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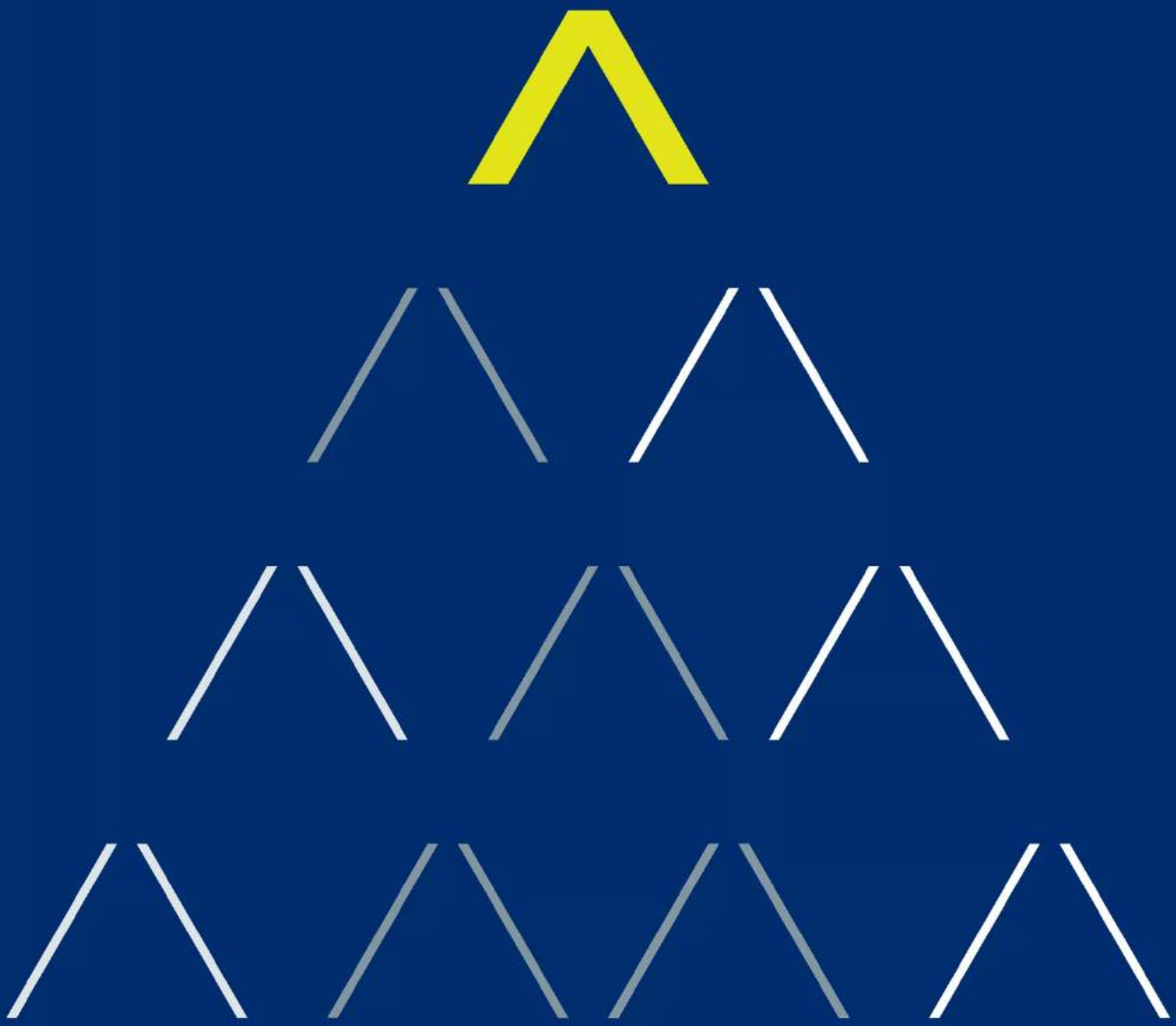
'Back to Basics' Employment Law Guide



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Welcome to our 'Back to Basics' guide where our employment team break down the life cycle of the employment relationship. Each chapter covers a specific topic within the employment relationship and together they provide a general guide on how to manage the employment relationship from start to finish.

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'Back to Basics' Employment Law Guide

Chapter One: Hiring Employees

Chapter One: Hiring Employees

This chapter will provide a general overview of the recruitment process, which is the first step to any employment relationship.

Deciding to hire a new staff member is one thing, but finding the right fit is another. Naturally, employers want to know everything that they can about who they are potentially hiring. However, when it comes to recruitment, there are several dos and don'ts.

Process

The recruitment process consists of several key steps, which are summarised below.

Consider what your employment needs are, including what would make someone successful in the role, and what level of skill and experience is required. Use this exercise to create a job description

Advertise the role

Shortlist candidates based on skills and experience to perform the role

Interview preferred candidates (consider if second interviews are required)

Select preferred candidate

Ask the preferred candidate for at least two references and complete reference checking

Offer employment

Consider whether an offer of employment should be conditional on any pre-employment checks (covered further in our next edition)

At each step of the process, care must be taken not to discriminate against a candidate or breach a candidate's privacy (even inadvertently). These are common and potentially costly pitfalls in the recruitment process.

Discrimination

Employers must be careful not to ask candidates questions that may be considered discriminatory.

Under the Human Rights Act 1993, there are several 'prohibited grounds' of discrimination.[1] These include, but are not limited to, discriminating against a candidate based on sex, religious belief, family status, race, disability, or sexual orientation. If an employer asks a candidate a question that relates to a prohibited ground of discrimination, or treats someone differently based on one of these grounds, the candidate may allege that they have been unlawfully discriminated against. In which case, they may make a complaint to the Human Rights Commission.

The reasoning behind this is that the prohibited grounds of discrimination generally have no impact on a candidate's ability to perform a role. For example, whether a person is married with children does not generally impact on that person's ability to perform a role successfully. You would be surprised how often we see an application form asking for a candidate's relationship status and number of dependents, which is concerning as it suggests that an employer is making hiring decisions based on irrelevant considerations.

