

August 2011

RUNNING A DISCIPLINE PROCESS



This paper outlines a complete, step by step process for conducting a disciplinary investigation.

PRELIMINARY (FACT FINDING) INVESTIGATION

There may be a need for a preliminary investigation. For example:

Employer receives complaints from staff members that their direct manager has bullied, intimidated and publicly humiliated them.

First step – consider employment agreement and company policies. Is there a harassment policy? If so, it should be followed - it is likely to provide for informal processes in the first instance. If the informal processes aren't successful/allegations are serious and/or complainant wishes to make formal complaint, may need to go to disciplinary process.

DISCIPLINARY INVESTIGATION

Obtain a signed, written complaint

- Employee has a right to know allegations against him/her.
- The allegation should be specific including, where possible, date and time.
- Employer cannot rely on information that cannot be disclosed to the employee.
- Normally the employee is entitled to know the identity of the complainant.

Comply with company procedures

- Employer should check the employment agreement again, and the disciplinary policy.

Do not delay

- An employer cannot take disciplinary action for historic conduct.
- A failure to address the issue could be seen as condoning this behaviour.

RUNNING A DISCIPLINE PROCESS

August 2011

Decide who should investigate

- If the employer is large enough, it should choose people (could appoint more than one person) who have not been involved in the incident(s) or who could not be accused of bias.
- The employee has a right to be heard by the decision maker. So the person(s) conducting the enquiry should also be the decision maker.

Put allegations in writing to employee

Employer should:

- Give the employee time to consider his/her response and take advice. At least 24 hours, preferably longer – up to 7 days.
- Tell employee of right to bring representative to meeting.
- To avoid delay, offer alternative date and time for meeting in case representative is not available.
- Explain the process that will be followed.
- Explain possible consequences including, if serious misconduct, dismissal.

In appropriate cases, employer may need to consider suspension

- Is there provision for suspension in employment agreement?
- Normally suspension should be on full pay unless employment agreement allows suspension without pay. Think carefully before suspending without pay – more appropriate in the case of a prolonged investigation.
- Consider other alternatives, e.g. transfer to other duties.
- Employer must satisfy itself that suspension is absolutely necessary.
- Employer must consult first with employee – give written notice that suspension is being considered and time to take advice – say 24 hours.

- Even if no provision in employment agreement, employer may be justified in suspending on the grounds of safety.
- Where possible, the employer should take advice before suspending, especially if there is no contractual entitlement or it is considering suspending without consultation.
- See notes about suspension cases below.

Inquiries

Obtain all relevant facts, by questioning all the people involved. If there is a conflict or disagreement in the accounts provided by two employees involved, investigate the possibility of other eye witnesses. Assess the credibility of these witnesses. Why is one more believable than the other?

Don't rely on what other people say they were told. If there has been a police investigation the employer cannot rely on the results of the police enquiries.

The employer must keep an open mind, and then make own decision.

First meeting

If possible, have at least two employer representatives present – one to take notes. Always take notes at all steps of the procedure in the event of a later dispute.

Taping of meetings may be appropriate for lengthy interviews or complex issues. Taping does lead to complications. It requires transcripts to be prepared and checked. This can cause delays, especially if there is a dispute about the accuracy of the transcripts.

Second Meeting?

If the employee suggests other witnesses to interview, give this serious consideration. If further enquiries are needed, the employee should be provided with copies of any information obtained in those enquiries and

RUNNING A DISCIPLINE PROCESS

August 2011

another meeting should be arranged to give the employee an opportunity to comment.

Consider the employee's explanation

The employer should adjourn the disciplinary meeting and take time to consider the employee's explanation and the information gathered. The amount of time required will depend on the facts of each case. A brief adjournment may be possible eg 20-30 minutes. In other cases, the employer may want to take a day or so.

Communicate Decision in Writing

The employer should tell the employee the decision in writing. In that letter, the employer could set a date and time for a hearing on penalty. There should probably be another meeting. Recent Court decisions have held that the employee should have an opportunity to be heard again before the decision on penalty is made.

Is the conduct serious enough to warrant dismissal?

If the conduct is serious enough to impair the basic trust and confidence required in the employee, then it is likely to be serious misconduct. Serious misconduct is a ground for dismissal.

Consideration of other factors

In deciding what, if any, disciplinary action to take, the employer should 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 employer has contributed to the situation. Have there been any previous warnings? Have they expired?

Give reasons at the time of dismissal

Only the reasons given at the time of dismissal can be relied on to justify it.

CRIMINAL CONDUCT

Where possible, the employer should conclude its process before making a complaint to the police. Otherwise, it is likely to find that its process is put on hold. This could involve a lengthy delay, because the employee is likely to have a right to silence until the criminal trial is over. The Court will be primarily concerned with the danger of injustice occurring in the criminal proceeding.

This is a situation where it is useful to have the contractual right to suspend without pay.

Eventually, after the trial, the employer is likely to have to continue its process. Even if the employee has been acquitted, the employer may still be able to dismiss. The criminal test is proof beyond reasonable doubt. For an employer, the test is different. An employer must have more than mere suspicion of an actual offence, but need not have proof beyond reasonable doubt.

NOTES ON SUSPENSION CASES

In *Williams v The Warehouse Ltd* (2005) staff members made complaints of bullying and intimidating conduct about Ms Williams while she was on sick leave. The Warehouse made enquiries with other staff members and decided that a disciplinary investigation was required. Ms Williams' manager was going to be away for a week after Ms Williams returned to work. In these circumstances, The Warehouse was very concerned about the health and safety of Ms Williams' team if she was to return to work without her direct supervisor being there until a disciplinary meeting could be arranged. There was no contractual entitlement to suspend.

At a meeting on her first day back the allegations were put to Ms Williams. The Warehouse then talked to her about the possibility of suspension and gave her an opportunity to comment. The Warehouse managers withdrew to consider, and then

RUNNING A DISCIPLINE PROCESS

August 2011

advised Ms Williams that she was to be suspended.

The Employment Relations Authority held that The Warehouse was right to make the decision to suspend in order to protect other staff. In these circumstances, the suspension was justified, even though the consultation had been limited, in particular in that there was no opportunity for Ms Williams to take advice.

The Employment Court has also recognised in a case dealing with suspension of an air traffic

controller that in some circumstances, for example imminent danger to the employee or others, or inability to perform safety-sensitive work, it may be inappropriate to consult before suspending – *Graham v Airways Corporation* (2005).

MCELROYS

Litigation Lawyers
Level 15
Tower Centre
45 Queen Street (cnr Queen and Customs Streets)
Auckland 1140
New Zealand
PO Box 835
DX CP20526

Phone: +64 9 3072003
Fax: +64 9 3097558
Email: mcelroys@mcelroys.co.nz

COPYRIGHT

You may download and print out this publication for your own use. Any other copying, distribution or use of this publication requires the prior written permission of McElroys.

DISCLAIMER

This publication is intended as a first point of reference. It does not constitute legal advice and should not be relied on. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.