A–Z OF EMPLOYING

Discipline

Our guide for Employers and Managers

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

BusinessCentral

Discipline

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Contents

This is only a guide. It should not be a substitute for professional advice.

Please seek advice from our AdviceLine Team if you require specific assistance.

BusinessCentral

Discipline

Our guide for Employers and Managers

Overview

1. Discipline means holding an employee responsible and/or accountable for their action or failure to act.
2. Whether a warning is issued or the employee dismissed depends upon the seriousness of the employee's action or failure to act as well as how that has impacted upon the trust and confidence you as their employer have in them.
3. Central to discipline and disciplinary action must be some idea of what you as an employer would like to achieve by undertaking a disciplinary process.
4. Before undertaking any discipline action employers should clearly establish who in the organisation has the authority to discipline employees, and what level of disciplinary action can be taken by various levels of management.
5. Natural justice is something which every employer needs to follow when taking discipline action against an employee. One aspect of natural justice is treating different employees consistently.
6. Any matters discussed by you and an individual employee in relation to discipline should be kept strictly confidential.
7. For every disciplinary matter that you discuss with your employees, a record should be kept on their personnel files.
8. The role a support person/representative plays in the disciplinary setting should not interfere with the employer's obligation to conduct a full and fair investigation.
9. Any disciplinary process will require a thorough investigation, which may be repeated or elements of it revisited throughout the process.
10. The disciplinary process should be clearly described by the employer in the company policies and procedures (house rules) and employment agreements.
11. It is recommended that you seek advice prior to beginning the disciplinary process for serious misconduct. The potential liability if your decision to dismiss is subsequently found to be unjustified is not just a financial risk but also a risk of damaging the company's credibility with other employees.

Introduction

The disciplinary process should be understood thoroughly before being undertaken by an employer as a dismissal or an action taken against an employee can be held to be unjustified on the basis of procedure alone. Any action taken or dismissal needs to be both procedurally and substantively (the reason for your decision) justified.

Every decision in the disciplinary setting is open to challenge. The personal grievance provisions of the Employment Relations Act 2000 allow an employee to challenge any decision or action taken by an employer. It is therefore important to understand the mechanisms of discipline and the requirements of procedural fairness.

This is merely a guide to the disciplinary process. The touchstones for any employer should be their own policies, procedures (often referred to as the "House Rules"), and employment agreements. These documents should complement each other and set out the standards of conduct that are expected and the sanctions that may follow if those standards are breached.

However, what is said here with regard to procedural fairness can be taken as authoritative in most circumstances. If you think your disciplinary situation is particularly tricky or challenging in some way, a second opinion can be extremely helpful; it may also highlight some of the intricacies of

procedural fairness in your immediate circumstances. Business Central encourages employers to seek advice before commencing any disciplinary process. The Business Central AdviceLine team can assist you with this matter.

Objectives

Central to discipline and disciplinary action is what you as the employer want to achieve by undertaking the disciplinary process. Discipline is by its very nature a condemnation of an employee's conduct. However if your objective is to improve an employee's conduct in terms of their performance then discipline is inappropriate; conversely if your objective is to discourage an employee's behaviour then appraisals and reward systems are inappropriate.

The objective of discipline should be to encourage a change in conduct. The disciplinary process is a progressive one; each step has the same objective of behaviour modification in mind but as the condemnation becomes increasingly serious so too do the consequences for repeated acts of misconduct by the employee.

Preliminary Considerations

Authority

You should clearly establish who in your organisation has the authority to discipline employees, and what level of disciplinary action can be taken by various levels of management. This should be clearly set out in your policy and procedures manual. Clarity about the scope of any delegated authority is helpful not only for an employee facing discipline, but the person who is required to manage that process.

Delegation of authority should take into account the concept of natural justice. The person responsible for questioning an employee and investigating an allegation of misconduct is usually the best person to determine whether or not in fact the alleged misconduct has occurred. If there is a question of bias or predetermination, then you should consider involving a third party to determine the outcome.

If serious misconduct is alleged, the person responsible for the dismissal must possess direct knowledge of the relevant facts, be the person to whom the employee should be given a right to be heard in a disciplinary setting and where credibility is involved they should be the person who interviews those involved.

