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## Edel Mary Rose Attard vs. Yellow Pages (Malta) Ltd (23/11/2017, Industrial Tribunal)

- 2 Gozitan employees worked in Gozo focusing on the Gozitan market
- They were later informed that only 1 of them was needed in Gozo, and had to decide who would move to Malta or whether they could devise a 6/12 month roster basis between them
- Before giving an answer, Attard was dismissed for poor performance
- Her performance had actually been declining (failure to reach targets) but it arose that this was because the Gozitan market itself was declining, and not Attard's performance
- Compensation: €5,000



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## Baran Duman vs. Tipbet (15/02/2021, Industrial Tribunal)

- Duman was dismissed on the basis of poor performance
- The company claimed that two complaints were made against him regarding his enhanced due diligence
- The company said that these arrived at the MGA and could have resulted in loss of its license – this was found to be untrue
- The Tribunal specifically noted that **no disciplinary procedure** was carried out
- The employee was awarded €7,000 in compensation



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## Baran Duman vs. Tipbet (15/02/2021, Industrial Tribunal)

*“min jimpjega, u b’mod specjali f’settur sensitiv...ghandu kull dritt li jittermina l-impjieg ta’ minn jikser ir-regolamenti tal-kumpanija, izda jekk sar xoghol b’aktar reqqezza milli suppost, u li dan ma irrizultax f’xi danni negattivi ghas-socjeta’ intimata, l-allegat ksur tar-regolamenti ma jistax jigi meqjus bhala nuqqas doluz”*

*employers, especially in sensitive industries...have the right to terminate the employment of those who violate company regulations, but if the work was done with more diligence than expected, and did not result in damage to the company, the alleged violation cannot be considered as wilful misconduct*



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## Mark Trapani vs. Sara Grech Ltd (24/09/2019, Industrial Tribunal)

- Trapani was given a demotion and had his salary cut by €13,000 for alleged lack of leadership and other negative feedback on his performance citing the following reasons:
  - Failure to work overtime
  - Lack of team drive
  - Making a costly mistake on a company banner
- After resigning, the company reinstated his original role and salary (following discussions with Trapani's lawyer) but he did not wish to return due to loss of trust



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## Mark Trapani vs. Sara Grech Ltd (24/09/2019, Industrial Tribunal)

- The Tribunal considered that:
  - The employer did not allow the applicant to defend himself in light of the alleged negative feedback on his performance
  - The employee had never been notified about poor performance
  - His payslips always contained an appraisal on his performance
- The tribunal also noted that the company was only interested in regulating its position following Trapani's resignation
- Trapani was awarded €7,500



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## Case Study

Jeremy is a sales assistant at ABC Electronics, a well-known electronics store in Malta. His main role includes him covering the sales till, assisting customers on the shopfloor and also managing and stocking the shelves and displays.

A few days ago, the HR manager received an email from Jeremy's sales manager. It contained Jeremy's last performance review, where it was concluded that he did not reach his sales target for 2020. It also contained 2 written customer complaints against his tense attitude with them from February and July 2020.



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What needs to be done?  
What questions will be asked?  
What action will you take?



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## What did ABC Electronics do?

From: HR <n.magro@abcelectronics.com.mt>  
To: Jeremy Bugeja <jer.ilbugejz@gmail.com>  
Date: 16<sup>th</sup> June 2021

Jeremy,

I've spoken with your manager Dario, who informed me that you have failed to reach your KPI targets for the year 2020, and we have also received several complaints from clients regarding your disappointing behaviour. This is unacceptable at our store and cannot be tolerated any further. Therefore, your employment is hereby being terminated with immediate effect. You will be paid the rest of your salary at the end of the month.

Regards,

Nikolai  
HR Manager



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## Investigating Performance Issues

What would you need to look out for?

- The root of the issue
- An explanation/justification
- A plan of action to ensure that the issue is addressed and/or does not happen again

You may choose to record the discussion in writing, and also to provide that it will remain on the employee's record for a few months.



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# What to consider in taking disciplinary action?

If it is decided that formal proceedings are to be applied, several points must be considered at the outset:

- Disciplinary procedure
- Investigations
- Charges to be issued
- Board of discipline
- External parties as investigators/board of discipline



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# Disciplinary Board

What is the purpose and role of the disciplinary board (specifically in performance cases)?

- To set out the charges to be issued to the employee
- To analyse the findings of investigations, PIPs, any performance reports etc.
- To permit the employee the opportunity to defend oneself and explain his/her side of the story (for example, if there is a justifiable excuse relating to issues arising outside of work)
- To take a decision on the basis of all this information



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## Disciplinary Procedure

- It is crucial to follow your Disciplinary Procedure where one exists
- Failure to follow the established procedure may result in a significant legal hurdle, as it may be argued that the certainty provided to the employee via the set procedure was denied, therefore not allowing the employee a fair hearing
- Where a procedure exists, ensure that it had been previously disseminated to all employees
- Together with a hearing invite, the employee should be provided with a copy of the procedure to ensure that s/he is aware of the procedure and how it will work



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## Disciplinary Procedure

Why is a meticulously drafted Disciplinary Procedure essential?

- The law does not provide for a manner in which fair and just disciplinary proceedings must be conducted
- Provides clarity and consistency
- Ensures fairness and adequate opportunity for the employee to defend oneself
- Assures a sense of certainty in case of a claim before the Industrial Tribunal



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## Charges

- Any formal disciplinary action following an investigation should be preceded by the issuing of a charge and invitation letter
- This letter should set out:
  - The charges issued against the employee
  - Any previous warnings/disciplinary issues which were also considered
  - A date and time for a disciplinary hearing (which should be within no more than a few days' time)
  - Potential consequences (disciplinary action)



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## Disciplinary Hearings

- The aim of disciplinary hearings is not to impose a punishment, but to allow the employee to divulge his side of the story and defend himself in the face of the accusations brought against him
- Before the hearing, the employee should be allowed adequate time to prepare his/her defence
- With this in mind, reasonable notice must be given, which is usually 2-4 days ahead



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## Disciplinary Hearings

- Hearings should preferably be conducted during working hours
- It may be advisable to conduct the hearing at a location away from the workplace, depending on the matter at hand
- The employer should be compliant, to an extent where one's own position is not prejudiced. The employee should be furnished with all necessary information regarding the allegations made against him/her
- Witnesses (such as managers etc) may be called up again, even at the employee's request, for the purposes of cross examination



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## Right to be Accompanied

- Check your **Disciplinary Procedure** or any contracts or collective agreements
- Often, employees are allowed a colleague/trade union representative to accompany them to a hearing
- The employee may also request that a lawyer accompanies them. You may opt to decline so as to not impose a litigious ambience – however if the employee insists on bringing a lawyer, it is recommended that the employer has its own lawyer present.



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## Record-Keeping

- The keeping of minutes of a disciplinary hearing is important, to retain a record of what was said
- Therefore, a person, who may also not be a person sitting on the board itself, may be appointed for the purposes of minute-taking
- Should live minute taking not be possible, a recording of the hearing may be made and minutes taken afterwards, however this must be done immediately and the recording deleted permanently at once



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## Penalties

- Reprimand
- Warning
  - Verbal
  - Written
  - Length of time for which it will remain active
  - Is it the first, second, final?
- Dismissal



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# Unfortunate Consequences

- An employee who does not agree with the manner in which s/he was dismissed may challenge the dismissal before the Industrial Tribunal and claim either re-integration in the workplace, or compensation
- This is why it is crucial that you:
  - Establish a clear and transparent procedure (written)
  - Stick to the established procedure
  - Allow the employee the opportunity to defend oneself



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