



Explanatory Note
on the operation of the
Disciplinary Procedure
for
HSE Employees

Note: This document is merely a set of guidelines and is not intended to be prescriptive or definitive in terms of the interpretation or application of legal principles.

1. Scope

Probationary employees

Probationary employees are not covered by the progressive stages of the disciplinary procedure as the purpose of the probationary period is to establish the employee's suitability for the job. Appendix 1 of the disciplinary procedure sets out the procedure to apply to probationary employees.

Where an allegation of serious misconduct is made against a probationary employee, the matter will be investigated in accordance with the procedure outlined under stage 4 of the disciplinary procedure. Following this investigation, a decision on whether to terminate the probationary employee's employment or otherwise will be taken by the manager who is responsible for signing off the probationary period or another appropriate manager.

Employees on Fixed Term/Specified Purpose Contracts

Employees on fixed term or specified purpose contracts who fail to meet the required standards of performance or conduct may have their employment terminated within the contract period. Depending on the circumstances of the particular case (e.g. duration of the contract, the employee's length of service, the nature of the unsatisfactory performance or misconduct), it may be appropriate to apply the progressive stages of the disciplinary procedure.

As there is a potential for employees appointed on a fixed term/specified purpose contract to have their contract renewed, line managers must monitor and assess their performance at regular intervals during the early stages of their employment in order to establish their suitability. Employees who have been given appropriate training and assistance to enable them to meet the required performance/conduct standards but fail to do so should have their employment terminated before they have completed 12 months' service.

Employees on short-term contracts who fail to meet the required performance/conduct standards should not be re-employed or have their contracts renewed. Employees who have in excess of twelve months' service and are not meeting the required performance/conduct standards should be dealt with under the disciplinary procedure.

Where performance or conduct issues arise, it is important to ensure that details of the employee's shortcomings and the measures taken to address these shortcomings (e.g.

counselling, training, extra supervision) are fully documented so that the manager can demonstrate that fair procedures were followed.

Employees on a fixed term/specified purpose contract cannot be “let go” merely because they do not have a “permanent” designation. The Unfair Dismissals Act, 1977-2005 does not distinguish between “temporary” and “permanent employees”; it is the employee’s length of service that determines whether or not s/he comes within the scope of the Act.

The Unfair Dismissals Act provides that an employee who has twelve months’ continuous services with his/her present employer may refer a claim for unfair dismissal to the Rights Commissioner or Employment Appeals Tribunal. Service is continuous unless it is terminated by either the dismissal of the employee or by the employee voluntarily leaving the employment. Continuous service therefore does not necessarily mean consecutive weeks of service. If an employee remains “on the books”, irrespective of whether his/her employment has been by way of a single contract, a series of short-term contracts or intermittent periods of employment, his/her service may be deemed to be continuous for the purposes of the Unfair Dismissals Act.

The Unfair Dismissals Act, 1977-2005 provides that fixed term or specified purpose contracts do not fall within the scope of the Act provided the contract itself is in writing, signed by both parties and expressly states that ***the Unfair Dismissals Act, 1977-1993 does not apply to a dismissal consisting only of the expiry of the period / cesser of the purpose***. However, attempting to use this exclusion inappropriately is a dangerous practice and may lull line managers into believing that once they issue such contracts, they will have no liability under the unfair dismissals legislation. It is important to understand that the exclusion under the unfair dismissals legislation only applies when the employee’s employment comes to an end on the stated expiry date or on the cesser of the stated purpose.

Employees on fixed term/specified purpose contracts whose employment is terminated ***by reason of the expiry date/cesser of the purpose*** set out in the contract are not covered by the disciplinary procedure. Employees should be notified well in advance of the expiry date of the contract (or before the purpose for which they are employed is expected to come to an end) that their employment will be terminated on the specified date/completion of the purpose.

A **fixed term contract** should contain the exclusion provision under the Unfair Dismissals Acts 1977 – 2005.

'Your employment with the _____ (employer) shall cease on (date). The Unfair Dismissals Act, 1977-2005 shall not apply to your dismissal consisting only of the expiry of your contract on this date.'

Under this provision if the employee's employment is terminated on the end date specified on the contract, s/he will not be covered by the unfair dismissals legislation. It should be noted that in cases of successive renewals of fixed term contracts, the employer may not automatically rely upon the exclusion provision.

A **specified purpose contract** should contain the following exclusion provision under the Unfair Dismissals Acts 1977-2005 i.e.

Your employment with the _____ (employer) shall be for the purpose of (give details e.g. filling a Clerical Officer vacancy on a temporary basis pending the permanent filling of the post through open competition). The Unfair Dismissals Acts, 1977-2005 shall not apply to your dismissal, consisting only of the cesser of the said purpose.

