



# Solving Problems at Work

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## Introduction

Problems can often happen in workplaces and common sense is usually the best tool. The sooner an issue is dealt with, and the better a process is followed, the less likely it is that outside assistance will be required.

Employers should have good processes and procedures for dealing with issues and should make sure that employees are aware of them. Everyone in the workplace should understand what is expected of them.

This guide describes some typical problems that can be experienced and where employees and employers can go for help. It also outlines the law relating to disciplinary action, dismissals, and redundancy and what can happen in ill health situations.

The first part of these guidelines explains the key principles that apply to all employment relationships. The guidelines outline various types of problems that can occur and go on to explain the key steps involved in some types of some disciplinary and termination processes that can arise.

## Key principles

These principles are important. If you understand and are guided by them, this will take you a long way towards getting it right in your employment relationships.

“Employers and employees must deal with each other in ‘good faith’; in particular, employers need to have a ‘good reason’ and follow a ‘fair process’ prior to taking disciplinary action, or making a decision to end someone’s employment.”

## Good faith

Employers and employees are obliged to deal with each other at all times fairly, reasonably and in good faith.

In broad terms, this means that both employers and employees must:

- act honestly, openly, and without hidden or ulterior motives
- raise issues in a fair and timely way
- be constructive and cooperative
- be proactive in providing each other with relevant information and consider all information provided
- respond promptly and thoroughly to reasonable requests and concerns
- keep an open mind, listen to each other and be prepared to change opinion about a particular situation or behaviour, and
- treat each other respectfully.



Good faith generally involves using practical common sense. Acting in good faith reduces the risk of conflict and problems. It is also a minimum requirement of the Employment Relations Act 2000.

There isn't a single set of requirements, because every workplace is different. However, there are some key expectations of a good faith relationship:

- Employers, employees and unions should be responsive and communicative with each other.
- The employee's employment agreement should reflect genuine discussion and negotiation.
- The employee should have access to appropriate information, including relevant confidential information about themselves, when the employer is making decisions that may affect his/her job. (An employee is not entitled to confidential information about another person if that would mean an unwarranted disclosure of the other person's affairs)
- Problems that arise should be dealt with in a manner that is consistent with what a reasonable person could do.

Good faith is about treating others in the way you would like to be treated. This does not mean that an employer should not act firmly where appropriate but employees should always have a fair opportunity to have a say before a decision is made, and neither party should treat the other in a degrading or humiliating manner. It also means that employers and employees need to raise concerns when they arise. Otherwise solving the problem becomes more difficult.

Employers should have good processes and procedures for dealing with issues, and should make sure that employees are aware of these processes. Everyone in the workplace should understand what is expected of them, including who to approach if they have a problem.

## **Preventing employment relationship problems**

Some simple practices can help make relationships smoother and prevent problems:

- Employees and employers should keep themselves well informed about their employment rights and responsibilities.
- Agreements (and changes to agreements) must be recorded in writing. This helps to prevent misunderstandings and resolve problems if they arise later.
- It should be clear that the terms of employment being offered are only those recorded in the written agreement, and employers should avoid giving assurances that are inconsistent with the written agreement or that are not recorded in it.
- Employees also have a responsibility to prevent and clear up confusion. For example, if an employee believes he or she is being paid more than the entitlements in their employment agreement, the employee should raise the potential error.
- Take time to communicate clearly. Poor communication often causes disputes and misunderstandings.
- Raising concerns when they first arise can help stop them becoming bigger and harder to resolve. An effective performance management system is a good way of ensuring this.
- Before any significant change, the people affected should be consulted. Getting everyone's ideas and perspectives will often lead to better decisions. People also respond better to change when they have some warning and have been listened to.
- Employers should ensure that they have processes to address and investigate complaints which the employee might bring to their attention, such as allegations of bullying or sexual harassment.



It is a good idea to record important communications in writing, especially where they relate to performance issues. These records do not need to be complex, but they should be dated, accurate and stored carefully.

### **Employment agreements and policies**

Every collective and individual employment agreement must contain a clear explanation of the processes for resolving employment relationship problems. This explanation does not need to be complex or long. It should be written very clearly, so everyone knows what processes they are required to follow, what their rights are and what happens when a problem is raised.

The Ministry's Employment Agreement Builder can help you draft an employment agreement. Visit our website at: [www.employment.govt.nz/agreementbuilder/](http://www.employment.govt.nz/agreementbuilder/) for more information or call us free on 0800 20 90 20.

Some employment agreements or policies specify the types of situation that might result in disciplinary action or dismissal, or the process the employer and employee must follow. It is important that both sides consult the employment agreement and any relevant policies before a disciplinary or dismissal process begins.

