

Guideline to the disciplinary process

When an employer is faced with a situation of alleged employee misconduct a thorough disciplinary process must be conducted to establish whether the allegations are confirmed, or not, and what outcomes are suitable.

PLEASE NOTE

Restaurant Association members are strongly advised to seek guidance from the employment team on 0800 737 827.

[PLEASE NOTE. The law relating to disciplinary action requires a formal process to be conducted. Restaurant Association members are strongly advised to first seek guidance from the employment team on 0800 737 827 before instigating any disciplinary process.]

When an employer is faced with a situation of alleged employee misconduct, a thorough disciplinary process must be conducted to establish whether or not the allegations are confirmed, and if so, what outcomes are suitable. This guideline provides step by step instruction on how to conduct this process.

Misconduct can be a just reason for a formal warning and examples could include lateness, minor breaches of an employment agreement or policy and minor instances of unprofessional or unacceptable conduct, such as swearing. Misconduct is usually behaviour that is deliberate. Compared to serious misconduct, which may justify instant dismissal, misconduct is generally considered to be misbehaviour that is not serious enough to undermine or destroy the relationship of trust and confidence between an employee and employer.

Whether a warning is a justified outcome will depend on all the circumstances at the time the warning is issued. For a warning to be lawful it must have both substantive and procedural justification. It must have a reason, established or confirmed only after a fair and reasonable process has been followed. It is only then that a warning can be issued. If both these elements are not met, the warning will be unjustified and the employee could challenge the warning as an unlawful action of the employer. An unjustified warning can give rise to a personal grievance even though the employee remains in employment.

The legal test of justification is what a fair and reasonable employer could have done in all the circumstances at the time. This legal test is the same for all actions of the employer, whether it is a low level verbal warning or a dismissal.

Disciplining and dismissing employees ~ step by step

Step One ~ Investigate

When an allegation is brought to your attention your first step is to evaluate and investigate the complaint or incident.

- Be objective and examine all possible explanations ~ don't automatically assume that the employee is guilty.
- Ensure all relevant facts are obtained by seeking the views of others who may have been involved in or witnessed the incident/episode. Do not rely on hearsay.
- Ask witnesses to write and sign a witness statement of the events (from their perspective).
- Check the employee's employment agreement and any relevant policies to assess whether there has been a breach of the terms of the employee's employment.
- Consider if the issue can be resolved without taking any formal disciplinary action.

Step Two ~ Invite the employee to a meeting

If you assess that the allegation(s) warrant further investigation. The allegations of misconduct must be put to the employee with all relevant and supporting information.

- Check whether the employee's employment agreement and any relevant policies outline warning and dismissal procedures, and if so, ensure that these are complied with.
- Set up a meeting with an employee by inviting them, in writing, to attend a formal disciplinary meeting.
- The employee will need adequate time to prepare, so allow at least 48 hours' notice of the meeting.
- The letter should contain:
 - information about the time, place and date of the proposed meeting (allowing at least 48 hours' notice)
 - detailed information about the reason for the meeting, so that your employee knows what to expect and can properly prepare their response prior to the meeting.

- any documents that you are relying on to support the allegations, for example witness statements.
- the alleged breaches of house rules/policies/the employee's employment agreement.
- a statement that clearly states that the employee will have an opportunity to respond to the allegations before any decisions are made.
- information advising the employee of the worst possible consequences of the process. As an example, if the conduct may result dismissal as its maximum sanction, the employee must be told of that possibility. If the conduct may only warrant a lesser maximum sanction, say a written warning, then the employee should be told that is the worst possible sanction. It is important not to under or overstate the worst possible outcome.
- the employee's right to seek independent advice and have a support person and/or representative present at any meetings.

Step Three ~ Meet with the employee

- Preparation is the key to a productive meeting. You cannot **over** prepare! In preparation to the meeting review and analyse:
 - a) The known facts
 - b) All relevant documents (including employment agreement, house rules, policies)
 - c) The employee (their work history, background, personality etc)
 - Determine what you want to achieve in the interview
 - Compile a list of questions you would like to ask and that will assist you in achieving your goal.
 - Group them accordingly to the structure of your interview (i.e. chronologically or by topic)
 - Write down follow-up questions to possible answers
 - Highlight the questions you definitely want to ask
 - Consider how you will deal with the employee's refusal to answer a question
- The employee would have been advised of their right to have a support person or representative present at the meeting in the letter inviting them to the disciplinary

meeting but it is important to remind the employee of that right before actually commencing the meeting. Therefore, if no support person and/or representative is present, remind the employee and confirm that they are agreeable to moving forward with the meeting without one being present. If the employee decides that they do want to have a support person and/or representative present, adjourn the meeting and arrange another meeting time to enable the employee to organise a support person and/or representative.

- An employee is entitled to know the purpose of a meeting, any allegations raised, and any potential outcomes of the disciplinary process. Again, the employee would have been advised of all of this in the letter inviting them to the disciplinary meeting but it is important to reiterate this at the beginning of the meeting and to make sure that the employee understands the situation and does not have any questions. Commence the meeting by:
 - a) Referring to the initial letter inviting the employee to attend the meeting
 - b) Stating the purpose of the meeting (i.e. to investigate certain allegation(s) and to seek the employee's response)
 - c) Reiterating the allegation (i.e. theft, consuming alcohol on duty, falsification of timesheets, sexual harassment etc).
 - d) Confirming the potential outcome (i.e. verbal warning, written warning or dismissal)
 - e) Seeking the employee's confirmation that he/she has no questions about the process at this stage.
- Let the employee provide his/her response/explanation/comments to the allegation(s). Note that the employee is entitled to have their support person and/or representative speak on their behalf if they so choose.
- Listen carefully to the employees responses and take note of what they say (we recommend that you have someone else take the notes so that you can concentrate on what is being said and on conducting the meeting).
- Once the employee has provided his/her response ask any questions that may have arisen as part of the employee's explanation (i.e. if the employee has provided an explanation that does not seem to make sense or that you do not believe to be correct, this needs to be challenged so that the employee has the opportunity to clarify and/or further explain). At this stage, especially if it is an issue of credibility, you can insist that the employees answers the question directly and does not have the

support person and/or representative answer on his/her behalf. It is important that you do not indicate that you have already made up your mind as to the employee's guilt, or otherwise.

