

Disciplinary and Dismissal Guidelines

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Overview

The guiding principles for an employer in carrying out a disciplinary process for poor performance or misconduct by an employee are **fairness** and **good faith**. There is no precise definition of these concepts. Often it is necessary for an employer to use good judgment and common sense in establishing a fair process to deal with any given situation. The two elements of fairness that the Courts require an employer to abide by in any disciplinary process are:

- **Substantive fairness:** the outcome of the disciplinary process must be fair and reasonable having regard to the performance or behaviour of the employee concerned.
- **Procedural fairness:** the way in which the disciplinary procedure has been carried out should comply with the rules of natural justice.

The key to complying with these aspects of fairness is to consult with the employee and carry out a proper investigation where there are allegations of wrongdoing or poor performance.

Managing a non-performing employee

The Courts have emphasised that the object in dealing with a non-performing employee should be to assist him or her to meet the standard of performance required, rather than to use the disciplinary process as a pretext for dismissal of that person.

Where an employer has concerns about the performance of an employee it should first consider whether the standards required of that employee are fair. If the situation is open to the interpretation that the employer has caused or contributed to the problem by, for example, giving the employee duties beyond his or her ability or overworking the employee, options such as counselling, retraining and redeployment should be considered before commencing a disciplinary process.

Where an employment agreement sets out a disciplinary procedure or where there are internal rules or policies that specify how performance issues are to be dealt with, those procedures should be followed.

First Meeting

When a disciplinary process is necessary, a first meeting should be set up with the employee to discuss the performance issues.

The employee should be given advance notice of the meeting and notice of the detail of the performance issues that are to be discussed. In most circumstances, at least 24 hours' notice would be appropriate. The employee should be told that he or she is entitled to bring a representative or support person to the meeting. Finally the employee should be advised of the possible outcome of the meeting, whether that be a warning, final warning or dismissal. All of this information should be given to the employee in writing.

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The meeting should be attended by the representative of the employer making the decision and by someone who takes notes and acts as a witness. At the meeting the employee should be told of the employer's concerns regarding performance as set out in the letter. The employee should then be given an opportunity to respond. It may be necessary to adjourn the meeting or reconvene the next day so that the employee can consider his or her response. The employer should consider carefully any explanation by the employee with respect to the performance concerns, before reaching a decision as to what, if any, disciplinary action should follow. A further meeting should be held at which the employer's decision is given.

First warning

If the employer decides that performance is unsatisfactory a first warning should be issued. This may be given as a verbal warning but in any event should be recorded in writing and copied to the employee. The warning should state the standard required of the employee, how the employee has failed to meet that standard and what steps the employee needs to take to meet that standard. The warning should clearly state that if there is no improvement further disciplinary action may follow, including a final warning or termination of employment.

Time to improve

A fair time frame should be allowed for improvement by the employee and a date set for a review meeting. If the performance of the employee does not improve during the review period, a review meeting should be held following the same process as for the first meeting. An outcome of the review meeting may be a written warning, final warning or dismissal, depending on the circumstances.

Further warning(s) – Dismissal

The test for determining whether a warning or dismissal for poor performance is appropriate is whether the disciplinary action being considered is "what a fair and reasonable employer would have done in all the circumstances". While the Courts have made it clear they will not interfere with an employer's general prerogative to run its business as it sees fit, including the right to dismiss staff, it does have full jurisdiction to inquire into the substance and decision making process in each case.

While a typical procedure may involve a first warning, followed by a final written warning followed by a dismissal, it may be appropriate in some cases to omit one or more of these steps and proceed directly to a final warning or dismissal. We would not generally recommend curtailing the procedure unless poor performance was very clearly demonstrable and very serious. In other cases where the performance problems are minor more warnings than usual may be required.

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Disciplinary procedure for misconduct

The concept of misconduct relates to the behaviour of the employee on the job and can arise in many ways, including breach of an express term of the employment agreement, disobedience of a lawful and reasonable instruction, insubordination, absenteeism or lateness, offensive language or behaviour, dishonesty, assault or other forms of violence, conflict of interest, and bringing the employer into disrepute.