Finally, you are not entitled to substitute the opinion of a criminal investigator (or some other third party), for your own, in any disciplinary process.

Consistency

One of the aspects of the concept of natural justice is consistency in how you treat employees. All situations of misconduct that are alike should be handled in a similar manner (in terms of procedure, however the disciplinary process may differ depending on the seriousness of the allegations) and all decisions arising out of the situation of misconduct should be consistent.

Where an employee can establish disparity of treatment against them, it may render your decision or action unjustified.

Confidentiality

Any matters discussed by you and an individual employee in relation to discipline must be kept strictly confidential. If an employee elects to discuss anything arising out of a disciplinary process with other employees and they are not bound by any confidentiality agreement, then that is their personal right. If the employee discusses those matters in such a way that it appears they have deliberately attempted to undermine you as the employer then it is recommended that you make no attempt to correct the misinformation. A well-intentioned effort to correct misinformation may be complained of as a breach of the Privacy Act 1993. This is not to say that an employee should not be disciplined over this because an employee does have an obligation not to undermine their employer.

Refer to the **A-Z Guide** on **Privacy** for more information on confidentiality and personal information.

Records

A record should be made and kept for every instance of discipline. This also includes investigations that do not result in counselling sessions, reprimands, warnings or dismissals. The importance of recording the process of discipline is two-fold:

Firstly, records provide a reference for you over the course of an employee's employment of the employee's performance and conduct. Sometimes you need to have recourse to the past for various reasons, and good record keeping of disciplinary matters is helpful for that;

Secondly, well informed records are invaluable if a dispute arises later about what happened in relation to a disciplinary matter.

Good record keeping of disciplinary matters will include:

- Details of the allegation, including who made it and what it involved;
- Details of the investigation;
- Details of preliminary interviews with employees as part of the investigation, including who, where, when, why and what;
- Details of disciplinary meetings, including copies of letters of notice;
- Details of counselling / reprimands / warnings / other actions;
- Details of explanations given by employee for conduct;
- Details of explanations given by employer for disciplinary action.

Refer to the **A-Z Guide** on **Records** for more information.

Support People/Representatives

Having a support person or representative present to assist the employee during a disciplinary process is vital in ensuring that a fair process is followed. Generally speaking, a support person will have one of two roles. They will either be there as emotional support for the employee, in order to make the process easier for the employee and allow them to keep calm, or the support person will act as a representative or advocate and will speak on behalf of the employee, make comments during the process, and give explanations where necessary.

While an employee can choose who they bring to any disciplinary proceeding, the employment relationship exists between the employer and the employee. An employer is entitled to question an employee directly as part of an investigation. Normally an employee may bring anyone they wish as a support person, however an employer may reasonably object to an inappropriate support person, such as a subordinate employee (as it could be unfair to the subordinate employee to allow them to be placed in such a conflicted situation) or a manager that is involved with the disciplinary action (as this might show a bias towards the employee or be a conflict of interest).

When you are considering what disciplinary action to take (because misconduct or serious misconduct has been established), both the employee and/or the support person / representative can comment on what disciplinary action they consider appropriate. It is considered best practice to specifically put the issue of what action should result following a finding of misconduct or serious misconduct to the employee for comment.

Disciplinary Process

What constitutes a disciplinary process is most often determined solely by the employer. You may set out the disciplinary processes for your organisation in its policies and procedures manual(s), sometimes called “House rules”, and employment agreements.

Any disciplinary process should stipulate what conduct it includes and describe the procedure and timeframes that it involves.

Refer to the **A-Z Guide** on **House Rules and Employee Handbooks** for more information.

When conducting a discipline process it is recommended that you take an investigative approach rather than an adversarial approach. The result is likely to be more constructive for both parties, and, the investigative approach is the approach used in the Employment Relations Authority.

Procedural Fairness

An employer must be able to show that they made a finding on issues of substance by following a fair and reasonable discipline process. The Employment Court has set out the minimum standards of procedural fairness in conducting investigations:

- *notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
- *an opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*

- *an unbiased consideration of the worker's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*
- *The employee must also have an opportunity to respond to the proposed outcome, for example a finding on the facts has been made by the employer and they are about to make a decision to dismiss but before the final decision is made the employee has a reasonable opportunity to respond. [note this response is in addition to the employee's response to the allegation]*

The Employment Court has noted that failure to observe any one of these requirements can render the disciplinary action as unjustified. However, a slight variance from this will not necessarily be fatal and the courts will look at whether the procedure was substantially fair and reasonable.

