

CRIMINAL PROCEEDINGS

GOVERNMENT'S APPROACH TO DISCIPLINE PROCEDURES WHERE CRIMINAL PROCEEDINGS ARE ALSO INVOLVED

INTRODUCTION

To ensure that Government adopts a consistent approach when dealing with disciplinary matters which may lead to, or arise from, criminal proceedings the following guidance is issued to employing authorities.

In issuing this guidance it is acknowledged that the approach to be adopted differs from that which would be adopted by other employers. However, paying regard to Government's responsibilities concerning law and order it is felt that there should be a degree of co-operation between Government's agencies, but this should not detract from an employer's responsibility for dealing with matters of discipline promptly in accordance with agreed procedures and good employee relations practice.

Thus, there is nothing in this guidance which departs from the principles of fairness, consistency of approach or natural justice. However, it must be stated that discipline matters involving criminal proceedings may be complex and each case will need to be considered on its merits. Where there is a doubt about the appropriate course of action to take, managers should be advised to seek specialist advice from the Office of Human Resources to ensure employment law and/or good practice are not breached.

GUIDANCE

- As soon as the employer becomes aware that an employee's actions might need to be considered as a disciplinary matter, an investigation should be instigated because the employer is concerned with the impact such action has on the employment contract.
- To render any subsequent dismissal as fair in law, the investigation must be timely and sufficiently thorough to justify dismissal. It should be conducted independently of any police or internal audit investigation but in certain cases where there is insufficient evidence to enable an allegation of misconduct to be resolved satisfactorily, the investigation may need to be suspended pending the outcome of criminal proceedings.
- In all cases where criminal proceedings are pending, either in connection with employment or outside of employment, consideration should be given to suspension pending further investigation.
- In order to give proper consideration to the need to suspend the employer must instigate the investigation and see the employee under caution and make a contemporaneous note of the meeting.
- The purpose of seeing the employee should be not only to seek an explanation from the employee if he is prepared to volunteer an explanation but also to discuss the action which the employer proposes to take, including the question of suspension. Employees should not be pressurised into making a statement and may choose to remain silent.
- It may well be that the matter of discipline is not the alleged criminal offence but a serious breach of conduct. Therefore, the employer must be clear as to what the allegation of

misconduct is. Also, care must be exercised not to pre-judge the likely outcome of any criminal proceedings.

- Clarity of what is of concern to the employer, i.e. a criminal conviction or the serious breach of conduct will inform the decision as to whether to suspend the employee. This is the key to what action should be taken and it is this aspect that commonly causes confusion in the mind of the employer.

For example, an employee who punched a colleague at work may well have committed a criminal offence, i.e. assault. However, the violent behaviour of the employee would represent a serious breach of conduct and would be the primary concern of the employer.

- Where there is sufficient evidence to enable the allegation of misconduct to be satisfactorily determined one way or the other, the disciplinary process should normally be proceeded with rather than awaiting the outcome of any criminal proceedings. On this matter the advice of the Attorney General's Chambers via the Office of Human Resources should be sought.
- The explanation sought from the employee during a disciplinary hearing should be given under caution and a contemporaneous note should be made.
- The use of cautions and making of contemporaneous notes should ensure that any criminal proceedings are not prejudiced by the employer's actions.
- It is incumbent on employers to follow the discipline procedure in regard to suspension either with pay or without pay.
- The advice of the Attorney General's Chambers should be sought via the Office of Human Resources where it is felt there could be other legal implications.
- The Office of Human Resources should be kept informed of discipline cases involving criminal proceedings so that the consistency of approach can be monitored.

CIVIL PROCEEDINGS

In relation to civil proceedings instituted or contemplated against an employee, the advice of the Attorney General's Chambers should be sought at an early juncture, since such proceedings may have an impact on any prosecution or disciplinary action. Although it is natural to focus on police and disciplinary action, it should not be forgotten that even in cases where a prosecution has been unsuccessful or where no prosecution is to be taken, there is the possibility of civil action, for example to recover monies allegedly misappropriated by the employee. Again, the advice of the Attorney General's Chambers should be sought and the Office of Human Resources should be kept informed of the advice received.