Nonetheless, there are exceptions where a particular trait may be required for a role. While ordinarily it would be discriminatory to exclude an applicant based on race, an exception may be where the role requires someone who speaks mandarin due to having a large Chinese client base.

Generally, if employers focus only on a candidate's ability to meet the skills, experience and competencies of the role during the recruitment process (and not other irrelevant factors), then they should avoid running into problems.

[1] Human Rights Act 1993, s 21.

Some of our most frequently asked questions on discrimination are set out below:

Can I ask a candidate if they have, or are intending to have, children?	No, a candidate's family status is irrelevant as to whether they can perform a role or not.
Can I ask a candidate if they are married or have a partner?	No, unless very limited circumstances exist, such as whether they have a relationship with an existing employee of the company (which could create a conflict of interest in the workplace).
Can I ask a candidate if they have a visa?	Yes, if you do so correctly. Employers legally must ask for evidence that candidates are entitled to work in New Zealand.
Can I ask a candidate how old they are?	No, unless it is relevant to the role, such as being old enough to work in a licensed premises.
Can I ask a candidate if they have a medical condition?	Yes, but this needs to be managed carefully. For example, you can ask if a candidate has a medical condition which may impact on the candidate's ability to perform the role that they are applying for.

Privacy

Employers must also be careful when collecting information about candidates during the recruitment process. Employers should ensure that they specifically get the candidates agreement and consent to contact referees or other sources of information before doing so.

In a recent decision of the Office of the Privacy Commissioner, a privacy complaint was upheld when an organisation contacted a candidate's current employer without the candidate's consent.[1]

Listing a former or current employer on a candidates resume does not amount to consent to contact those employers. Employers should be careful to only collect information from the candidate directly, or from others with the candidate's consent.

[1] Case note 287445 [2021] NZPrivCmr 4.

Summary

As you can see, there are several things to keep in mind when navigating the recruitment process. First and foremost, we recommend that employers focus only on whether candidates have the skills and experience to perform the role and ensure that any information collected about the candidate is done so with their permission.

We have prepared the a checklist for you to work through on the following page when it comes to hiring your next employee.

Checklist

Consider what your employment needs are, including what would make someone successful in the role, and what level of skill and experience is required	
Create a job description	
Advertise the role (completing the previous steps should help you to sufficiently describe the role and attract the right candidates)	
Shortlist applicants based on skills and experience to perform the role (select the most appropriate candidates to interview)	
Arrange interviews with the preferred candidates and consider who is appropriate to attend the interview (often it is helpful to have at least two people attend to assess suitability)	
Consider if second interviews are required (this may be with other members of your team for another point of view regarding suitability for the role)	
Select your preferred candidate based on the skills and experience to perform the role	
Ask the preferred candidate for at least two references	
Conduct reference checking, and only speak to the specific referees provided by the candidate. Some good questions and topics to cover when reference checking are: • Confirm that dates of employment are the same as listed on the candidate's resume • Whether the referee would have any hesitations in recommending the candidate • How the candidate works as part of a team • Whether the candidate has any areas that need development • What the candidates' strengths and weaknesses are • Whether the referee would re-employ the candidate • Whether there is anything else that you should be aware of before making a final decision	
If satisfied with reference checking, select preferred candidate. If not, go back to the list of shortlisted applicants and repeat the process	
Offer employment	

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Chapter Two: Individual Employment Agreements

Chapter Two: Individual Employment Agreements

This chapter is all about what happens once the recruitment process is complete, and an employer has found a candidate that they would like to offer employment to.

At this stage of the relationship, employers must prepare a letter of offer and an individual employment agreement to provide to the successful candidate. As part of this, employers must consider whether the offer will be subject to any conditions, what type of employment they will offer, and on what terms.

Pre-employment conditions

Employers may choose to make offers of employment subject to one or more conditions being met. This means that an offer of employment is not confirmed until any specified conditions are completed to a satisfactory standard. The most common conditions that employment may be subject to are set out below:

Criminal record check

Drug and/or alcohol tests

Medical assessment

Confirmation of qualifications

Credit check

However, there are some fish hooks to be aware of when making a conditional offer of employment.

Importantly, any pre-employment test or check that a candidate is asked to complete must be relevant to the role being applied for. If not, such a condition may be found to be an unreasonable and unfair intrusion into the candidate's privacy.

For example, if a person has applied for a safety sensitive role, such as a truck driver, then a pre-employment drug test may be an appropriate condition of employment. This is because a driver being affected by drugs can pose a serious risk to health and safety. On the flipside, if a person has applied for an office-based role and will spend the majority of his or her workday at a desk, a pre-employment drug test is unlikely to be appropriate. This is because the role is not one that is safety sensitive.

Similarly, the Office of the Privacy Commissioner has previously found that a pre-employment credit check where the role applied for posed no financial risk was an intrusion into the candidate's privacy.

Careful wording must also be used when preparing a conditional offer of employment to ensure its validity. For example, employers must clearly state in the letter of offer that the offer is conditional, and remains conditional, on the check or test being completed to the satisfaction of the employer. Employers must also ensure that they receive the candidate's permission before conducting any pre-employment check.

Type of employee

Employers at this stage of the process must also consider what type of employee they are hiring so that the most appropriate form of employment agreement is used.

There are several types of employees: permanent, fixed term or casual. Each type of employee comes with a different set of obligations, rights, and responsibilities, so employers need to ensure that they get it right from the outset to save problems down the line.

Permanent

Permanent employment is the most common type of employment and will continue indefinitely until terminated by either party in accordance with the terms of the agreement. Permanent employment can be full-time or part-time.

Fixed-term

If an employer wishes to hire an employee on a fixed-term (temporary) basis, there must be a genuine reason based on reasonable grounds for the fixed-term, and the employer must record that reason in the agreement. Common reasons for a fixed-term include to cover a specific busy period, to complete a project, or to cover another employee on maternity leave.

Wanting to test someone's suitability for permanent employment is not a sufficient reason for putting them on a fixed-term agreement.