Investigation

The importance of investigations cannot be overstated. The law (case law) stipulates that there should be an inquiry leading up to every decision to take any disciplinary action against an employee, and that inquiry should be both full and fair.

The purpose of an investigation is to determine whether the alleged misconduct occurred, and if so, in what circumstances and to what extent. The employee in question is able to provide their own version of events, justification or defence during the investigation and subsequent disciplinary meeting, so a decision is never to be predetermined on just the investigation alone.

Every disciplinary process should begin with an investigation, and sometimes, an investigation may need to be repeated or revisited during a disciplinary process, generally where new information has come to light that requires further investigation. This could be because the employee has offered some justification to their actions that, if confirmed by investigation, would render disciplinary action unfair or unreasonable, or it could be because a new witness stepped forward part way through the disciplinary process.

If an employee elects to respond to written allegations only, and only in writing, making it difficult for you to question him or her to clarify issues or make judgements about credibility, then it is within your rights to set out your concerns to the employee about the limitations they are placing on your investigation and the effects that may have on the outcome.

External Investigations

On 4 June 2020, the Private Security Personnel Licensing Authority (PSPLA) issued a decision (1 [2020] NZPSLA 007), regarding individuals conducting employment investigations. The decision of the PSPLA significantly restricts who can carry out workplace investigations.

The PSPLA determined that persons carrying out workplace investigations must be internal to the workplace, practicing lawyers or be an independent consultant or investigator holding the required licence.

Independent consultants and investigators who do not hold the required licence or are not practicing lawyers will not be able to conduct workplace investigations and may be found to be in breach of the Employment Relations Act 2000. This does not prevent employers conducting their own internal

investigations, nor from engaging law firms and individual lawyers with current practicing certificates to undertake such work.

Although employers can conduct their own internal investigation, this has its own challenges, given that an investigation must be discrete regarding dealing with any findings, and in particular where these require disciplinary steps. In such case, an employer is likely to be better served by engaging the required external party to investigate, who can then hand over their findings to the employer to undertake any next steps required.

Please note, **Practice Kit** on **Workplace Investigations** available for purchase. Refer to end of guide for more details.

Scope of Inquiry

An employer need not conduct a 'commission of inquiry' or have to establish any allegations beyond reasonable doubt. The employer should be able show that they investigated the allegations by a fair, honest and adequate process and based their decision on the evidence obtained from this process. The decision must be one that would have been made by a fair and reasonable employer in all the circumstances.

In *Man O'War Farm Limited v Bree* (Unreported) [CA 169/02; 31/07/2003; Glazebrook J], the Court of Appeal considered the scope of an employer's inquiry, particularly in respect of the rules of natural justice. It found that the employer was not bound to interview the employee's witnesses, who had made statements in the employee's defence, because it had considered the statements and determined that the evidence contained in them could not overwhelm the evidence of its other employees.

In finding so, the Court held that the rules of natural justice do not impose a positive obligation on an employer to do more than give the employee a reasonable opportunity to be heard and to consider with an open mind the employee's response to the allegations and to the proposed outcome.

Criminal Charges

Although employers are tempted to go directly to the Police when they discover possible instances of employee theft, an employer should, if possible, conduct their disciplinary procedure to ascertain the employee's breach, and take disciplinary action before referring the matter to the Police. This is because the employee's right to silence in relation to criminal charges may interfere with the employer's ability to conduct a disciplinary process.

Furthermore an employer should discipline the employee based on the employee's breach of their terms of employment – for example, unauthorised possession of company property, rather than theft, as dismissals which rely on criminal charges for justification may fail if those charges do not result in a conviction or are withdrawn by the Police.

Disciplinary Meeting

Invitation to meeting

If as a result of a full and fair investigation there is a need to hold a disciplinary meeting, the employer should inform the employee in writing that they will be required to attend this meeting. A disciplinary meeting letter should also state the allegation, possible consequences of the meeting (eg a warning or dismissal), and the right to bring a representative.

