Performance and Conduct Management Discipline and Grievances

1. Overview

1.1. 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 their employer.

1.2. 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.

1.3. The process outlined below illustrates how to generally approach these situations to ensure that the employee is treated fairly and reasonably. Failure to follow this sort of process may result in a valid personal grievance, even if the grounds for the action were sound.

1.4. 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 or conduct.

1.5. The formal process to deal with any employment relationship problem or personal grievance is outlined in HTRHN's resource "Problem Resolution under the Employment Relations Act". See Appendix D.

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

2. A Fair Process

2.1. 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

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taken to deal with performance problems or other instances of misconduct or serious misconduct.

2.2. The focus of the process is to assist the employee to improve the problem behaviour or poor performance and to come up to standard if that is achievable.

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

- *In the case of early 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 (setting the standards) and to allow you to work together to identify any assistance the employee may require to meet that standard.

- *In the case of continued performance issues,* a Performance Improvement Plan is a good approach to try before moving to formal disciplinary action. This involves setting out performance expectations clearly in writing and putting in place timelines and measures to assess the employee against. A period of time is usually allowed for the plan (for example, one month) with regular feedback and assistance from the employer.

- *For persistent performance or behavioural problems,* a progressive warning process is used. In considering whether to move to a formal warning process, the employer should think about whether they have made the standards clear and whether they have provided feedback, training and assistance for the employee to meet the standards. The warning process usually involves a first formal warning, a final warning and dismissal on notice if the problem is not resolved.

- *For very 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.

2.4. A warning or dismissal should only take place after an appropriate investigation and disciplinary meeting. Procedural fairness requires the employee to be advised before you meet that you intend to address a serious issue, to be told what the issue is and given any information you have about the issue, to be told what the potential consequences could be, and to be given the opportunity to bring a representative or support person of their choice to the meeting (this may be a union representative, solicitor, advocate, friend, colleague or family member). Such a meeting is normally held at a time acceptable to all involved.

2.5. 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.

2.6. 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 feedback 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.

3. Misconduct and Serious Misconduct

3.1. The options available to an employer to deal with a disciplinary issue depend on the seriousness of the offence.

3.2. Misconduct is behaviour or conduct that fails to reach the required standard. Dismissal may follow after sufficient warnings have been given. Examples of misconduct include:

- Not complying with a policy or procedure
- Wasting time or materials or being careless
- Lateness or absenteeism
- Smoking anywhere prohibited by company policy
- Failure to meet clothing and/or personal hygiene standards
- Low level rudeness, unprofessional behaviour or discourtesy

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 an employee. Summary dismissal is the likely disciplinary action.

3.3. Serious misconduct includes but is not limited to the following:

- Physical or verbal violence or threats, provoked or otherwise
- Misuse of or damage to company property
- Unauthorised possession of company property or the property of another employee or a patient
- Possession, consumption or being under the influence of drugs on or off the employer's premises during working hours including meal breaks
- Consumption of or being under the influence of alcohol on or off the company premises during working hours including meal breaks, without the specific authority of management
- Insulting or abusive behaviour, or abusive language directed at another person

- Failure to account for any monies received on behalf of the employer
- Refusing to perform work assigned, walking off the job, or failure to follow a lawful and reasonable instruction
- Falsification of the employer's records
- Sexual or racial harassment or bullying, intimidation, discrimination or unwelcome behaviour
- Bringing the employer into disrepute
- Working unsafely
- Creating or not resolving or not declaring a conflict of interest
- Misrepresentation, dishonesty, misleading or deceptive behaviour or withholding information
- Inappropriate, unlawful or offensive use of technology, internet, email or social media
- Breach of confidentiality
- Negligence

It is common to include a list of conduct that may be considered to be misconduct or serious misconduct in house rules, code of conduct or disciplinary policy. It is important that any items quoted are identified as examples only. Any other action by an employee that is similar in nature may also initiate disciplinary action.

