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HUMAN RESOURCES

Basic Guide to Carrying out an Employment (Disciplinary) Investigation

QUICK GUIDE

Matters requiring investigation can be straight forward involving just one employee or complex involving many employees and/or matters of a subjective nature. This guide will provide you with an overview but all investigatory matters require specific advice from an experienced practitioner to coach you through a fair process.

Introduction

Before there can be any conclusions drawn about the necessity for and nature of any disciplinary action, there must be some fundamental enquiry into the circumstances which have caused an employer to consider taking such action – whether that be a verbal reprimand, written warning or the ultimate sanction of dismissal.

The rigour with which an employer will be expected to carry out an employment investigation will vary according to the circumstances, the potential consequences for the employee and the resources reasonably available to the employer. A large corporate with its own Human Resources specialists, for example, will be reasonably expected to carry out a more comprehensive investigation when required than that of, for example, a corner-dairy owner. That said, *all* employers, as a minimum, must be confident that they will be able to meet the statutory test of justification set out in s103A of the Employment Relations Act if they are to be able to effectively rebut a potential personal grievance.

The test of justification essentially requires an employer to be able to objectively demonstrate that its actions and procedures were those expected of a reasonable employer.

The Authority or Court, in applying this test must consider –

- Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee, and
- Whether the employer's concerns were raised with the employee before taking action, and
- Whether the employer gave the employee a reasonable opportunity to respond to those concerns before taking action, and
- Whether the employer genuinely considered the employee's explanation (if any) before taking action.

This Guide focusses on the process of carrying out a formal investigation once a concern becomes apparent and has the *potential* to result in disciplinary action. This may arise from concerns with an employee's continued poor performance following an unsuccessful performance management process, alleged misconduct or serious misconduct and includes responding to allegations of bullying or harassment.

One important aspect that an employer must guard against is that of pre-determination - or creating an impression of pre-determination. The investigation itself and deciding whether any disciplinary action should follow an investigation are separate phases. Care should be taken to use neutral language throughout the

commencement and carrying out of an investigation. Investigations should be carried out promptly – but be thorough.

Deciding whether an investigation is actually required is important and strangely, often overlooked. There can be tendency to launch directly into a formal investigation process if confronted with a complaint or an incident. Not every complaint or incident will require formal investigation and to do so prematurely can risk wasting valuable resources and sometimes delay taking effective and appropriate action. Many issues can be appropriately dealt with at an informal level – particularly if a complainant is seeking a more informal or low-level resolution of a matter. Against this needs to be balanced the interests of the organisation which may be better served in carrying out a formal investigation. There can be no hard and fast rules but some things to consider might include –

- The seriousness of the matter
- Whether it is a repeat incident/behaviour
- The need to demonstrate a consistent approach
- The overall interests of the organisation (including consideration of the interests of other employees)
- The complainant's wishes (where applicable)

Immediately following allegation or incident:

- Ascertain and record the material facts – who, what, where, when. Record the names of potential witnesses.
- Seek preliminary explanation from the alleged perpetrator *but only to the extent of establishing whether there is an immediate and obvious explanation which would dispose of the need for further enquiry or need for any further action to be taken.* (Care must be taken here – particularly in respect of infringements which may invoke allegations of serious misconduct and where the *possibility* of dismissal arises – to ensure that the alleged perpetrator is not denied an opportunity to take advice before providing a full explanation). Form a view as to whether further investigation will be required – if it is, inform the alleged perpetrator that you will be doing so and that he/she will receive written confirmation with details of the specific allegation(s) together with all relevant information.
- Get early advice from The Chamber's Employment Relations Advisers, as your initial response and decisions may compromise a fair and reasonable process. Consider whether utilising an external investigator is appropriate.
- Consider whether suspension is reasonable and appropriate in the particular circumstances. Check the terms of the relevant employment agreement and *consult* with the alleged perpetrator before deciding to implement suspension
- Commit specific allegations to writing:
 - Identify the term/policy/implied term allegedly breached
 - Assemble relevant documentation e.g. the relevant clause or clauses from the employment agreement or policy statement etc.
 - Obtain or prepare written statements from witnesses whilst their recall is optimal.
- Assemble other evidence: Where necessary and relevant, visit the site of the alleged infringement; take pictures or make sketch maps; make sure you understand the position of key people at the material time(s). Ask relevant persons to show you where they were and record that information together with information about background processes if that is relevant. Where relevant, secure and make back-up copies of electronic files e.g. computer history, video recordings etc.

Preparation for Investigation Meeting:

Review the evidence collected so far; determine whether there is a need to carry out further investigation.

If so –

- Prepare a letter to the alleged perpetrator; ensure that he/she is provided with –
 - the specific allegation(s),
 - details of any specific terms allegedly breached (provide copies),
 - all other relevant information e.g. copies of witness statements, photographs, video files etc.,
 - advice of the potential consequences if the breach is established,
 - notice of a meeting at which the allegations will be discussed and the employee will be expected to provide an explanation,
 - advice that the employee is entitled to have a representative or support person present at the meeting. Inform the employee who will be conducting the meeting and whether other persons will be present.
 - Advise the employee if you intend recording the meeting.
- Ensure that a suitable venue is available for the meeting – this may be at the workplace or elsewhere. Ideally the meeting should occur at a place free from interruption or distraction and where a private place will be available for consultation between the employee and his/her representative if it is required. Make sure you allocate sufficient time for the meeting.
- Arrange to have another person (manager, supervisor) present who can act as a witness and take notes or make arrangements to record the meeting. If requested, a copy of the digital audio file should be provided to the employee unless they make their own arrangements.
- Consider the use of an external person to assist in the conduct of the investigation.

