



# Principles and Guidelines for Investigating Alleged Employment Misconduct

Legal Principles  
Expectations of Employee and Supervisors  
Investigation Process  
Non-Culpable and Culpable Conduct

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# LEGAL ASPECTS OF THE EMPLOYMENT RELATIONSHIP

## Introduction

Experienced managers know that the large majority of employees perform their jobs well and with care. A lesser number of employees do not have this ambition or skill, but nevertheless perform at a minimally acceptable level. Finally, there are a few employees whose poor attitude and continuing misconduct clearly distinguish them from their fellow employees. These exceedingly hard-to-handle employees command a disproportionate amount of scarce management time.

As a supervisor, you have the responsibility to work with these hard-to-handle employees to attempt to correct their performance. You may also have a primary responsibility for deciding the employment consequences if these employees do not improve as required.

This document is designed to provide you with the essential information that you will need to carry out a fair and effective correction process. Topics discussed include the following:

- a review of the essential legal principles governing this area

- a listing of some of the fundamental rights and obligations of managers engaged in the supervision of employees

- an introduction to the conduct of a fair and effective investigation, including a review of six steps to conclusion

- a review of the legally sound and effective means at your disposal for correcting misconduct and poor performance

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## **A. Legal Principles-The Basics**

### **1. Basic Obligations**

The employment relationship, particularly when it is governed by a sophisticated collective agreement, can be very complex, but at its root are some simple principles. These principles continue to apply in the collective bargaining setting, unless they are expressly changed by the employer and its trade union. An employer agrees to employ the employee for a particular job and to pay the employee a stipulated rate. By accepting employment, the employee agrees to attend at work regularly and to perform the work with reasonable competence. The employee also implicitly agrees to perform work honestly and faithfully and to accept the lawful directions of the employer.

### **2. Culpable and Non-Culpable Conduct**

Employees may breach their obligations in either of two ways (or in a mixture of both). The first involves what is called culpable conduct, which is blameworthy conduct. Culpable conduct may lead an employer to impose discipline. Disciplinary measures are penalties, which are designed to make clear to an employee that his or her conduct must be corrected, or further penalties, up to and including dismissal, may be imposed.

In extreme cases, such as theft or assault, misconduct may lead directly to dismissal

Discipline, is inappropriate in a circumstance in which the employee cannot be faulted for the poor performance. This may occur where the employee is excessively absent from work due to medical causes.

This may also occur where an individual is simply no longer capable of performing the job to an acceptable standard-



## **B. What You Can Reasonably Expect From Employees**

The following guidelines will help define the boundaries of reasonable performance and conduct that you, as supervisors and managers, can expect from employees.

### **1. Honesty and Integrity**

- x Employees have an obligation to represent the University in a responsible manner.
- x You can expect employees to conduct themselves with honesty and integrity. This includes, for example:
  - o not removing or using private documents where it is reasonable to assume the documents are confidential;
  - o safeguarding, and not stealing property of the University, co-workers and students;
  - o having scrupulous regard for the confidentiality of student, employee, and

### **3. Attendance**

- x Employees are expected to organize their personal affairs so that they can attend work on a regular basis. In order to assist employees with this, there are provisions within the Collective Agreements or employment contracts. These may include paid or unpaid leaves, flexibility in scheduling, and other time off provisions as operations allow.
- x Where an employee may not be attending work regularly, you as the supervisor or manager have a responsibility to meet with the employee to determine what, if anything, the University can reasonably do to assist them in their efforts to come to work.
- x Employees must provide a reasonable or justifiable explanation for their absence (subject to the limits in your Collective Agreement). Concerns for privacy may allow an employee to refuse the details of an illness, but when an employee is unexpectedly away from work for justifiable reasons, they must notify you about the absence, its expected duration, and the general reasons for the absence.
- x When an employee intends to leave work early, even for justifiable cause, they must notify you, except in rare circumstances where this would not be reasonable.

### **4. Off-Duty Conduct**

- x You can expect that employees will conduct themselves away from their jobs in such a way as to not seriously prejudice the University's interests or reputation.

### **5. Dealing with problems or issues**

- x If an employee has a complaint or issue with their work conditions, co-workers or their duties, they are expected to use proper procedures (e.g. notifying their supervisor, union steward, human resources consultants) to remedy a situation.
- x Ultimately if an employee's continued employment presents a serious risk to the University's property or to the well-being of co-workers, or where their behaviour persists over such a period of time so as to confirm conclusively their unwillingness to cooperate or to follow the reasonable and lawful directions of their supervisor, the employee may be discharged for cause.



## C. What Employees Can Expect From You As A Supervisor

The following guidelines define the boundaries of reasonable support that is expected from you as a supervisor. **Allow these guidelines to supplement, not replace, your own reasonable expectations.**

### 1. Job Description and Expectations

- x When the employee is hired, they can reasonably expect to come into a well-defined role, with clear expectations that are applied consistent with the job description. Normally, the role and expectations would begin with a job description or job profile enhanced by the UVic Core and Leadership Competencies.
- x The job description and expectations form the basis for [Performance Development](#) including Probationary and Annual Performance Planning and Review.

### 2. Orientation<sup>1</sup>

- x The employee can expect you, as their supervisor, to ensure they are oriented to their job, as well as to their role, and the roles of their colleagues.
- x The employee's orientation should also include departmental and University policies and procedures as well as any health, safety and environment rules and regulations that impact on their work and personal safety.

### 3. Performance Development<sup>2</sup>

- x The University has a performance development process in place that includes both Probationary and Annual Planning and Review.
- x Performance planning will normally begin in the probationary or trial period. This is the opportunity for you and the employee to assess the fit of the position. The assigned [Human Resource Consultant](#)<sup>3</sup> can assist in this.
- x Once the employee has passed their probation or trial period, you should begin the annual performance planning and review process, including regular 'check-ins'. The plans ensure the employee is clear on expectations, the "check-ins" allow for progress updates and the reviews 'close-off' the year in preparation for a new plan and year.

#### 4. Feedback and Coaching

- x As a supervisor you have a responsibility to support the employee in the performance of their duties and this sometimes requires constructive feedback on performance or behaviour inconsistent with expectations. This is not discipline; rather it is mentoring and guidance.
- x You should also provide recognition for work well done and for work that is 'on the right track'.
- x You are also expected to provide practical co.1(i)6(es)14( t)a.96 107.4 56/19BmH5 8 t  
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## **Step 2. Plan the Investigation**

You probably have a good sense of what is involved in an investigation. You interview people. You gather documents. You question the employee whose conduct is in question. As in an investigation into a financial irregularity, you must know what you are looking for and you must have a plan. Each case will be somewhat different. Careful planning of the investigation is very important to a fair outcome, and is a step, which should not be neglected no matter what the urgency of the situation

The following are just some of the questions you might ask yourself before beginning the investigation:

- x Does the collective agreement place obligations on me that I should be aware of before or during the investigation? For instance, you might find out the following:

Must I give notice orally or in writing to the union or the employee that an allegation has been made?

Must I agree to the presence of a shop steward when I interview the employee against whom the allegations are made?

Must I give the employee any particular amount of notice before the interview?

If the complaint was made in writing, do I have an obligation to provide a copy of it to the employee? To the union? If so, when?

- x What other employees, if any, should I interview? Should I allow bargaining unit witnesses to

- x Should I interview the employee against whom the allegations are made first, or only after I have interviewed everyone else? Should I interview the accused employee twice?







- x Establish how the employee was aware of the standard (e.g. policy, etc.) If the employee denies the allegation, ask for an explanation of the incident from the employee's point of view.
- x Ask the employee if there are any other matters that s/he wants to tell you about that you should consider.
- x End the discussion by advising the employee that you will be continuing your investigation, that they will be advised of your decision, and that there may be disciplinary action. You may need to advise an employee not to discuss the matter with anyone other than their Union and you may have to direct that they not attempt to approach others (e.g. a complainant).

**Record the results of your interviews.** It is preferable that you take notes during the discussion, but if you feel that you can't and are unable to arrange for another supervisor to do so then, make your interview record immediately after the interview is complete. You should be aware that as these are investigation notes, the other side to any future dispute will likely be able to demand copies of these records if the matter goes to hearing. As with a complainant or witnesses, on occasion it may be necessary to get a written statement.

Consider any Mitigating Circumstances. Also verify, to the degree possible, the employee's explanation. Consider how long the employee has worked for the University without any adverse reports on file.

**Comply with all Collective Agreement provisions.** Violations

#### **Step 4. Assess the Facts**

Your investigation is intended to provide you with a clear picture of the facts of who, what, when, where, why, and how. You can then consider what the implications of those facts are, including the question of whether and to what extent discipline may be imposed on the employee. Finding the facts is not a science-it is an art. It is part detective work, part intuition, part observation, and a lot of hard work. But it is a task that must be done, and done well, before an investigation can be considered complete.

Finders of fact are often confronted with different stories. Key witnesses, even eye-witnesses to a critical event, see things differently. One of the major challenges for a fact finder is to determine credibility.

Did the witness have the **capacity** and **opportunity** to see the events unfold in the way that they have described? (An extreme example to make the point-could a legally blind person really recognize anyone from across the football field?)

Is the story told by the witness inherently **probable** or not? Which of two or more stories, if they differ, is more probable in view of all of the circumstances?

In your investigation, you must strive equally to find both the innocent answer and the guilty one. You must be as open to an innocent explanation of events as you are to a guilty one. The more serious the offence, the more convincing must be the proof. Where the offence is so serious that the employee's career would effectively be over, you must be very satisfied that the event occurred.





Has the supervisor provided a clear statement of the employee's role and responsibilities (by way of a fulsome job description, for instance)? Has employee been given proper orientation and training during their probation/trial period? Have the University and department rules been clearly communicated? Has the supervisor given sufficient coaching and feedback?

Will a non-disciplinary warning accomplish your objectives?

With the advantage of the full results before you, are you uneasy or uncertain about whether the case justifies discipline? If so, consider whether a non-disciplinary warning will accomplish your objectives. Get advice as you see fit.





## The Long Service of the Employee

**Was It Spur-of-the-Moment Misconduct? or Was it Systematic and Repetitive?  
Was It Premeditated, Planned and Deliberate?**

These factors apply most specifically to issues of dishonesty. The issue is whether the University will be able to trust the employee to act honestly in the future. Answering these questions can help make that determination. If the dishonest event was planned, and deliberately carried out with some knowledge of the consequences, this is much different than a spur-of-the-moment act that the employee truly regrets.

**Did the Misconduct Involve a Breach of Trust?**

This factor looks at the impact of the offence. Was it a breach of an essential trust between the employee and the employer? Or between the employee and the public? Or between twhis?ee a10(c)5( )JTJ 0 Tc 0 TdD(r)7.41.3(u)-06 Tcs It helthe oyer( m)-d4( )-w twhiem

**Bona Fide Confusion or Mistake by the Employee As To Whether He or She Was Entitled**

It is in this area that the non-disciplinary aspects of an employee's work record can have great importance. Is the work record of the past, including attendance, attitude, and performance appraisals, a good predictor of the future? If not, what has changed in the employee's attitude or approach to the workplace?

What resources were available to the employee in the workplace that the employee did not utilize? Is it relevant that an alcoholic employee knows of but never uses an employee assistance program? What is it about the current situation that implies changed behaviour in the future?

### **Extraordinary Economic Hardship**

Arbitrators may take into account whether termination will result in extraordinary economic hardship for the employee.

The foregoing is not a complete list. Nor do all of the factors mentioned in it have application to all cases. Some, like those dealing with recognition and apology, have their greatest impact in theft and dishonesty cases. Others may have greater application in patient abuse situations. In any case, the exercise of considering the mitigating factors is a very important step prior to deciding and communicating the results.