### **Non-disciplinary actions**

Sometimes it might not be necessary to follow a disciplinary or dismissal process. For example, an employer might be generally satisfied with an employee's work, but wants the employee to make some changes to the way he/she works. In these types of situations, the employer should talk to the employee about what changes the employer would like the employee to make.

These sorts of issues do not need to be a big deal - again, good communication between employees and employers helps to build good employment relationships and to prevent more serious issues arising.

### **Disciplinary action**

Sometimes, an employer might need to raise more serious concerns with an employee. In these cases, the employer may wish to commence "disciplinary action".

"Disciplinary action" can take many forms. It should be seen primarily as a corrective measure, aimed at preventing further misconduct or poor performance.

The most common types of disciplinary action are warnings and, in serious cases, dismissal. However, disciplinary action can sometimes mean suspension from work, or the removal of certain privileges, or, in rare instances, demotion.

To be lawful, disciplinary action or dismissal must be fair and reasonable in all the circumstances (with some limited exceptions). There are two aspects to this:

1. the employer must have good reason for the dismissal or disciplinary action, and
2. the employer must follow a fair process in reaching and implementing its decision.

### **Good reason**

In order for the employer to have 'good reason' for the dismissal or disciplinary action, the employer must:

- have a genuine work-related reason for the dismissal or disciplinary action, and
- genuinely and reasonably believe that dismissal or disciplinary action is necessary or appropriate.

The following reasons are generally accepted as genuine work-related reasons that might justify disciplinary action, including dismissal:

- repeated misconduct, or serious misconduct (i.e. some form of wrongdoing), and
- poor performance – an ongoing failure to meet the reasonable expectations of the job.



An employer's reasons for dismissal or disciplinary action must be reasonable to an independent and 'reasonable' observer. For example, it would not be reasonable to dismiss an employee instantly for a one-off instance of minor or trivial misconduct. However, if the employee has had sufficient warning and persists with the same or similar misconduct, then, after a fair process, dismissal may be reasonable.

The following reasons are generally also accepted as genuine business-related reasons that might justify a dismissal:

- **redundancy** – a situation in which the employee's employment is terminated because, for a genuine work-related reason, the employer no longer needs that position
- **incapacity** – an inability by the employee to properly do his or her job, usually for health reasons, and
- **incompatibility** – a fundamental breakdown in the relationship between employees which makes continuing employment unworkable.

Dismissal and disciplinary action are serious matters, and should not be taken lightly.

### **Fair process**

A fair process will usually involve the following:

- **Provision of information** – employees must be given the information the employer is relying on when considering dismissal or disciplinary action.
- **Opportunity to comment** – employees should be given an opportunity to comment on that information, and an opportunity to provide any other information that might be relevant. This includes being given sufficient time to consider the information provided and to prepare a response. The employee should be given an opportunity to comment on the outcome of any investigation before any decision is made.

- **Promptness** – any action should be taken as soon as practicable after the event.
- **Representation** – employees should be told in advance that they can be represented (e.g. by a union delegate, lawyer or friend) when being asked to comment on a proposed dismissal or disciplinary action.
- **Open mind** – the employer must listen to the employee's comments with an open mind and consider all relevant information. This means that, before the employer makes a decision, the employer must carefully consider what the employee has to say.
- **Relevant considerations** – the employer must take into account all relevant matters, and must not take into account matters that are not relevant.
- **Even-handed treatment** – the employer should generally treat similar situations in the same way (e.g. if two employees engage in the same misconduct they should receive the same treatment), unless there is a good reason for treating them differently.
- **Access to decision-maker** – the employee should be given an opportunity to address the person who is making the decision. The decision-maker may get someone else to undertake part of the process (e.g. appoint someone else to undertake a fact-finding investigation), but must personally consider what the employee has to say. The decision-maker should also personally advise the employee of his or her decision.
- **Alternatives** – the employer should consider alternatives to dismissal or disciplinary action before deciding on what action should be taken.

If the problem goes to the Employment Relations Authority or the Employment Court, they will look at whether the employer was being fair and reasonable in the disciplinary or dismissal action.



In particular, they will consider whether:

- the employer investigated sufficiently, taking into account the resources of the employer to do that
- the employer raised their concerns with the employee before taking the disciplinary action or dismissing the employee
- the employer gave the employee reasonable opportunity to respond
- the employer genuinely considered the employee's explanations.

When meeting as part of a disciplinary process, employers and employees should each have a support person present, and should take accurate notes of what is discussed and agreed.

## Types of problems that can occur

### Misconduct and serious misconduct

“Misconduct” means some form of wrongdoing. Usually it will involve deliberate wrongdoing, but there may be circumstances where an employee acts so carelessly that it amounts to misconduct (i.e. gross negligence or recklessness).

“Serious misconduct” involves serious wrongdoing. Where, after a fair process, it is established that an employee's actions amount to serious misconduct, an employer may terminate the employee's employment without notice (sometimes referred to as “instant” or “summary” dismissal).

The misconduct must be sufficiently serious that it undermines the trust and confidence that the employer has in the employee (e.g. theft, sexual or other assault, or the use of illegal drugs at work).

Sometimes employment agreements list conduct that the agreement says amounts to “serious misconduct”. If an employee engages in misconduct that is listed, that doesn't necessarily mean that serious misconduct has automatically occurred.

In every case the employer must consider all the facts and the employee's response before it decides whether serious misconduct has occurred. When this is done, what looked like serious misconduct may not be so serious after all.

Also note that minor misconduct cannot become serious misconduct just because it is on the serious misconduct list.



## Process for considering disciplinary action

The purpose of any disciplinary action is to prevent reoccurrence of the inappropriate behaviour/misconduct. The emphasis should be on the corrective action required to change the employee's conduct and giving the employee a reasonable opportunity to do so, not on punishing the employee.

An employer should generally take the following steps when considering disciplinary action for possible misconduct or serious misconduct. The employee should also know their rights and obligations in this process.

- *Before taking action* – before commencing a disciplinary process, the employer should assess whether the particular concern or complaint is sufficiently robust and serious to require such a process. It may be necessary for the employer to undertake some preliminary steps to make this assessment (e.g. to read documents, or to speak briefly with someone who saw what happened or the employee who might be disciplined). If the employer needs to speak with an employee who could be disciplined later, then the employee needs to be told of this possibility and that what he/she says could be relevant in any disciplinary process.
- *Forewarning and information* – if the employer decides to commence a disciplinary process, the employer should provide the employee at the outset with all of the relevant information (e.g. documents), the reasons why the employer is concerned, and the possible consequences the employee is facing (e.g. a warning or dismissal). It could be procedurally unfair if, at the end of the disciplinary process, the employer decides to take a type of disciplinary action that the employee was not forewarned about.
- *Preparing for a meeting* – the employee should be invited to a meeting to provide a response. The employee should have enough time before the meeting to consider the information provided and to prepare his or her response and should be told that the response can be made orally or in writing, or in both ways. The employee should also be told who is coming to the meeting, and should be told of his or her right to bring a support person or representative with him/her.
- *Listening and explaining* – at the meeting, the employer should listen to the employee's response with an open mind. If the employer disagrees with the employee's response, the employer should say so, and should provide the reasons for that. This does not necessarily have to be done at the meeting, but the employee needs to know what it is that the employer is thinking, so that he or she has an opportunity to address that.
- *Keeping a record* – it may be helpful for both the employer and employee to keep a record of all discussions, agreements and meetings held.
- *If further investigation is needed* – once the employer has the employee's response, it may be necessary to investigate further. The employee should be given an opportunity to comment on any new information that comes out of that further investigation. It may be necessary to meet again to do this.
- *Decision* – once the employer has all of the relevant information, the employer can decide whether the employee has committed misconduct or serious misconduct.
- *Considering action to take* – the employer should then consider what action it should take, if any. At this stage the employer should consider any matters that could be relevant to what action it takes (e.g. long-serving employee with a clean record), possible alternatives to disciplinary action, and any other appropriate assistance that might be provided to help prevent a recurrence (e.g. training or supervision). The action may



be a warning (see below). If the employee has not had an opportunity to comment on the outcome (e.g. dismissal or disciplinary action) it might be necessary to have another meeting to hear and consider what he/she has to say.

- *Preliminary decision* – in serious or complex situations, the employer could provide the employee with a ‘preliminary decision’ (including details of any proposed disciplinary action), and to allow the employee to comment on it before a final decision is made. The employer must consider the employee’s comments with an open mind – that is, the employer must be prepared to listen to the employee and consider what they have to say before making a final decision.
- *Final decision* – once the employer has reached a final decision, the employer should tell the employee and provide reasons for the decision. This needs to be done in a respectful and sensible way.
- *Giving notice* – if the decision is to dismiss, and there is no serious misconduct, the employee should be given notice in accordance with his or her employment agreement. If the employee is to be dismissed for serious misconduct, the employer does not have to give notice but may choose to do so anyway.

Both sides are required throughout the process to cooperate with each other, to answer questions honestly and openly, and to act in a respectful and sensible way. The employee has the right to have a representative present to speak on his or her behalf.

