

STEP BY STEP...  
your guide to handling  
disciplinary issues  
with employees

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# 1. Introduction

Dealing with the disciplining of an employee for misconduct or poor performance can be very difficult, for everyone involved.

It is not a pleasant topic to have to discuss at any time.

But it is important that you understand your obligations and that when faced with a misconduct or disciplinary situation you follow the correct procedure.

Because **procedure is everything** when it comes to handling the disciplining of an employee.

You get that wrong and you face a potential claim for unfair dismissal before the Workplace Relations Commission (WRC).

Unfair dismissal claims make up nearly 50% of all claims before the WRC.

And of the cases that are won by employees, roughly 80% are lost on grounds of unfair procedures.

Many employers fail to understand that regardless of how bad the performance of the employee, regardless of the alleged misconduct or whatever other reason for dismissal, if you fail to give the employee fair play and natural justice then the employee will win his/her case.

In addition to the potential award for an employee in an unfair dismissal claim of up to 2 years' salary, you also need to factor in the cost of defending a claim against you.

## What is natural justice and fair procedures in this context?

In short, basic fair play.

This would include the right to respond to any allegations or complaints, the right to have a colleague or union representative accompany the employee to **any** disciplinary hearing, the right to appeal any sanction imposed, the right to have the sanction removed from the record after a reasonable period of time (generally 6 months).

Whatever the reason for your decision to discipline your employee, it's important you're clear on what's happening from the start.

In this guide we have set out a practical action plan, including a series of disciplinary letter templates, to help you handle the process.

## 2. What is misconduct?

Let's start by defining what is meant by misconduct.

Essentially, anything that counts as misbehaviour by an employee can be described as misconduct.

There are different types of misconduct that describe the various levels of seriousness:

- general misconduct
- serious misconduct
- gross misconduct

We explore each of them in this guide, together with the actions, communications and options available to you at every stage.

3 things to consider before starting a misconduct process...

### 1. Is it actually misconduct....?

Unacceptable behaviour can sometimes be an indication that an employee is being harassed, feels they've been unfairly treated or is suffering from an illness that they haven't felt able to tell you about.

So, always keep in mind that there could be a reasonable cause for the employee's behaviour, and you should explore this further, in case the employee has a legitimate need for support or flexibility or a different type of action on your part.

For more background on how to deal with employees and sickness, see our [guide to handling employee sickness and absence](#)

### 2. Is it a performance or capability issue...?

There's a key difference between capability processes (relating to performance stances or competence) and disciplinary ones (targeting bad behaviour).

So, make sure you're being supported by the right process before you kick it off.

Performance is all about the outcome of the employee's work: the question of whether it's satisfactory and/or if the employee is competent to meet the standards required.

But if your concern is more about the employee's behaviour and/or attitude towards the doing of the work, then misconduct sounds like it's the process you need.

Take a look at our step-by-step [guide to handling employee poor performance](#) if your concerns are more about an employee's competence or standards of performance.

### **3. Is the employee still in their probation period?**

Employees who are still within their probation period should be considered differently.

You can't simply instantaneously dismiss an employee on probation - except in exceptional circumstances where they've committed gross misconduct.

But you can follow a relatively swift process of performance review and dismissal, if they're not achieving the levels of competence that are reasonably required to meet their job description and you do not have reasonable expectation of this position changing.

Take a look at our [guide to managing employee's probation periods](#) and follow the guidance and template suite of letters there.

If it's definitely a misconduct concern – so you've ruled out probation periods and performance, and you're confident that your concerns relate to inappropriate behaviour by your employee – this guide will steer you through the appropriate next steps.

### **How to tackle employee disciplinary issues: a quick overview**

It's not always possible to know before you meet your employee how they'll react to you raising disciplinary concerns.

The moment you raise a concern, the employee's immediate focus is likely to be on whether their job is at risk.

They may also be very worried about their reputation and what others may say, if they learn of the process.

They may become defensive, hostile, tearful or they might even agree with you.

You'll need to be prepared for any of these reactions.

One thing that is really important to the smooth running of this process is that the concerns are raised with the employee as early as possible, once the conduct comes to your attention and you have taken reasonable steps to verify that it is a genuine concern, (rather than something that might, e.g. have been maliciously or frivolously raised by someone else with their own agenda).

If you're not sure about the best approach for tackling particular conduct by an employee, get a quick view from an expert.



### 3. The disciplinary policy: your starting resource for misconduct by employees

#### Your disciplinary policy

Underlying any step you take in any misconduct matter should be **your disciplinary policy**.

If you don't have a disciplinary policy, check out our template

#### Disciplinary policy template

This sets out your disciplinary procedure in full and it's important both for you and the employee that you follow this to the letter.

Every business with employees (however many) should have one.

You have a legal obligation to provide your employees with written procedures to be followed before dismissing an employee.

All employees should be able to access an up-to-date copy of the policy.

It must be written and presented clearly.

The terms of the employment contract with your employee will also be relevant.

#### Is the disciplinary policy part of the employment contract?

This will depend on the wording of the employment contract that you've agreed with your employee.

