

Disciplinary Hearings: How to write legally compliant conduct allegations



The importance of careful and correctly worded allegations should not be underestimated. An invitation to a disciplinary hearing should set out exactly what the employee is being brought into the hearing to discuss and it must also be precisely the same reason that is given for any warning or dismissal that may be required.

This means it is imperative that the disciplinary allegations in the invite letter are fit for purpose from the outset. Case law has repeatedly shown that a dismissal can be legally unfair when the allegations are unclear or do not correspond precisely with the reason given for a warning/dismissal or imply the outcome of the hearing may be pre-determined.

A strong investigation will set you up to know what is reasonable for you to allege against the employee.

What are allegations?

An allegation is a genuinely held concern about the conduct of an employee which the employer needs to address. An allegation is always tentative, hence 'alleged', until a formal outcome has been reached following a formal disciplinary hearing. The outcome of the hearing will confirm whether the allegation has been upheld against the employee or not.

Tips on constructing allegations

In short, it is important that all allegations:

- State that it is alleged
- Are clearly articulated
- Identify what rule or expectation has not been complied with
- Identify when and how this supposedly happened

The word "alleged"

The word "alleged" must be used in a disciplinary process before any decision is made. This is because of what is known as "natural justice", which requires a manager to not pre-determine a case until the issues have been fully explored and having provided the employee with an opportunity to explain their version of events. Until this point, the issue is only an accusation.

Special guidance for Gross Misconduct allegations

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In addition to the guidance set out in the above section, there are further requirements when dealing with allegations that are gross misconduct in nature. An allegation that is gross misconduct, if upheld, could lead to summary dismissal for a first offence.

So, in addition to the above guidance, we specifically recommend for gross misconduct allegations:

Include the term 'gross':

This shall identify the allegation as one in which summary dismissal could be the outcome for if it is upheld against them. It is also a reminder that the misconduct was more than a minor or moderate issue and is regarded as extreme or abnormal conduct.

A description of the misconduct as 'deliberate and wilful' or 'negligent':

The misconduct should be characterised by one or the other for it to be regarded as gross misconduct in tribunal. It is worth including this in standard gross misconduct allegations to serve as a reminder to all parties that this bar should be achieved for gross misconduct to stand.

Legal considerations

Employment Rights Act 1996

The law of unfair dismissal is set in the Employment Rights Act 1996, section X. An employee who has two years' service at the time of dismissal or if the reason falls within one of the exceptions that do not require this two-year qualifying service, then a claim can be brought.

Not only must a dismissal be for one of the five potentially fair reasons (conduct, capability/performance, redundancy, statutory illegality or breach of statutory restriction, or some other substantial reason), but a fair process must also be followed. The subject of careful and correctly worded allegations is examined when considering whether a fair process has been applied.

Acas Code of Practice on Disciplinary and Grievance

The Acas Code of Practice on Disciplinary and Grievance is a key document for all employers. It provides practical guidance and principles for how to handle a disciplinary (or grievance). It is not a legal document although an Employment Tribunal expect any reasonable employer to follow it when managing disciplinary and grievance cases. An Employment Tribunal would even go so far as to take any unreasonable failures to comply with the code into consideration which may result in an adjustment of up to 25% in any compensation awarded.

The Acas code deals with many practical matters relevant to how to handle a disciplinary matter, including how an employer informs their employee of the problem that is the subject of a disciplinary process.

Specifically, within the code, Acas state:

"if it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting".

Furthermore, there is a clear statement within the code about how an employee must be allowed the ability to present their case, evidence and respond to allegations. If an allegation has not been written in a legally compliant way, then an employee cannot do this, meaning the process of setting out the allegation by the employer does not sufficiently meet the advice set out in the code.

The code specifically states on this point that:

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“The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses.”

Additionally, when deciding on appropriate action, there is also guidance within the code, that states:

“a first or final warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required...”

This is a further point that illustrates the importance of a written allegation. This part of the code advises employers that once they have notified the employee of the alleged misconduct and carried out a hearing enabling the employee to effectively respond to the charges, it reasonably follows that there is a need to set out the nature of the misconduct that has been found to have occurred and the consequences moving forward.

If an employee is to have a formal warning on their file, and expectations set for changed behaviour moving forward, then these must both align and link back to the allegation that was set out at the beginning of the disciplinary process. It would be unfair otherwise.

Further HR Guidance

- **Webinar Recording:** you can watch the HR Solutions webinar and download the webinar slides, at <https://www.hrsolutions-uk.com/resources/videos-webinars-archive/>

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