

## Dealing with Poor Performance & Misconduct

**Most employers will, at some stage, have to deal with poor performance and misconduct by employees. When doing so, it is important to ensure that a fair procedure is followed. It is also important to act consistently and reasonably in relation to any action that is taken.**

Employers should consider not only their own disciplinary procedure before embarking on disciplinary action but also the **Acas Code of Practice on disciplinary and grievance procedures** (the Acas Code). The Acas Code is intended to provide practical guidance to employers on how to fairly carry out disciplinary procedures for misconduct.

We have put together our top 10 key steps for employers to consider when contemplating disciplinary action:

### Step 1: Is formal action necessary?

Employers should consider whether a formal investigation and disciplinary proceedings are even necessary. The foreword to the Acas Code encourages informal resolution where appropriate and emphasises that a "quiet word" may often be all that is required to resolve a problem.

Informal discussions with, for example, an employee whose timekeeping may be giving cause for concern, may be all that is needed to alert the employee to the fact that their lateness has been noticed and is not acceptable. This can often be a better way of dealing with the problem than launching straight into an investigation and formal disciplinary action. If this approach is unsuccessful and the lateness continues, a more thorough investigation may be necessary, and will involve the employer in keeping records of the lateness in order to provide evidence at a disciplinary hearing.

### Step 2: Commencing a disciplinary process – planning is key!

If informal action has not resolved an issue, or if the issue is too serious for informal resolution, the employer will need to commence formal processes.

Both at the outset of and during a formal process, it is beneficial to understand the requirements and the stages of the process. Planning will involve:

- Checking the requirements of the employer's disciplinary policy.
- Choosing an appropriate investigator.

- Keeping in mind the general requirement of having different people at each stage (that is; the investigation, disciplinary meeting and appeal meeting) and deciding who could conduct each stage.
- Keeping to timescales in disciplinary policies.

### Step 3: Suspension

In some instances of serious misconduct, an employer may wish to consider suspending the employee. However, the act of suspension itself if handled unreasonably can lead to claims so it is important that employers fully consider the suitability of suspension in each case and do not impose suspension as a knee jerk reaction. Suspension may be appropriate, for example, where there is a potential threat to the business or other employees, or where it is not possible to properly investigate the allegation if an employee remains at work (for example because they may destroy evidence or attempt to influence witnesses).

Employees need to be informed of the fact that they have been placed on suspension as soon as possible and this should be followed up in writing.

Any suspension should be on full pay (and contractual benefits). The suspension itself is not a sanction or punishment and care should be taken to avoid any suggestion that the suspension implies guilt or that the situation has been pre-judged.

The period of suspension should be as short as possible, and the suspension decision should be kept under regular review.

### Step 4: Investigation

The requirement for an investigation to take place prior to any disciplinary action is critical. The level of the investigation will depend on the circumstances of the matter and could include investigation meetings and obtaining witness statements or simply a collation of the evidence.

The investigation should be conducted in a proportionate and sensitive manner remembering that guilt should not be presumed.

An employer needs to consider who should conduct the investigation. In most cases, the employee's immediate line manager will be the appropriate person. However, this may not always be the case. Sometimes the employer's own procedure (which may be contractual) stipulates who is to conduct an investigation.

When selecting the investigator, the employer will also need to consider who should conduct the disciplinary hearing, if one becomes necessary, and any potential appeal hearing.

The disciplinary chairperson should be impartial and ideally have no previous involvement in the matter. This means that they should not also be a witness, have

conducted the investigation or have taken the decision to suspend the accused employee. Prior to appointing a chairperson, the employer should also consider who would be the appropriate person to conduct any appeal. Acas guidance recommends that ideally the person who conducts the appeal should be more senior than the person who made the disciplinary decision.

### **Step 5: Information to be given to the employee before the disciplinary hearing**

Once the investigation is complete, if the employer decides that formal disciplinary action is required, it should write to the employee to confirm the outcome of the investigation and invite them to a disciplinary hearing.

The letter should set out sufficient information about the allegations and their possible consequences to enable the employee to prepare their case for the disciplinary hearing. Copies of any documents or evidence on which the employer intends to rely at the hearing should be provided. It is advisable to send the employee a copy of the employer's disciplinary procedure, so that the employee understands the process.

The disciplinary invitation letter should also set out the arrangements for the disciplinary hearing. The disciplinary hearing should be convened at a reasonable time and place.

An employee should be given sufficient time to consider the allegations and to read any witness statements and other investigation materials.

It is important to make sure the employee appreciates the severity of the allegations and the possible consequences. They should not be expected to work this out for themselves from the disciplinary policy. In particular, an employee who is at risk of dismissal must be told of this in advance of the hearing, otherwise the dismissal may be unfair.

### **Step 6: Statutory Right to be Accompanied**

The statutory right to be accompanied is a freestanding right under the **Employment Relations Act 1999**. The right applies to all workers and is not limited to employees. The right applies whenever a worker is required or invited to attend a disciplinary hearing by their employer. They can choose to be accompanied by either a fellow worker or trade union representative.

### **Step 7: Record keeping**

Records should be made of all disciplinary proceedings.

As such and in addition to the person conducting the disciplinary hearing, it is advisable to have a second person present from the employer's point of view, who can take notes. Although the employee may often have their own companion at a disciplinary hearing who takes their own notes, it is good practice to ensure that the

employee is provided with a copy of the employer's notes and, where possible, their signature obtained to confirm their agreement as to the notes' accuracy.

The more contemporaneous the notes, the easier it will be to recollect events and decisions taken at the time. Records kept should be clear and concise, bearing in mind that it may be necessary not only to refer to them, but also to produce them during the course of any subsequent disciplinary hearing or tribunal proceedings.

### **Step 8: The Decision**

There are two main components to the decision; does the disciplinary chairperson uphold the allegations of misconduct and, if yes, what sanction does he/she impose as a result?

The disciplinary chairperson should only reach a finding that an employee is guilty of the allegations against them if the chairperson has a genuine belief in that guilt and that genuine belief was based on reasonable grounds (i.e. was formed following a fair and appropriate investigation). If there is any room for doubt, the chairperson should take steps to close any holes in the investigation before making a decision.

It is good practice to adjourn the disciplinary hearing for the chairperson to consider the evidence and make a decision. This adjournment will assist in showing that the decision was reached fairly and reasonably having taken all information and evidence into account. A decision given to the employee too hastily could indicate that the matter had been prejudged and therefore the employee could claim that the hearing was not conducted fairly.

### **Step 9: Communicating the decision**

Once a decision has been made, the employee should be informed of the decision without unreasonable delay. They must also be informed of their right of appeal.

Although the Acas Code requires this to be in writing, it is good practice, once the employer has reached a decision, to reconvene the meeting and also explain the decision to the employee face-to-face.

### **Step 10: Appeals**

If an employee appeals against the disciplinary decision, they should be invited to a meeting to discuss their grounds of appeal.

Ideally, the person hearing the appeal should be more senior than the person responsible for making the decision to dismiss or imposing the disciplinary sanction in the first instance.

As is the case with the disciplinary hearing itself, the employee must be given the right to be accompanied by a work colleague or a trade union representative.

Following the appeal meeting, the employer should write to the employee to give them the appeal decision and state that the decision is final.