We recommend that you do not make the exact wording of the policy part of your contract terms.

We do recommend, however, that you include a clause in the employment contract that requires the employee to comply with all your policies, and which gives you the right to update, in your discretion, from time to time.

Other policy documents you may need:

- **Bullying and harassment policy**
- **Drug and alcohol policy**
- **Performance Improvement policy**
- **Computers, devices and internet usage policy**

You'll find our [employee handbook](#) containing all of these policy templates on our website, if you're missing any of them.

## Follow the Code of Practice

A good rule of thumb with any disciplinary issue is to follow the WRC [code of practice on disciplinary and grievance procedures](#), as this will be strongly taken into consideration by the Commission if you end up defending your business.

The WRC code is an Irish code of practice for employers to follow when handling disciplinary issues and employee complaints in the workplace.

Employers aren't legally obliged to follow the code, but not following it (or not running a process that is consistent with it), is likely to negatively influence the WRC's attitude towards you as an employer.

The basis test at all stages of the procedure is "what would a reasonable employer do in the circumstances" and this will depend on the nature of the grievance.

As an employer, it is strongly advisable that you review your disciplinary procedures regularly as the legislation can be updated regularly, case law may necessitate change and the circumstances in the workplace can necessitate it.

Now let's look at the different sorts of misconduct and how best to deal with them.

## 4. General Misconduct

General misconduct is where an employee has behaved incorrectly but has not done anything too serious.

For example, they've:

- arrived late to work several times
- they're not appropriately dressed for work
- been absent from work without permission
- been careless when carrying out work
- been time wasting
- behaving offensively
- made an excessive number of personal phone calls on business phones
- made unauthorised use of business equipment or property.

All of the above examples fall within the category of general misconduct, and/or potentially within serious misconduct (see Serious Misconduct section of this guide).

Having said that, repeated episodes of these activities might end up with you being justified in taking more severe action, including dismissal of the employee.

**So, if an employee is guilty of general misconduct what should you do?**

We have set out below the 5 steps that you should follow

### Step 1: Hold an informal meeting

If your concerns about an employee's conduct or behaviour are relatively minor, it may be more effective to deal with them informally in the first instance.

You may be able to resolve matters there and then, without having to resort to your formal disciplinary procedure.

You can use this template **letter inviting the employee to an informal meeting about conduct or behaviour** to invite the employee to a meeting to talk informally about your concerns.

Where the employee's conduct is not hugely concerning or should be capable of easy remedy by the employee, this informal meeting is the recommended first step.

### **The purpose of this letter**

Your letter should explain that as this is an informal meeting to discuss your concerns, it's not currently part of your formal disciplinary procedure.

But that if you continue to have concerns after this meeting, you may continue the discussions more formally, under the disciplinary procedure.

### **Objectives for the meeting**

#### **Calm, constructive conversations**

Raising your concerns informally at the outset will feel less overwhelming and confrontational for the employee.

It typically helps to avoid panic in their mind, which in turn, tends to better empower them to focus on what you are pointing out to them and to give more considered responses.

Be clear and concise about the concerns that you have and the facts surrounding them, e.g. how the misconduct has come to your attention and why it is a matter of concern.

During this meeting, make sure that you give the employee the best opportunity to explain why they're behaving this way.

#### **Don't rush the conversation.**

Allocate a sensible amount of time for you to be able to say what you need to, so you can be sure that your employee understands your concerns and has time to ask you questions and to respond meaningfully.

### **Important fact-finding**

This will also enable you to do some helpful fact-finding and to get a feel for how far apart you both are in terms of agreeing that the employee's behaviour has been unacceptable.

### **Avoid the need for more formal, 'on the file' steps...**

For many employees, this conversation is sufficient to prevent the behaviour that you're concerned about being repeated.

### **Being clear that this is still a warning**

However, if the employee doesn't have a reasonable explanation for the behaviour, or they don't demonstrate that their behaviour will stop, you should verbally warn them that you'll need to next meet formally, as part of your disciplinary procedure, and that this will be followed by a formal written warning notice.

### **Note taking**

It's helpful to take a note of the discussion - even if at this stage, that note is simply an email that you send to yourself or another member of management, containing your observations from the meeting.

### **Location of the meeting**

Find somewhere discreet to have the meeting, to ensure your conversation is suitably confidential and uninterrupted.

### **What if the employee disagrees that their behaviour is misconduct?**

If your employee denies the behaviour or disagrees that it is properly classified as misconduct, they may become defensive or even hostile.

If this does happen, try not to allow yourself to be intimidated or to make decisions in the moment.

Do not allow the employee to set the tone of the meeting in this way.

If you really need to do so, postpone the meeting or give the employee chance to take a few minutes to themselves, before you continue any discussions.

Step 2 examines what should happen if the employee's unacceptable behaviour continues.

## **Step 2: Hold the first formal meeting**

If the unacceptable behaviour continues after your verbal warning to the employee, you'll need to call another meeting with the employee, explaining why it's been necessary to get together again.

Use our **letter inviting the employee to attend first formal hearing for conduct or behaviour**

### **Who should chair this meeting?**

You might want this meeting to be with another more senior member of management – or you could save that person for any next and final warning communication.

