A–Z OF EMPLOYING

Discipline & Termination

SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS

This is only a guide. It should not be a substitute for professional advice.

Please seek advice from our AdviceLine Team if you require specific assistance.

Contents

Introduction 3

Disciplinary Procedure 4

- Investigation 4
- Suspension 5
- Disciplinary Meeting 5

Verbal and written warnings 8

Reasons for termination of employment 9

- Serious Misconduct 9
- Misconduct 10
- Performance Management 10
- Probationary Periods 11
- Trial Periods 11
- Abandonment 12
- Incapacity/Long Term Illness 13
- Redundancy 14
- Consultation 14
- Selection 14
- Vulnerable Employees 15
- Employees on Parental Leave 15
- Notification 15
- Compensation 15
- Employee Assistance 16
- No Work Permit 16
- Negotiated Exit 17

Personal Grievance Procedure 17

Conclusion 17

Introduction

While employees in New Zealand can terminate their employment at will for no reason, employers must be able to justify their decision to dismiss an employee. Common reasons for terminating an employee's employment include dismissal for misconduct, serious misconduct, redundancy, incapacity, poor performance or abandonment. Besides having a reason for the dismissal, employers must ensure they follow the correct procedure. These procedures exist to ensure that employees are given a fair chance to consult or have an opportunity to put forward information and explanations before an employer makes any decision to dismiss or discipline an employee. Once employers have followed this procedure they are able to make an informed decision as to what action is fair and reasonable in the circumstances.

If employers are unable to justify the termination of their employees, both substantively and procedurally, they open themselves to potential liability for a personal grievance for unjustified dismissal. Potential liability is reduced by ensuring that these procedures are followed. This guide outlines the steps an employer should follow in a situation where an employee may be disciplined or have their employment terminated. However, as every situation is unique, we recommend that should a possible dismissal or disciplinary situation occur in your workplace, further advice should be sought from the AdviceLine team or your Business Central Employment Relations Consultant.

Disciplinary Procedure

In any situation where there is a chance of disciplinary action or a possibility that an employee's employment may be terminated, employers should ensure that the correct procedure is followed, taking into account the requirements of procedural fairness.Before dismissing or taking action against an employee, employers should ensure they:

Before dismissing or taking action against an employee, employers should ensure they:

- sufficiently investigate the allegations against the employee
- raise the concerns with the employee
- give the employee a reasonable opportunity to respond to the employer's concerns
- genuinely consider the employee's explanation (if any) in relation to the allegations against the employee

Failure to observe any of these requirements can generally be expected to render a dismissal unjustified. These are minimum requirements under the Employment Relations Act 2000. Other requirements which are also discussed in this guide would need to be complied with, such as offering the right to representation and giving adequate notice of any investigation or disciplinary meeting. It is also recommended that employers give the employee an opportunity to comment on the proposed outcome before a final decision is reached. For example if a finding on the facts has been made by the employer and they have made a preliminary view of the appropriate penalty, before a final decision is made the employee should be given an opportunity to comment on the proposed outcome.

Investigation

As soon as a possible disciplinary situation arises, an employer must act. It is not open to an employer once the situation has come to their attention to wait until a later stage to discipline the employee, unless they can justify the delay. An employer may be seen to have condoned the employee's behaviour by not taking action straight away. If information comes to the employer's attention and they are able to justify the delay in dealing with the situation (eg if they were going to be away from work), this will be acceptable, however if possible an employer should inform the employee that the situation will be dealt with on their return.

The first part of the discipline process is to undertake a full and fair investigation. An employer should inform the employee before starting the investigation that it is going to take place and that they will be given an opportunity to provide an explanation at a disciplinary meeting. A full and fair investigation may involve checking facts, interviewing witnesses (if any) and reviewing the employee's personnel file.

It is not recommended to have a preliminary fact finding discussion with the employee concerned where the allegation may constitute serious misconduct. Information in this situation should only be obtained from the employee in a formal disciplinary meeting. If a preliminary fact-finding or counselling exercise with the employee is necessary as part of the investigation process in a misconduct situation, it should never itself assume a disciplinary character. If a preliminary investigation suggests that disciplinary action may be required, further information should not be sought from the employee at that stage as this should be the subject of a subsequent interview, with the employee offered the right to representation to ensure that procedural fairness requirements are met.

At the conclusion of an investigation the employer should decide whether it is appropriate to proceed to a disciplinary meeting or, alternatively it may be appropriate at this stage just to counsel the employee or reprimand them. The employer should also ensure the treatment of employees is consistent and be aware that their action or inaction may be setting a precedent for how issues of this type are to be dealt with in the future.

Suspension

In some circumstances, the employer may need to insist that an employee cease working while an investigation is carried out. To be able to suspend an employee, the right to suspend must be expressed in the employee's employment agreement or disciplinary procedures. However, an employer may be able to suspend an employee without a contractual right in limited circumstances (for example, for health and safety reasons).

The decision to suspend should only be taken after the employee has been consulted with on the issue of suspension. The employee should be given an opportunity to comment on the proposed suspension and have those comments considered before a decision is made. Any period of suspension should be for the minimum duration necessary to conduct a proper investigation, and suspension should be used only where there is no other feasible alternative. Suspension could be considered where the allegation directly impinges on the employee's ability to carry out their duties. It should be used sparingly, and it is strongly advised to obtain further advice on the issue. Unless the employment agreement provides specifically for suspension without pay, suspension should be on ordinary pay.

Disciplinary Meeting

Notice

If as a result of a full and fair investigation there is a need to hold a disciplinary meeting, the employer should inform the employee in writing that they will be required to attend this meeting. A disciplinary meeting letter should also state the allegation, possible consequences of the meeting (eg a warning or dismissal), and the right to bring a representative.

Sample Letter

Dear [Employee's Name]

You are required to attend a disciplinary meeting on [give at least two days' notice where possible]. The purpose of this meeting is to provide you with an opportunity to explain the allegation that you [give details of the allegation to be discussed].

As per our house rules/disciplinary procedures [type of misconduct eg failure to follow a lawful and reasonable instruction] is considered to be [misconduct/serious misconduct]. Therefore it is possible that if the allegation is established against you [you may be issued with a warning/or you may be dismissed instantly].

You have the right to bring a representative to this meeting. Attached are copies of relevant information.

Yours sincerely [Employer]

Providing Information

Where possible, an employer should provide the employee with copies of the relevant complaints and information before the meeting so that the employee knows what will be discussed. The purpose of providing information is to give the employee an opportunity to properly consider the allegation against them before the meeting. It is not the purpose of a disciplinary meeting to surprise the employee at the last minute with information so as to catch them out. Should information come to light which the employee has not had time to consider, it may be appropriate to adjourn the meeting. With the employee's authority a representative can request information from the employer.

Complaints

Employers cannot take any disciplinary action against an employee where a complaint has been made anonymously. An employer is only able to take action where the person making a complaint is prepared to have their identity and a copy of the complaint made available to the employee concerned. Employers should ensure they have the complainant's authority to release that information before doing so.

Pre-determination

The purpose of a disciplinary meeting is to provide an employee with the opportunity to have their explanation considered before a decision is made. Employers should not have made up their mind on the outcome before the meeting. Warning or dismissal letters should therefore never be written out before the meeting.

Meeting

The employer should also have a witness with them at the meeting taking notes. It is important that the person who is making the decision about what disciplinary action to take is the person who conducts the meeting and that this is not delegated to someone else. The employer should be seeking the employee's response to the simple question, "Why?" They should be encouraged to discuss exactly what the problem is from a personal perspective. No judgments should be made, nor opinions formed, until the matter has been thoroughly explored.

An employer should not be in a rush to conclude the disciplinary process and should be prepared to investigate further if necessary. The meeting can be adjourned if the employee's explanation gives rise to the need to investigate further. The employer should then resume the disciplinary meeting to give the employee an opportunity to comment on the outcome of the further investigation before making a decision.

Decision

After all the issues have been discussed and the employee has been given an opportunity to provide an explanation at the disciplinary meeting, the employer should adjourn the meeting while the matter is given objective consideration. If the employer has concluded that the allegation(s) have been made out, they should inform the employee of what action is being considered and give them an opportunity to comment. The employer may have to adjourn the meeting again to consider anything the employee has raised before making a final decision.

