MANAGING MISCONDUCT

Suspension

When to Suspend

This may not be appropriate in every disciplinary situation. For example, if the employee has committed an offence which does not warrant dismissal it is probably not necessary to suspend them. However, if one of the following situations apply the employer would be wise to suspend the employee from duty:-

- Where the employee is suspected of a gross misconduct offence
    - This would be an extremely serious offence such as theft, violence or being under the influence of drugs or alcohol at work

- Where it would be inappropriate to allow the employee to continue working
    - This would be where there is a possibility of on-going conflict with colleagues, interference with witnesses or the investigation, where the allegation is one of bullying or harassment or there is a risk of a continuation of the offence (e.g. disclosure of confidential information)

How to Suspend

First and foremost, it should be considered that when an employee is suspended for an alleged disciplinary offence, they are "innocent until proven guilty". The suspension is not a disciplinary sanction in itself and is simply the employer's opportunity to carry out an investigation. The investigation may reveal there is no case to answer and if that is so, the employee will be entitled to return to work without any adverse consequences. A badly handled suspension could destroy the relationship between the employee and employer to such an extent that the employee would be entitled to resign and claim constructive dismissal. As such, tact and discretion should be used when handling a suspension.

The person who will suspend the employee should be someone senior to the employee, e.g. a supervisor, manager or director. Ideally, it should not be the person who will be handling any eventual disciplinary meeting. However, a tribunal will understand that in small companies this is not always possible. It is permissible for the person suspending the employee to be the same person who will investigate the disciplinary allegation. Again, ideally, the person handling the suspension should be accompanied by another employee to take notes and act as a witness to what has been said. The rank of the witness is unimportant but they should be reminded of their obligations to keep the situation confidential.

A private room or area should be found where the employer can speak to the employee confidentially. Try and avoid somewhere that can be viewed by a large number of employees.

The person handling the suspension may give the employee the right to have a companion with them as good practice dictates that the employee be allowed to have a colleague of their choice who is present in the workplace at the time of the suspension to accompany them whilst the suspension notification takes place.

The employee should be told the reason for their suspension. It is not necessary to go into minute detail but they should be told the basic reason. For example, "The Company suspects that you have been defrauding the Company in unlawful expense claims and is suspending you whilst a full investigation takes place."

The employee should be told the terms of their suspension. The usual terms are that they will be paid full basic pay, that they will not be allowed in the workplace during their suspension, that they are not permitted to contact any colleagues, suppliers or customers during their suspension.

The employee should also be told that an investigation will take place and, if this is known, who will be conducting the investigation. They should be told that they are expected to make themselves available during the investigation to either answer questions over the telephone or, if necessary, to attend an investigation meeting. Finally, the employee should be told that the suspension is not an assumption of guilt and that when the investigation is concluded a decision will be made as to whether the disciplinary procedure should be activated. If this is the case, the employee will be provided with details of the investigation and invited to a disciplinary meeting. If not, they will be able to return to work with no adverse record on their personnel file. For these reasons, the suspension and investigation will be kept as confidential as possible and all those involved or interviewed under the investigation will similarly be told to keep the matter confidential.

The employee should then be given the opportunity to make any comments which should be noted by the note taker.

Finally, the employee should be accompanied whilst he leaves the workplace and, if necessary, taken home. The reasons for and terms of the suspension should be confirmed in writing.

A letter should be sent to the employee confirming the suspension.

Pay during suspension

As stated above, suspension is not a disciplinary sanction and, as such, the employee should be suspended on full pay whilst the investigation takes place. If the employee has benefits, such as a company car, commission or bonus, he should continue to

receive these benefits unless the employer has the contractual right to remove it from him during periods of suspension.

