



Disciplinary Action, Dismissal, Redundancy and Ill Health

GUIDE FOR EMPLOYEES



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A. INTRODUCTION

These guidelines have been developed by a committee (comprised of employer and union representatives and legal experts) established by the Department of Labour. These guidelines aim to give employees information about their rights when their employer raises issues about their work or things they have done or not done. Separate guidelines are available for employers.

The first part of these guidelines explains the key principles that apply to all employment relationships. These principles are important. If you and your employer understand and are guided by them, this will help to create a constructive and respectful employment relationship and will help prevent problems arising later.

These guidelines go on to outline how concerns are dealt with and an employee's rights to fair treatment and fair process when an employer has raised serious issues. They detail what an employer should do and how an employee should respond.

These guidelines are not a legal document or a "code" under the Employment Relations Act 2000. Nor are they a substitute for professional advice. They set out the key principles and steps to guide you. They will not answer every question and are not a recipe that can be followed in every situation.

If you are in any doubt, or if the matter you are dealing with is a complicated one, you should seek information from the Department of Labour (phone 0800 20 90 20) or seek advice from a union, community law centre, lawyer or other professional adviser.

These guidelines are to provide practical guidance, focussing on issues surrounding discipline and dismissal. It is not a guide to resolving more generic employment relationship problems. When an employment relationship issue or problem first arises you should seek advice from the Department of Labour or take professional advice.

B. KEY PRINCIPLES

Good faith

Employers and employees have mutual obligations to deal with each other at all times fairly, reasonably and in “good faith”.

In broad terms, this means that both employers and employees must:

- act honestly, openly, and without hidden or ulterior motives
- raise issues in a fair and timely way
- be constructive and cooperative
- be proactive in providing each other with relevant information and consider all information provided
- respond promptly and thoroughly to reasonable requests and concerns
- keep an open mind, listen to each other and be prepared to change views about a particular situation, or behaviour, and
- treat each other respectfully.

A good yardstick is for employees and employers to treat each other in the same way they would expect a close family member to be treated in the same circumstances. This does not mean that an employer cannot act firmly where appropriate (e.g. dismissal for serious misconduct), but it does mean that an employee should have a fair opportunity to have a say before a decision is made that affects him or her. It also means that employees and employers should treat each other with respect and that employers should not treat employees in a degrading or humiliating manner.

And, it also means that employers and employees need to raise their concerns when they arise – an employer will find it difficult to address an employee’s concerns if he or she does not know about them or if they are raised months after the event. Similarly, if an employer has concerns about something an employee has done, he or she needs to tell the employee – the employee can only address things if he/she knows about them.

Employment agreements and policies

Some employment agreements or policies specify the types of situation that might result in disciplinary action or dismissal, or the process the employer and employee must follow. It is important that the employee checks his or her employment agreement and any relevant policies at the start of any disciplinary or dismissal process.

Non-disciplinary actions

Sometimes a disciplinary or dismissal process will not be necessary. For example, an employer might be generally satisfied with an employee’s work, but wants the employee to make some changes to the way he or she works. In these types of

situations, the employer should talk to the employee about what changes the employer would like the employee to make.

These sorts of issues do not need to be a big deal – good communication between employees and employers helps to build good employment relationships and to prevent more serious issues arising.

Disciplinary action by an employer

Sometimes, an employer might raise more serious concerns with an employee.

In these cases, the employer might commence “disciplinary action”. While disciplinary action can include dismissal or warnings, the primary aim should still be to get a clear understanding on what needs to be done to solve the problem and to prevent further problems.

However, under disciplinary action, things will be more formal than they are with “day-to-day” concerns. The most common types of disciplinary action are warnings. In cases of serious misconduct or failure to make changes after receiving warnings, dismissal can result. Other less common types of disciplinary action are suspension from work, or the removal of certain privileges, or, in rare instances, demotion.

“Dismissal” simply means termination of employment by the employer. While dismissal can be a disciplinary step, it does not have to be (e.g. dismissal might be for redundancy or for health reasons). The reasons for dismissal are covered in more detail below.

Good reason and fair process

To be lawful, disciplinary action or dismissal must be fair and reasonable in all the circumstances (with some limited exceptions). There are two aspects to this:

- the employer must have good reason for the dismissal or disciplinary action, and
- the employer must follow a fair process in reaching and implementing its decision.

The next section of these guidelines introduces these two requirements. There are some exceptions to these requirements in relation to trial periods.

