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# EMPLOYMENT LAW GUIDELINES FOR SMALL-MEDIUM BUSINESSES

## 1. INTRODUCTION

New Zealand's current employment law is based on notions of "fairness" and "good faith". The Employment Relations Act 2000 ("ERA") says it aims "*to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship*" and refers to "*the implied mutual obligations of trust and confidence".*

However our law also strongly supports the right of the owner to decide the employment requirements of its own business: the *"management prerogative"*.

If you want to keep control of your business, you need to understand both ends of the spectrum: most employers do understand "*management prerogative*", but many do not have an innate understanding of "*fairness and good faith*".

The guidelines below address common mistakes employers (especially small to medium ones) make, starting with the hiring process, through to performance management, disciplinary and dismissal procedures, and redundancy. These guidelines focus on *individual* employment agreements ("IEAs") as most small-medium workplaces have IEAs rather than collective agreements. The guidelines are general and should not be relied on in the absence of specific legal advice.

## 2. THE START: HIRING

- Check references. It is worth it. A fraud expert in New Zealand said in 2005 that 30% of job applicants lied on their resumes, although some US studies put the figure as high as 70%. An Australian study in 2012 put the figure at 39% for managers and 25% (down from 32% in 2011) for other workers.

- Good faith (not to mention the Fair Trading Act 1986) requires the prospective employer and employee to be open and honest with each other in the hiring process. Discuss the role, responsibilities, terms. Don't mislead/deceive/exaggerate.

- It is unlawful to discriminate of grounds of sex (include pregnancy and childbirth), sexual orientation, marital status, religious/ethical belief, colour/race/ethnic/national origin, disability, age, political opinion, employment status (means being unemployed or on a benefit), family status or trade union involvement.

- Make the job offer subject to signing a written employment agreement. The law requires the employment agreement to be in writing and to be retained on your file. Even if the employee has not signed the agreement you are required to retain the "intended" agreement. Give the employee a copy of that proposed agreement, advise of the right to get independent

advice about it, give a reasonable opportunity to get that advice, and consider and respond to any issues the employee raises.

- Content of the written employment agreement: the list of items that must be written is small: names, description of the work, indications of the place of work and hours, the wages/salary, an "employee protection clause" (says what the employer would do if selling the business or contracting that work out), advice as to Holidays Act and leave entitlements, right to time and a half on public holidays, and a plain English description of the procedures for resolving employment relationship problems. However to achieve maximum "certainty" (and so avoid disputes) employers should use a comprehensive form of employment agreement, plus have a clear written job description.

- Record fixed term agreements: if the agreement is for a fixed term, it must state that, plus state why it needs to be a fixed term (there must be genuine operational reasons) and when/how it will come to an end. If not, the employee can elect to treat it as ongoing employment.

- Record any probationary period: otherwise the employer cannot rely on the trial period.

- 90 day trial periods: from 1 April 2011 employers can employ new employees on the basis the employee can be dismissed, and have no right to take an unjustified dismissal grievance, for a specified period of up to 90 days. But to be effective, the 90 day trial period has to be written into the IEA and be agreed - it should be signed by both employer and employee.

- Record independent contract agreements: not a legal requirement, because genuine independent contractor agreements are outside the scope of the ERA. However the so called "control", "integration" and "fundamental" tests used to decide what is/not a genuine independent contractor agreement make it important to set the terms out in writing.

- Where a collective agreement covers the work to be done by the new employee:

  - If the new employee is a member of the union: the collective agreement automatically applies. Additional terms can be offered but must not be inconsistent with the collective;

  - If the new employee is not a member of the union, the employer must inform him/her about the collective, give a copy of it, plus give information on contacting the union. The offer must say that for the first 30 days there will be an individual employment agreement on the same terms as the collective (and any additional terms that are not inconsistent with the collective). If the employee agrees, the union must be advised. If the employee joins the union the collective continues to apply. If not, then after the 30 days the parties can agree (in writing) any terms they wish, whether consistent with the collective or not. If they don't agree different terms, the 30 day IEA continues in effect.

## 3. DURING THE EMPLOYMENT

- Conduct regular performance reviews which result in work plans, with performance targets and timeframes to meet them.

