

Carey Olsen Starting Point Employment Law Guide

– disciplinary issues

Service area / [Employment, Pensions and Incentives](#)

Location / [Jersey](#)

Date / [November 2016](#)

Introduction

Carey Olsen Starting Point Guides are intended as a general introduction and guide to different aspects of Jersey law.

They are a summary of the most important issues that we come across. It is very much the edited highlights of those issues. If you would like legal advice in relation to any specific circumstances, please do give us a call.

The aim of this Starting Point Guide is to:

- raise management awareness of the issues surrounding disciplinary issues; and
- ensure that managers are provided with practical and easily understood tools to be able to manage disciplinary issues within their teams.

This Starting Point Guide should be read in conjunction with your organisation's disciplinary policy and procedures.

Managing conduct

The management of conduct is a process which seeks to maximise the performance of the organisation through enabling individual employees and teams to achieve high levels of performance through positive behaviours and conduct.

- **Recruitment and Retention** – getting and keeping the right people is key to achieving high standards.
- **Standards of Behaviour** – individuals and teams need to know what is expected of them; be clear and be consistent.
- **Confronting Problems** – unless employees know that their conduct is unacceptable, how can they improve?

Why is it so important?

Ensuring that standards of conduct and behaviour are set and adhered to helps individuals, teams and organisations to achieve a happier and more productive workplace and thereby assist in achieving and maintaining high levels of performance.

More fundamentally, the unfair dismissal regimes in both Jersey and Guernsey identify conduct as a potentially fair reason for dismissal. A dismissal on conduct grounds will however generally only be fair as long as the employer can demonstrate that a full and fair procedure has been followed (see the section on Corrective Action) below.

Setting standards

Employees must:

- know the standard of conduct and behaviour expected of them and be encouraged to seek clarification if unsure;
- be kept informed of progress at all stages of any formal procedure;
- be advised that they may be represented by a colleague or trade union representative; and
- undertake any additional training or development or other remedial action recommended by their supervisor or Manager.

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Managers must:

- know and communicate the standard of conduct and behaviour expected of their staff and provide clarification where appropriate;
- monitor and manage conduct and behaviour appropriately;
- investigate all the salient facts;
- advise or warn the member of staff of the problem as soon as their conduct and behaviour falls below expected standards;
- inform the member of staff that they may be represented at the formal stages by a colleague or trade union representative;
- take any appropriate action to assist and support the member of staff during any review period (whether formal or informal); and
- maintain a complete, written record of all discussions and actions throughout the formal process. This record is confidential and should be restricted to those who need to know, i.e. the member of staff, those involved in the process and HR.

Corrective action

Disciplinary procedures

Disciplinary procedures are designed to manage staff whose conduct and behaviour is not of an acceptable standard.

They do not generally form part of contracts of employment although they may result in contractual consequences (such as the termination of a contract of employment).

Employers naturally seek to ensure that staff achieve and maintain a high level of conduct and behaviour in their work. To this end managers need to ensure standards are established, conduct and behaviour is monitored and that staff are given support to meet these standards. When it is apparent that a member of staff is not adhering to the required level of conduct and behaviour, managers need to confront matters at an early stage.

When are disciplinary procedures not appropriate?

In certain circumstances it may not be appropriate to apply a disciplinary procedure. For example:

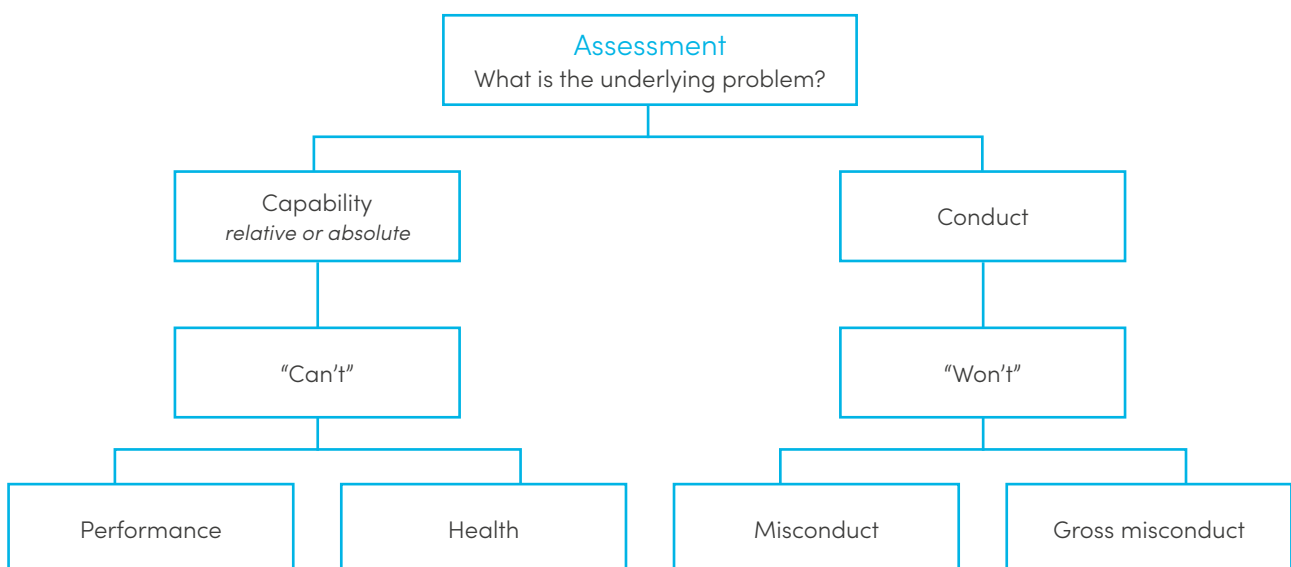
- the disciplinary policy may state that it does not apply to new staff who are still within their probationary period (although such staff are often appraised);
- cases of capability and/or poor performance should be handled under performance management procedures; or
- cases of incapacity due to ill health may initially be handled under incapacity/sickness absence procedures.

It is often difficult for managers to decide which procedure should apply. The following guidance may assist:

- if the employee is unable to deliver the requisite performance, consideration should be given to:
 - a. performance procedures; or
 - b. incapacity/sickness absence procedures (in the event of ill health);
- if the employee is unwilling to deliver the required standard, disciplinary procedures should be considered.

There is a degree of overlap - HR specialists can assist in deciding the best course of action.

Lack of Capability implies that there is no element of choice in the employee's failure to measure up to the required standards. This may be due to an innate lack of ability, skill or experience or to a lack of adequate training and/or supervision. In these cases, staff should be given reasonable help and encouragement to reach a satisfactory level of performance, before any formal action is embarked on. The organisation also needs to make sure that objectives, expectations and standards are clearly documented at the outset.



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Conduct, in contrast, normally involves a measure of personal culpability, negligence, wilful conduct or misconduct. The member of staff's performance could be inadequate due to a lack of motivation, interest or attention. In all matters of conduct, including negligence, disciplinary action will often be appropriate (rather than performance management procedures).

Wherever possible, managers should seek to address any individual or minor performance problems as they occur and without the need to implement formal procedures.

Disciplinary procedure – an example

The following sets out a typical example of how a disciplinary process should operate.

In addition, there is a Code of Practice on Disciplinary and Grievance Procedures (the 2014 Code) which offers guidance on how to handle disciplinary issues. Breach of the 2014 Code does not of itself amount to a breach of the law, but the 2014 Code will be taken into account by a Court or Tribunal when determining whether there has been a breach of the Employment (Jersey) Law 2003. References to the 2014 Code are included at various points in the example below.

A flowchart showing how a typical procedure operates is set out at Appendix 1.

Where a manager considers that the issues which have arisen are serious or otherwise have (or may have) a material commercial impact on the business of the employer, the procedure may need to be invoked at any stage without completing the earlier stages.