### **Proof**

A disciplinary investigation is not a criminal prosecution – the employer does not need to prove that misconduct occurred ‘beyond all reasonable doubt’. However, to discipline an employee for misconduct, the employer needs to be convinced that the misconduct occurred, and there needs to be reasonable grounds to support that. The more serious the

misconduct (e.g. theft, sexual assault), or the more serious the possible consequences are for the employee (e.g. final warning, dismissal), the stronger the employer’s supporting information and reasoning needs to be before action is taken.

### **Suspension**

In particularly serious cases, an employer might be entitled to suspend an employee during the disciplinary process. Generally, there is no right to suspend unless the employment agreement provides for suspension. However, employers can sometimes suspend employees when investigating very serious cases if there is good reason (e.g. alleged theft resulting in a need to ensure the accounts are not interfered with during the investigation; or alleged sexual assault resulting in the need to protect the employee who may have been sexually assaulted).

The employer must also follow a fair process before deciding to suspend the employee. The employee should be given an opportunity to comment on the proposed suspension, and the reasons why the employer thinks suspension is appropriate. Again, the employer must consider the employee’s comments with an open mind.

### **Warnings**

In circumstances where the misconduct is not serious, or where the employer otherwise decides not to dismiss, the employer may decide to give the employee a warning.

The employment agreement may stipulate whether written or verbal warnings are required. The type of warning required may be different at different stages of the process. The warning must include information making it clear what the misconduct is and the consequences of further misconduct. A final warning should be in writing, unless there is a different process in the employment agreement.



If an employee has had warnings previously, the employer might be able to dismiss the employee or might give a further or final warning. However, a previous warning or warnings do not always justify dismissal or a final warning – generally speaking, a warning for one type of conduct cannot be relied upon when dealing with another type of misconduct and, if a warning is too old, it may be unfair for an employer to rely on it.

### **Poor performance**

Poor performance is a situation where the employee is not meeting the reasonable expectations of his or her job.

#### ***Process for dealing with poor performance***

Where there are performance issues, the employer should discuss it with the employee. This might involve providing clear direction about what is required, or support and training to assist the employee to do the job properly.

If the employee's performance fails to improve, the employer might consider starting a disciplinary process. The process is essentially the same as it is for misconduct (provision of information, advice about representation, meeting to discuss the employee's response before any decisions are made etc. – see above).

Employers issuing an employee with a warning for poor performance should tell the employee clearly about his or her expectations and put in place a process and timeframes for monitoring performance and providing feedback.

The employer also needs to ensure that the employee has a reasonable opportunity to improve his or her performance – this includes giving enough time to improve and providing appropriate support and assistance, including any relevant training.

### **Incapacity**

An employer may dismiss an employee who is incapable of doing his or her job for a period that the employer cannot reasonably be expected to sustain. Usually, dismissal for incapacity occurs for health reasons. When an employee is physically incapable of doing his or her job, there comes a point at which the employer may dismiss the employee and appoint a replacement.

#### ***Process for determining incapacity***

In determining the point at which an employer may consider dismissal for incapacity, the following factors are relevant:

- any timeframe specified in the applicable employment agreement or policy
- the extent to which the employer's business is affected by the employee's absence
- the employer's ability to appoint a temporary replacement, and the cost of doing so
- the nature and extent of the employee's incapacity, and the likelihood of recovery. Where the incapacity is caused by a health issue, the employer should request appropriate medical advice. Sometimes it may be appropriate to seek independent or specialist advice for this. However, employees have the right to refuse to provide an employer with access to his or her medical information. If an employee is not willing to provide such information, the employer is able to make a decision based on the information the employer has
- whether reasonable adjustments could be made to the employee's work, or whether an alternative position might be offered, to enable the employee to continue in employment
- whether the employee has used up all of his or her sick leave and other holiday and leave entitlements.





As with the other reasons for dismissal, the employer must advise the employee that he or she is potentially facing dismissal, provide the employee with all of the information that the employer is relying on, and give the employee an opportunity to comment on that information in meetings at which the employee is able to be represented.

It is common for a dismissal for incapacity process to take a number of weeks, if not months, and for there to be a number of meetings or exchanges of information.

These processes can be frustrating and difficult for all concerned. They often involve difficult decisions and it will often be sensible to get some advice.

### **Incompatibility**

“Incompatibility” means a situation where there is a fundamental breakdown in the relationship between two or more individuals, such that they can no longer work together. Incompatibility may underpin a conduct or performance problem.

For a dismissal because of incompatibility to be justified, the disharmony would be serious so that it becomes unworkable for the employee to stay. Where there is a dismissal for incompatibility it is not necessary for one of the individuals to be at fault (although there often will be issues of fault involved).