Again, fixed-term employment can be full-time or part-time.

Casual

If an employer wishes to hire an employee on a casual (intermittent) basis, they must be certain that the employee will not work regular hours and/or a regular pattern of work. A casual agreement should generally only be used if the employee will work on an ad hoc basis, such as to cover an employee who is away sick or to call on occasionally during a peak period (such as Christmas).

There are serious risks associated with keeping long-standing employees on casual agreements, and it pays to seek advice if you are not certain whether an employee should be employed on a casual agreement or a permanent part-time agreement. Generally, if an employee will have set hours of work each week (even if a small amount) for a continuous period of time, then this is a clear indicator that they are not a casual employee.

Terms of employment

The next step is to ensure that any terms of employment offered to a new employee are fit for purpose. There are three main things for employers to consider when preparing an employment agreement for a new employee:

1. The minimum entitlements set out in the Employment Relations Act 2000
2. Clauses that must be included by law
3. Any additional wording or clauses specific to the business and/or a role

The minimum entitlements provided by law apply to employers and employees regardless of whether they are recorded in an employment agreement. However, we recommend that employers do include them to avoid any confusion. Examples include the minimum entitlement to sick leave, annual leave, bereavement leave, statutory holidays, and the requirement for both parties to act in good faith. In some cases, employers and employees may negotiate and agree to better terms and conditions than what is provided by law.

There are also clauses that legally must be recorded in every employment agreement. Examples include, the name of the employer and employee, the agreed hours of work, the agreed remuneration and an explanation of how to solve an employment relationship problem and raise a personal grievance. Employers risk a penalty being imposed if they do not note these key points in their employment agreements.

Employment law in New Zealand is constantly changing and it is important that employers regularly review their employment agreements to ensure that they are compliant with the law and remain fit for purpose.

In addition, employers should also consider whether there are any additional clauses that they would like to include. Optional clauses usually depend on the role, the person being hired and industry standards. Employers can essentially include any wording they wish, so long as it is reasonable, and the employee agrees to it. Some optional clauses that are good to include are ones dealing with:

- 90-day trials or probationary periods
- Drug and alcohol testing
- Bonus schemes
- Company vehicles
- Information technology and social media
- Post-employment obligations (restraints of trade and/or non-solicitation clauses)
- Industry standards and registration
- Tenancy agreements (most common in farming situations)
- Force majeure

Summary

Finally, make sure that the employee is presented with the letter of offer and proposed employment agreement with plenty of time to review the agreement and seek advice before his or her intended start date. It is also important to understand that once an offer of employment is made and accepted, that person is considered an employee by law, so you cannot simply withdraw an offer (even if they have not yet started their employment).

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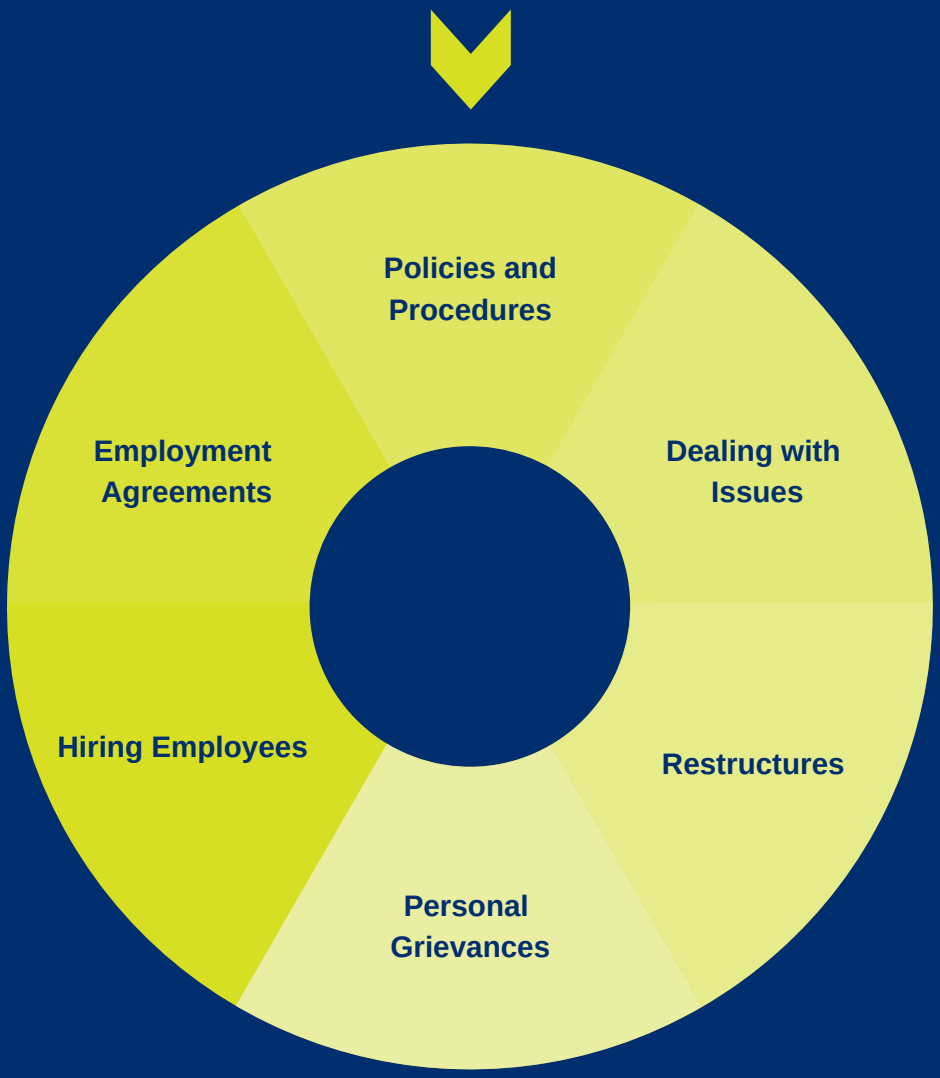
Chapter Three: Policies and Procedures



Chapter Three: Policies and Procedures

In this chapter we focus on company policies and procedures, and answer all of your frequently asked questions on the topic.

