Performance Management

Discipline and Grievances

Overview

This resource outlines a procedure to deal with performance problems and disciplinary issues involving both persistent infringements and more serious issues that may lead to summary dismissal. It also outlines the process for dealing with a personal grievance that an aggrieved employee may pursue against the employer.

These are difficult issues for employers and can cause real problems if not handled properly. Failure to follow the correct procedure in these situations probably causes more problems for employers than any other staff management process.

The process outlined below illustrates how an employee should generally be treated to ensure that they are treated fair and reasonably. Failure to treat an employee in this way may result in claims for compensation or worse, even if the grounds for the action were sound.

But remember, if a problem arises, a formal disciplinary process and/or dismissal should be the last option you consider. Your first option should always be to try other methods for getting your employee to respond and lift their performance.

The formal process to deal with any employment relationship problem or personal grievance is outlined in the Association's resource "Problem Resolution under the Employment Relations Act". A copy of that resource is attached as Appendix E.

Note: If you have legal expenses or employment disputes insurance you should contact your insurers before starting a disciplinary process with staff.

A Fair Process

The Employment Relations Act (ERA) requires the employer to act in good faith in all dealings with their employees and their unions and representatives. The essence of this is honesty and fair dealing and this should underpin all actions taken to deal with performance problems or other instances of misconduct and serious misconduct.

The overall intention of the process is to assist the employee to improve the problem behaviour and come up to standard if that is achievable.

There have been numerous decisions from the Employment Relations Authority, the Employment Court and the Court of Appeal that have crystallised the elements of a fair process for each of these areas. We recommend the following:

- *For performance issues and minor behaviour problems,* the first step should normally be a counselling process to ensure the employee clearly understands what you expect of them and to allow you to work together to identify any assistance the employee may require to meet that standard. If that does not achieve the desired result, you are

justified in moving to a disciplinary process. Where the problem to be managed is more severe, this step may be omitted.

- *For persistent performance or behavioural problems,* a progressive warning process is used. This should comprise an initial meeting to confirm the standard required (this is likely to be the counselling meeting), followed by a first warning, a final warning and dismissal on notice if the problem is not resolved.

- *For more serious issues,* warnings are not needed. After a fair enquiry to satisfy the employer that the employee committed the action and a decision that dismissal is the appropriate remedy, the employee can be dismissed with immediate effect.

For any disciplinary meeting, procedural fairness requires the employee to be advised before you meet that you intend to address a serious issue and be given the opportunity to bring a support person of their choice to the meeting. (This may be a union representative, solicitor, friend, colleague or family member.) Such a meeting is normally held at a time acceptable to all involved.

The employer must advise the employee of the concerns and any information they have that will be used to make the decision. Refer back to any previous warnings or discussions relevant to the matter and provide copies of documents to support this if available. Remember, you must make the decision on the information you have and cannot rely on information disclosed after the process to justify your action.

The employee must have the opportunity to respond to the allegations and to have their views considered before any decision is taken on the penalty to be applied. Take time to consider the employee's views and to investigate any matters raised. It is better to take the time to make the right decision than to have to rescind a decision taken in haste if it is later found to be unfair.

Misconduct and Serious Misconduct

The options available to an employer to deal with a disciplinary issue are dependent on the seriousness of the offence under consideration.

Misconduct can be characterised as behaviour or work performance that fails to reach the required standard. Dismissal may follow after sufficient warnings have been given. Examples of misconduct include:

- Consistent lateness for work
- Repeated unsatisfactory work performance
- Repeated and/or unexplained absenteeism
- Smoking anywhere prohibited by company policy
- Failure to meet clothing and/or personal hygiene standards
- Truculent or negative behaviour towards colleagues or management.

Serious misconduct occurs where the employee's behaviour or negligence is such that it destroys the essential elements of trust and confidence that the employer is entitled to have in the employee. Summary dismissal is the likely disciplinary action.

Such misconduct includes but is not limited to the following:

- Physical violence provoked or otherwise
- Wilful misuse of or damage to company property
- Unauthorised possession of company property, the property of another employee or a patient
- Possession, consumption or being under the influence of illicit drugs on or off the employer's premises during working hours including meal breaks
- Consumption of or being under the influence of intoxicating liquors on or off the company premises during working hours including meal breaks, without the specific authority of management
- Insulting or abusive behaviour unacceptable to management
- Failure to account for any monies received on behalf of the employer
- Refusing to perform work assigned in accordance with the employment agreement
- Wilful falsification of the employer's records
- Sexual or racial harassment.