**Step 5(b). Decide the Level of Discipline-Second Key Question:  
What is the Appropriate Measure of Discipline?**

You have decided that the event occurred and that it justifies discipline. How much discipline? Keep in mind that at all levels of discipline, procedural obligations (such as Union involvement) must be followed. Subject to the specific provisions of the Collective Agreement, as well as thorough review of the above-noted questions, the disciplinary sanctions available to you may include the following:

**Verbal Warning**<sup>5</sup> This is often the first step when the conduct in question is a minor infraction. Examples include lateness, minor breach of policy, quarrelling with co-workers and very minor insubordination. The purpose of the verbal warning is to ensure that the employee is spoken to and to make clear that any repetition of the conduct will result in greater discipline. The supervisor should put a note in their own working file, not in the employee's personnel file.

**Written Warning** These may or may not be preceded by a verbal warning depending on the seriousness of the misconduct. They may be appropriate if one or more verbal warnings have been ineffective to correct employee misconduct. The written warning should follow an investigation meeting and:

- x give details of the incident, unacceptable behaviour or performance which has occurred;
- x refer to any previous problems and progressive discussions which relate to this situation;
- x report back the employee's explanation or lack thereof;
- x explain what actions are to be taken to bring about improvement and what follow up actions the supervisor intends;
- x state clearly that repetition may lead to more severe disciplinary action and indicate follow-up action to be taken;
- x be copied to the employee file as well as the Union.

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<sup>5</sup> Note that in the CUPE951 Collective Agreement, a verbal warning precedes formal discipline and is therefore not considered a step in the "progressive discipline" process (see Article 13).

**Short-Term Suspension** This suspension usually lasts from one to three days. It may be imposed for more serious offences, such as deliberate damage to property, or absenteeism without an acceptable excuse, or where a verbal or written warning has not succeeded. The purpose of short-term suspension is to bring home to the employee that the employer has a serious concern about the employee's behaviour and that repetition could result in further, more serious disciplinary action, including termination.

**Long-Term Suspension** This involves a suspension of one week or more. It is normally issued when lesser forms of discipline have failed to bring about a change in the employee's conduct or where the misconduct is so serious as to justify a very serious suspension. This type of suspension may be appropriate for conduct, which occurs repeatedly, such as fighting, on-the-job intoxication, gross negligence, and gross insubordination. It is intended to convince the employee that her or his job with the employer is in serious jeopardy and that employment will be terminated if the conduct is not immediately corrected.

Suspensions of any length are confirmed in writing and will include, as well as the items noted above, the duration (start and end date) of the suspension, as well as any conditions that may be imposed upon return to work.

**Termination** This is the end of the road. You must be sure that you have carefully studied the case to determine the prospects for success.

## **Step 6. Communicate the Decision**

The decision has been made, and it is now time to communicate it to the employee. You will wish to consider the following checklist before carrying out the communication:

### **Recheck the Collective Agreement Provisions.**

What, if anything, does the collective agreement say about the following?

- whether the communication is to be oral or in writing?
- confirm that the Union and employee file are copied on the communication?
- what is the timing of the communication; are there notice provisions?
- any requirements for the presence of representatives during the communication process?
- any other collective agreement issues arising in this context?

### **Plan the Meeting Carefully**

- Meet in a private location – sometimes away from the immediate work site is best.
- Ensure that all the required parties are there including a Union steward and, where practical, a management witness.
- Plan the content so that the meeting remains on the subject.
- Keep the meeting short and to the point.
- Present the results in a respectful and professional way.

**Consider Your Options for Drafting the Communication.** Consider the following questions:

Are there any available university precedents for this kind of communication which can assist you?

Apart from collective agreement concerns, are there any legal concerns respecting the content of this particular communication?

In the circumstances of this particular case, should the communication be lengthy or short and to the point?

**Consider Your Options and Obligations for Communicating the Decision to Other Employees**

Discipline is normally a personal and confidential matter, and it is very rare that co-workers would be advised of such.

In cases of termination of employment, 3(pl)EoTj -0.00o1nica7(m)k( )-10(w)166tyo



## **E. Non-Culpable Conduct: Dealing with the Poor Performer**

The issues of culpable and non-culpable conduct were discussed at the beginning of this document. This section focuses on the particularly troublesome issue of non-culpable poor work performance.

Poor work performance issues often come to a head when an incident risks patient safety. Such an incident obviously generates the need for a careful investigation. If, during the course of the investigation, you decide that the matter is non-culpable (that is, non-blameworthy) then you must ensure that you do not treat the matter as a disciplinary issue.

