

The Disciplinary Process – Do's & Don'ts

As a business owner or manager of employees, there will be occasions when issues arise with an employee's conduct or performance. Following the right process before issuing a warning to an employee is critical to:

- ✓ Ensure the warning can be relied upon if there are repeated incidents of poor performance or misconduct, and,
- ✓ Avoid the time, cost and stress in addressing a personal grievance claim.

An employee is able to raise a personal grievance in respect of any disciplinary action taken against him/her by an employer if;

- (a) the disciplinary action is **not substantively justified**; and/or
- (b) the employer has failed to follow a **fair process** in reaching its determination to issue a warning.

What is required by an employer to ensure it complies with its obligation to act in a justified manner and as a **fair and reasonable** employer? This may vary according to the particular circumstances and it is recommended that you take advice as to your obligations. You can contact 0800CHAMBER for guidance. However, there are some general **do's and don'ts** in conducting an investigation where disciplinary action is a potential outcome.

THE DO'S

1. ACT PROMPTLY

- If misconduct is alleged by the employer, then in order for the employee to be able to respond fairly to the allegation, the concern should be brought to the employee's attention promptly. As an example, if the complaint is one of repeated lateness, then raising the issue two months after the event does not allow an employee a fair opportunity to recall and provide an explanation.
- We hear of many cases where an employee's conduct or performance is unsatisfactory, and has been repeatedly so. The situation has become frustrating. When employers reach this point where it is no longer tolerable, they often want to dismiss the employee. It is important to act carefully. Without having issued prior warnings that the conduct or performance was unsatisfactory, and allowing the employee an opportunity to improve, dismissing an employee is fertile ground for a personal grievance claim, other than when the situation is one of serious misconduct. Even with serious misconduct, there is a process to follow.

2. ACT FAIRLY

- Ensure there is no disparity of treatment between employees.
- Understand exactly what the issues are, and check how the issue has been dealt with regarding any other employees. There may be a precedent.

3. COMPLY WITH POLICIES AND PROCEDURES

- If you have notified policies and procedures regarding how disciplinary action will be investigated and conducted, ensure the steps you take will comply with those policies and procedures. And, check that the employee was given policy and procedure information when they joined your business.

4. CONSULT

- An employee is entitled to understand the complaint, the documents and the evidence relating to the employer's complaint, before he/she provides a response to, or explanation for, the conduct under the complaint.
- In advance of any meeting, the employee should be advised that he/she may have a support person attend the meeting with them. It is up to the employee whether they chose to bring someone or not.

5. CONSIDER AND INVESTIGATE

- An employee is entitled to a fair opportunity to provide his/her account of events in response to an employer's concerns. The employee's response may require the employer to undertake further investigations, such as talking to other staff about what they may have observed, or speaking to external parties.

6. CONSULT AGAIN

- Once you have considered the employee's response and determined that there has been misconduct or poor performance, then you will need to consult with the employee regarding the proposed penalty.
- After receiving and considering the employee's response, the employer can advise of its determination of the appropriate penalty.
- If a warning is to be issued for poor performance, the employee should clearly understand the employer's expectations regarding future performance and a date be set for further review of performance.

THE DON'TS

7. RUSH

- Even where serious misconduct is alleged, the employee is still entitled to an opportunity to provide his/her account of events prior to the employer making any decision. If there are concerns about having the employee at the workplace, suspension may be an option which can be discussed with the employee. Check there is a power to suspend in the employment agreement.
- Generally the consultation process can be undertaken in two to three meetings with the employee.

8. PREDETERMINE THE OUTCOME

- An employer needs to enter into the process with an **open mind** and can only determine whether to issue a warning or dismiss **after** allowing the employee a fair opportunity to respond.

9. WITHHOLD RELEVANT INFORMATION

- If a particular matter is important in an employer's decision about whether to issue a warning or dismiss an employee, then the employee must be allowed an opportunity to comment on that matter. Don't withhold relevant information.

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