Trial periods

Employers who employ 19 or fewer employees may offer new employees a trial period of up to 90 calendar days. If a new employee agrees to such a trial period as part of their employment agreement and the employer subsequently gives the employee notice of dismissal within that trial period, the employer does not need to provide a reason for the dismissal or follow all the dismissal processes in these guidelines. However, the employee will need to be given notice in accordance with his or her employment agreement.

Further information about trial periods is available on the Department of Labour’s website at: www.ers.dol.govt.nz/relationships/trialperiod.html

C. GOOD REASON AND FAIR PROCESS

Good reason

In order for the employer to have 'good reason' for the dismissal or disciplinary action, the employer must:

- have a genuine work-related reason for the dismissal or disciplinary action, and
- genuinely and reasonably believe that dismissal or disciplinary action is necessary or appropriate.

The following reasons are generally accepted as genuine work-related reasons that might justify disciplinary action, including dismissal:

- repeated misconduct, or serious misconduct (i.e. some form of wrongdoing), and
- poor performance - an ongoing failure to meet the reasonable expectations of the job.

An employer's reasons for dismissal or disciplinary action must be reasonable to an independent and 'reasonable' observer. For example, it would not be reasonable for an employer to dismiss an employee instantly for a one-off instance of minor or trivial misconduct. However, if the employer has given the employee warnings about his or her conduct and he or she persists with the same or similar misconduct, then, after a fair process, the employer may be justified in dismissing the employee.

In some situations, an employer may have genuine business-related reasons for dismissing an employee. These could include:

- redundancy – a situation in which the employee's employment is terminated because, for a genuine work-related reason, the employer no longer needs that position
- incapacity – an inability by the employee to properly do his or her job, usually for health reasons, and
- incompatibility – a fundamental breakdown in the relationship between employees.

It is important to remember that dismissal and disciplinary action are serious matters, and cannot be taken lightly.

Fair process

Section B of these guidelines sets out the key principles that apply to employment relationships. Those principles must be applied in every situation.

In addition, a fair process will usually involve the following:

- *Provision of information* – the employer must give the employee the information the employer is relying on when considering dismissal or disciplinary action.
- *Opportunity to comment* – the employer must give the employee an opportunity to comment on that information, and an opportunity to provide any other information he or she thinks might be relevant. The employee is entitled to have sufficient time to consider the information provided and to prepare a response and an opportunity to comment on possible outcomes (warnings, dismissal etc) before the employer makes a decision.
- *Promptness* – the employer should provide the employee with information and an opportunity to comment as soon as practicable after the event.
- *Representation* – the employee has a right to representation (e.g. by a union delegate, lawyer or friend). The employer should make it clear to the employee that there could potentially be significant consequences and that he or she may care to arrange for representation.
- *Open mind* – the employee has a right to put his or her version of events. The employer must listen to his or her comments with an open mind and consider all relevant information. This means that, before the employer makes a decision, he or she must carefully consider what the employee has to say.
- *Relevant considerations* – the employer must consider everything that is relevant but cannot take into account matters that are not relevant.
- *Even-handed treatment* – the employer should generally treat similar situations in the same way (e.g. if two employees engage in the same misconduct they should receive the same treatment), unless there is a good reason for treating them differently.
- *Access to decision-maker* – the employer should give the employee the opportunity to address the person who is making the decision. The decision-maker may get someone else to undertake part of the process (e.g. appoint someone else to undertake a fact-finding investigation), but must personally consider what the employee has to say. The decision-maker should also personally advise the employee of his or her decision.
- *Alternatives* – the employer should consider alternatives to dismissal or disciplinary action before deciding on what action should be taken.

These principles are common to all disciplinary and dismissal processes. The following sections provide more detail on how they might be applied in different situations.

D. MISCONDUCT AND SERIOUS MISCONDUCT

What is meant by misconduct and serious misconduct?

“Misconduct” means some form of wrongdoing. Usually it will involve deliberate wrongdoing, but there may be circumstances where an employee acts so carelessly that it amounts to misconduct (i.e. gross negligence or recklessness).

“Serious misconduct” involves serious wrongdoing. Where, after a fair process, it is established that an employee’s actions amount to serious misconduct, an employer may terminate the employee’s employment without notice (sometimes referred to as “instant” or “summary” dismissal). Because of this, the misconduct must be sufficiently serious that it undermines the trust and confidence that the employer has in the employee (e.g. theft, sexual or other assault, the use of illegal drugs at work).