Where an employer has concerns about the behaviour of an employee the first step is to investigate to establish whether there is any substance to the concerns. If necessary other staff should be spoken to, in a manner (as much as possible) so as not to embarrass the employee if it turns out that there is no substance to the concerns. The credibility of the evidence of misconduct should be assessed before proceeding with a disciplinary procedure.

Investigation

If there is substance to the concerns a disciplinary procedure should follow. An investigation meeting should be scheduled with the employee. Before the meeting the employee should be told of the detail of the concerns and given an indication of the seriousness of the matter.

If the issue is misconduct then the employee should be told that a warning may follow or if serious misconduct, that his or her employment may be at risk. The employee should be advised that they are entitled to bring a representative to the investigation meeting. Once again this information should be given to the employee in writing.

It is sometimes necessary to suspend an employee pending an investigation, where for example the employee's continued presence in the workplace may harm the employer's business, where issues of intimidation may arise or where employees may be reluctant to come forward when the employee concerned is still present. Often a suspension will be no less humiliating than a dismissal, so when considering whether to suspend an employee pending an investigation, the usual rules of procedural fairness apply. It is necessary to give the employee an opportunity to comment on the proposed suspension, and take his or her comments into account, before arriving at any decision to suspend.

The employer should provide any relevant evidence it holds, including witness statements, to the employee before the investigation meeting. Any witnesses should be told that their statements may be shown to the employee being investigated. The employee should then be allowed reasonable time to prepare for the meeting, at least 24 hours.

At the investigation meeting the employer should have a witness/note taker present. The employer should tell the employee of its concerns as set out in the letter, and give the employee and/or his or her representative an opportunity to respond. If the employer wishes to raise any new matters, the employee should be given time to consider those matters before responding. This may mean taking a break during the meeting or holding a second meeting later that day or the next day as appropriate.

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After the employee has given his or her response it may be necessary for the employer to carry out further enquiries. The person involved in making the final decision to dismiss or discipline should carry out the enquiries, rather than relying on reports from others. The employer is obliged to ensure that the relevant facts are obtained by questioning all persons involved. Where further evidence is obtained, it should be put to the employee and his or her representative again for a response.

In cases of serious misconduct a summary (instant) dismissal may be justified following the disciplinary investigation. There is no precise definition of serious misconduct and a study of the cases is required to fully understand the concept. Examples include theft from the employer, fraud against the employer, assault, deliberate disobedience, gross insubordination and dishonesty. The employment agreement may record what is agreed to be serious misconduct, but it should not be assumed that the employer can automatically dismiss if that conduct has occurred. The issue will always be whether the disciplinary action being considered is “what a fair and reasonable employer would have done in all the circumstances”.

Warning(s) – Dismissal

Once the investigation process is complete, the employer can properly draw conclusions and, if appropriate, take disciplinary action. In doing so the employer should assess the credibility of the evidence carefully. The employer should check company records for similar offences, to ensure that there is no disparity of treatment between employees. The employer should also check for any previous warnings given to the employee for the same type of behaviour. Where a previous warning has been given it may be appropriate to proceed directly to a final written warning or dismissal.

A potential pitfall in the process is predetermination by the employer. It is important that the employer genuinely keeps an open mind until the process is complete. Furthermore, any appearance of pre-determination should be avoided. During the process it is best to speak of “concerns” or “allegations” rather than “misconduct”. Warning letters or letters of dismissal should be drawn up after the process is complete not during the disciplinary process. Obviously, a final pay cheque should not be taken to a consultation meeting.

Where a decision to dismiss has been made, a final meeting should be held to inform the employee. The employee should be told the reasons for the dismissal, including a response to any explanations by the employee. The employee should then be formally dismissed and final pay arrangements explained. A letter should be provided to the employee confirming the dismissal. This can be handed to the employee at the final meeting or posted shortly afterwards. The employer should allow the employee to leave the workplace in a manner that is not embarrassing or humiliating to the employee.

Where the employee could face criminal charges, he or she may exercise their right to silence, thereby preventing the employer from completing an investigation until any criminal matters are concluded. For this reason, the

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employer may choose to complete its own disciplinary process before calling the Police.

These are guidelines only and not a substitute for good legal advice. For further information on this or any other employment matter, please contact:

CONTACT DETAILS

Shelley Eden *Solicitor*

direct dial +64-9-336 0844

<mailto:shelley.eden@shieffangland.co.nz>