At the investigation meeting:

- Check whether the employee has made arrangements for a representative or support person to attend – if not, make sure that the employee is aware of this option and explain that you are prepared to adjourn the meeting at any time if the employee wishes to obtain assistance. If the representative/support person does not introduce him/herself make sure you ascertain their identity when you introduce others present at the meeting.
- Briefly summarise the purpose of the meeting; establish that the employee understands the formal nature of the meeting and the potential for disciplinary action. Emphasise that this is an *investigation* and no conclusions will be made with regard to further action until the investigation is complete and the employee's explanations have been fully and fairly considered. Explain the process the investigation will follow.
- Make sure that the employee understands who the decision maker will be. (If it is not the person conducting the investigation meeting it is important to ensure that the employee is provided with a copy of any report and recommendations made to the decision-maker and that the employee has an opportunity to be heard by the decision maker prior to any decisions being made). The decision-maker should ensure that he/she has the required authority or delegated authority to make decisions in this context.
- Deal with each allegation in turn (if there are multiple allegations).
- In most cases it will be useful to have a number of pre-prepared questions, however, an investigation is a pro-active process and it will usually be necessary to use supplementary questions to fully and fairly

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establish the facts in each case. Use open-ended questions and avoid asking questions of a nature or in a manner which may be perceived as having pre-determined an outcome or demonstrate bias. The objective of the investigation is to *investigate*: to establish the facts.

- Carefully listen to the employee's explanation and be prepared to clarify conflicts/inconsistencies through use of questioning/answer. Clarify your understanding of the employee's explanation. Be proactive.
- Keep discussion on point.
- Identify any need for follow-up investigation with other persons and how that information will be made available i.e. resumption of meeting at a later time/date or in writing.
- Keep full notes – or agree that the meeting will be recorded. (Both parties may make their own arrangements or one may undertake to do so and provide the other with a copy of the recording).
- In some more complex cases, such as allegations involving one or more other witnesses or complainants it may be wise to compile an investigation report (most commonly done in cases of alleged bullying or harassment). This will allow the decision maker to establish if the allegations are of sufficient magnitude to warrant disciplinary steps and also allows the alleged perpetrator to fully respond to the comments of others. If a report has been written then it should be provided to the parties (alleged perpetrator, complainant(s) and decision maker) after the investigatory meeting.

Consider Findings:

- At this point any allegations can either be upheld, partially upheld or not upheld. Any tentative disciplinary decision proposed by the decision maker as an outcome could be put in writing to the perpetrator or you could move to meet again to present a preliminary decision (see 'Post-investigation meeting(s)'). For privacy reasons, if you have a complainant, they are not to be informed of any further disciplinary steps proposed to the perpetrator.
- It is suggested that if the matter is complex and the business have the resources available to them, the investigator should remain independent from the ultimate decision maker. This is particularly important in comprehensive investigations where an investigation may have resulted in an independent report being presented to the Employer. The investigator should not then become involved in any decisions of a disciplinary nature.

Post-investigation meeting(s):

- Whilst not always necessary, it is recommended – particularly where dismissal is contemplated – that following the conclusion of the investigation, the employer meets with employee (and their representative) again. The purpose of this meeting is to summarise the process of the investigation, the evidence considered and the conclusions reached about the facts together with the employer's tentative view as to the proposed course of action. The employee should be invited to respond – particularly in relation to the proposed action (if any). This may or may not require further adjournment in order for the employer to consider and respond to any submissions made.

Decision making

- Once confident that you have reasonably established the facts and the investigator has drawn fair and appropriate conclusions, it will be necessary for the Employer to determine the nature of any disciplinary action (if required). It is not necessary to establish proof of any finding to the extent of it being "beyond reasonable doubt" but evidence must be sufficiently robust to enable conclusions to be

reached 'upon a balance of probability'. This is not an exact standard. Generally speaking, the more serious the potential consequence for the employee, the more robust the evidence required to support the decision will be.

- The law requires an employer to consider *all of the circumstances*. This will therefore include consideration of the circumstances of the employee as well as other factors.
- In cases of alleged serious misconduct, concluding that serious misconduct has occurred will not automatically justify dismissal. Dismissal may be one of a range of options open to the employer – it will be for the employer to show, having due regard for all the circumstances, that termination of employment is justified and appropriate. It is recommended that you seek advice from the Employment Relations Advisers at the Chamber when considering these matters.
- It is essential that decisions be made upon the basis of evidence actually put to the employee – and taking into account the employee's explanation. Decisions made wholly or in part upon other evidence or for reasons which the employee has not had an opportunity to respond to will, in all probability, render disciplinary action unjustifiable.
- Communicate your decision(s) in writing clearly setting out the reasons and summarising the supporting evidence (and the reasons for rejecting other evidence). Demonstrating a clear, logical, fair and reasonable approach here may itself avert a PG from being raised and thereby avert the need to devote further time and resources inevitably required in dealing with such matters. Struggling to achieve this may be an indication that your investigation could be incomplete or conclusions unsafe.
- Avoid unwarranted delay.

Final words

An investigation is not a scripted event and it needs to be sufficiently flexible to fairly and adequately deal with the circumstances. We have attempted to set out above a basic guide to the approach that should be taken but this is no substitute for tailored advice which can address the specifics and variables of each case.

"Get advice – and get it early" is probably some of the best advice we can give. Our Employment Relations Advisers are experienced and available. You are encouraged to make full use of their experience and the assistance they can provide.

For further information regarding employment investigations or other aspects of Employment Relations, please contact The Chamber, email info@cecc.org.nz or phone 03 366 5096.