

April 2014 Essential Update

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This month's update has a focus on Disciplinary Process – its pitfalls and what you can do to ensure you “do it right”!

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- **Did You Know?** – Drug Testing
- **Legal Latest** – Dismissal process flaws

Helpful Hint

Discipline – Why is it that the Employer ends up paying when the Employee is in the wrong?

One thing that really gets to me is when I see an employee walk away on top when they have clearly misbehaved or under-performed but their employer hadn't followed the correct process. In cases like this, the employer will always pay – it's just a matter of how much. When it comes to the law, it doesn't matter how good the reason is to discipline an employee – if the employer hasn't followed the right process it is likely to be a significant financial cost to the employer. Correct process is absolutely critical when it comes to dealing with employee misconduct.

Everyone knows and understands the “innocent until proven guilty” rule in New Zealand's legal system, and it's important to remember that in the workplace, this “rule” still very much applies. It doesn't matter what you think might be going on, what you've seen or what you've heard through the grapevine – the burden of proof is usually on the employer, and there must be enough proof for a reasonable person to conclude that the Employee is in the wrong.

Disciplinary processes are fairly rigid in New Zealand, and for good reasons:

1. the “innocent until proven guilty” rule protects the accused. While it may only be a job at stake, rather than a long prison term, the principles remain;
2. it provides security. Employers must have a good reason for any sort of dismissal or disciplinary action; and
3. it provides balance to the employer/employee power imbalance. The employer must follow a completely fair process when it comes to making and implementing decisions.

As soon as one of these principles goes out the window, the employer is potentially being unjust.

All too challenging for a small employer struggling with all the pressures of running such a process. I so often am called in to help after one of the principles above has already not been followed and have seen an unfortunate number of employers pay out when the employee was in the wrong. In one case, an employee admitted making derogatory racial remarks to another workmate, but the employer had begun the replacement process even before concluding the disciplinary process. In another, an employee was

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<http://www.essentialhr.co.nz/news/>.

This month I have posted on:

- **Minimum Wage Increase and kiwisaver**
- **Vocational pathways – helping people start careers**
- **Be careful not to discriminate when recruiting**
- **New Health and Safety Help**
- **Health and Safety Reform Bill**

Mike's Whereabouts

Ashburton: May 14th, 22nd, 28th
June 5th

Westport: Still hoping?

Did you Know?

Drug Testing is being taken more seriously:

- The number of on-site workplace drug tests has increased 19% in 2013 – across all sectors.
- 5.5% tested positive (primarily for Cannabis)
- Construction industry had the most tests (14%) with 14% testing positive
- Tourism/adventure activity had the highest detection rates – 71% positive

Source: NZ Drug Detection Agency

under investigation by the police, but the employer suspended and subsequently dismissed them while the police investigation process was still ongoing. In these two instances, nothing was proven before the employer made their move to get rid of the employee, making the process both unfair and potentially unjust. In both cases, the employee was paid out despite being in the wrong.

Disciplinary processes are never easy or fun, but even in the heat of the moment, if you are an employer, you must remember that they always need to be done in the right way. If you are considering action against any of your employees, I'd recommend taking advice if you are unsure of the correct process to follow **before** doing anything that relates to disciplinary action at all. It may mean the difference between coming out on top, or not.

Legal Latest

More Haste less Fairness

In a recent case an Employee was dismissed because they did not disclose a criminal history when asked to do so in an application for employment. The Employment Relations Authority (ERA) found that the company's haste compromised the fairness of the process. In particular, the company did not:

1. clearly lay out its concerns with the Employee before taking action;
2. make it clear that the Employee's continued employment was at risk;
3. have a formal meeting with the Employee, giving him an opportunity to respond to allegations. As a result, the company could not genuinely consider the Employee's explanations.

This cost the company three month's wages plus \$9,000 for hurt and humiliation.

Delays and bias are not fair

Further examples of the Court finding fault with the process used by Employers are easy to find. One particularly interesting one is the recent case of *Sergeant vs Western Mailing Ltd*. Here the CEO of Western Mailing was suspended and eventually dismissed by the Board for a range of things, chief of which being that he exceeded his delegated authority of \$5,000 by approving expenditure of \$46,000! However, while the ERA found that the unauthorised expenditure was a serious breach of the Employment Agreement, it also concluded the process taken by the Board was flawed because of the delay of a month before taking action and because the person making the decision was also the person making the complaint! The outcome was that the unfairness in the company's process could have cost them lost wages and \$7,000.

The moral of these stories? Don't react to a situation in haste, but don't waste time; and do carefully consider the process that you will use when undertaking a disciplinary process. The key to remember is that you must act in a fair and reasonable manner: clearly lay out your concerns; give the employee the opportunity to have support and to respond; genuinely consider the responses before taking any decision; and document everything! Call us for guidance in any and all situations.

Essential Essentials

Here are a few Essential Processes for you to follow – if in any doubt, confirm proposed actions with me:

Investigations

1. Aim is to identify what has actually happened
2. It should always take place as soon as practicable
3. Use an unbiased investigator
4. Be clear on confidentiality
5. Anyone who may be disciplined may have a support person
6. Keep as full a record as possible
7. Conclude on what has occurred to complainant and Employer
8. Disciplinary processes follow – investigations cannot discipline

Suspensions

1. Suspend only to investigate something that may involve serious misconduct
2. May extend this to cover the disciplinary process
3. You must consult the employee first – explain reasons for suspension and allow comment and a call to a lawyer – but you may insist on immediate action
4. Must be "on pay" – can change to unpaid, sometimes, if the employee unreasonably delays

Disciplinary Process

1. Consciously think the employee is innocent until you have considered the evidence
2. Evidence must include the employee's explanations
3. Ensure the employee has support, and brief them on details of allegations and the potential seriousness of the outcome, before hearing them
4. Before deciding on any warning or dismissal carefully consider all you've heard and seen and be sure your decision is what a reasonable employer could do
5. Be unbiased, open and logical

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