Where possible an employer should provide the employee with copies of the relevant complaints and information before the meeting so that the employee knows what will be discussed in the meeting. Should information come to light which the employee has not had time to consider, it may be appropriate to adjourn the meeting.

Sample letter

The following template can be used for giving notice to an employee of a disciplinary meeting:

Dear [Employee's Name]

You are required to attend a disciplinary meeting on [give at least two days' notice where possible]. The purpose of this meeting is to provide you with an opportunity to explain the allegation that you [give details of the allegation to be discussed].

As per our house rules/disciplinary procedures [type of misconduct e.g. failure to follow a lawful and reasonable instruction] is considered to be [misconduct/serious misconduct]. Therefore it is possible that if the allegation is established against you [you may be issued with a warning/or you may be dismissed instantly].

You have the right to bring a representative to this meeting. Attached are copies of relevant information.

Yours sincerely

Meeting

The employer should also have a witness with them at the meeting taking notes. It is important that the person who is making the decision about what disciplinary action to take is the person who conducts the meeting and that this is not delegated to someone else. The employer should be actively seeking the employee's response so as to be able to make a full and balanced decision understanding all of the relevant facts.

An employer should not be in a rush to make a decision and the outcome should not look pre-determined. After all the issues have been discussed and the employee has been given an opportunity to provide an explanation at the disciplinary meeting, the employer should adjourn the meeting while the matter is given objective consideration. If the employer concludes that the allegations have been made out then the employer should inform the employee of their decision and what disciplinary action will be taken.

Decision

After all the issues have been discussed and the employee has been given an opportunity to provide an explanation at the disciplinary meeting, the employer should adjourn the meeting while the matter is given objective consideration. If the employer has concluded that the allegation(s) have been made out, they should inform the employee of what action is being considered and give them an opportunity to comment. The employer may have to adjourn the meeting again to consider anything the employee has raised before making a final decision.

If disciplinary processes are not put in writing, the justification of any disciplinary action taken in response to misconduct or serious misconduct is questionable. This is because the Courts have ruled that employees cannot be expected to guess what conduct may be considered conduct that warrants disciplinary action. In this situation it is far more difficult for an employer to show that it acted fair and reasonably when the employee may not made aware ahead of time what is and is not prohibited.

Employers should provide an explanation in their policies and procedures manual (and sometimes employment agreements) of each category (misconduct and serious misconduct) and non-exhaustive lists of examples, which assist both employers and employees in understanding them. Despite this, the categories are often confused. Sometimes the conduct requiring investigation is of an apparently ambiguous nature and the distinction between misconduct and serious misconduct is difficult to make.

Misconduct

Misconduct applies to any conduct that does not attract the ultimate censure of instant (summary) dismissal but instead results in counselling, a reprimand, a warning or dismissal on notice. Repetitions of misconduct, whether they involve the same or different conduct, will mean that the offending employee will progress along a disciplinary process as laid out by the employer.

Misconduct can include conduct that involves an employee's poor performance in achieving the expectations of their position. Employers can expect that beyond a settling-in stage in which an induction and a period of training was a feature, employees will come to terms with their new positions and responsibilities. If performance problems arise, and continue despite the employer's intervention, then it is not inappropriate that the employee faces a disciplinary process on the understanding that employees are ultimately responsible for their performance.

Refer to the **A-Z Guide** on **Performance Management** to assist your understanding of the difference between discipline and performance appraisal.

Recurrences of misconduct may result in an employee being dismissed on notice. This usually occurs when an employer has exhausted the disciplinary process.

If an employee commits an act of serious misconduct at any stage of a disciplinary process for misconduct, the employer may dismiss the employee instantly and is not bound to dismiss on notice ("instantly" only refers to the lack of a notice requirement, you must still follow a fair process, including giving the employee the right to respond to the allegation, bring a support person etc). The requirement to justify your decision in substance (the reason) and procedure will still apply.

Generally speaking, misconduct will initiate a 3-warning disciplinary process; although it may be preceded by counselling and/or reprimands, should the circumstances allow such.

Counselling

Counselling is the mildest form of disciplinary action and may be considered where there has been either a minor breach of policy or it is the first instance where work performance has been unsatisfactory. The aim of counselling is to set the employee on the right path before the relationship is affected, poor performance becomes entrenched or the employee offends more seriously.

