair timeframe should be allowed for improvement by the employee, depending on the particular circumstances, and a date set for a review meeting. Consideration needs to be given to any support the employee may need to help them meet the requisite standards, such as further training, supervision or mentoring. If there are further instances of misconduct, or performance does not

improve, then a further meeting should be held following the same process as for the first meeting. An outcome of this meeting may be a written warning, final warning or dismissal, depending on the circumstances. Again, the employer's own policies should be complied with.

## **Dismissal**

18. Where there is further misconduct or failure to perform, a meeting may be held at which dismissal may be an outcome. It needs to be clearly stated to the employee that dismissal is being considered by the employer. The same process should be again followed, as set out above.
19. While a typical procedure may involve a first warning, followed by a final written warning and then by dismissal, it may be appropriate in some cases to omit one or more of these steps and proceed directly to a final warning or dismissal. Ordinarily in the case of poor performance the procedure would not be curtailed unless the poor performance was very clearly demonstrable and very serious.
20. A potential pitfall in the process is predetermination by the employer. It is important that the employer genuinely keeps an open mind until the process is complete. Further, any appearance of predetermination should be avoided. During the process it is best to speak of "concerns" or "allegations" rather than "misconduct". Warning letters or letters of dismissal should be drawn up after the process is complete, not during the disciplinary process. Obviously, a final pay cheque should not be taken to a consultation meeting.
21. Where an employee is dismissed, a letter should be provided to him/her confirming the dismissal, after the dismissal meeting. The employer should allow the employee to leave the workplace in a manner that is not embarrassing or humiliating to the employee. Confidentiality should be maintained in the workplace.
22. Where the employee could face criminal charges, he or she may exercise their right to silence, thereby preventing the employer from completing an investigation until any criminal matters are concluded. For this reason, it is desirable to complete the employer's own disciplinary process before calling the Police.
23. If an employee considers that he or she has been wrongfully treated during the disciplinary process, he or she has 90 days following the date of the action taken to raise a personal grievance with the employer.

## **Overall**

24. We reiterate the obligations on an employer to act as a fair and reasonable employer would in all of the circumstances. This requires a careful and unemotional assessment of the entire situation. The employer must act on facts discovered during its investigation, and always act fairly and in good faith.
25. Disciplinary action is a serious matter, and we always recommend taking legal advice before acting.

*If you have any questions about this issue, or any other employment relations questions, please do not hesitate to contact Shelley Eden on +64 9 336 0844 or +64 27 265 5174*

Disclaimer: These are guidelines only and not a substitute for legal advice.