In a nutshell, policies and procedures are stand-alone written guidelines and rules set by employers that support employment agreements and ensure that employers and employees are on the same page when it comes to a particular part of the employment relationship. Breaches of policies and procedures can lead to disciplinary action for misconduct or serious misconduct, in the same way that a breach of an employment agreement would.

So, do employers need workplace policies?

Technically, employers are not required by law to have any policies and procedures.

However, for workplaces that operate in a safety sensitive industry, it would be risky not to have a robust health and safety policy in place.

Beyond that, policies are not compulsory, but are good to have. One of the biggest benefits of polices is that they are simple to introduce, update, or even remove entirely.

In comparison, it is much harder and labour intensive to reissue new employment agreements every time that an employer wants to clarify something or introduce new rules to employees. Employment agreements also tend to be lengthy enough without recording policies and procedures within them.

What policies and procedures should employers consider?

This depends on how each employer operates and the type of industry and business that they operate in. For this reason, we recommend that employers seek specific advice on what policies and procedures may be good for their business, as well as having their policies reviewed regularly to ensure that they remain fit for purpose and compliant with ongoing changes to employment law.

From a general perspective, employers should ensure that they have well drafted policies and procedures to cover any aspect of their business which poses a risk of harm or may be ambiguous or any area that they want to place additional emphasis on.

Therefore, there are some general policies and procedures that we suggest for all businesses, such as a health and safety policy, and a policy dealing with bullying, harassment and discrimination. We also recommend a code of conduct as employers can use this to set general standards of behaviour and cover off a range of ad hoc topics.

Some other policies and procedures that are worth considering are:

- Drug and alcohol policy
- Privacy policy
- Social media policy
- Company vehicle policy
- Incentive schemes policy
- Dress code policy
- Progression policy
- Training and development policy
- Flexible working policy
- Travel policy
- Disciplinary policy
- Diversity / Equal opportunity policy
- Covid-19 related policies
- Conflict of interest policy
- Fraud policy / Credit card use policy
- Recruitment policy

Whilst these are common policies, an employer can essentially create a bespoke policy to cover any part of its business. It is also important to understand that not all policies will be appropriate for all workplaces. For example, if employees do not regularly use company vehicles as part of their employment, then a company vehicle policy would not be necessary.

What should a policy include?

Generally, a policy should explain the following:

- The purpose of the policy
- Why the policy was developed
- Who the policy applies to
- What is acceptable or unacceptable behaviour under the policy
- The consequences for non-compliance under the policy

How do employers introduce new policies and procedures or change existing ones?

An employer should consult with employees when introducing new policies. This means that employers should provide draft policies and procedures to employees, give employees a reasonable amount of time to provide feedback on the proposed policy, and then genuinely consider all feedback before formally implementing the policy (subject to any changes that may be made as a result of the consultation process). The same process should be followed when varying or removing existing policies.

In reality, a full consultation process may not always be required, and sometimes just advising employees of the change will be enough. In saying that, we recommend consulting wherever possible, and especially where new policies and procedures, or amended ones, will have a significant impact on the day-to-day role or behaviour of employees. For example, a drug and alcohol policy can impact significantly on an employee's privacy and personal time, and a full consultation process would be required before implementing such a policy.

Employers are also expected to make it known to employees that policies and procedures exist. There are a few different ways to do this, for example by providing employees with copies when they start their employment, or by showing new employees where to find company policies and procedures on their first day and providing them with time to read them. It is important that all company policies are easily accessible by staff at all times.

How strictly should policies and procedures be applied by employers?

The answer to this is straightforward – when employers implement policies and procedures, they need to follow them. This is why it is so important to ensure that policies are fit for purpose from the outset and to regularly have them reviewed.

If an employee does act in breach of a policy or procedure, then a disciplinary process would need to be followed to investigate the breach and discipline the employee where necessary. A breach of a policy should be dealt with promptly, and according to any procedures set out in the policy. We cover the disciplinary process in more detail in chapter four.

In a leading case on this topic, an employer dismissed an employee for failing a drug test under its drug and alcohol policy. However, the employer did not follow its own testing procedures recorded in its policy. The Employment Court went as far as saying that a failure by an employer to comply with its own policy is "*likely to render a dismissal as unjustified*".

Summary

To end, we thought we would finish with some dos and don'ts when thinking about workplace polices.

Do	Don't
Think about your organisation's requirements	Assume that employees will know what to do and how to act in particular situations
Think about the workplace culture that you want to create or maintain	Introduce policies that aren't necessary for your business just for the sake of having policies
Think about any gaps or areas of the workplace that could be better clarified to employees	Hide policies away – they should be easily accessible to staff at all times
Think about the industry you operate in, and whether there are any commonly used policies in that industry	Introduce important policies without consulting with employees first

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Chapter Four: Dealing with Issues

Chapter Four: Dealing with Issues

This chapter is all about dealing with issues that arise during the employment relationship.

The issues that employers most commonly encounter are related to:

- Employees not performing their role to the standard required (poor performance); and
- Employee's behaviour not meeting the expected standard (misconduct or serious misconduct).

While there can be numerous other issues that may occur during the employment relationship, poor behaviour and performance are the issues that we see most on a day-to-day basis.

While some minor issues may be easily dealt with informally, such as by pulling the employee aside and saying that you don't want to see that sort of behaviour again, in many cases, a more formal process will be necessary. The main difference between an informal and formal process is that disciplinary outcomes can be issued at the end of a formal process, such as a written warning or termination, while informal discussions cannot be used or relied on in the same way.

We generally recommend a formal process where possible. Even if the conduct is relatively minor, a formal process shows that you take the issue seriously, and it means that the conduct can be relied on later if a similar issue arises. For that reason, the focus of this edition will be on conducting a fair and robust process.

