

Disciplinary, Grievance, Sickness Absence: The Essentials for Care Home Providers & Domiciliary Care, Allison Grant Partner and Head of Employment Healys LLP

A. DISCIPLINARY

1. Common examples within Care

- *Failure to meet regulatory requirements e.g. CQC standards/ updates*
- *Misconduct/ negligence jeopardising health and wellbeing of Service User*

2. What is your legal obligation?

- *As an employer you have a duty to act fairly and reasonably when handling a disciplinary issue*
- *ACAS Code of Practice on Disciplinary and Grievance Procedure- provides basic practical guidance to employers, employees and sets out principles for handling disciplinary and grievance practice in the workplace*
- *This Code provides the standard of reasonable behaviour for most cases and sets out what is likely to be considered fair treatment by an Employment Tribunal*

3. What must you get right?

- *Clear Disciplinary Policy*
- *Follow a fair process- consider if situation/ conduct requires a formal or informal process to be followed*
- *Must set out in writing the reasons for the alleged misconduct with evidence*
- *Suspension- consider if appropriate? If so the employee should be suspended on full pay and be given formal letter confirming the terms of suspension*
- *Conduct a fair and balanced investigation and disciplinary hearing*
- *Give appropriate warnings*
- *Give opportunity to appeal - should be conducted by someone not previously involved and ideally more senior where possible*
- *Suspension- see example suspension letter on page 4*
- *Dismissal - see example dismissal letter on page 6*

4. The pitfalls

- *Failure to comply with your internal procedure*
- *Inadequate outcome for both employer and employee*
- *Worst case scenario- unfair dismissal claims or Employment Tribunal action*
- *Unreasonable failure to comply with ACAS Code can render a dismissal unfair and increase the amount of compensation a Tribunal may award by up to 25%.*

5. Solution

- *Clear communication with the employee*
- *Ensure a structured process followed from the outset- have clear stages of the process*
- *Make sure management are trained and equipped so they know what their obligations as the employer is before the disciplinary issue occurs*
- *Adhere to the ACAS Code!*
- *Ensure you have paper trail in place to demonstrate you followed a fair process*

N.B. Remember if an employee goes on sick leave during the disciplinary process, you can still require them to attend a disciplinary hearing (subject to what the nature of the sickness is). The GP Sick Note means they are not fit to work BUT this does not mean they cannot be required to attend a Disciplinary Hearing

B. GRIEVANCE

1. When to trigger the Grievance process

- *Recognising a grievance*
 - o *Written/ Verbal grievances*
- *Clarify and consult with the employee to ascertain their intention behind the potential grievance*
- *Deciding whether appropriate to follow an informal/ formal process*

2. What is your legal obligation?

- *Your obligation as an employer is again set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures*
- *ACAS guide to workplace investigations*
 - o *ACAS procedures apply where the employee has a grievance which relates to statutory employment rights such as equal pay, discrimination, redundancy, maternity etc.*

3. What you must get right

- *Clear Sickness Policy*
- *Independent investigation/ decision-maker*
- *Confidentiality*
- *Timeframe- ensure grievance dealt with in a time efficient manner*
- *Appropriate clear outcome to Grievance and investigation- see exemplar Grievance decision letter on page 8*
- *Employee must be given right to appeal decision*

4. The pitfalls

- *Failure to identify other potential issues raised by the Grievance- e.g. whistleblowing, equal opportunities, anti-harassment/ bullying, discrimination*
- *Failure to address Grievance sufficiently with employee leading to unrest and low morale in the workplace*
- *Failure to follow fair procedure- unable to conduct independent investigation*
- *Grievance after dismissal*

5. Solution

- *Clear communication with the employee throughout the Grievance process and after*
- *If the Grievance is upheld, ensuring adequate recourse/ adjustments made*
- *Workplace mediation*
- *Again ensure you have paper trail in place to demonstrate you adhered to your Grievance procedures (and the ACAS Code!*

C. SICKNESS ABSENCE

1. Impact on your operational needs

- *Handling long-term absence is a delicate matter for employer. There are two scenarios you may be facing:*
- - o *The illness may be serious, and involve an operation and recovery time, or could be a mental health problem. These require a sympathetic approach.*
 - o *Alternatively, you may suspect an illness is being drawn out to delay a return to work*
- *Both scenarios, although contrasting, still mean the absence is likely to be a strain on the operational needs of the Care Provider*
- *You should:*
 - o *assess if colleagues can manage for a period of time without a replacement, or whether you need to hire someone on a temporary contract;*
 - o *ensure there is a clear sickness policy setting out what is expected of both employer and employee when an employee is absent due to sickness*
 - o *Put in place a plan to manage the employee's sickness, carry out a risk assessment, consider what adjustments to hours/work may give weight to have the employee return to work earlier, a phased return*
 - o *Review and consider the prospect of dismissal. Whilst you should approach this with caution, you should not rule dismissal out provided handled fairly and you seek advice to ensure no pitfalls triggered*

