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Disciplinary measures: What should employers do to reduce the risk of litigation?

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As an employer, you may occasionally be required to impose disciplinary measures on problem employees. Handling such difficult situations requires an objective, planned approach so as to put an end to the misconduct and minimize the risk of litigation. To assist you in implementing your intervention and imposing disciplinary measures, here is a brief review of the three essential steps: (1) conducting an investigation, (2) selecting an appropriate disciplinary measure, and (3) imposing the disciplinary measure.

It is important to note that a disciplinary measure should be both a penalty and corrective action.

Non-disciplinary (administrative) action is used when an employee commits an unintentional violation that cannot be rectified because of the person's inability to perform the required work (e.g., due to lack of knowledge or skills).

On the contrary, disciplinary action is warranted when an employee deliberately engages in misconduct. In this case, the measure is aimed at penalizing the employee and correcting the behaviour.

Step one: conducting a thorough, objective disciplinary investigation

Steps required for a disciplinary investigation

When you find out that an employee may have committed a violation that warrants a disciplinary investigation, it is essential that you promptly gather the facts, rather than acting impulsively.

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Steps to follow:

- Determine whether it is necessary to suspend the employee with or without pay during the investigation;
- Determine who may have witnessed the violation;
- Set up meetings with the witnesses:
  - Prepare a list of open-ended questions that do not suggest a version of the facts or a judgment of the situation (this list may be improved during investigation meetings by adding sub-questions aimed at obtaining more detail, while ensuring that the same questions are asked and the same aspects confirmed with all those interviewed);
  - Meet with witnesses individually in a private area to ensure the confidentiality of the process;
  - Set aside sufficient time to cover all aspects of the situation being investigated;
  - Plan for replacements for employees called to meetings, if necessary; and
  - Ensure that a second person is present to act as a witness (to take notes during meetings and to attest to what was discussed).
- Meet with potential witnesses:
  - Take notes that are as complete as possible during meetings;
  - Ensure that you fully understand the answers and information provided by the witnesses;
  - Ask questions to obtain clarification when in doubt to avoid misunderstanding the version of the facts being reported;
  - Do not be afraid of moments of silence, since they sometimes have the effect of making witnesses speak more, giving them the opportunity to elaborate on their answers; and
  - Ideally, obtain a written statement, dated and signed by the witness, that summarizes the information provided during the meeting, or confirm the contents of the oral statement with the witness by having the witness read the notes taken during the meeting.
- Meet with the employee suspected of having committed the violation last, to obtain his or her version of the facts.
  - Apply the same rules to that meeting as those listed above for setting up meetings and meeting with other witnesses.

Act quickly and carefully

It is important to act diligently when initiating and conducting the investigation, as doing so will allow you to:

- Collect evidence while it is still fresh in the minds of those concerned;
- Rectify the problematic situation quickly; and
- Avoid creating unnecessary stress for employees, particularly if the investigation reveals that no violation can be proven.

Notwithstanding the above, take the time to gather all necessary information or carry out further investigation before deciding whether to impose a disciplinary measure.

Respect the collective agreement or the organization’s working conditions

If a collective agreement applies to your employees, you must ensure that you comply with the disciplinary investigation requirements set out in the agreement, including the obligation to inform the union or allow a union representative to be present at meetings, time limits for imposing a disciplinary measure, conditions for disclosing the reasons why a measure is being imposed, etc.

If there is no collective agreement, it is prudent to follow the rules the employer has set for itself in internal policies or other working condition documents.

Step two: selecting the disciplinary measure

If the investigation reveals that the employee has indeed committed a violation that warrants

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disciplinary action, you must now select a disciplinary measure.

Penalty proportional to the misconduct

When selecting a measure, the first principle is to ensure the penalty is proportional to the misconduct. The more serious the misconduct, the more severe the penalty should be.

Penalty scale (subject to exceptions)

Barring exceptional circumstances and subject to your organization's collective agreement and policies, you should use a penalty scale, which normally includes the following:

Verbal notice;
> Note: Although this is a verbal notice, a detailed description of the notice must be kept in the employee's file to ensure that the situation is monitored.

Written notice;
Suspension;
> Depending on the circumstances, it is generally preferable to impose a short suspension, followed by a longer one, before dismissing an employee.

Dismissal.

There are exceptions to implementing such a penalty scale, including, in particular, the following:

Serious misconduct having the effect of permanently breaking the relationship of trust which must exist between employee and employer; and
Management employees (although such a scale is difficult to apply to management employees who have committed violations, nevertheless, with few exceptions, they should have been previously notified of the allegation and been given the opportunity to make amends).

Things to consider when selecting a penalty

In addition to using a penalty scale, you must ensure that you comply with the **collective agreement** and your **business's policies**, which may include provisions for disciplinary action in the event of violations of the requirements specified in such policies.

You must also verify whether the proposed measure is consistent with disciplinary measures applied in previous similar cases, so as to demonstrate that discipline is carried out consistently and fairly throughout the business, while respecting the specific facts of each case.

Finally, you must consider the **aggravating and mitigating factors** that are relevant to your employee's situation. Here is a non-exhaustive list of examples:

Aggravating factors	**Mitigating factors**
Seniority (depending on violation)	Seniority (depending on violation)
Disciplinary record riddled with violations	Clean disciplinary record
Significant consequences of the violation for the business, customers, colleagues, etc.	Violation with no significant consequences for the business, customers, colleagues, etc.
Status or importance of the employee's duties to the business	Employee's tasks are generally supervised or not critical to corporate affairs
Premeditated violation	Violation that was not premeditated
Absence of remorse or apology	Admission of guilt, show of remorse and apology
Lack of collaboration or transparency during the investigation	Collaboration and transparency during the investigation
Employee autonomous when carrying out duties, generally without supervision	Lax supervision or requirements on the part of the employer in the past in relation to the violation

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Step three: imposing the disciplinary measure

Once you have determined the disciplinary measure that best fits the circumstances, you must call a meeting to inform the employee of the measure.

As with investigation-related meetings, you must meet with the employee in private and ensure that a witness is present with you to take notes during the meeting. Notes and disciplinary measures must be entered in the employee's file.

During the meeting, a disciplinary letter must be given to the employee, and the contents of the letter must be repeated to confirm the measure being imposed and to clearly and succinctly explain the violation(s) the employee is accused of.

If the measure is not dismissal, you should take the opportunity to remind the employee of your expectations, which should also be explicitly stated in the disciplinary measure letter. In addition, the letter should state that any subsequent misconduct may result in a more severe disciplinary measure, which could even include dismissal.

We remind you that you must document and carry out the measure in accordance with the requirements of the collective agreement and business policies, if applicable.

Conclusion

This quick reference guide should help you plan the imposition of a disciplinary measure to ensure that you:

> Carry out a proper investigation;
> Carefully select the measure to be imposed; and
> Impose a disciplinary measure in an appropriate manner, ensuring that you monitor your employee's disciplinary file.

However, measures must be imposed on a case-by-case basis. Our Labour and Employment Law team is available to advise and assist you for each of the three steps.

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