Staff and Volunteers

There are several methods for terminating an employment agreement. Aside from being dismissed by an employer, an employee can choose to terminate their employment agreement by resigning, or a position may be made redundant.

Resignation

A resignation occurs when an employee voluntarily terminates their employment agreement. The reasons for resignation can be varied. An employer should be open to the reasons given by the employee for their resignation. If the reasons given by the employee are serious, such as workplace bullying, an overly stressful environment or harassment, then an employer must take steps to resolve the problem.

Resignation procedure

The legislation does not set out a procedure that employers and employees must follow if an employee resigns. The first place to check to determine what procedure should be followed is the employee's employment agreement. An employment agreement should set out:

- That the employee can terminate the agreement by resigning
- How the employee may resign, which could be:
    - verbally
    - verbally and in writing (this is the recommended option)
    - in writing only
- If there is a notice period for resignation, and if so, what the notice period is (some employers do not have a notice period, in which case, the employee must give "reasonable notice" to the employer of their resignation. Employers can use their discretion when deciding what notice period is "reasonable". This depends on a few factors, including:
    - the employment agreement

    - type of work
    - seniority of the role
    - salary level
    - what sort of notice periods are common in the industry
- What would happen if the employee gives less notice than the specified notice period or gives no notice. This could include deduction of wages owed.

An employee may have to work the full notice period before resigning. Alternatively, if the employee agrees in writing, or the employment agreement allows it, the employer may pay out some or all of the notice period in lieu of the employee working for that period. If an employee resigns and gives the required notice, the employer must pay the employee in full. The employee's final pay must include any holiday pay owing to that employee.

If the employee's employment agreement states that the employer can deduct wages if the notice period is not complied with, then the employer should check whether or not the employee has withdrawn consent for this before deducting wages. An employee can withdraw consent to deductions from wages at any time by giving written notice to the employer, even if they have signed an employment agreement giving consent. The Employee's signature will satisfy the written consent requirement of section 5 of the Wages Protection Act 1983. In such a case, the employer may still be legally entitled to a payment from the employee, but cannot deduct it from the employee's wages.

Constructive dismissal

A constructive dismissal occurs when an employer directly or indirectly pressures an employee to resign.

Examples of a constructive dismissal include where an employee resigns because:

- the employee is told to resign or else they will be dismissed
- the employer has made working conditions for the employee intolerable
- the employer has embarked on a course of conduct deliberately aimed at making the employee resign (e.g., bullying the employee)
- there has been a breach of the employment agreement by the employer, or the employer has breached the duty of fair and reasonable treatment, such that the employee feels that

they cannot remain in the job

If an employee has been subjected to a constructive dismissal, the employee may have an actionable personal grievance (discussed below).

Redundancy

Redundancy happens when a position within an organisation either becomes non-essential or its nature changes so much that the position is no longer relevant. When that happens, the organisation may remove the position altogether. This often occurs during restructures or mergers.

Redundancy versus dismissal

A redundancy is different from a dismissal. An employer must have a genuine work-related reason for a dismissal. A redundancy must be about the employee's position, not the employee personally.

An employer cannot use redundancy to get rid of an employee if the employer has other motives for wanting to end the employee's employment. That means:

- if a position has been removed and an employee made redundant, the employer cannot re-advertise the same position or a position that is substantially the same
- poor performance cannot form any part for the decision to remove a position and make an employee redundant
- an employer may not make someone redundant for being pregnant or for applying for parental leave
- if an employee suspects that they has been made redundant unfairly, the employee may raise a personal grievance (discussed below)

An employee cannot raise a successful personal grievance in relation to a redundancy if the redundancy is genuine, reasonable and the process used is fair.