The employer should also consider whether and to what extent the company management may have contributed to the situation through, for example, lack of training, unclear instructions, failure to act earlier, lack of house rules or a code of conduct, and standards and expectations not clearly defined. The employer should also consider any extenuating or mitigating circumstances that may be present. Possible employer action could include the following:

- Further training;
- Counselling;
- Re-allocation of duties;
- Further monitoring;
- Warning;
- Demotion (only if specifically allowed in the employee's agreement or as a last resort before dismissal);
- Suspension;
- Dismissal.

Factors to be considered when deciding on the correct action to take include:

- Employee's age (younger employees are less likely to be aware of implied conditions of employment);
- Length of service;
- Whether the employee was adequately trained;
- Employee's disciplinary record;
- Employee's work record with the organisation;
- Communication of the standards expected and the consequences of breaching those standards;
- Job responsibility;
- Extenuating circumstances;
- Employer policy and previous history – if it is a policy to take certain actions, or there is a history of certain actions being taken, these precedents should be adhered to;
- Any mitigating factors;
- Employee's responses – whether the employee undertook to improve in future or remedy the action;
- Whether the standard required was reasonable and lawful;
- Whether the employee's actions were the result of ignorance or deliberate disobedience.

Should an employee challenge the decision, the employer will have to be able to justify that their decision was one that a reasonable employer could have made in all the circumstances. In a situation involving serious misconduct, an employer will not only have to justify that the conduct itself was capable of being regarded as serious misconduct and warranted instant dismissal, but also that the action taken, and how the employer acted was what a fair and reasonable employer could have done in the circumstances, taking into consideration the factors listed above. This is required by the new test of justification in section 103A of the Employment Relations Act 2000.

The Authority or Court may also consider any other factors it thinks appropriate. Case law under the new test has identified a number of other factors in the particular circumstances. Although the Employment Court has confirmed that there may now be a wider range of reasonable responses open to an employer, that should not alter the careful process employers are advised to follow. The Courts have provided some useful guidance for employers when investigating employee misconduct. See the A-Z employers' guide on Discipline for further information.

When advising the employee of the decision, reference to their explanations could be made. Where appropriate a time frame for improvement might be given. The employee should be told clearly what the consequence of any further misconduct or poor performance will be.

Verbal and written warnings

Unless the matter is serious enough to warrant instant dismissal, employees are entitled to be warned about disciplinary breaches and told of the manner in which their performance or conduct must improve.

Warnings may either be verbal or written. The procedural requirements for a verbal warning are the same as for a written warning. The employer must still conduct a full and fair investigation, hold a disciplinary meeting, and consider the employee's explanation before making a decision to issue a verbal warning. Verbal warnings should also be recorded in writing.

Each warning is procedurally the same but the requirement for procedural fairness increases with each more serious warning. Employers should follow their disciplinary procedures to ascertain how many warnings should be given before dismissal. A three-warning disciplinary process is commonly used, although there may be situations where the circumstances may call for one final warning due to the seriousness of the misconduct. Where the employer's disciplinary process makes provision for this, warnings do not necessarily have to relate to similar incidents of misconduct. An expiry date may be placed on the warning. However, without an expiry date, the warning will remain valid for as long as is reasonable in the circumstances. Having no formal expiry date may give an employer more flexibility to rely on prior warnings should the employee subsequently re-offend.

Example warning procedure:

- 1st offence - 1st warning
- 2nd offence - 2nd warning
- 3rd offence - 3rd and final warning
- 4th offence - dismissal on notice

The warning (whether verbal or written) should include:

- A statement of the specific problem;
- The house rule or company standard breached;
- Reference to the meeting and the employee's explanation;
- Reference to prior warnings (if appropriate);
- The corrective action required (if any);
- The time period the action must be corrected within where appropriate;
- The company's decision (eg "this is a final warning");
- The results of any further violations (eg "shall result in dismissal/a further warning").

Where dismissal results following a series of warnings, the employee should be given notice according to the relevant employment agreement, which generally will allow for payment in lieu of notice. The employee should receive final pay, including holiday pay owing, on the day of leaving the employer's premises.

Reasons for termination of employment

Serious Misconduct

Whether the type of misconduct alleged will be serious enough to warrant instant dismissal is a question of degree in each individual case. Acts of serious misconduct are those which are inconsistent with the due and faithful discharge by an employee of their duties of service, such as (but not limited to) a failure to follow a lawful and reasonable instruction, dishonesty, inability to carry out work due to consumption of non-prescription drugs or alcohol, breach of confidentiality, insubordination, insolence, violence, harassment, or breach of implied duties such as fidelity and trust.