Sometimes, employment agreements list conduct that the agreement says amounts to “serious misconduct”. If an employee engages in misconduct that is listed, that doesn’t necessarily mean that serious misconduct has automatically occurred. In every case the employer must consider all the facts and the employee’s response before it decides whether serious misconduct has occurred. When this is done, what initially looked like serious misconduct may not be so serious after all.

Also note that minor misconduct cannot become serious misconduct just because that minor misconduct is on the serious misconduct list.

Process

The employer has the right to take disciplinary action where that action is justified. The employee has a right to a fair process.

The purpose of any disciplinary action is to prevent the reoccurrence of the inappropriate behaviour/misconduct. The emphasis should be on the corrective action that is required to amend the employee’s conduct and giving him or her a reasonable opportunity to do so, not on punishing the employee.

An employer should generally take the following steps when considering disciplinary action for possible misconduct or serious misconduct:

- Before commencing a disciplinary process, the employer should assess whether the particular concern or complaint is sufficiently robust and serious to require such a process. It may be necessary for the employer to undertake some preliminary steps to make this assessment (e.g. to read documents, or to speak briefly with someone who saw what happened or the employee who might be disciplined). If the employer needs to speak with an employee who could be disciplined later, then the employee needs to be told of this possibility and that what he or she says could be relevant in any disciplinary process.

- If the employer decides to commence a disciplinary process, the employer should provide the employee at the outset with all of the relevant information (e.g. documents), the reasons why the employer is concerned, and the possible consequences the employee is facing (e.g. a warning or dismissal). It could be procedurally unfair if, at the end of the disciplinary process, the employer decides to take disciplinary action that the employee was not forewarned about.
- The employee should be invited to a meeting to provide a response. The employee should have enough time before the meeting to consider the information provided and to prepare his or her response and should be told that the response can be made orally or in writing, or in both ways. The employee should also be told who is coming to the meeting, and should be told of his or her right to bring a support person or representative with him/her.
- At the meeting, the employer should listen to the employee's response with an open mind. If the employer disagrees with the employee's response, the employer should say so, and should provide the reasons for that. This need not be done at the meeting necessarily, but the employee needs to know what it is that the employer is thinking, so that he or she has an opportunity to address that.
- It may be helpful for the employee to keep a record of all discussions, agreements and meetings held with his or her employer.
- Once the employer has the employee's response, the employer may decide to investigate further. The employee should be given an opportunity to comment on any new information that comes out of that further investigation. It may be necessary to meet again to do this.
- Once the employer has all of the relevant information, the employer can decide whether the employee has committed misconduct or serious misconduct.
- The employer should then consider what action it should take, if any. At this stage the employer should consider any matters that could be relevant to what action it takes (e.g. long-serving employee with a clean record), possible alternatives to disciplinary action, and any other appropriate assistance that might be provided to help prevent a recurrence (e.g. training or supervision). (If the employee has not had an opportunity to comment on the outcome (e.g. dismissal or disciplinary action) it might be necessary to have another meeting with him/her to hear and consider what he/she has to say.)
- In serious or complex situations, the employer might provide the employee with a 'preliminary decision' (including details of any proposed disciplinary action), and allow the employee to comment on it before a final decision is made. The employer must consider the employee's comments with an open mind. That is, the employer must be prepared to listen to the employee and consider what they have to say before making a final decision. This ensures that there is no misunderstanding between the employer and the employee, and that the employee has had a full opportunity to comment on the employer's thinking.

- Once the employer has reached a final decision, the employer should tell the employee and provide reasons for its decision. Even in the most serious of situations, this needs to be done in a respectful and sensible way.
- If the decision is to dismiss, and there is no serious misconduct, the employee will need to be given notice in accordance with his or her employment agreement. If the employee is to be dismissed for serious misconduct, the employer does not have to give notice but may choose to do so anyway.

If an employee finds himself or herself in this process, he or she should answer questions honestly and openly, put forward his or her version of events, and (like the employer) act in a respectful and sensible way. The employee has the right to have a representative present to speak on his or her behalf.

Warnings

If an employee has done something that amounts to “misconduct” or “serious misconduct” but the employer decides not to dismiss him/her, the employer might give the employee a warning. The warning must include information making it clear what the misconduct is and the consequences of further misconduct.

If an employee has had warnings previously, the employer might be able to dismiss the employee or might give a further or final warning. However, a previous warning or warnings do not always justify dismissal or a final warning – generally speaking, a warning for one type of conduct cannot be relied upon when dealing with another type of misconduct and, if a warning is too old, it may be unfair for an employer to rely on it.

