Consistency rules in a disciplinary

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Consistency in disciplinarys is treating employees in the same way if they have behaved in the same way. Consistency is important when:

- Deciding whether an employee should be disciplined in the first place
- Affording rights in the disciplinary process
- Imposing a disciplinary sanction, choosing between a final warning and dismissing.

Disciplinary treatment can and indeed should vary if there are differing circumstances or the misconduct differs in a material way.

Deciding whether conduct justifies disciplinary action

Staff should be treated fairly. That doesn't mean that you have to treat staff the same unless and until it comes to disciplinary action. Then, a consistent approach is required. It is likely to cause disharmony if you decide to throw the rule book at one member of staff whilst ignoring the misconduct of another.

Make sure you are communicating the message of policy compliance to everyone. Pro-active reminders that there are policies to be followed helps employees know that there will not be exceptions or favourites.

You may be able to justify applying formal disciplinary procedures because that employee is proving more 'troublesome' than others. If that is the case, then it is important to bring up the history of conduct in the disciplinary meeting and to define the troublesome historical behaviour of the employee.

Consistency in the process

In the disciplinary process, employees are entitled to procedural rights. These may be unwritten but will include:

- The right to know the allegations
- The right to state their case
- The right to bring a companion to the formal disciplinary meeting and
- The right of appeal.

Allowing one employee the option to bring their partner along to a disciplinary meeting but refusing another is inconsistent. This inconsistency is more damaging where

the employee has the right to bring an unfair dismissal claim because the procedure of dismissal tends to be scrutinised closely by tribunals.

A notable exception to the rule of equal treatment is disability where you are not only able to treat disabled workers more favourably but required to do so where you can lessen the impact of their disability.

A common mistake is suspending one staff member and not the other, where both could be at fault such as in an allegation of bullying or harassment. Make sure that any change in role or location, during investigation stage, is not imposed on just one employee and not the other, unless there is good reason.

Eliminating inconsistency in the process is best achieved by either following your own disciplinary written procedure or if you don't have one, adopting the ACAS Disciplinary Code as a guide. The ACAS Code is available online and is regularly updated to account for matters such as COVID-19. If you say you are following a written policy make sure you are familiar with it, as again any divergence from its terms is likely to be picked up. Note that in Northern Ireland you have to follow the statutory procedure and guidance.

Disciplinary sanction – dismissing one guilty employee but not another

There is a temptation to just announce the result of a disciplinary briefly especially if it is dismissal. It is important to go into some detail over the reasons why you believe that dismissal is justified, perhaps drawing attention to the history of the employee's conduct and the seriousness of the conduct.

If an employee is dismissed then it is not unusual for them to say that others who did the same have not been dismissed.

It is important to offer an appeal from dismissal if the employee has been employed for two years and can bring an unfair dismissal complaint. You can then deal with the unfair treatment argument at appeal and explain why one was dismissed and the other not. Or if you do not offer an appeal, make sure that you answer the unfairness allegation if it is raised in correspondence.

Normally it will be enough for an employer to show that the misconduct was materially different between two present or previous cases or committed in differing circumstances or that the employee had a different conduct record. Unfair dismissal

law supports this approach, the courts won't interfere with an employer's decision as long as they relied on facts supporting a material difference in the two cases and the dismissal decision lies within a band of reasonable responses.

In one legal case, *MBNA v Jones* (2015), the Employment Appeal Tribunal found that the disparity in dismissing one employee but not another was justified. The employer had relied on the fact that although both had been fighting each other, one of them had started the fight. The EAT said that misconduct of both has to be the same to raise the consistency rule.

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A different decision was reached in *Westlake v ZSL London Zoo* (2015) where again two employees were involved in a serious fight, one suffering a facial injury. Westlake was dismissed but the other employee got a final warning. The tribunal ruled that the employer had not justified the difference in treatment. That said, despite the employee win, she didn't receive any compensation because the tribunal held that she had significantly contributed to her dismissal.

What is the best advice when contemplating dismissal of two staff involved in serious and similar misconduct? Seek professional advice, but you might find that you are advised to dismiss both employees unless you can clearly show that a difference in treatment is justified.

The exception – treating self-employed staff differently from employees

The position of the self-employed, most dentists and some hygienists, is exceptional when it comes to misconduct. You should not apply a disciplinary procedure to them

Further information

- the ACAS Disciplinary Code: www.acas.org.uk/acas-guide-to-discipline-and-grievances-at-work
- Northern Ireland Statutory and Procedure Guide: <https://www.nidirect.gov.uk/articles/disciplinary-procedures>

and it is quite acceptable to give a brief reason for termination. This approach protects the self-employed status of associates by ensuring you don't treat them as employees. To that extent, the approach isn't consistent in comparison with employees. At the same time, you don't have to lower your standards and stop applying policies or professional codes of conduct. Indeed, most associate contracts are fully replete with conduct requirements.

If an associate is not complying with important procedures, you may need to warn them informally because that is the only 'sanction' available before ending their contracts. There is no scope for formal warnings or disciplinary meetings. Suspension is necessary if you need a self-employed person off the premises pending investigation and ideally you need a contract that gives you the right to suspend.

That said consistency is still important when dealing with your self-employed staff as they might well argue the protection of anti-discrimination laws. These laws protect against gender, race, sexuality, age and disability discrimination. They outlaw 'unfavourable treatment' often based on drawing comparisons between two people. Discrimination claims often rely on an employer's inconsistencies.

Consistent treatment is desirable when managing a team and especially for dental practices which have small staff teams. When it comes to dismissals it becomes even more important. Practice owners should make sure that they are acting consistently when dismissing or giving final warnings for misconduct. ♦

<https://doi.org/10.1038/s41404-021-0806-4>