Counselling involves:

- Discussing the circumstances of the breach or failure with the employee; and
- Listening to any explanation or comments the employee may make; and
- Giving careful instruction as to the standard of conduct required; and
- Indicating a period to allow the employee to correct their conduct; and
- Indicating how the employee will be assessed at the end of that period;
- Considering any other reasonable interventions that may be available.

Procedural fairness does not require that an employee be given advanced notice of counselling, nor the right to bring a support person, as this will usually give the impression of a more serious situation. However there is no reason why such an offer cannot be made if the specific circumstances warrant it.

Reprimand

A reprimand is a clear and unequivocal statement to the employee that their performance or conduct is unacceptable; it is not a warning. Reprimands should be considered where there has been minor misconduct or a lapse in performance, but there are some mitigating circumstances. It may also be considered where counselling has been ineffective but a warning is not yet indicated.

Neither counselling or reprimands are part of the formal disciplinary process, however often they are essential in terms of procedural fairness and as such, record keeping is required.

Progressive Warnings

Each warning is procedurally the same; however the requirement for procedural fairness increases with each more serious warning. You can elect how many warnings will be part of your disciplinary process for misconduct; employers commonly use a three-warning disciplinary process.

Example: 1st offence ⇨1st warning

2nd offence ⇨ 2nd warning

3rd offence ⇨ 3rd and final warning

4th offence ⇨ dismissal on notice

Your policy (house rules) or employment agreement should explain clearly how many warnings (the duration of each warning will be relevant) an employee can expect to receive in a progressive warning process before he or she may be dismissed. It is recommended that they are clearly described as first, second, third (and final, if that is the case) warning.

As you can see from the steps below, every warning is communicated initially verbally and then in writing, so it is confusing and misleading to describe warnings as "verbal" or "written". These steps should occur once the investigation has been completed and the misconduct has been established.

Each warning should involve the following steps, however only after the initial investigation clearly indicates that there is a need to proceed with formal disciplinary action (this does not mean that it will result in a warning or dismissal, just that it can):

Notice –

- Putting the allegation including all the known details in writing before the employee, and
- Advancing a time and place for disciplinary meeting, and
- Inviting the employee to bring a support person / representative, and
- Giving the employee the opportunity to respond at the meeting, knowing what has been alleged, and
- Who will be involved in the decision making, and
- What the outcome could be if the employer is satisfied that misconduct has been established.

Disciplinary meeting – (notes should be taken by a third party, typically another senior staff member)

- Putting the allegation to the employee again, and
- Inviting the employee's response.
- Considering the employee's response, and
- Adjourning if necessary to corroborate claims, or
- Adjourning if necessary to investigate further, and
- Advising the employee whether their explanation is adequate or inadequate, and
- Making a tentative decision on the consequence, and
- Inviting the employee to reconsider their response in light of the consequence being considered
- Consider the employee's explanation (which should involve an adjournment), and
- Communicating your final decision and the reasons for that decision, and

- Explaining the implications (duration, scope, re-offending) of the disciplinary action being taken.

Follow up –

- Completion of written notification to employee of disciplinary action being taken, and
- Completion of notes and supplementary records in personnel file.

Warning – (should include) –

- A statement of the specific problem;
- The house rule or company standard breached;
- Reference to the meeting and the employee's explanation;
- Reference to prior warnings (if appropriate);
- The corrective action required (if any);
- The time period the action must be corrected within where appropriate;
- The company's decision (eg "this is a final warning");
- The results of any further violations (eg "may result in a further warning/dismissal")

Where an employee is facing a final warning for misconduct, because of the seriousness of the consequences to the employee (dismissal) the requirement for procedural fairness is stricter. It is imperative that the employee understands before they give their final response to the allegations against them, that if their explanations are unacceptable that they could be dismissed.

An employer should not take an expired warning into account when dismissing an employee in terms of progressing the type of warning, however they may use it to establish knowledge on the part of the employee that the conduct was known to be unacceptable. Where an employer is contemplating dismissal on the basis of a series of warnings, the employer bears the burden of establishing that each of those warnings was justified.

Serious Misconduct

This is conduct that an employer considers to be so serious, that upon consideration it justifies summary dismissal. However, the Court of Appeal in *Northern Distribution Union v B P Oil NZ Ltd* [1992] 3 ERNZ 483 said:

"It is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."

