How to: Assess the level of misconduct and decide a discipline penalty

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Introduction

1. This guide will help to steer line managers through the early handling stages when deciding what level of action is appropriate to deal with a disciplinary matter. It will also help Decision Makers arrive at an appropriate penalty and consider any mitigating factors once the case has been investigated. It should be read in conjunction with the Discipline Policy and Procedure.

2. In most cases the employee’s line manager will take on the role of Decision Maker. The Decision Maker must always be at least one grade higher than the employee concerned. In gross misconduct cases, because dismissal is a potential outcome, the Decision Maker must be at least SEO grade, and should not be the person who conducted the investigation.

Line Manager Action

3. Taking prompt and decisive action as soon as line managers become aware of inappropriate conduct is in the best interests of the department, the employee and where others are involved, the wider team.

4. Line managers are reminded that not dealing with misconduct issues as soon as they occur, or when they are made aware of them, may imply an endorsement of unacceptable behaviour.

Assessing the appropriate level of action to take
5. It is important to be clear from the start what the likely level of action in cases of misconduct is to be. This will depend on a number of factors and individual circumstances and should not pre-empt the decision.

6. However, line managers may find that, as an investigation proceeds, the level may change. Line managers should then consider the case under the appropriate level.

7. Factors to consider when deciding the level of seriousness of misconduct:
   - the degree of the misconduct, for example, physical violence towards others will be considered gross misconduct
   - the impact on others and the department
   - damage to property value may be a factor in deciding whether the misconduct is minor or gross
   - culpability
   - intent
   - breach of the Civil Service Code or Standards of Behaviour policy.

8. Line managers must be able to justify their decision for the course of action taken and whether or not the decision was reasonable in the given circumstances. If they are unsure about this, they should seek advice from the HR Expert.

**Decision Maker Action**

9. Before considering a penalty, the Decision Maker must have decided whether the case has been proven or not.

10. When reaching a decision in discipline cases, if the decision is that the case has been proven, the Decision Maker must hold a genuine belief on reasonable grounds and at the time of making the decision, that the employee had committed misconduct. The Decision Maker will need to be satisfied, having considered all the evidence that the misconduct has occurred. They do not need evidence of hard facts as in legal proceedings.

11. It is essential for the Decision Maker to:
   - read carefully the investigation report, including witness statements and any other supporting information
   - fully reflect on discussions that took place at the disciplinary meeting
   - carefully consider the notes of the disciplinary meeting
   - give consideration to the full facts and circumstances of the case
   - follow the guidance set out in the HR Decision Maker’s Guide to ensure the process and outcome is fair, reasonable and transparent.

**What is meant by mitigating factors?**

12. Mitigation refers to something about the case that justifies a lower penalty than the norm.
13. Mitigation may take many different forms and it is for the individual to put forward mitigating factors together with supporting evidence, if available. Such factors should always be considered before deciding the penalty. Typical examples may be (this list is not exhaustive):

- cases of ill-health or conduct due to medication
- issues related to disability, for example where the condition can influence behaviour
- provocation, for example if the employee felt provoked in some way
- exceptional pressures upon the employee
- serious personal trauma
- the employee may appear to have been acting out of character, particularly where they have an unblemished record
- the employee may have volunteered information about the misconduct and gives an explanation prior to any disciplinary action being started.

14. Consideration of mitigating factors is of vital importance, particularly in cases where dismissal is a potential outcome. Mitigation should be taken into account when considering all penalties. It is important that the case is decided as proven before mitigation is taken into account and that no penalty is given until consideration of mitigating factors has taken place.

15. The point in the procedure to ask the employee to provide any mitigating factors will depend on the complexity of the case. Mitigating factors may be discussed:

- early in the procedure, for example in straightforward cases where the employee has admitted wrongdoing, put forward an explanation and the decision has been made that the case has been proven
- at the end of the discipline meeting after a decision has been made that the case has been proven but the decision about the penalty has not yet been made.

