

EMPLOYMENT AGREEMENTS AND GOOD EMPLOYMENT PRACTICES

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Individual Employment Agreements

Employment Relations Act 2000

All employees must have a written employment agreement. Collective agreements are between employers (or groups of employers) and unions and cover the employees employed by the employer who are members of the union party.

Individual employment agreements are between one employee and one employer. Parties may be represented. There is an expectation that individual employment agreements are negotiated. The Employment Relations Act 2000 (s.65) sets statutory minimums for individual employment agreements.

1. The names of the employer and employee
2. A description of the work to be performed by the employee
3. An indication of where the employee is to perform the work
4. An indication of the arrangements relating to the times the employee is to work
5. The wages or salary payable to the employee
6. An Employment Relationship Problem clause (explaining the services available for the resolution of such problems and including the reference to the 90 day limit within which any personal grievance must be raised by an employee with the employer)

1. An Employee Protection Clause to provide protection to employees where the employer's business is restructured (defined as sold or contracted out) and setting out the process the employer will follow in negotiating with any potential purchaser of the business or contractor about the impact for existing employees
2. If an employee is employed with an initial probationary period, this must be included in writing in the individual employment agreement to be enforceable. Failure to comply means that the employer may not rely on the probationary provision.
3. If an employee is employed for a fixed term, the employment agreement must state in writing the way in which the employment will end and the reasons for the employment ending in that way. S.66 states that the reasons must be genuine and reasonable. This does not include a term to determine the employee's suitability. A failure to comply will result in the employee's right to treat the term as ineffective.
4. The employment agreement must include a clause acknowledging an employee's right to T1.5 for work on a public holiday.
5. The employer must advise the employee of entitlements under the Holidays Act 2003:
 6. minimum sick/bereavement
 7. annual leave
 8. right to public holidays

These need not be in the agreement but must be advised.

Issues that are not required by law but should be provided in all employment agreements:
9. Length of notice
10. Consequences of redundancy
11. Deductions provision
12. Reference to any policies

Notes:

Discipline and termination - getting it right

Introduction

When disciplining or dismissing an employee an employer can expose itself to risk on two grounds:

1. that the employer had no justification for the action taken, ie, the employer's reasons were not justifiable, and/or
2. that the employer did not follow a fair procedure in reaching the decision it did in regard to the action it took.

The above two grounds are commonly referred to as *substantive* (the reason) and *procedural* (the procedure). An employer's decision to discipline an employee, either by warning or termination, can be challenged on either one or both grounds.

As such, an employer needs to ensure that it has complied with the legal requirements when taking disciplinary action.

Legal considerations

Sections 103 and 103A of the Employment Relations Act 2000

There are several key sections under the Employment Relations Act, contained in Part 9 – Personal Grievances, which cover disciplinary action taken by an employer:

A personal grievance is a complaint by an employee against the employer or former employer that they have been mistreated in some way during their employment.

Section 103(1) of the Employment Relations Act 2000 provides that the possible grounds for a personal grievance are:

- “(a) that the employee has been unjustifiably dismissed; or
- (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
- (c) that the employee has been discriminated against in the employee's employment; or
- (d) that the employee has been sexually harassed in the employee's employment; or
- (e) that the employee has been racially harassed in the employee's employment; or
- (f) that the employee has been subject to duress in the employee's employment in relation to membership or non-membership of a union or employees organisation.”

In relation to this Part an employee may bring a personal grievance claim generally in two circumstances, that of unjustified dismissal or unjustified action such as a warning or suspension.

Unjustified Dismissal

As discussed above generally there are two alternative bases for a claim of unjustified dismissal:

1. There is no good cause for dismissal (substantive justification); and/or
2. The dismissal was carried out in an unfair way (procedural fairness).

Substantive Justification will be established or satisfied where the employer can show compliance with section 103A of the Employment Relations Act 2000 which provides:

“103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred]”

S.103A requires the Court “to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer’s actions by that objective standard.”

Air NZ v. Hudson May 2006

This section was inserted in December 2004 and while there has been no substantial case law in regard to the section it was made clear by the Select Committee that the section is intended to reflect the law in *BP Oil v NDU* (1989) ERNZ Sel Cas 512 where the Court of Appeal stated:

“A definition of the kind of conduct that will justify summary dismissal is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship...

In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.”

Notes:

Procedural Fairness

The elements of procedural fairness are as follows:

(a) Warning or notice of conduct in question

The employee must be warned of the misconduct and that improvement in his/her performance is required, or the misconduct in question is not to occur again. The employee must also be advised that if he/she does not improve their performance or there is a repeat of the misconduct his/her job is at risk.

The above does not apply in circumstances of serious misconduct where the employee may be terminated summarily. In instances of serious misconduct the employee need only be notified that the employer wants to investigate the allegation of serious misconduct (refer to (b) below) and that the employee's job is at risk.

