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Discipline at the Workplace

- Why is it workplace discipline important?
- How has it changed over time?
- What do YOU think is a fair way to conduct a disciplinary process?
- To what extent is it regulated by law?

Disciplinary Action

Questions to ask yourself:

- What is the issue at hand about?
- Is it serious enough to warrant action?
- Is this a repeated issue? Have there been other issues in the past , whether identical or not, with the same person?
- Are third parties somehow involved?
- For how long has the issue persisted? Was it a one-off incident?



Informal Action



As a pretext to certain incidents, you may opt to take informal action and have a chat, or a low-level meeting, with the employee in question to address the issue. This can apply in cases of:

- Unexpected issues of minimal consequence
- An employee's random and unusual outburst with a manager
- Minor breaches of performance
- Issues of workplace culture integration for new recruits

Informal Action in Practice

What do we mean when we talk about informal action?
This can vary from any kind of action including:

- An informal chat with a manager
- An email requesting an explanation as to an employee's behaviour
- In cases of performance issues, regular assistance and monitoring (without the PIP formalities)
- A verbal reprimand (rather than a written warning)

In any case, **confidentiality is crucial.**



Informal Action in Practice

What would you need to look out for?

- The root of the issue
- An explanation/justification
- A plan of action to ensure that the issue is addressed and/or does not happen again

You may choose to record the discussion in writing, and also to provide that it will remain on the employee's record for a few months.



Formal or informal?

At what point in the list below would you apply a formal process to the following case? - *An employee's performance has taken a sudden decline over the past month. The employee:*

- has been working for you since 2017
- has no other issues on record
- is a good friend of yours
- has recently separated from his wife
- has been spending lots of time flirting on Tinder, as reported by his desk-mate



Formal Proceedings

If it is decided that formal proceedings are to be applied, several points must be considered at the outset:

- Disciplinary procedure
- Investigations
- Charges to be issued
- Board of discipline
- External parties as investigators/board of discipline



Investigations

Why investigate?

- Investigations are a crucial fact finding mission which ensure that you are in possession of all the relevant facts prior to taking action, if at all
- To see whether the issue actually warrants formal action
- To act fairly vis-à-vis the issue/accusations at hand prior to actually taking formal action



Suspension

- You may feel that, pending investigations and the appointment of a disciplinary board, the employee being investigated should stay away from the place of work and have all contact with colleagues blocked in case of:
 - Tampering with evidence
 - Unjustly influencing witnesses
 - Causing a nuisance out of frustration

Suspension

- An employee may be suspended for the duration of the investigation process, which should be carried out as efficiently as possible
- The employee should ideally be informed for how long s/he shall be suspended

Suspension Letter

A suspension letter should outline:

- That the employee is being ordered to not attend the workplace
- That the employment contract and obligations shall continue to subsist during the suspension period
- The (expected) duration of the suspension period
- The employee's rights and obligations
- That the employee should not contact any employees or related third parties during this period



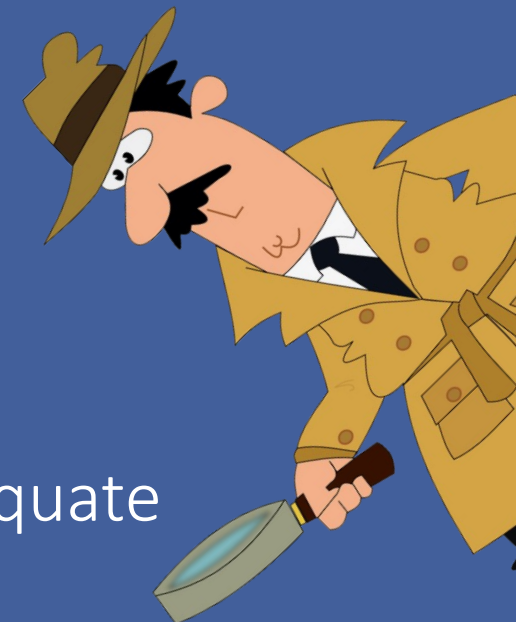
Suspension & the Law

Unless otherwise prescribed in a collective agreement, when an employer suspends an employee from work and during the period of suspension does not pay him wages or pays him less than the wage to which the employee is entitled, the employer shall be deemed to have made a deduction from the wages of the employee by way of a fine equivalent to the amount underpaid to him in wages.

