



A-Z OF EMPLOYING

Lawful and Reasonable Instruction

Our guide for Employers and Managers

**SUPPORTING,
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BUSINESS**

Business**Central** 

Lawful and Reasonable Instruction

Our guide for Employers and Managers

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

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Lawful and Reasonable Instruction

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Use this guide to understand

- ▶ what lawful and reasonable instructions are and how they relate to your business;
- ▶ whether instructions are reasonable or unreasonable;
- ▶ circumstances where it is appropriate to discipline employees for failing to follow a fair and reasonable instruction;
- ▶ refusing an employee's leave request; and
- ▶ when employees can be summarily dismissed for failing to comply with a fair and reasonable instruction.

Introduction

The concept of lawful and reasonable instructions relates to an employer's right to require an employee to carry out the terms of their employment. Instructions must be within the scope of an employee's contractual obligations under their employment agreement, and the instructions cannot require the employee to do anything contrary to law or demand the performance of an impossible or dangerous task. Instructions must also be given in good faith. Depending upon the particular circumstances, a failure to follow an instruction could be described as disobedience, indirect disobedience or insubordination.

Direct Disobedience

Direct disobedience usually consists of an open and deliberate refusal to obey a lawful and reasonable instruction given by a person in authority.

An instruction will generally be regarded as lawful and reasonable providing it:

- ▶ does not require the servant to perform any act contrary to law;
- ▶ is within the scope of the servant's contractual obligations; and
- ▶ does not demand the performance of any impossible or dangerous task.

An employee can be required to perform any duties that form part of the employment agreement, even if those duties are not explicitly stated in the job description. However you must consider whether the employment agreement enables you to require employees to perform other additional duties occasionally. Another consideration is whether the employee has performed the additional duty before, or whether the duty could reasonably be said to fall within the general scope of the role, for example through custom and practice.

The duty to follow the instruction of a judicial officer (e.g. Police officer) is an example of a duty that may not be explicitly stated in the employment agreement. An employee who wilfully fails to follow the instruction of a judicial officer will be engaging in direct disobedience. It is advisable to inform employees that they are expected to follow instructions from judicial officers, which could be covered in company policy.

In relation to drug testing policies in safety sensitive areas of work, if an employee refuses to participate in on-the-job random testing, where the testing was part of an approved health and safety or drug and alcohol policy, the refusal would constitute unjustified disobedience to a lawful and reasonable instruction. However you must consider whether the employee has good reason for refusing to take such a test, or for returning a positive sample. Therefore it is important to keep an open mind when deciding whether disciplinary action is appropriate in the circumstances.

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Where an instruction is given that could expose employees to a risk of serious harm, the employer cannot reasonably expect employees to follow it. An example of this was where City Council employees refused to comply with an instruction to wear name badges displaying their first and last names. The Courts acknowledged that, whilst the Council's instruction could not be considered unlawful or unreasonable, the manner of its implementation was unreasonable. Complying with the instruction would have exposed Council employees to the hazards of potential violence and personal harassment from the public; therefore they had good reason for refusing the instruction.

In terms of collective agreements, it is unreasonable to expect your employees to follow an instruction that is inconsistent with the terms of the collective agreement.

The process of requiring employees to carry out the instructions must also be undertaken in a reasonable manner. For example, a decision to implement fingerprint scanning as a means of timekeeping was in itself an adequate basis for a lawful and reasonable instruction. The employer however still needed to comply with its obligations to consult employees in a timely and appropriate manner about the change. If the employer failed to do so, the instructions could be unlawful because they were in breach of contractual and statutory obligations.

Indirect Disobedience

Indirect disobedience generally occurs where an employee had a reasonable belief that their actions, which breached instructions, were permissible. Discipline for failure to comply with the instruction may not be appropriate in these circumstances.

For example, if you initially decline an employee's application for leave, but the employee subsequently took the leave on the advice of their union representative, the employee cannot be said to be disobeying a lawful instruction because they genuinely believed they were entitled to take the leave. Another example is where an employee was advised by their union to attend a delegates' meeting, however the employer had specifically instructed the employee not to attend. Discipline may not be justified in this situation because the employee had an honest belief that they were entitled to attend the meeting.

Indirect disobedience commonly arises where the employer's ability to unilaterally impose changes to an employee's terms and conditions of employment is in question. For example, an employee refuses to comply with changes to their roster. The key in this situation is to resolve the dispute, using the dispute resolution process set out in the agreement, before issuing the employee with an instruction to comply with the change or initiating disciplinary action for non-compliance.

Instructions should be clear and employees should be informed of possible consequences of non-compliance. For example, if an employer gives an instruction that could reasonably be interpreted as a suggestion then it would not be appropriate to discipline an employee for non-compliance because the disobedience would not be wilful.

If you want to refuse an employee's leave request, the refusal must be reasonable. Declining a leave application without genuinely considering it could be construed as unreasonable; therefore it would be inappropriate to discipline an employee for taking leave in defiance of an unreasonable refusal. The consequences of unreasonably refusing leave can be significant. For example, an employer dismissed an employee who took leave when their leave application had been refused. The Court held that the employer's refusal to grant the leave was "unjustified" and the instruction not to take the leave was "unreasonable and unlawful". The dismissal was considered substantively unjustified because the employee had not disobeyed a lawful instruction.

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Insubordination

Insubordination can include public criticism of an employer, and disobedience or abuse directed at supervisors or managers. It is generally reasonable to discipline employees for insubordination.

The Courts consider that, in some circumstances, it is reasonable to dismiss employees for insubordination. For example, dismissal was reasonable where an employee distributed pamphlets that tended to bring the employer into disrepute, disregarded the employer's clear instruction not to distribute the pamphlets, and attempted to strike unlawfully. However it should be noted that if an employee criticises their Council, which happened to be the employee's employer, discipline may not be appropriate because the employee could be entitled to express their criticism as a ratepayer so long as the criticism could be seen to be reasonable. In such circumstances it would be advisable to have internal mechanisms set up so that employees can express criticism.

You can contact one of our employer advisors for telephone advice and assistance: **0800 800 362** or email the AdviceLine at advice@businesscentral.org.nz

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to Business Central courses and conferences designed for those who manage employees.

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