



LESS SERIOUS MISCONDUCT

the easy complete guide for employers

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LESS SERIOUS MISCONDUCT

PROCEDURE FOR LESS SERIOUS MISCONDUCT

Advise the employee of the disciplinary meeting

as follows:

- Complete the NOTICE OF DISCIPLINARY MEETING FOR LESS SERIOUS MISCONDUCT. This letter is critical to the process as it contains key elements of procedural fairness. You must be able to prove that the employee is aware of the rule or practice that has been breached.
- Call the employee to a private place such as an office and advise them of the allegation against them, by handing them the notice referred to above.
- Ask whether the time set for the disciplinary meeting suits the employee.
- Make sure that the employee reads and understands the letter. It is suggested that you repeat the key elements of the letter to them, namely –
 - the allegation
 - the fact that it may lead to disciplinary action
 - the time and place of the disciplinary meeting
 - the right to bring a representative to the meeting
 - the right to offer an explanation at the meeting.

Hold the disciplinary meeting

Begin by referring to the allegation as set out in the notice of disciplinary meeting and ask the employee to explain what happened, and how it came about.

Ask any questions you may need for clarification, and if necessary, adjourn the meeting to gather further information.

Allow the employee and their representative to ask questions, but keep these to establishing the facts of what happened. The employee's representative should not be allowed to prevent the employee from answering questions. If they do so, they should be reminded that the employer is only trying to get to the truth of the matter and can only do so by means of the employee answering the questions.

If the representative continues to be obstructive, they should be warned that the meeting will be adjourned until such time as they agree to be cooperative and assist the employer in establishing the facts. If they are not cooperative, you can advise that you will then make a decision based on the facts you have.

When you feel you have all the facts, tell the employee that the meeting is over and that you will consider everything and advise them of your decision in writing.

Complete the **RECORD OF DISCIPLINARY MEETING** and keep it on file.

Consider the facts and decide what to do

You may –

- accept the explanation, or
- reject the explanation, in which case you have to decide on the disciplinary action.

Remember that the purpose of disciplinary action is to prevent the incident from re-occurring. You should always be consistent in the application of discipline and ensure that employees are treated in the same way as other employees have been in the past. It is common practice to give two written warnings before dismissing for less serious misconduct.

Misconduct justifies disciplinary action, but you should review the following –

A fair and reasonable employer would...

You must be able to justify dismissal or any other action that disadvantages an employee. There are two issues – WHAT to look at and HOW to look at it.

WHAT to look at. You should look at all of the circumstances, including (but there may be more factors)–

- The conduct of the employee
- The conduct of the employer
- The employment history
- The nature of the industry and its customs and practices
- The terms of the contract (express, incorporated and implied)
- The terms of any other relevant agreements
- The circumstances of the dismissal.

HOW to look at it. Then you must view the matter as a fair and reasonable employer would do. There is no standard for such an employer – it is a hypothetical idea.

The matter is made more difficult by section 103 of the Employment Relations Act, which the Court said “redressed the imbalance of power” between employer and employee and “shifted it out of the hands of the employer”. The relevant part of section 103 reads as follows –

“... the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”

Clearly, process is paramount.

In so far as the decision itself is concerned, the Court has given the following guidance –

“...if an employee is unequivocally caught red-handed stealing large amounts of money, a fair and reasonable employer both could and would dismiss with justification. However, if an employee has made a negligent accounting error, the employer could dismiss but whether a fair and reasonable employer would dismiss is a matter for evaluation against all the relevant circumstances.”

All the circumstances of the case includes not just the employer's reaction to the misconduct with it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer.

Write to the employee and advise them of the decision, without delay.

KEY POINTS

PROCEDURE FOR LESS SERIOUS MISCONDUCT

- Advise employee in writing of meeting
- Hold meeting and listen to employee's explanation
- Complete RECORD OF DISCIPLINARY MEETING and keep on file
- Decide whether employee's explanation is acceptable
- If not, decide necessary action to prevent recurrence
- Be consistent
- What would a fair and reasonable employer have done
- Advise employee in writing