

SEPTEMBER 2015

CHECKLIST

Misconduct



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PREPARING TO CONDUCT AN INVESTIGATION

- Establish the general nature and background to the complaint.
- Consider whether a brief period of suspension with pay is required to enable an unhindered investigation to take place. This may be appropriate in cases involving, for example, gross misconduct or where working relationships have broken down.
- Set clear terms of reference which specify the scope of the investigation, responsibilities and timescales.
- Ensure the investigator has no previous involvement with the matter and is independent.
- The investigator should:
 - Analyse any documentary evidence made immediately available.
 - Assess the key points to investigate.
 - Identify and obtain all further relevant documentary evidence required.
 - Identify and interview witnesses.

CONDUCTING THE INVESTIGATION

- The date, location and time for any interview should be reasonable and should comply with any advance notice provisions in the organisation's procedures.
- The letter of invitation to an interview should include details of the matter under investigation and should attach documents relevant to the interview.
- Notes should be taken as a record of any interview.
- When the employee under investigation is being interviewed, it is important to stress that the meeting is an investigation and is not a disciplinary hearing. At the investigatory interview the facts must be put to the employee, any relevant evidence discussed and their comments invited to establish whether there is a case to answer and if there are any external or mitigating factors which might have contributed to the misconduct.
- Use the investigatory interview to establish if the employee has any documentary evidence or witnesses to refute the complaint.
- Ensure that a record of the interview is sent to the employee for review.

REACHING A CONCLUSION

- The investigator should evaluate all the evidence from their investigation and decide whether it is appropriate to take no further action (where it becomes clear there is no case to answer) or informal action (where the matter can be resolved quickly and easily) or whether formal disciplinary action is required.
- It will be important to consider whether the employee knew about the disciplinary rule that has been broken and the consequences of breaking it. It is also important to consider whether the employee was entirely at fault or whether someone else was responsible, or whether there was a failure outside the individual's control.
- In circumstances where, after thorough investigation, it is concluded that an employee has acted in a way which contravenes the employer's required standards of behaviour, whether such behaviour is of a minor nature, for example poor timekeeping, or of a serious nature, for example theft, the employer should take steps to address the employee's misconduct by way of formal disciplinary action.

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TAKING FORMAL DISCIPLINARY ACTION

- The employer's disciplinary procedure must be followed in full.
- All notes taken and records made during the process must be thorough and objective.
- In advance of any disciplinary hearing, the employee should be told, in writing, why the hearing is taking place and provided with full details of the alleged misconduct; the arrangements for the hearing; their right to be accompanied; and the potential consequences of the hearing.
- At the hearing the allegations of misconduct should be restated and witness evidence presented where appropriate.
- The employee should be invited to respond to and comment on the allegations against them and to present their own witnesses.
- The employee's companion should be permitted to address the hearing and to ask questions to clarify issues. The companion is entitled to support the employee but they may not answer questions on the employee's behalf. They may, however, put the employee's case and respond to any view expressed at the hearing.
- The key points of the employee's response should be summarised and their confirmation sought that the disciplining officer has understood it correctly.
- The meeting should be adjourned for a short while so that the outcome can be considered. The seriousness of the misconduct and any mitigating circumstances should be taken into account. Any existing live disciplinary warnings and the penalties previously imposed on other employees in similar circumstances should be considered.
- On reaching a decision it will be important to consider whether the proposed penalty is reasonable in all the circumstances.
- The employee should be recalled and the decision explained. Where a disciplinary warning is given, the period for which the warning will remain 'live' and the consequences of any future misconduct which might take place during the life of the warning should also be explained.
- The decision must be confirmed in writing and the employee advised of their right to appeal.
- The employee's conduct should be monitored following a disciplinary warning to ensure that an improvement in conduct is maintained.
- All notes of the proceedings should be collected and placed on the individual's personal file.

HOLDING AN APPEAL

- The person appointed to hear the appeal should be unbiased and not have had any involvement in the investigatory stage or disciplinary hearing. Ideally, the appeal hearer should be more senior than the decision maker at the preliminary stage.
- The appeal hearer should:
 - Examine the employee's written appeal to establish the grounds of their appeal.
 - Review all the records to understand the reasons the action was taken.
- Where the review reveals that a serious procedural flaw has occurred (for example if the individual was not advised of the case against them in advance of the hearing or the person who heard the appeal was biased) then the appeal must be a complete re-hearing of the case.

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- The employee should be informed in writing of the arrangements for the appeal hearing and of their right to be accompanied to that meeting.
- At the hearing the employee should be asked to confirm the grounds of their appeal.
- Any evidence the employee has to support their grounds for appeal should be obtained and any new evidence produced considered.
- The role of the companion is the same as at the disciplinary hearing (see above).
- The employee's case should be summarised and confirmation sought that the appeal hearer has understood it correctly.
- The meeting should be adjourned to review any new evidence and to consider the decision. Points to address will include:
 - Comparing the grounds of appeal with the level of disciplinary penalty imposed.
 - Considering whether the original procedure was carried out in full and in a fair manner.
 - Considering the circumstances leading to the original disciplinary action, the employee's previous service, any mitigating circumstances and penalties applied in the past to other employees.
 - Deciding whether the penalty was fair or too harsh.
- The decision and the reasoning applied in reaching the decision should be documented together with all the options and alternatives considered.
- The decision should be communicated to the employee as soon as possible and confirmed in writing, advising if appropriate that there is no further right of appeal.
- Where a decision is overturned, the reasons for this should be discussed with the original decision maker and any appropriate follow up measures implemented.
- All notes of the proceedings should be collected and placed on the employee's personal file.

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