

## Disciplinary Guide

### Overview

*Composite Legal Expenses Insurance provides advice to thousands of businesses and individuals each year through its legal advice helpline. The vast majority of calls to the helpline come from businesses seeking help on employment related matters.*

*Our expert lawyers have used their years of experience dealing with these matters to create this guide for you to use as a reference tool. The guide gives a general overview of some of the main procedures that should be used during a disciplinary process.*

*The guide has been condensed as much as possible to make sure you only get an overview of the area, for that reason it should not be viewed as comprehensive or as a substitute for specific legal advice.*

*If you have the benefit of a legal expenses policy with us, then the guide can be used in addition to the advice we provide and you should contact our advisors for advice in relation to any specific situations.*

*The guide refers to a number of template letters that can also be found on our website. These letters can be amended to suit individual circumstances.*

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# DISCIPLINARIES

## Procedures

Naturally the majority of employment related disputes arise from disciplinary related matters. Therefore, it is vitally important to have a disciplinary procedure in place.

This procedure should be clear, accessible and in writing. It should set clear standards for behaviour and performance and set out the procedures you will follow if those standards are not upheld. Having a clear procedure should mean employees are aware of what standards are expected of them, how they should behave in the workplace, how rules will be enforced and how they could be dismissed if the rules are broken.

We usually recommend the procedures are kept separate to the employment contract and are non-contractual in nature. This will allow you to adopt a flexible approach in circumstances where a rigid application would be inappropriate or could cause hardship or unfairness in its own right. If possible employees and their representatives should be involved in the development of rules and procedures.

### The ACAS Code of Practice for Disciplinary Procedures (“The Code”)

Any disciplinary procedure has to **at least** comply with the requirements of The Code; it sets out principles for handling disciplinary situations in the workplace.

Disciplinary situations are defined as including misconduct and poor performance.

**Fairness and transparency** is promoted throughout The Code. If matters need to be dealt with formally, what action is reasonable or justifiable will depend on all the circumstances of the particular case and matters should:

- Be dealt with promptly and without any **unreasonable delay**
- Be dealt with consistently
- Give the employee the opportunity to defend themselves by providing them with all the information
- Allow employees to be accompanied at disciplinary meetings
- Have an opportunity for the employee to appeal to someone independent

The disciplinary process should have 3 distinct stages an **investigation**, a **hearing** and an **appeal**. Each of these stages should be dealt with by separate independent managers and their seniority should increase throughout the process.

The Code has statutory authority and must be taken into account by an Employment Tribunal when considering fairness in relevant cases. An unreasonable failure to comply with The Code could result in a dismissal being deemed unfair and a tribunal may increase an award for compensation by up to 25%.

## The disciplinary process

### Dealing with matters informally

The first thing to consider once an employee has breached a rule or policy should be whether the matter should be dealt with formally or informally. If possible The Code suggests you should try and deal with matters informally. It would be appropriate to give a verbal warning to an employee without following a formal procedure. If the matter is likely to lead to a sanction greater than a verbal warning a formal procedure will need to be instigated.

### Suspension

Suspension should be considered in the most serious cases of misconduct or if you consider a matter to be gross misconduct. Suspension would usually be appropriate if you have a situation where, should the allegation be founded, the outcome may lead to dismissal or if the employee's presence in the workplace could hinder the investigation. If you do decide to suspend, it should be on full pay and you should inform the employee of the terms of the suspension making it clear it is not a disciplinary act or an assumption of guilt but rather a neutral act to allow for a full investigation to take place.

*\*See letter 1*

### Investigation

An independent manager should be appointed to carry out an investigation into the allegations against the employee. Separate managers will be needed to hold the disciplinary hearing and if necessary an appeal meeting.

The investigation should be fair and balanced, so the investigating manager should be looking for evidence that could prove innocence as well as guilt. The investigation is essentially a fact finding exercise to gather all the facts.

The amount of investigation needed will depend on all the circumstances but should always be thorough enough to allow the person holding a disciplinary hearing to establish if they have reasonable grounds for believing or disbelieving the allegations against the employee. It should also be thorough enough to allow the case to be put to the employee in a manner that makes it clear exactly what is being alleged.

Where there are allegations of misconduct, it is likely that witness statements will be required and therefore the person investigating the matter will want to speak with the witnesses and gather appropriate written statements.

An investigation meeting will most likely need to take place with the employee and usually this can be done at an early stage to get the employee's initial response to the allegations. This is not the disciplinary hearing and therefore there is no statutory right for the employee to be accompanied by a work colleague or trade union representative. You may decide to provide evidence at this point depending on the circumstances and nature of the allegations.

Any investigation meetings held with the employee or witnesses should be done in private and notes should be taken.

Once the investigation is complete you may decide no further action is needed and this will be the end of the process. If, however, the investigating officer considers there is a case to answer, a disciplinary hearing will need to be arranged.

### **Letter**

When dealing with a formal disciplinary process it is important to invite the employee to a disciplinary hearing in writing, as a minimum this letter should:

- Inform the employee of the time and place of the disciplinary hearing. This should be reasonable and allow the employee sufficient time to prepare their case. As a minimum the employee should be given 48 hours' notice.
- Explain fully the allegations against the employee.
- Warn the employee of the potential consequences of the disciplinary hearing, if dismissal is a potential outcome this should be made clear.
- Explain that the employee has the right to be accompanied at the hearing by a work colleague or a trade union representative.
- Enclose all evidence that will be relied upon at the disciplinary hearing. This will include any witness statements and other documents.