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GUIDANCE FOR MANAGERS ON DISCIPLINE PROCEDURES

WHERE CRIMINAL PROCEEDINGS ARE ALSO INVOLVED

The impact of criminal proceedings on the discipline process can be complex. And, as with any discipline matter, the actions which managers take will depend on the circumstances of each particular case. However, there are a number of issues relating to such cases which merit the issue of further guidance to public service managers so that the principles of the procedures are not breached. Also, in the event of dismissal, the actions of managers should render that dismissal fair in accordance with employment law.

What are the issues?

Where there is sufficient evidence of theft of an employer's property or fraudulent practice this will normally amount to a fair reason for dismissal provided that the employer honestly believes on reasonable grounds that the employee is guilty and provided that the employer acts reasonably in dismissing for that reason. However, far more difficult to handle are cases of suspected dishonesty. The critical factors in either of these situations are the thoroughness and timeliness of the investigation.

Criminal proceedings and police involvement in the case can have an important bearing on the timing of dismissal and the kind of investigation which can be properly carried out. On the one hand employers must make their own enquiries into alleged criminal acts. On the other, the fact that criminal charges have been brought may limit what can be done.

Where an employee admits dishonesty or is caught red-handed, little investigation is likely to be necessary. Also, in such cases the police will normally liaise with the employer concerning admittance of guilt but paying regard to any legal constraints regarding evidence or disclosure. But, where the probability of guilt is less apparent the safer course would be to consider the appropriateness of suspension pending the outcome of any criminal proceedings. Whether a criminal conviction in itself justifies dismissal will depend on the nature of the crime and the impact of such on the employment contract.

The fact that employees have been charged with a criminal offence should not prevent the employer communicating with them (or their representatives) to discuss the matter. What needs to be discussed is not only the alleged offence but the action which the employer proposes to take. Also, the involvement in an alleged criminal offence quite often involves a serious breach of duty or discipline.

In the context of employment law and more particularly unfair dismissal, it is relevant to consider acts of such a nature, whether in the course of employment or outside of employment, which reflect in some way on the employee/employer relationship. Thus, managers need to be clear on whether it is the criminal conviction or a breach of conduct which is of primary concern to the employer and what act of gross misconduct is suspected. Also, there should be no pre-judgement of the likely outcome of criminal proceedings. And that is why careful consideration needs to be given to the suspension of an employee and the reasons for it. It should be remembered that in circumstances where the employer has decided an investigation cannot be completed until after the criminal charge has been disposed of and the outcome is that there has been an acquittal or prosecution has been abandoned, subsequent disciplinary proceedings cannot be for the same offence, i.e. a criminal act.

For example, if the criminal charge related to fraud or theft the disciplinary offence could not be the criminal act but there might well be evidence of a serious breach of duty or trust which could justify disciplinary action including dismissal.

What should managers do?

Having become aware of a situation where an employee is likely to be involved in criminal proceedings an investigation should commence.

Before seeing the employee consideration should be given to obtaining information from other sources to gain a clearer understanding of some of the issues which might need to be taken into account. This could involve speaking to the police, internal audit, other employees or the Office of Human Resources. Due regard needs to be given to the formal discipline procedure and any code of conduct applicable.

Reference should be made to a senior manager to secure a view on the offence and its impact on the organisation. The main consideration here is whether the offence is one that makes the individual unsuitable for the type of work or unacceptable to other employees.

All the foregoing information is essential if a sound judgement is to be made on the need to suspend an employee whether with pay or without pay.

