



A FREE GUIDE TO CONDUCTING DISCIPLINARIES



***Are you are struggling to effectively
implement disciplinary actions?
Then read on...***

In this ebook, we will talk you through the common mistakes that employers often make regarding disciplinary procedures. We will then explain how to manage disciplinary procedures properly, and coach you through carrying out investigations, hearings, outcomes, appeals, and more...

10 Disciplinary Downfalls...

Recently, more and more clients are approaching us wanting support in how to navigate the minefield that is conducting disciplinaries at work. We understand that breathing life into your disciplinary policy is not easy, and managers are not always comfortable and confident in going it alone.

Here are the top 10 downfalls of getting it wrong...

- 1. Not warning the employee at the outset of the possible consequences of the disciplinary action.**
- 2. Not setting out the nature of the accusations clearly, in writing, to the employee and providing evidence that is pertinent to the offence.**
- 3. Not furnishing the employee with relevant evidence against them.**
- 4. Not operating a system of warnings where appropriate.**
- 5. Not allowing the employee to be accompanied at a disciplinary hearing.**
- 6. Relying on evidence from one particular source, with no corroborative evidence.**
- 7. The absence of an adequate appeal stage.**
- 8. Failure to keep clear records of the whole disciplinary process.**
- 9. Delays in dealing with disciplinary issues.**
- 10. Having the same person deal with the whole disciplinary process.**

But... We have some tips for getting it right!!

Why do you need a Disciplinary Procedure?

In any company, it is necessary to have a code of rules and standards that employees can work within safely and efficiently.

The purpose of the disciplinary procedure is to help and encourage all employees to achieve and maintain standards of conduct and work performance. The first step to improved performance is **informal counselling** by the supervisor or manager. If you spend time on this, and get this right, in the majority of cases you may never need to move to the **formal disciplinary process**.

Informal Disciplinary Procedure explained...

At work, discipline is a combination of having clear and fair rules that everyone understands and can work to, *e.g.* smoking, safety, timekeeping, and standards of work, and ensuring that these rules and standards are kept, and if they are not, taking action to close the gap between required behaviour/performance and actual behaviour/performance.

The management of employee's performance and behaviour is crucial to the supervisor/manager's job. Informal disciplining is essential to successful management. It is important to keep on top of any problem and to identify, and then work through, a solution with the employee.

Remember:-

- **Managers have the right to manage.**
- **Failure to deal with the problem effectively can impact negatively upon the team & the business.**
- **The informal disciplinary interview is designed to improve behaviour or performance, not to punish - so act sooner rather than later.**

Establish the Gap in Performance

If you have concerns about an employees behaviour, attitude or performance you should first:-

- Check facts on standards - what are they? Has the employee been informed about these?
- Check facts on performance – gather data and actual figures/circumstances. If you have a vague feeling, gather evidence to clarify this feeling. **DO NOT** go into a disciplinary interview without being properly prepared.
- Only discuss with the individual once you are very sure of the above.

Arrange an informal meeting: -

Whilst this requires no notice, you should avoid reacting immediately. Never discuss concerns in front of colleagues; find somewhere private. Think about what you are going to say.

At the meeting it is vital for the interviewer to find out why the gap in performance or behaviour exists. It may be: -

- The standards were not made clear.
- Not enough support training was given to reach the standards.
- An individual chooses not to work within the required framework.
- A personal problem or grievance inhibits performance.

In order to determine the reason for the gap, you must : -

- Ask open questions.
- Allow the person to answer.
- Listen to the answers.
- Be firm and clear about the standards required, and consequences of not meeting standards.
- Don't jump to conclusions.
- Agree the reason for gap with individual.
- Agree review period for improvement.
- Where appropriate, explain that if behaviour/performance does not improve, a formal disciplinary procedure will follow.
- Make brief notes of key points of the meeting.
- Summarise what has been agreed, and make sure the individual understands what is expected of them.