Proof

A disciplinary investigation is not a criminal prosecution – the employer does not need to prove that misconduct occurred ‘beyond all reasonable doubt’. However, to discipline an employee for misconduct, the employer needs to be convinced that the misconduct occurred, and there needs to be reasonable grounds to support that. The more serious the misconduct in issue (e.g. theft, sexual assault), or the more serious the possible consequences are (e.g. final warning, dismissal), the stronger the employer’s supporting information and reasoning needs to be.

Suspension

In particularly serious cases, an employer might be entitled to suspend an employee during the disciplinary process. Generally, there is no right to suspend unless the employment agreement provides for suspension. However, employers can sometimes suspend employees when investigating very serious cases (e.g. alleged theft resulting in a need to ensure the accounts are not interfered with during the investigation; or alleged sexual assault resulting in the need to protect the employee who may have been sexually assaulted).

The employer must also follow a fair process before deciding to suspend the employee. The employee should be given an opportunity to comment on the proposed suspension, and the reasons why the employer thinks suspension is

appropriate. The employer must consider the employee's comments with an open mind. That is, the employer must be prepared to listen to the employee and consider what he or she has to say before making a final decision.

E. POOR PERFORMANCE

What is meant by poor performance?

Poor performance is a situation where the employee is not meeting the reasonable expectations of his or her job.

Process

Where there are performance issues, the employer should discuss it with the employee. This might involve providing clear direction about what is required, or support and training to assist the employee to do the job properly (see "non-disciplinary actions" in section B).

If the employee's performance has failed to improve, the employer might start a disciplinary process. The process is essentially the same as it is for misconduct (provision of information, advice about representation, meeting to discuss the employee's response before any decisions are made etc – see section D).

If the employer issues the employee with a warning for poor performance, he or she should tell the employee clearly about his or her expectations and put in place a process and timeframes for monitoring his or her performance and providing feedback.

The employer also needs to ensure that the employee has a reasonable opportunity to improve his or her performance – this includes giving enough time to improve and providing appropriate support and assistance.

F. REDUNDANCY

What is meant by redundancy?

A redundancy, in general terms, is the situation in which an employer terminates an employee's employment because, for a genuine work-related reason, the employer no longer needs that position. This might occur for a range of reasons. For instance, the employer may transfer or stop all or part of its business, reduce the number of employees it has, or restructure or reorganise its business. A redundancy can also occur where an employer changes a position to such an extent that it is no longer the same position.

Sometimes employment agreements or policies define redundancy in a way that changes this general meaning. It is therefore important to check the relevant employment agreement and any relevant policy.

An employer must have a genuine work-related reason for a redundancy, which must be about the employee's position, not the employee personally. A concern about how a particular employee may be performing is a performance issue and not a reason for pursuing a redundancy. If an employer makes an employee redundant because of concerns about his or her performance, this would be unlawful and the employee would be able to bring a claim against the employer.

Process

An employer cannot decide to make a position redundant until he or she has talked the matter through with the employee (i.e. consulted with the employee). Generally this will involve the employer making the employee aware of what he or she is proposing and why, providing any relevant documentation, and receiving and considering any feedback provided by the employee. While the employer is allowed to want to proceed with the proposal and to say this, he or she must approach the consultation with an open mind. That is, the employer must be prepared to listen to the employee and consider what he/she has to say before making a final decision.

In some redundancy situations the employer needs to select between employees, for instance where there are two employees doing the same thing and only one is required. Some employment agreements or policies provide the rules for selection (e.g. last on first off). Where rules are provided they must be followed. Where there are no rules, the employer needs to consult with the potentially affected employees on how the selection might be made and consider any feedback about the selection process.

Before the employee's employment is terminated, the employer must consider possible alternatives to termination, such as appointment to another role (i.e. redeployment). Unless the employment agreement says so, there is no obligation to redeploy. However, where there are vacant positions that a redundant employee could fill without difficulty or cost, an employer, acting in good faith, will at least have to consider offering one of those positions.

When a decision to proceed with a redundancy is made, notice will need to be given to the employee, as well as any other contractual entitlements such as redundancy compensation. An employer has an obligation to pay redundancy compensation where the relevant employment agreement provides for compensation. However, if the employment agreement does not provide for the payment of redundancy compensation, an employer can still pay redundancy compensation if the employer wants to.

