CANTERBURY EMPLOYERS' CHAMBER OF COMMERCE

WE KNOW HUMAN RESOURCES

WARNINGS & THE DISCIPLINARY PROCESS

QUICK GUIDE

Having a transparent, well-structured disciplinary process is fundamental to an organisation's ability to address issues arising from employee misconduct or poor performance. This Quick Guide sets out the required elements of an effective disciplinary process. (Note: Serious misconduct should be dealt with separately - refer to the related Quick Guides Dealing with Serious Misconduct and Warning Steps).

The essence of a structured process is that its objective is to correct rather than punish unacceptable behaviours/performance, at the same time clearly signalling that unless addressed, such behaviours/performance will ultimately result in dismissal.

A warning puts an employee on notice that they have not met the employer's required standards and that a continuing failure to meet those standards could result in further disciplinary action, including dismissal. A warning may therefore lessen an employee's security of employment and if not given for sufficient reason or without following a proper and fair process, can result in a finding that the employee has been unjustifiably disadvantaged (Personal Grievance), requiring the award of compensation and the warning being set aside.

PROCESS

Natural justice requires that employees be warned if their continued employment is threatened as a result of repeatedly falling short of reasonable standards. This is to allow employees an opportunity to remedy the employer's concerns in the way required by the employer. A warning must therefore clearly communicate several things (see below), however, it is first necessary to determine whether, in all the circumstances, a warning is appropriate or whether some other form of action is required e.g. retraining.

Many organisations have formal disciplinary procedures either set out in their employment agreements or in ancillary policy or work rules. These should be checked to ensure that the intended process fully complies with those procedures.

No form of disciplinary action should be implemented without first investigating the alleged misconduct or poor work performance directly with the employee. The employee should be informed, ideally in writing, of your intention to meet with them to address your concerns. This notification should clearly state the purpose of the meeting, the specific concerns to which the employee will be expected to respond, the possible consequences in terms of the type of disciplinary action which may follow if there is no satisfactory explanation and should also inform the employee of their right to have a competent representative attend the meeting. The employee should be allowed sufficient time in order to arrange for a representative if required. Usually one or two days notice will suffice, however, there will always be exceptions to this.

It is important that a record of all meetings is kept and for this purpose the employer is strongly advised to have a witness present. This is all the more important if the employee elects to have a representative or support person present. Indeed, in these circumstances it is strongly advisable that the employer also have a representative. The Employers' Chamber has 3 employment lawyers within its Employers' Services team, any of whom will be able to assist member employers. If the employee initially elects not to have a representative present you should remind him or her that they are entitled to involve a representative at any stage and that, if necessary, the meeting can be adjourned to facilitate this.

It is not necessary to make an immediate decision at the conclusion of the investigation. Undue delay should be avoided but no adverse consequences will follow by ensuring that full and fair consideration of all the facts and evidence established during the course of the investigation is given. The same process should precede all disciplinary actions – whether a warning or termination of employment.

FORM OF WARNING

If you conclude, after completing a full and fair investigation, that a warning is warranted this should be communicated to the employee without undue delay. Some established disciplinary procedures provide for 'verbal warnings' particularly in the first instance. We recommend that all warnings be given in writing – and even when a 'verbal warning' is required as part of the organisation's policy, the employee's personal file should record the fact that a warning has been administered. The advantages of a written warning (providing it conveys the recommended information) are obvious: there can be no question in the future as to the fact that a warning has been issued and that certain action was required of the employee.

An effective warning will contain the following information:

- The employer's specific concerns.
- The date(s) upon which the employer met with the employee to investigate those concerns.
- Whether or not the employee elected to have a representative present.
- The employee's explanation, if any, and the employer's response.
- The remedial action required by the employee.
- The consequences should the required standards not be met e.g. final warning/dismissal.
- The requirement for a review after a specified period of time.
- The period during which the warning will remain valid (but see under 'Validity' below).

NUMBER OF WARNINGS

There is no set rule as to the number of warnings required before dismissal may be contemplated. What is required is that an employee be fairly warned if their continued employment is in jeopardy. One warning may be sufficient. We generally recommend, however, that a formal structured disciplinary process provide for two (written) warnings before dismissal occurs. It may be appropriate to consider the use of informal counselling at first instance before a first warning.

VALIDITY

The passage of time will affect the extent to which an employer may rely upon the existence of a warning (in terms of justifying further disciplinary action). Here again there is no fixed rule. Generally warnings will remain valid for at least six months. Two approaches can be taken here. An organisation might specify the 'life' of a warning as part of its disciplinary procedure. The advantages of this approach are that of certainty and consistency. The downside is that such a rigid approach can be abused by employees who are attuned to 'playing the system'. The alternative approach is not to specify the period of time within which any further misdemeanour or poor performance will invoke a subsequent warning/dismissal. The advantage of this approach is that it can more readily accommodate the habitual re-offender on the basis that a warning, when applied to such a person, could reasonably be expected to extend for a longer period than might otherwise be the case.

For further information on Drug Testing in the Workplace, or other aspects of Employment Relations, please contact The Chamber, email Keith Woodroof; keithw@cecc.org.nz or phone 03 366 5096.