OVERVIEW OF DISCIPLINE AND DISMISSALS

the easy complete guide for employers

DISCLAIMER
This publication is a general guide only. No person should act on any statement contained in this guide, without first getting professional advice. For specific advice applicable to your circumstances, contact 0800 WANZHELP (0800 9269 4300).

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CHAPTER 1 - FIRST THINGS FIRST

CHECK THE AGREEMENT

Check the employment agreement. The Employment Relations Act 2000 says that employment agreements must be in writing, but there are still many verbal employment agreements, which are always more difficult to prove. Almost inevitably verbal agreements do not stand up to scrutiny in the courts or at mediations and the Employment Relations Authority.

If you do have an agreement, follow it. If it is a verbal agreement or it doesn't give guidance, read on **but get a written agreement in place without delay by calling 0800WANZHELP.**

WHO ARE WE DEALING WITH?

Employee or Contractor

The Employment Relations Act does not apply to independent contractors or people in business on their own account and who are engaged to do work in a capacity other than as an employee. In other words **only employees are entitled to the protection set out in the employment laws.**

Exactly where the difference lies has proven elusive. In a test case, a model maker (Mr Bryson), heard the Employment Relations Authority declare him to be a contractor of a film company (Three Foot Six); the Employment Court that he was an employee; the Court of Appeal that he was a contractor; and the Supreme Court that he was an employee. Sadly, the rules are still as clear as mud to the average employer.

There have been numerous cases of persons taking on a job on contract and subsequently successfully claiming employee status and benefits, so you should not employ any person as a contractor without checking with an employment expert.

WHAT KIND OF AGREEMENT DO WE HAVE?

There are three types of employment agreement -

- Permanent
- Fixed term or temporary
- Casual

Permanent

Permanent employees can work either –

- Full time or
- Part time

A **full time** employee works 5 days a week, generally 8 hours per day or 40 hours per week.

Part time employees work less than a full week, either by not working on all 5 days or by working fewer hours each day, or both. Part time employees in particular, should have their normal days of work spelled out in their agreements, because their annual and public holidays and sick and bereavement leave are based on that.

Fixed Term or Temporary
Fixed term employees can also work either full or part time.

A fixed-term agreement is one which provides for a fixed or set term (time) of employment. This can be either on a particular date or at the end of a period, or on the completion of a specific task. Examples are seasonal work or temporary work.

Fixed term agreements are legal provided that -

- there is a genuine reason for doing so (such as seasonal work, project work, temping work, or where the fixed-term employee is filling in for a permanent employee on leave), and
- the employer advises the employee of those reasons and how or when the employment will end, and does so prior to employing the employee.

In other words, the employer must make these things clear to the employee at the outset. It is important to note that the employment agreement must set out the reasons for the fixed term and say how the employment will end. For example –

> *"The position is for a fixed term, namely from 1 February 2006 to 31 March 2006, which is how long I estimate it will take you to put our customer database on computer."*

Fixed term agreements cannot last more than 12 months. It is, however, lawful to employ someone on a series of fixed term agreements, all lasting less than 12 months, even if the total exceeds 12 months.

If a temporary employee works beyond 12 months, they automatically become permanent, regardless of what the agreement and the parties say. It is therefore important to keep an eye on temporary agreements – there is no excuse if employment extends beyond 12 months.

A fixed term agreement can be turned into a permanent one (but it cannot be used as a form of trial employment - **beware**).

Casual Employees
A casual employee is one who is called in to work whenever the employer has work available and needs the employee. Because the contract is casual, the employee can refuse a call-out, just like the employer has no obligation to offer work.

If an employee is rostered for regular days and hours and has to apply for time off or notify the employer in advance if unavailable for work, they are permanent, not casual.

The Holidays Act 2003 effectively defines a casual employee as someone who works "intermittent or irregular" hours.

Casuals become entitled to sick and bereavement leave if, during any 6-month period, they work –

- at least an average of 10 hours per week; and
- at least 1 hour in every week during the period or
- at least 40 hours during every month during the period.