It is common to include a list of conduct that may be considered to be misconduct or serious misconduct in house rules or another document that records the expected practice if disciplinary action is required. It is important that any items quoted are identified as examples. Any other action by an employee that is similar in nature may also initiate disciplinary action.

Counselling

A counselling process is usually the most effective way to resolve a performance problem and to deal with minor behavioural problems before they become serious. This is not a disciplinary process and that should be made clear to the employee. However, if the required improvement doesn't happen, the next step is likely to be disciplinary.

The primary focus of the counselling process is to identify and agree on the problem, ascertain possible causes, and identify ways in which the employee's performance can be improved or the problem behaviour changed through the development of an action plan.

It is important to provide specific examples of the issues you are raising. This helps reduce denial and defensive behaviour and encourages acceptance, which is usually a prerequisite for progress.

It is possible that performance or behaviour problems emerged through no fault of the employee. The first step of the counselling process is to identify the cause of the problem to allow you and the employee to agree on an action plan to resolve it.

Possible causes of poor work performance may include:

- Poor selection for the position.
- Poor induction- the employer's expectations are not clear because of a failure to communicate and guide the employee into the workplace and the job.
- Lack of specific skills and knowledge – once identified this problem can generally be resolved through training and coaching.
- Poor resources to do the job.

- Too much or too little supervision.
- A lack of challenge or stimulation from the job.
- Job overload.

Other causes outside the employer's influence include:

- Personal circumstances.
- Poor motivation.
- Bad attitude.
- A lack of basic aptitude for the job.

Possible causes of behavioural problems can include:

- Peer pressure.
- Personal circumstances.
- Personality conflicts within the workplace.
- Personal issues such as alcohol or drug dependency;
- Unclear rules for acceptable behaviour or the employer condoning unacceptable behaviour.

Once the cause has been identified and agreed upon you and the employee can discuss how the problem is to be solved.

Your objective should be to assist the employee to attain the required standard if possible. An employer who is supportive and encouraging through this process will help to influence its success. Possible solutions, depending on the problem and cause, can include:

- Setting work priorities on a regular basis.
- Clarifying your expectations and the tasks and responsibilities required.
- Coaching the employee and providing informal feedback on a regular basis.
- On or off the job training.
- Changing hours of work, duties or working conditions.
- Referral to an outside agency such as an employee assistance programme, budget service, etc. (We suggest the employer funds the initial sessions as a signal of commitment to help resolve the problem.)

Having identified the problem, the next step is to develop an action plan including timeframes and a review date to monitor progress and confirm the required change.

The employer is responsible for ensuring that review dates are kept and progress monitored to ensure the agreed outcomes are achieved. This may include regular coaching or training sessions and reinforcement through positive feedback. It should be clear to the employee what will happen if the necessary changes are not made.

A record of the agreed problem, the action plan and the follow up meetings should be kept on file. The employee is entitled to see those records and to receive copies if they wish. It can be useful for the employer to initiate this to reinforce the process.

If the employee challenges the records because they do not agree they are factual, and you concur with their view, you may revise the content. If your views differ on this point, give the employee the opportunity to record their view on the notes.

The counselling records confirm your commitment to procedural fairness and efforts to solve the problem without recourse to disciplinary action. Where the required change is not made and it is necessary to enter into a formal disciplinary process, the record confirms that the employee understands the standard expected of them and has been given support to meet that standard.

Where the counselling process achieves the improvement sought, this should be acknowledged to the employee and the outcome recorded.

We recommend that the records of the process be retained as a permanent record on the file. While the record may not necessarily be useful if problems arise in the future, they will ensure that there is no misunderstanding about the facts or actions taken.

Warnings

If the employee fails to reach the standard required after the counselling process or commits a serious offence that falls short of serious misconduct, a more formal process should be followed.