- After the employee has provided further responses to questions. Adjourn the first meeting and arrange for a second meeting.

Step Four ~ Conduct further investigations

If the employee has raised issues that need to be investigated further (i.e. the employee has advised that he/she has a witness or has evidence that he/she wishes to be considered), this should be done after the first meeting.

- These investigations need to be full and fair so that you can gather more information. Make notes of any interviews (these can be brief, but ensure you record precisely what are believed to be the important points). Ask the people you speak with to sign the notes to verify that they are an accurate record of what they have said.

You may skip this step if the If the employee has admitted the conduct or has not provided any comments that need further investigation.

Step Five ~ Further meeting with employee

Once this further investigation has been completed, a summary should be provided to the employee and the employee should be invited to a further meeting (this is done again by letter).

- Present to the employee the additional information you have gathered from your further investigations in writing before the meeting. Tell them the names of the witness and what they have said.
- At the meeting go over the new information and provide the employee with the opportunity to provide comments on the employer's further investigation.

- This process needs to repeat until all the employee's comments/explanations etc have been fully investigated and the employee has had the opportunity to comment on the investigation.

You may skip this step if the If the employee has admitted the conduct or has not provided any comments that need further investigation.

Step Six ~ Consider the employee's response

Once you have all of the relevant information, decide whether you think that the employee has committed misconduct. You should take an adequate amount of time to consider everything before making a preliminary decision. If later challenged about the procedure at Mediation or before the Employment Authority you must be able to show that you had not prejudged the matter and that you fairly investigated the episode.

If you decide that no misconduct has occurred you will need to communicate this decision to your employee by meeting with them again.

Step Seven ~ Proposing a sanction

If you believe, after considering all of the relevant information and deliberating on the employee's feedback, that misconduct has occurred, you will need to decide what you consider an appropriate penalty could be – for example you may decide that the misconduct warrants a warning, or, in the case of serious misconduct, dismissal.

- You must advise in writing the reason why you are proposing this sanction and arrange another meeting with the employee to get their comment/feedback on the proposed sanction.
- Advise the employee that you have formed the preliminary view that the allegation(s) is proven and that the company is leaning towards a: verbal warning, a written warning, a final written warning or dismissal.

- Ask the employee to provide comments on your preliminary view with regard to the allegation(s) and preliminary decision re disciplinary action.
- Listen to the employee's feedback, then adjourn meeting to consider the employee's comments. You may wish to only adjourn briefly (if the employee has not said much, possibly just take a break for ½ hour to an hour) or you may wish to adjourn overnight before providing the employee with the final decision. Consider whether anything that the employee has said changes your mind about what sanction you should impose.

Step Eight ~ Deliver your final decision

Reconvene the meeting to deliver your final decision.

- You must at this point tell the employee the reason why you made this decision. Any resulting warning should detail what conduct is prohibited or expected and the time frame for review or monitoring. A warning must also include what may or is likely to happen if there are further instances of misconduct or continued poor performance.
- Follow up the meeting with written confirmation of your decision. This letter should summarise the allegation(s), the employee's response / feedback to the allegation(s), the decision and the reasons for it, and the sanction imposed.
- If the employee is dismissed, it will be necessary to advise what day their employment will end, whether they are required to work out their notice period, or be paid in lieu of notice (if your employment agreement allows for this), or if they are to be terminated without notice for serious misconduct.
- A warning (verbal and written) must contain four important elements, namely:
 - Highlight the unsatisfactory issues (ie continually late for work / abuse of fellow workers etc).
 - Advise what the employee needs to do to remedy the issue.
 - Advise them that failure to correct the identified issues or any other issue that arises could result in further warnings, or dismissal.
 - Advise the expiry date of the warning. The warning need not be of a short duration (say 6 months) as this does not preclude the employer from invoking disciplinary procedures in the interim. Warnings for serious misconduct should not expire.

- Following disciplinary meetings/warnings any subsequent disciplinary matters do not have to relate to previous issues as long as the warning is not restricted to specific conduct.

Tips

- Ensure the employee is invited to bring a support person or representative to any meetings as part of this disciplinary process.
- Conduct a thorough investigation of the matter – be objective do not try and drag up a weak reason to achieve an objective.
- Never have a pre prepared letter of warning/dismissal (or final pay). This is a clear indication that you have already made up your mind, before hearing and considering the employees feedback.
- Do not make an immediate decision at the conclusion of first meeting. Consider what has been said, make further investigations, seek some advice, then decide what action you consider appropriate.
- If after a period of time following a warning the problem is still ongoing, set up another meeting process. At this meeting indicate that you consider there is still an issue and invite the employee to respond as to why they have failed to correct the earlier identified problem.
- During the disciplinary process, if the employee asks “do you want me to resign?” always respond by saying no. If you answered in the affirmative (even if that is the hoped for outcome) it could successfully be argued that your actions amounted to constructive dismissal. In such situations say something like “any decision on your ongoing employment relationship is for you to make”. Invite them to go away and think about it and come back to you.
- There are no set number of warnings that must be issued before dismissal could result; it depends on the particular situation and circumstance, and/or employment agreement and/or policy.