In general, the misconduct should be such as to interfere with and prejudice the safe and proper conduct of the employer's business, or be serious enough to destroy or deeply impair the basic confidence and trust essential to an employment relationship. The instance of serious misconduct must be serious enough to warrant instant dismissal on its own, therefore an employer should not rely on previous warnings to justify instant dismissal.

Where the offence is serious enough to warrant instant dismissal (that is, without warnings or notice) the employee should be paid up to the day of dismissal, including any holiday pay owed. "Instant dismissal" does not mean that the dismissal process should take place quickly, but simply that the employee is dismissed without notice due to the seriousness of the misconduct.

Misconduct

Misconduct is behaviour by an employee that is not serious enough to warrant dismissal. Employees can be issued with verbal or written warnings for misconduct (see information on warnings above). Examples of types of behaviour which could be considered to be misconduct are:

- Poor time keeping, including arriving late for work, or from lunch and/or tea breaks;
- Being discourteous to other employees, customers or clients;
- Aggressive/argumentative behaviour;
- Smoking in a non-smoking area;
- Failure to advise the employer as soon as possible that they will be absent from work on sick leave;
- Using abusive language that may cause offence to another person, while at the company's place of work;
- Leaving an assigned place of work without permission.

Performance Management

When there is a need to implement formal disciplinary action due to an employee's poor performance, the employer will have to follow further procedural requirements. Before holding a disciplinary meeting, an employer should first have a meeting with the employee in which they express their dissatisfaction with the employee's performance. The employer should outline their expectations and explore whether there is a need for further training and support. Objective targets and a reasonable timeframe in which the employee can meet those targets should be set. The timeframe set for the employee to improve must be reasonable to meet the desired targets. What is reasonable will depend on what the targets are. The timeframe should be long enough to give the employee a real opportunity to improve and meet the desired objectives. At this stage employees should be informed that a failure to meet the targets will result in a warning for poor performance.

Following the expiry of the time the employee is given to improve, the employer should assess whether the employee has achieved or substantially achieved what was expected, by measuring the employee's performance against the objective targets that have been set. If the employee has failed to improve, the employer should then hold a disciplinary meeting and consider the employee's explanation before deciding whether to issue a warning for poor performance. The employer would then re-set the targets and follow the same procedure outlined above, continuing with the progressive warning system.

Before making the final decision to dismiss an employee for poor performance, the employer should consider their responsibility for the situation and any favourable aspects of the employee's service record, and should have exhausted all possible remedial steps, including training, counselling, and the exploration of redeployment. Dismissal for poor performance is with notice as stated in the employment agreement.

Probationary Periods

All probationary periods should be recorded in writing in an employee's employment agreement to be valid. The existence of a probationary period does not give the employer the right of automatic dismissal should the employee not meet the standards expected. An employer must still follow the normal misconduct or performance management procedures in place during a probationary period.

During a probationary period an employer should advise the employee of the standards expected and be ready to point out shortcomings and advise the employee what improvements are necessary. Employees should be warned of the likely consequences should they not meet performance expectations. All the necessary training and support for the probationary period to be a success should be provided. Probationary periods may be extended if this is allowed for in the employee's employment agreement.

Trial Periods

Trial periods allow an employer and employee to agree to a period of up to 90 days during which the employer may give notice of termination without the ability for an employee to raise a personal grievance for unjustified dismissal.

All employers can include a trial period clause in employment agreements provided the employer has never employed the employee before. They must be agreed as a term within written employment agreements. All employment agreements must be mutually agreed and there are obligations to negotiate terms and conditions in good faith. It is possible for an employer to have two notice periods; a shorter notice period relating to notice under the trial period and another and maybe longer notice period to apply once the trial is over. The notice periods must be reasonable and agreed by both parties.

The good faith obligation to be responsive and communicative applies during a trial period. Therefore it is best practice to meet with employees regularly and raise and discuss any concerns. If there are performance problems it is important to advise the employee of this and give them a reasonable opportunity to improve before considering termination.