In addition, employers may consider providing other support or assistance, such as counselling, time off to attend job interviews or outplacement services (e.g. assistance writing CVs, etc). This type of assistance is sometimes required by the applicable employment agreement or policy.

G. INCAPACITY (ILL HEALTH)

An employer may dismiss an employee who is incapable of doing his or her job for a period that the employer cannot reasonably be expected to sustain. Usually, dismissal for incapacity occurs for health reasons. When an employee is physically incapable of doing his or her job, there comes a point at which the employer may dismiss the employee and appoint a replacement.

In determining the point at which an employer may consider dismissal for incapacity, the following factors are likely to be relevant:

- any timeframe specified in the applicable employment agreement or policy
- the extent to which the employer's business is affected by the employee's absence
- the employer's ability to appoint a temporary replacement, and the cost of doing so
- the nature and extent of the employee's incapacity, and the likelihood that he or she will recover. In circumstances where the incapacity is caused by a health issue, the employer should request appropriate medical advice. Sometimes it may be appropriate to seek independent or specialist advice, rather than relying solely on the advice of the employee's general practitioner or health professional. However, employees have the right to refuse to provide an employer with access to their medical information. If an employee is not willing to provide such information, the employer is able to make a decision based on the information the employer has
- whether reasonable adjustments could be made to the employee's work, or whether an alternative position might be offered, to enable the employee to continue in employment, and
- whether the employee has used up all of his or her sick leave and other holiday or leave entitlements.

As with the other reasons for dismissal, the employer must advise the employee that he or she is potentially facing dismissal, provide the employee with all of the information that the employer is relying on, and give the employee an opportunity to comment on that information in a meeting or meetings at which the employee is able to be represented. It is common for a dismissal for incapacity process to take a number of weeks, if not months, and for there to be a number of meetings or exchanges of information.

These processes can also be frustrating and difficult for all concerned. They often involve difficult decisions and it will often be sensible to get some advice.

H. INCOMPATIBILITY

“Incompatibility” means a situation where there is a fundamental breakdown in the relationship between two or more individuals, such that they can no longer work together. Dismissal for incompatibility is not disciplinary, so it is not necessary for one of the individuals to be at fault (although there often will be issues of fault involved).

Dismissal for incompatibility is rare and if an employee finds himself/herself in this situation, it is important to get advice.

I. PERSONAL GRIEVANCE

If the employee is not satisfied with the outcome of the disciplinary process, he or she has a right to raise a personal grievance under the Employment Relations Act 2000 within 90 days of when the facts that gave rise to the grievance occurred or came to his or her attention.

However, if the employee has been given notice of dismissal during a trial period he or she may not be able to raise a personal grievance about that dismissal. Further information about your employment rights and trial periods is available at: www.ers.dol.govt.nz/relationships/trialperiod.html.

If the employee raises a personal grievance, he or she should first look to resolve the matter at the workplace level. The employee may wish to seek advice on how to deal with the specifics of their case.

If the personal grievance is not resolved at the workplace level, then either the employee or the employer may seek assistance from a Department of Labour mediator. Mediators are skilled at facilitating discussions between the parties and helping them to identify issues and potential solutions. The aim of mediation is for the parties to resolve the matter by agreement.

If the employee and employer are unable to resolve the matter by agreement, they can (if both agree in writing) ask the mediator to make a binding decision to resolve the matter. If the employee and employer cannot agree, then either party may refer the matter to the Employment Relations Authority for decision.

If the Employment Relations Authority finds that a personal grievance has been established, the Authority can order remedies including financial remedies. Remedies might include an order that a dismissed employee be paid lost wages and/or an order that the employer pay compensation for humiliation, loss of dignity and injury to feelings. The Authority can also order that the employee be given his or her job back (i.e. reinstatement).

When considering financial remedies, the Authority must consider both the conduct of the employer and the conduct of the employee and may reduce the amount of compensation where conduct by the employee contributed to the situation. There have been examples where, although a grievance has been established, the

employee's conduct was such that the Employment Relations Authority has made a 100% reduction to the amount the employer would otherwise have had to pay. The amount of compensation ordered by the Employment Relations Authority varies depending on the facts of the particular case.

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3. These guidelines are not intended to address the specific circumstances of any particular individual or entity nor are they professional or legal advice.
4. If you are seeking specific advice, you should seek this from qualified professionals.

The information provided is not in substitution or in any way an alteration to the laws of New Zealand or any other official guidelines or requirements.



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