

EMPLOYEE GUIDE

Defending a Disciplinary Allegation of Misconduct

EMPLOYEE GUIDE

Defending a Disciplinary Allegation of Misconduct

CONTENTS

Introduction

Does your employer have a Disciplinary Procedure?

About the allegations

Helping yourself – get good at record keeping

The Disciplinary Meeting

Appealing a Disciplinary Sanction

Can we help you?

INTRODUCTION

At LincsLaw Solicitors we understand problems at work can affect every part of your life. As employees, we can spend as much time with our work colleagues as we do with our family and friends. We appreciate that your home, way of life and security will be dependent upon the salary and income your employment provides. Therefore, if you are the subject of an allegation of misconduct and your employment is put at risk, it can put pressure on every aspect of your family life.

We set out below some general guidance which should help you if you are defending yourself against an allegation of misconduct. The information provided in this guide is intended to be of assistance, but it is no substitute for a proper consideration of your situation and legal advice about the disciplinary allegation against you.

At Lincoln based, LincsLaw Solicitors would be happy to meet with you to discuss your matter and undertake a proper assessment of your situation. Information about our Fixed Fee Consultations can be found at our website at www.lincslaw.co.uk

DOES YOUR EMPLOYER HAVE A DISCIPLINARY PROCEDURE?

If you find yourself subject to misconduct allegations, you should make sure you know what steps your employer is going to take and what procedure they should follow. Many employers will have their own Disciplinary Procedure and you should request a copy as soon as you become aware of a potential problem.

In any event, whether your employer does or does not have a Disciplinary Procedure of their own, they are still required to abide by the principles in the ACAS Code of Practice: Disciplinary and Grievance Procedures. The Code sets out the minimum standards for an employer dealing with a disciplinary matter and an employer's adherence to the Code (or otherwise) will be considered by the Employment Tribunal in the event your disciplinary matter becomes an Employment Tribunal claim. If at the Employment Tribunal the employer is found to have breached the code, the Employment Tribunal may increase any award that is made to you by up to 25%.

Whatever the procedure, make sure you are familiar with your employer's obligations to you. If they are not complying with the ACAS Code and their own procedures (for example, they have not complied with a deadline, or they have not provided you with documentation) you need to complain in writing, keeping a copy for yourself. Although a claim to the Employment Tribunal should be a last resort (and hopefully the situation never gets that far), you should ensure you have the best evidence available. Should you have cause to bring a claim for unfair dismissal against your employer, the Employment Tribunal will take

into account the procedure your employer used for your disciplinary and whether they were fair in the operation of that procedure. Therefore, having your contemporaneous letters and emails documenting your employer's failures throughout the process will be extremely helpful.

ABOUT THE ALLEGATIONS

Before you engage with any investigation interview or go to a disciplinary meeting, make sure you have proper information about the allegations against you. If your employer is at the stage of undertaking an investigation or requiring you to attend a disciplinary meeting, they must have a clear idea of what misconduct you are alleged to have committed; they should therefore share that information with you.

All too often we have seen employers make vague references to "turning up late" or suggest there is a problem with an employee's "behaviour" without giving any specifics. Too often clients come to see us after they have been ambushed in an investigatory or disciplinary meeting, having attended without sufficient information from their employer about the allegations against them.

If you do receive an invitation to a meeting but you are concerned you do not have sufficient information about the misconduct allegations against you, write to your employer requesting further information. You should explain that requiring you to attend an investigatory or disciplinary meeting without having specific information about the disciplinary allegations renders their procedure unfair. You should ask for information such as:-

- (a) What is the nature of the alleged misconduct? (If your employer states you are in breach of one of their policies or procedures, make sure you request a copy)
- (b) The dates and times the alleged misconduct took place.
- (c) Where there any witnesses to the alleged misconduct? If so, request copies of the witness statements.
- (d) Is the employer relying on any document, CCTV footage or other non-witness evidence? If so, request a copy.
- (e) Are they intending to rely on any previous instructions or warnings? If so, request a copy.
- (f) Do they consider the allegations against you to be so serious that you are at risk of dismissal?

You should comment that if they intend to question you about the allegations, witness information or documentary evidence etc., it will be unfair to do so without first giving you the opportunity to review the information.

Obviously not all of the questions in the list above will be relevant to you. Much will depend upon the type and nature of the allegations against you. However, for all situations you should find out from your employer whether these are matters they consider to be so serious that they view your dismissal as a possible outcome of the disciplinary procedure. All too many employees attend an investigation or disciplinary

Defending a Disciplinary Allegation of Misconduct

meeting believing the misconduct to be a trivial matter. They are expecting nothing more serious than a telling off, only to find that their employer is considering their immediate dismissal.

If your employer is referring to “gross misconduct” then even if they have not been explicit, they consider the matter is so serious as to warrant your immediate, summary dismissal. This means a dismissal with no notice or warning. Whilst all disciplinary action needs to be taken seriously (and we would recommend that anyone finding themselves the subject of misconduct allegations should properly and fully prepare), potential gross misconduct matters should be treated with extra care.

Once again, we provide this guide to help people who are defending themselves against an allegation of misconduct. However, whilst the above information is intended to be of assistance, it is no substitute for a proper consideration of your situation and legal advice about the disciplinary allegation against you. This is especially important if your employer is considering your potential summary dismissal for gross misconduct.

