

How to decide an appropriate disciplinary penalty or sanction

Introduction

When considering what sanction to impose under a disciplinary procedure, employers must ensure that their decision is fair and reasonable in all the circumstances.

If the decision does not meet this test, the employer may be exposed to a claim for unfair dismissal if the employee is dismissed, or a claim for constructive unfair dismissal if the employee resigns in response to the sanction applied.

When should the decision be made?

The employer should ensure that it carries out a fair and reasonable investigation into the matter.

The [Acas code of practice on disciplinary and grievance procedures](#) states that employers should carry out any necessary investigation to establish the facts of the case.

If, following the investigation, the employer concludes that there is a disciplinary case for the employee to answer, it should hold a disciplinary hearing, giving the employee the opportunity to respond to the allegations, put forward their own evidence and set out any mitigating factors.

It is good practice for the employer to adjourn the hearing to consider the decision, even where there is no need for further investigation and the employer is clear as to the sanction that it wishes to impose. Announcing the decision immediately may suggest a predetermined outcome.

In what circumstances might particular penalties be appropriate?

Once the employer has reached the decision that an act of misconduct has taken place, there are a number of factors that will influence the next decision as to which sanction it should apply.

When considering which penalty would be appropriate in the circumstances, the employer should take into account the nature of the act of misconduct, the seriousness of its consequences and whether or not the misconduct has occurred repeatedly or is a one-off incident.

1 Verbal warning

A verbal warning would be appropriate when dealing with the first occasion of minor misconduct, such as:

- lateness;
- sub-standard work;
- appearance/a failure to comply with the dress code;
- a failure to follow the requirements of the sickness absence reporting procedure; or
- excessive personal use of the employer's email, telephone or internet systems.

2 First written warning

A first written warning would be appropriate where further instances of minor misconduct occur after a verbal warning is given, or when the employer is dealing with the first instance of more serious misconduct, such as:

- unauthorised absence;
- a failure to carry out a reasonable instruction;
- inappropriate behaviour towards a colleague or customer;
- breaches of the employer's policies and processes, such as *minor* infractions of the health and safety policy, or breaches of the email and internet policy; or

- misuse of company property or equipment.

3 Final written warning

A final written warning would be appropriate for persistent acts of misconduct where the employer has already issued the employee with warnings or for a very serious act of misconduct that falls short of gross misconduct, for example:

- persistent lateness;
- further breaches of the employer's policies and procedures following a written warning;
- persistent unauthorised absence; or
- serious breaches of health and safety rules, even if the incident is a one-off event.

A final written warning for a first offence may be appropriate where the act could be considered gross misconduct, which would normally justify dismissal, but where there are strong mitigating factors, and the employee has undertaken to improve their conduct.

It could also be appropriate in borderline cases where the disciplinary rules did not make it clear that a specific act would result in dismissal.

4 Dismissal with notice

The ultimate sanction for misconduct or poor performance is dismissal. When taking the decision to dismiss, the employer will have to demonstrate that dismissal in the particular circumstances falls within the 'band of reasonable responses'. This means that the employer must demonstrate that a 'reasonable' employer could have reached the same decision.

Dismissal with notice is likely to be appropriate where a final written warning has been issued for misconduct or poor performance and further acts of misconduct take place or performance does not improve. The final act of misconduct may not be sufficient on its own to amount to gross misconduct but would justify dismissal when taken together with earlier acts and a failure by the employee to improve or modify their conduct.

5 Dismissal without notice

In most cases dismissal for a first offence will be appropriate only where the conduct amounts to gross misconduct. Gross misconduct can also justify dismissal without notice.

Gross misconduct will arise where the act is so serious that the employment relationship between the employer and the employee has been irreparably damaged.

The employer should consider carefully whether or not there has been a genuine breakdown in the 'trust and confidence' between it and the employee. Such a breakdown might occur where the employer can no longer have confidence that the employee will carry out their duties with honesty and integrity or will perform their role without causing loss or damage to customers or the organisation.

Whether or not a specific act amounts to gross misconduct will depend on the circumstances of the case, including the nature of the employer's business. Examples of gross misconduct include:

- fighting or physically threatening behaviour;
- insubordination (a single act is unlikely to be gross misconduct, but dismissal may be justified if, for example, the act is accompanied by offensive language);
- discriminatory conduct, for example racially offensive language;
- theft or fraud;
- acts of dishonesty, for example falsifying time sheets; or
- a breach of the employer's drug and alcohol policy.

The employer's disciplinary policy

The employer's handbook or disciplinary procedure should list acts that will be regarded as gross misconduct, but it should explain that employees can also be summarily dismissed for something that is not on the list, if this is reasonable in the circumstances.

Where disciplinary rules have made it clear that particular conduct will lead to dismissal, it is more likely that the dismissal will be fair. Further, the rules will draw attention to, and encourage employees to comply with, particular requirements that are important in the employer's organisation, for example in sectors where the employer is responsible for ensuring that employees meet specific legal or regulatory requirements and standards.

Even where a specific act is designated as gross misconduct, the employer must still be able to demonstrate that it genuinely attaches great importance to specific rules and standards and that there is a good reason for treating that misconduct seriously. If it has repeatedly applied a sanction short of dismissal for similar offences in the past, the fairness of the employer's decision to dismiss may be undermined.

