# DISCIPLINARY MEETINGS

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## What is a disciplinary meeting?

The practice of training people to obey rules or a code of behaviour and using punishment to correct disobedience is nothing new. It was a practice that we have all been subject to going through school. The workplace is not much different. The expectation that in-house rules must be obeyed remains the same.

A disciplinary meeting often involves situations where there are allegations against an employee that rules or behavioural standards have not been followed, and the employee responding to those allegations is given an opportunity to be heard before a decision is made as to whether to sanction or to exonerate the accused employee.

All workplaces have different policies and procedures as to how disciplinary matters are dealt with, including what sanctions could be imposed, such as written warnings and dismissal. Whether it's a disciplinary meeting or disciplinary investigation meeting, the employer is undertaking a process to inquire as to what allegations have been raised, whether they are established, and if the employee has the opportunity to respond and be heard.

An employer breaching its own policies can render a decision or sanction against the employee to be unjustifiable. Some examples include an unjustifiable disadvantage personal grievance claim where a warning has been issued, or an employee is suspended, or an unjustifiable dismissal if the employment has been terminated by the employer.

If an employer has written policies or contractual procedures prescribed the employer must follow them and must not take shortcuts. To tell a story: I was sitting in at a disciplinary meeting last year when the HR manager insisted on the outcome being a final written warning. Like most HR managers I have met, this one too did not understand or know their own disciplinary policies. They were doing a performance improvement plan that had a monthly cycle. When I pointed out that a final written warning would be a shortcut given that a second written warning had not yet been issued, and I referred to their own policy, I was able to buy my client another month. He was here on a visa and wanted to keep his job for as long as possible. Let's say that if he had instead been wanting to exit, I would have played dumb on the policies, let the final warning proceed, and let the employer breach its own disciplinary policy and then later use this against the employer later in bringing a claim for an unjustified final written warning and unjustifiable dismissal if the warning was later relied upon.

## Employee rights

While an employer investigates and consults with an employee on a disciplinary matter, and while it can be argued that a process was adopted and the employee was invited to a disciplinary meeting and heard, it's important that I emphasise that whatever the findings the employer has made, the employer must be able to demonstrate that their findings were reasonably found and importantly, that the employer must have sufficient and reliable evidence to show that their findings and conclusions were reasonably reached.

If an employer cannot show that they have a sufficient and reliable evidential basis, it then becomes not about whether the employee actually committed the wrong, but more so, about whether the employer's investigation into the alleged misconduct can reliably prove that the misconduct occurred. I really do emphasize this point.

I will give an example: a recent client of mine, a truck driver, had allegedly engaged in an altercation with another motorist while at a red light. It was alleged that my client had damaged the motorist's car and pulled a knife on the motorist. My client was saying that he only got out of their truck at the lights to approach the motorist to convey that he was unsatisfied with the motorist's erratic and dangerous driving, and the worst my client did was shout at the motorist. In undertaking a disciplinary process, the employer unquestionably accepted the motorist's version of events over my client's version. There was absolutely nothing to prove that my client had damaged the motorist's car or pulled out a knife. There was no reasonable explanation from the employer to demonstrate how or why the employer came to the conclusion that it did. Where my client should have been exonerated and the matter dropped, instead the employer moved to terminate my client's employment having unquestionably accepted the motorist's story.

Often I come across human resource consultants that are plainly ignorant of what the law requires. What really makes me laugh is that often we hear them say after dismissal or imposing a sanction that the employer investigated and found its findings "on the balance of probabilities" and that the employee was justifiably dismissed. These HR managers and consultants are clearly misguided, and they do not understand the law.

To explain: The "balance of probabilities" is an evidential standard used by the Court in civil litigation. Compare this with criminal litigation where the standard is "beyond reasonable doubt", does that ring a bell? you might have heard that on TV. In civil litigation particularly with employment law, the "balance of probabilities" is whether the evidence established that facts alleged by a party or witness were more likely than not to be true. It's that evidential standard that the Employment Relations Authority and Employment Court are bound to when making an inquiry into what an employer did and whether a fair and reasonable employer could have taken the action that it did. The employer, therefore, only needs to show that their findings were concluded on a reasonable basis, not on the "balance of probabilities".

Procedural fairness requirements of an employer are easily followed where HR managers are involved, an employer and their HR consultant can easily pay lip service the Employment Relations Act 2000 to doing these things before coming to a decision to issue a warning or to dismiss:

1. Raising the allegations or concerns with the employee.
2. Provide copies of all the information that's being considered as part of the process.
3. Advise what the process will be and what the possible outcome could be (e.g. written warning, dismissal).
4. Give the employee a reasonable opportunity to respond to the employer's concerns.
5. Genuinely consider the response. Quite often we see employers come unstuck on this aspect even if we haven't already got them on their investigation being flawed.

An employee is entitled to have a legal representative or support person present. From reading the ERA and Employment Court cases, I'm a firm believer that it does not matter whether an employer should advise whether the employee is entitled to a support person.

A support person or an employment advocate, employment lawyer, or representative will often be helpful. An old expression I repeat here: "a man who is his own lawyer has a fool for a client".

## Cost of representation

The more incompetent the HR manager that you're dealing with, the more you will need representation if you want to keep your job. This is because if we go to a disciplinary meeting, we're there to ask the employer difficult questions about their findings and processes as they are making them, and this will highlight when it's clear that a written warning or dismissal should not follow.

Disciplinary meetings and the associated efforts required to respond and engage can potentially cost thousands of dollars in getting paid representation through an advocate or lawyer. They can take hours to prepare for, attend, follow up discussions, and more meetings. Incompetent HR managers will schedule a one-hour meeting, but it will always go over time and be two hours in duration and sometimes longer.

HR managers do not learn from their mistakes and will keep repeating them. The HR manager and HR consultant is quite a predictable creature in its wild habitat in New Zealand workplaces and employment law. With effective representation, they can be easily outsmarted.

Most of the calls we get involve employees who are hot and bothered where they have just received a letter inviting them to a disciplinary, investigation, or disciplinary investigation meeting. Do not resign. Talk to us. We can help.

Either you want to keep your job or you want to exit. If you don't wish to keep your job, then you may have an opportunity for us to achieve an exit package for you where your employer will agree to pay something out. If we don't attend the meeting then I say, when you're fired, come back to us, and I also stress that you record the meeting, take notes, ask questions, and don't agree to anything.

If you have been fired, then we may look at doing a 'no win, no fee' arrangement. Rather than being at the meeting to help the process to persuade the employer not to fire you, instead, when you're fired, we look at everything the employer got wrong and bring a claim for unjustifiable dismissal.

If there's a reasonable offer to settle, we take it; if not, we keep going further (to the Employment Relations Authority and Employment Court as necessary). ■

**For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz**