

ESSENTIAL GUIDE TO HANDLING DISCIPLINARY CASES

Disciplinary procedures

You will need to have clear disciplinary procedures set out in your policies or staff handbook which provide clear structures for dealing with difficulties which may arise as part of the working relationship, from either your perspective as an employer or your employee's perspective.

These procedures are needed to make sure everybody is treated in the same way in similar circumstances and to deal with issues fairly and reasonably. Your procedures need to comply with the Acas Code of Practice and they should:

- let employees know what is expected of them in terms of standards of performance or conduct (and the likely consequences of continued failure to meet these standards)
- provide examples of what constitutes misconduct and gross misconduct
- identify the process the company will take to deal with disciplinary matters

If your procedures do not follow the Acas Code of Practice Disciplinary and Grievance Procedures then an employment tribunal will consider this and may adjust any awards made by up to 25% for unreasonable failure to comply.

http://www.acas.org.uk/media/pdf/k/b/Acas_Code_of_Practice_1_on_disciplinary_and_grievance_procedures-accessible-version-Jul-2012.pdf

What constitutes disciplinary action?

Disciplinary action may be used in the following circumstances:

Capability/poor performance

Capability issues may arise because an employee doesn't have adequate training, or is just unable to do the work to a satisfactory standard for another reason. An employer must try to identify the reason and give appropriate support, before invoking a formal procedure.

Situations where an individual is unable to do their job because of ill-health may also fall into this category. In these instances an employee should be dealt with sympathetically and offered support. However, unacceptable levels of absence could still result in the employer making use of warnings.

Conduct

Employee misconduct could range from continued lateness, failure to follow a reasonable management instruction, abuse of the organisation's computer system or Internet access, bullying behaviour or creating a hostile work environment, through to theft, fighting and committing criminal offences. The more serious offences may constitute gross misconduct.

Informal Action

In many cases, the right word at the right time and in the right way may be all that is needed and will often be a more satisfactory way of dealing with a breach of rules or unsatisfactory performance than a formal meeting.

- Talk to the employee in private. This should be a two-way discussion, aimed at pointing out the shortcomings and encouraging improvement. Criticism should be constructive, with the emphasis on finding ways for the employee to improve and for the improvement to be sustained.
- Listen to what the employee has to say about the issue. It may become evident that there is a no problem – if so make it clear to the employee where improvement is required, how progress will be monitored. Make clear that if there is no improvement then the next stage will be for the formal disciplinary process.
- Keep notes of any agreed informal action for your reference.

Avoid any informal measures turning into the formal disciplinary action as you may unintentionally deny the employee certain rights. If during your discussions it becomes obvious that the matter may be more serious, adjourn any discussion and refer to your formal policy/procedures.

Stages of the formal process

If disciplinary action is to be taken, the Acas code recommends the following stages as a minimum:

- a letter
- a meeting
- an appeal

There must always be a full and fair investigation to determine the facts and to decide if further action is necessary.

Record-keeping

Always keep records as they will be vital should a case go to an employment tribunal. The type of records to keep are: minutes of meetings, emails, attendance notes, notes of telephone calls, copies of correspondence, evidence submitted for any disciplinary meeting etc.

Investigations

In all cases, it is important to establish the facts and this may mean carrying out an investigation without unreasonable delay. The investigation may require the simple collation of evidence eg attendance records, meeting minutes, company data. In other cases it may require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. Where practical it is best practice that different people should carry out the investigation and disciplinary hearing and that a note taker be present. The investigatory meeting this should not by itself result in any disciplinary action.

If the investigation is large scale or complex then it may be useful to produce a report to summarise the key points and to organise documents.

Inviting the employee to a formal disciplinary meeting

Invitations to attend a disciplinary meeting must be put in writing to the employee and they must be given 'reasonable' notice of the meeting. (CIPD suggest 72 hours minimum notice). Letters should include:

- The fact they are required to attend a disciplinary meeting
- The date, time, location of the meeting
- Who will be attending and their role
- The nature of the allegations
 - Enclose copies of relevant evidence, witness statements etc
- Confirmation that disciplinary action may be taken as a result of the meeting
 - If dismissal is a potential outcome, this should be specifically referred to
- Their right to be accompanied by a work colleague or trade union representative
 - They have the right to address the meeting, confer with the employee and ask questions but they do not have the right to answer questions on the employee's behalf
- The date they must respond to confirm their attendance
- Request to submit any information they wish to be considered at the meeting
- Enclose a copy of your disciplinary policy other relevant procedures, for example, IT Policy if the allegation is linked to mis-use of company computers or email.

Handling disciplinary interviews

Prior to the meeting, make sure that all the relevant evidence (including any submitted by the employee) is available and arrange for a note taker to be present. It is useful for an HR professional to attend if possible. Think about the structure of the meeting and prepare the key points to be covered in advance. Meetings rarely proceed in neat, orderly stages but the following guidelines may be helpful:

- Never pre-judge the outcome of the interview before hearing the employee's perspective
- Introduce those present and explain their roles
- Explain how the meeting will be conducted
- State precisely what the allegation is against the employee and refer to appropriate statements and evidence
- Give the employee plenty of opportunity to put forward their side of the story and call any supporting witnesses
- Employers can also call witnesses, but they can only be in the room for the relevant part of the interview – not the duration
- Make use of adjournments; always take a break to consider and obtain any necessary extra information before reaching a decision. Adjournments can be especially useful if things become heated or people are upset during the interview

- Summarise the key points after the questioning is complete. Allow the employee the opportunity to clarify, ask questions, put further detail forward.
- Confirm that the outcome decision will be put in writing.

