



A GUIDE TO DISCIPLINARY PROCESSES

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Introduction

Employers are entitled to set and expect reasonable standards of conduct and behaviour within their workplaces. If an employee breaches those standards or rules, then employers can take action to ensure there is no repeat of the breach.

- Codes of conduct, house rules and employment agreements can all contain information about workplace rules, and the processes by which any breach of them will be investigated.
- Case law has also developed some important requirements of employers investigating potential misconduct or serious misconduct.
- In brief, an employer is required to investigate and determine whether an alleged breach can be substantiated on the available evidence and is sufficiently serious to take disciplinary action.
- Any disciplinary action taken must be substantively and procedurally justified. In other words, the reason for it, and the way it is carried out, must be what a fair and reasonable employer could do in all the circumstances.

Substance

Misconduct includes repeated poor performance and can be described as behaviour that is unacceptable to an employer, but which does not irreparably breach the trust and confidence relationship.

This type of conduct will result in counselling (for example, where rules or standards may not have been made clear at the outset) and progressive (generally, but not always, first and final) warnings. Repeated misconduct can eventually result in dismissal on notice.

Serious Misconduct is unacceptable behaviour that breaches the trust and confidence relationship to such an extent that it is irretrievable. This type of conduct can give rise to summary termination of employment (i.e. without notice).

Process

Disciplinary action of any kind will be unjustified if the process followed by an employer is not fair and reasonable, and in line with statutory obligations and certain key principles developed by the courts over many years.

That is why it is important that employers follow a fair process and are aware of their obligations in managing such processes. While each case will be different and will require specific consideration, we have outlined below the key steps to be taken in undertaking a disciplinary process:

- 1 Gather preliminary information to determine whether an employment investigation needs to be undertaken.
- 2 Determine who will be the decision-maker and ensure the appropriate delegations to make decisions about the matter are held.
- 3 Inform the employee of the allegations and potential outcomes in writing, attaching all relevant documents / information.
- 4 Meet with the employee to hear their response to the allegations.
- 5 Undertake further investigation if necessary, to verify / disprove the employee's response.
- 6 Put any new information to the employee.
- 7 Hear the employee's response to the new information in person and / or in writing.
- 8 Make a preliminary decision on the allegations and the outcome.
- 9 Hear the employee's response to the preliminary decision in person and / or in writing.
- 10 Make a final decision considering the employee's response and all relevant information.
- 11 Communicate the final decision to the employee in person and in writing.
- 12 Implement the final decision as appropriate – e.g. ensure final pay is set up; put disciplinary outcome letter on employee's file.

Key points:

- All allegations should be fully investigated before disciplinary action is taken.
- The employee should be provided with all information available to the decision-maker, including statements from witnesses and the identity of the complainant and any witnesses.
- The employee should be given an opportunity to respond to all allegations and information.

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- The employee should be given an opportunity to meet personally with the decision-maker before any decisions are made.
 - The employee's response should be genuinely considered by the decision-maker.
 - The employee should be informed of their right to have a representative and / or a support person present at all meetings.
 - The final decision should be a decision that a fair and reasonable employer could have made in all the circumstances.