Lincoln based, LincsLaw Solicitors would be happy to meet with you to discuss your matter and undertake a proper assessment of your situation. Information about our Fixed Fee Consultations can be found at our website at www.lincslaw.co.uk

HELPING YOURSELF – GET GOOD AT RECORD KEEPING

We fully understand that you would wish to avoid bringing a claim at the Employment Tribunal. Litigation is a last resort and you should always try and resolve your dispute with your employer amicably and informally if at all possible. That being said, if you are defending yourself against disciplinary allegations, then clearly there is a dispute between you and your employer and it would be sensible to approach the situation and conduct yourself as if you expect to bring a claim before the Employment Tribunal in the future.

No-one likes paperwork and we all have better things to do than filing, however brushing up on your administration skills will stand you in good stead through your employer’s disciplinary process and, in necessary, the Employment Tribunal.

Make sure you:-

- (a) keep a diary of all contact with your employer or your colleagues from the moment you become aware of the disciplinary allegations. Keep notes of the time and dates of who you spoke to, what they said, any promises or explanations they gave. Try and make your note either during or immediately after your conversation. Also, all communication means all communication. This would include telephone calls, meetings, text, video calls – in fact any contact at all;
- (b) keep a copy of all written communication including text, emails, letters etc. Make sure you make a note

of when the message or document was received. This is particularly important with letters (the date on your employer's letter can often be several days earlier than when you received it;

- (c) ensure as much of your communication to your employer is in writing as possible. Emails with read receipts are particularly helpful. Telephone calls can be mis-remembered, even with your notes. There is much less opportunity for dispute with written contact.

THE DISCIPLINARY MEETING

At some point you will be invited to a disciplinary meeting. The old adage "fail to prepare, prepare to fail" very much applies to this situation. As discussed above, make sure you know what the allegations against you are and that you have sufficient information to prepare yourself for the meeting. In addition, whilst we acknowledge attending a Disciplinary Meeting can be extremely stressful, it is always better to attend and defend yourself against the allegations if you can.

Make sure you prepare a full written statement or representations for the Disciplinary Meeting. It will be much easier for you to make sure you include everything you want to say in a written statement you prepare in the comfort of your own home, rather than in the pressured environment of the Disciplinary Meeting. Also, should your matter come before an Employment Tribunal in the future, they will consider what information the employer had and relied upon when making their decision about your disciplinary. If you have provided a full written statement to your Disciplinary Meeting, your employer cannot suggest later they had no knowledge of your representations or recollection of events.

At the Disciplinary Meeting you have a legal right to be accompanied by either a colleague or Trade Union Adviser. If you wanted someone else to attend, for example a legal representative or a family member who does not work for your employer, then it is the employer's choice whether to allow them to attend the meeting. You have no legal right to their attendance, it is entirely your employer's choice.

Many employees request their Disciplinary Meeting is recorded, either taped or with a Dictaphone or mobile phone. You have no legal right to record the meeting, that being said it is in everyone's interest to have an accurate record and recording rather than taking notes enables everyone at the meeting to fully take part.

If you want to record your Disciplinary Meeting, you should request permission from whoever will be conducting the meeting. If you are asked to explain why you want the meeting to be so recorded, you should state that you are the subject of the Disciplinary Meeting which could put your employment and career at risk. Therefore you want an accurate and full recording of the meeting and the evidence considered in respect of the allegations of misconduct against you. If you have a further reason, for example a disability which affects your concentration, you should set out that reason to your employer. If your request is refused, ensure that your employer sets out in full and in writing their reasons for their refusal. If at some

point in the future the Employment Tribunal were considering your matter, they would want to consider your employer's response to such a reasonable request.

At the end of the Disciplinary Meeting, make sure you have a decision or, alternatively, a date when the decision will be made.

APPEALING A DISCIPLINARY SANCTION

If, after your Disciplinary Meeting, you believe your employer has been unfair in their decision or disciplinary sanction, you should appeal. Your appeal is likely to fall into one of two categories:-

1. That you did not do the act (or failed to do an act) resulting in the misconduct as alleged; or
2. That you did commit some of the acts of misconduct but you consider the disciplinary sanction to be too harsh and unfair.

Whatever the reason, you need to set out clearly in writing why you are appealing your employer's decision. Do you consider they failed to undertake a fair investigation? Was some part of the Disciplinary Meeting unfair? Did they give more weight to the statement of one of your colleagues than they did to your statement? Did they unfairly take into account your previous disciplinary record? There could be any number of reasons you want to appeal against your employer's disciplinary decision and inevitably there will be some overlap between the statement you prepared for your Disciplinary Meeting and your Appeal.

APPEALING A DISCIPLINARY SANCTION

We have set out above some general guidance which should help you if you are defending disciplinary allegations. The information provided in this guide is intended to be of assistance, but as stated previously, it is no substitute for a proper consideration of your situation and legal advice about your concerns.

At Lincoln based, LincsLaw Solicitors would be happy to meet with you to discuss your disciplinary and undertake a proper assessment of your situation. Information about our Fixed Fee Consultations can be found at our website at www.lincslaw.co.uk

LincsLaw

EMPLOYMENT SOLICITORS

www.lincslaw.co.uk