4. Counselling

4.1. A counselling process is frequently 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.

4.2. The aim of counselling is to identify and agree on the problem, ascertain possible causes, and agree about ways in which the employee's performance can be improved or the problem behaviour changed.

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

4.4. 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 how to resolve it.

4.5. 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.

4.6. Other causes outside the employer's influence include:

- Personal circumstances
- Health or mental health issues
- Poor motivation
- A lack of basic aptitude for the job.

4.7. Possible causes of behavioural problems can include:

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

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

4.9. 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, could 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).

4.10. Counselling, including the problem, the causes identified or discussed, and the solutions agreed on or put in place should be clearly documented. The employer

should keep good notes and it is good practice to record the discussion and steps being taken in a letter or email to the employee. Where a specific period of time has been agreed on for a solution or progress, this should be documented, and the employer should ensure those review dates are kept.

5. Performance Improvement Plan

5.1. In the case of a performance issue, if counselling and the solutions identified have not resolved the problem, the next step may be to agree on a Performance Improvement Plan (PIP) including timeframes and a review date to monitor progress and confirm the required change.

5.2. The employer and employee should meet to discuss the employee's performance and the employer should explain that they want to implement a Performance Improvement Plan, with the aim of getting the employee's performance up to the required standard. The specific areas that the employee will work on should be agreed and documented, along with how success will be measured. A time period (for example, one month) should be set for the plan. Regular feedback meetings during the period of the plan (e.g. weekly) should be scheduled and a final formal meeting to assess whether the PIP has been successful should be set for the end of the plan. Any assistance that will be provided, such as further one on one training should be documented and should take place early in the PIP.

5.3. The employer is responsible for ensuring that feedback meeting 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.

5.4. At the end of the time period set out in the PIP, the employee's progress should be assessed. If the employee has not achieved the required outcomes, the employer will likely want to move to formal disciplinary action. If the employee has made some good progress and has partially but not fully met the required outcomes, the employer may choose to implement another PIP to continue the progress. If the employee has achieved the required outcomes, the employer should provide feedback about the success. It is usually appropriate to agree and record how the improved performance will be sustained into the future and/or to agree on a further meeting in a month's time to ensure the performance improvement has been sustained.

6. Records

6.1. Records about any action taken prior to disciplinary action should be kept on file. The employee is entitled to see these records and to receive copies if they wish. It can be useful for the employer to initiate this to reinforce the process.

6.2. 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.

6.3. Records of steps taken prior to disciplinary action 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 has been clearly advised of the standard expected of them and has been given support to meet that standard.

6.4. Where the improvement sought has been achieved, this should be acknowledged to the employee and the outcome recorded.

6.5. We recommend that the records of the process be retained as a permanent record on the file. Records ensure that there is no misunderstanding about the facts or actions taken.

7. Warnings

7.1. If the employee fails to reach the standard required after counselling or a performance improvement plan, or appears to have committed misconduct, a more formal process should be followed.

7.2. The first step is to carry out some preliminary investigation into what has happened. Get together any documentation or evidence and speak to any witnesses. If it appears that the matter may warrant a formal warning, you should call a meeting with the employee. You should write to them, setting out the concerns that you have, providing the information that you have from your preliminary investigation, and asking them to attend a meeting. The employee must be offered the opportunity to have a representative or support person accompany them to the meeting, e.g. a union delegate, a lawyer or a family member, and that should be specifically mentioned in the letter. In the letter you should outline what the possible outcome of the meeting may be e.g. – You should be aware that the outcome of this meeting could be a formal written warning. It is important at this stage that the outcome of the meeting is not pre-determined, so you should state that you have not made any decisions and will not do so until you have heard their explanation, but it is important that they understand the possible consequences so that they can take advice and prepare for the meeting. A draft letter is attached as Appendix A.

7.3. During the meeting, outline your concerns and then allow the employee to present their side of the story. Listen, make good notes, and ask any questions you need to so that you have a full understanding. Keep an open mind. Sometimes at this point further investigation is required, and if this is the case, you should adjourn the meeting for that further investigation. Once you have carried out that further

investigation, you should then provide that to the employee and meet again so that the employee has the opportunity to comment further about that further information.