### **Fair opportunity to explain**

Again, during the meeting you must give the employee the best opportunity to explain their position.

### **The employee's right to be accompanied**

In advance of this meeting, don't forget to tell the employee they can bring a fellow colleague (or trade union member, if relevant) with them as support.

The accompanying person is not there to speak on behalf of the employee or otherwise to represent them.

They are there purely to support the employee practically and emotionally and to hear what is said by both of you.

### **Your right to ask others to attend the meeting**

While you should endeavour for these meetings to never feel confrontational or like a courtroom, you may want to invite other 'witnesses' to come to this meeting as well.

These should be people who are connected with the misconduct in question and who may be able to augment the fact-finding.

The employee should be able to hear what they say and to ask questions or clarifications too.

The employee might also want to ask if others can attend to speak on their behalf, or to request that relevant documents or other records can be considered at the meeting.

### **A formal warning is appropriate**

If you're not persuaded that there's a valid reason for the employee's behaviour, you should give them a first written warning (step 3 below) immediately following this meeting.

### **The employee must be clear on what they need to do**

Make sure you explain at this meeting, and in the written warning, exactly what improvements (or other relevant actions) you expect to see and by when.

You may find our [checklist guide for conducting disciplinary meetings](#) useful

## **Step 3: Reflect on whether the misconduct concerns were addressed**

If you reflect that, yes, the above steps were sufficient...

If you're satisfied that the concerns have been resolved, you can simply write to the employee formally to let them know that you're not planning on taking any further action and the disciplinary procedure is at an end.

### **What should the letter say?**

There's no special format to this letter.

But it should include confirmation that:

- your concerns have been successfully addressed and

- the disciplinary process is now ended;  
as well as
- a warning that if they don't maintain expected standards of conduct/behaviour, you have the right to reopen the disciplinary process and potentially, to issue further warnings that could lead to their dismissal, and (if appropriate).

Keep the tone of this letter positive and thank the employee for complying with your disciplinary policy.

You can use our template **letter confirming no further steps after disciplinary hearing** for this.

**If you reflect that, no, the concerns remain outstanding...**

If this is the case, it's time to give the employee a formal first written warning notice.

## **The first written warning letter**

If your first two meetings haven't addressed the employee's conduct, behaviour or performance, you will now need to write to them formally.

You can use our template letter for this:

### **First formal written warning - misconduct**

You'll see that this template includes:

- **details of why you've concluded the employee's conduct has been unacceptable** and why it requires a first written warning, (ideally by reference to the relevant section of your disciplinary policy)

Make sure you're as clear about your reasons as possible so that the employee cannot claim any misunderstanding or ambiguity in what you've said.

- **the standards of conduct** the employee must meet from now on.



Here you need to insert details of the standards of conduct that you expect the employee to meet, any applicable deliverables, and dates by which they must be achieved.

The employee must understand what is expected of them and how their progress with, and success at reaching, these objectives will be measured.

- **the expiry date** of the first written warning will expire.

There is no precise legal rule on how long a first written warning can be allowed to remain active.

However, the WRC Code of Practice on Disciplinary and Grievance Procedures (which the WRC may take into account in determining whether an employer has acted lawfully), recommends that first written warnings should remain 'active' on an employee's personnel file for 6 months.

Longer periods can be applied, provided:

- i. you have sound business reasons for it and
- ii. you apply the policy consistently

to ensure you don't expose your business to allegations of unfair or discriminatory treatment.

## **The employee's conduct improves**

If your employee takes on board the warning that you issued and their conduct improves, meeting the standards required in the timeframe that you set, then you should formally confirm this to them and you can end your disciplinary process, for now.

Our relevant template confirmation letter can be used here.

### **Letter confirming no further steps after warning or review period expires**

You'll see that this template:

- **recaps the process** so far
- **summarises** the requirements you placed on the employee

You should explain, in relation to each allegation of misconduct, your reasons for reaching your decision.

When you describe these reasons, make sure you refer to the facts and evidence that you have seen during the process, including documentary evidence as well as verbal evidence given to you by the employee or any witnesses.

- **confirms the employee has met those requirements**
- **warns about any relapse** and explains what will happen in the event of a relapse in standards of conduct
- **explains** that like any HR-related matter, the employee's personnel file will record the fact of this process and your decision to bring it process to an end
- **how the employee can appeal**, if they want to challenge your process and/or findings.

Even though your conclusion is that no further action will be taken, the decision is potentially still open to scrutiny, and employees will sometimes challenge having been taken through a disciplinary process at all.

A clearly evidenced rationale for a fair-minded decision will be crucial in defending any appeal or grievances raised by employees, or indeed any legal proceedings they might bring against you for discrimination.

But if there's no improvement...

It's time to issue a second and final formal warning to the employee.

## **Second formal warning meeting**

If your employee's conduct still hasn't improved by the time frame you set in your first written warning, you should invite the employee to a further meeting.

During this meeting, you should reiterate your concerns and given the employee a fair opportunity to explain their position in response.