The principal difference lies in the approach to correction. In the disciplinary context, penalties are used to get the employee's attention and to rehabilitate the employee. In the non-culpable setting, the key objectives are to ensure that the employee knows what is expected, receives appropriate instructions, and is aware of the consequences of failure, even if she or he can ultimately do nothing to prevent failure.

If you are considering termination of an employee for non-culpable work performance problems, then you must be satisfied about each of the following:

The University has identified to the employee the level of job performance that it requires.

The University has communicated these standards to the employee.

The University has given suitable instruction and supervision to enable the employee to meet the standards.

The University will be able to establish on the evidence before an arbitrator that the employee did not meet the standards

The University can prove before an arbitrator that it warned the employee in clear and unequivocal terms about the consequences of the employee's failure to meet the standards.

The University decision does not violate Human Rights principles which apply in the particular circumstance in question. (This last is another subject. Get advice in cases where the work performance issue is connected with mental or physical incapacity, or with other issues arising under Human Rights legislation).

## **APPENDIX 1 - Common Questions and Answers That Apply to the Progressive Discipline Process**

### **1. What is progressive discipline?**

Progressive discipline is a process whereby increasingly more severe disciplinary measures are taken by the employer in response to some culpable misconduct. The objective is to ensure that the employee understands that his/her performance is inadequate and that the employee is being given an opportunity to modify his/her behaviour in order to meet the employer's expectations.

### **2. What kind of performance does progressive discipline attempt to change?**

Progressive discipline attempts to rectify unacceptable actions or conduct, over which an employee has control and that adversely, affects job performance. The employer's policy of progressive discipline only applies to instances of culpable misconduct. In essence, the employer's policy of progressive discipline is intended to apply to performance for which the employee is responsible and deserving of blame (i.e. employee knows, is capable but chooses otherwise).

### **3. What is the difference between culpable and non-culpable conduct?**

Culpable conduct is performance that has the following characteristics:

- x the employee knows, or could reasonable be expected to know, what is required of him/her,
- x the employee is capable of carrying out what is required,
- x the employee chooses to perform in a manner other than as required.

Non-culpable conduct is performance or behaviour, which the employee, through no fault of his/her own, is unable to control or change. Examples include poor work performance caused by lack of aptitude or high absenteeism caused by illness.

**Remember:** An employee cannot be disciplined for non-culpable conduct. The University in its Employment Accommodation Policy 1110 (June 2004) states that it “has a legal duty to provide accommodation for both employees and job applicants with regard to matters that are governed by the BC Human Rights Code, unless it would cause undue hardship for the University to do so”. Where an employee has a bona fide disability or other protected ground that, but for the disability, prevents the employee from performing the responsibilities of the position, the University must every effort up to the point of undue hardship to accommodate the employee so that she/he can perform to an acceptable standard. Similar obligations apply to other protected grounds under the Human Rights Code.

This does not mean that an employee is not responsible to do a job to an acceptable level of performance. It does mean that the University has an

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## **5. What if culpability is unclear?**

It is not always possible to determine whether an employee's behaviour falls under the heading of culpable or non-culpable conduct. Culpable and non-culpable elements may be mixed together and it may not be possible to separate them. In some cases, while an employer may suspect the employee's behaviour is blameworthy, there may be no proof of that suspicion. Where it is unclear whether or not the conduct is culpable or non-culpable, it is prudent to err on the side of caution and respond to the conduct as if it were non-culpable. These circumstances have been considered by arbitrators and you should consult with your Human Resources Consultant if you have such a case.

## **6. If the employee's conduct is non-culpable, how should I proceed?**

If a behavioral or performance problem is non-culpable, discipline is not appropriate. Addressing such a problem requires a methodical approach to resolution, which includes continued observation of the employee and performance improvement over time. Your performance improvement efforts should include:

- x Communication with the employee that identifies the behavioral or performance problem and the standard expected. Review the employee's job description and any other applicable rules, policies and procedures.
- x Providing supervisory direction to the employee to assist the employee in meeting the standards, including what follow-up procedures you will be taking to ensure the employee's compliance with the standards.
- x Communication with the employee intended to ensure his/her understanding that the behavior or performance is unsatisfactory and the consequences of continued failure or inability to meet the required standard.
- x Discussion with the employee of strategies the employee might use to correct deficiencies in his/her work performance or behavior
- x Discussion after a period of time to review the employee's progress to meet the required standards.