The first step is to call a meeting with the employee. You should write to them, setting out the concerns that you have and asking them to attend a meeting. The employee must be offered the opportunity to have a support person accompany them to the meeting, e.g. a union delegate, a lawyer or a family member. In the letter you should outline what the possible outcome of the meeting may be .e.g – Y*ou should be aware that the outcome of this meeting may result in a written warning.* It is important at this stage that the outcome of the meeting is not pre-determined – e.g. you should not refer to the meeting as being to issue a written warning. A draft letter is attached as Appendix A.

During the meeting, outline your concerns and then allow the employee to present their side of the story. At this stage you should advise the employee that you are going to consider the facts and that you will advise them of your decision in a few day's time e.g. 3-5 days.

After consideration of the facts and the employee's explanation, the employee should be advised of your decision. That should then be confirmed in writing. A draft warning letter is attached as Appendix B.

A reasonable timeframe should be specified for any required improvements to be achieved. As a general idea, such time limits could be 2-6 weeks for simple clerical tasks and 1-3 months for practice nurses or someone in a management position.

During this period, the employer should ensure that the employee receives all reasonable assistance necessary to make the change required. If a further incident related to the problem for which the warning was given occurs within the review period the employee should be spoken to immediately. Feedback can and should be provided at all times.

If the problem continues, the employer may give the employee a further written warning. That warning may be a final warning and the employee can be advised that failure to heed the warning will lead to dismissal without further warning. It is particularly important to

ensure that the procedure used before a final warning is given is procedurally fair. See the notes above under the section titled "A Fair Process".

We recommend that copies of any warnings issued be retained on file as a permanent record of the incident. The warnings are of limited value after the end of the review date, but do ensure that there is no later misunderstanding about the issue and the action taken.

Dismissal

That fair process should also be followed where dismissal is contemplated. The employee's past record should be taken into account and credit given for good service. Remember that the test to courts will apply when determining whether or not a dismissal is justified is "what could a reasonable employer have done in the circumstances". We strongly recommend that any proposed dismissal is given careful consideration and that time is allowed to take independent advice before the final decision is taken.

If an employee considers that a decision to dismiss them is unjustified, a personal grievance may be raised. This allows the employee to challenge the reasons for the dismissal and the procedure followed by the employer. Personal grievances are often raised on procedural grounds even where there is good evidence that the decision to dismiss was justified on the facts of the situation.

If the decision to dismiss is for misconduct and warnings have been given, it is usual for the dismissal to be "on notice". The notice required should be the period of notice prescribed by the relevant employment agreement or, if notice is not specified, a "reasonable notice period". In the absence of any other standard, such as the notice required for other comparable employees in the practice, a reasonable period would be the normal pay period for the employee, *ie,* one week, one fortnight or one month as the case may be.

This does not prohibit waiving the period of notice if the employment agreement allows this or it is by mutual agreement. The employer may also offer to pay wages in lieu of notice for the period if the employee is not required to work through the notice period.

The dismissed employee is entitled to be advised of the reasons for the decision. We recommend that the reasons are included in the letter of dismissal. See Appendix C for a sample dismissal letter.

Where the employee has access to confidential information, you may also wish to confirm the requirement for continuing confidentiality. See Appendix D for a sample letter that requires an employee to confirm their understanding of this obligation.

Absence Due to Illness

Occasionally, employers find they are in a difficult situation because an employee is off sick for a long period of time on accident compensation. The fact that the employee is absent does not mean that they are no longer in their position.

Termination of employment in these circumstances requires special consideration. A special resource covering this situation is available to NZMA members. Contact the NZMA Member Advisory Service for more information.

Redundancy, Sale of Business and Other Change Affecting Employees.

The ERA places additional responsibilities on the employer to consult with staff before any action is taken to introduce a change that may impact on the employment of an employee, including any proposal to make the employee redundant.

Remember that a redundancy only occurs when the position occupied by an employee is no longer required. There is no redundancy where an employee has been asked to leave because they are unsatisfactory and the employer intends to replace them. Redundancy applies to the position, not the individual employee.

A special resource covering redundancy and business change is available to NZMA members. Contact the NZMA Member Advisory Service for more information.

Personal Grievances and Employment Relationship Problems

The ERA allows an employee to raise a personal grievance for a number of concerns other than unjustified dismissal. Action can also be initiated by an employee or the employer for any other problem relating to or arising out of the employment relationship.