It should be noted that if an employee on a specified purpose contract is also assigned to do other work, the exclusion provision may no longer be relied upon. In these circumstances, the employee may come within the scope of the unfair dismissals legislation, provided s/he has the requisite one year's service.

2. Operating the progressive stages of the disciplinary procedure

The disciplinary procedure comprises four stages (oral warning, written warning, final written warning and dismissal or action short of dismissal) which are preceded by a *Pre Procedure – Informal Counselling* stage. Except in cases of alleged serious misconduct, there is an onus on local management to address issues of poor attendance, performance or conduct through informal counselling and, if necessary, to invoke the progressive stages of the disciplinary procedure. Proper intervention by local management at the outset will often avoid the matter being progressed to the dismissal stage of the procedure (i.e. stage 4). In this connection it is important to ensure that managers are provided with an opportunity to undergo a training session on the *Employee Performance* module of **People Management – the Legal Framework**.

Where an employee has been issued with an oral, written and final written warnings under the progressive stages of the Disciplinary Procedure and the matter has now progressed to **Stage 4 Dismissal or Action Short of Dismissal**, the following process should apply:

The decision-maker who is assigned to conduct the disciplinary hearing under Stage 4 should be provided with a file containing copies of all relevant documentation in relation to the previous disciplinary hearings (including evidence that was relied upon at each disciplinary hearing). The file should be accompanied by a report from the Department Head or other appropriate manager outlining why the matter has now progressed to Stage 4 and attaching corroborative evidence to support this decision e.g. copies of attendance/time keeping records, specific details of unsatisfactory performance following the issuing of the final written warning etc. The documentation compiled in this file and report would thus constitute the "fact finding" element of the investigative process. A copy of this documentation should also be given to the employee concerned prior to the disciplinary hearing.

3. Appeals Process for Dismissal Decisions

Where a decision is taken to dismiss the employee, s/he must be advised of the procedure for submitting an appeal (see Section 6 of the Disciplinary Procedure). The employee is required to submit the grounds for appeal in writing within 14 days of being notified of the original dismissal decision. The employee should be advised to send the letter outlining the grounds for appeal to a named manager who will be responsible for forwarding the letter of appeal to the HSE-Employers Agency. The manager should acknowledge receipt of the letter to the employee. A copy of the appeal letter and all relevant documentation (correspondence, investigation report, minutes of disciplinary hearings etc.) should be sent to:

Ms Clare Brady
Executive Secretary
HSE-Employers Agency
63/64 Adelaide Road
Dublin 2

Following receipt of the letter of appeal, Ms Brady will arrange for the establishment of a Disciplinary Appeals Committee (DAC) to hear the appeal. The relevant HSE Area will be

responsible for meeting the costs arising from the DAC hearing including DAC members' fees/expenses.

Where the DAC uphold the original dismissal decision, the employee may make a final "mercy appeal" (Ad Misericordium Appeal) to the Chief Executive Officer of the HSE. The grounds for this appeal must be submitted in writing within 21 days of the employee being notified of the DAC's decision.

The employee will remain on the payroll pending the outcome of the appeal.

4. Allegations of serious misconduct which could potentially constitute a criminal offence (including fraud or theft)

In cases of allegations of serious misconduct which could be the subject of a criminal investigation, it should be noted that an employer is obliged to conduct its own investigation into the allegation in the context of the employer/employee relationship before any decision is made with regard to appropriate disciplinary action.

Where there are reasonable grounds to suspect that a criminal offence has been committed, the matter should be reported immediately to the gardai. Where the gardai are notified, the HSE may conduct its own investigation in parallel with the criminal investigation. If the employee refuses to co-operate with the HSE's internal investigation pending the outcome of criminal proceedings, this should not always deter the HSE from proceeding with its investigation. In the normal course of events in these circumstances the employee should be advised that if s/he is not prepared to co-operate with the internal investigation, the HSE may have to form its conclusions on the basis of the information available and then proceed to take appropriate action. However, there may be cases where the gardai request the employer to put the investigation on hold, pending the outcome of the garda investigation.

The standard of proof required in criminal proceedings ("beyond reasonable doubt") is higher than that required in investigations carried out by the HSE in the context of the employer-employee relationship. The HSE must be satisfied "on the balance of probabilities" that the employee engaged in the alleged misconduct but does not have to prove the case beyond all reasonable doubt. In other words, the HSE must form a

reasonable belief that the employee committed the alleged misconduct and take disciplinary action accordingly.

5. Off-duty misconduct

Off-duty misconduct may result in an employee being charged with or convicted of a criminal offence. In such cases the employer must decide whether the alleged offence warrants disciplinary action because of its employment implications. Criminal offences committed outside the scope of employment cannot be treated as automatic reasons for dismissal. The main consideration should be whether the nature of the offence is such as to render the employee unsuitable for the job for which s/he is employed, e.g. a conviction for speeding would not necessarily render an employee unsuitable for continued employment.