

## Performance Management

### Discipline and Grievances

#### *Information for Employees*

#### **My employer has started a disciplinary process with me – what does this mean?**

Disciplinary processes are normally started when your employer has concerns about your performance, or something has happened that needs investigating further. It does not necessarily mean you have done anything wrong. Your employer needs to start a process to enable them to find out details about their concerns and investigate further.

#### **What are my rights during the process?**

Your employer is required to treat you fairly and reasonably. Any final decision made by your employer must be a decision that a 'fair and reasonable employer could have made in all the circumstances at the time the action occurred'.

The first step of this process is the employer wanting to meet with you. They must let you know what the meeting is about and invite you to bring in a support person. This support person can be any person of your choice, including a union delegate, lawyer, or family member.

At this meeting your employer will need to give you the opportunity to put your side of the story to them. They must consider your views and not make any disciplinary decisions at the meeting. They are required to come back to you after the meeting with their decision.

You must be offered the opportunity to bring a support person for any future meetings throughout this process.

#### **What if my support person is unable to attend the meeting?**

Your employer will set a time and date for the meeting. If your support person is unable to attend at that time you can request that the meeting time is changed. You cannot be unreasonable about delaying the meeting too long. If your support person is unavailable for a long period of time, you would need to consider finding another support person.

#### **Is there a correct process of warnings (verbal and written) that my employer must follow?**

No, however your employment agreement may provide a set number of warnings.

If the discipline is due to serious misconduct, then there is no requirement for warnings. Provided the situation is investigated thoroughly and your employer finds your actions were serious misconduct, then dismissal can take place.

If it is just minor misconduct or a performance issue your employer just needs to be able to demonstrate that you have been advised of the issue and given a reasonable time to

improve. They may also need to offer you training and support to bring your performance up to a suitable level. Good practice would suggest that all warnings should be put in writing.

If your employer does not follow a correct process even if there is good evidence that the decision to dismiss or discipline was justified you may have grounds for a personal grievance.

### **I am thinking of taking a personal grievance against my employer – what is involved?**

The Employment Relations Act allows you to raise a personal grievance for a number of concerns other than unjustified dismissal. Action can be initiated for any other problem relating to or arising out of the employment relationship.

Employment relationship problems are typically dealt with in the first instance through Mediation. This is an informal process intended to resolve problems at the earliest stage before they become entrenched.

Mediation is a positive process and usually facilitated without charge through the Department of Labour's Mediation Service. Private mediation can also be arranged at the parties own expense. If a problem is not resolved at Mediation it is likely to be formalised and taken through to the more formal processes in the Employment Relations Authority and the Employment Court.

The grounds for pursuing a personal grievance include any claim you may have against your employer that:

- you were unjustifiably dismissed; or
- that your employment, or one or more conditions of employment, is or are affected to your disadvantage by some unjustifiable action by the employer; or
- you were discriminated against on certain grounds (*eg.* age, sex, marital status - note this aligns with the grounds in the Human Rights Act 1993); or
- you were sexually or racially harassed in your employment; or
- you have been subject to duress in relation to membership or non-membership of a union.

### **What is the time frame for raising a personal grievance?**

Any personal grievance must normally be raised within 90 days of the date on which the action alleged occurred or came to the notice of the employee. However there are several grounds on which that 90 day period may be extended.

A grievance may be raised after the 90 day period has expired where the Employment Relations Authority agrees on the grounds that "exceptional circumstances" exist and the Authority considers it just to allow the grievance to proceed. "Exceptional circumstances" under the Act include circumstances where:

- The employee was so affected/traumatised by the matter giving rise to the grievance that they were unable to properly raise it in time;
- The employee reasonably relied on an agent to raise the grievance within time, and the agent unreasonably failed to ensure it was raised;

- The employee's Individual Employment Agreement (IEA) or Collective Employment Agreement (CEA) does not contain an effective explanation of the procedures for resolving employment relationship problems; or
- The employer has failed to provide a written statement of reasons for dismissal on receiving a request by the employee.

#### **How likely is it that my personal grievance will be successful?**

That will depend entirely on the merits of your case. However, you may succeed with a personal grievance claim for a number of reasons including:

- You were not aware of any problem and therefore not given the chance to improve your behaviour.
- The conduct for which you were dismissed was not sufficiently serious to warrant dismissal.
- There was inconsistent treatment or some kind of unfair treatment (e.g. you were not given adequate opportunity to give an explanation).
- Inconsiderate action was taken by the employer, e.g. mitigating factors or the employee's previous good record had not been considered.
- You were forced to resign (constructive dismissal).

#### **What is Constructive Dismissal?**

This is a situation where you can claim you had no option other than to resign. In this type of dismissal the onus of proof that a personal grievance exists lies with the employee.

Examples of constructive dismissal include situations where an employee was told that their work was substandard and they should resign to "save face"; where there was a confrontation and the employee walked out claiming the employer was unreasonable; or similar cases where wrongful pressure is placed on an employee such that they feel they had no choice but to resign.

#### **What could be the outcome of a successful Personal Grievance?**

Where the Employment Relations Authority or Employment Court determine that you have a personal grievance the following remedies are available:

- *Reinstatement* - This is the primary remedy if requested by or on behalf of the employee. If ordered, the employer must reinstate you immediately or on the specified date, even if the decision is to be appealed. Interim reinstatement may be ordered before the matter is resolved.
- *Reimbursement* for any remuneration lost as a result of the personal grievance. You may be awarded the lesser of the actual remuneration lost or three months' ordinary time pay. There is also discretion to award more.
- *Compensation* for humiliation, loss of dignity, injury to feelings and/or any lost benefit.

An award of compensation for a personal grievance may be discounted where the Authority or Court decides that the employee's behaviour contributed to the problem.

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## Need more help?

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