Managing misconduct

There are a range of behaviours that may be considered misconduct; from a breach of policy or procedure, repeated lateness, or behaving unprofessionally, to more serious issues such as workplace assault, harassment, theft or unsafe behaviour. Essentially, if an employer considers that an employee has behaved inappropriately at work, then a disciplinary process for misconduct or serious misconduct may be appropriate.

The difference between misconduct or serious misconduct can be fairly grey. However, serious misconduct is generally recognised as behaviour that is so serious that it destroys the relationship of trust and confidence, which is essential to the continued employment relationship.

However, if the employer is dealing with issues where the employee simply is not meeting the expected standards of their role, then that should be addressed via a process for poor performance (covered further below).

We outline the general steps that you will need to take as an employer to manage misconduct below.

If the nature of the allegations are serious, and you hold ongoing concerns about the employee remaining in the workplace while you investigate, you may want to consider suspending the employee on pay while the formal process is carried out.

1. Consider the issue

Think about what the issue is, and whether a formal process is required or whether it is something minor that could be dealt with informally. If you consider that there is good reason to start a formal process, continue to the next step.

2. Outline the allegations

This is a very important step of the process. You need to comprehensively outline the allegations in a letter to the employee.

The letter should carefully detail your concerns, and all relevant information to support the concerns should be provided with the letter. For example, if you have been told by someone about an incident, a statement from the person who gave you the information should be provided. Similarly, you should provide any written documentation that you are relying on.

3. Give the employee the letter

You should meet privately with the employee to give them the letter. You should make it clear that you do not expect a response to the allegations at this time, but that they will have an opportunity to provide their response to the concerns at the meeting set in the letter.

If you consider it appropriate to suspend, at the same time as giving the employee the letter, it is important that you propose that they be suspended due to the serious nature of the concerns and hear their feedback on that proposal before reaching a final view.

4. Formal meeting

At the formal meeting, you should go through each of the allegations set out in the letter and hear the employee's response. It is important that no decisions are made at the meeting.

5. Consider the employee's response

You should then go away and consider the employee's response, and the appropriate outcome. If you were satisfied with the employee's explanation to the allegations, it may be that the process is ended with no disciplinary outcome. However, if you do not consider that the employee provided a reasonable explanation, you will need to consider whether the conduct was so serious to warrant termination for serious misconduct, or if a written warning would be appropriate.

If you consider that you need further information, you will need to gather additional information from the relevant sources, and then have a further round of consultation with the employee.

6. Decision

Once you have considered the employee's response and the appropriate outcome, you can put your decision in writing and deliver that to the employee. Justification should be provided around how that decision was reached. In some cases, providing the employee with a preliminary decision for comment prior to reaching a final decision will be appropriate.

Deciding whether conduct amounts to misconduct or serious misconduct can be fairly grey. However, serious misconduct is generally recognised as behaviour that is so serious that it destroys the relationship of trust and confidence, which is essential to the continued employment relationship.

Managing performance

If the employee is not meeting the expected standards of their role, you may need to consider ways to lift their performance.

When it comes to managing poor performance, the process is similar to that for misconduct, but, more involved. As you will see, a common theme with all employment processes is providing employees with relevant information and seeking their feedback before reaching any decisions.

Again, as a first step, you may wish to consider ways to informally lift the employee's performance before commencing a formal process. If a formal process is considered appropriate, we recommend following the below steps.

1. Outline your concerns

As with a disciplinary process, the first step is to clearly outline your concerns with the employee's performance, supported by examples where possible.

At the same time, you should prepare a draft Performance Improvement Plan (**PIP**) which clearly outlines the areas where the employee is not meeting expectations, what the expectations are, what they need to do to meet expectations, and the timeframe for improvement.

This first step can require considerable preparation and thought, however, it is important to get this right from the outset.

Beyond outlining the concerns, the letter should also, for example, set a meeting time to hear the employee's feedback, inform the employee of potential consequences, and advise the employee of the entitlement to bring a support person or representative to the meeting and to seek legal advice.

2. Give the employee the letter

You should meet privately with the employee to give them the letter. You should make it clear that you do not expect a response at this time, but that they will have the opportunity to provide their response at the meeting set in the letter.

3. Meet with the employee

You should meet with the employee to hear their response to the performance issues and proposed PIP. You should also consider and discuss with the employee whether they think any additional support or training could be provided to assist them.

4. Decision

If, after meeting with the employee, you still consider it necessary to implement the proposed PIP, this decision should be confirmed in writing and the PIP finalised. It may be that some tweaks need to be made to the proposed PIP in light of the employee's response before finalising.

5. Give the employee time to improve

Generally, you should allow the employee a reasonable time to improve after implementing the PIP. During this time, you should set regular meetings (at least weekly) with the employee to discuss their performance. These meetings also allow the employee the opportunity to ask questions or for extra support where necessary.

If any training or additional support was previously identified, then this should also occur during the review period.

6. Meet with the employee to review progress

You should meet with the employee at the end of the review period to discuss their performance over the course of the period.

7. Consider next steps.

After meeting with the employee, you should consider whether the agreed performance standards have been met. If so, you can bring the process to an end. If not, you can move to issue a first written warning for poor performance, and then set a further review period to improve. You will then repeat the performance management process until the performance standards are met.

Your decision should be confirmed in writing and discussed with the employee.

8. Termination

If you have repeated the PIP process several times, you could look to issue a final written warning, and failing improvement, terminate the employee's employment on notice for poor performance.

Summary

As you can see, there are multiple steps to follow in a formal process, and it can take some time to complete. However, it is important that the correct process is followed, otherwise you risk a personal grievance being raised on procedural grounds.

For your convenience we have created flowcharts setting out the two processes which can be found over the next two pages.

In any case, as formal processes can have negative impacts on an employee's employment, they come with risks. Therefore, we always recommend seeking legal advice tailored to your situation before embarking on any process.

