Conducting a disciplinary investigation and hearing
A guide for employers

At some stage, most managers will have to deal with the thorny issue of employee misconduct. Tempting as it may be to go ahead and dismiss underperforming or misbehaving employees, in doing so, you could put your business at risk of disruptive and costly employment claims.

Throughout the disciplinary investigation and hearing process, it is vital that you adhere to a fair procedure, as established by case law.

This short guide provides some useful advice to help your business manage the employee disciplinary process, and reduce the risk of a successful unfair dismissal claim being made against your company.
Employment disputes are disruptive and stressful for employers and employees alike.

With the maximum compensatory award for unfair dismissal claims currently £78,335, prevention is always better than cure.

At Linder Myers, our employment law team is committed to helping employers avoid such disputes with expert employment law advice and support. Helping us to help you, this short guide has been created to provide business owners, Managing Directors, managers, and HR professionals with some top-tips on how best to manage the disciplinary process.

Is formal action necessary?

Before starting down the investigation and disciplinary path, employers should consider whether, at this stage, the formal process is necessary.

In many cases, a quiet word may be all that is needed to resolve the matter. Informal steps could involve a private meeting to highlight the problem, enquires as to why it has arisen, and agreeing any steps that could be taken (by both parties) to put an end to the problem (e.g. further training).

Of course, where informal action has already happened, and the inappropriate behaviour or poor performance continues, a more official investigation is likely to be needed. Certainly, the employee should be aware that a formal process may be initiated if the situation is not resolved.

A word of warning however, the informal process should never be used by employers where the misconduct could result in dismissal.

Before starting an investigation

The Advisory, Conciliation and Arbitration Service (Acas) - the body devoted to preventing and resolving employment disputes – provides employers with some helpful, practical guidance on how to carry out a disciplinary investigation.

While a failure to follow the Acas code does not, in itself, make any dismissal unfair, any employment tribunal will take this code into account when considering whether an employer has acted reasonably or not.

As such, prior to starting disciplinary action, employers should familiarise themselves with the Acas code. In fact, where an employer is found not to have adequately complied with the code, the employment tribunal can increase the amount of compensation it awards to the employee – so it pays to be careful.
Conducting an investigation

A disciplinary investigation must take place prior to any disciplinary action to ensure that the employer does not fall foul of the Acas code, or the principles of fairness established by case law.

Even where the employer believes there to be “obvious guilt”, it is vital that this stage is not skipped.

When carrying out the investigation employers should:

1. Prepare a list of questions to discuss with the employee/witnesses.
2. Consider suspending the employee if there is a risk they could prejudice the investigation by remaining at work. However, this should only be done as a last resort. Suspension should be on full pay and last only as long as necessary for the investigation to be carried out. Suspension should be kept under review and the employee should be kept up to date as to the progress of the investigation.
3. Speak to anyone who witnessed the alleged misconduct and ensure that notes are kept of these discussions. The employee is entitled to see the evidence against them in advance of a disciplinary hearing and witnesses should be made aware of this at the time they are interviewed. Anonymous witness statements can be taken in exceptional circumstances. However, legal advice should be sought if this becomes an issue, or where witnesses are reluctant to provide evidence.
4. Be careful if undertaking any covert evidence gathering. While such evidence can be relevant, the court is unlikely to look favourably on an employer’s covert surveillance if it is disproportionate to the alleged misconduct. There is a balance to be struck between the employer’s need to gather information and the employee’s right to be treated fairly and reasonably.
5. Consider who should conduct the investigation. While the employee’s immediate line manager is often the most appropriate person, this is not always the case. It may be appropriate to appoint a member of Human Resources to conduct the investigation for example. In all cases, the investigator should not be a key witness unless this is completely unavoidable.

6. Invite the employee to an investigatory meeting. The employee does not have the right to be accompanied at this meeting. However, you may allow this if you wish. It is advisable to allow the employee to be accompanied if, for example, they have hearing difficulties and may benefit from someone who can use sign language, or where an employee has language difficulties and may benefit from a translator.

What to do during the investigatory meeting

It is important that employers understand the distinction between the investigation and any subsequent disciplinary proceedings. The investigatory meeting is not the same as the disciplinary hearing and, any admission of guilt by an employee during the exploration stages of the process does not remove the need for a final disciplinary meeting.

The purpose of the investigation meeting is to establish whether there is a case for the employee to answer (i.e. whether relevant disciplinary action might be taken). No decision should be made about this until the employee has had an opportunity to put their case forward.

Employers should start the meeting by providing the employee with a summary of the alleged incident(s). They should also be informed about any discussions with any witnesses. They should be given the opportunity to respond to the information provided and the allegations made against them. It is important that notes are made of any responses they provide as this information may be relevant in the future, particularly if disciplinary action is taken against them.

Following the meeting, employers should consider all the evidence in their possession and determine whether they have enough to take disciplinary action. If they decide that there is not enough evidence, they should write to the employee confirming that the investigation has been completed and no further steps will be taken.
Conducting a disciplinary hearing

Following an investigation into the alleged conduct of an employee, if the employer decides that there is enough evidence to take disciplinary action, they should write to the employee and invite them to a disciplinary hearing. The allegations against them should be set out in this letter and they should be given reasonable notice (at least 3-4 days) of the hearing so that they have enough time to prepare their defence.

The employee has the right to be accompanied to the disciplinary hearing by either a trade union representative, a legal representative, or a work colleague.

Acas provides employers with helpful, in-depth advice and guidance on planning and conducting disciplinary investigations, however as a rule:

1. If the employee, or the employee’s companion, cannot attend on the proposed date, it is advisable to re-arrange the hearing. If, after two re-arranged dates, the employee continues to say that either they or their companion, cannot attend, unless there is a genuine and verifiable reason for re-arranging the hearing, the hearing can take place in their absence. The employee should be made aware of the fact that the hearing will take place without them. Employers should, however, be wary of proceeding with the meeting in the employee’s absence, unless there is a compelling reason to do so.

2. Witnesses can be called at the disciplinary hearing by either the employee or the company. Should the employee wish to call witnesses, they should inform their employer of their proposed witnesses in advance, so that arrangements can be made in terms of the length of the hearing, suitable venue etc.

3. In advance of the disciplinary hearing, the employee should be provided with all the evidence the business wishes to rely on at the hearing so that they have an opportunity to prepare their defence.

4. Insofar as it is possible, the disciplinary hearing should be conducted by someone other than the person who carried out the investigation to ensure independence and a fair hearing. This will help to avoid complaints of bias from the employee, particularly if the outcome results in their dismissal.

5. Notes should be taken at the disciplinary hearing. It is, therefore, advisable for someone to attend on the employer’s behalf purely to do this.
6. The allegations should be put to the employee in as much detail as possible, using evidence gathered during the investigation. Depending on the number of allegations, it is easier to cite each one separately, giving the employee the opportunity to respond, before moving onto the next.

7. The employee’s companion can put forward arguments/views on behalf of the employee but they cannot answer questions on the employee’s behalf. Should they attempt to do so, they should be reminded that this is not their role and, if their conduct continues, asked to leave the hearing.

8. Once the employee has presented their defence, they should be asked to confirm that they have nothing else to add prior to ending the hearing. The employee should then be informed that the company will consider all the evidence, and will write to them with an outcome, in due course.

9. If issues arise at the hearing that require further investigation, and/or should witnesses need to be re-interviewed, the employee should be made aware of this in writing, and sufficient time to consider this new evidence should be allowed. This includes giving the employee the opportunity to respond at a reconvened hearing.

10. Where no further investigation is needed, the meeting should be adjourned and the company should consider its decision. Even if the employer knows the sanction they want to impose, proper consideration should still be given to prevent claims of a predetermined outcome.

Once the meeting has been adjourned and appropriate consideration has been given, the employer should write to the employee with the result of the disciplinary hearing, clearly stating any sanctions, and the reasons for this decision. In addition, it is important that the employer informs the employee about their right to appeal in this letter, along with any deadline to do this.
At Linder Myers we work with businesses to deliver cost-efficient and practical legal advice, reducing the potential of costly litigation and removing the headache of dealing with difficult personnel issues.

Employ-Line from Linder Myers

With a focus on providing help and support, Employ-Line from Linder Myers provides specialist legal advice for a fixed fee monthly subscription with unlimited access to our team of specialist employment lawyers.

With a dedicated online portal full of practical templates and guides, Employ-Line members can utilise a range of information to help keep them compliant throughout the disciplinary investigation and hearing process.

In addition, with a full audit of your current employment procedures, including the drafting and amending of contracts of employment and staff handbooks, we ensure your employment documentation works to your benefit, delivering peace of mind while allowing you to manage your costs.

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When a tribunal claim is made, we can litigate, mediate, and negotiate on your behalf. Steering you through the entire process to deliver the best possible result for your business.