It is not uncommon for some employees to be signed off due to ill health during a suspension. The pay to the employee in these circumstances again depends upon the contract of employment. If the employee is only entitled to receive SSP it is legitimate for the employer to lift the suspension for the duration of the employee's doctor's certificate and only pay SSP. However, if the employee is entitled to contractual sick pay under the contract of employment there would need to be a contractual provision to allow the employer to pay SSP only if the employee were signed off due to ill health during the period of suspension.

Investigation

The lack of a thorough and impartial investigation is a common area of criticism by Employment Tribunals and can often lead to an unfair dismissal decision. An Employment Tribunal must determine whether an employer has acted reasonably in the way in which they have dismissed an employee. In particular, they must establish that they had a reasonable belief in the employee's guilt in order to justify dismissal. The employer's investigation is one of the key areas where reasonable belief can be established.

Investigation is also a specific requirement of the ACAS Code of Practice which states that, "It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case."

The amount of investigation very much depends upon the circumstances of each case. If the employee has admitted the offence then it is unlikely that much investigation is necessary. If it is an offence that has been witnessed by several colleagues, other than the taking of witness statements, it is unlikely that anything further needs to be done. However, if it is a more complex matter such as financial fraud, a more complex investigation may be necessary.

Who should carry out the investigation?

The employer must appoint an appropriate person to investigate. This person should be sufficiently senior to have access to confidential information and to have the trust and confidence of witnesses. In some cases the employer's contract of employment or Disciplinary Policy specifies who will conduct the investigation. They should not, unless there is absolutely no alternative, be the same person who will conduct the disciplinary meeting or a key witness in the investigation.

If the case is particularly technical or complex the employer may wish to appoint the services of an independent investigator with specialist knowledge e.g. the employer's accountants or IT support.

If it is a case involving an allegation of discrimination or harassment, the employer should, where possible, appoint someone who has had the appropriate equal opportunities training or who has the right personality to be able to handle delicate sensitive issues.

How to Investigate

The purpose of the investigation is to collect information to establish whether the disciplinary offence occurred which can then, ultimately, be used at a disciplinary meeting. It is important for the investigation to take place as soon as possible after the event in question, particularly regarding interviewing witnesses to ensure that memories are as fresh as possible. This information can be collected in several ways:-

Witness Evidence

The collection of witness evidence can often prove a difficult situation for employers to handle. It is not uncommon for an employee to inform an employer of a disciplinary offence that has been committed by a colleague but then refuse to provide a formal statement or, alternatively, be willing to provide a statement but require that their identity be protected.

The employer must, ultimately, remember that they must be able to produce sufficient evidence against the employee to enable them to answer the case against them. It would not be considered to be sufficient evidence to simply inform them of a disciplinary offence without being able to substantiate the evidence behind it. As such, an employee accused of a disciplinary offence is entitled to see the witness statements which are being used against him.

It is important for the employer to establish that there is no ulterior motive for the witness wishing to retain their anonymity, for example a vendetta against the accused employee. In order to do this the employer should establish the reasons for the witness wishing to remain anonymous, whether there are any other witnesses to the issue in question, whether there is any other evidence supporting what the witness is saying (e.g. CCTV footage), and whether there is any history of acrimony between the witness and the person they are accusing.

If the employer is satisfied with the witness's reasons, it is permissible for them to have their identity protected. If it is possible to simply delete their names from the statements and then provide a copy of the statement then that should suffice. However, if the statement contains information which would easily identify the witness the employer should prepare an overview of the evidence in the statement so that the employee knows the most relevant parts of the statement. For example, "On 20th May 2011 you were seen leaving the premises by the back door with a bag full of the company's stock." The identity of the person who saw this does not have to be disclosed.

If a witness is refusing to give a statement at all, the investigator should make every attempt to reassure them that, provided their motives are sound, their anonymity will be protected. However, if that is insufficient to obtain their evidence, the employer must decide whether to continue with the case in the absence of the witness's evidence (which can only be done if there is other evidence to support the case) or to threaten the witness with disciplinary action for failing in their duty of good faith which is owed to the employer. The latter is a particularly extreme tactic which should only be used if the employee is alleging that a criminal offence is being committed by a fellow employee.