As soon as their hours drop below this level, they lose sick and bereavement leave benefits, but not annual and public holidays.

Trial or probationary agreements
A trial agreement is simply a permanent or fixed term agreement with a trial or probationary clause, usually three or six months. There is no "trial agreement" as such.

Collective Contracts/Agreements
If you are dealing with an employee covered by a collective contract, check the terms carefully as you may be required to involve the union in any disciplinary process.

WE RECOMMEND THAT YOU CONTACT 0800 WANZHELP WHEN YOU ARE CONSIDERING DISCIPLINARY ACTION AGAINST A UNION MEMBER.

GRIEVANCES DON'T LAST FOR EVER

Personal grievances must be filed within 90 days of the grievance arising or of the employee becoming aware of it. If more than 90 days has passed, the employee needs the permission of the Employment Relations Authority, to whom they will have to show good reasons for the delay.

KEY POINTS

FIRST THINGS FIRST

- Check and follow agreement, if any
- If you don't have written employment agreements, get them
- What kind of agreement – permanent, fixed term, casual or union
- 90 days to file a personal grievance

CHAPTER 2 - TO DISCIPLINE AN EMPLOYEE, YOU MUST

HAVE GOOD REASON

Introduction

Before the concept of unjustified dismissal was introduced, employment agreements could be terminated at the will of either party, by the giving of notice. Now the situation is very different and dismissals must always be justified. In other words, the employer must always have a good reason for dismissing an employee.

Good reasons are…

There are numerous reasons for discipline and ultimately dismissal, but they can be grouped into the following categories -

- Misconduct
- Incompetence (substandard performance)
- Incompatibility
- Redundancy is a reason for dismissal, but **is not a disciplinary measure**. It is therefore dealt with in a separate chapter.
- Incapacity based on ill health or injury is a reason for dismissal, **but is not a disciplinary measure**. It is therefore dealt with in a separate chapter.

A fair and reasonably employer would…

You must be able to justify dismissal or any other action that disadvantages an employee. There are two issues – WHAT to look at and HOW to look at it.

WHAT to look at. You should look at all of the circumstances, including (but there may be more factors)–

- The conduct of the employee
- The conduct of the employer
- The employment history
- The nature of the industry and its customs and practices
- The terms of the contract (express, incorporated and implied)
- The terms of any other relevant agreements
- The circumstances of the dismissal.

HOW to look at it. Then you must view the matter as a fair and reasonable employer would do. There is no standard for such an employer – it is a hypothetical idea.

The matter is made more difficult by section 103A of the Employment Relations Act, which the Employment Court has found to have "redressed the imbalance of power" between employer and employee and "shifted it out of the hands of the employer". The relevant part of section 103 reads as follows –

> *"… the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, where what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred."*

Clearly, process is paramount.

In so far as the decision itself is concerned, the Court has given the following guidance –

> *"…if an employee is unequivocally caught red-handed stealing large amounts of money, a fair and reasonable employer both could and would dismiss with justification. However, if an employee has made a negligent accounting error, the employer could dismiss but whether a fair and reasonable employer would dismiss is a matter for evaluation against all the relevant circumstances."*

All the circumstances of the case includes not just the employer's reaction to the misconduct with it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer.

FOLLOW A FAIR PROCEDURE, which means

Full and Proper Investigation
There must be reasonable grounds for putting an allegation to an employee, and you must carry out a proper inquiry before you do so. Remember that the process must withstand subsequent scrutiny by the Mediation Service, Employment Relations Authority or the Employment Courts.

Where serious misconduct is admitted by an employee, that is enough to proceed to the disciplinary meeting stage.

An Opportunity For The Employee To Be Heard
The purpose of an inquiry (or meeting or hearing) is to allow the employee to defend themselves by giving an explanation and answering questions.

The hearing also enables you to consider any personal or other factors regarding the disciplinary action to be taken.

Very importantly, a hearing enables justice to be seen to be done.