Employment relationship problems are typically dealt with in the first instance through Mediation. This is an informal process intended to resolve problems at the earliest stage before they become entrenched.

Mediation is a positive process and usually facilitated without charge through the Department of Labour's Mediation Service. Private mediation can also be arranged at the parties own expense. If a problem is not resolved at Mediation it is likely to be formalised and taken through to the more formal processes in the Employment Relations Authority and the Employment Court.

Further details of the processes to resolve employment relationship problems and personal grievances are set out in the NZMA resource "Problem Resolution under the Employment Relations Act". See Appendix E.

The grounds for pursuing a personal grievance include any claim the employee may have against the employer that:

- they were unjustifiably dismissed; or
- that the employee's employment, or one or more conditions thereof, is or are affected to the employee's disadvantage by some unjustifiable action by the employer; or
- the employee was discriminated against on certain grounds (*eg*. age, sex, marital status - note this aligns with the grounds in the Human Rights Act 1993); or
- the employee was sexually or racially harassed in their employment; or
- the employee has been subject to duress in relation to membership or non-membership of a union or an employees organisation.

Particular care should be taken with any allegation of sexual or racial harassment. Upon receiving such a claim, an employer must take whatever steps are practicable to prevent

repetition of the behaviour. Failure to act effectively gives grounds for a personal grievance to be established. An employee may choose to raise a claim of sexual or racial harassment under either the personal grievance procedure of the ERA or as a complaint under the Human Rights Act, but not both.

Any personal grievance must normally be raised within 90 days of the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee. However there are several grounds on which that 90 day period may be extended.

A grievance may be raised after the 90 day period has expired where the Employment Relations Authority agrees on the grounds that "exceptional circumstances" exist and the Authority considers it just to allow the grievance to proceed. "Exceptional circumstances" under the Act include circumstances where:

- The employee was so affected/traumatised by the matter giving rise to the grievance that they were unable to properly raise it in time;
- The employee reasonably relied on an agent to raise the grievance within time, and the agent unreasonably failed to ensure it was raised;
- The employee's Individual Employment Agreement (IEA) or Collective Employment Agreement (CEA) does not contain an effective explanation of the procedures for resolving employment relationship problems; or
- The employer has failed to provide a written statement of reasons for dismissal on receiving a request by the employee.

It is important to remember that if the employee seeks a personal grievance hearing, as an employer you have to justify the reasons for your decision. As advised, notes or other records of disciplinary discussions with an employee should always be made, and retained until it is clear that they were no longer needed.

Remedies for a Personal Grievance

Where the Employment Relations Authority or Employment Court determine that an employee has a personal grievance the following remedies are available:

- *Reinstatement* - This is the primary remedy if requested by or on behalf of the employee. If ordered, the employer must reinstate the employee immediately or on the specified date, even if the decision is to be appealed. Interim reinstatement may be ordered before the matter is resolved.
- *Reimbursement* for any remuneration lost as a result of the personal grievance. The employee may be awarded the lesser of the actual remuneration lost or three months' ordinary time pay. There is also discretion to award more.
- *Compensation* for humiliation, loss of dignity, injury to feelings and/or any lost benefit.

An award of compensation for a personal grievance may be discounted where the Authority or Court decides that the employee's behaviour contributed to the problem.

Resolution of Sexual or Racial Harassment Claims

In sexual or racial cases, you may be asked to take action against an employee or other person who has been harassing the complainant(s). Recommendations may include transfer, disciplinary or rehabilitative action, or anything else to prevent further harassment.

Grounds for Successful Personal Grievance Claims

An employee may succeed with a personal grievance claim for a number of reasons including, but not limited to:

- The employee was not aware of any problem and therefore not given the chance to improve his or her behaviour.
- The conduct for which the employee was dismissed was not sufficiently serious to warrant dismissal.
- There was inconsistent treatment of employees or some kind of unfair treatment (e.g. the dismissed employee was not given adequate opportunity to give an explanation).
- Inconsiderate action was taken by the employer, e.g. mitigating factors or the employee's previous good record had not been considered.
- The employee was forced to resign (constructive dismissal).

