Following a fair process during disciplinary situations

In cases of repeated misconduct, serious misconduct or ongoing poor performance, a disciplinary process may be necessary. To be lawful, disciplinary action needs to meet two key criteria:

- There needs to be a good reason for the action
- You need to follow a fair process in arriving at your decision.

At all times, you are required to act in good faith, making sure that your actions are that of a fair and reasonable employer. What’s ‘fair and reasonable’ depends on the situation. Please seek advice from your employer’s association or lawyer; they can provide expert assistance on your particular case.

Your employee has the right to lodge a personal grievance if they feel a dismissal was unjustified or any other action (e.g. a warning or suspension) was unfair and caused them disadvantage.

Good reason:

The employer needs to have a genuine work-related reason for the disciplinary action and must genuinely and reasonably believe that such action is necessary and appropriate given the circumstances. This means you cannot initiate disciplinary action for one-off minor or trivial offences. Common ‘good reasons’ are repeated misconduct, serious misconduct or ongoing performance concerns.

It’s good practice to provide examples of misconduct and serious misconduct in an employment agreement or workplace code of conduct.
Fair process:

The following are key principles to follow in any disciplinary process. These principles have been well established through the courts and are what’s expected of a fair and reasonable employer.

- Being open and honest in your communications. This includes:
  - Providing the employee with full information. They must be given access to any information the employer is relying on when making their decision e.g. documents;
  - Warning them about the potential outcomes of a disciplinary process so they understand the seriousness of the situation.
- Providing employees with opportunity to give their side of the story. This includes providing employees with time to consider relevant information and prepare a response;
- Ensuring the employee has been given the opportunity to address the person making decisions;
- Raising the issue promptly after the event;
- Advising the employee that they can bring along representation; (e.g. a union delegate, lawyer or friend)
- Conducting a full and fair investigation;
  - Going into meetings with an open mind;
  - Listening carefully to the employee’s explanation;
  - Taking all relevant matters into account;
  - Ensuring any decisions are based on reasonable proof. The more serious the matter and the more serious the possible consequences, the stronger the amount of reasonable proof required;
  - Not pre-determining the outcome or rushing into decisions and
  - Considering the alternatives available. (e.g. training, coaching, supervision)
- Being fair and even-handed – treating employees similarly and
- Reaching a decision only after careful consideration of the problem at hand, the employee’s side of the story, all relevant information and the alternatives available