



Disciplinary Action, Dismissal, Redundancy and Ill Health

GUIDE FOR EMPLOYERS



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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 help employers, particularly small business owners, to understand the law relating to disciplinary action (including dismissals), redundancy and ill health. Separate guidelines are available for employees.

The first part of these guidelines explains the key principles that apply to all employment relationships. These principles are important. If you understand and are guided by them, this will take you a long way towards 'getting it right' in practice - not just in relation to disciplinary action and dismissals, but in all aspects of your employment relationships.

The second part of these guidelines describes the key requirements of having a 'good reason' and following a 'fair process' prior to taking disciplinary action, or making a decision to end someone's employment.

Lastly these guidelines explain in more detail the key steps involved in the various types of disciplinary and termination processes that arise from time to time.

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 get advice from a union, employer organisation, lawyer or other professional adviser.

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 your views about a particular situation, or your 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 should not act firmly where appropriate (e.g. dismissal for serious misconduct), but the employee should have a fair opportunity to have his or her say before a decision is made, and should not be treated in a degrading or humiliating manner. It also means that employers and employees need to raise their concerns when they arise. An employee and an employer will have difficulty in addressing any concerns they don't know about, or if they are raised months after they happened.

As noted in the introduction to these guidelines, these principles apply to all employment relationships. If you understand and are guided by the principles, that will go a long way towards 'getting it right' in practice - not just in disciplinary and dismissal processes, but in all aspects of your employment relationships.

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 employer checks the employment agreement and any relevant policies before it starts a disciplinary or dismissal process.

Non-disciplinary actions

Sometimes it might not be necessary to start a disciplinary or dismissal process. 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/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.

What is meant by “disciplinary action” and “dismissal”?

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

In these cases, the employer may wish to commence “disciplinary action”. “Disciplinary action” can take many forms. It should be seen primarily as a corrective measure, aimed at preventing further misconduct or poor performance. The most common types of disciplinary action are warnings and, in serious cases, dismissal. However, disciplinary action can sometimes mean 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 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 to dismiss an employee instantly for a one-off instance of minor or trivial misconduct. However, if the employee has had sufficient warning and persists with the same or similar misconduct, then, after a fair process, dismissal may be reasonable.

The following reasons are generally accepted as genuine business-related reasons that might justify a 'non-disciplinary' dismissal:

- 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* - employees must be given the information the employer is relying on when considering dismissal or disciplinary action.
- *Opportunity to comment* - employees should be given an opportunity to comment on that information, and an opportunity to provide any other information that might be relevant. This includes being given sufficient

time to consider the information provided and to prepare a response. The employee should be given an opportunity to comment on the outcome of any investigation before any decision is made.

- *Promptness* - any action should be taken as soon as practicable after the event.
- *Representation* – employees should be told in advance that they can be represented (e.g. by a union delegate, lawyer or friend) when being asked to comment on a proposed dismissal or disciplinary action.
- *Open mind* – the employer must listen to the employee’s comments with an open mind and consider all relevant information. This means that, before the employer makes a decision, the employer must carefully consider what the employee has to say.
- *Relevant considerations* – the employer must take into account all relevant matters, and must not 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 employee should be given an 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.

When meeting with an employee as part of a disciplinary process, employers should have more than one person present, and should take accurate notes of what is discussed and agreed. The employer should also take notes of all the steps taken as part of the process.

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 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 purpose of any disciplinary action is to prevent reoccurrence of the inappropriate behaviour/misconduct. The emphasis is on corrective action that is required to change the employee’s conduct and giving the employee 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/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 a type of 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 does not necessarily have to be done at the meeting, 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 employer to keep a record of all discussions, agreements and meetings held with the employee.
- Once the employer has the employee's response, it may be necessary 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, it may be advisable for the employer to provide the employee with a 'preliminary decision' (including details of any proposed disciplinary action), and to 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 can be a very good way to ensure 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.

The employee is required throughout the process to cooperate with the employer, to answer questions honestly and openly, and (like the employer) to act in a respectful and sensible way. An employee can ask someone to speak on his or her behalf.

Warnings

In circumstances where the misconduct is not serious, or where the employer otherwise decides not to dismiss, the employer may decide to give the employee a warning. Employers should check the employment agreement to see whether written or verbal warnings are required. The type of warning required may be different at different stages of the process. A final warning should be in writing, unless there is a different process in the employment agreement.

When issuing a warning, it is important for the employer to be specific about the misconduct for which the employee is being warned, and the consequences of further misconduct.

If an employee has had warnings previously, the employer will need to consider whether it can take those into account when deciding whether to dismiss the employee, or to give a further or final warning.

One issue is whether the previous warning is sufficiently recent to be able to be relied on. If a warning is too old, it may be unfair for the employer to rely on it. The other issue is whether there is a close enough connection between the previous warning and the most recent misconduct. Generally speaking, a warning for one type of misconduct cannot be relied upon when dealing with another type of misconduct.

This is an area where the employer may need to take advice.

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 for the employee (e.g. final warning, dismissal), the stronger the employer’s supporting information and reasoning needs to be before action is taken.

Suspension

In particularly serious cases, where there is risk in the employee remaining at work, the employer may want to consider suspending the employee while the employer carries out the disciplinary process. Generally, there is no right to suspend unless the relevant employment agreement provides for suspension. However, in very serious cases (e.g. alleged sexual assault or where there are significant health and safety issues) suspension may be possible. This is an area where the employer should take advice.

Suspension is a disciplinary step in and of itself, so the employer must have a good reason for suspending (e.g. alleged theft resulting in a need to ensure the accounts are not interfered with during the investigation; alleged sexual assault resulting in the need to protect the employee who may have been sexually assaulted).

The employer must implement any suspension fairly before the employer decides to suspend. 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 they have 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, it is generally expected that the employer will have tried other ways of improving the employee's performance before the employer starts a disciplinary process. This might involve providing clear direction about what is required, or support and training to assist the employee.

If the employee's performance has failed to improve after attempts to resolve performance issues, the employer may wish to 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).

When issuing a warning for poor performance, it is important for the employer to tell the employee clearly about the employer's expectations, and to put in place a process and timeframes for monitoring the employee's performance and providing feedback.

The employer also needs to ensure that the employee has a reasonable opportunity to improve his or her performance, which includes the provision of enough time to improve, as well as 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 before pursuing a course which may result in a redundancy.

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's position redundant because of concerns about 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 the employer 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 the employer 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, the employer must approach the consultation 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.

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 the potentially affected employees on how the selection might be made and consider any feedback the employees provide 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 the 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. This is an area where the employer should take advice.

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 his or her 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 very difficult to get right. This is an area where advice should be taken. The employer will need to have considered very carefully any alternatives to dismissal, and have been scrupulous in choosing between the individuals concerned.

I. PERSONAL GRIEVANCE

If the employee is not satisfied with the outcome of the disciplinary process he or she should be advised of his/her 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/her attention.

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

If the parties cannot resolve the matter at a workplace level, then either 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 parties 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 parties cannot agree that the mediator should make a binding decision, 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. reinstated).

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.

Disclaimer

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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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Department of Labour
TE TARI MAHI



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