If the employer wants to terminate, it is best practice to invite the employee to a formal meeting, provide an opportunity to bring a support person and advise them that the meeting could lead to the termination of their employment. Please note an obligation to consult and follow a full process remains if an employee on a trial period has their employment at risk due to a reason not associated with the trial period, such as a redundancy or contracting out situation. It is important to remember that although an employee cannot raise a personal grievance for unjustified dismissal, they can raise a grievance on the basis of one of the other grounds in the Employment Relations Act 2000 including disadvantage. As the law requires an employer to actually give notice under a trial period, it is important not to pay in lieu of notice. However a trial period clause may provide that an employee does not have to attend work during the notice period but will be paid their usual pay during the notice period or at the end of it.

The Courts have so far interpreted the trial period law very strictly and the cases have highlighted the importance of:

- bringing the inclusion of a trial period to the attention of a prospective employee;
- providing the prospective employee with the written agreement including the trial period clause when the job offer is made;
- giving the employee reasonable opportunity to seek advice;
- and ensuring a new employee signs the employment agreement before the first day of employment.

The Courts have also interpreted the law in a way which means a trial period clause needs to be very carefully drafted in order for employers to rely on it. Before including a trial period clause in a new employment agreement contact AdviceLine for our sample clause. It is also available on our website.

See the A-Z employers' guide on Trial and Probationary Periods for further information.

Criminal Charges

Although employers are tempted to go directly to the Police when they discover possible instances of employee theft, an employer should, if possible, conduct their disciplinary procedure to ascertain the employee's breach, and take disciplinary action before referring the matter to the Police. This is because the employee's right to silence in relation to criminal charges may interfere with the employer's ability to conduct a disciplinary process.

Furthermore an employer should discipline the employee based on the employee's breach of their terms of employment – for example, unauthorised possession of company property, rather than theft, as dismissals which rely on criminal charges for justification may fail if those charges do not result in a conviction or are withdrawn by the Police.

Abandonment

Some employment agreements contain clauses covering abandonment of employment. Such a clause will provide that the employee is deemed to have abandoned his or her employment after absence without leave for the number of days specified in the clause. The key word is "abandonment" – the clause will not cover situations of authorised leave without pay, sickness, accident or resignation.

Before an abandonment clause is invoked, an employer should make all reasonable attempts to contact the employee, and should log these attempts. If attempts to contact the employee by phone have been unsuccessful, the employer should write to the employee at their last known address expressing concern at their absence and lack of notification, and asking them to get in contact urgently. The employer should give the employee a deadline in which to get in contact and state that if they fail to do so, the employer may have no choice but to assume that the employee has abandoned their employment. If there is still no contact, the employer should write formally advising the employee that it is considered that they have abandoned or terminated their employment without notice, and advise final pay arrangements.

Should the employee get in contact with the employer after their employment has been terminated for abandonment, the employer should at least listen to the employee's explanation in good faith. Until such time as the employee's employment is formally terminated or the employee hands in their resignation, the employee is still employed. Therefore should the employee return to work before their employment is terminated for abandonment, the employer should deal with the issue through the normal disciplinary procedures for "unauthorised absence".

Incapacity/Long Term Illness

Absence due to long term illness or injury will not in itself terminate the employment relationship. When an employee is sick or injured for a long period of time, the employer should stay in contact with the employee to ascertain how they are and when they might be expected to return to work. Unless there is reliable information to suggest that the employee will never be able to return to work, the employee should be given a reasonable opportunity to recover before their on-going employment with the company is reassessed. What is reasonable will depend on the individual circumstances of the case. However as an indication, in a small to medium sized enterprise, it would be reasonable for an employer to review the situation after six to eight weeks of absence. In a larger enterprise, a review at perhaps twelve weeks would be reasonable.

A review of the employee's employment involves consulting with the employee and obtaining information about their true medical condition before any decision to dismiss the employee is made. The employee should be informed that the reason for obtaining medical information is to assess the employee's on-going employment. Discussions with the employee (and their representative) should cover matters such as:

- The present state of the employee's health;
- The future prognosis;
- The estimated period of time for which the employee will be absent from the date of the interview;
- The employer's position with respect to the need to replace, and if necessary, an indication from the employer that if the employee is unable to return to work within say a four week period, either:
    - The situation will be reviewed again, at which time the possibility of finding a replacement will be considered; or
    - The employer will not be able to keep the position open any longer and will have to terminate the contract.

Any decision to terminate the employee's employment must be based on a business need to replace the employee due to operational difficulties as a result of their absence. The employer should consider whether it is reasonable to accommodate the employee's absence by taking on temporary staff, and any decision to terminate the employee's employment should be reasonable in light of the individual circumstances. The reason for the termination should be stated as the inability of the employee to fulfil the requirements of their role, and not their illness or injury, and dismissal should be on notice.

Redundancy

The definition of redundancy, and the question of when redundancy compensation must be paid, has in the past proved controversial. While there is no one single definition, redundancy can generally be summarised as a situation where an employer has a supply of labour that is surplus to requirements. Redundancy may occur because there is less work coming into the company, or because there is a need for cost saving, relocation, introduction of new technology, or sale and transfer of a business.

Where an employee has been made redundant they have been dismissed, and as with any other termination of employment, the employer must justify the dismissal on both substantive and procedural grounds. In relation to the substantive reasons for the redundancy, the employer must be able to show that the redundancy is genuine (ie that the employee's position is superfluous to the needs of the company). Therefore if a position is made redundant, the employer would not replace the employee. Where the employee's position is restructured, there should be a substantial difference between the two positions, and the employer should consider whether the existing employee is suitable for the new role, or could reasonably be trained to perform the role. Redundancy is considered to be a last option and should not be used as a reason to justify the dismissal of an employee for poor performance or misconduct.

As well as justifying the genuineness of the redundancy, an employer is required to conduct the redundancy in a procedurally fair manner. Procedural fairness in a redundancy situation will require the employer to consult with the employee before the decision to make the position redundant is made, consult on and have fair selection criteria for redundancy if necessary, give employees a reasonable notice period, and consider whether compensation is reasonable.

Consultation

The requirement to consult with employees about a possible redundancy situation involves keeping employees informed about issues that arise that may affect their employment. Consultation should not be a mere formality, and employees should be given a reasonable opportunity to express their views and have them considered. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Alternatively, in a situation where an employer is unable to advise employees about the sale of a business until the decision has already been made, the consultation process will involve seeking the employees' views as to how the sale or transfer will be implemented, and advising employees about the negotiation process in regards to their on-going employment, or the likelihood of redundancy.

Selection

In a situation where there are redundancies within a group of employees employed in the same position, the employer will need to adopt selection criteria to ascertain who will be made redundant. The employer may, in terms of maintaining an efficient workforce, include employees' skills and performance in the selection criteria, and also looking at the traditional "last on first off" criteria. It is essential before selecting employees to be made redundant to check the employment agreement, since this may govern the selection methods.

Employees should be consulted with regarding the proposed selection criteria, and should they later be selected for redundancy, they should be given a chance to comment on their selection before the decision to make them redundant is made. Good faith requires the employer to provide affected employees with access to information relevant to the continuation of the employee's employment, and about the decision. Employers are also required to provide employees with an opportunity to comment on the information before any decision is made. An employer does not have to disclose certain types of confidential information, but an employer must not refuse to provide access to information merely because the information is confidential.

See the A-Z employers' guide on Restructuring and Redundancy for further information.

A final consideration before an employee is selected for redundancy should be whether they can be redeployed within the company.

Vulnerable Employees

Specified groups of employees in Schedule 1A of the Employment Relations Act will be entitled to elect to transfer to the new employer in a situation where the company is restructured (which includes contracting out or contracting in positions), if the new employer has fewer than 20 employees. These employees are commonly referred to as 'vulnerable' employees and are those who provide caretaking, laundry services, and orderly services in specified sectors, and all employees working for cleaning service businesses or food catering firms. The affected employee may choose to transfer to the new employer on the same terms and conditions of employment in the event of restructure. If the new employer makes the employees electing to transfer redundant they will be entitled to redundancy compensation. The redundancy will still have to be genuine, therefore a new employer will be unable to merely negotiate redundancy compensation and then hire new staff to fill the same positions.

Employees on Parental Leave

A higher threshold of justification will apply in cases where employees on parental leave are being made redundant. In that situation an employer's duty to consult will involve making sure the employee is completely informed and up to date on the issues concerned so as to be able to provide feedback on the proposed redundancy. An employer will also have to be satisfied that there is no prospect of being able to appoint the employee to a position which is vacant and substantially similar to the position of the employee at the beginning of their parental leave.

Notification

All employment agreement obligations relating to the notification of redundancy must be met, including providing the correct notice of termination to employees. Employees may be paid in lieu of notice if there is a contractual right to do so, or if they agree.

