

# GOOD DISCIPLINE?

Getting the disciplinary process wrong can be costly for employers. Alan Knowsley of Rainey Collins provides 7 steps to doing it right.

**A**n employer who was dissatisfied with an employee's performance advised the employee he was not going to keep him past the 90-day period. Unfortunately for the employer, the employment agreement did not contain a 90-day trial clause.

The Employment Relations Authority (ERA) held that no proper process was followed and the employee was called to a meeting with no idea what it was about. No formal warnings were given for poor performance, and the concerns about the employee's interaction with other staff were not clearly addressed. No disciplinary action was imposed at the time for the use of bad language, or follow-ups as to whether the required improvements had been met before termination.



The ERA held a fair and reasonable employer should have commenced a process of identifying to the employee deficiencies that the employer believed he had. This would give the employee an opportunity to improve his performance. The ERA held

that the employee was unjustifiably dismissed and awarded \$8,800 for lost wages and compensation of \$5,000.

As can be seen, getting the disciplinary process wrong can be very expensive! So how do you get it right?

As a first step, **make sure you follow any requirements in the employment agreement.**

In addition, the following steps will help you conduct a disciplinary meeting that complies with your obligation of 'good faith' under the law:

## 1. Decide what the problem is:

- If it's a minor issue, a simple chat might resolve it.
- If it's a performance issue, you'll need to follow a performance process.
- If it's more serious, or something you've already discussed before which is becoming a problem, a formal disciplinary process may be required – in which case, proceed to step 2.

## 2. Investigate initial concerns

- Put together your notes of what's happened, and talk to other staff if you need to. Also look at any videos or consider any documents.
- Decide if a clause of an employment agreement or policy might have been breached.
- Consider whether suspension is appropriate. In general, you can only suspend if you have the power to do so in your employment agreement, or you are concerned about safety (eg, if the employee is accused of assaulting staff or is apparently under the influence of drugs or alcohol). If you do think suspension is appropriate, give the employee an opportunity to comment on whether they should be suspended or not, before you decide to suspend them.

## 3. Invite your employee to a disciplinary meeting

- Invite your employee (in writing) to a disciplinary meeting. Ensure the invitation sets out everything the employee needs to know, including:
  - What the allegation is
  - What documents you have that support the allegation
  - What policies or clauses of the employment agreement have been breached
  - What could happen if the allegation is true (ie, is dismissal a possibility?)
  - That they are entitled to have a support person at the meeting
  - Where and when the disciplinary meeting will be.

- It is vitally important that in any invitation, you state the matters are only allegations, and no conclusions have been reached.

## 4. Have a disciplinary meeting

- Explain the meeting is a formal disciplinary meeting to investigate the allegation, and set out what those allegations are.
- Ask the employee whether they wish to explain, or accept, or deny the allegations. Give them the opportunity to do so.
- Listen. Take notes. Consider what they say.
- Tell the employee you will consider what they've said and will notify them of your decision. Conclude the meeting.

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## 5. Consider

- Are you satisfied with the explanation?
- Do you need to make further enquiries?
- Do you think the allegations are correct?

## 6. Decide: is the allegation true?

- If you are satisfied with the employee's explanation, then notify them of that.
- If you are not satisfied, decide what further action to take. The course of action you take will depend on the seriousness of the allegation, any particular steps set out in the employment agreement, and whether the allegation is the first against that employee.
- Once you reach a conclusion, notify the employee of your conclusion on the allegation, eg, that the employee has inappropriately failed to follow your instructions on cash handling by not locking cash away in the safe.
- If the matter is serious, give the employee an opportunity to have input into the steps to be taken as a result of your decision, eg, should they get a warning or be dismissed or some other outcome. Ask for their input by a set date, and be open to them submitting their comments in writing or at a meeting. This is an opportunity for them to comment on how you deal with the matter (and is not an opportunity for them to argue about what happened).
- Let them know you will consider what they have said.

## 7. Decide: how will you deal with this?

- Consider all the facts, including your employee's input, and decide what level the behaviour is at. Can it be handled with a verbal warning? Does it require a written warning? Should it be a final warning? Should the employee be dismissed? If so, is the dismissal to be immediate or on notice?
- Communicate the outcome to the employee, and confirm it in writing. Remember to confirm your decision in writing, even if you decide a 'verbal' warning is all that's needed. Keep a record of that on their personnel file.

If you take shortcuts in the procedures then, even if you would have been justified in taking disciplinary action against an employee, you will be liable to the employee for breaches of the process. That could include having to pay for lost wages, hurt and humiliation, plus legal costs and you may have to reinstate them to their position. ■



*About the author:* Alan Knowsley is a Partner with Rainey Collins Lawyers, specialising in employment law. He is the immediate past President of the Employment Law Institute and represents many employers throughout the country. For more information on this topic, contact Alan at [aknowsley@raineycollins.co.nz](mailto:aknowsley@raineycollins.co.nz), or call 04 473 6850. [www.raineycollins.co.nz](http://www.raineycollins.co.nz)