Potential outcomes of a disciplinary meeting

No action: After the meeting, the employer may decide that no action is necessary. For example, if an employee was unclear about what was expected from them and they agree to try to resolve the issue via additional support or counselling.

Warnings: The employer may decide to give the employee a warning. Your disciplinary policy should outline exactly which warnings will be given. Here are some examples of warnings an organisation may use:

- first written warning/improvement notice
- final written warning

Employers should specify a 'life' for formal disciplinary warnings after which they are disregarded for disciplinary purposes. Typical timescales suggested by Acas for the types of warning are:

- first written warning – 6 months
- final written warning – 1 year.

It may be appropriate for a warning to continue to be regarded for a longer period, provided the timescale was specified in the organisation's disciplinary policy from the outset. The time period employers select for warnings to remain current, and the penalties imposed, must be reasonable in all the circumstances. For example, they must take into account the nature of the misconduct, the employee's disciplinary record and be consistent with penalties imposed in similar cases.

Please note: the concept of verbal/oral warnings are no longer recommended by Acas as part of a formal disciplinary procedure, but for cases of minor misconduct at the informal stage it may prevent a problem from escalating

Dismissal: Dismissal is the ultimate penalty for serious allegations that are found to be upheld during the disciplinary meeting; they will normally be for cases of gross misconduct. For a decision to dismiss to be seen as 'reasonable' by an employment tribunal the employer must follow the Acas Code. They must also have ensured that the process had been fair overall, for example by complying with internal procedures, treating employees consistently and carrying out a proper investigation.

Appeals

Where an employee feels that disciplinary action taken against them is wrong or unjust they have the right to appeal against the decision. Appeals should be heard without unreasonable delay and ideally, be dealt with impartially by a manager who has not been involved in the case before.

Employees should let employers know the grounds for their appeal in writing. They also have a statutory right to be accompanied at appeal hearings.

Employees should be informed in writing of the results of the appeal hearing as soon as possible.

Frequently Asked Questions

Q Can an employee be disciplined whilst off sick?

It is possible to proceed with the disciplinary hearing whilst someone's on sick leave, however the employer, should they choose to do that would need to take into account the reasons behind the sick leave.

For example if the employees on short term sick leave they could consider postponing the meeting to a time when the employee may be fit to attend. If however the absence has more long-term the employer could consider making adjustments to their actual procedure.

What needs to be balanced here is the process having to proceed without unreasonable delay with the employee's opportunity to put forward their case. The Employer would have a duty to explore whether any adjustments would be appropriate for example if it would be more appropriate to attend at neutral venue or going to the employee's home to have a meeting.

Q Should I suspend an employee whose disciplinary case is being investigated?

Suspension should be a last resort, for example in very serious cases or where there are concerns that the employee could influence the investigation process or where the employee's continued presence in the workplace may produce further damage or conflict. In cases where a period of suspension with pay is considered this period should be as brief as possible, should be kept under review and it should be made clear to the employee that suspension is not a disciplinary sanction.

Q Do employees have the right to be accompanied to an investigation meeting?

Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, you may include the right under your own company procedure.

Q Who can attend as an accompanying person?

Accompanying persons will normally be a work colleague or an appropriate Trade Union representative. Employers don't usually have to allow other companions (for example family members or lawyers) but may do so if they wish.

Q What if the employee raises a grievance during a disciplinary hearing?

If the grievance relates to the disciplinary case then it may be appropriate to adjourn or suspend the hearing until the grievance can be considered.

Q What if during an informal meeting, I realise the matter is more serious than I originally thought?

If during an informal discussion, you think the matter may be more serious, bring the discussion to an end. Avoid an informal discussion turning into formal disciplinary action as this may unintentionally deny the employee certain rights and will be viewed as a breach of your own process. Deal with the issue separately using the procedures laid out in your disciplinary policy.

Q What do I do if an employee becomes upset or angry during a disciplinary meeting?

It is possible that a disciplinary meeting may not proceed very smoothly and people may get angry or upset. If the employee becomes upset or distressed, allow time for them to regain composure before continuing. If the distress is too great to continue then adjourn for a short period or if necessary, reconvene at a later date. However, it is best that the issues are not avoided.

During the meetings, there may be some 'letting off steam' and this can be helpful in finding out what has actually happened. However, abusive language or conduct should not be tolerated.

Q What is gross misconduct?

Gross misconduct is misconduct by the employee which is serious enough to terminate the contract between the employer and the employee, justifying dismissal without notice. Each situation must be considered on its own particular circumstances, but examples of gross misconduct include:

- theft or fraud
- physical violence or bullying
- serious incapability at work through alcohol or illegal drug use
- a serious breach of health and safety rules
- a serious breach of trust and confidence

This is not an exhaustive list. It is still important for an employer to follow a fair procedure before taking action to dismiss an employee for gross misconduct.