The investigator, when interviewing witnesses, should attempt to obtain as much information as possible to corroborate what they are saying. In particular, dates, times, locations and details of other people present when a disciplinary offence occurred are all crucial. The investigator should not simply write down everything they are told by the witness but should be prepared to ask questions too. The investigator should then go away and corroborate dates and times in the statement with the witness's and the accused employee's diaries to establish whether they equate with what is being said.

Non-witness evidence

Non-witness evidence can take many forms such as:-

- Letters of complaint
- Attendance records
- Phone records
- Photographs
    - Damaged property
    - Damaged goods
    - The scene of an incident
    - Injuries to a person
- CCTV footage
- Emails

Interviewing the employee

It is possible, in some situations, that the investigator may feel it appropriate to interview the accused employee to establish their version of events either before or after he has collected all his evidence. The advantage of this is that it gives the investigator the opportunity to carry out any further investigation necessary to either corroborate or rebut the employee's response to the investigatory evidence. This will

then, in turn, accelerate the disciplinary process as it will prevent the disciplinary meeting having to be postponed whilst further investigations take place.

It is worth noting that as no disciplinary action will be taken at an investigatory meeting, the employee does not have the statutory right to be accompanied by a colleague or trade union official at this meeting.

Investigator's Report

After he has concluded his investigation, the investigator should produce a report summarising his findings and attaching all relevant statements and evidence. The investigator should include everything, even statements or evidence which is supportive of the employee. The investigator should not make any sort of judgment or recommendations as to what disciplinary action should be taken against the employee – that is not his job. He can, however, recommend that disciplinary action should follow.

The report should then be given to the person in the employer's organisation who should decide whether there is a case to answer and whether the employee should be called to a disciplinary meeting.

Police Investigations

If the employer is attempting to investigate a case where the employee is either being investigated by the police or is in police custody, this can create a difficult situation.

Whilst the employer can attempt to interview the employee in question it is likely that the employee will have been advised by their legal adviser not to provide any details as this could be used against them in the criminal action. As such, if this is the employee's response the employer must proceed without the employee's cooperation.

Firstly, the investigator should interview as many witnesses and collect as much evidence as possible and produce his Report. A decision then has to be made by the relevant person in the employer's organisation as to whether there is sufficient evidence to proceed with the disciplinary meeting in the employee's absence or without his cooperation.

The employer should remember that they are not bound by the same burden of proof as the criminal courts who must prove beyond all reasonable doubt that the employee committed the offence in question. The employer simply has to have a reasonable belief in the employee's guilt. As such, if there is strong evidence to suggest that the employee committed the offence in question it can proceed in his absence.

However, if the only evidence is the employee's own evidence the employer would be best advised to wait until the outcome of the criminal proceedings to decide whether to hold a disciplinary meeting.

The employee's access to witnesses

The ACAS Code of Practice specifically refers to employees giving notice to call witnesses at a disciplinary meeting. In the circumstances, it must be assumed that the employee has similar rights to interview witnesses prior to a disciplinary meeting. However, the decision as to whether to be interviewed is ultimately the witness's and, therefore, if the witness refuses to cooperate with the employee there is little he can do about it. It is important that the employer is not seen to be interfering in this process and that the employee is given the opportunity to have access to witnesses if he desires.

If a witness refuses to physically meet with the employee the investigator could suggest that the employee writes down the questions he wishes to ask in a letter and that this letter be passed to the employee to answer.

Taking disciplinary action

Depending on the outcome of the investigation, you must consider whether formal disciplinary action is required. Subject to any additional requirements that may be stipulated by your own disciplinary procedure, the following steps should be adopted:

- You should write to the employee to confirm the outcome of the investigation and set out the allegations and the basis of the allegations. The letter should also set out the employee's right to be accompanied at the meeting by a colleague or trade union official. This letter should also include an invitation to the disciplinary meeting. For employees who live within a reasonable travelling distance of the employer it may be better to use a courier or hand deliver the letter rather than relying on the post. If not, recorded or registered mail should be used to prevent any allegation that the letter was not received by the employee. Of course, if the employee is still working the letter can be given in person.