*\*See letter 2 or letter 3*

### **Disciplinary Hearing**

A separate manager should be appointed to chair the disciplinary hearing, this manager should be independent and should not have been involved in the investigation. This manager should be more senior than the manager who dealt with the investigation. Bear in mind another manager, preferably more senior, may be needed to conduct any subsequent appeal meeting.

The employee should be given a reasonable opportunity to prepare for the disciplinary hearing and the hearing should be held in private during the employees normal working hours.

There should be someone at the meeting who can take notes, these notes will usually be provided to the employee following the disciplinary hearing.

It is useful at the start of the disciplinary hearing for the chair to ask if the employee is satisfied with the procedure so far and check if the employee has received all the information provided. The chair should also introduce those present, explain the complaint against the employee and the purpose of the meeting.

The chair should go through each of the allegations and make reference to all relevant evidence. The employee should be allowed the opportunity to make representations, ask questions and challenge the evidence as appropriate.

Usually all witnesses will have provided statements prior to the hearing and there will be no need to call witnesses. If the employee wants to call witnesses to the hearing this should be allowed although there is no legal right for the employee to demand a court room style cross-examination. If the employee does have appropriate questions that need to be asked of the witnesses, the hearing should be adjourned.

The employee's companion should be there to support the employee and should be allowed to make statements or put forward questions on the employee's behalf. The companion should not be allowed to answer questions that are put directly to the employee.

The chair should be sensitive to the fact that an employee involved in a disciplinary process could be under a significant amount of stress. If the employee seems distressed or becomes aggressive during the hearing an adjournment could be used to allow the employee to regain composure.

Once all the allegations have been addressed and the employee's case has been presented, the chair should take the time to summarise and seek clarification from the employee where appropriate. The hearing should then be adjourned for the chair to make a decision.

## The Decision

The chair will need to consider the following:

1. Are the allegations founded?
2. If they are founded, what is an appropriate sanction?

When considering whether the allegations are founded the chair will need to decide if he genuinely believes the allegations are founded and he will need to demonstrate there are reasonable grounds on which to base that belief.

It is not a criminal trial so there is no requirement the allegations are proven beyond all reasonable doubt. A genuine belief could be based on the fact the chair thinks it is more likely than not that the allegations are founded.

If the chair doesn't believe the allegations are founded, the employee should be informed and this will be the end of the process. If the chair genuinely believes the allegations are founded an appropriate sanction must be considered.

Careful consideration should be given to what would be an appropriate sanction. Options will generally involve; an informal warning, additional training, a written warning, a final warning or dismissal. Dismissal and final warnings will usually only be appropriate in cases of serious or gross misconduct.

If dismissal is considered an option, consideration should be given to any alternatives. Only in cases of gross misconduct should employees be dismissed without any prior warning.

The chair should consider what sanctions have been imposed on other employees for similar misconduct. If the employee has 'live' warnings on file for previous inappropriate conduct these should be taken into account. The chair should also consider if there is any appropriate mitigation.

It can be useful for the chair to make a note of the decision making process. Why does he genuinely believe the employee is guilty of the misconduct? Why does he think this is an appropriate sanction? This could be an extremely useful piece of evidence if the matter led to an Employment Tribunal.

Once the chair has made a decision, it will need to be communicated to the employee. This must be done in writing and it is also advisable to communicate the decision verbally either by telephone or ideally by reconvening the hearing.

The employee should be advised of the sanction, the reason for imposing it and the fact that they have the right to appeal against the decision. If a warning is imposed, the length of time the warning will remain 'live' should be explained and the consequences of further misconduct or failure to improve must be made clear. The employee should be given a reasonable opportunity to appeal.

***\*See letter 4 or letter 5***

## Appeals

If the employee appeals against the decision made at the disciplinary hearing, an appeal meeting should be arranged. The employee will again have the right to be accompanied by a work colleague or a trade union representative.

*\*See letter 6*

Another independent manager should be appointed to deal with the appeal. This manager should be more senior than the disciplinary chair so they are in a position to overrule any decisions made. Often the person hearing the appeal will be the most senior manager in the organisation.

The appeal should be treated, firstly as a review of the procedures:

- Has a thorough investigation been carried out?
- Has the organisation complied with The Code and/or its own procedures?
- Has the employee raised any procedural issues?

And secondly, as a review of the decision:

- Were the allegations proven?
- Was the decision reasonable?

Any additional information or mitigation provided by the employee should be taken into account. If the employee raises any additional points these should be considered fully.

If the original hearing was flawed procedurally then the matter should either be dropped or if appropriate the appeal may be conducted as a full rehearing of all the evidence.

The chair will either uphold the decision, reduce the sanction or remove the sanction altogether. The sanction should never be increased at appeal.

Once the decision has been made it should be communicated to the employee and a letter should be sent confirming the outcome. This will be the end of the internal process and that should be made clear to the employee.

*\*See letter 7*