7.4. When you have completed the investigation stage, you will have as much information as you can gather about what happened, and the employee will have been provided with all of the information you have. You should then reach your conclusions or findings about what happened. This part of your consideration just focuses on the "what" – not the outcome. You should consider the information and decide what you believe happened. Sometimes there may be different versions of events, and in that case you will need to decide what you believe happened.

7.5. You should then advise the employee of your findings, give them an opportunity to comment, and ask them if they have anything else they would like you to consider. Specifically invite them to provide any contributing or mitigating circumstances they would like you to take into account.

7.6. You should then adjourn the meeting to consider what the outcome should be. Take the time you need.

7.7. Meet again with the employee to tell them what your preliminary thoughts are about the outcome. This should be phrased as a preliminary decision – for example, "I am considering issuing you with a formal warning. I have not finalised my decision at this point, and I would like to give you a final opportunity to give me any feedback, and to comment about that proposed outcome, before I make a final decision". Listen to the feedback, and then adjourn the meeting to decide about the outcome.

7.8. When you have made a final decision, the employee should be advised of your decision. That should then be confirmed in writing. A draft warning letter is attached as Appendix B.

7.9. If the issue is performance, 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 more complex tasks that may require more time to meet the standard.

7.10. During this period, the employer should ensure that the employee receives all reasonable assistance necessary, including prompt feedback about progress, to make the change required.

7.11. If the employee continues to not meet the performance standards, or if misconduct continues, the employer may give the employee a final written warning. A final warning should not be given about something different from the behaviour, conduct or performance resulting in the first warning. For example, if an employee has received a formal warning for persistent lateness, and the

employee subsequently breaches a policy, that would entail a separate warning process. A final warning should only be considered where the employee has already been warned about the performance, behaviour or misconduct and that has continued despite the warning. The same process outlined above should be followed before a final warning is issued.

7.12. In the case of a final warning, the employee should be advised that this is a final warning and 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".

7.13. We recommend that copies of any warnings issued, including meeting notes and other documentation, be retained on file as a permanent record of the incident. A warning cannot be relied on as a precedent forever – generally if there has been no repetition within 6-12 months, the warning should be considered to have "expired", but they do ensure that there is no later misunderstanding about the issue and the action taken.

8. Dismissal

8.1. That same 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 the Employment Relations Authority applies 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.

8.2. 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/or 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.

8.3. If the decision to dismiss is for misconduct or poor performance 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.

8.4. The employer may offer to pay wages in lieu of notice for the period if the employee is not required to work through the notice period, provided the employment agreement allows for this.

8.5. A 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.

8.6. Where the employee has access to confidential information, you may also wish to confirm the requirement for continuing confidentiality.

9. Absence Due to Illness or Injury

9.1. Occasionally, employers find they are in a difficult situation because an employee is off for a long period of time due to sickness or injury. The fact that the employee is absent does not mean that they are no longer in their position.

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

10. Redundancy, Sale of Business and Other Change Affecting Employees.

10.1. The Employment Relations Act places additional responsibilities on employers to consult with their staff before any action is taken to introduce a change that may impact on the employment of an employee or employees, including any proposal to make the employee/s redundant.

10.2. Remember that a redundancy only occurs when the position occupied, or the work done 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.

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

11. Personal Grievances and Employment Relationship Problems

11.1. The Employment Relations Act 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 employer for any other problem relating to or arising out of the employment relationship – for example, a disagreement about what the employment agreement provides for.

11.2. 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.

11.3. Mediation is a positive process and usually facilitated without charge through the Ministry of Business Innovation and Employment'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 taken through to the more formal processes in the Employment Relations Authority and the Employment Court.