The same format and approach to the first formal warning meeting apply here, including the employee's right to invite someone to accompany them in an informal supporting (not representational) capacity.

If you're not satisfied after this second formal meeting, this is the moment to issue the employee a final written warning following the meeting.

## Final written warning

This communication is the final warning to the employee before you start to consider sanctions for the lack of improvement in their behaviour.

We have a template for this situation too.

### Final written warning for misconduct

You'll see that this template walks you through the key elements that you need to spell out to your employee, including:

- why you've concluded the employee's conduct is properly classified as 'misconduct' and justifies a final written warning
- **improvements you expect** to see and by when.

Here you need to insert details of the standards of conduct that you expect the employee to meet, any applicable deliverables and the dates by which they must be achieved.

Additionally, make sure you explain how the employee's progress with, and success at reaching these objectives will be measured.

- **the expiry date** of the final written warning, i.e. how long it will remain 'active' on the employee's personnel file.

The WRC Code of Practice on Disciplinary and Grievance Procedures recommends that final written warnings should remain active for 12 months.

As with first written warnings, longer periods can be applied, as long as:

- i. you have sound business reasons for it and

- ii. you apply the policy consistently,  
to ensure that you don't expose your business to allegations of unfair or discriminatory treatment.
- **how the employee can appeal** your decision; and
- **what will happen next.** Usually, this involves a statement that if there is no positive change in the employee's behaviour, you will invoke your dismissal procedure.

There's the obvious reference to dismissal here. (Unless your disciplinary policy allows you to demote an employee as an alternative to dismissal, you will not be able to use demotion as a sanction.)

### What happens next?

Well... you may now be facing a dismissal action (see Step 4), unless the employee's behaviour has improved sufficiently for you to now bring this disciplinary process to an end (see section below).

### The employee's conduct improves

If the employee's complied...

If your employee has finally taken on board the two warnings that you've issued, and they've improved to the extent that they are now meeting the standards required, you should formally confirm this to them, update your records and end your disciplinary process, for now.

Our relevant template confirmation letter can be used here.

**Letter confirming no further steps after warning or review period expires**

But if there's no change?

Head to Step 4 and dismissal...

## Step 4: Dismissal

If at the end of the second warning period, the employee's conduct is still a problem, then you may want to dismiss the employee.

You can use our formal notice of dismissal letter for these purposes.

Here's our **dismissal letter for misconduct following disciplinary warnings**.

Dismissal is a very serious step and not a decision to be taken lightly.

It always carries a risk of a legal claim by an employee (such as unfair dismissal or a discrimination allegation) even if you've followed a fair and robust process.

We recommend you:

- consider carefully whether there are any realistic prospects of the employee sufficiently changing their conduct
- consider whether there are any less drastic sanctions

(N.B. you can only demote an employee if your contract gives you the right to do so. Many employment contracts do not contain this right as a matter of course.)

- take expert advice before you press the button on this decision.

### Dismissal letter for misconduct

You'll see that our templates include all the key elements that legally, and pragmatically, you'll need to cover, such as:

#### 1. Giving your reasons for the dismissal

*More than 2 years as your employee*

Employees who've served as an employee in your business for two or more years are entitled, on request, to a written statement setting out the reasons for their dismissal.

### *Pregnant or on maternity leave*

Employees who are dismissed while pregnant or during statutory maternity or adoption leave must be given a written statement of reasons **without having to request it**, regardless of their length of service.

### **Just include them...**

As a matter of good practice and based on their experience of what best protects employers where an employee challenges a dismissal decision, we recommend that you include these reasons as a matter of course.

#### **2. Explaining what alternatives to dismissal you considered**

We also recommend that you explain what alternatives to dismissal have been considered and why it was ultimately decided that dismissal was the appropriate outcome.

If the employee's conduct was particularly serious, and your trust in them has been badly damaged, it may well be that no alternative would have been reasonable.

That's fine. You should explain that you have considered alternatives but not been able, in all reasonable conscience, to propose any of them in the circumstances.

#### **3. Stating whether dismissal is instant or if notice will apply**

You'll need to confirm this.

Many contracts make gross misconduct an instantly sack-able 'offence', but general misconduct does not fall into that camp and it may be that you consider a notice period appropriate, even if the employee is removed from the workplace and required to serve out their notice remotely.

#### **4. Noting whether payment may be given in place of the employee serving out any notice**

If there is no express right in the contract for you to do so, a dismissal with pay in lieu may constitute a wrongful dismissal of the employee by you, which would mean that any restrictive covenants and other post-termination contractual restrictions on the employee may become ineffective.

This is quite a risk for you, especially if the circumstances of the misconduct are such that you already have a concern about the employee's integrity, trustworthiness or commitment to honouring the contract terms.

### **5. Explaining how the employee can appeal**

The employee has a right to appeal and you must provide them with the relevant details for them to consider it.

### **6. Stating that an appeal doesn't delay the dismissal taking effect**

The template confirms this, but also makes clear that if the employee is subsequently reinstated, then you will reimburse any pay that you have lost.

## **Step 5: The appeal**

### **The timeframe for an appeal**

If the employee wishes to appeal, you should hold an appeal meeting within 2–3 weeks of receiving their appeal letter.