Employment and Industrial Relations Act



The Investigating Officer



The investigating officer may be:

- The employee's immediate (line) manager
- Someone from HR, who may have more specialised and adequate training for a more effective investigation to be carried out
- An external investigator, which may be a better option for guaranteed transparency and impartiality (where applicable)

Always check what your written procedure states

The Investigating Officer

- You may also opt to appoint an **external investigator** – this would ensure increased transparency and impartiality. However, ensure that your external investigator:
 - Is made aware of any internal processes and rules applicable to the case
 - Is familiar with any industry-specific operations of the employer
 - Is provided with all necessary material/access to conduct a fair investigation, and not just to select material to benefit the employer's case



Investigations

- The extent of an investigation will depend on the issue at hand and how severe the case is
- Investigations can cover various actions, including:
 - Interviews and witness statements
 - Analysis of documentation
 - Computer/systems investigation

Investigations & Confidentiality

- Confidentiality is an important factor to be observed during an investigation process, and the appointed investigator must be made explicitly aware of this
- Any witnesses/interviewees must also be made aware of their duty of confidentiality, most especially with their colleagues
- Of course, confidentiality has its limits in terms of practicality

Investigations & Confidentiality

- The identity of the employee being investigated should ideally not be divulged, however this would wholly depend on the case – it may be easy to do that when investigating an issue of online fraud, but not so easy in a case of overt harassment, for example
- Realistically, witnesses may also gossip between themselves despite being warned against it, especially between the witnesses themselves – you may opt to take disciplinary action against such, however the fairness of such is questionable

Witnesses

- Witnesses are often crucial to investigations as they can provide the most detailed accounts – statements should be signed by the witness
- Warning them of their duty of confidentiality is essential
- Credibility is important –probe them to repeat statements to ensure that they are credible and consistent in what they say
- You may wish to compare and contrast statements and see which ones corroborate each other

Witnesses

Make sure that witnesses recall, to the best of their ability:

- Main details, namely date, time and place
- The level of their involvement
- Why the witness was present at the scene
- Any third parties who were somehow involved in the issue/incident

Make sure you address the situation appropriately, especially if the witness was a victim to the misconduct. Take note of what may seem to be minor/irrelevant details – these may still prove important when seen together with other statements.

Tykocki v Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust (UK)

- An incident at a hospital saw a nurse subjected to disciplinary proceedings, subsequently being dismissed
- She appealed her dismissal and further allegations came to light against the employee, however these were not investigated and the evidence obtained during the first stage only was relied on
- The employee sued the employer, and the EAT found that a more thorough investigation was required, **even at the appeal stage**



Investigator Limitations

The investigator must be impartial, and should therefore not be:

- A key witness
- In any way involved in the issue
- Connected on a personal level with the employee being investigated
- Nominated to sit on the board of discipline, where applicable

These conditions will however always depend on the size and scale of the employer organisation

A Crucial Distinction

- Investigations are not disciplinary hearings
- Employers commonly make the mistake of confusing the two, which may prove problematic if the employee becomes contentious
- The conclusion of an investigation does not mean that the employer can immediately take a decision once formal proceedings have been opted for, since one crucial element would still be missing – **the employee's right to defend oneself.**

Concluding Investigations

- An investigation report is essential, especially when the investigating officer is appointed externally
- The report, or a summary thereof, may be presented to the employee, and may also be requested by the employee or any legal advisor appointed by him/her
- On the basis of the report, you should decide whether or not to move forward with issuing charges and holding a **disciplinary hearing**

Disciplinary Board

What is the purpose and role of the disciplinary board?

- To set out the charges to be issued to the employee
- To analyse the findings of the investigation
- To permit the employee the opportunity to defend oneself and explain his/her side of the story
- To re-hear witnesses, if necessary
- To take a decision on the basis of all this information

Disciplinary Board

The composition of the disciplinary board will largely depend on the severity of the issue at hand and also the employer's size. The board may be composed of:

- Director
- Manager
- HR professional
- External adjudicator
- Lawyer



Disciplinary Board

- The investigator should preferably not sit on the disciplinary board (although this largely depends on the human resources available to the employer)
- It will be difficult for the investigator to remain impartial during the hearing as s/he will already have been exposed to all the material without the accused's input/defence
- A **chairperson** would be required to direct and coordinate the hearing and its procedure

Disciplinary Procedure

- It is **crucial** to follow your Disciplinary Procedure where one exists
- Failure to follow the established procedure may result in a significant legal hurdle, as it may be argued that the certainty provided to the employee via the set procedure was denied, therefore not allowing the employee a fair hearing



Disciplinary Procedure

Why is a meticulously drafted Disciplinary Procedure essential?

- The law does not provide for a manner in which fair and just disciplinary proceedings must be conducted
- Provides clarity and consistency
- Ensures fairness and adequate opportunity for the employee to defend oneself
- Assures a sense of certainty in case of a claim before the Industrial Tribunal

Disciplinary Procedure

- Where a procedure exists, ensure that it had been previously disseminated to all employees
- Together with a hearing invite, the employee should be provided with a copy of the procedure to ensure that s/he is aware of the procedure and how it will work

Charges

- Any formal disciplinary action following an investigation should be preceded by the issuing of a charge and invitation letter
- This letter should set out:
 - The charges issued against the employee
 - A date and time for a disciplinary hearing (which should be within no more than a few days' time)
 - Potential consequences (disciplinary action)

Disciplinary Hearings

- The aim of disciplinary hearings is not to impose a punishment, but to allow the employee to divulge his side of the story and defend himself in the face of the accusations brought against him.
- Before the hearing, the employee should be made aware of any witness statements given, so he can adequately prepare his/her defence.
- With this in mind, reasonable notice must be given, which is usually 2-4 days ahead.

