

DISCIPLINARY INVESTIGATIONS

1. Introduction

It is well established that an employer must conduct a reasonable investigation into alleged misconduct and that any subsequent decision on the matter must be that of a reasonable employer – based on the “range of reasonable responses” test. Without a proper investigation any subsequent decision to dismiss may be found to be unfair by an employment tribunal (ET).

2. Need for investigation

When a potential disciplinary or other matter has arisen, the employer should investigate the background to gather all the relevant facts. Common situations that will require investigation include:

- a grievance raised by an employee
- allegations of bullying and harassment
- potential disciplinary matters against an employee.

This bulletin deals with disciplinary investigations only.

3. Importance of investigation

A reasonably thorough investigation by an employer is a key component in an ET’s decision about whether a dismissal has been fair or unfair. The requirement is enshrined in the ACAS Code of Practice on Disciplinary and Grievance Procedures which all reps should have to hand when representing members. In a disciplinary situation a flawed or

incomplete investigation can undermine the subsequent disciplinary process and leave the employer vulnerable to a claim of unfair dismissal.

4. Standard of investigation

If an employer goes on to dismiss an employee it must show at ET that it:

- genuinely believed misconduct had occurred
- had reasonable grounds for such belief
- had arrived at the belief following a reasonable investigation.

Therefore, to affect a fair dismissal an employer must be able to show the decision to dismiss flowed from a reasonably thorough investigation.

5. Procedural requirements

Disciplinary procedures involve a three-stage process. An investigation must gather all relevant material to enable an employer to reach a decision to dismiss, based on all relevant factors.

Following dismissal there must be an opportunity to appeal the decision. See the ACAS Code of Practice referred to above.

6. Reasonable responses test

The courts and tribunals have been directed by senior courts to apply the range reasonable responses test to evaluate whether the employer has conducted sufficient investigation in all the circumstances of the case – as

well as whether dismissal itself is a reasonable response.

NB: Investigation is just as important when an employee raises a grievance – decisions about peoples' employment matters should only ever be made based on evidence properly gathered.

7. Investigatory requirements

To ensure a disciplinary investigation meets legal requirements the employer should ensure:

- all the relevant facts and information on the matter are collected
- the ACAS code of Practice is followed – failure to do so can lead to an uplift in compensation
- the investigating officer is appropriate, which means they should have had no prior involvement and they do not conduct the disciplinary hearing
- there should be clear guidance on what is to be investigated and how to report their findings
- the investigator should be fair and objective, looking for evidence that both supports and disproves the allegations
- the investigation establishes the facts by collecting relevant evidence which may take many forms – witness statements, interviews, documents, physical evidence, CCTV – and drawing a conclusion from that evidence.

8. Suspension

Case law has determined that employers should not adopt a “knee-jerk” reaction to the suspension of an employee facing charges. Suspension is not a neutral act. It is a serious step that inevitably casts a shadow over the employee's competence and reputation. Inappropriate suspension

could amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal. (Reps must **always** seek the advice of their full-time officer before suggesting such action since it is a much more difficult claim to win at an ET). The employer may face a claim for damages for any psychiatric injury suffered by an employee that is suspended without sufficient reason

Where an employer does decide to suspend an employee because the allegation is one of serious misconduct (for example to preserve the integrity of the investigation process or to safeguard the business and/or its employees or customers), then it should be on the basis of full pay. Any period of suspension should be kept under review and if, during the investigation, it becomes apparent that suspension is no longer needed the employee should be returned to work.

9. Speed of investigation

Even where guilt appears to be obvious it remains important that an investigation is carried out properly. The employee may have a plausible explanation for what they were doing which could mean that a disciplinary hearing is not required and this will not become apparent without an investigation. Having said that, it is always important that the investigation is undertaken without undue delay.

10. Accompaniment

There is no statutory right for an employee to be accompanied at an investigation meeting but reps should check their company disciplinary policy since some follow the ACAS suggestion and allow a companion to be with the employee under investigation.

11. Past misconduct

In a recently reported case (NHS 24 v Pillar) an ET found it to be unfair for the investigation to include details of two previous acts of misconduct for which no disciplinary action had been taken. However, the employment appeal tribunal (EAT) overturned that decision and pointed out that it is highly unlikely that including too much information in an investigation report will render a dismissal unfair.

In similar vein in a Court of Appeal judgement (Airbus v Webb) it was held that where an employee's previous misconduct constituted a dismissible offence the employer could rely on that in determining the appropriate disciplinary penalty.

12. Reps' action

When asked to represent a member in a disciplinary hearing reps should closely examine the investigation report and think carefully, along with the member, whether there is helpful information available to the employer that should reasonably have been included and has been omitted. That may be of great assistance during the formal disciplinary hearing because it can interfere with the range of reasonable responses tests for both the quality of the investigation, and then for any decision to dismiss or to impose an alternative sanction.

Reps who believe a member has a claim to an ET should refer the matter to their full-time officer in the first instance. TSSA will only support claims we believe have more than 50% chance of achieving a successful outcome. Where the employment rights adviser does not believe there is that level of success available the individual member will be provided with a written explanation of the legal tests that will apply, advice about how to make an independent claim, and a

right of appeal to the executive committee. Reps should not seek to advise members of the strength of success at an ET but refer the matter to HQ for analysis.

Further Information

More information on this and other legal matters is available from:

- ❑ Val Stansfield, Employment Rights Adviser at stansfieldv@tssa.org.uk or 020 7529 8046
- ❑ the TSSA Helpdesk – 0800 328 2673

The information given here is for general guidance only and should not be regarded as a complete or authoritative statement of the law.