

Handling a disciplinary procedure: conclusion of the investigation and disciplinary hearing

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This is the second in a three part series of updates about handling disciplinary procedures in your school. The first of this series was sent out on 1 May 2015 and you will remember that we discussed, conducting an investigation and preparing for a disciplinary hearing.

This update focuses on the actual disciplinary hearing and what happens after you have conducted an investigation and have received the information that will be discussed and considered at the hearing.

In this update we will look at:

- 1) The format of the hearing;
- 2) The roles which the various individuals will play;
- 3) The hearing itself;
- 4) The decision making process and the factors that need to be taken into account when reaching a decision; and
- 5) How to communicate that decision to the employee.

The legal bits!

Make sure:

- that you are familiar with the school's policies and procedures as you will need to follow these as well as the ACAS Code of Practice on disciplinary and grievance procedures.

Why? Failure to follow your own procedure may make the disciplinary process unfair and failure to comply with the ACAS code could increase any amount of compensation awarded by an employment tribunal for a successful claim by up to 25%. Useful, practical advice for the code is available at www.acas.org.uk.

- Manager's conducting meetings should do so without any discrimination. If an employee feels that they have been treated less favourably because of his or her:
 - a. Age
 - b. Disability
 - c. Gender reassignment
 - d. Marriage or civil partnership
 - e. Pregnancy or maternity
 - f. Race
 - g. Religion or belief
 - h. Sex or sexual orientation

They may present a claim for discrimination to an employment tribunal.

The format for the hearing

Your disciplinary policy or procedure may include a predetermined agenda, if it does, you should follow that. If your policy does not have an agenda, the suggested basic steps are as follows:

1. Make introductions and explain everyone's role;
2. Check any adjustments, required by the employee, have been made;
3. Explain the purpose of the meeting, for example, to consider whether disciplinary action should be taken in accordance with the school's disciplinary procedure in relation to the allegation(s) or that it is a disciplinary hearing in relation to the allegations (state allegations);
4. Explain how the meeting will be conducted:
 - a. Presentation of the investigation
 - b. Questions in relation to the investigation
 - c. The employee or their representative presents their case.
 - d. Questions in relation to their presentation.
 - e. Summary from both parties
 - f. Adjournment to consider the evidence and presentations.
 - g. Decision made
 - h. Decision communicated.

Roles

The panel

Best practice would suggest a panel of up to 3 people made up of either the Head Teacher and Governors or just Governors. The panel would be responsible for;

- Reading the case paperwork
- Chairing the meeting,
- Hearing the representations,
- Ensure they have all the information in order to make a decision
- That the process is conducted fairly
- Making a decision,
- Communicating the decision

It is advisable not to include staff governors wherever possible. The panel are there to ensure that the case is presented and that the employee has an opportunity to state their case, they are there to ensure that they have all the information that they need in order to make a decision and to ensure that the process runs smoothly and fairly.

The chair

Responsible for ensuring that the agenda is followed, introductions are made and to give any feedback from the decision, if the feedback is to be given in person.

The note taker

Responsible for detailing the main points of the hearing, the notes do not have to be verbatim but the more detail the better!

It is important that the note taker clarifies anything that they are uncertain of at the time as these notes are crucial for any further action as a result of the disciplinary hearing, for example, employment tribunal claim.

Make sure that notes taken by anyone during the meeting are free of any doodles or inappropriate comments as these could be disclosable to the tribunal and the employee in the event of an employment tribunal claim.

The investigating officer/presenting officer

This person will have conducted the investigation and will present a statement of case and any supporting evidence to the panel and answer questions about their presentation and investigation.

They will also have the opportunity to question, for clarification purposes, the employee or their representative following their presentation of case.

It is important that they do not give an opinion on the employee's guilt and/or what disciplinary sanction should be imposed. This is not part of their role and they should not influence the panel in making its decision.

The employee/representative

The employee has a statutory right at this stage to be accompanied by either a trade union official or work colleague. The employee or their representative will present their case and answer any questions in relation to that case as well as ask any questions of the investigating officer. The representative can confer with the employee and ask questions or make representations but should not answer questions on behalf of the employee.