### **Process**

Dismissal for incompatibility is rare. This is an area where advice should be taken by both sides. The employer will need to consider very carefully any alternatives to dismissal, and to be scrupulous in choosing between the individuals concerned.

## **Resolving employment relationship problems**

Every employment agreement must clearly explain the process the employee and employer have agreed for resolving employment relationship problems.

If there is a problem, it is important to be clear about the issues, check the facts and make sure that both sides have the time and opportunity to take advice and think through the issues.

### ***Steps in resolving an employment relationship problem or dispute***

1. A good starting point is for the employee and employer to talk to each other to see if they can in good faith come to an agreement about how to fix the situation.
2. If you're an employee who feels their minimum employment rights have been breached by your employer, phone our Service Centre on 0800 20 90 20. We can talk to you about your employment rights and how we can help you resolve your complaint.
3. For other employment problems, employees and employers can get advice or help by phoning our Service Centre on 0800 20 90 20.
4. Employees and employers can also ask for free mediation to help settle their differences by phoning 0800 20 90 20.
5. If that doesn't work, more formal action can be taken by going to the Employment Relations Authority.

### **Recognising an employment relationship problem**

A problem includes anything that harms or that may harm an employment relationship. While the most obvious relationship is between an employer and an employee, other examples are relationships among employees, between a union and its members, between a union and an employer, and among unions covering employees in the same workplace.



Examples of problems from an employer's perspective include allegations of:

- poor performance or unacceptable behaviour
- lateness and absenteeism
- long-term illnesses
- failure to comply with health and safety procedures
- breaches of company policy or the law
- misconduct
- conflict between employees
- incompatibility.

Problems from an employee's perspective can include allegations of:

- discrimination or harassment
- disagreement about whether a warning should be issued
- problems with health and safety
- disagreement about the meaning of a term in an employment agreement
- misunderstood or poorly managed discipline, dismissals, redundancies or restructuring
- disputes over holidays or pay (including deductions from pay).

Some of these problems may be the basis of "personal grievances", which require specific treatment under the Employment Relations Act. (See later.)

A number of staff in the same workplace may perceive the same problem. If so, it can help to deal with the problems collectively and to look for a solution that works for everyone. Where the employees are union members, their union can play an important part in representing their collective interests and agreeing on a sustainable solution.

Whether a problem involves an individual or a group, it is important for everyone to:

- deal with the issue as soon as it arises
- take the time to get the facts straight
- listen to everyone's views
- seek solutions
- follow a fair process that everyone understands

- record actions and expectations.

### **Following a problem-solving procedure**

Ignoring a problem and hoping it will go away, often only leads to bigger problems later. Delays can also create added frustration and "avoidable distress", with productivity, legal and cost consequences.

As noted, a process for issue resolution should be outlined in any employment agreement. A clear problem-solving procedure can help protect people's rights, and provide information to support decision-making. It can also help ensure that the problem doesn't get worse through inconsistencies or misunderstandings.

In some cases, process problems themselves can cause the breakdown of the employment relationship and lead an employee to claim unfair treatment, so it's important to get the process right.

### ***First steps in dealing with a problem***

If either side believes that there is a problem, it should be raised as soon as possible. Everyone should try in good faith to resolve any problems themselves before looking for outside assistance.

It is critical that no one jumps to conclusions when an issue is first raised. Everyone should make any decisions fairly and consistently. This is usually not complicated – but each side should investigate, gather information and think before acting.

In all cases, everyone should be treated with respect and consideration. Sensitive issues should be dealt with in a confidential manner – for example, by not conducting interviews in public or open-plan spaces. Both sides should try to set aside emotion and concentrate on identifying and addressing the underlying reasons for the problem.



It may help to have a third party present as a witness when a problem is discussed, to prevent misunderstandings. For instance, an employee may wish to have a support person, union delegate, or other representative present. Both sides should keep notes of any meetings and any agreements reached.

In general, it is a good idea to:

**1. Be clear about the facts**

Make sure that what each side thinks has happened or is happening is not just based on an assumption or a misunderstanding. Employees or employers may get help to clarify the issue by talking to the Ministry or their own representative organisation such as a union or employer or industry association.

**2. Talk to each other**

Employers and employees should try to resolve the problem by discussing it with each other. Both parties are responsible for this. Union members can ask their union, and employers can ask their employers' association, to approach the other party for them. If an employee believes they have a personal grievance, they must raise it with their employer within 90 days of the action complained of, or the date they became aware of it, whichever is the later.

**3. Clarify whether there is a problem, and if so, what it is**

This shouldn't be delayed. The problem should be fully discussed to clarify what the problem actually is.