Remember to document your efforts. In addition, consideration should be given to warning the employee in writing that his/her employment is in jeopardy due to unsatisfactory performance. The letter must be carefully drafted so that it will not be interpreted as being disciplinary in nature. The letter must indicate the employee is being given time and counselling/coaching to get to the required standard.

**7. When might progressive discipline not apply to unacceptable performance?**

Unacceptable performance can take many forms and the means used to correct each will vary. To illustrate, consider the following examples:

- x an employee, while endeavoring, cannot fulfill work requirements;
- x an employee fails to meet requirements due to inadequate direction; and,
- x an employee does not meet standards because she or he chooses to follow other than accepted procedures.

In all cases unacceptable performance results in deficient performance. However, the employee who endeavors but does not succeed is not dealt with via the employer's discipline policy; she or he may know what is required but is not capable. This employee requires non-culpable performance correction. The employee who is inadequately directed may be capable and willing but she or he does not know what is required; discipline would not be appropriate

- x more effective supervision;
- x counselling/training; and,
- x measuring work outputs against objectives and determining/  
removing obstacles to progress.

Failure of the employee to improve may result in a reasonable accommodation: i.e. non-disciplinary demotion and/or transfer to a job level commensurate with ability. As a last resort and after all reasonable avenues have been exhausted, the employee may be terminated.

**Disability or Incapacity:** This situation is characterized by the employee having a condition, illness, disability: physical or emotional, that prevents him/her from performing at the accepted standard. By way of example, the employee may have a degenerative illness/disability that results in diminished performance.

In this situation, the employer is prepared to assist the employee in a number of ways:

- x referring the employee to the appropriate medical authorities via Occupational;

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**9. What about when an employee is experiencing personal problems?**

Situations may arise where personal problems, on or off the job, could result in unacceptable performance or deficient job performance. The employee may be encountering marital, financial or interpersonal problems of a private nature. A manager or supervisor is required under the Progressive Discipline Policy to consider such “mitigating circumstances”. The EFAP is available to employees to help them deal with such problems. It is the employee’s responsibility to take action to deal with personal problems, communicate with his/her manager and make every effort to meet job requirements. Communication and understanding between the manager and employee will usually help see the employee through the temporary problem period and avoid the necessity for formal progressive discipline.

**10. After having disciplined the employee, what should I do?**

It is important that you monitor and follow-up with the employee after any counsel or discipline. The manager should ensure that all supervisors follow-up on objectives set with the employee at regularly scheduled intervals. If a further incident occurs, follow the same progressive discipline steps to determine the appropriate response. Implementing and following a regular performance review process is an important and effective tool for dealing with performance problems.





### **APPENDIX 3 - The Arbitrator s Viewpoint**

Arbitrators have asked the following types of questions in assessing whether particular disciplinary measures were justified:

- x Was the employee given advance warning(s) of the possible or probable disciplinary consequences of her/his conduct?
- x Did the employer make earlier efforts to educate/rehabilitate the person causing the problem?
- x Was the specific discipline based on the progressive discipline approach?
- x Was the rule broken or order disobeyed reasonably related to the efficient and safe operation of the work area?
- x Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate a rule or order of management?
- x Was the employer's investigation conducted fairly and objectively and was it fully completed before disciplinary action was taken?
- x Was the employee given an opportunity to give her/his side of the case?
- x Did the investigation produce substantial evidence or proof that the employee had committed the offense?
- x Had the employer applied its rules, orders, and penalties without discrimination (i.e. consistently throughout the organization)?
- x How severe is the problem or infraction?
- x Have there been other discipline problems in the past, and over how long a time span?
- x Is the current problem part of an emerging or continuing pattern of discipline infractions?
- x How long has the employee worked for the organization, and what was the quality of performance?
- x Was the employee provoked in whole or in part to commit the nonperformance?