The employer should check its disciplinary policy before applying a penalty, as the policy may restrict its ability to apply a particular sanction in particular circumstances, such as a final written warning where it has not issued a first written warning.

The employer's particular industry or sector may have a bearing on how seriously a particular act of misconduct should be treated. For example, a breach of health and safety rules may be treated more seriously in the construction industry than in other sectors due to the potential consequences, such as death or injury; or in sectors such as finance or healthcare, a one-off breach of confidentiality may present such a high risk to the organisation that dismissal is appropriate.

The employee's disciplinary record

The employer should consider whether or not the employee has any 'live warnings' on their personnel file (the disciplinary policy should set out for how long a warning will remain live).

The relevant date for assessing whether or not a warning is "live" is the date of the act of misconduct, not the date of the decision.

If there are live warnings, looking at the cumulative impact of these is appropriate and can lead to a fair dismissal. The employer should not normally take account of expired warnings when deciding on the appropriate disciplinary penalty.

Consistency

The employer should ensure that it deals with disciplinary issues consistently.

Generally speaking, this means that employees who commit similar acts of misconduct should receive a similar penalty. However, even where a lesser sanction has been applied in the past for similar misconduct, an employer may still be able to demonstrate that a subsequent dismissal is fair if it can distinguish the earlier case. The issue of consistency (in a tribunal) will be relevant in determining the fairness of a dismissal only if:

- There is evidence that the dismissed employee was led to believe that they would not be dismissed for such conduct;
- Other cases give rise to an inference that the employer's stated reason for dismissal was not genuine; or
- In "truly parallel circumstances" a different and lesser sanction was applied.

Mitigating factors

Once the employer has reached a decision that the employee's conduct amounts to misconduct or gross misconduct, it should consider any factors that would mitigate against the sanction that it would normally apply.

It is important that the employer draws a distinction between evidence that suggests that the employee has not committed misconduct and mitigating factors relating to the employee's circumstances, which are relevant after the employer has decided that the employee has committed the misconduct.

The employer should consider whether or not any of the following potential mitigating factors could be relevant:

1 Previous conduct

Previous conduct may be a mitigating factor, in particular where the employee has an unblemished record. For example, if a long-serving employee with no previous disciplinary record commits an act of misconduct that could justify dismissal, it could be fair for the employer to give them a final written warning, even where another employee is dismissed in the same circumstances.

2 Health or disability

Health issues may be a mitigating factor if they were the cause of the employee's behaviour, or in some way explain the employee's actions.

Where the employee has health issues that may be relevant to their conduct, the employer should consider at the outset of the disciplinary process whether or not the employee may be covered by the Equality Act 2010.

The employer should consider if it is necessary to obtain a medical report to establish whether or not the condition mitigates the employee's conduct, and whether or not disciplinary action against the employee in the circumstances would amount to discrimination because of their disability.

3 Provocation

The employer should consider the individual circumstances, including whether or not the employee was provoked. For example, if an employee is disciplined for verbally abusing a colleague, it may be appropriate for the employer to impose a lesser sanction if the employee clearly was provoked by the colleague, compared with an unprovoked act.

4 The employee's position, experience and length of service

Depending on the nature of the misconduct, a less severe penalty may be appropriate for a relatively new, inexperienced employee, compared with an employee who is in a position of responsibility or who is long serving, on the basis that the more experienced employee ought to know better and set an example.

On the other hand, a long-serving employee may argue that length of service should mitigate against their dismissal if the misconduct is a one-off incident.

Imposing no penalty

An employer may impose no penalty where there is insufficient evidence to reach a decision, where evidence demonstrates that the employee has not committed any misconduct, or where evidence shows that the incident was not as serious as first thought.

It could also be appropriate for the employer to impose no penalty if the misconduct was relatively minor, and the employee puts forward strong mitigation.

Where no penalty is imposed, the employer should confirm this in writing to the employee and should keep a record of the process.

The employer should treat these records as confidential and keep them securely, for no longer than is necessary, in accordance with data protection rules.

The employer may conclude that, although no disciplinary penalty is required, the employee would benefit from training or coaching. This may arise, for example, where the employee provides an explanation for their conduct that leads the employer to decide that the employee genuinely did not know that their actions were improper.

If no action is taken following the disciplinary process, the employer should review this result. There may be occasions where, due to lack of evidence or competing evidence from the employee and witnesses, the employer simply cannot reach a decision that the employee has committed misconduct.

However, if the employer finds that the original allegations were not serious enough to amount to misconduct, or the evidence was weak, it should examine whether or not there are lessons it can learn to avoid disciplinary proceedings being implemented unnecessarily in the future.

For example, a more thorough investigatory stage may be needed, or training may be required for those responsible for gathering evidence and taking witness statements.

The appeal

The employee will be entitled to appeal against the disciplinary sanction imposed. The employee is likely to argue either that no sanction should have been imposed, or that the sanction is too severe.

If practicable, the appeal should be handled by a different manager, to ensure that the employee is given a fair hearing and the manager hearing the appeal is seen to be impartial.

Where an employee has been dismissed but the employer decides to reinstate them as a result of the appeal, the employer should pay the employee any back pay for the period between the date of dismissal and reinstatement, and their continuity of service should be preserved.