Suspension may be to allow a fuller investigation prior to forming a belief as to whether there has been a breach of conduct. But, it may also be appropriate to suspend as a safeguard of the employment relationship and hence a protection for the employer and employee, e.g. where a criminal charge arises outside of employment, **say, for example, shop lifting or indecent assault.**

The overriding principle of employment law is the fairness and reasonableness of the employer's actions which may lead to a dismissal being deemed to be 'fair'. However, in strictly legal terms there are rules about disclosure of information. Anything that might be said to the employer during the disciplinary process could be used in court. Therefore, when seeing an employee either during the course of the investigation or at the disciplinary hearing, a suitably worded caution must be used advising the employee of the position. Also, a contemporaneous note must be made of what the employee says. However, the use of such caution does not prevent the employee from choosing to remain silent and the employee must not be pressurised into making a statement.

The following checklist should ensure that Government's managers act fairly when dealing with cases.

CHECKLIST

Where it is suspected that there may be an act of gross misconduct on the part of an employee, managers who have the authority to suspend should take the following action:

- conduct an investigation immediately.
- seek an explanation from the employee under caution and retain a contemporaneous note (see model cautions attached).
- establish what is of concern to the employer, i.e. the outcome of any criminal proceedings or a breach of conduct as a consequence of the employee's actions.
- consider what impact the action might have on:-
 - the employer/employee, and the employer/employee relationship.
 - e.g. the nature of services provided, the role of the employee, the risk to the employer/employee and discipline procedures.
- consider the need to suspend pending fuller investigation of the incident or as a protection for the employer and employee.
- consider the basis of suspension, i.e. paid/unpaid.
- consider is there sufficient evidence to believe on reasonable grounds that there has been a breach of contract.
- where there is sufficient evidence conduct a disciplinary hearing in advance of criminal proceedings under caution and retain a contemporaneous note of the employee's explanation.
- consider whether there may be other legal implications and seek advice via the Office of Human Resources, if appropriate.
- advise the Office of Human Resources of the discipline case and proposed actions.

MODEL FORMS OF WORDING FOR CAUTIONS

FOR USE WITH DISCIPLINE PROCEDURES

Model 1

I am conducting an investigation into certain apparent irregularities concerning (*STATE MATTER BEING INVESTIGATED*) to ascertain whether there are any issues of discipline or capability arising from the audit report which (*NAME OF EMPLOYER*) ... should address.

As there is a possibility that criminal proceedings might be brought against some of the parties involved, I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of our discussion and will be read to you at its conclusion before I ask you to sign it.

Model 2

I am aware that criminal proceedings have been brought against you in relation to the matters about which I wish to question you, namely I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of our discussion and will be read to you at its conclusion before I ask you to sign it. If you are in any doubt about your position you should seek legal advice.

Model 3

This is a disciplinary hearing regarding an alleged breach of conduct which, if proven, would constitute (*GROSS MISCONDUCT*) ... for which you could be dismissed from your employment with (*EMPLOYER*) ... We are not concerned today with any criminal proceedings which might be brought against you but only with the relationship between the (*DEPARTMENT*) ... and you as a member of staff. Nonetheless, I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of this hearing and will be read to you at its conclusion before I ask you to sign it.

Model 4

I understand that you may have been charged with a criminal offence and criminal proceedings are being proceeded with. I wish to question you about these matters as Public Services Commission Civil Service Regulation 2015 [A8](#) states:

- (a) If a civil servant is arrested, charged with, or found guilty of any criminal offence he must report the matter to his Head of Department without delay. An exception is a traffic offence for which the penalty did not include imprisonment or the suspension of his driving licence.
- (b) If the case appears serious enough to warrant it, his Accounting Officer should seek advice from the Office of Human Resources as soon as practicable and consider whether the Disciplinary Procedures need to be used."

Also, I should say that a criminal conviction may constitute gross misconduct under **Section B** of the Public Services Commission Civil Service Regulations 2015.

Depending on what your response is I may need to consider whether you should be suspended from duty pending further investigation.

I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of our discussion and will be read to you at its conclusion before I ask you to sign it. If you are in any doubt about your position you should seek legal advice.