**4. Consider what assistance is needed to help resolve the problem.**

Parties may consider whether mediation assistance might be useful at this stage.

It's a good idea to know what the law is and what the employment agreement says and, if necessary, to consult an advisor.

Phone our Service Centre on 0800 20 90 20 for help if there are breaches of minimum

employment rights. We have a range of services that may help you.

**Further steps**

If a problem can't be resolved, parties can go to mediation, either through the Ministry's mediation services or through independent mediators. If this does not resolve the problem, employers or employees can go to the Employment Relations Authority for a determination.

If either party is dissatisfied with the determination of the Employment Relations Authority, the issue can be taken to the Employment Court.

**Dismissal**

"Dismissal" simply means termination of employment by the employer. While dismissal can be a disciplinary step, it does not have to be (e.g. dismissal might be for redundancy or for health reasons).

**Process**

There must be a good reason for a dismissal and the dismissal must be carried out fairly. Otherwise, the employee may have a personal grievance claim against the employer.

What is fair depends on the circumstances. Any relevant provisions in the employment agreement must be followed. If an employment agreement does not have a notice period, then reasonable notice must be given.

Employees have the right to be told what the problem is and that dismissal or other disciplinary action is a possibility. Employees must then be given a genuine opportunity to tell their side of the story before the employer decides what to do.



The employer should investigate any allegations of misconduct thoroughly and without prejudice. Unless there has been misconduct so serious that it warrants instant dismissal, the employee should be given clear standards to aim for and a genuine opportunity to improve.

If an employee is dismissed, he or she has the right to ask the employer for a written statement of the reasons for dismissal. This request can be made up to 60 days after they find out about the dismissal. The employer must provide the written statement within 14 days of such a request.

If the employer fails to provide this written statement, the employee may consequently be able to raise a grievance after the required 90-day limitation period.

#### ***Dismissal during a trial period***

Employers are able to employ new workers on a trial period of up to 90 calendar days, and may dismiss them without a written statement of the reasons for dismissal during that time.

An employee cannot pursue a personal grievance for unjustified dismissal during trial period. However, the employee may pursue a personal grievance where issues such as discrimination or harassment arise.

#### ***Forced resignation or “constructive dismissal”***

If an employer puts pressure (directly or indirectly) on an employee to resign, or makes the situation at work intolerable for the employee, it may be a forced resignation often known as a “constructive dismissal”.

A constructive dismissal may be where, for example, one or more of the following occurs:

- the employer has followed a course of conduct deliberately aimed at coercing the employee to resign
- the employee is told to choose between resigning or being dismissed

- there has been a breach of duty by the employer (i.e. a breach of the agreement or of fair and reasonable treatment) such that the employee feels he or she cannot remain in the job.

If an employee has been forced to resign, they may have a personal grievance case.

#### **Redundancy**

A redundancy is when an employer terminates someone’s employment because the position is no longer required. An employer must have a genuine work-related reason for a redundancy.

A redundancy must be about the employee’s position, not the employee personally. A concern about how a particular employee may be performing is a performance issue and not a legal reason for pursuing a redundancy.

#### **Process**

The law requires employers to provide information to employees when they are considering changes that will affect their jobs and to give them an opportunity to comment and contribute to any decisions.

In some redundancy situations the employer needs to select between employees, for instance where there are two employees doing the same thing and only one is required.

Some employment agreements or policies provide the rules for selection (e.g. last on, first off). Where rules are provided they must be followed. Where there are no rules, the employer needs to consult the potentially affected employees on how the selection might be made and consider any feedback the employees provide about the selection process.

Before anyone’s employment is terminated, the employer must consider possible alternatives, such as appointment to another role (i.e. redeployment). Unless the employment agreement says so, there is no



obligation to redeploy. However, where there are vacant positions that the redundant employee could fill without difficulty or cost, an employer, acting in good faith, will at least have to consider offering one of those positions.

When a decision to proceed with a redundancy is made, notice must be given to the employee, as well as any other contractual entitlements such as redundancy compensation. An employer has an obligation to pay redundancy compensation where the relevant employment agreement provides for that. If there is no provision, an employer can still choose to pay redundancy compensation. Any entitlement to annual leave should be included in the final pay.

In addition, employers may consider providing other support or assistance, such as counselling, help writing CVs, time off to attend job interviews etc. This type of assistance is sometimes required by the employment agreement or policy.

An employer may not make someone redundant for being pregnant or for applying for parental leave. However, the law does not prevent employees on parental leave from being made redundant for legitimate reasons. However, it must be for a good reason and must be done fairly.