How issues arise

Concerns and expectations regarding conduct and behaviour should be communicated clearly and regularly (or at least annually via a robust appraisal scheme). However, there may be occasions when a manager becomes concerned that an individual's conduct and behaviour requires more support and guidance. This procedure is designed to assist managers in supporting staff to reach an acceptable standard.

Initially, in situations where there is a gradual decline in conduct and behaviour, or where an acceptable standard has never been achieved, a line manager should explore with the individual concerned the reasons or any underlying cause for a decline in their ability to carry out the role. The manager should encourage an open and honest discussion of any underlying factors. Where health and/or attendance may be a factor, the manager should generally take advice from an HR specialist before proceeding.

Informal management support

Where conduct and behaviour is considered by the line manager to be below acceptable standards, the normal course of action in the first instance (unless an issue is considered too serious to be resolved informally) would be to attempt to resolve problems with the employee on an informal basis.

A brief note will be made of the general issues discussed and the dates of any meetings. At this stage line managers are encouraged to set and clarify expectations and continue to monitor conduct and behaviour. Many conduct problems may be resolved in this way.

The manager should generally ensure that the following points are discussed and recorded (at least informally):

- identify and clarify the required standards of conduct and behaviour;
- identify the conduct issue which has arisen;
- discuss and establish the cause of misconduct (including any personal circumstances which may need to be taken into account);
- discuss any support that may be required and identify any action that can be taken to help to improve the situation; and
- set a date(s) for a review meeting(s).

(The above guidance is reflected at paragraphs 5 to 7 of the 2014 Code).

Formal procedure

This formal procedure may become necessary if initial management support does not lead to an improvement in conduct and behaviour or if the matter is considered too serious to be resolved informally (paragraph 8 of the 2014 Code).

Managers should generally consult their relevant HR advisor for advice and guidance before taking formal action. When addressing a misconduct issue, employers should ensure that they comply with both the terms of the organisation's disciplinary procedure and the 2014 Code.

At all stages, the method to be followed by the manager will generally be:

- to investigate the facts, circumstances and causes of the misconduct;
- to state the problem(s) and provide the evidence to support this;
- to give the opportunity for the employee to respond to the issues raised; and
- to state the expectations, i.e. what acceptable conduct and behaviour should look like.

(See also paragraph 3 of the 2014 Code).

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Preliminary considerations – suspending the employee

Depending on the nature of the allegations of misconduct made against an employee, it may be desirable to suspend him/her whilst such allegations are investigated. Managers should seek guidance from an HR specialist before taking any action to suspend an employee.

It is often the case that an employee's contract of employment will give an employer the right to suspend an employee in circumstances where there are allegations which may, if substantiated, give grounds for the employer to take disciplinary action against that employee. In this situation:

- the employer should meet with the employee to inform the employee that (s)he will be suspended;
- the employer should investigate the allegations promptly – any suspension should be kept to a minimum.

If there is no contractual right to suspend an employee in his/her contract of employment then employers should seek advice prior to suspending the employee.

Who handles what?

The employer should decide at the outset who will handle the investigation and any disciplinary hearing. It is important that the person conducting the investigation is different to the person holding any disciplinary meeting (see paragraph 17 of the 2014 Code).

If the matter goes to appeal then someone who has not been involved in the process to date should hear the appeal (see paragraph 44 of the 2014 Code). Further, it is preferable that anyone who is involved in the investigation as a witness is not chosen to hold any disciplinary hearing or appeal.

The investigatory meeting

Where reasonably practicable, an investigatory meeting should be held with the employee who is the subject of the allegations (see paragraph 10 of the 2014 Code). It is important that the person holding the investigatory meeting is clear as to the detail of the allegations against the employee and that appropriate evidence has been collected prior to the investigatory meeting regarding these allegations.

If, as a result of the investigatory meeting, the employee raises points which require further investigation then the employer should investigate these issues and, if appropriate, arrange a subsequent meeting with the employee in order to discuss the results of the further investigation before any decision to invoke the disciplinary procedure is made.