A fair process for redundancy

The employer needs to ensure the reasons behind the redundancy are reasonable and based on correct information. An employment agreement should include a robust redundancy clause

that makes it clear to both the employer and employee what will happen if the employer wishes to make, or is considering making, the employee redundant. If an employer intends to make an employee redundant, the employer must follow any redundancy process set out in the employee's employment agreement. A redundancy process should include the following considerations:

- The employer should consider other options before making an employee redundant. Other options include:
    - redeployment of the employee to another role
    - having the employee working reduced hours
    - changing the employment agreement to reflect a new role if the previous role is abandoned.
- If the employer is still considering making an employee redundant after considering other options, then the employer must tell the employee.
- The employer must provide information to the employee about the process relating to their redundancy, including the period of time they can expect to remain employed by the employer.
- The employee should be given the opportunity to express their views and concerns about the redundancy
    - Often the employee is best placed to offer input about their role, and should use this opportunity to advocate for retaining the role
    - An employee should be open to participating constructively in the consultation process. If the employee is able to come up with some alternative solutions to a redundancy, those solutions should be communicated to the employer.
- An employer is not bound to take the advice of the employee. The employer is however required to offer the employee the opportunity to provide input and consider the options given by the employee.
- If, after speaking with the employee, the employer still wishes to make the employee redundant, the employer should give notice of the redundancy to the employee in writing. The notice should also be given to the bargaining officer or the union if the employer is terminating a collective agreement.
- When assessing the fairness of a redundancy process, a court is likely to consider:
    - whether notice was given in writing

    - whether the employer consulted with the employee prior to making its decision
    - the quality of the information given to the employee about the redundancy
    - the employer's level of resources (e.g. if the employer is a small organisation with few resources, the court will take this into account when evaluating the fairness of its process).
- An employer may offer the redundant employee an exit package, which may include:
    - help with drafting the redundant employee's CV
    - counselling services
    - career guidance
    - a letter of recommendation or a reference
    - severance pay (if the employee is eligible).
- An employer is not legally required to give compensation to an employee it has made redundant unless there is a compensation clause in the employment agreement. However, an employer may decide to give compensation to the employee it is making redundant before or after the employment relationship has been terminated. If an employer has, or is planning to have, a compensation clause in its employees' employment agreements, it should ensure that it has sufficient funds to pay any amounts owed.

Technical redundancies

A technical redundancy occurs when a position is made redundant as a result of the sale of the business, or when the business merges with another business. If employees are offered similar positions on similar terms as their previous roles by the purchaser of the business (or a new entity created out of a merger), then those employees are not entitled to compensation.

Vulnerable workers

A different redundancy process must be followed in respect of vulnerable workers. Vulnerable workers have rights beyond what regular employees have with regards to redundancy.

Vulnerable workers include persons who carry out:

- cleaning services and food catering services in any place of work

- laundry services for the education, health or age-related residential care sector
- orderly services for the health or age-related residential care sector
- caretaking services for the education sector

Vulnerable workers have the right to access resources and have the time to make an informed decision about their future prospects, and:

- if there is a sale of the business or a merger of the business with another business, transfer to the purchasing business or the merged entity on the same terms and conditions
- choose to stay with their current employer
- take on a role with a third party (in which case the employee will be made redundant by the current employer

Retirement

Retirement occurs when an employee voluntarily terminates their employment agreement, and either does not seek another job, or moves on to another profession. If an employee wishes to retire, they must resign from their role in accordance with the usual resignation process.

An employer cannot generally force an employer to retire because of their age. There are, however, exceptions to this general rule, including where:

- the employee has a written employment agreement with the employer that was in force on 1 April 1992 and remains in force
- that agreement specifies a retirement age, which has been confirmed by the employer and the employee in writing on or after 1 April 1992

Underperforming employee

If your community venue is concerned about an underperforming employee, the centre should check the community venue's code of conduct or the employee's employment agreement to see if there is a procedure for dealing with underperforming employees. If your community venue does not have one, consider creating one. As always when dealing with an employee, an employer must engage with the employee in good faith throughout the entire process.

The process set out below is a formal one that covers all the procedural requirements of the law. This process is necessary if the result of the process could potentially be disadvantageous to the employee's employment (e.g. a verbal/written warning, some form of privilege taken away, job description changes) or result in a dismissal. If the issue is minor and will not result in a disadvantage to the employee's employment, a more informal process is likely to be adequate to address the issue.