Incidence Diary

Keep brief notes on all counselling sessions in your diary. The notes should be brief and contain the following:-

- Statement of problem in performance.
- Date and duration of conversation/counselling session with individual.
- Improvement required .
- Follow up date.

TOP TIP- Remember FOSA

Facts – to demonstrate the shortfall in performance e.g. timesheets, sales figures, customer complaints etc.

Objectives – the standards they should be achieving.

Solutions – identify solutions to improve performance.

Actions – agree an action plan, including a review date.

This is powerful information for you to share with the individual about their performance.

Follow up...

Follow up as agreed. Refer to your incidence diary to keep on top of the problem. Note incidences of good performance so you can praise achievement and share this with them at the next review. If behaviour/performance does not improve within agreed time scale, discuss with the individual and invite them to a formal disciplinary hearing.

When to move to Formal Disciplinary Hearing or Capability Hearing

Unsure when to move to the formal procedure? Read on...

Formal proceedings are required when:

- Behaviour, action, or shortfall in performance is significant.
- The standards or timescale for improvement, set in an informal or formal review, have not been met.
- The problem is repeated.
- Informal approaches have failed to improve the behaviour/performance.

- **All investigations have been completed!** Remember that no disciplinary will be conducted unless it has been **fully investigated**.

Please don't wait until the behaviour/performance is so bad that you are looking for a way to dismiss. Remember, the procedure is about **improving performance**, which will ultimately make your life easier. Once the decision is made to move to the formal procedure, you need to consider whether it is a capability or a conduct issue?

In brief, the Capability Procedure should be used where an employee is trying to do their best to achieve the standards required, but is unable to do so due to a lack of skill, aptitude, physical/mental ability, or because performance is being affected by a health condition. Read the introductions for both policies prior to making this decision.

The Investigation

Before holding a disciplinary hearing, it is crucial that employers have sound evidence on which to base their decisions. Failing to conduct a full investigation, in all but the most exceptional of circumstances, may render a dismissal unfair and result in costly consequences in terms of tribunal awards and staff morale.

Investigate the incident. Ideally, the person who conducts the hearing should not conduct the investigation.

How serious is it?

An investigation must establish the seriousness of the alleged misconduct and be proportionate to it. So, your response may range from a brief discussion with the employee to establish the facts, to a full-scale investigation. The objective should be to provide sound evidence for any subsequent disciplinary action. Investigators should ask themselves what they can reasonably expect to achieve given the time and resources available. Any internal investigation should be logical, impartial, fair, and time-bound.

Keep an open mind

Do not assume guilt or innocence. If the investigation indicates that gross misconduct may have been committed, the employee should be suspended on full pay, pending the investigation. This should also be the policy in other serious cases, where the employee's continued presence in the workplace might have a disruptive effect, or enable employees to undermine the case against them. Make sure this is described as a precautionary measure – it should be made clear it is not a disciplinary sanction.

Establish the Evidence

Identify the types of evidence you need to gather. Don't rely merely on witness statements. Think about gathering files, documents, CCTV footage or computer records, if available. Policy documents and training records can also be used. If any

evidence is likely to perish, or be removed, gather it as a priority. Decide who you need to interview, and do it as soon as possible before memories fade. You are entitled to interview the employee against whom the allegation has been made, but it should be made clear it is an exploratory interview, and not a disciplinary hearing. Identify what you need to establish from each interviewee and prepare accordingly. It is not advisable to have a pre-prepared list of questions as you may need to explore particular responses in more detail during the interview. It is better to prepare a list of topics and decide on the order in which you wish to deal with them.

There is no requirement for an individual to be accompanied when giving a witness statement, however, take care not to intimidate the witness, put words in their mouth or try to engineer what is said.

You have the following options;-

- Provide them with a blank incident form, and ask them to put down in their own words what happened.

or

- Design a set of questions which you ask each witness, and ask them to complete their answers in their own words.

or

- Interview the witness using the same questions for each witness, write up their responses and give back to the witness to amend/agree the wording accordingly.

