



DOYLE CLAYTON
Workplace Lawyers

Misconduct Allegations

Key considerations for dealing with misconduct allegations

At the outset:

- Is this definitely a conduct concern, or are there performance elements that would be better dealt with under a capability procedure?

Your procedures:

- Is there a disciplinary procedure in place?
- If there is, is it contractual? If not, are there reasons not to follow it – for example, an employee with less than 2 years' service where the risk of other claims is minimal.
- Does the procedure comply with ACAS guidance? <https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures>
- Make sure your procedure gives clear examples of gross misconduct (though it should be a non – exhaustive list, we cannot predict everything employees might do!)

Considerations throughout:

- Keep in mind potential claims for unfair dismissal (if you end up dismissing the employee) or constructive unfair dismissal (from employees who say they have been treated unfairly through the process) in respect of employees with less than 2 years' service or who can claim automatically unfair dismissal.
- Think about how your letters and emails now could be interpreted by the Tribunal in 6-12 months – chose your wording carefully!
- Be cautious about creating new documents that don't benefit from legal privilege which could be disclosable in future...this can include all mediums of communication including SMSs and WhatsApps!
- Do you need to make any reasonable adjustments to the procedure in respect of an employee's disability?
- Could there be allegations that the disciplinary is discriminatory in any way?
- Could there be allegations that the disciplinary or disciplinary sanction are in retaliation for the employee having blown the whistle?
- Think about confidentiality to protect both the business and the employee – make sure expectations on confidentiality are clearly communicated.
- Be clear that no decision has been made (until the outcome is communicated) and that the employee had the chance to answer the allegations in full.
- ***Consider whether you want to have a protected conversation/without prejudice correspondence to negotiate an exit as an alternative to an "on the record" process – a route that can only be taken in certain circumstances.***

The procedure

- Minor conduct – could be dealt with verbally and informally, but subsequently should not be relied upon to justify future disciplinary action.



- For more serious misconduct – does it amount to gross misconduct? You will need to be clear with the employee if they are facing allegations of gross misconduct, and warn them that a possible outcome of the procedure could be dismissal.
- Suspension key points:
 - Only where serious allegations of misconduct and there are concerns about evidence tampering /risks to other employees.
 - Do you have the contractual right to suspend?
 - Keep suspension under review and for as short a period as possible.
 - Make clear it is not a punishment and the employee will remain on full pay through suspension.

Outcome

- How have employees been disciplined for similar matters previously? You should act consistently or be prepared to explain why you have not.
- Any written warning should specify the misconduct, how long the warning will remain current and the consequences of further misconduct.
- Only gross misconduct will justify dismissal without notice, and even where there is proven gross misconduct, you must consider any mitigating factors.
- The outcome should be communicated to employees as soon as possible following a disciplinary hearing, including the reasons for the decision. The outcome should include information about how the employee can appeal the decision, usually within 5 days.

Appeal

- The appeal should be dealt with impartially without the influence of the original decision maker, ideally by someone more senior than the disciplinary hearing manager.
- Disciplinary sanction may be decreased or increased on appeal – BUT do not use this as an opportunity to punish employees for appealing the original decision.



Hannah Mathews
hmathews@doyleclayton.co.uk



Emily Battcock
ebattcock@doyleclayton.co.uk

Please contact either Hannah or Emily if you have questions or need advice.

The information given in this information sheet on 28 July 2020 is for reference purposes only. It does not constitute legal advice and should not be relied upon as such. Specific legal advice about your own circumstances should always be sought separately before taking any action.