(b) Investigation

The employer must carry out a full investigation of all the relevant facts before actually reaching a decision to terminate the employee's employment.

An investigation may be a simple meeting to allow the employee to put forward their explanations of the allegation(s) in question or a series of meetings with all affected parties.

(c) Opportunity to be heard

As part of the investigation and before any decision to dismiss (or otherwise) is effected an employee should be provided with a real opportunity to be heard and to offer an explanation as to the alleged misconduct.

Additionally there may be an obligation on an employer to allow the employee an opportunity to comment on the decision to dismiss.

(d) Duty to consider alternatives

An employer may also have a duty to consider alternatives to dismissal as well. The employee should be provided with the opportunity to put forward their views to the employer for consideration.

(e) Reasons

Reasons for the dismissal should be provided to the employee before the dismissal is effected.

(f) Representation

The employee should generally be provided with the opportunity to be represented.

Practical application of the law

The following will provide some practical steps to follow when disciplining an employee.

Steps in Discipline/Dismissal Interviews - A Checklist

- Outline the purpose of the interview and its possible consequences in advance of the employee attending

- Invite employee to have a representative during the interview - allow sufficient time for this to be arranged
- The employer should have a witness/representative present as well
- At the commencement of the interview, reiterate the nature of the alleged conduct and its seriousness, if proven
- Outline the facts gathered relating to the conduct
- Refer back to previous warning(s) or warning interview(s), if appropriate
- Allow the employee to comment on or explain the behaviour/performance in question
- Adjourn to consider course of action and to conduct further investigation if necessary
- Reconvene and put to employee
 - any new facts arising from investigation, or
 - give warning/dismissal decision as appropriate
- If a written warning or dismissal notice is issued
 - write the notice AFTER the interview NOT before
 - hand to employee in the presence of the same people present at the interview
 - if a warning, invite employee to sign
 - keep a copy for file
 - a copy goes to the employee
- If dismissal:
 - make arrangements for pay in lieu of notice (unless dismissal is for serious misconduct)
 - don't give a reference
 - Keep good records.

Performance reviews

There is any number of ways to conduct a performance review in the disciplinary context within the requirements of procedural fairness. The following outlines two options:

'Warning' system

This system is "traditional" in the sense that it is the most commonly used.

Notes:

Following the requirements of procedural fairness (see above) an employer highlights the poor aspects of the employee's performance of their job and provides detail on the needed improvements.

Usually a first warning is issued which provides that if there is not an improvement in performance, further disciplinary action may be taken.

There is usually a period of observation and if the required improvements are met no further action is taken. If improvement is not forthcoming further disciplinary action is taken.

The number of warnings that are required or must be issued (the "life" of the warnings) will depend on the circumstances.

A 'managed' System

This system is modelled on the probationary system.

After complying with the requirements of procedural fairness and deciding disciplinary action is required, the employer implements a performance management system.

The employee is told where their current performance level is, where it needs to be and the time frame the employee's performance will be expected to improve in (Figure 1).

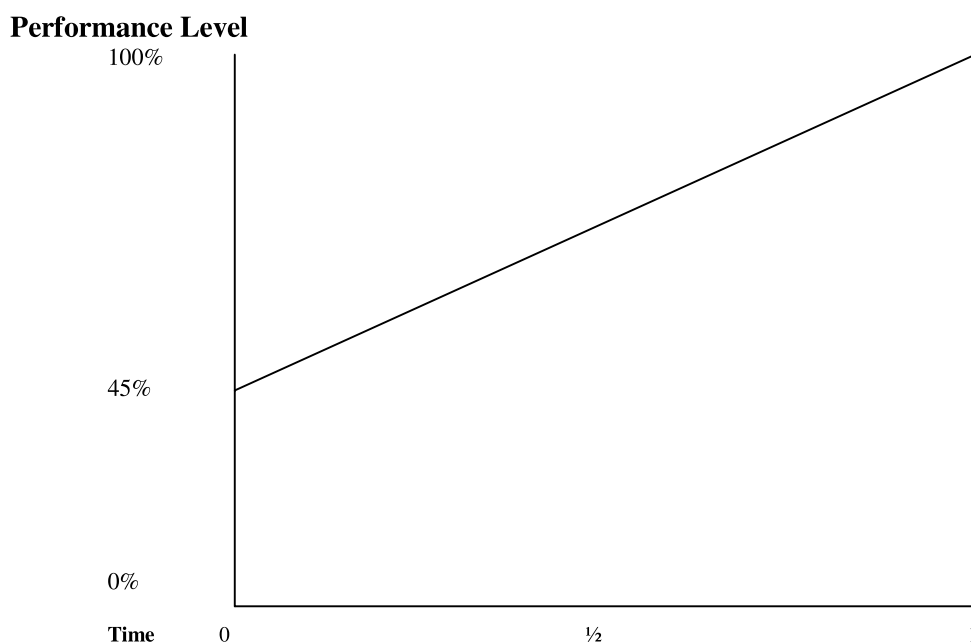


Figure 1: Performance review timeframe

The timeframe could be weeks or months as appropriate.