Disciplinary process for misconduct

- Formally outline the allegations
- Provide the letter to the employee
- Consider whether suspension is appropriate
- Meet with the employee to hear their response
- Consider the employee's response
- Issue final decision in writing

Poor performance process

Formally outline the performance concerns and proposed PIP

Provide the letter and PIP to the employee

Meet with the employee to hear their response

Consider the employee's response

Issue decision in writing

Allow the employee time to improve and provide any additional support

Meet with the employee to hear their response

Consider whether the employee's performance has improved

If improved, discontinue process. If not, issue a warning and set a further review period

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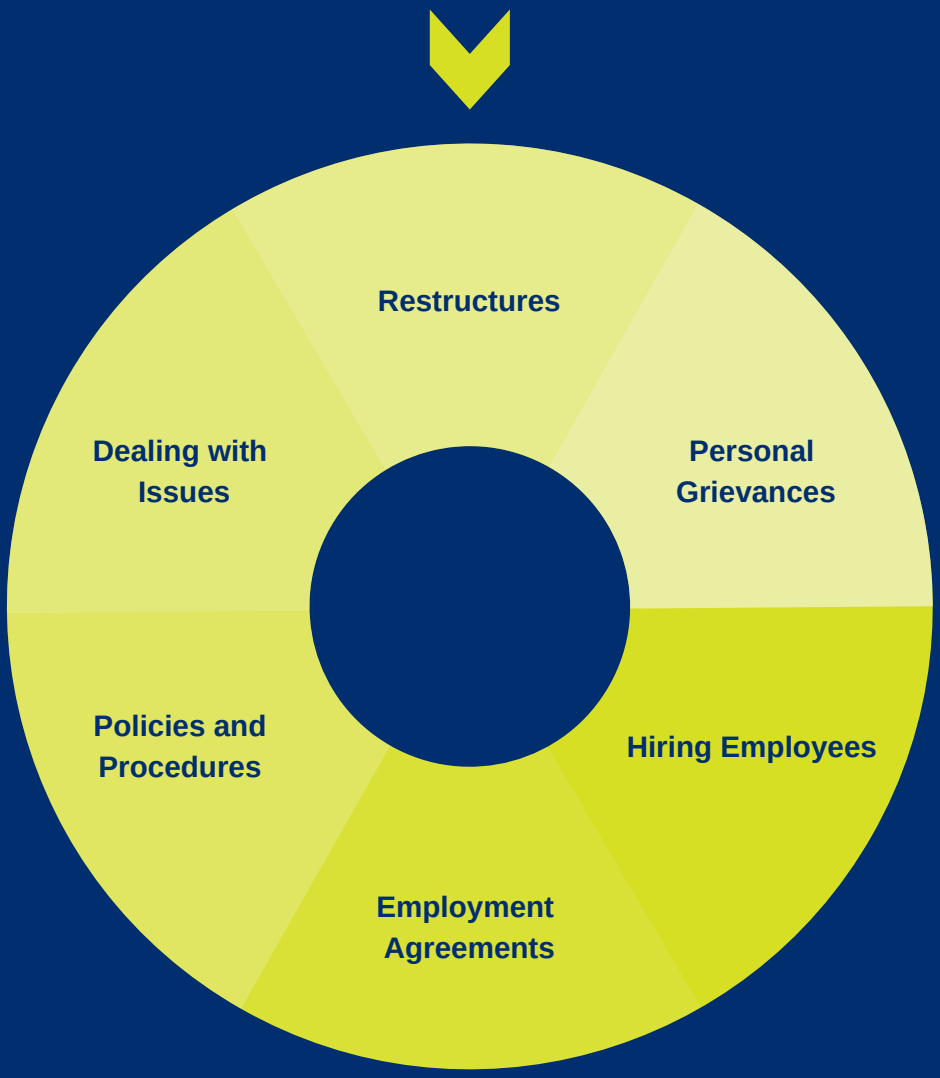
Chapter Five: Restructures



Chapter Five: Restructures

This chapter is about how to properly propose and implement a restructure to a business.

Restructures come in several shapes and sizes, and can affect one role, or multiple roles. The definition of a restructure is fairly broad, but it generally includes circumstances where an employer is wanting to:

- Sell or transfer all or part of their business
- Create new roles
- Merge two or more existing roles
- Change roles, such as changing reporting lines, position titles or position descriptions
- Disestablish roles that are surplus to requirements
- A mixture of any or all of the above

Therefore, a restructure process can be used to carry out a range of different changes to an organisation, and not only to make employees redundant (as people often presume). However, that can certainly form part of it.

Business reasons

Restructures can be a challenging task for employers, and stressful for everyone involved. However, they are an important and valuable tool that employers should consider in the right circumstances. **Importantly, any employer considering restructuring their organisation must have genuine business reasons to do so.**

Restructuring is about having the right roles and the best structure. It is not about individual staff members. If you are having performance or behavioural issues with an employee, those issues are better dealt with by using the processes detailed in edition four of this series.

Some examples of genuine business reasons that would justify restructuring an organisation are listed on the following page.

Genuine business reasons

Some examples of genuine business reasons that would justify restructuring an organisation include:

Financial difficulties and the need to create cost savings

Rapid and unexpected growth

An outdated structure

Market changes

Partial or full sale of a company, or a merger

New opportunities

Redirection of goals

Advances in technology

Branch closures

Outsourcing

Other internal factors

The process

As with any workplace change, employers must follow a careful process and consult with employees before making any decisions. If employers do not follow the correct process, they are likely to face personal grievances.

We outline the general steps that you will need to take as an employer to restructure your business below. However, we strongly recommend that you seek specific advice tailored to your business before taking any steps. Restructures can be complex depending on what you are wanting to achieve, and it is important to get the process right.

1. Proposal

When you decide that there is a genuine business reason to consider restructuring your business, you need to prepare a written proposal document to give to staff. This document should be robust and provide employees with a real understanding of what the proposed changes are and the genuine business reasons behind it. It should also include any supporting documentation that you are relying on and any new or updated job descriptions if you are creating or changing roles.

Best practice to communicate the proposal is to hold a meeting with all affected staff where you speak through the proposal and explain the next steps. It should be made clear to staff that the proposal is just a proposal at this early stage.