Disciplinary Hearings

- Hearings should preferably be conducted during working hours
- It may be advisable to conduct the hearing at a location away from the workplace, depending on the matter at hand
- The employer should be compliant, to an extent where one's own position is not prejudiced. The employee should be furnished with all necessary information regarding the allegations made against him/her
- Witnesses may be called up again, even at the employee's request, for the purposes of cross examination

Right to be Accompanied

- Check your **Disciplinary Procedure** or any contracts or collective agreements
- Often, employees are allowed a colleague/trade union representative to accompany them to a hearing
- The employee may also request that a lawyer accompanies them.



Record-taking

- The keeping of minutes of a disciplinary hearing is important, to retain a record of what was said
- Therefore, a person, who may also not be a person sitting on the board itself, may be appointed for the purposes of minute-taking
- Should live minute taking not be possible, a recording of the hearing may be made and minutes taken afterwards, however this must be done immediately and the recording deleted permanently at once

Data Protection

- Data protection laws must still be observed, however exceptions may be made in certain instances
- *Garamukanwa v Solent NHS Trust (UK)* – the EAT confirmed that the right to one's private and family life was not infringed when one's personal emails caused a serious workplace issue
- This is however subject to **significant subjectivity**, and advice should be sought in any case of concern on data privacy breaches

After the Hearing

- Reprimand
- Warning
 - Verbal
 - Written
 - Length of time for which it will remain active
 - Is it the first, second, final?
- Dismissal



Appeals

- You may allow the employee the option to appeal – this should also be outlined in your disciplinary procedure if you wish to apply it
- An appeal can give you an added layer of protection, and also allows the employee another opportunity at defending oneself
- Preferably, the person/s sitting on the appeal board would not have been involved in the previous disciplinary process

Khan vs Stripestar Ltd (UK)

- An employee was dismissed and claimed that the disciplinary process applied was unfair
- The Tribunal found that the initial process was in fact unfair, however the employee retained the faculty to appeal
- The person deciding the appeal had not been previously involved, made a very thorough investigation, and decided that the dismissal was warranted – this was sufficiently fair in the eyes of the Tribunal

Khan vs Stripestar Ltd (UK)

- The Tribunal treated the **appeal** stage as a “*cure*” for the procedural issues in the initial stage
- Despite this reasoning, it is best to ensure that **all stages are fair and transparent** – imagine if the employee hadn’t appealed?
- The Tribunal may have noted the employee’s failure to use the option to appeal, but the employer’s procedural failures would have been amplified even more

Unfortunate Consequences

- An employee who does not agree with the manner in which s/he was dismissed may challenge the dismissal before the Industrial Tribunal and claim either re-integration in the workplace, or compensation
- This is why it is crucial that you:
 - Establish a clear and transparent procedure (written)
 - Stick to the established procedure
 - Allow the employee the opportunity to defend oneself

Summary Dismissal

- Sometimes, an incident would be so great and overt/obvious (such as overt verbal or physical bullying against a person on the basis of race or ethnicity, for example) that the disciplinary process is dispensed with and the employee is dismissed immediately – such cases must be of gross misconduct
- The fairness of these cases is debatable. In any case it is recommended to suspend, investigate and hold a summary hearing

James Buhagiar vs Jani Ltd (2018)

- **Tribunal:** decided that the employer did not follow the disciplinary procedure set out in the employment agreement
- The employer appealed claiming that the Tribunal failed to take heed of the evidence in substance, since the employee had admitted to the wrongdoing and was to be dismissed anyway – *the good and sufficient cause*



James Buhagiar vs Jani Ltd (2018)

- The Court of Appeal distinguished between **wrongful** and **unfair** dismissal
 - Wrongful: breach of contract where an alternative remedy could have been sought
 - Unfair: the substance and behaviour in question must still be taken into consideration
- The Court concluded that compensation is not due to an employee who was dismissed without following due process, if the conclusion of the process would nonetheless have been dismissal

James Buhagiar vs Jani Ltd (2018)

- Problems arise where evidence shows that the employee was in fact **innocent**
- It is therefore up to the Tribunal to determine the fairness and reasonableness of the situation
- Lack of due process may have denied the claimant the opportunity to defend oneself, which may be a crucial turning point in a decision to dismiss

Joseph Silvio vs Corinthia Palace Co Ltd (2009)

- This case regarded a disciplinary procedure established in a **collective agreement**
- The employer did not follow the procedure, and the Court emphasised the importance of doing so
- The Court of Appeal concluded that whilst the employer has the final say, the procedure set out (especially in a CA) cannot be disregarded as it is established for the protection of the employees and in the interest of good faith



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