



Disciplinary Hearing Invitation

Consistently issues arise in relation to what should be in a disciplinary hearing invitation.

It is absolutely clear from recent employment law decisions that the EAT is interested in the procedures used by an employer in dismissing an employee to a significant extent. This means it is essential for employers to keep a full and accurate record of the procedure used in all communications. This includes the information provided to an employee after an investigation has been completed and before a disciplinary hearing takes place.

An employer needs to be in a position to show that the employer provided fair procedures to an employee before any dismissal.

When calling an employee to a disciplinary hearing it is important that an employer sets matters out clearly in writing.

We are consistently asked about what should be in an invitation to a disciplinary hearing and therefore we thought it might be useful to set out a sample letter.

(Addressee)

(Date)

Hearing – Invitation to Disciplinary Hearing

Dear (employee name)

I am writing to inform you that you are required to attend a disciplinary hearing at (place) on (date) at (time).

The purpose of the hearing is to consider an allegation against you of (misconduct or gross misconduct – delete as appropriate) against you.

This allegation is that (you must set out specific details of what the allegation is).



The basis of this allegation is (give an overview of information obtained as a result of any investigation into the allegation. This should be sufficient to enable the employee or anybody reading the letter subsequently to clearly identify what issues will be the subject of the disciplinary hearing).

I am attaching a summary of the findings of the investigation. This sets out further details of the allegations. (I am attaching copies of relevant witness statements and other documents which may be used or referred to at the disciplinary hearing – these should be fully set out). You are entitled to call any relevant witnesses to the hearing. Please let us have their names as soon as possible and no later than (date). If there are any further documents you wish to be considered at the hearing please provide copies of these as soon as possible. If you do not have these documents please let me know what these documents are so that they can be obtained.

The hearing will be held in accordance with the disciplinary proceeding which is attached. (It is vital that a copy of the disciplinary procedure is attached. The fact that the employee may have received a copy of the staff handbook previously is not in itself sufficient. A further copy should always be furnished of the disciplinary procedures. If you do not have a disciplinary procedure then a copy of the Code of Practice on Grievance and Disciplinary Procedures should be attached and you should set out the procedures which will apply at the hearing.)

If it is found that you are guilty of misconduct or gross misconduct we may decide to (issue you with a written warning, a final written warning or dismiss you with notice, without notice or pay in lieu of notice.)



The hearing will be conducted by (insert name of person who will conduct the disciplinary hearing). The following people will also be present (set out their names in full). You are entitled to bring a fellow employee or a trade union representative to the meeting in accordance with our disciplinary procedure. If you wish to bring a companion who is not a fellow employee please let me know their name as soon as possible. (Where the employee is on suspension on pay pending the outcome of the disciplinary hearing you should state – your suspension on full pay will continue pending the outcome of the disciplinary hearing).

Please confirm you have received this letter and that you will attend at the time stated above. If for any unavoidable reason, you or your companion cannot attend at the time please contact me as soon as possible. If you have any specific needs at the hearing as a result of a disability or if you have any other questions please contact me as soon as possible.

Your sincerely,

(Name)

(Position within the company)

An issue which also arises regularly is whether or not an employee is entitled to be represented at a disciplinary hearing, by a Solicitor.

The Supreme Court in the case of Alan Burns and Another –v- the Governor of Castlerea Prison and Another delivered on 2nd April 2009 is one where the Supreme Court made the following findings.

1. The absence of a reference to legal representation in the rules of the Prison Service did not necessarily preclude a right to legal representation.
2. That even if legal representation was expressly excluded that the constitution might require legal representation in “exceptional cases” irrespective of the wording of any rule, code or conduct.



3. That the issue as to whether legal representation is required essentially boils down to a consideration of whether legal representation is desirable in the interest of a fair hearing.

The Supreme Court approved six factors to be considered in deciding whether a fair hearing would require a Lawyer;

- (a) The seriousness of the charge and the potential penalty
- (b) Whether any points of law are likely to arise
- (c) The capacity of a particular person to present his own case
- (d) Procedural difficulty
- (e) A need for reasonable speed in making the adjudication which would be an important consideration
- (f) The need for fairness between the parties

A case which is sometimes referred to is Vidmantas Stoskus and Goode Concrete Limited 2007 No. 7066P. Neutral citation number 2007 IHC 432 in which case Ms. Justice Irvine on 18th December 2007 stated;

“If the plaintiff had not signed a contract of employment or had signed a contract of employment which was silent as to the disciplinary procedure to be followed in the case of alleged misconduct, then the plaintiff might be in a stronger position to contend that the rules or natural justice and fair procedures should be implied into the agreement so as to entitle him, in the context of his nationality, ability to speak English or other factors to have a right of legal representation”.

What is interesting in this case is that while the Court did hold against the Plaintiff as regards mandatory relief the Court stated;

“It appears to this Court that whilst the Plaintiff may have an arguable case he was entitled, as a matter of natural justice, to fair procedures, to legal representation at his disciplinary hearing. The Court concludes that the plaintiffs case does not amount to a good arguable case and is certainly not one which is “strong” such as would support his application for which this Court believes is truly mandatory relief. In the opinion of the Court the plaintiffs’ claims is no more than merely statable”.



This is an important statement of law in that this was an application for an injunction which has an extremely high threshold.

Where an employee requests legal representation at a disciplinary hearing an employer may be in difficulties as regards fair procedures if such a request is refused in a subsequent Unfair Dismissal claim.

To minimise the risk to an employer employers should exclude the right to legal representation in their contracts and handbooks to maximise their ability to exclude a Lawyer. If an employer does not have such a procedure in their contractual relationships with the employee then it is arguable that the employee who will request legal representation is entitled to it.

By including a specific provision in a contract of employment that there is no right of legal representation the matter is then a matter of private law as opposed to public law considerations.

Where the sanction to be imposed might result in dismissal this must be clearly set out in any letter sent to the employee in advance of the disciplinary hearing. Where dismissal may be warranted then in these circumstances there is a far greater potential that the employee would be entitled to legal representation. Where the disciplinary sanction which might be imposed would not include dismissal then this should be excused from any invitation to the disciplinary hearing and the employer will be in a far stronger position to argue that legal representation is not necessary as the employee cannot lose their employment. If however the result of a disciplinary action could result in demotion or reduction in salary then again there is a stronger argument that legal representation is required.

Where evidence taken as part of an investigation is to be tendered to the employee the employee must be entitled to cross examine those individuals. Failure to allow a right to cross examination by having those individuals available for the employee to cross examine effectively means that that evidence cannot be used in any disciplinary process.



For employers it is important to:

1. Review contracts of employment as regards disciplinary procedures
2. Ensure that any staff handbook and disciplinary procedure is up to date and complies with fair procedures and the code of practice on Grievance and Disciplinary Procedures as set out by the Labour Relations Commission.
3. That the employer ensures that the employee has signed a contract which incorporates any disciplinary procedure so as to be in a position to claim that the employee has agreed to same.

The issue of fair procedures is consistently highlighted by the Employment Appeals Tribunal and we presume will also be highlighted by the Labour Court when Unfair Dismissal claims are heard by them after the Workplace Relations Act becomes operational on 1st October.

Our sample disciplinary letter should of course not be regarded as legal advice it is simply setting out our view as to what should be included in an invitation to a disciplinary hearing. All practices within any organisation should be adapted to the operational requirements of the organisation and in line with the practices operated within the organisation.

Where disciplinary action could result in dismissal it is always advisable to get advice from a Solicitor who specialises in employment law.