The recognised categories of serious misconduct are:

- Deliberate disobedience to a lawful and reasonable instruction;
- Personal abuse;
- Violence and harassment;
- Serious breach of work rules (including those involving health and safety);
- Dishonesty;
- Misrepresentation;
- Breach of implied duties such as confidentiality, loyalty and fidelity;
- Conduct outside work that brings the employer or the employment relationship into disrepute.

Serious misconduct is conduct that, generally, justifies nothing short of summary dismissal however the employer may consider a very serious sanction (such as a final warning) short of summary dismissal.

An example of a situation where there were issues of serious misconduct but the employer decided against dismissal was, where the employer stopped short of dismissing an employee for serious misconduct, and issued a final warning instead. The employee, who had 20 years' experience of customer service with the employer, was disciplined for swearing at a customer and refusing to serve him. The employer considered that the fact that the customer had sworn at the employee first was an extenuating circumstance which could render a summary dismissal unjustified.

The disciplinary process involving an allegation of serious misconduct is relatively short (compared with misconduct), but the requirements for procedural fairness are stricter and so may involve more time. Generally, there are no warnings required in a disciplinary process for serious misconduct.

As discussed above, in most instances, the likely consequence for the employee of a finding of serious misconduct is summary dismissal. This means that the standard of proof is high. Further, the more serious an allegation is, the more rigorous the investigation should be, and, the more certain the employer should be that the employee is responsible for the serious misconduct.

Where the employee admits the serious misconduct at a properly convened meeting there is no need to spend more time investigating the matter. However the admission should be properly taken into account when considering the disciplinary outcome, i.e. making the decision of a fair and reasonable employer.

Suspension

In some circumstances, you may need to consider the suspension of an employee against whom an allegation of serious misconduct has been made.

Suspension should be treated very seriously and not be imposed lightly. The decision to suspend should only be taken after *giving the employee an opportunity to comment on the proposed suspension*. Once a suspension is imposed, it should be no longer than is absolutely necessary for

the purposes of carrying out the investigation if that was the reason it was imposed. It should only be imposed where no other alternatives are feasible.

Normally an employer will require an express power to suspend an employee in the employment agreement or for one to be provided for in a statute, however in exceptional circumstances where there are health and safety concerns or substantial financial risk or risk to company property then a suspension may be justified with or without an express provision in the employment agreement (for example see *Bay v Nu-Age Plaster Limited* [AA 104/04; 25/03/2004; J Scott]*)*. Regardless, a power to suspend must be exercised fairly and reasonably both with regard to the substantive reason for the suspension and the procedure.

Unless the employment agreement permits otherwise, the employee must be suspended on pay. If the employment agreement stipulates conditions and/or a procedure to be followed for suspension, it will be a breach of that agreement for which the employer may be liable, if they are not followed. Likewise it is difficult to justify your actions as a fair and reasonably employer if you breach your own house rules or employment agreements.

The courts have considered suspension to be a drastic measure which is likely to have a devastating effect on an employee. It is almost impossible to remove the stigma attached to a suspended employee, even if they are ultimately vindicated and reinstated with full entitlements. It therefore needs to be treated carefully and can potentially result in an unjustified disadvantage personal grievance claim regardless of if any further disciplinary action occurs.

The following judicial observations have also been made in respect of suspensions:

> *A suspension may and often does hamper the employee in the preparation of an answer to the charges. Sometimes that may be the very purpose of the suspension. Employers need to consider in each case whether it is fair to suspend when no immediate need to do so exists.*
>
> *A prolonged suspension of an employee on account of suspected misconduct unfortunately almost always leads to dismissal on account of that conduct. The interim inquiry and the disciplinary process run the risk of being influenced, prejudiced, and sometimes compromised by a premature and unnecessary suspension, especially if the suspension has been ordered by an officer more senior than those who are entrusted with the task of carrying out the inquiry. Suspicion hardens into firm belief for no particularly good reason other than a desire to protect the status quo represented by the suspended employee's absence from the workplace: Frank v Air New Zealand Ltd (Unreported)* [AEC 65/95; 5 July 1995; Goddard CJ].