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

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

- they were unjustifiably dismissed; or
- their employment, or one or more conditions thereof, is or are affected to their disadvantage by an unjustifiable action by the employer; or
- they were discriminated against on one of the grounds in the Human Rights Act 1993); or
- they were sexually or racially harassed in their employment; or
- they were treated adversely due to being a person affected by family violence; or
- they were subjected to duress in relation to membership or non-membership of a union or an employees' organisation; or
- the employer has not complied with the restructuring requirements for vulnerable employees in the Act; or
- the employer has not complied with the employment standards requirements in the Act; or the employer has contravened certain requirements in the Health and Safety at Work Act.

11.6. Particular care should be taken with any allegation of sexual or racial harassment by a co-worker, customer or client. 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.

11.7. 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 grounds on which that 90 day period may be extended.

11.8. A grievance may be raised after the 90 day period has expired where the Employment Relations Authority agrees 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 to do so by the employee.

11.9. It is important to remember that if the employee lodges a personal grievance, as an employer you must be able 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.

12. Remedies for a Personal Grievance

12.1. 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 sought and ordered before the substantive personal grievance case is heard.
- *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.

12.2. 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.

12.3. Recommendations may also be made by the Authority or Court. These can include recommendations about the action the employer should take against a person who has harassed an employee, including transfer or disciplinary or rehabilitative action.

13. Grounds for Successful Personal Grievance Claims

13.1. 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 did not have 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).
- The employee was forced to resign (constructive dismissal) in circumstances where dismissal would not have been justified.

14. Constructive Dismissal

14.1. 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, who must prove that although they resigned, they essentially had no other choice.

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

14.3. 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 where wrongful pressure is placed on an employee such that they feel they had no choice but to resign. Constructive dismissal can also be claimed where an employer has breached the employment agreement, such as unilaterally changing terms and conditions of employment, or where an employee is told that if they don't resign, they will be dismissed.

15. General

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

Need more help?
Contact HTRHN:

Phone	021-595-937
Email	Robyn Fell: robyn.fell@htrhn.org.nz

Date: March 2024

APPENDIX A

LETTER TO DISCUSS CONCERNS

The following format may be used to request an employee to attend a disciplinary meeting:

Date

Employee's name
Employee's address

Dear

Either:

Some concerning issues have arisen which I need to discuss with you. It has been alleged / it appears that [Detail concerns and attach any relevant documents from initial investigation]

I am concerned about these matters. [Refer to your house rules or code of conduct if relevant and note if the allegations could constitute misconduct. Refer to any previous discussions, coaching etc].

Or:

Some concerns have arisen with regard to your performance. I am concerned that it appears:

- Outline issues

[Explain implications of issues – why this is causing problems for the practice. Refer to any previous discussions, additional training or performance improvement plan.]I would like to meet with you to discuss these matters further and to hear your explanation and anything you would like me to take into account.

I would like to meet with you on ____ at _____. _____ would be with me. I would like to offer you the opportunity to have a representative or support person present at the meeting. Please let me know if this time is not suitable for your representative/support person.

It is important that you know that the outcome of this meeting could be a formal warning. No decisions will be made about the outcome until you have had the opportunity to provide your explanation, but it is important that you know that a formal warning could be the outcome so that you can take advice if you wish and prepare for the meeting.

[Note: If a final warning may be the outcome, this should be stated and the previous warning should be referred to; if dismissal may be the outcome, this should be stated, and if it is not an allegation of serious misconduct, the previous warnings should be referred to]

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

As you know, I wrote to you on [date] to request you to attend a meeting to discuss [issues]. I invited you to bring a representative or support person and advised you that a potential outcome of the meeting could be a formal warning.

We met on [dates of meeting]; you were accompanied by [representative or support person] and [employer's witness] also attended. We discussed these issues and you explained that [summarise explanation, summarise any further investigation carried out].

I concluded that [set out findings about what happened].

I advised you that I was considering a formal warning and gave you a further opportunity to provide any feedback you would like me to consider. You said [summarise feedback].

I considered this and concluded that a formal / final warning was the appropriate outcome and advised you of that.