- The disciplinary hearing should be convened at a reasonable time and place. It should certainly be conducted during the employee's normal working hours and consideration should be given to its location. If the matter is of a particularly sensitive or confidential nature it may be advisable for the meeting to be conducted away from the employee's place of work. An employee should be given sufficient time to consider the allegations and should normally be provided with copies of any documents or evidence which the employer intends to rely on at that hearing.

- It may also be advisable to send the employee a copy of the employer's disciplinary procedure, so that the employee understands the process.

In cases of serious or gross misconduct where dismissal is a potential sanction the employee should be alerted to this. The employee needs to know that he is "fighting for his job". Sometimes, however, an employer will not know the level of sanction to

impose prior to any disciplinary meeting until they have heard what the employee has got to say and taken into account any mitigating circumstances. In these circumstances, it is preferable to set out the maximum offence possible (even if unlikely) to give you as much flexibility as possible. However, you should be aware that if you dismiss an employee at a meeting where they were not aware that this was a possible sanction, it is likely that this dismissal will be unfair.

It will be open to you to issue a sanction in accordance with your disciplinary procedure (normally a verbal warning, a written warning, a final written warning or dismissal). This will depend upon the seriousness of the offence and any mitigating factors on the employee's behalf. For example, an employee has been absent without explanation for over a week. This would normally result in dismissal but the employee has long service and this is his first offence. He explains at the disciplinary hearing that his marriage has broken down and he is suffering from depression. Apart from the fact that the depression may be a disability within the meaning of the Equality Act 2010, given the mitigating factors it would be more reasonable to issue him with a final written warning. The sanction issued must be one which a "reasonable employer" would issue and, therefore, if you are concerned as to the level of sanction to issue you should call the HR Helpline.

Whatever sanction is issued at the end of the disciplinary meeting should be confirmed in writing to the employee, together with the employee's right to appeal against the sanction.

If you do dismiss the employee and it is not a dismissal for gross misconduct they should be paid their notice money. In all cases of termination of employment the employee should be paid their accrued holiday entitlement.

Gross misconduct dismissals

An offence for gross misconduct is one which is so serious it fundamentally breaches the contract of employment. The following are examples of offences which, subject to mitigating factors, would normally be deemed to be gross misconduct (although this list is not exhaustive):

- Any act or omission which brings the Company into disrepute or any act or omission which is inconsistent with the relationship of good faith required between an employer and employee,

- Conviction of a criminal offence which relates to the employee's duties or acceptability in relation to other employees,

- Theft, fraud, misappropriation or unauthorised use of Company property, facilities or services,

- Falsification of records or failure to observe Company cash handling or receipts procedures,

- Gross negligence or dereliction of duty resulting in damage, loss or potential loss of Company property including monies,

- Serious or persistent breach of health and safety rules and procedures,

- Serious or persistent breach of security procedures,

- Violence (actual or threatened), fighting, insulting language or behaviour,

- Sexual, racial, sexual orientation, religious, age or disability harassment,

- Being in possession of or under the influence of drink or controlled drugs on Company premises,

- Smoking in prohibited areas,

- Insubordination or failure to follow a reasonable instruction from a superior (including refusing to do or walking off a job),

- Misuse of or falsification of the time recording procedures,

- Unauthorised gambling,

- Dangerous horseplay or practical jokes.

If you are in doubt as to whether the offence itself or with the mitigating factors the offence warrants dismissal for gross misconduct call the HR Helpline for further guidance.

If you dismiss an employee for gross misconduct no notice pay will be payable, although accrued holiday pay and any outstanding salary and expenses up to and including the termination date will be payable.