- Stress: the Health and Safety in Employment (HSE) Act 1992 defines "harm" and "hazard" to include the physical and mental harm caused by work-related stress. Hazards that cannot be eliminated are to be minimised by taking all practicable steps. Over-stressed employees would have to show the employer "ought to have known", but the employer should also be on the look out for, and reactive to the effects of over-stress. "We are all under stress here" is not likely to be an acceptable response. An ideal time to monitor whether stress is moving into the harm/hazard category is the regular performance review.

- Varying the terms of employment: collective agreements must have a clause stating how the agreement can be varied. The starting point with individual employment agreements is that, as with any legal agreement, it can only be varied by agreement of both parties. The management prerogative will give the right to make relatively minor changes and updates. A well drafted employment agreement will give the right to change policies and procedures and may allow more significant changes, eg to place of work, hours. If there is evidence the employee has accepted a unilateral/imposed change, that might be upheld, but might not, and if it was put on a "take it or leave it" basis the employee may have good grounds for a personal grievance.

- Sexual harassment: can present as a personal grievance, a complaint under the Human Rights Act, and potentially as a criminal prosecution against the alleged harasser. Employers should have sexual harassment policies which form part of the employment agreement, and include procedures for reporting to safe contact persons within the organisation, training of managers, and getting the message out to staff that the "culture" does not permit sexual harassment.

## 4. DISCIPLINARY PROCEDURES

- The test of whether a dismissal or action (in particular a disciplinary action) is "*justifiable*" is: could a fair and reasonable employer have dismissed, or taken that disciplinary action, in all the circumstances at the time: section 103A Employment Relations Act 2000. The "could" word recognises that there may be a range of responses available to a fair and reasonable employer in "all the circumstances". The circumstances may include the nature of the employer business. Unjustifiable dismissal or action by the employer opens the door (for the employee) to the remedies of reinstatement and/or compensation, and in some cases penalties.

- It is a so called "objective" test, meaning the Court (or Employment Relations Authority) has the opportunity to evaluate the employer's decision against what a hypothetical "fair and reasonable" employer "could" have done, and how. The Court/Employment Relations Authority is not allowed to say a dismissal (or action) was "unjustifiable" just because of some minor procedural defect that didn't actually result in unfairness. As well, when they are looking at the employer's investigation process, they have to take on board "the resources available to the employer", ie that smaller employers may not have the resources to carry out a perfect investigation process. However, the section 103A test is a point at which our employment law starts to conflict with the "*management*

*prerogative"*, because it does still give the Court (or Employment Relations Authority) the right to override the employer's substantive decision, including on grounds the employer failed to adopt a fair *procedure*.

In practical terms the test highlights the importance of the employer standing back and making a decision which is objective and avoids any emotional or heat-of-the-moment elements. Eg, ask: if I was to look back at this in 6 months time when it has all died down, would I make the same decision? Some key points for the employer are:

- Ensure you raise your concerns with the employee before dismissing (or before taking the particular action); and
- Ensure you give the employee a reasonable opportunity to respond to your concerns; and
- Make sure you genuinely consider the employee's explanation (if they gave one) to the allegations you have put.
- Make sure you have done all of these things before taking a decision to dismiss, or a decision to take the particular action against the employee.

As well it is important to get outside input, because the test is not what *you* thought was fair and reasonable, but what that hypothetical "fair and reasonable" employer could have decided. The best outside input is legal advice.

- The decision must be both *substantively* and *procedurally* justifiable:
  - Substantive justification: could a fair and reasonable employer have reached that *outcome*?
  - Procedural justification: did the disciplinary *process* comply with rules of natural justice/fairness (could a fair and reasonable employer have carried it out that way)?
- Where most small to medium employers come unstuck is the *process*. An unfair process runs the serious risk of rendering the action unjustifiable, even if the outcome was substantively justified. As well, if the process of investigating the employee's conduct was not fair, it would not usually be possible to show the *outcome* was one a fair and reasonable employer could have reached.
- The key to carrying out a fair process is to consult with the employee before making the decision. "*Consult*" does not mean: *"I've made this decision and I'm telling you about it"*. It is infused with notions of "*good faith*": the employer must be "*responsive and communicative"* with the employee, seek out their view, give them the specific information and the opportunity they need to have input, keep an open mind, don't mislead, and don't rush it.