Compensation

There is no legal obligation to provide redundancy compensation to employees (other than in the case of 'vulnerable' employees as discussed above). However, there is a requirement to consult with employees when business changes are contemplated. Employment agreements must also contain an employment protection provision outlining the process by which employers will negotiate with the new owners in regards to the on-going employment of employees, and setting out what entitlements, if any, are available. Employers should ascertain whether they are contractually obliged to pay redundancy compensation. Employers should consider whether it is reasonable to offer compensation if there is no contractual obligation.

Employee Assistance

An employer will need to consider the impact of their decision to make a position redundant on the employee concerned, and where necessary offer assistance to employees to adjust to the change. Employers should also consider allowing affected employees time off during their notice period (if they are going to be required to work) in which to attend job interviews.

No Work Permit

It is an offence under the Immigration Act 2009 for an employer to knowingly employ or allow the continued employment of any employee who is not entitled to work in New Zealand. An employee's work visa should be current as a pending application for residency or a work visa is not sufficient. Employers also have an obligation to check an employee's immigration status to ensure that they have the right to work in New Zealand. This can be checked by viewing the employee's passport or work visa, as the fact that an employee has an IRD number does not mean that they have the right to work in New Zealand. The penalty for an offence under the Immigration Act 2009 may be a fine of up to $100,000, or, imprisonment for a term of up to 7 years, or both. A best practice guide for helping employers check work entitlements, and an online employer enquiry system is available at:

http://www.immigration.govt.nz/visaview

You are obliged to end that employment relationship if you become aware that an employee does not have a legal entitlement to work in New Zealand. If the employment relationship has been defined by terms and conditions set out in a written employment agreement, then you should terminate the relationship as per that agreement, taking particular note of any provisions relating to termination, notice and procedure. The Immigration Act 2009 clarifies that an employer does not commit an offence if they allow the employee to work during the notice period specified in the employment agreement.

The rules of procedural fairness are applicable, so you should not terminate the employment without giving your employee a reasonable opportunity to respond to the situation, and/or rectify their lack of entitlement to work in New Zealand. What is reasonable will be dependent on the circumstances of the unique situation. It is advisable to seek advice if you are unclear on this. If the employment relationship has not been reflected in a written agreement, then you will need to consider in addition to the rules of procedural fairness:

- Reasonable notice; and
- Payment for, or in lieu of, the notice that cannot be worked.

Where the lack of entitlement to work is due to a “procedural oversight” which can be rapidly corrected, you may consider suspending the employee until the matter is rectified. This would not be a recommended course of action unless the correction could be completed within a matter of days, and if the New Zealand Immigration Service could provide assurance of that. Suspension would be on pay.

Negotiated Exit

The parties to an employment relationship can come to a mutual agreement to end the employment relationship. One of the ways in which agreement may be reached is by offering an employee compensation to terminate their employment in return for them waiving any rights they have to raise a personal grievance. Agreements should be recorded in a settlement agreement which is signed as "full and final" by a mediator at the Mediation Service of the Ministry of Business, Innovation and Employment (formerly the Department of Labour). Negotiated exit discussions must occur on a without prejudice basis, and it is highly recommended that an employer seek advice and representation from an Business Central Employment Relations Consultant or Solicitor before commencing this process.

Personal Grievance Procedure

An employee may raise a personal grievance with the employer for unjustified dismissal if an employer terminates an employee's employment without just cause or without following the correct procedure. The employee must raise the grievance with the employer within 90 days of the dismissal. A statement of reasons for the dismissal can be requested from the employer and must be provided within 14 days.

Further advice should be sought before deciding how to respond if an employee has raised a personal grievance. The first step in attempting to resolve a personal grievance is to follow the problem resolution processes contained in the employee's employment agreement. The employer can attempt to resolve the issue with the employee before it is referred to mediation. If a settlement is reached at this stage it may be appropriate for it to be recorded and signed off by a mediator at the Mediation Service.

The problem can be referred to mediation if it is unable to be resolved between the parties. The mediation process is conducted by the Mediation Service and the purpose of mediation is to facilitate the parties reaching an agreement to resolve the grievance. A mediator cannot make a binding decision for the parties unless the parties have given the mediator specific authority to do so on their behalf.