Witnesses

It may be that the investigating officer and/or employee/representative wish to call witnesses to support their case. The witnesses should be brought in at the appropriate time during the investigating officer or employee/representative's presentation of case. The witnesses are there to answer questions.

The hearing

The hearing is the opportunity for the *main* points of the investigation/defence to be presented *in line with the relevant allegations*.

It should not be an opportunity to bring in issues that are not relevant to the allegations, and it will be the panel's responsibility to ensure that the presentations on both sides are relevant to the allegations presented.

The hearing should allow for evidence to be presented and questions to be answered in order for the panel to consider the full case and reach a reasonable and proportionate sanction.

The panel should consider where unofficial adjournments or "time out" are required for the employee and their representative, or for the investigating officer. It may also be appropriate for the panel to take some time out to ensure that they have asked all of the questions that they need to ask prior to the official adjournment.

Once the investigating officer and the employee/representative have presented their case, called their witnesses, and answered any questions, they should be given the opportunity to summarise the main points of their case before an adjournment.

Refer to your internal policy and procedure to understand whether or not you need to feed back the decision on the same day and in person or whether you can take some time to deliberate and feed the outcome back in writing. You would need to be mindful of any time frame set within your policy and procedure for the decision to be communicated; it is normally within a few days.

The decision making process

During the adjournment, the panel or decision making person should consider the evidence, what has been presented and whether further investigation is required.

If further investigations need to be carried out then the employee should be given the chance to respond to any new findings at a reconvened hearing before a decision is made.

The purpose of the decision making process is to reach an outcome that is *reasonable* and *proportionate* to the allegation, to use an example:

- if an employee mistakenly parks in the wrong part of the car park on site then dismissal is not likely to be seen as a reasonable response whereas if they had been violent towards another member of staff then dismissal may well be within the range of reasonable and proportionate responses.

Your internal policy and procedure is likely to detail the scale of warnings or sanctions that can be used. These are normally:

- No formal action/counselling;
- Verbal warning;
- First written warning;
- Final written warning; and
- Dismissal.

What to consider

So, what should the panel take into account when making a decision?

- a. Any live warnings;
- b. Any situations where a sanction has been imposed on another employee for a similar allegation;
- c. Any mitigation provided by the employee or their representative, this could include lack of training, ill health, level of remorse, etc.;
- d. Any alternatives to dismissal, such as, demotion or re-deployment.

The question the panel has to ask themselves is, does the evidence presented fall more heavily towards the likelihood that the allegations are substantiated or does the evidence fall mainly towards the allegations being unsubstantiated, this is "balance of probability".

It is not the panels remit to prove or disprove the allegations, it is only to consider whether on balance of probability the allegations are substantiated or not. If they are, what is the reasonable response to these allegations?

During your decision making process it is important that you note your considerations so that you can present them back to the employee and/or include them in the outcome letter. This is so that the employee is fully aware of what has been taken into consideration and it provides justification for your decision.

If the allegations of misconduct are serious enough to warrant dismissal, when you consider this as a sanction you also should consider other alternatives and note why they are or are not appropriate.

Employees should not normally be dismissed without any prior warnings unless it is a case of gross misconduct; it is best practice to give two warnings, a first written warning and a final written warning before dismissal. Again, should you wish to go straight to a first written warning without there being any previous warnings, you should note your justifications for this decision so that you can demonstrate it is a reasonable and proportionate response to the allegations.

Communicating the decision

You should consider your internal policy and procedure as to whether or not you need to reconvene the hearing and give the outcome face to face or whether you can provide the decision in writing. Either way it is important that the decision is given in writing in any event and within any timescales included in your internal policy or procedure.

The employee should be advised of your decision, the reason for the decision and the fact that they have the right to submit an appeal if a warning is given and how to do that.

You should also inform the employee of the length of the warning if applicable and the consequences of any further misconduct.

Looking ahead to Part 3...

In our next e-shot we will look at how to handle an appeal hearing, the format of the hearing, along with the roles that individuals play in that hearing.

We will also discuss the decision making process at appeal, the factors that need to be taken into account when reaching your decision and how to communicate that decision to the employee.



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