Our disciplinary policy makes clear that the employee should write to you to notify you of their intention to appeal within one week of receiving your decision.

You will then need to confirm the arrangements for the hearing in writing. You can use our template letter to do this.

### **Letter inviting employee to an appeal hearing**

### **Who will chair the appeal?**

If possible, the appeal meeting should be led by someone other than the person who led and made decisions relating to earlier disciplinary meetings.

## Who else can attend the appeal hearing?

The employee is entitled to invite someone to accompany them to the meeting, just as with all other meetings within the disciplinary process.

You and/or the employee may want to invite witnesses to support your respective arguments.

They could be colleagues, customers or experts.

They might not be witnesses at all – for example, you might want to invite a legal adviser.

## Logistics for the appeal

In advance of the appeal hearing, you should:

- i. **prepare a note** (preferably agreed by the employee) of the process to date, summarising in particular, dates and discussions at all the previous disciplinary meeting/s and in the written warning notices that you've sent
- ii. **appoint a chairperson**, ideally this would be another member of management (who was not involved in the investigation or the disciplinary meeting) or a suitably qualified adviser, and, if appropriate
- iii. **make arrangements for:**
  - **the named witnesses** to attend the appeal hearing and
  - **disclosure of any relevant documentation** that has not already been disclosed.

## Decision on the appeal

You should send the employee your final decision in writing, normally within 2 weeks of the appeal meeting.

Our template decision on appeal letter is the ideal base for this communication.

## Decision on employee appeal against dismissal (disciplinary)

There are no formalities for the content of the letter. But ...



Your final decision should include a number of factors....

Most importantly:

- **whether you're upholding your original decision** to dismiss the employee or
- **whether you're changing your decision.**

The WRC Code recommends that an employer should inform the employee of the outcome of the appeal in writing as soon as possible after the hearing.

It's highly advisable to explain the reasons for your decision in a reasonable level of detail.

The decision taken at the appeal stage is equally open to scrutiny as the original decision.

It should never be viewed as a rubber-stamping exercise.

Take care to ensure that you have addressed each ground of appeal that the employee has raised.

(A thorough appeal process and well-reasoned decision can often rectify any procedural errors that may have occurred at the original disciplinary stage.)

## **1. Upholding your original decision**

If you decide to uphold your original decision, you'll need to inform the employee that your dismissal (or other sanction) decision stands and there is no further right of appeal.

## **2. Not upholding your original decision**

If you decide to revoke the original dismissal decision and to reinstate the employee, then you'll need to consider a number of practical matters.

For example:

- the legal effect of reinstatement is that the employee must be treated as if they were never dismissed so it would be necessary to backdate pay for any period between the original dismissal date and the date of reinstatement.

It would also be necessary to confirm that the employee's continuity of service has been preserved.

- you may need to confirm the practical next steps for the employee's resumption of their duties.

### **3. Altering your original decision**

Alternatively, you might choose, on appeal, to take a less severe route than dismissal, such as redeploying the employee to another part of the business or demoting them.

Check the terms of the employment contract to confirm what rights you have to action these alternatives.

#### **Can the employee bring a claim against you for stress or reputational damage connected with the change of decision?**

This is a question that may well arise in these particular circumstances.

No matter how tactfully and discretely you handle your disciplinary process, word often gets out.

And if someone has been dismissed, colleagues will likely be aware of that fact very fast - often before an appeal hearing has taken place.

Provided you've properly followed a robust disciplinary process, then in the vast majority of cases, an employee would not be able to bring a successful action against you, including for any stress, reputational damage or stigma caused by the original dismissal process and any decision on appeal.

#### **It's as if there was never a dismissal**

You must also ensure that you continue in all respects (including when it comes to subsequent appraisals, salary reviews and bonus entitlements) to treat the employee as though the original dismissal decision was never reached.

#### **Expert advice is highly recommended**

This is typically a very fact-specific situation.

Get advice from the right expert on how you should best handle any complain from an employee about stress, stigma and/or reputational damage.

### **No further right of appeal**

This letter should make the employee know that they do not have any further right to appeal against your decision.

## 5. Serious Misconduct

### What is serious misconduct?

It's the conduct that falls between general misconduct and gross misconduct.

If an employee's behaviour has caused serious damage to your business, but it hasn't quite destroyed the employee-employer relationship, they've committed what's known as serious misconduct. It's essentially the 'catch-all' zone.

Activities, such as poor attendance and time-keeping, unauthorised absence from work, being careless when carrying out work, time-wasting, behaving offensively, making an excessive number of personal calls from business phones and unauthorised use of business property, could constitute serious misconduct.

However, depending on their severity and regularity, they could also fall into general misconduct.

It matters to get this classification right as different procedures may apply - in particular, you may be able to take fewer procedural steps in a serious misconduct situation.

### How to handle serious misconduct?

For serious misconduct, you may be justified in:

- **having just the one warning meeting** (or not having a meeting at all), and
- giving the employee **just the one written warning notice** and,
- ultimately, **dismissing them** if there's no material improvement.