Please refer to paragraphs 9 to 12 of the 2014 Code for further information on conducting a fair investigation. In addition, JACS have prepared guidance on the conduct of investigations (<http://www.jacs.org.je/employment/model-policies-procedures/disciplinary-investigation/>) although you should be aware that this guidance has no formal legal status.

Outcome of investigation

The outcome of the investigation – either way – should be confirmed to the employee, preferably in writing.

If the conclusion of the investigation is that formal disciplinary action is required, this should be confirmed to the employee in a letter summoning him/her to a disciplinary hearing.

The disciplinary hearing

It is important that the person holding the disciplinary hearing reviews all of the material collected during the investigation.

All documents and witness evidence should be available to the employee (paragraph 14 of the 2014 Code).

It is important to consider carefully all the evidence collected, including the evidence provided by the employee, to establish what (if any) disciplinary sanction may be appropriate before deciding what action to take (paragraph 25 of the 2014 Code). The decision maker should therefore adjourn the hearing to consider his/her decision.

The decision maker should establish what the outcomes of any comparable cases have been and should be familiar with any relevant policies and procedures. It should be remembered that whilst consistency is important in disciplinary matters, every case will turn on its own facts.

The decision should be communicated to the employee either verbally at a reconvened hearing (and confirmed in writing) or by writing to the employee.

(See also paragraphs 17 – 28 of the 2014 Code).

Representation

Employees attending disciplinary hearings and appeal hearings have the right to bring a colleague or trade union representative to the hearing with them.

In the event that the colleague or trade union representative is not available on the date chosen for the hearing then the hearing may be postponed for up to 5 working days to allow the chosen representative to attend.

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Appeals

Appeals should be available in relation to the outcome of any of the formal stages outlined above. Please refer to paragraphs 43 to 46 of the 2014 Code.

The standard deadline for appeals is within 5 working days of the formal outcome of the meeting, however, managers should check the wording of the disciplinary procedure which applies to their case to see whether a different time period is specified.

If the employee exercises his/her right of appeal it is important that the person nominated to hear any appeal is impartial and has not been previously involved in the matter (see paragraph 44 of the 2014 Code).

The manager hearing the appeal should investigate the appeal grounds and should subsequently arrange an appeal hearing.

An appeal hearing may either be a review of the original decision or a full rehearing; the decision as to which it should be is one for the individual hearing the appeal, taking into account:

- the grounds of appeal;
- any new evidence or facts which have come to light; and
- any obvious errors in the process followed.

The employee should be advised of their right to be represented at the meeting by a trade union representative or work colleague. A member of Human Resources should normally be present.

Arrangements should be communicated before the meeting.

At the appeal hearing, the employee should be asked to go through his grounds of appeal. The hearing may be adjourned if necessary for further investigation.

Following this discussion, the manager should generally adjourn to consider what the outcome of the meeting should be. The possible outcomes are as follows:

- no further action under the disciplinary procedure;
- an extension of (or return to) any of the stages referred to above;
- upholding the decision but not the sanction (for example, overturning a decision to dismiss and 'downgrading' it to a final written warning); or
- upholding the original decision and sanction.

The manager should inform the employee of the outcome (and provide reasons) and confirm that outcome in writing to the employee.

Notes of all meetings

Notes should be taken at all meetings (including the investigatory meeting), preferably by an HR representative if possible) and copies circulated to the employee for comment (see paragraph 23 of the 2014 Code).