Suspension could be considered where the allegation directly impinges on the employee's ability to carry out their duties, because it involves:

- Unauthorised possession or removal of company property, or
- Violence against another employee, or
- Serious harassment of another employee, or
- Gross negligence, or
- Risk of serious harm to the employee or other employees.

As mentioned earlier, a suspension must be carried out in a procedurally fair manner. An employer is expected to act fairly and to consult with an employee about the suspension before deciding to suspend. The consultation should be in respect of whether a suspension is necessary and is not a full investigation of the actual allegation(s). An employee's input should be sought before a suspension decision.

After hearing the employee's view you should take time to consider it. If you are still convinced that a suspension is necessary, advise the employee of your decision and the reasons for it. The suspension must be for the shortest possible period and the manner in which the suspension is handled must be such that it does not appear that the employee has already been dismissed, such as requiring the return of all company property.

If an employee is suspended in light of serious allegations that then prove to be false or unsustainable, so long as you have followed a fair and reasonable process, and, considered the alternatives before imposing the suspension, the suspension should withstand a legal challenge.

If an allegation is found to be false or unsustainable, the suspended employee should be fully informed about that. It is recommended that additional support for that employee be considered at that time; the employee may experience apprehension about returning to the workplace, particularly if the allegations were widely known.

Where a suspension is not substantively or procedurally justifiable an employee may raise a personal grievance under the Employment Relations Act for an 'unjustified disadvantage'. For further information refer to the **A-Z Guide** on **Suspension**.

Summary Dismissal

This is the most serious disciplinary action that an employer can take against an employee. Having completed an investigation, you should be satisfied that the allegation of serious misconduct and that all the facts in support of that allegation, can be put before the employee in a disciplinary meeting.

When you advise the employee of the intention to hold a disciplinary meeting, you should strongly recommend that the employee seeks the assistance of a support person or a representative. If the employee elects to attend the disciplinary meeting unsupported or unrepresented, then you should give them the opportunity to address that at the time. If the opportunity is declined, the notes kept of the disciplinary proceedings should clearly reflect the offer and refusal.

As a basic guide the following steps are recommended for a potential summary dismissal:

- Inform the employee that you wish to have a discussion.
- Advise the employee that an allegation has been made and inform them of what the allegation is. They should also be advised that the allegation is considered serious. Do not seek an explanation from them at this stage.
- Inform the employee that the matter will be investigated and that a meeting will be held to give the employee an opportunity to provide their explanation on the matter. Advise the employee of the date and time of the meeting and offer them an opportunity to have a representative or support person present. Give the employee a letter confirming the above, including the allegations being made and the possible consequences if proven to be correct.

- At the meeting put the allegation to the employee. If you have evidence (witness statements, etc.) of the allegation, that you will rely on, you should provide the employee access to this as well and then request an explanation. You should have an additional person representing your company or organisation at this meeting. Do note that the employee is entitled to address the person who will be making the decision.
- Any explanation by the employee and responses should be recorded and the employee should be advised that you will consider their explanation and any evidence before coming to a decision. Close the meeting and adjourn to consider all the information. The length of the adjournment will depend on the circumstances but can range from an hour to a day or two. A longer adjournment may be required where you need to verify information provided by the employee.

Whether you are satisfied or not with the explanation will determine the next step. If satisfied, the matter comes to a conclusion without the need for any disciplinary action. If you are not satisfied with the explanation offered by the employee then you could make a tentative decision to dismiss them summarily (instantly) for serious misconduct but you will need to put this tentative decision to the employee for a response with representation and considering any response before confirming the tentative decision to dismiss. If dismissed, the employee does not need to be given the reasons in writing immediately, in fact producing a letter prior to the decision shows predetermination and rushing to produce such a letter after the decision can lead to mistakes. The employee is entitled to request, under s120 of the Employment Relations Act, that the employer provides a statement in writing of the reasons for the dismissal, following such a request the employer must provide a written statement of the reasons for dismissal within 14 days – so there is plenty of time to produce a carefully written letter.

As mentioned earlier, the above is intended to be a guide only and there may be a need for slight deviations to suit the situation at hand. It is recommended that advice always be obtained if there is any uncertainty about the process.

The decision to summarily dismiss an employee for serious misconduct generally involves a 2-stage test:

> **First of all you must be satisfied that, having conducted a full and fair investigation, the conduct disclosed is conduct capable of being regarded as serious misconduct. At the time of the dismissal you must believe that serious misconduct has occurred.**
>
> **Second of all you must be satisfied that the decision to dismiss is one which a fair and reasonable employer *could* take in all the circumstances, after a full and fair inquiry has disclosed serious misconduct. The test is an objective one, not subjective.**

This test of justification is required by the new section 103A of the Employment Relations Act 2000 introduced on 1 April 2011. The Employment Relations Authority or Court, in applying the test, is required to consider whether the employer:

- Sufficiently investigated the allegations, in light of the employer's available resources;
- Raised its concerns with the employee;

- Gave the employee a reasonable opportunity to respond to those concerns;
- Genuinely considered the employee's explanation.

The Authority may also consider any other factors it thinks appropriate. In the first case under the new test, *Sigglekow v Waikato District Health Board* ([2011] NZERA 384), the Authority identified a number of other factors it would consider in assessing justification for employer actions:

- Good faith requirements, contractual obligations and any relevant policies;
- Whether the employer's expectations were made clear to the employee;
- The parties' conduct and the employment history;
- The nature of the industry, its customs and practice, and industrial practice;
- Any statutory or public interest obligations applying to the employer;
- Employer resources, the size of the workplace and the number of employees involved;
- Whether significant conclusions, including tentative ones, were articulated to the employee;
- Any disparity of treatment; and
- Any mitigating factors.

Some key points from the *Sigglekow* case for employers investigating employee misconduct include:

- Make sure that the right type of process is followed, whether the issue is one of misconduct, poor performance or medical incapacity;
- Bear in mind that an employer with HR and legal resources at its disposal will be expected to use those resources, and take care to comply with any internal policies;
- Follow up on issues that arise during an investigation. This includes checking that conclusions are supported by the evidence, as well as giving proper consideration to the employee's responses;
- Consider how similar issues have been dealt with in the past, treat like cases alike and communicate with employees in advance if certain conduct will no longer be tolerated;
- Where summary dismissal is a possibility, particularly where health and safety is a factor, consider whether suspension may be appropriate; and
- Ensure all relevant information is put to the employee for a response, including any inferences and conclusions being drawn from the evidence.

The Employment Court provided further guidance on the new section 103A in the case of *Angus v Ports of Auckland Limited* ([2011] NZEmpC 160). The Court confirmed that under the new test there

may be more than one fair and reasonable response that might be justifiably applied by a fair and reasonable employer. The new section 103A would require the Authority or the Court to determine:

- As a matter of fact, how and what the employer did leading up to the employer's dismissal or disadvantage of the employee.
- What a fair and reasonable employer could have done and how a fair and reasonable employer could have acted in all the relevant circumstances at the time of the dismissal or disadvantage.
- Whether what the employer did and how the employer did it, were what a notional fair and reasonable employer could have done in the circumstances. There may be more than one justifiable process and/or outcome. The Court or the Authority must undertake this examination objectively to ensure that they do not substitute their own decisions for those of a fair and reasonable employer.

It is recommended that, prior to beginning the disciplinary process for serious misconduct, you seek advice. The potential liability, if your decision to dismiss is subsequently found to be unjustified, is not just a financial risk but may also damage your credibility among your other employees.

Conclusion

Disciplining employees is often an uncomfortable and, a labour intensive, process. It is frequently fraught with questions about the gravity of the misconduct and the range of responses open (or not open) to the employer for consideration.

Employers are sometimes sufficiently fearful of the consequences of getting the process wrong that they look for softer options.

Disciplining employees need not be like this. By understanding the rules laid down by the courts to procedural fairness and by seeking a professional and objective opinion before beginning a disciplinary process you can confidently manage your employees' conduct and performance.

Business Central Legal has developed Practice Kits on Workplace Investigations as well as the Disciplinary Process to assist employers who have to navigate these complicated areas of employment law so they can reduce their risk of exposure to costly personal grievance claims. If you would like further information or wish to purchase a Practice Kit please call AdviceLine or email mailto:advice@businesscentral.org.nz.

Remember:

- Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.
- Visit our website www.businesscentral.org.nz regularly.
- Attend our member briefings to keep up to date with all changes.

- Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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