**How to decide which penalty is appropriate**

16. Where misconduct has been proven, the Decision Maker should decide on a penalty consistent with the seriousness of the misconduct. Consistency does not necessarily mean that the same penalty must be applied in every instance of the same act of misconduct. Each case must be looked at on its own merits. Any relevant circumstances should be taken into account and the same procedure be applied in addressing similar instances of the same misconduct.

17. It is important that all penalties are decided on the basis of what is appropriate having taken into account the following:

- the likely penalty for the particular level of misconduct, for example, minor, serious or gross
- where known, the decision made in similar cases – refer to the HR Expert for advice.
- the relation between the behaviour of the employee and that of others, ensuring that the employee is not being unfairly singled out
- any live warnings
• whether the penalty is reasonable taking account of any mitigating factors.

18. A first written warning will be given for a period of 12 months. Final written warnings will normally be given for 12 months but exceptionally may be extended up to a maximum of 24 months. Extensions may be appropriate where the employee would ordinarily have been dismissed but there are extensive mitigating circumstances. An HR expert must be sought in all cases where extensions are being considered.

19. Disciplinary penalties are not always sequential as the penalty depends upon the level of the misconduct. Further misconduct committed after a warning has been given and is still live – ie within the 12 month period - will link and could increase the warning level.

20. The examples in the Penalties for Misconduct table are intended to help managers decide how best to deal with a case. It should be noted that the examples listed are neither exhaustive nor mutually exclusive and should be used as guidelines. If the case is borderline, managers should give the lesser penalty. More specific guidance for information security cases (including examples of specific scenarios) can be found in How To: Deal with breaches of information security.

21. Decision Makers and Appeal Managers should consult an HR expert for advice where they have any doubt about the appropriate penalty. They may also find it helpful to consult with the countersigning manager, although they should remember the need for confidentiality and their own responsibility in making the decision.

22. Decision Makers must make the decision within the required timescales, record it on RM and, if the case has been investigated by Internal Investigations, notify them of the outcome.

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**Penalties for Misconduct**

**Minor Misconduct**

<table>
<thead>
<tr>
<th>Description</th>
<th>Examples of Misconduct</th>
<th>Possible Outcome</th>
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</table>
| An isolated example of misconduct which falls short of the standards expected. First offence and minor in nature | • Poor timekeeping/failure to follow flexi procedures  
• Failure to carry out a reasonable management instruction with minor consequences  
• Minor misuse of departmental assets | Informal discussion – the manager talks to the employee and asks them to explain their actions; invites them to provide information about any relevant personal details or health reasons that may have affected their behaviour and reminds them of the Employee |
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<thead>
<tr>
<th>Such as phone / photocopier</th>
<th>Assistance Programme, Right Corecare.</th>
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<tbody>
<tr>
<td>• Failure to notify sick absence promptly</td>
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<tr>
<td>• Being unfit to come to work due to effects of alcohol/drugs outside of work</td>
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<tr>
<td>• Being rude to colleagues</td>
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<tr>
<td>• Smoking in a no smoking area</td>
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</tbody>
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More serious minor misconduct may result in immediate formal action

See How To Deal with breaches of information security for more examples of minor misconduct in information security cases

| • Minor breaches of the Civil Service Code or Standards of Behaviour policy such as inappropriate behaviour on social media sites or in public where the department can be identified | The normal penalty will be a First Written warning. |
| • Abuse of the flexible working scheme | A First Written Warning lasts for 12 months. |
| • Being rude to members of the public | |
| • Short duration of unauthorised absence | |
| • Some breaches of information security that are accidental, genuine errors where reasonable care was taken and where there is no criminal act, no harm or distress caused and no reputational damage or significant financial cost to the | |
### Serious Misconduct