2. What is your legal obligation?

- *Sick pay- no statutory right to receive full pay for time spent away from work by reason of sickness. Employees may however be entitled to receive statutory sick pay (SSP).*

- *Employees may also be entitled to receive full, or reduced, remuneration if their contract of employment or employer's sickness policy specifically entitles them to this.*
- *Employer's need to ensure compliance with disability discrimination legislation*

3. The pitfalls

- *Dismissing worker on long-term sick leave- a potentially 'fair' reason, but be careful how you handle the dismissal as could trigger an unfair dismissal claim*
- *Potential disability discrimination*
- *Holiday and Sickness- re-scheduling sickness-affected statutory holiday*
- *Unmanageable workload for remaining employees*

4. How best to manage sickness absence

- *Clear Sickness Policy*
- *Recording absence*
- *Regular contact with employee*
- *Sickness Absence Meeting- see exemplar invitation letter on page 9*
- *Planning- adjustments to the workplace*
- *Advice- Occupational Health*
- *Where appropriate- provide for temporary substitute to fill employee's role*
- *Get a paper trail in place, to record the steps you take to address the sickness absence, and how you manage the dismissal*

25.10.2018

Disciplinary - Sample Letter suspending an employee pending an investigation

[ON HEADED NOTEPAPER OF EMPLOYER]

[ADDRESSEE]

[ADDRESS]

[DATE]

Dear [EMPLOYEE'S NAME],

Suspension pending disciplinary investigation

Following our meeting of [DATE] I am writing to confirm that, as of the date of this letter, you have been suspended from work until further notice pending investigation into an allegation [of [gross] misconduct **OR** GIVE DETAILS]. We reserve the right to change or add to these allegations as appropriate in the light of our investigation.

Your suspension does not constitute disciplinary action and does not imply any assumption that you are guilty of any misconduct. We will keep the matter under review and will aim to make the period of suspension no longer than is necessary. Your suspension may be lifted at any time and with immediate effect.

During your suspension, we shall continue to pay your salary in the normal way. You are also entitled to your normal contractual benefits including [INSERT RELEVANT BENEFITS].

You will continue to be employed by us throughout your suspension and you remain bound by your terms and conditions of employment.

You are required to co-operate in our investigations and may be required to attend the workplace for investigative interviews or disciplinary hearings. However, you are not otherwise required to carry out any of your duties and you should not attend the workplace unless authorised by [NAME] to do so. You must not communicate with any of our employees, contractors or customers unless authorised by [NAME]. However, you are required to be available to answer any work-related queries.

[Your pre-arranged period of annual leave from [DATE] to [DATE] inclusive is unaffected by these arrangements, and you will not be required to be available for disciplinary or work-related matters during that time].

Should you wish to take [further] annual leave during the period of suspension this must first be approved by [POSITION]. You must request annual leave if you wish to go on holiday or make yourself unavailable in any other way.

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Please read and ensure you understand our Disciplinary Procedure and Disciplinary Rules, which are enclosed. When we have completed the investigation, we will write to confirm whether you will be required to attend a disciplinary hearing. If we consider that there are grounds for disciplinary action we will inform you of those grounds in writing and you will have the opportunity to state your case at the hearing, in accordance with the Disciplinary Procedure.

If you know of any documents, witnesses or information that you think will be relevant to the matters under investigation please let me know as soon as possible.

[We have agreed the following statement regarding the investigation, which will be used in response to any enquiries from employees and third parties including customers, contractors and the press: [DETAILS OF AGREED STATEMENT]. Please refer any queries you may receive to [NAME].]

If you have any queries about this matter or the terms of your suspension please feel free to contact me.

Yours sincerely,

[NAME]

On behalf of [NAME OF EMPLOYER]

25.10.2018

Disciplinary – Dismissal Letter for Gross Misconduct

[ON HEADED NOTEPAPER OF EMPLOYER]

[ADDRESSEE]

[ADDRESS]

[DATE]

Dear [EMPLOYEE'S NAME],

Confirmation of summary dismissal

I am writing to confirm that, following the disciplinary hearing held on [DATE], and in view of the seriousness of this matter, it has been decided that your employment with [NAME OF EMPLOYER] should be terminated for gross misconduct without notice and without any [further] warnings.

The reason for your dismissal is that [SUMMARISE FINDING IN RESPECT OF EACH ALLEGATION AND REASON FOR FINDING OF GROSS MISCONDUCT FROM INVESTIGATION AND DISCIPLINARY HEARING].