So, the steps for general misconduct above can be condensed into fewer interactions with the employee.

And, where appropriate you can also miss out the initial verbal warning too.

You can adapt our final warning notice template for general misconduct earlier in this guide for these purposes.

## Final written warning for misconduct

Our other template documents in the general misconduct suite i.e. those relating to dismissal, appeals and your final decision following an appeal, are equally relevant to a serious misconduct situation.

### Dismissals are often controversial for employees

As before, dismissing an employee carries risks.

It's good to double check with an expert that your intentions here don't inadvertently give rise to an unfair dismissal case against you by the employee in question.

### The process must still be fair and compliant with your disciplinary policy

Fair employee interaction remains absolutely paramount to the legal robustness of your process.

This means that:

- just like with general misconduct, you should keep the employee informed about exactly what they need to do to improve, and by when, so they have every opportunity to reduce their risk of dismissal;
- ideally, you'd
  - meet the employee to warn them of your concerns and
  - during that meeting, give the employee ample opportunity to explain their actions.
- since some employees need to digest what you say and what you've sent in writing to them, before they feel able to respond meaningfully, you must provide them with a reasonable time-frame to come back to you afterwards and ask more questions or to state their position;
- ensure that the employee's right of appeal in relation to all disciplinary sanctions is respected - and this should take place *before* any sanction is applied;
- take good, factual notes and keep accurate, contemporaneous records of all interactions.

## Investigating serious misconduct

With serious misconduct, it's likely that you'll need to internally investigate the circumstances.

### Investigate before imposing any sanction

If the employee disputes the alleged misconduct and an investigation is required, the investigation must be carried out before you issue any disciplinary sanction against the employee.

(If you sanction the employee before your investigation is concluded, you could expose yourself to allegations of having prejudged the situation and/or unfair treatment of the employee).

The following Guides and Checklists will be of some assistance on how to carry out an investigation.

### Step by step guide to conducting an Internal Investigation

#### Investigation Plan

#### Investigation checklist

So, if you decide that an investigation is needed, as soon as reasonably possible, you must:

- let the employee know that you are planning to investigate further
- who will be doing the investigating and
- warn them that the person investigating will probably want to talk to them as part of this investigation exercise.

### Can you suspend the employee while the investigation is conducted?

Unlike the position with gross misconduct (see more on that below), the law does not allow you to suspend the employee while the investigation is conducted.

You may be able to suspend them afterwards, based on what your investigation confirms.

## Who is the ideal person to conduct this investigation?

You'll want to conduct this further investigation as promptly and as thoroughly as you can and keep it very separate from any subsequent disciplinary meetings with the employee.

If you can, it's best to investigate using someone different to the person chairing the disciplinary meeting if you can.

Then the investigator can ask questions of the employee if need be, but these are part of the fact-finding/investigation process, not any decision-making process.

## 6. Gross Misconduct

### What is gross misconduct?

If an employee does something that is so serious it destroys the employee-employer relationship, you're able to dismiss them rapidly, without notice and without any pay place of notice, as long as you follow a proper and fair process of dismissal.

### Examples of gross misconduct include:

- Serious breaches of health and safety rules
- Intoxication at work (alcohol or drugs)
- Theft or other criminal conduct
- Accepting bribes or engaging in money laundering
- Violence
- Offensive behaviour (e.g. bullying, harassment, discrimination)
- Immoral, unethical or indecent behaviour (including downloading pornography)
- Sabotage of equipment or projects
- Deliberately anti-competitive behaviour (e.g. engaging in unlawful discussions designed to fix prices or divide up customer groups or markets)
- Flagrant (gross) insubordination
- Other conduct bringing the reputation of the business into serious disrepute.

These are just examples.

There may be other activities that are very specific to your own business you might also want to list in your employment contract and disciplinary policy documentation.

It's not actually instant...

Generally, instant dismissal isn't actually instant.

This kind of dismissal is often called a 'summary dismissal'. It's regularly described as 'instant dismissal' too, but due to the legal need to still demonstrate a fair dismissal process, it's rarely literally instant.



Your employment contract with the employee should make very clear what behaviour or activity constitutes gross misconduct and is therefore worthy of this escalated dismissal treatment.

We recommend taking expert advice before dismissing someone instantly.

## **How to handle gross misconduct**

There are several steps to this process:

1. suspension of the employee, while you investigate (optional)
2. invite the employee to a disciplinary meeting
3. hold the disciplinary meeting
4. your decision on whether or not to take further steps
5. dismissal (if you decide this is the right course of action)
6. appeal by the employee
7. your final decision

We'll look at each in turn and point out any relevant template documents you'll need to support each step.

## **Step 1: Suspending the employee**

If the employee is causing a disturbance, or you're legitimately concerned that further damage to individuals or the business might otherwise result, you may want to suspend the employee (on full pay), while you carry out your investigations.

You do not have to do so, however.

Check the terms of your employment contract to ensure that you have this right of suspension on full pay - it's not an automatic legal right.