**Managing poor performance**

- Review the employment agreement, especially as to the employee's key duties/responsibilities, and disciplinary process.

- Schedule a performance review meeting, giving employee specific information (in writing) about the issues to be discussed, advice that he/she can have a representative or support person at the meeting, enough time to prepare (a day would generally be fair but it may need to be longer, eg if the rep is not available) and advice of the possible outcomes (eg warning, final warning, dismissal).

- At the meeting: if possible arrange for someone to take notes. Inform employee of the performance issues identified in the letter. Be specific. Invite employee to respond. If they would need time, adjourn.

- After the meeting: put on "fair and reasonable employer" hat and consider whether that employer could "in all the circumstances" issue a warning. If so, deliver warning at a further meeting, record it (even if it is a "verbal" warning) and copy it to employee. It needs to specify the required standard, the ways in which employee failed to meet it, what needs to improve, the support the employer will give to help it improve, and set a reasonable timeframe for improvement to occur, plus state what might happen if it does not (ie further warning, final warning, dismissal). Set a date to review the progress.

- The review date meeting: repeat process for first meeting. Put on "reasonable employer hat", decide and deliver the outcome: warning and further review date, final warning, or dismissal.

- How many warnings before a fair and reasonable employer would dismiss for poor performance? It depends. Typically there would be a first warning, then final warning, then dismissal. For very serious and readily proved under-performance, a single (final) warning might suffice. For minor performance issues or those which are more difficult to specify, there may have to be more than the typical number of warnings. If the decision is to dismiss it would be prudent to get outside (legal) advice.

**Misconduct**

- Assessment: find out if there is evidence the employee has engaged in misconduct. That usually includes speaking with other staff. Do so discretely, but making it clear they would have to put their name to a specific statement if the matter was to proceed to an investigation. Get statements from all witnesses of the conduct, including if their evidence favours the employee. You cannot be selective. Review the employment agreement, especially the misconduct and disciplinary process sections. Decide if the conduct could amount to misconduct, and if so could it be serious misconduct. It would be prudent to obtain legal advice at this point.

- Schedule investigation meeting with employee. Give specific information (in writing) about the details of the allegation, an indication of how serious it is, what the outcomes could be (usually warning, final warning, or risk of a dismissal), and advice that he/she can have a representative at the meeting. Evidence should be put in detail, and in writing to the employee. If you have written statements from witnesses, they must be shown to the employee, to give a fair opportunity to understand the specific allegation and reply to it. If the witness will not agree to their statement being put to the employee under investigation, the employer would not be able to use that information. The employer cannot hide behind "the Privacy Act" (eg say: "*We have this information but we can't disclose it in detail and can't tell you who has said it because of the Privacy Act*"). Put all the evidence

that touches on the conduct, whether it goes against or favours the employee. Allow enough time for employee to prepare for the meeting and arrange representative.

- If considering suspending the employee pending the outcome of the investigation: assess if suspension really would be necessary. If so, review the employment agreement as to right to suspend. Suspension can be very harmful to the employee, so it is necessary to treat the suspension decision like a mini disciplinary process: put the proposal to suspend to the employee, with the necessary information, give opportunity to comment, take comments on board, then put on "fair and reasonable employer" hat and decide whether or not to suspend.

- At the investigation meeting: arrange for someone to take notes/be witness. Explain the concerns specified in the letter. Refer to the specific witness statements/allegations. A very common pitfall is that the employer puts the allegations in a vague way, which does not give the employee a fair opportunity to respond. The allegations must be absolutely specific. Invite employee/representative to respond. If employee raises some potentially relevant point you have not considered, you may have to adjourn to examine that. If employer wants to raise some matter that was not specified in the letter and supporting material, you would have to adjourn to give employee time to respond.

- Avoid predetermination. Don't have ready prepared warning/dismissal letters. Remember that, until the investigation is complete, it has not been established whether "misconduct/serious misconduct" occurred, so don't use terminology that suggests you are predetermining the outcome.