[You were previously given warnings on [DATES] about your conduct. In your final written warning on [DATE] you were told that you were likely to be dismissed if your conduct did not improve.]

You have the right to appeal against your dismissal. If you wish to appeal, you must do so in writing to [NAME] by [SPECIFY DATE], stating your grounds of appeal in full. You will then have a full opportunity to present your case at an appeal hearing in accordance with our disciplinary procedure. You may be accompanied at the hearing by a fellow employee or a trade union representative. Lodging an appeal will not delay the dismissal taking effect but if you are subsequently reinstated any lost pay will be reimbursed.

The following arrangements apply with immediate effect (but may be varied or revoked in the event of a successful appeal):

(a) Your dismissal takes effect immediately and your final day of employment is therefore [DATE].

(b) You are not entitled to any period of notice or payment in lieu of notice.

(c) Your holiday entitlement for this year, calculated pro rata up to your final day of employment, is [NUMBER] days. You have taken [NUMBER] days.

(c) You have [NUMBER] days outstanding holiday entitlement for which you shall receive payment in lieu as part of your final payment of salary. [As your dismissal is for gross misconduct this entitlement is based only on your statutory holiday entitlement, according to

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clause [CLAUSE] of your contract.] This shall be subject to normal deductions of tax and National Insurance contributions.

(e) You must return any property including [INSERT LIST OF PROPERTY] belonging to us in good condition by [DATE].

(f) Your final salary payment (for the period up to [DATE]) will be made on [DATE] subject to normal deductions of tax and National Insurance contributions. We shall forward your P45 to you in due course.

If you have any questions please do not hesitate to contact me.

Yours sincerely,

[NAME]

On behalf of [NAME OF EMPLOYER]

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Grievance – Sample Decision Letter

[ON HEADED NOTEPAPER OF EMPLOYER]

[ADDRESSEE]

[ADDRESS]

[DATE]

Dear [EMPLOYEE'S NAME],

Grievance decision

I write further to the grievance meeting held with you on [DATE] in respect of your written grievance dated [DATE] [and our subsequent meeting on [DATE]].

[As I advised you when we last met,] After taking into account the findings of the investigation, the information provided by you, and our discussions at the grievance meeting, we have decided [to uphold **OR** not to uphold] your grievance. This is because [DETAILED REASONS].

[In light of this decision **OR** Due to issues brought to light by your grievance], we will take the following action [DETAILS OF ACTION].

You have the right to appeal against the grievance decision. If you wish to appeal, you must submit your appeal in writing to [NAME] by [DATE]. You should state the grounds for your appeal in full and explain what action you believe should be taken in respect of the matters raised in your grievance.

Yours sincerely,

[NAME]

On behalf of [NAME OF EMPLOYER]

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Sickness – Sample Letter inviting employee to meeting to discuss sickness absence

[ON HEADED NOTEPAAPER OF EMPLOYER]

[ADDRESSEE]

[ADDRESS]

[DATE]

Dear [EMPLOYEE'S NAME],

Sickness absence meeting

I am writing to invite you to a meeting at [PLACE] on [DATE] at [TIME]. The purpose of the meeting is to discuss the reason for your sickness absence for the following period[s] [DATE(S)].

We would like to discuss [when you are likely to be able to return to work **OR** whether it is likely that your recent intermittent absences will recur].

[The enclosed medical report [DESCRIBE] will be discussed at the meeting. We would ask you to have a look at the report in advance of the meeting to see if there is anything which you would like to comment on or to agree or disagree with.]

We will want to discuss the following issues:

- [Where possible, agreeing a time frame for your return to work, including whether this may be phased. A phased return to work means not doing your full duties and/or hours initially, but building up to this over an agreed period. **OR** What improvement is required in your attendance patterns.]
- [In the light of the fact that you are disabled, whether there are any reasonable adjustments which may be made to enable you to perform your role, when you are fit enough to return to work.]

We may decide that it is premature to [agree a timeframe for your return to work **OR** set an improved attendance target], in which case we will arrange a further meeting with you to review the state of your health and any additional issues. Please let us know if there is anything else you would like to raise, whether in advance of the meeting or at the meeting itself.

[The meeting will be held in accordance with the Sickness Absence Policy, which is set out in the Staff Handbook.

The meeting will be conducted by [NAME] and the following people will also be present: [NAMES AND JOB ROLES OF PARTICIPANTS]. You may bring a colleague or a trade union representative to the meeting. If you wish to bring a companion, please let me know their name as soon as possible.

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Please confirm that 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 that time, 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.

Yours sincerely,

[NAME]

On behalf of [EMPLOYER]