You need to act promptly before the memory fades. Ensure that statements are written in first person, relate to the facts, focus on observations rather than opinions and rumours, and ensure that all witness statements are signed. If a person refuses to oblige, explain that if a case goes to Employment Tribunal, the court can insist that they give a statement.

NB. Employers do not have the right to force an employee to sign a statement. If a statement is unsigned it can be used to influence, but not determine, the outcome.

Witnesses should be informed at the end of the interview, that if the case results in a disciplinary hearing, they may be required to give evidence. They need to be aware that anonymity cannot be guaranteed, unless there is a genuine fear of reprisal.

Is it criminal?

Some of the more serious allegations of misconduct may potentially be criminal offences. If you suspect this is the case, you may need to inform other agencies – for example, the Health and Safety Executive, or the police. The evidence you gather for

your internal investigation may also be required for a parallel criminal investigation. If this is the case, continuity of evidence is important. For your evidence to be admissible in a criminal prosecution, you need to be able to demonstrate its physical location at any point in time. Seek legal advice at an early stage on how continuity can best be achieved.

Handle confessions with care

If an employee admits to a criminal offence during the course of an internal investigation, it is advisable to make a note of it in case it needs to be used as evidence in any subsequent criminal proceedings. The note should be timed, dated and signed by the person taking it and the employee should read and sign it. Where the employee disagrees with the record, note the details and ask them to read and sign them to the effect that they accurately reflect the disagreement. Any refusal to sign should also be recorded. The investigation should then be terminated with a view to involving the police or any other appropriate investigatory body. Failure to do this is likely to make such unsolicited comments inadmissible in a criminal court.

Completing the investigation

The investigating officer does not make any judgement as to whether the case is proven or not, rather than, on the balance of probabilities, there is a case to answer. You do not have to prove your case “beyond reasonable doubt” for it to stand up in a tribunal.

All relevant evidence collected as part of the investigation must be sent to the employee, and the person conducting the disciplinary hearing, in good time.

NB. While a minimum of 24 hrs notice is required for a disciplinary hearing, this should be extended where the evidence is complex, in order to allow all parties sufficient time to review all relevant information.

No judgement or decision is made regarding the alleged offence until the hearing has been completed. The presiding officer at the disciplinary hearing will hear the disciplinary and make judgement based on all the information available and presented to them.

Invite to Disciplinary Hearing & Conductin a

The wording of this letter of invitation is critical, as this forms the foundation of the disciplinary hearing, and governs what can and cannot be discussed.

TOP TIP... You will need to provide evidence that is pertinent about the offence, allow time to consider, take time to carefully word allegations so they are broad enough to allow scope when things unfold in hearing, but precise enough so the employee knows what they are being accused of - not as easy as you might think. Take time to consider what rule may have been broken. All too often clients jump ship mid-stream, which

can result in the decision not reflecting the original allegations and can result in the decision being unsound and unfair.

It is important that any evidence *i.e.* witness statements, and any relevant information that supports the case, and any documents that will be referred to at the hearing, must be copied and attached to this letter of invitation. *E.g.* If an individual has failed to follow a procedure, you would supply a copy of that procedure, evidence that the person had been trained in the procedure, and any information that points to the failure of the person to have followed the procedure.

Disciplinary Hearing

Definition of Roles:

The following defines the roles of each person at the hearing

The ‘Presiding Officer’

The ‘Presiding Officer’ (Manager) conducts the disciplinary hearing, hears the allegations, hears the evidence from the company’s perspective, and hears the evidence from any witnesses and the employee.

The Employee

The employee is required to attend the hearing, and is permitted to make a defence against the allegations made. They are permitted to call witnesses, but must advise of the names of witnesses beforehand to ensure that they are available to attend.

The ‘Accompanying Person’ (Companion).

The chosen companion can be either a trades union representative, or a fellow worker, and attends the disciplinary hearing to support the employee, and as such, should have met with the employee before the meeting and helped to prepare the defence. The chosen companion has a statutory right to address the hearing, but no statutory right to answer questions on the employee’s behalf.