A Fair Hearing
The essence of fair procedure is a fair hearing, which includes -

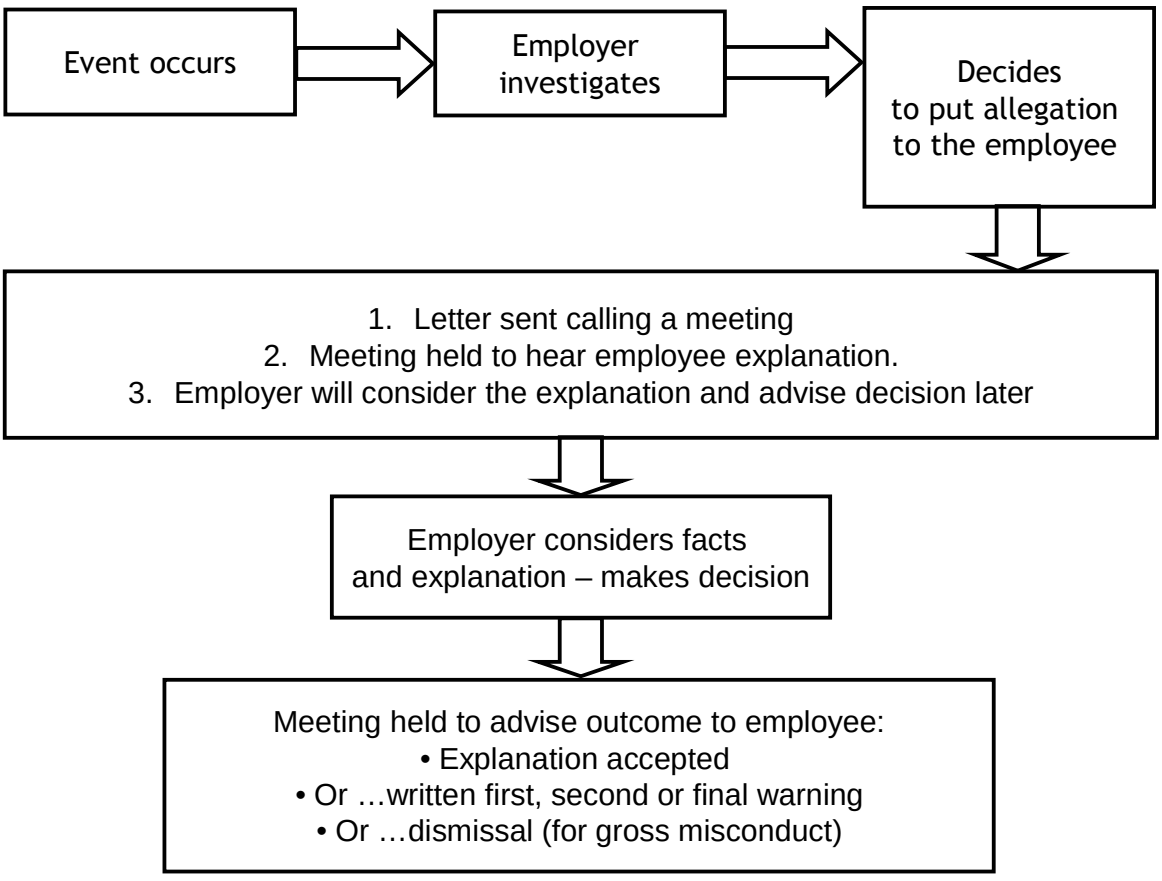
- reasonable notice of the hearing. Anything less than a day would most likely not be reasonable, and if the employee had problems arranging representation, you would have to be flexible and allow time for this.
- specifics of the alleged misconduct or incompetence. This is to enable the employee to prepare an informed response. Notify the employee in writing and spell out the problem in fair detail.
- establishing that the employee was aware of the rule that was broken. Rules must be consistently applied.
- the right to be represented. This could be a colleague, relative or lawyer. This is a fundamental right of which the employee must be advised before the meeting.
- advice to the employee that disciplinary action is a possibility.
- advice to the employee that their explanation will be considered when the final decision is made.
- an impartial and objective person conducting the hearing. This is often difficult in small businesses. The Authority and Court are mindful of this and are fairly reluctant to find that a person conducting a hearing has been biased or impartial, unless it is obvious. **DO NOT HAVE ANY PREPARED LETTERS OR WARNINGS READY BEFORE THE DISCIPLINARY MEETING.**
- reasons must be given for the final decision. Both the Employment Relations Act and the rules of procedural fairness demand that one give reasons for the disciplinary action.