Employees can raise a personal grievance if they believe their employer has acted unjustifiably. If the grievance is not resolved by the parties themselves or by mediation, the Employment Relations Authority or the Employment Court will look at each case individually, including whether:

- the redundancy is for genuine commercial reasons
- the provisions of the relevant employment agreements have been observed
- the employer has acted reasonably and fairly in the way the redundancy was carried out.

## **What is a personal grievance?**

The law gives all employees the right to pursue a personal grievance if they have any of the following complaints:

- unjustifiable dismissal
- unjustifiable action which disadvantages the employee
- discrimination
- sexual harassment (by someone in authority or by co-workers)
- racial harassment
- duress over membership of a union or other employee organisation.

An employee has a right to raise a personal grievance case under the Employment Relations Act 2000. This must be done within 90 days of when the grievance occurred or came to his or her attention.

However, the employer may consent to a personal grievance being raised after that time. If the employer doesn't consent, the employee may apply to the Employment Relations Authority to be allowed to raise the personal grievance after the 90 day period.

As noted above, if the employee has been given notice of dismissal during a trial period, a personal grievance may not be raised for unjustified dismissal unless the personal grievance was about discrimination or harassment.

## **Process**

In all cases, the parties should seek to first resolve the matter at the workplace level. Both the employee and the employer may wish to seek advice on how to deal with the specifics of the case.



If a problem can't be resolved, parties can go to mediation, either through the Ministry's mediation services or through independent mediators. If this does not resolve the problem, employers or employees can go to the Employment Relations Authority for a determination. If either party is dissatisfied with the determination of the Employment Relations Authority, the issue can be taken to the Employment Court.

The Employment Relations Authority or Court must consider the test of justification which assesses the fairness of an employer's decision in relation to disciplinary action. For instance, before dismissing or taking action against the employee, did the employer:

- having regard to the resources available, sufficiently investigate the allegations against the employee
- raise his or her concerns with the employee
- give the employee a reasonable opportunity to respond to those concerns
- genuinely consider the employee's explanation (if any) in relation to the allegations.

An employer's action cannot be viewed as unjustified solely because of mistakes made in the prescribed process, if those were minor, and they did not result in the probability of the employee being treated unfairly.

## **Mediation**

Mediation is the use of an independent person where a problem has emerged that employers and employees are unable to solve without assistance.

Mediators are skilled at facilitating discussions between the parties and helping them to identify issues and potential solutions. The aim of mediation is for the parties to resolve the matter by agreement.

Mediation can help to:

- obtain information on problem solving

- identify the skills needed to deal with the problem
- be the trigger for both parties to recognise a problem exists.

Mediators are not advocates for either party. They are independent people committed to the process of problem resolution. The mediator's role is to:

- help people find the best way to resolve their problems
- encourage parties to identify the real issues
- help the parties explain those issues to each other
- identify points of agreement between the two parties
- help people find a way through their problem that may not seem immediately apparent
- work with people to find answers that reflect good faith and common sense
- work with parties to seek a resolution that allows both parties to move on.

Mediators can:

- provide early assistance to parties, without representatives being present
- mediate in a mediation meeting
- make recommendations
- make decisions (at the parties' request)
- record settlements
- provide information to unions, to community groups and advisors, to employer organisations or employment law seminars.

## **Process**

Each mediation has a different format and dynamic. It can involve a range of activities including email and telephone correspondence, meetings and workplace discussions. Mediation provides a confidential process where problems can be discussed, issues clarified and a conclusion reached that all those involved can accept.



A mediator may contact you and the other party to discuss the problem and see if there is a way of resolving it without attending a mediation meeting. At a mediation meeting people often represent themselves but they also can ask an advisor, friend or family member for assistance and support. An external advisor is often useful in bringing another perspective.

People who attend should be prepared to present the issues from their perspective, listen to the other party, and bring options for resolution.

Information and comment exchanged during the meeting are confidential and “without prejudice” and cannot be used later in discussions about that or any other problem.

### ***Reaching agreement***

Employers and employees can agree on any matters which meet both their interests, as long as they are within the law.

At any point parties can agree to ask the mediator to make a recommendation in relation to the matter. Both parties must consent to this. Unless the recommendation is rejected by either or both parties, it becomes a full and final settlement. If the recommendation is rejected (and this must be done in writing within an agreed timeframe) mediation can continue.

Alternatively, the parties could ask the mediator to make a binding decision to resolve the matter.

When an agreement is reached the mediator will record the decision to be signed by all parties. The mediator will generally record when and how any agreements – such as reinstatement of an employee, payment of a settlement or a formal apology – are to take place. Once signed, the agreement becomes a full and final settlement and cannot be reopened by either party.

A settlement should reflect the effect of the disputed event on the parties and will not necessarily involve money.