The grievance can be referred to the Employment Relations Authority for resolution if it is not resolved at mediation. The Authority can investigate, establish facts and make determinations about a wide range of employment relationship problems. The Authority will issue a written determination at the conclusion of its investigation and may award costs. The Authority's determination may be challenged in the Employment Court.

Remedies available to an employee include reinstatement, compensation for lost wages, and compensation for hurt and humiliation as a result of being unjustifiably dismissed.

Conclusion

Ensuring that a proper procedure is followed in a situation where an employee is facing the possibility of termination reduces an employer's potential liability in the case where a personal grievance is raised. The employee is also provided with an opportunity to put forward their views and explanations before a decision is made. This allows the employer to make a more informed decision as to what course of action is appropriate in the circumstances. Due to the continual flow of Authority and Court decisions which affect this area of the law, it is always recommended to obtain further advice before any decision to dismiss an employee is made. Therefore this publication should only be used as a guide to outline the main principles to be considered in a situation where an employee's employment may be terminated. Employers should seek advice from Business Central on an individual case by case basis.

Summary

- Act promptly - As soon as the information giving rise to the possible need to invoke the disciplinary process reaches your attention, you must act. An unjustified delay in taking action could be seen as condoning the employee's behaviour.
- Take notes – It is advisable to take notes and diarise the events that occur throughout a disciplinary procedure, should any future decisions be challenged by an employee.
- Inform the employee that you are conducting an investigation - And that they will be given an opportunity to provide an explanation to the allegation at a disciplinary meeting.
- Initial explanation – Only obtain an initial explanation if absolutely necessary to rule out the need for further action, and do not seek too much information from the employee at this stage. Do not seek an initial explanation where the situation involves serious misconduct.
- Investigate – Conduct a full and fair investigation by making all necessary enquiries. For example, talk to people who were involved or who were witnesses to the incident, double check the relevant facts and the employee's personnel file.
- Consider how to proceed – Depending on the circumstances, it may be appropriate at this stage to counsel or reprimand the employee rather than proceeding with a formal disciplinary meeting.
- Read house rules and disciplinary procedures – If the need to hold a disciplinary meeting arises as a result of the investigation, read the house rules and disciplinary procedures contained in either the employee's employment agreement or staff handbook. Employers should always follow their own rules and procedures. This will also help the employer identify the specific allegation and what type of misconduct it is considered to be.
- Give the employee notice of the disciplinary meeting – Inform the employee by letter that they will be required to attend a disciplinary meeting, the allegation that will be discussed at the meeting, the possible consequences of the meeting (eg they could be issued with a warning or dismissed), and that they have the right to bring a representative. Allow a reasonable amount of time for the employee to organise a representative (eg 2 days).
- Give the employee relevant information – Provide the employee with copies of relevant complaints and details of the information to be discussed at the meeting. Employees are entitled to this information so that they can provide an explanation. An employer will not be able to act on an "anonymous" complaint, as they must provide employees with full details about the complaint and who it was made from so they have a fair opportunity to refute the allegations made against them.
- Disciplinary meeting – At the disciplinary meeting the employer should seek the employee's explanation and discuss the issues at hand. The person conducting the meeting should be the person who is going to be making the decision as to what action to take. The employer should also have a witness present taking notes of the meeting.

- No pre-determination – The purpose of a disciplinary meeting is to provide the employee with an opportunity to have their explanation considered before a decision as to what disciplinary action, if any, is necessary. Employers should give the employee's explanation unbiased consideration and should not have pre-determined the outcome of the meeting before it is held. Warning or dismissal letters should never be written out before the meeting.
- Reasonable decision – An employer's decision to take disciplinary action and what disciplinary action to take (eg warning or dismissal), should be a decision a reasonable employer could have made in all the circumstances at the time. Serious misconduct should be serious enough to warrant dismissal, for example, where an employee has breached the trust and confidence essential to maintain the employment relationship. The employer should be satisfied that the particular type of behaviour has not been condoned in the past and the employee knew or ought to have known that the behaviour constitutes misconduct before deciding to discipline an employee. If not, the employer will need to "draw a line in the sand" and outline consequences of future incidences of this behaviour before being able to discipline the employee.
- Consistency of treatment – Employers should ensure that they are consistent in their treatment of employees. Similar instances of misconduct should attract the same type of disciplinary action.

Published: August 2017