- If there is potentially a criminal offence, you need to consider whether and when to make the complaint to the police. If you make it at the outset, the employee would have the so called right to silence and might refuse to answer questions in your disciplinary investigation, so you may wish to conclude that investigation before going to the police. In no circumstances should an employer threaten to "go to the police if" the employee runs a personal grievance, as that would likely be blackmail.

- After the investigation meeting(s): put on "fair and reasonable employer" hat and decide what (if any) should be the disciplinary outcome. Make your assessment of the credibility of the employee under investigation and the witnesses. Look at how similar conduct has been disciplined in the past, to avoid allegations of disparity of treatment. Review whether the employee is under a current warning for similar conduct. If satisfied the conduct took place, decide whether it is "misconduct" and (if so) whether it is "serious misconduct". It is prudent to take legal advice, especially if it is potentially serious misconduct.

- If the outcome is a warning or final warning, give it. If repeat conduct might result in a dismissal, say so. Record the warning in writing and copy to employee.

- If decision is to dismiss, you need to decide if that is to be on notice, or summary dismissal (which should only be for serious misconduct - but get legal advice). Arrange further meeting and inform the employee, including as to the reasons and why the employee's explanations were not accepted. Explain final pay. Confirm in writing. If summary dismissal, allow employee to leave discretely.

## 5. RESTRUCTURING/SALE OF BUSINESS/OUTSOURCING - HANDLING REDUNDANCIES

- Redundancies can result from restructuring, but also from outsourcing or sale of the business.

- So long as a decision to make a position redundant is genuine (eg not a camouflage for a poor performance dismissal) the Court (or Employment Relations Authority) will not second-guess the employer's business decision. The "*management prerogative"* applies.

- However the "fair and reasonable employer" must comply with the obligations of good faith, including the obligation to consult with the potentially affected employees (or where there is a collective agreement, their union) and to provide them with relevant information.

- Examine the business case for a restructure, including the efficiencies you wish or require to achieve and options for achieving them. This would normally include identifying the position or positions which might be made redundant, examining what would be fair selection criteria, and the potential for redeployment.

- The obligation to consult with the potentially affected employee(s) is triggered at the point there is a "proposal" that is likely to have an adverse effect on the continued employment of any of the staff. It may not be easy to identify the point at which an idea or a range of options becomes a "proposal", but a rule-of-thumb is to say the consultation must happen at a point when the staff (or their union) could still realistically have input that could influence the final decision.

- Review the employment agreement(s), especially for the employer's obligations under the "employee protection" clause, the redundancy and notice of termination provisions, and you should review the job description(s).

- Consult with potentially affected employees (or their union). Give notice of consultation meeting, including advice of their right to have a representative or support person present. At the meeting: outline the proposal. Make available (or arrange to make available) the information they would need in order to comment on the proposal and have a realistic chance of influencing the final decision. This could be quite extensive information. Include the selection criteria proposed, and any potential for redeployment. The employer is not obliged to give access to information if there is good reason to maintain confidentiality in it, eg to comply with statutory requirements of confidentiality, to protect commercially sensitive information, or protect individuals' personal information. But expect the Court (or Employment Relations Authority) to take a fairly narrow view of the confidentiality exception. Truly confidential information may be able to be provided confidentially (ie on condition that the employees must not use or disclose it other than for purposes of consultation with the employer about the proposal) rather than simply withheld. The employees must be given enough time to assess the information and give their input as to the proposal. Set a time to hold second consultation meeting to receive that input.

- At second consultation meeting: listen with an open mind to employees' input. Reasonable requests for further information and/or time would have to be accommodated, so further meetings may be necessary.

- Following end of the consultation about the proposal, review employee's input with an open mind. If rejecting alternatives they have put up, have reasoned explanations, but note that ultimately it is the employer's business decision. Consider any available alternatives to redundancy. Put on "fair and reasonable employer" hat and make decision.

- Implement the decision: involves notifying the employees, including as to why specific alternatives they put up were rejected. Consult with the affected employees as to precisely how the redundancies would be carried out, including timing, alternative positions that may be available, compensation, outplacement/ other services that can be made available to the affected employees.



**Important note: This guideline contains general information and opinions, and should not be used or relied on in the absence of specific legal advice.**