

Employee misconduct and disciplinary action

Employers can take action, including dismissals, against employees who have been errant or recalcitrant. However, any action taken must follow the proper disciplinary procedure.



Progressive disciplinary action is a process whereby an employer takes disciplinary action against an employee in a progressive manner; that is, going from lesser to heavier intensity action.

A lesser form of disciplinary action may include counselling the employee and issuing warning letters. Heavier intensity action include the issuance of a showcause letter, suspending the employee, conducting domestic inquiry and finally dismissal.

There are various clauses in the Employment Act 1955 that pertains to taking disciplinary action in a progressive manner.

If an employer acts with due care in taking disciplinary action, the courts will not intervene. Following the process step by step will reflect fairness on the part of the employer and can minimise industrial court cases for unlawful dismissal.

From time to time, cases of misconduct and dismissal involving employees may arise, and it is crucial that employers know what steps to take under the regulation to avoid being challenged for wrongful dismissal or dismissal without just cause.

All misconducts and acts of indiscipline must be investigated to identify whether they are minor or major in nature. The handling of misconduct and some of the related clauses is regulated under Section 12, 13, 14 and 15 of the Employment Act 1955 and also in Section 20 of the Industrial Relations Act 1967.

Any act of misconduct can be further defined as below:

Minor misconduct

Minor misconduct can be described as any act of indiscipline or behaviour by an employee that causes minimal harm or damage, and is less detrimental to the reputation of the personnel and assets of the employer.

Some examples of minor misconducts are occasional tardiness, absence without leave, leaving the workplace before time, careless use of company tools and equipment, not storing tools in proper order, not wearing uniform, not using basic safety equipment, using company property for personal purposes and all other similar acts.

All complaints must be put in writing on a formal complaint form provided by a supervisor or the head of department. If the complaint is found not to be an offence after investigations, the supervisor or head of department should respond to the complainant that there is no case of misconduct.

However, if an offence is found, the employee should be counseled immediately and the counseling is to be recorded.

A warning letter should be



issued if the same misconduct is repeated. The letter must state the misconduct, and warn that serious disciplinary action can and may be taken against the employee in question if the misconduct is not corrected. Should the employee again commit the same misconduct, a second warning letter should be issued.

It is permissible that the first warning letter be issued by the respective head of department so that the employee is aware that the person he to whom directly reports, such as supervisor or manager, can take disciplinary action against his subordinate.

Regardless, the human resource department should issue the second warning letter and handle any other action if the situation becomes serious and needs further attention, as it would be more familiar in handling the progressive disciplinary processes. If the misconduct persists, it may be considered a major misconduct.

Major misconduct

A major misconduct is any act of indiscipline or behaviour that causes substantial harm or damage, is detrimental to or affects the reputation of the personnel and assets

of the employer. Similar to minor misconduct, all major misconduct must be investigated.

Some examples of major misconducts are: insubordination, disobedience, theft, fraud, dishonesty, gambling, assault, violence, abuse, habitual absences, habitual late attendance, bribery, negligence of duties, failure to observe safety rules, chronic inefficiency in performance, drug and alcohol abuse, engaging in private work during working hour, destroying company documents and all other similar act of misconduct.

Depending on the merits of the case, several measures can be taken – including suspension with half-pay and the issuance of a show-cause letter. A final warning letter can and may be issued if the response given by the employee is not acceptable.

If the employee does not satisfy to the conditions set down, the employer may proceed to hold a domestic inquiry and to take a more serious disciplinary action against the accused employee, including dismissal.

Alternatively, depending on the weight of the misconduct, the employer can and may consider not suspending the employee, issuing instead a final warning letter.

If suspension with half-pay is required, the next immediate step is the issuance of a showcause letter. In a typical situation, the employee should be given a reasonable period of time to respond (example, five working days to reply to a showcause letter), but may be extended if the magnitude of the event warrants a longer process, such as if witness accounts need to be compiled.

A final warning letter may be issued if the reply is not acceptable. In situations where said misconduct persists, the employer may proceed with a domestic inquiry.

Domestic inquiry

In a domestic inquiry process, a panel is set up to determine whether the accused is “guilty” or “innocent” of the charge. The panel consists of a chairman and two panel members, and their role is to listen to the proceedings of the domestic inquiry and come to a decision.

After that management will make a decision on punishment.

There will be one person from the office that can act as the secretary to prepare a verbatim report (word by word) during the domestic inquiry process, while another person from human resource can

be the presenting officer. At this stage, the case against the employee should be supported with proof of evidence, and it should be guided by the principles of natural justice and of good conscience in its deliberations.

If the accused is found guilty, the domestic inquiry panel may recommend the punishment to management.

On the other hand, the employee can and may provide an avenue for an appeal to the management committee to reconsider for other lesser punishment, if any.

If the employee is found not guilty, the domestic inquiry panel will inform the managing director of its decision.

Then, management will inform the accused employee of the decision, which is guided by the domestic inquiry panel, and pay back any amount due to the accused employee during his period of suspension with half-pay.

■ The National Human Resource Centre (NHRC) conducts one-day workshop on the subject “Progressive disciplinary action on handling misconduct” for small and medium enterprises” regularly. For more information, you call 1800-88-4800 or visit www.nhrc.com.my