Poor performance

Poor performance occurs when an employee fails to meet the standards required of a person in their job. It is different from misconduct (which involves some form of wrongdoing) or incapacity (where an employee is unable to do their job for a reason such as illness).

If an employee is failing to perform their job to the level required, the employer should go through a performance management process before undertaking a formal disciplinary procedure described below.

Identify the gap

First, the employer should identify the gap in the employee's performance. What is the employee not doing that they should be doing as part of the job? Make sure that the gap is determined and measured objectively, which can be done by referring to the duties or job description in the employee's employment agreement. Other places to consider when determining whether the standard is an objective one are the code of conduct or procedural documents in your workplace. Once identified, the employer should discuss the gap with the employee.

Develop a performance management plan

Once the employer has started the discussion with the employee, the employer should develop a performance management plan with the employee. The employer should work out what standards it wants the employee to achieve. The employer must ensure the standards are practical, reasonable and are objectively measurable, allocate a reasonable time frame for improvement by the employee, and consider whether additional training or other support is necessary to meet those standards.

If further training or support is necessary, the type of training or support will depend on the employer's resources and the nature of performance that needs improving. If it has limited resources, having another employee provide training might be adequate. The employer might

also need to provide additional support for the employee, such as ensuring that the employee has adequate resources and support from other employees and/or volunteers.

A performance management plan should also require regular check-ins with the employee. The employer should set up a regular meeting to discuss how the employee is improving or, if they are struggling to achieve the targets, why that might be and if further support should be provided.

When the time that the employee was given to improve has passed, the employer should again evaluate the employee against the standard it set in the performance management plan. If the employee has:

- improved, then this should be the end of the process
- improved a little but not fully, the employer should evaluate whether further action is required or if more time would be appropriate
- not improved their performance to an adequate degree, the employer should begin a formal disciplinary procedure (as discussed below)

Formal disciplinary procedure

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

"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 serious misconduct (i.e. gross negligence or recklessness).

"Serious misconduct" involves serious wrongdoing. Where, after a fair process (e.g. the performance management 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).

Before the meeting

Before advising the employee that they are being formally disciplined, the employer must know what the issue is. This must be defined and tangible, and the employer must think about the issue objectively.

An employer can discipline employees only for work related issues. An employer cannot discipline an employee because of issues that are only personal. The employer must be open to considering any explanations the employee might provide. If the person responsible for the employee, such as a manager, feels they are too close to the issue, or if there is a conflict of interest, the employer should arrange for someone else to carry out the procedure (e.g. an employment subcommittee or representative of the management committee).

If there is alleged serious misconduct and there is a safety risk in keeping an employee at work, the employer might be able to stand the employee down. The employer should check the employee's employment agreement to see if there are any requirements as to how to stand down the employee. Standing an employee down can be considered a disadvantage to employment, so an employee should only do this when it is within the range of options a fair and reasonable employer could undertake. Generally a stand down will need to be on full pay.

Before meeting with the employee, the employer must give the employee an explanation of the issue or behaviour in question and the nature of the meeting. This will give the employee a chance to provide an explanation and to seek advice if it is appropriate. 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 pre-warned about.

The employee must have enough time before the meeting to consider the information provided and to prepare their response and be told that the response can be made orally or in writing, or in both ways. The employee must also be told who is coming to the meeting, and of their right to bring a support person or representative with them. A good way of communicating the arrangements for a meeting is by sending a letter or email.

When an employer raises the issue with the employee, the issues outlined should be the only issues that are discussed. An employer should not raise past issues unless they are relevant. If an issue from the past has already been dealt with, an employer cannot raise it again.

During the meeting

During the meeting, the employer should explain the issue tactfully and respectfully. It will be

helpful for both the employer and employee to keep a record of all discussions, agreements and meetings held.