Useful information

Link to the 2014 Code:

www.statesassembly.gov.je/AssemblyReports/2014/R.003-2014.pdf

Jersey Arbitration Conciliation Service:

www.jacs.org.je/

Link to the ACAS Code of Practice 1 – Disciplinary and Grievance Procedures (which also contains an embedded link to a non-statutory guide):

www.acas.org.uk/index.aspx?articleid=2174

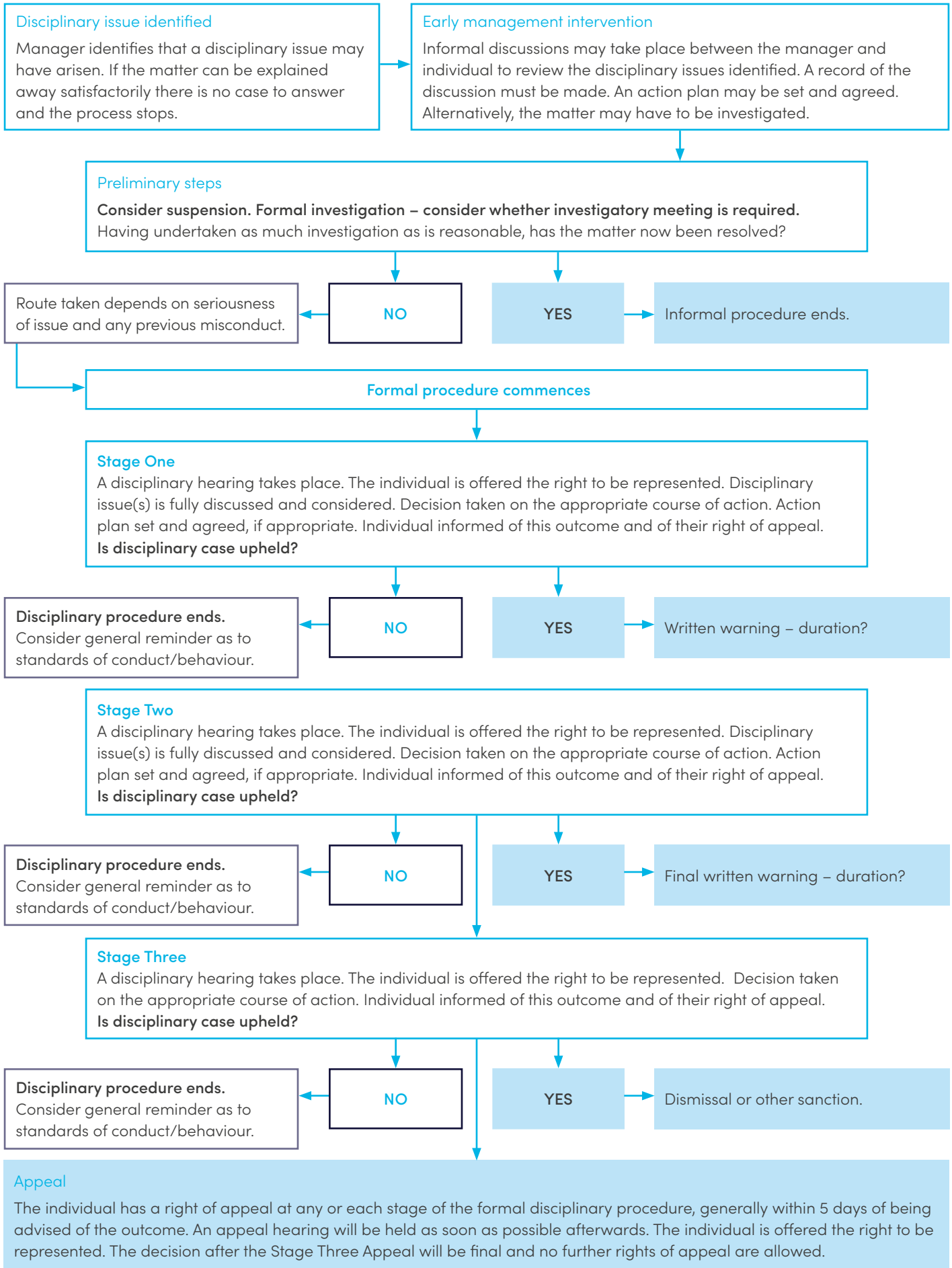
Further information

We are happy to supply specific advice where required.

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Appendix

Appendix 1 – Disciplinary procedure overview flow chart





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