You must have reasonable grounds for the suspension

Ways to ensure that you have these legitimate grounds include initial, confidential examinations by you of:

- what other employees or affected persons (e.g. a customer) tell you

- what the employee says in response to your invitation to them to come to the disciplinary meeting, or in any other relevant interactions
- what's showing on camera footage, and
- anything else that could confirm or disprove your suspicions.

If on balance, you think that it's appropriate to suspend the employee right away, you'll need to inform the employee of this action in writing.

Our template below is designed for this.

### Letter suspending employee pending investigation

Your suspension letter needs to include:

- **details of the potential gross misconduct**

Here you should insert the details of the allegation(s) and why you believe this warrants a suspension.

You should refer to the relevant section of your disciplinary policy when you explain this - and ensure that the employee still has access to a copy of this policy.

Be as clear as possible so that the employee cannot claim any misunderstanding or ambiguity in what has been communicated to them.

- **the outcome** of any provisional internal investigation
- **the date of the disciplinary hearing** to discuss the gross misconduct
- **who** will be present?
- **who** will be chairing it?
- **confirmation of the employee's rights to bring a companion or witnesses** to the hearing meeting, including someone from their trade union (if relevant);
- **a mandate not to attend the workplace or to do any work**
- **confirmation that full salary and contractual benefits will be paid** in the usual way, (although you may need to make provision for certain benefits to be suspended, such as membership of a gym at your place of work, where contact between the employee and fellow colleagues would be possible).

## Step 2: Invite to a disciplinary meeting

If you feel the employee's behaviour doesn't justify an immediate suspension, then your first step will be to invite the employee to a disciplinary meeting.

### Letter inviting employee to disciplinary meeting about gross misconduct

Your letter will need to include:

- **details of the potential gross misconduct**

Here you should insert the details of the allegation(s) and why you believe this warrants a suspension.

You should refer to the relevant section of your disciplinary policy when you explain this - and ensure that the employee still has access to a copy of this policy.

Be as clear as possible so that the employee cannot claim any misunderstanding or ambiguity in what has been communicated to them.

- **the outcome** of any provisional internal investigation
- **the date of the disciplinary hearing** to discuss the gross misconduct
- **who** will be present
- **who** will be chairing it
- **confirmation of the employee's rights to bring a companion or witnesses** to the hearing meeting, including someone from their trade union (if relevant);

## Step 3: The disciplinary meeting

The substance of this meeting will be fact dependent, just like any disciplinary meeting. But there are some core elements that you should make sure to cover:

### Explain the format and purpose of the meeting

This is an important 'scene-setter' for the meeting.

Make sure that the employees know how you propose to run the meeting, who everyone present is (and their role in attending), and what is the intended outcome of the meeting.

### **Being clear on the allegations**

Even though the employee will have received the detailed account of the gross misconduct allegations in the letter that invited them to this meeting, you should ensure that these are clearly and accurately recounted at the start of this meeting.

### **Fair opportunity to explain**

During the meeting you must give the employee the best opportunity to explain their position.

### **The employee's right to be accompanied**

In advance of this meeting, don't forget to tell the employee they can bring a fellow colleague (or trade union member, if relevant) with them as support.

The accompanying person is not there to speak on behalf of the employee or otherwise to represent them.

They are there purely to support the employee practically and emotionally and to hear what is said by both of you.

### **Your right to ask others to attend the meeting**

While you should endeavour for these meetings to never feel confrontational or like a courtroom, you may want to invite other 'witnesses' to come to this meeting as well.

These should be people who are directly connected with the misconduct in question and who may be able to augment the fact-finding.

The employee should be able to hear what they say and to ask questions or clarifications too.

## **The employee's right to request their own witnesses or documentation**

The employee might also want to ask if others can attend to speak on their behalf, or to request that relevant documents or other records can be considered at the meeting.

### **Next steps**

At the end of the meeting, you should inform the employee what to expect next. This should be:

- your careful consideration of all that you have heard and discussed with the employee and other attendees
- possible further explorations of factors that have been raised or questions that need to be answered. and
- then a decision by you, which the employee can expect to receive by a target date.

It may be that your decision is not to take any further steps and to close your disciplinary process.

If that's the case, move forward to Step 4 in this guide.

However, if your conclusions result in a decision to dismiss the employee, skip to Step 5 below.

## **Step 4: No further steps, process ended**

There are two slightly different formats to the letters that you'll need to send if you decide not to take any further steps at this stage in your disciplinary process.

The differences relate to whether you suspended the employee during the investigation or went straight to a disciplinary meeting and did not suspend them.

We'll cover them both below.

**If the employee was NOT suspended during the investigation...**

Once you've held the disciplinary meeting, if you decide that no further action is needed, (e.g. because the employee's actions were not in fact gross misconduct), then you'll need to inform the employee that you're ending the process, and what that means.

Our template 'no further action' letter can be used for this.

### **Letter confirming no further steps after a disciplinary hearing**

This letter recaps on the process and confirms that the process has ended, and this fact will be recorded on the employee's file.

It provides the opportunity for you to explain why you may have chosen to downgrade the employee's conduct from 'gross' misconduct to a lesser form of misconduct.