This letter confirms my advice to you of my decision to issue you with a formal//final warning .

This letter is a formal warning.

If initial warning:

Either:

As discussed, unless your performance reaches the required standard by (date), this is likely to result in a in a final warning and ultimately dismissal.

Or:

Any further misconduct is likely to result in a final warning and ultimately dismissal.

If final warning:

Either:

This is your final warning. As discussed, unless your performance reaches the required standard by (date), this is likely to result in your dismissal.

Or:

This is your final warning. As discussed, any further misconduct is likely to result in your dismissal.

Yours sincerely,

(EMPLOYER)

APPENDIX C

SAMPLE LETTER OF DISMISSAL

Date

Employee's name
Employee's address

Dear

As you know, I wrote to you on [date] to request you to attend a meeting to discuss [issues]. I invited you to bring a representative or support person and advised you that a potential outcome of the meeting could be your dismissal.

We met on [dates of meeting]; you were accompanied by [representative or support person] and [employer's witness] also attended. We discussed these issues and you explained that [summarise explanation, summarise any further investigation carried out].

I concluded that [set out findings about what happened].

I advised you that I was considering dismissal and gave you a further opportunity to provide any feedback you would like me to consider. You said [summarise feedback].

I considered this and concluded that dismissal was the appropriate outcome and advised you of that.

This is to confirm our advice to you that your employment with us is terminated with effect from (*time and date*). [if serious misconduct, no notice should be given, otherwise notice in accordance with the employment agreement should be given]

(*Set 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

PROBLEM RESOLUTION

Under the Employment Relations Act (ERA)

The Employment Relations Act 2000 requires employers to have a plain language explanation of the services available for the resolution of employment relationship problems, including reference to a 90-day limit for raising a personal grievance. Such an explanation should be written into all individual and collective agreements. Not having a plain language explanation in the employment agreement can result in penalties against the employer and an employee who does not have a plain language explanation in their employment agreement can 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 the case of an employment agreement which does not contain a plain language explanation of the problem resolution process, the employer should ensure an updated employment agreement is offered which contains the explanation. If the employee does not agree to the revised employment agreement, the employer should write to the employee providing the explanation and noting that the employer has sought to agree a new employment agreement containing the explanation.

Sample clause

An "employment relationship problem" includes:

(a) A personal grievance
(b) A dispute
(c) Any other problem relating to or arising out of the employment relationship but does not include any problem with negotiating new terms and conditions of employment.

Where an Employment Relationship Problem arises the parties will in the first instance seek to resolve it between the immediately affected parties. Further to this:

(a) The employee is entitled to seek representation at any stage during the process. Help with an employment relations problem is available from within the workplace (employee manager) or outside the workplace (Ministry of Business, Innovation and Employment 0800 20 90 20), or a union, an advocate or a lawyer.

(b) If the matter is unresolved either party is entitled to seek mediation from the Ministry of Business, Innovation and Employment or refer the matter to the Employment Relations Authority. (Both mediation and investigation by the Authority are services available for the resolution of employment relationship problems.)

A "personal grievance" means a claim that an employee:

(a) has been unjustifiably dismissed; or
(b) has had his/her employment, or his/her conditions of employment, affected to his/her disadvantage by some unjustifiable action by the employer; or
(c) has been discriminated against his/her employment; or
(d) has been sexually harassed in his/her employment; or
(e) has been racially harassed in his/her employment; or
(f) has been subjected to duress in relation to union membership.

If the employment relationship problem is a personal grievance, the employee must raise the grievance with the employer within a period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter.

Where any matter comes before the Authority for determination, the Authority must direct the matter to mediation in the first instance. Where mediation has failed or been deemed inappropriate in the circumstances, the Authority will then have the power to investigate the matter.

If the employment relationship problem relates to discrimination or sexual harassment, services available for the resolution of the problem include either application to the Authority for the resolution of this grievance or a complaint under the Human Rights Act 1993, but not both.

Date: March 2024