Constructive Dismissal

Employers need to be careful to avoid situations where an employee can claim that they had no option other than to resign. In this type of dismissal the onus of proof that a personal grievance exists lies with the employee.

If an employee leaves as a result of the employer's action or occasionally even inaction (such as failure to investigate a complaint of sexual harassment), it is a dismissal.

Examples of constructive dismissal include situations where an employee was told that their work was substandard and they should resign to "save face"; where there was a confrontation and the employee walked out claiming the employer was unreasonable; or similar cases where wrongful pressure is placed on an employee such that they feel they had no choice but to resign.

General Comment

The golden rule if you are in doubt about how to go about disciplining an employee or handling a dismissal is to ring the **NZMA Member Advisory Service** for advice.

This document was reviewed August 2015.

Need more help?

Contact the NZMA:

Phone | 0800 65 61 61
Email | Robyn Fell: robyn@nzma.org.nz

APPENDIX A

LETTER TO DISCUSS CONCERNS

The following format may be used to convene a meeting to discuss concerns of an employee:

Date

Employee's name
Employee's address

Dear

Meeting to Discuss Performance Issues

I would like to call a meeting with you to discuss some concerns we have in relation to some performance issues as follows:

- Outline issues

You should be aware that the outcome of this meeting may result in a written warning.

I would like to offer you the opportunity to have a support person present at the meeting, therefore, I am happy for it to be held at a mutually convenient time to all parties. Please discuss with me a suitable time for this meeting.

Yours sincerely,

(EMPLOYER)

APPENDIX B

SAMPLE WARNING LETTER

Any formal warning given to an employee should be confirmed in writing and a copy retained on the employee's file. There is no set format for a warning but we recommend that it should include at least the following information:

- A concise statement of the problem.
- The consequences arising from the problem.
- Any corrective action required of the employee.
- The likely action by the employer if such corrective action is not taken.
- Reference to any previous warnings given (including dates).

The following format may be used for either a first warning or for a final warning:

Date

Employee's name
Employee's address

Dear

This confirms my advice to you given on … (date) of my decision to issue you with a (first written) or (final) warning in relation to …(List problems addressed.)

In making that decision, I had regard to the discussion we had on (day and date) about the following matters:

(List faults/complaints discussed.)

You will remember that I told you that these matters required improvement and that if you failed to improve the outcome would be … (Summarise previous warning or advice)

(For first warning) As discussed, you are therefore warned that unless your performance reaches the required standard by (date) further disciplinary action may result, up to and including dismissal.

OR

(For final warning) You are therefore warned that if there is any further repetition of (the behaviour complained of) you may be dismissed without further warning.

Yours sincerely,

(EMPLOYER)

EMPLOYEE'S SIGNATURE
(as proof written wording was received and understood)

APPENDIX C

SAMPLE LETTER OF DISMISSAL

Date

Employee's name
Employee's address

Dear

This is to confirm our advice to you that your employment with us is terminated with effect from (*time and date*).

I/we have reached this decision after considering the explanation you provided on … *(Date on which employee was given opportunity to respond to the concerns that prompted the dismissal*.)

(Either - for dismissal on notice)
The reason for the termination is that, despite warnings given to you on (*date*) and (*date*), your performance (or behaviour) has not reached the required standard in the following respect:
(*List areas where performance has not reached the required standard.*)

(Or - for summary dismissal)
The reason for dismissal is … (*(List reason)* In taking our decision, we had regard to all the circumstances including your past employment with us.

(S*et out details of the final pay and holiday pay)*

Please arrange with *(insert name)* to return all company property in your possession.

Yours sincerely,

(EMPLOYER)

APPENDIX D

SAMPLE LETTER - Departing Employee's Agreement not to Disclose Confidential Matters

Date

Employee's name
Employee's address

Dear

Following the termination of your employment with us, I wish to confirm your on-going obligation to retain full confidentiality of all information you received while employed by us.

To confirm your acknowledgement of this obligation, please sign the confirmation section below and return the letter to me.

Yours sincerely

(EMPLOYER)

Confirmation

I … *(name)* acknowledge that I have received all salary and compensation due to me during my employment with (*organisation name*), which terminated on (*date*).