In some circumstances, a proposal should also be accompanied by an individual letter to each affected employee detailing the personal impact if the proposal proceeds.

2. Feedback

You need to provide employees with reasonable time to consider the proposal document and to provide feedback on it.

You then need to genuinely consider any feedback provided to you. It can be tempting to shortcut this step, however, employees may provide feedback that justifies a change in approach or consideration of other alternatives that had not previously been considered.

If, following feedback, the changes you want to make differ from those originally proposed to staff, you may need to allow for a further consultation period.

3. Decision

Lastly, you need to finalise your decision on the structure and communicate it to affected staff.

If, as a result of the decision, some employee's roles are disestablished, you must consider whether there are any potential redeployment opportunities within the business for those employees. If there is an available role that an affected employee could perform, then they should be offered that role. The obligation to consider redeployment opportunities is strict and applies even if some development and training for a role would be required.

Even though this may be the last step of the process, it does not make it any less important and it should be managed with care. It should also be treated with sensitivity. For example, if staff are being made redundant, you should work with them to decide how it will be announced, whether they will work out their notice period, whether they would like a farewell with their colleagues and whether you can offer any additional support (such as time off to apply for jobs). We find that these small gestures go a long way in maintaining a good relationship as an employee's role is coming to an end.

If you are reducing the number of roles that several employees hold, a further step in the process will be required to assess the people in those positions against a selection criteria to determine who will get the reduced number of roles. You will also need to consult with those employees about the selection criteria you are using. This is one of the most litigious aspects of the process, and we recommend that you seek advice if a selection process is required.

Summary

There are many reasons why a business may choose to undergo a restructure. The key to carrying out a successful restructure process is to ensure that you have genuine business reasons for what you are proposing, and that a robust process (as set out in a flow chart on the next page) is carried out. A failure to get either of these right will give employees grounds to pursue a personal grievance.

As always, the best advice is to seek advice!

Restructure process

- Carefully consider whether there are genuine business reasons to restructure
- Prepare a written proposal document
- Present proposal document to affected staff
- Give employees ample opportunity to give feedback on the proposal
- Consider all feedback received
- Communicate decision to affected staff
- Go through selection process if applicable
- Consider how you can support employees affected by the outcome

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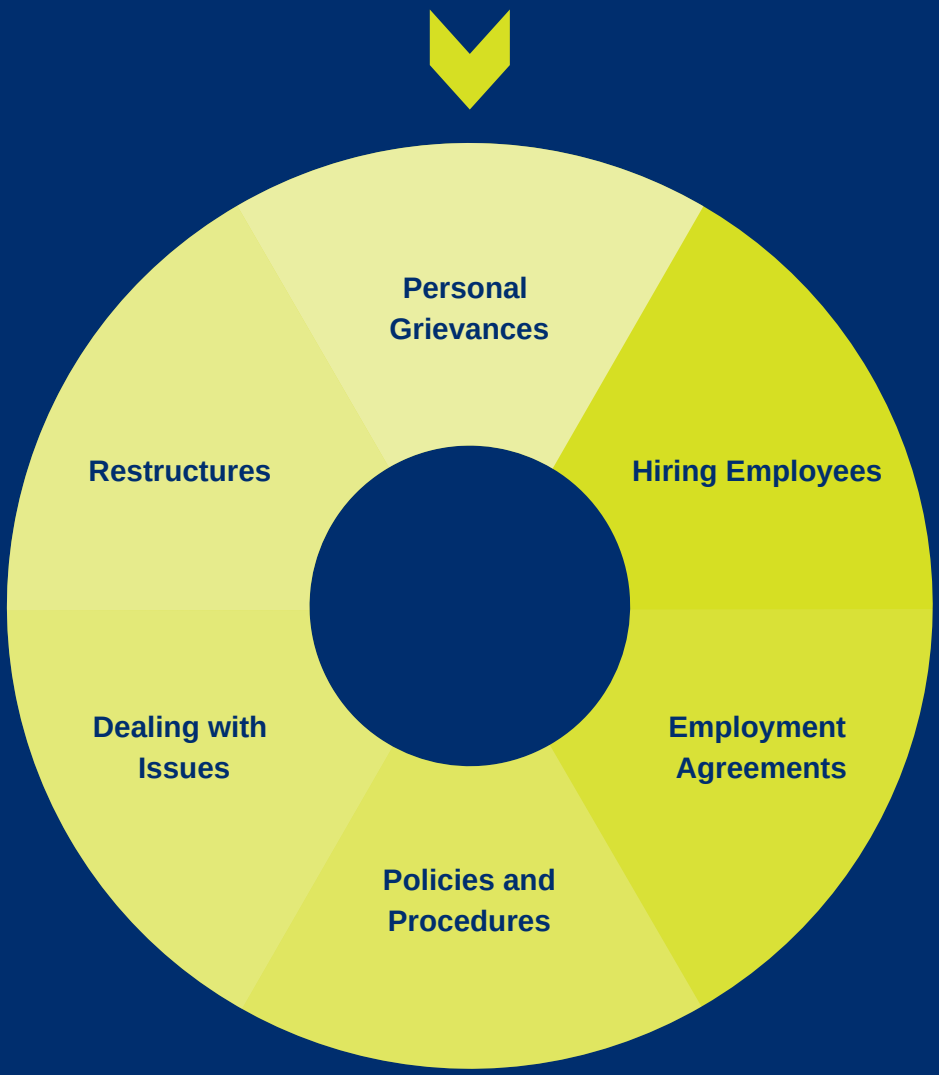
'Back to Basics' Employment Law Guide

Chapter Six: Personal Grievances



Chapter Six: Personal Grievances

This chapter covers dealing with personal grievances, which can often occur at or near the end of the lifecycle of the employment relationship.

What is a personal grievance?

A personal grievance is a type of complaint that can be brought by an employee against an employer either during or after employment. While there are a range of personal grievances that can be raised, the most common are set out below.