Warnings
If the employment agreement sets out a formal warning process, (for example, first warning, final warning, and dismissal), that process must be followed. Warnings do not have to be for the same offence to lead to dismissal. It is generally accepted that warnings expire after six months, unless a further warning is given.

A fair procedure must be followed every time, whether the employee has a previous warning or not. Be wary of relying on unrelated warnings of a less serious nature, especially where this has not been provided for in the employment agreement or in the disciplinary procedure.

A copy of each warning must be kept on the employee's personnel file. Of course, serious misconduct may justify dismissal without having to go through any formal warning process.

THE DISCIPLINARY PROCESS



KEY POINTS

DISCIPLINARY ACTION

- Have good reason
- Imagine what a fair and reasonable employer would do
- Follow a fair procedure, meaning –
  - Full and proper investigation
  - Opportunity for employee to be heard
  - Fair hearing
  - Warnings

CHAPTER 3 - MISCONDUCT

INTRODUCTION

Misconduct means a breach of the rules or terms that apply to a particular job. The rules include the company's operating procedures and policies, collectively called the house-, work- or company rules. It goes without saying that to enforce these rules they must have been known to the employee.

The rules are usually summarised in a separate disciplinary code and procedure, as well. Such a document sets out the types of misconduct and the relevant discipline, such as a warning or dismissal.

TYPES OF MISCONDUCT

Serious Misconduct Usually Includes:

- Unauthorised possession of company, client or other employees' property
- Failure to follow the company's safety rules and procedures
- Unauthorised use of company, customer or client equipment or vehicles
- Disclosure of confidential information
- Wilful damage to company property
- Falsification of any company, client or employee documents or records
- Refusal to work, which includes refusal to work reasonable overtime as required, and refusal to perform assigned work
- Harassment or intimidation of another employee, customer or client
- Assaulting or verbally abusing another employee, customer or client on company premises or at company functions
- Consuming alcohol on company property during working hours without consent
- Being in possession of, or using non-medication drugs while at work
- Reporting to work in a condition which, in the employer's opinion makes them unfit for work. This covers the consumption of alcohol or drugs, or fatigue, which renders you unable to carry out your duties properly or safely
- Smoking in a dangerous place
- Absence from work without good cause during a period for which a request for leave has been denied
- Withholding or offering false information in respect of questions asked for work-related personal injury insurance purposes
- Failing to advise the company of any change in the circumstances of the employee's other employment or income received from other employment
- Any other matters covered in the company's House Rules or which the company may advise from time to time

Less Serious Misconduct Usually Includes:

- Refusal to see a doctor nominated by the company
- Smoking in a non-smoking area
- Negligence

- Leaving the workplace without permission.
- Unauthorised absence without good reason
- Poor time keeping
- Being discourteous to other employees, customers or clients
- Using abusive or foul language which may cause offence to other employees, clients or customers
- Aggressive or argumentative behaviour
- Insubordination or insolence
- Disruptive behaviour
- Any other matters covered in the company's House Rules or which the company may advise from time to time

Warnings usually last for a period of six months and are not limited to the repetition of the same or related offences.

PROCEDURE

Check the employment agreement and disciplinary code and procedure: If these contain a procedure, follow it. If there is no written procedure, turn to the following chapter and follow that.

KEY POINTS

MISCONDUCT

- Means breaking company rules
- Usually summarised in a disciplinary code and procedure
- Disciplinary code has separate lists of serious and less serious misconduct
- Rules MUST have been known to the employee
- Be consistent