The Company “Note Taker”

The Manager should not attend the meeting unaccompanied. The note taker will act as a witness for the Manager and will take notes of the meeting on behalf of the Company.

Conducting the Hearing

a. Open the hearing

- Introduce those present to the employee, and explain why each person is there.
- Introduce the accompanying person and explain her/his role.
- Explain that the purpose of the hearing is to consider whether disciplinary action should be taken in accordance with the company's disciplinary procedure.
- Explain how the hearing will be conducted (structure).

b. State the Complaint

- The complaint is detailed in the letter that you sent inviting the person to the hearing. Read this to confirm that this is what the hearing has been convened to discuss. (NB. You cannot discuss any other issues, without proper notice having been given in writing.)
- Outline the case briefly by going through the evidence that has been gathered. Ensure that the employee and their representative or accompanying person have had time to review any information that you are going to refer to during the hearing, and any statements made by witnesses. Adjourn for this purpose if necessary.
- Remember that the point of the hearing is to hear the *truth, not to catch people out*. Establish whether the employee is prepared to accept that they may have done something wrong.

c. Employee's Reply

- Give the employee the opportunity to state their case and answer any allegations that have been made. Allow them to ask questions, present evidence and call witnesses. The accompanying person can also ask questions and may confer privately with the employee. Remember that the accompanying person has no statutory right to answer questions on behalf of the employee.
- Listen carefully, and be prepared to wait in silence for an answer, as this can be a constructive way of encouraging the employee to be more forthcoming.
- If a witness does not attend, or it is not practical for a witness to attend, consider proceeding only if it is clear that their evidence will not affect the substance of the complaint.
- If a grievance is raised during the hearing about the behaviour of the Manager/ Presiding Officer handling the case, it may be appropriate to suspend the disciplinary procedure for a short period until the grievance can be considered. It may be appropriate to bring in another Manager to deal with the disciplinary case.

d. General Questioning and Discussion

- Use this stage to establish all the facts.

- Adjourn the hearing if any further investigation is necessary, or if necessary, at the request of the employee or their representative.
- Ask the employee if they have any explanation for the misconduct or failure to improve, or if there are any special (mitigating) circumstances to be taken into account.
- If it becomes clear that the employee has provided an adequate explanation, or there is no real evidence to support the allegation, adjourn to consider, then dismiss the proceedings and confirm no action will be taken, in writing - see letter.
- Keep the approach formal but polite, and encourage the employee to speak freely with a view to establishing the facts. The hearing should be a two way process.
- Use open questions to clarify the issues, and to check that what has been said is understood. The types of questions that can be used are of the 'who, what, where, when, how types', for example, 'what happened then?' to gain a broad picture. Only ask precise closed questions when specific information is needed that can be answered yes/no.
- Do not get involved in arguments, and do not make personal or humiliating remarks.
- Avoid physical contact.
- Avoid gestures that could be misinterpreted or misconstrued as judgemental.
- If the employee becomes upset or distressed, adjourn to allow them time to regain composure before continuing. If their distress is too great reconvene at a later date.
- Although some 'letting off steam' can occur during the hearing, do not let abusive language or behaviour, that could in itself constitute gross misconduct, pass without comment. If this happens, the incident can be dealt with as a separate disciplinary issue. Adjourn and convene at a later date during which both issues can be, if necessary, considered together.

REMEMBER.....*If in doubt at any point, request a short adjournment to take advice.*

Summing Up

- Summarise the main points of the discussion after questioning is completed to allow all parties to be reminded of the nature of the offence, the arguments and evidence put forward, and to ensure nothing is missed.
- Ask the employee if they feel that they have had a fair opportunity to state their case.
- Ask the employee if they have anything more to say. This helps to demonstrate to the employee that they have been treated reasonably.

Adjournments

- Always adjourn before making your decision. The time taken must be appropriate to show that you have allowed time for reflection and due consideration.
- Also during this time, any facts raised that need to be verified can be checked, particularly if there is a dispute over facts.
- If new facts emerge, consider whether to reconvene the hearing.