Unjustified disadvantage

When an employee alleges that the terms and conditions of their employment have been disadvantaged in some way. For example, if their hours of work were unilaterally changed without consultation.

Unjustified dismissal

When an employee alleges that the termination of their employment was unjustified. A personal grievance for unjustified dismissal can be based on substantive grounds (alleging that the reasons for termination were not justified), or procedural grounds (alleging that the correct process was not followed), or both.

Unjustified constructive dismissal

When an employee resigns but alleges that they were constructively dismissed due to being asked to resign or being put in a situation where they felt that they had no option but to resign.

Importantly, a personal grievance must be raised by the employee within 90 days of the events supporting the alleged grievance. There is some ability for a personal grievance to be raised outside of this timeframe but only in exceptional circumstances.

There is no standard form that a personal grievance must take, however, it should be raised in writing and contain enough detail to support the allegations in order to enable the employer to respond. It should generally also include examples of any accusations made.

Resolving a personal grievance

Personal grievances may be treated differently depending on whether the employee is still employed or not, and the outcomes being sought.

If the employee is still employed, immediate steps should be taken to preserve the employment relationship. A good first step would be for an employer to arrange a time to meet with the employee to talk through their grievance and see whether the issues raised can be resolved amongst themselves. The employee should be given the opportunity to have a support person or legal representative present at any meeting, and the employer should keep clear records of who attends and what is discussed. Failing that, the Ministry of Business, Innovation and Employment (MBIE) offers a great free phone resolution service or mediation service that can assist to resolve employment disputes.

Mediation can be applied for on MBIE's website, and when the employee remains employed, a mediation date will be prioritised, and can usually occur quite quickly.

At mediation, an independent mediator helps parties to identify issues and find potential solutions, with the aim being for the parties to reach an agreed outcome and way forward. Depending on the nature of the issues, this could become a discussion around the employee's exit from the business, or how to enable them to confidently return to work. While it is not essential, it is common for legal representatives to attend mediation alongside employees and employers.

If the employee has already left their employment, then it is common practice for the employer to respond to the personal grievance in writing. The employee may also ask that the employer attend mediation to resolve the issues raised. At this early stage, attending mediation is voluntary, so, depending on the employer's views on the merits of the grievance, the employer may decline mediation.

What if the personal grievance can't be resolved?

If the personal grievance cannot be resolved, the employee will have three years from raising a personal grievance to file a statement of problem in the Employment Relations Authority (the **Authority**).

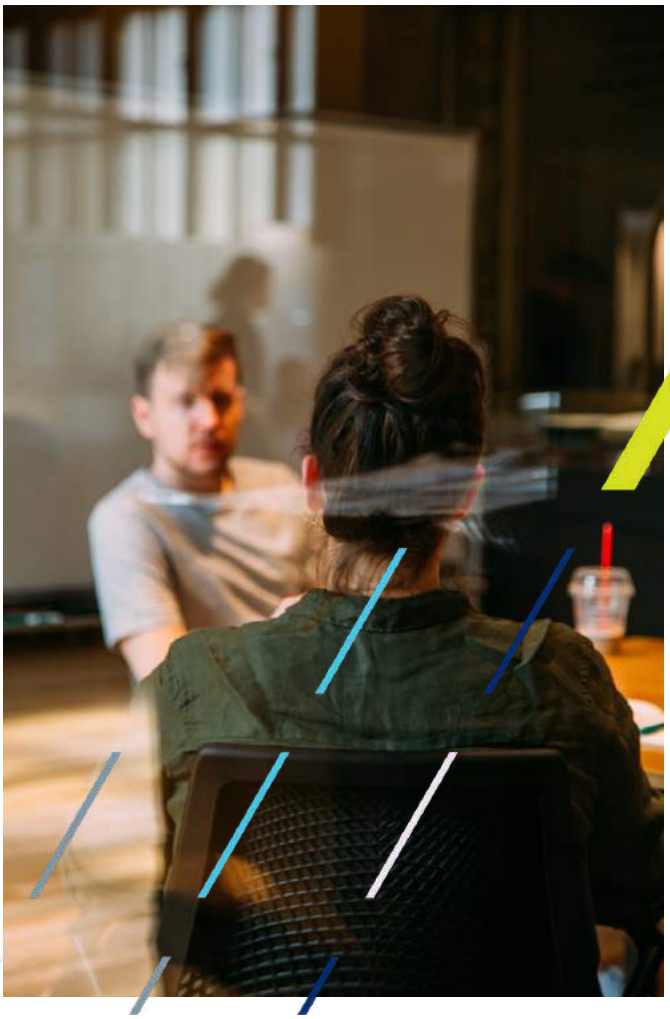
Once a statement of problem is filed, the employer will have 14 days to prepare a statement in reply responding to the statement of problem and setting out the employer's version of events. There are specific forms that a statement of problem and statement in reply must take.

Once a statement in reply has been lodged, the matter will be referred to an Authority member (akin to a judge) to make a direction. If the parties have not already attended mediation, then the member will likely direct the parties to do so, which will be compulsory. That is why in many circumstances it is worth attending mediation at an early stage.

If the matter is still not resolved at mediation, or if the parties have already attended mediation without success, then the matter would continue along the path to a formal investigation meeting (akin to a hearing) in the Authority. However, we find that most matters will resolve at mediation, or via private negotiations, given the time, costs and stress involved in progressing a matter to the Authority.

While it is possible for employers and employees to represent themselves through the Authority process, it is still a court process with evidential rules, and we would always recommend seeking advice on the strengths and weaknesses of your position before progressing.

While it is possible for employers and employees to represent themselves throughout the Authority process, it is still a court process with evidential rules. Therefore, we recommend seeking legal advice on your position at all stages of the process.



Summary

And that brings an end to our 'Back to Basics' Employment Law Guide. We have now followed through the key events that may occur during the life cycle of an employment relationship, and we hope that you now have a good general understanding of the law in these areas.

However, every situation is unique, and we always recommend seeking advice before taking any steps that may impact on employees. Please feel free to get in touch if we can be of assistance or if you have any questions.

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