I certify that I have complied with all provisions that I signed on my employment and that I have not done or in any way been a party to or knowingly permitted to any:

1. Disclosure of any confidential matters of the company; and/or

2. Retention by me or others of any confidential materials or documents used by me or others during my employment.

I acknowledge that I have again been carefully and fully advised by _____ of my continuing obligation to preserve as confidential, not to reveal to anyone, or use, for myself or anyone else, any confidential matters learned by me during, or by reason of, my employment with … (*organisation name*).

I agree that I will not, in any way or at any time hereafter, disclose or reveal to my new employer or to any other party, or use in any way for my own purposes, any confidential information, records, or other materials learned by me or disclosed to me during my employment with … (*organisation name*).

Employee _____ Date _____

APPENDIX E

PROBLEM RESOLUTION
Under the Employment Relations Act (ERA)

The Employment Relations Act 2000 (ERA) aims to provide information and mediation services as the primary means of resolving problems that you cannot resolve with your employee or employees, in a speedy, informal and flexible way. As part of this, employers are required to have a plain language explanation of the services available for the resolution of employment relationship problems, including reference to a 90-day period for raising a personal grievance. Such an explanation should be written into all individual and collective agreements, and non-compliance can result in penalties and/or an employee could raise a personal grievance outside of the 90-day period.

An employment relationship problem includes a personal grievance, a dispute about the interpretation, application or operation of any employment agreement, and any other problem relating to or arising out of an employment relationship, but does not include any problem with fixing new terms and conditions of employment.

The following is a sample of a plain language explanation of services available for problem resolution which members can adopt and write into any employment agreement. In addition, to ensure employers are complying with the Act the NZMA recommends that this or a similar version be distributed to existing employees so that they are aware of their rights in this regard.

If required employers can also develop further internal processes within their business which employees and employers would be required to follow where an employment problem arises.

Sample clause

1. The employer and employee can save time and help preserve their working relationship by solving their own problems as far as possible.

   The following are suggestions for what the employee might do if they think there is a problem, and what help is available.

   1.1 Clarify the problem

   (a) The employee should make sure there really is a problem by checking facts and ensuring nothing has been assumed or misunderstood. The employee might discuss the apparent problem with family, friends or advisers and find out what the laws and/or what this employment agreement says.

   (b) The employee can:
   - Contact Employment Relations Infoline
     - call free 0800 800 863
     - visit the website at www.ers.dol.govt.nz
   - Get pamphlets/fact sheets from Employment Relations Service offices.
   - Talk to a Union, a lawyer, community law office, industrial relations consultant, or other adviser.

1.2 Discussion with the Employer

The employee can arrange to discuss the facts with the employer to clear up any assumptions or misunderstandings, and try and find a solution. The employee may bring a friend, relative, or colleague to support them in the discussion at any time.

1.3 What are the Next Steps?

If the problem cannot be solved by discussion, either the employee or the employer can do some or all of the following things:

(a) Contact Employment Relations Infoline, who may provide information and/or refer both parties to mediation;

(b) participate in mediation provided by the Employment Relations Service (or the employer and employee can agree to use their own private mediator);

(c) if there is agreement, a mediator provided by the Employment Relations Service can sign the agreed settlement, and that will be binding. Otherwise both parties can choose to have the mediator provided by the Employment Relations Service decide the matter, and if so, that decision will be binding;

(d) if mediation does not resolve the problem, either or both parties can take the problem to the Employment Relations Authority for investigation;

(e) the Employment Relations Authority may direct both parties to mediation or it can investigate and make a determination about the problem;

(f) any party dissatisfied with the determination of the Authority, can take the problem to the Employment Court for a judicial hearing. (The Court may also tell both parties to go back and have more mediation).

1.4 Personal Grievances

(a) If the employee considers that there are grounds for raising a personal grievance (for unjustified dismissal, unjustifiable disadvantage, discrimination, duress, sexual or racial harassment), the employee must notify the employer within 90 days of the action occurring or coming to the employee's notice, otherwise the claim may be out of time.

(b) The employee must let the employer know what the grievance is about, by either telling the employer, or putting the grievance in writing, so the employer can respond to the claim.

(c) If the grievance is raised out of time, the employer may reject it, in which case the employee can ask the Employment Relations Authority to allow the grievance to be raised out of time but only if there are exceptional circumstances.