



FEATURED ARTICLE

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REDUCING THE RISKS OF A DISCIPLINARY INVESTIGATION

Firing staff is never a bullet-proof procedure. Any attempt to make it so, by attempting to codify the requirements of fairness and reasonableness, even if done with scrupulous care, would risk either unduly fettering the conduct of the employer/employee relations and of business generally or causing even greater uncertainty that may already be perceived to exist.

However, there are a number of steps you can take to reduce the risks. When investigating, employers should remember the test is the civil standard of proof – the balance of probabilities.

Comply with the company's internal procedures. Study the employment contract and company policy manuals and abide by the house rules, even in informal discussions.

Do not delay. You cannot take disciplinary action for historic conduct therefore the disciplinary process should start as soon as the alleged misconduct comes to the employer's attention. Failing to do so can be seen as condoning the employee's behaviour.

Keep an open mind. Avoid any real or perceived bias. Anyone who may have been involved in the alleged incident or who could be accused of bias should not conduct the investigation.

Take notes. A paper trail is important if matters of fact are later called into question.

Suspension. This has significant stigma and must be justified separately from the conduct under investigation. Ensure you have the contractual right to suspend and consider alternatives.

Give the employee a right of reply before deciding.

The decision-maker must conduct the investigation. The employee has a right to be heard directly by the decision-maker.

Keep the employee informed of the course and timing of the inquiry.

Wait until the disciplinary meeting to get the employee's explanation. He/she should not be expected to give an explanation without notice of the allegation and without information on which to base a response.

Give the employee notice in writing. The more you leave to oral discussion, the more chance there is for misunderstanding. At least 24 hours' notice should be given of the allegations and possible consequences if they are substantiated.

Representation. Advise the employee of his/her right to representation.

Disclosure. Give the employee all information gathered from the investigation before the disciplinary meeting, including statements, notes and video surveillance.

Hearing. Give the employee a real opportunity to be heard. This involves more than simply the chance to confirm or deny the facts.

Consideration of explanation. Adjourn the disciplinary meeting and take time to consider the employee's explanation and the information gathered.

How serious? Consider whether the conduct is serious enough to warrant dismissal. This is usually the case if conduct is serious enough to impair the trust and confidence required in the employee.

Other factors. Consider the employee's length of service, any mitigating factors, alternatives to dismissal, whether the rules were clear and to what extent, if any, the company has contributed to the situation.

Treat cases alike. The decision-making must be even-handed. Give similar punishment for similar offences.

Reasons. Give reasons at the time of dismissal. Only these reasons can be relied on to justify the dismissal.

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