The employee is informed from the outset that if they do not meet the standard required in the time frame their employment may be terminated.

Meetings are scheduled and targets are set to be achieved during the managed process.

The employer then meets with the employee throughout the timeframe, much in the same way as they would meet with a probationary employee, to assess the employee's progress.

At each meeting the employee is given the opportunity to have input as to what is occurring. The employee is informed of their progress and informed whether or not it is satisfactory. Any additional factors, such as additional training or support required, are addressed.

At the end of the managed process, action is taken as appropriate.

While the above chart shows a linear improvement, often the actual improvement can be "broken".

The key aspect is that there is constant improvement throughout the managed process.

Which option?

The option actually used will depend on the circumstances. Certain circumstances may warrant alternatives or variations on the above.

Ultimately there is no "*one right way*" of dealing with performance in a disciplinary context.

SUMMARY

Warning or dismissing an employee is covered by legislative and common law requirements.

However, by following a fair procedure and evaluating the circumstances when issues arise before taking action, an employer can generally defend any claim raised.

It is often failure in procedure that leads to a claim for unjustifiable dismissal or action being sustained.

Notes:

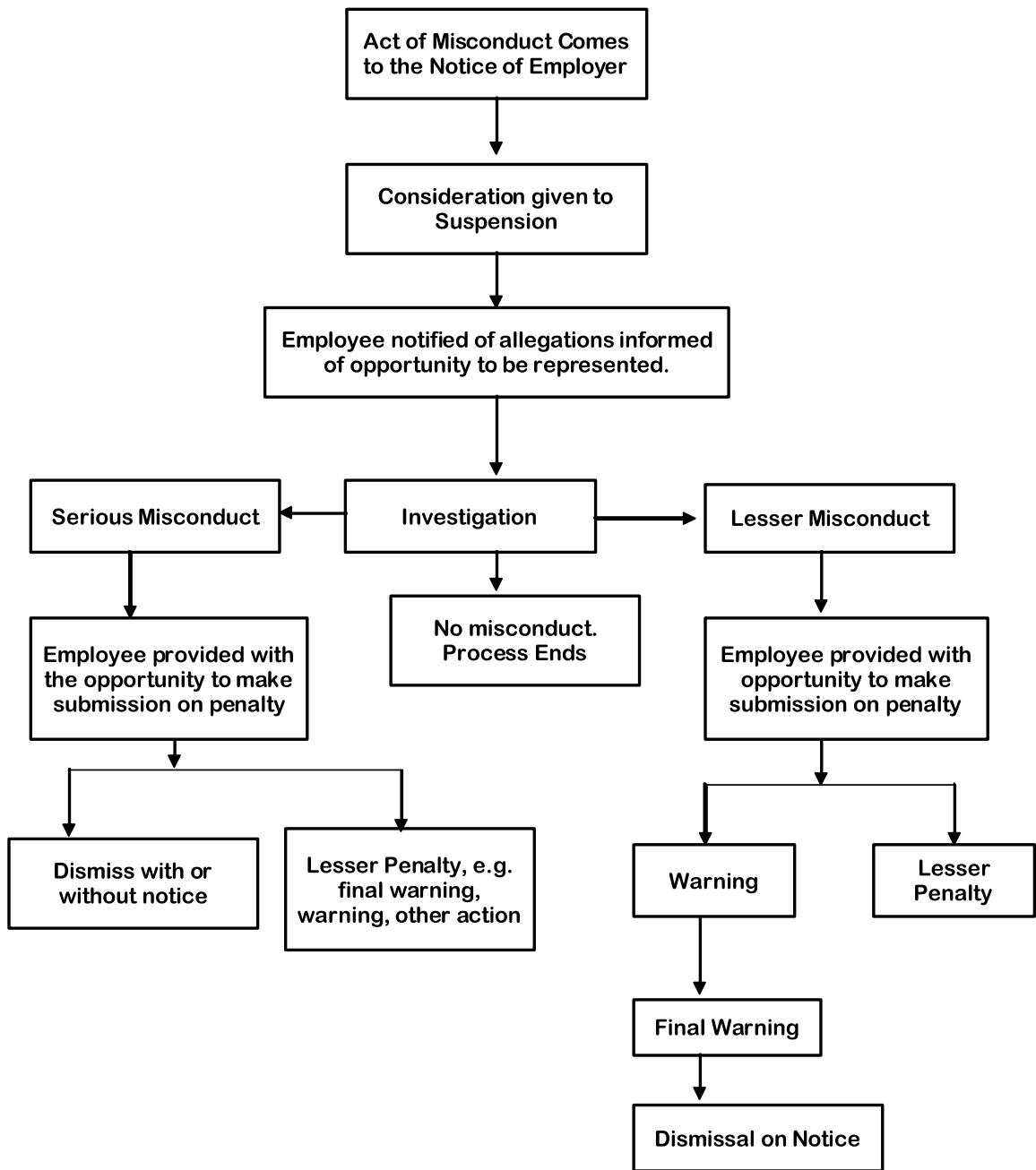


Figure 2: Misconduct procedures

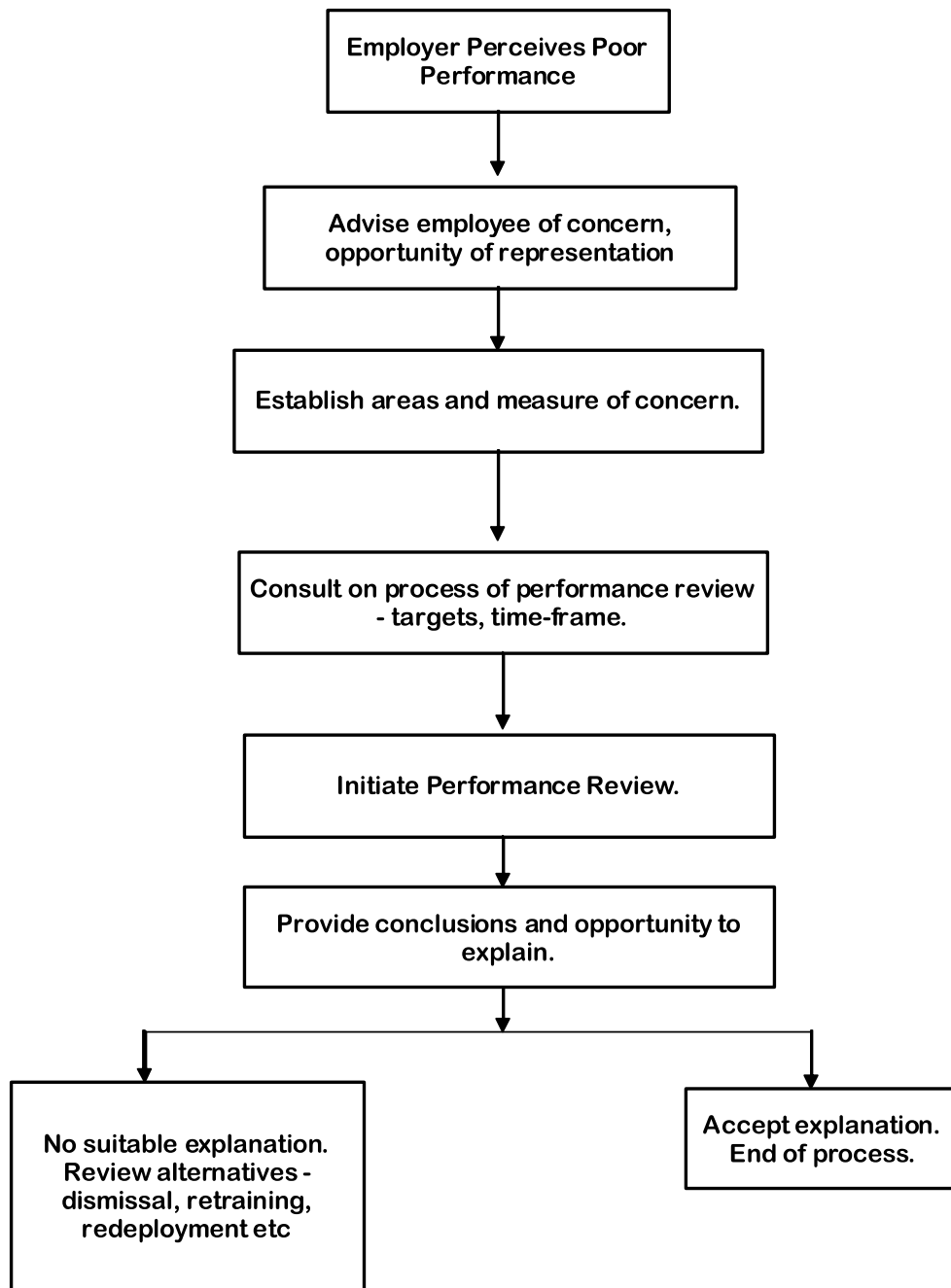


Figure 3: Non-performance

Notes: