

Introduction

The chair of a disciplinary hearing should ensure that the hearing is conducted fairly.

They should keep in mind the rules of natural justice; these being that the employee should know the nature of the charge and be given the opportunity to state their case, and that the disciplinary panel should be unbiased and act in good faith.

The chair of the hearing should also ensure that the principles contained in the Acas code of practice on disciplinary and grievance procedures are followed. Although the code is not legally binding and employers are not liable to proceedings if they fail to follow its recommendations, employment tribunals take the code into account when considering relevant cases and they are able to adjust any awards made by up to 25% for unreasonable failure to comply with any of its provisions. *Note that this adjustment can be up or down, depending on which party is at fault.*

As there is an overriding obligation on the employer to act reasonably in carrying out a dismissal, the chair should ensure the employer's disciplinary procedure is followed and that the overall process is fair.

Selecting an appropriate chair

Some disciplinary procedures are specific as to who can hear a disciplinary case and which officers of the organisation have the power to impose sanctions such as dismissal. If dismissal is a possible outcome, it is important that the case is heard by an officer who has the relevant authority to dismiss. *The chair should have the necessary authority under the terms of the disciplinary procedure.*

The chair should be untainted by the process. This means that they should not have been involved in the factual matters giving rise to the disciplinary hearing and should not have been involved in the investigation. For example, an employee's line manager should not hear the case if it is an allegation of refusing to follow the line manager's instructions and a different manager should be appointed.

The chair may hear the case alone or with other members of a panel. This will depend on the disciplinary procedure and customs and practices. A chair may hear the case with HR support and advice. It should be made clear to all involved in the hearing whether an HR panel member is present in an advisory capacity only, or as a joint decision maker. Where the role of HR is only to provide support and advice, they must not seek to influence the outcome of the proceedings.

Setting up the hearing

Setting up a disciplinary hearing properly is an important part of ensuring that it is conducted fairly. The employer should:

- write to the employee, giving reasonable notice of the date and time of the hearing;
- state that the hearing will be held under the organisation's disciplinary procedure;
- provide written details of the allegations against the employee;
- provide details of any evidence supplied by other employees, for example by enclosing copies of any witness statements;
- inform the employee of the right to be accompanied at the hearing by a colleague or trade union official of their choice; and
- state that the outcome could be disciplinary action or dismissal, as appropriate.

The meeting should be held without unreasonable delay, with the employee given reasonable time to prepare their case. The chair should be satisfied that this requirement has been met.

Before the hearing

The chair and any other panel members should be familiar with the disciplinary procedure and should also have access to the Acas code. It would be advisable for the chair and panel members to re-read these documents in advance of the hearing. Prior to the hearing, the chair should also:

- review all the facts (*a thorough investigation should have been conducted before the disciplinary hearing is convened*);
- review all relevant documents, for example previous warnings that are still active, previous appraisal review forms that contain pertinent information, telephone or computer records, expense claim forms, examples of work containing errors and any witness statements;
- ensure that the dates and times of incidents are clearly listed;
- plan a list of key questions that will be put to the employee, and think carefully about how they should be phrased; and
- consider if the employee is likely to react in a negative or defensive way and, if so, what the best approach to handling such a reaction will be.

The right to be accompanied

The chair should make sure that the employee has been made aware of their right to be accompanied at the hearing. If the employee attends the hearing without a representative the chair should check they were made aware of the right and are happy to proceed unaccompanied and a note should be made of this.

If it becomes clear that the employee was not aware of this right and wishes to be accompanied or the hearing was arranged at a time when the representative was not available and the statutory rules around companions have not been complied with, the chair should adjourn to allow the rules to be met. If the companion cannot attend on the proposed date, the employee has the right to suggest an alternative date and time, so long as it is reasonable and no more than five working days after the original date.

The statutory right is to be accompanied by a work colleague or trade union representative. However, the employer's disciplinary rules may extend the right, for example by permitting accompaniment by a friend or relative. A tribunal may order compensation of up to two weeks' pay if the statutory right has not been complied with. A failure to comply with the employer's own extended rules would be considered as part of the overall question of fairness of procedure.

The hearing

It is advisable to have a note-taker at the hearing so that a written record is kept. This should be someone who is not involved in the case. The chair should outline the procedure to be followed during the hearing and introduce any parties who may be unknown to one another. The chair should check that the employee is fully aware and has had advance notice of the disciplinary charge that they are facing. The hearing should be adjourned if the employee has not had advance notice. The chair should also check that the employee has received copies of any documents that will be relied on during the hearing. If the employee has not seen documents that will be used the chair should adjourn for a reasonable period of time to allow them to read the documents.

The chair should:

- explain that the aim of the hearing is to establish the facts and seek a resolution;
- list the issues that will be discussed;
- put all evidence of misconduct to the employee and give opportunity to respond fully;
- explain the issue objectively, giving examples of the unacceptable conduct or behaviour.

To uncover detail during the hearing, the chair should ask open, probing questions. If the employee is represented by a trade union representative or work colleague, the companion has the right to put the employee's case, sum up their case and respond on the employee's behalf to any view expressed at the hearing. The companion may ask questions of the employer's witnesses but has no right to answer questions on the employee's behalf. The companion however should not prevent the employer from explaining its side of the case.

Adjournments

If the chair becomes aware of any material breach of the disciplinary procedure, there should be an adjournment to ensure compliance. This may be brief, for example an hour to read documents. If it transpires during the hearing that new matters have arisen that require further investigation and that a fair decision cannot be reached without this, the hearing should be adjourned to a later date to allow that investigation to take place. If the employee or a witness becomes upset or distressed at any point during the hearing the chair should ask if they would like a break. The chair will need to exercise discretion and apply the principle of reasonableness in each situation.

The conclusion of the hearing

Once the chair is satisfied that all relevant matters have been raised and discussed, they should bring the hearing towards its close. This will involve:

- checking if the employee has anything else that they would like to say;
- summarising the key points that have been discussed;
- restating any action points agreed, i.e., what the employee (and/or the manager) will do in the future, or any change to behaviour that has been agreed;
- advising the employee that a decision will be taken as to whether a disciplinary penalty will be imposed and, if it is, the type and level of the penalty; and
- advising the employee when and how they will be informed of the decision - this should be as soon as possible, but not before the chair has had the time and opportunity to consider all the facts.

The decision

The chair should adjourn the hearing to consider the decision and a reasonable period of time should be allocated to decision making. What is reasonable will vary with the complexity of the case. An over-hasty decision could lead to the employee suggesting the matter was prejudged.

The chair and any other panel members should weigh up the evidence heard and make a decision on the balance of probabilities. This means they should determine if it is more likely than not that the employee committed the misconduct. There should be consistency in decision making. If another employee has faced similar disciplinary charges in the past, the chair should consider the penalty imposed on any previous occasions so that there is consistency of treatment.

Following the hearing

Once a decision has been made it should be given to the employee.

Even if the decision has been given verbally, the chair should confirm the decision and explain the decision making behind it, whilst confirming the right of appeal, in writing. The employee should be given details of the person to whom any appeal should be addressed and should be given a time limit in which to appeal.

The Acas guidance indicates that five days is usually appropriate, but the employer's disciplinary procedure may allow for a longer period. In any event, the employer should reserve discretion to consider later appeals depending on the circumstances of the case.