Administration

- Tidy notes and type up immediately after the meeting. Sign, date and retain on file.
- Confirm the disciplinary action to the individual in writing.
- Keep a simple record of the action taken for future purposes.
- Monitor performance against targets.
- Ensure any training, help *etc.* that was offered is provided.
- Notify individual when standards are achieved, as appropriate.
- Review Company Rules/ Procedures, as appropriate

Deciding & Implementing Disciplinary Action

The decision that has to be made at the end of a disciplinary hearing is whether to take disciplinary action. If so – what action needs to be carried out e.g. retraining, job change *etc.*

Before deciding whether a disciplinary penalty is appropriate, and at what level, look at;

- The employee's previous disciplinary and general record, work experience, position and length of service.
- Whether the company's disciplinary procedure points to a likely penalty.
- What action has been taken in previous similar cases.
- Any explanations or mitigating circumstances that are to be taken into account that would make it appropriate to lessen the severity of the penalty.
- Whether the penalty is reasonable in view of all the circumstances.

Dismissal for gross misconduct without warnings, notice, or pay in lieu of notice, must only be for the most serious offences as outlined in the Company's Disciplinary Policy. Leave the employee in no doubt as to the nature of the disciplinary penalty, the improvement expected, and the need to sustain the improvement. Advise the employee of their right to appeal and the method and timing of appeals.

All warnings, including a verbal warning, must be confirmed to the employee in writing. The letter should ensure the following:-

- The employee should be informed as soon as possible of the decision in all cases.
- The employee should be told the reasons for the decision, including the results of any further investigations, and left in no doubt as to what action is being taken under the disciplinary procedure.
- The period that any warning is to remain effective must be clearly stated.
- Ensure that the employee understands what improvement is required, over what period, and how it will be assessed.
- Always advise the employee in writing of the decision, together with right to appeal the decision.
- Keep records of disciplinary action secure and confidential.

Formal Disciplinary Stages/Potential Outcomes

No action

After the meeting, you 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

Alternatively, you may decide to give the employee a warning...

Your company policy should outline exactly what warnings will be given, but the following are examples of warnings that you may use in line with the ACAS Code of Practice on Disciplinary and Grievances:

- **Verbal/oral warning-** This is an area that causes some confusion. The main confusion being the difference between a verbal warning and informal counselling. (ACAS no longer recommends this stage as part of a formal procedure, but, for cases of minor misconduct, this will often be a reasonable method to prevent a problem escalating.)

- First written warning/improvement notice.
- Final written warning.

Employers should specify a time frame for formal disciplinary warnings, after which they are disregarded for disciplinary purposes. Typical timescales suggested in the ACAS non-statutory guidance 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.

Dismissal

Employers need to be sure that any decision to dismiss an employee will be seen as 'reasonable' by an employment tribunal. The employer must follow the ACAS Code prior to any dismissal, and also have been fair overall, for example; by complying with internal procedures, treating employees consistently, and carrying out a proper investigation.

NB. The company may reserve the right to terminate your employment, without having used the Disciplinary Procedure, where you have completed less than two year's continuous service.

Appeals Procedure

TOP TIP

Do your dismissal and disciplinary procedures form part of an employment contract?

If you do choose to make your disciplinary procedure contractual, and you fail to follow it when taking disciplinary action, the employee could bring a breach of contract claim against you.

If you are dissatisfied with any disciplinary action taken against you, including dismissal, or with any action initiated under the company's capability procedure, you have the right to appeal.

Details of the grounds for your appeal should be put in writing, and sent to a director of the company within 7 days of receipt of the letter confirming the decision or action with which you are dissatisfied.

As soon as is reasonably practical, your appeal will be considered by the director or another member of senior management who was not involved in the decision/action against which you are appealing.

At any appeal hearing, you may be accompanied by a work colleague, or Trade Union Official, and will be encouraged to state your views. After due consideration, you will be advised in writing of the result of the appeal and this decision will be final.

This free e-book has been brought to you by HR specialists:

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