Parties to the mediation are responsible for ensuring that the agreement is followed through. If it is believed that the agreement has not been implemented after a reasonable period of time or has been breached, the mediator can be asked to follow up. If necessary, enforcement can be sought through the Employment Relations Authority or the Employment Court.

### ***Failing to reach agreement***

Sometimes parties are unable to reach agreement. If it looks like more information or assistance could lead to a settlement, the mediator can arrange an adjournment. If there is no possibility of agreement, the mediation ceases and the parties manage their remaining differences or can choose to pursue the matter with the Employment Relations Authority or the Employment Court.

These institutions can direct the parties to try mediation again if they believe it should be possible to reach agreement.

### **The Employment Relations Authority**

The Employment Relations Authority (the Authority) is an independent institution. Its role is to resolve employment relationship problems by looking into the facts and making a decision based on the merits of the case, not on technicalities. It investigates employment relationship problems and has the power to make legally binding decisions on these matters.

The Authority must also consider whether mediation will be helpful before an Authority investigation, and it can refer parties back to mediation.



### ***The applicant fills out a Statement of Problem***

Applicants to the Authority need to fill out an application form, which includes a Statement of Problem.

The applicant must explain what the problem is, including:

1. the facts that caused the problem
2. the steps taken to try to solve the problem, such as mediation
3. how they would like the problem resolved.

Other relevant documents should also be attached and then the application lodged with the necessary fee.

The Authority sends a copy of the Statement of Problem to the other party.

### ***The respondent fills out a Statement in Reply***

The respondent must complete a Statement in Reply form within 14 days, explaining:

1. their view of the problem in plain language
2. their account of the facts
3. any steps taken to resolve the problem, such as mediation.

### ***The Authority establishes the facts***

The Authority member sorts through the issues and establishes the facts in a number of ways, including:

1. holding preliminary conferences, often by phone
2. asking for information from the parties or anyone else
3. holding investigation meetings
4. interviewing the parties or anyone else
5. allowing parties or their representatives to cross-examine others about their evidence or information during the investigation meeting.

An investigation meeting is a more formal process than mediation, and is more like

attending a court hearing. It is open to the public.

The parties may attend an investigation meeting with or without an advisor or representative. Many people choose to use a representative to present their case, but people can represent themselves.

During an investigation the Authority member may make a recommendation to the parties about solving the problem. If it is not rejected by one or both parties the recommendation becomes final and binding.

After the investigation meeting, the Authority member may need to get more information to establish the relevant facts. The Authority member will usually tell the parties by the end of the investigation meeting what extra information they need and who will be asked to get that information.

### ***The Authority makes a decision***

Where the Authority member completes the investigation and reaches a decision about the problem, the Authority must, wherever practicable:

- give an oral decision (known as a determination) to both parties, or
- give an oral indication of its preliminary findings to both parties.

The Authority can only reserve its determination if there are good reasons for not giving an oral determination or oral indication. In this case the Authority gives a 'reserved determination'.

The Authority can also determine matters without holding an investigation meeting. However, in all cases the Authority must give a written determination (or a written record of an oral determination) to the parties.

Members of the public can also get copies of determinations.





### ***The Authority may order remedies***

If the Employment Relations Authority finds that a personal grievance has been established, the Authority can order remedies, including financial remedies. Remedies might include an order that a dismissed employee be paid lost wages, or an order that the employer pay compensation for humiliation, loss of dignity and injury to feelings. The Authority can also order that the employee be given his or her job back (i.e. reinstatement).

When considering financial remedies, the Authority must consider both the conduct of the employer and of the employee. For example, if a grievance is established but the employee's conduct was poor, the Authority may reduce the amount the employer would otherwise have to pay. The amount of compensation ordered by the Authority varies depending on the facts of the particular case.

The Authority can order one party to cover the other's costs. However, this isn't automatic, and parties are expected to make a claim with the Authority in writing.

### **Going on to the Employment Court**

Parties unhappy with a determination by the Authority can challenge it in the Employment Court. Parts of the determination or the whole determination may be challenged. The Employment Relations Authority may also refer applications directly to the Employment Court.

The Employment Court usually follows the same formal procedures as other courts when it hears a case. Applicants must apply to the Employment Court within 28 days of the date of the Authority's determination. Applicants must say whether they want the court to hear the whole matter again or to consider only specific parts of the Authority's determination. More information is available from the Employment Court website at [www.justice.govt.nz/courts/employment-court](http://www.justice.govt.nz/courts/employment-court) or community law offices.

### **Further Information**

Information, examples, and answers to your questions about the topics covered here can be found on our website [www.employment.govt.nz](http://www.employment.govt.nz) or by calling us free on 0800 20 90 20.