Alternatively, it also covers the position where your findings confirm no misconduct has been proven at all.

### **Can the employee claim against you for stress or reputational damage?**

This is a question that may well arise in circumstances where the employee feels that their reputation has been 'besmirched' by rumours or knowledge of the allegations against them having leaked out to colleagues and wider.

It is always a challenge to keep proceedings such as these confidential and it's important to do so to the very best of your ability.

Any colleagues in whom you confide and whose assistance you enlist in handling disciplinary matters must be reminded of the sensitivity of these situations and the need to observe the utmost professionalism and discretion.

Only those strictly needing to be 'in the know' should be informed.

We advise that provided you've properly followed a robust disciplinary process, and you've taken all reasonable steps to ensure confidentiality and discretion, then in the vast majority of cases, an employee would not be able to bring a successful action against you, including for any stress, reputational damage or stigma caused by the original dismissal process and any decision on appeal.

### **It's as if there was never a dismissal**

You must also ensure that you continue in all respects (including when it comes to subsequent appraisals, salary reviews and bonus entitlements) to treat the employee as though the original dismissal decision was never reached.

### **Expert advice is highly recommended**

This is typically a very fact-specific situation.

Get advice from the right expert on how you should best handle any complain from an employee about stress, stigma and/or reputational damage.

### **If the employee WAS suspended during your investigation...**

You'll need the different 'no further action' template letter for these circumstances, acknowledging the fact of the suspension.

### **Letter confirming no further steps after suspension and investigation**

This letter follows much the same format as the one above, with the exception that it confirms the end of the suspension.

### **Agreeing a written statement**

Importantly, the template letter also offers you the chance to agree a written statement with the employee concerning the investigation/suspension, which can be used to explain what has happened to anyone who has been affected by/who has heard about the situation.

Take care not to make any statement which may prejudice the outcome of the investigation, or to say anything that might damage the employee's reputation.

### **Agreeing verbal explanations/statements**

You may additionally need to agree what the employee should say if they are approached by clients or other employees who may not be aware of the situation.

The more senior the position, the greater the likelihood of harm to the employee's reputation or stigma being caused by a suspension, and so careful thought should be given before suspending senior employees.

Our experts recommend always seeking advice before taking such a step.

### **The employee's right of appeal**

Even though the outcome of this process will be good news to the employee, you should still point out to them that they have a right of appeal so that they can challenge any of your findings.

This helps demonstrate the fairness and robustness of your process and will stand you in good stead if you need to defend any subsequent grievances or claims by the affected employee.

## **Step 5. Dismissal for gross misconduct**

If the outcome of your disciplinary meeting is a decision that dismissal is appropriate, then you'll need to inform the employee of your decision in writing.

You can use our template letter to create this communication.

### **Letter dismissing employee for gross misconduct**

You'll see this template contains all the necessary components supporting your decision, including:

- **whether the employee is to be dismissed immediately**

This is called 'summary dismissal'.

It describes the situation when an employer dismisses an employee without notice, or pay, because the employee has committed gross misconduct.

Summary dismissal is only considered fair if this is included as an option in the employee's employment contract.



- the **employment termination date**

Legally, a dismissal is only effective once it has been communicated to the employee in question.

If the letter is hand delivered or sent electronically on the same day, then the date of termination would be that day's date

If the letter is being posted, it may be sensible to state that termination is two days later, as the rules around postal delivery assume this.

- **reasons** for your decision

Be as comprehensive as you can when you explain these.

Set out details of your findings/decision in relation to each allegation of misconduct, summarising the key evidence from the investigation and disciplinary hearing.

Explain clearly why you have decided that the employee was guilty of the misconduct, and why you have decided that it should be treated as gross misconduct justifying dismissal.

- **any alternatives to dismissal that you considered and ruled out**

It's a good idea to explain what alternatives to dismissal have been considered and why it was ultimately decided that dismissal was the appropriate outcome.

- details of final pay and any unclaimed holiday pay\*\*, and
- **how the employee can appeal** should they wish to do so.

## Step 6: Appeal

As with general misconduct and serious misconduct, if the employee appeals your decision, you'll need to make arrangements to hold an appeal hearing and formally invite the employee to attend.

You can use our template invitation to an appeal hearing for this and adapt it to suit your intended arrangements.

### Letter inviting employee to an appeal hearing

The same guidance in relation to the holding of employee appeals for other forms of misconduct are equally applicable here.

## Step 7: Your final decision

This is the last stage.

You should send your employee the final decision in writing and normally within 2 weeks of the appeal meeting.

Our template decision on appeal letter is the ideal base for this communication.

### Decision on employee appeal against dismissal (disciplinary)

## 7. Summary

Dismissal can be a drastic and often emotionally fraught step in any misconduct or performance procedure.

Employees on the receiving end of it often feel indignant, ashamed, outraged, angry.

A stock reaction is to challenge you and to threaten you with a claim of unfair dismissal, potentially accompanied with other 'heavyweight' accusations, such as unfair discrimination.

It's by no means an easy process for either party.

But you can give yourself the best prospects of a smoother and justifiable outcome by running a robust and well organised process - as recommended in this guide.