<table>
<thead>
<tr>
<th>Description</th>
<th>Examples of Misconduct</th>
<th>Possible Outcome</th>
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</table>
| Repeated minor offences or significant breaches of the standards expected. | • Repetition of minor misconduct which the employee has already been warned about either formally or informally  
• Serious misuse of departmental assets such as phone/photocopiers  
• Abuse of sick leave provisions  
• Being unfit to work through using drugs/alcohol while at work  
• Failure to secure protectively marked documents (with low to medium impact)  
• Certain instances of bringing the department into disrepute, for example, being drunk and disorderly outside working hours in a situation where the department may be identified  
• Failure to follow reasonable instructions with serious consequences, for example, damage to property or disruption to service delivery | In most cases, the normal penalty will be a First Written warning, unless the misconduct is after a First Written Warning has been given and is still live, in which case the manager should consider a Final Written Warning.  
Final Written Warnings are appropriate where the misconduct has serious consequences for the department but does not amount to Gross Misconduct.  
If managers accept mitigation put forward by the employee a Final Written Warning may be reduced to a First Written Warning.  
If a further act of misconduct is committed after a First Written Warning has been given and is still live a Final Written Warning will be issued  
Final Written Warnings last for a minimum period of 12 months  
In addition to, but only when a Final Written Warning has been given, managers may also impose one or more additional... |
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<tr>
<th>Description</th>
<th>Examples of Misconduct</th>
<th>Possible Outcome</th>
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<tr>
<td>Exceeding level of authority with negative impact on the business (for example speaking to the media instead of referring queries to Press Office)</td>
<td>Failure to return from a period of unpaid special leave/unauthorised absence</td>
<td>The normal penalty will be Dismissal (with or without notice). If managers accept mitigation put forward by the employee this may mean it can be reduced to a Final Written Warning.</td>
</tr>
<tr>
<td>Failure to notify the loss of equipment, documents or information/data as a matter of urgency to the Line Manager or failure to immediately notify the police – where the loss may have been in public or external to DWP.</td>
<td>Deliberate and gross misuse or damage to</td>
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<td>Offensive personal behaviour, for example abuse of a colleague (verbally or by email or social media)</td>
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<td>Vexatious or malicious complaints and grievances</td>
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<tr>
<td>Victimisation</td>
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<tr>
<td>Smoking in buildings</td>
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<td>Bullying, harassment and discrimination</td>
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**Gross Misconduct**

Gross misconduct is serious enough to destroy the working relationship between the employee and employer and the likely sanction is dismissal.
Repeated acts of serious misconduct are included and have the same status as gross misconduct.

See How To Deal with breaches of information security for examples of gross misconduct in information security cases.

- Physical violence or threatening behaviour, including more serious cases of bullying, harassment and discrimination
- A serious criminal conviction
- Deliberate sharing of smartcards, passwords or other access control devices that provides access to customer, employee or other sensitive information.
- Failure to secure protectively marked documents (with high impact)
- Certain instances of bringing the department into disrepute, for example, posting defamatory comments or unauthorised information about the department, colleagues, customers, ministers on social media sites
- Bribery, theft or fraud
- Falsification of records
- Gross negligence
- Causing major loss, damage or injury through serious negligence
- Abusing position as a civil servant, for

Final Written Warnings are normally given for a minimum of 12 months but exceptionally may be extended to a maximum of 24 months. Extensions may be appropriate where the employee would ordinarily have been dismissed, but there are extensive mitigating circumstances. Advice must be sought from the HR Expert in all cases where extensions are being considered.

In addition to, but only when a Final Written Warning has been given, managers may also impose one or more additional sanctions.

If a further act of misconduct is committed after a Final Written Warning has been given and is still live Dismissal will be considered.
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<th>Example signing false passport applications</th>
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<td>• Significant breach of health and safety rules</td>
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<td>• Being unfit for work through the use of drugs or alcohol with serious consequences for department, customers or public</td>
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<tr>
<td>• Vexatious or malicious grievances with serious consequences for the department, customers or public</td>
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<td>• Extreme forms of harassment or victimisation</td>
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<td>• Improper interference in the award of contracts and/or failure to comply with proper tendering procedures</td>
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<td>• Working without permission for another employer while on sick leave</td>
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<td>• Failure to declare an unspent criminal conviction</td>
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<td>• Repeated or significant breach of the Civil Service Code or Standards of Behaviour policy</td>
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<tr>
<td>• Very offensive behaviour</td>
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<tr>
<td>• Repeated or persistent failure to follow reasonable instructions</td>
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