The employee should be given a reasonable time to explain their situation. If an explanation is satisfactory, the employer should note this on the employee's file and consider the issue dealt with. The employer cannot then raise the issue again. An explanation may, however, require further investigation by the employer. If this is the case, the meeting should be adjourned and further investigation carried out. Another meeting may then be required to put the results of the investigation to the employee.

If the explanation provided by the employee is unsatisfactory, the employer should explain why this is the case and the possible consequences. The employer should then end the meeting, so that it can fully consider the employee's explanation and whether disciplinary action is appropriate.

Consideration and disciplinary choices

The employer should ensure that any consequences are proportionate to the issue. The employer should also consider whether there are any mitigating factors (such as the employee being a long-serving employee with a clean record).

If the employee's behaviour has changed positively, this should be taken into account by the employer. The employer could decide that the issue has been resolved or that a lesser consequence would be appropriate.

Some disciplinary options that are available include:

- verbal warning
- written warning
- final written warning
- dismissal
- change of role or responsibilities
- change of location (good for separating employees that are in conflict with each other)
- requiring additional training or education

When deciding what disciplinary action is appropriate, the employer should check the employment agreement. Some employment agreements will set out a hierarchy of disciplinary

actions e.g. a verbal warning may need to be given before a written warning. In that case, the employer must follow the hierarchy. The employer must also comply with any other requirements relating set out in the employment agreement. If there is nothing in the agreement, the employer can decide itself what disciplinary action to take, so long as that action is reasonable and that the employer acts in good faith.

Communicating the outcome to the employee

Once the employer has made a decision, the employer should arrange a meeting with the employee. The employee should be given the opportunity to bring a representative or a support person. The disciplinary meeting template letter referred to above can be adjusted to include this information.

In the meeting the employer should outline its decision and the disciplinary action it believes is appropriate. The employee should then be given a chance to respond to this. The employer should consider this response; it is a good idea to adjourn the meeting to ensure there is adequate time to do this. The employer's final decision must then be communicated to the employee and appropriate follow up action taken e.g. write and record any warning given, or make arrangements for dismissal and give notice (if required).

An employer must not write a warning or dismissal letter before the meeting. Doing so can indicate that the employer had a closed mind and did not genuinely consider the employee's response.

Vicarious liability

Community venues should also be aware of the principle of 'vicarious liability' commonly found in employment issues. When an employee or a volunteer in the course of doing work 'integral to the business' commits an offence, the employer is held accountable.This is called 'vicarious liability'. To minimise liability, a community venues should identify common risk factors, formulate risk management plans and implement regulation policies (e.g. a Code of Conduct).

Employee grievances and dispute resolution

Grievances arise when an employee considers the employer has done something that is unfair to the employee, which could include an action that unjustifiably negatively affects employment conditions, discrimination, harassment, or the employer having undue influence relating to unionism. Disputes are disagreements about the interpretation, application or operation of an

employment agreement.

It is important that an employer has sound policies for dealing with issues arising in employment relationships. A dispute or grievance could arise for a number of reasons and with varying degrees of seriousness. A dispute resolution clause that sets out how disputes and grievances will be dealt with must be included in all employment agreements, including both individual and collective agreements.

How to identify problems

An issue may come to your attention through an employee making a complaint, either verbally or in writing. Alternatively, a situation may be so serious that you are able to identify an issue without a complaint being made (e.g. if you witness the bullying or harassment of an employee).

You should try and address any issues as early as possible, whether it has resulted from a complaint or has been identified more informally. This may involve asking the employee to provide you with more information so you can properly consider and address the issue.

Dealing with a dispute about the employment agreement

If an employee comes to you with a dispute or you realise there is an issue with the employment agreement, think through the key facts about the problem, and gather any relevant information. Some questions you could consider include:[7]

- What are the relevant parts of the employment agreement?
- How does the dispute relate to the employment agreement?
    - Are there any obvious breaches?
    - Are there any mistakes?
- Do I need to seek further legal advice on this issue?
- How does the dispute affect the employee?
- Does the dispute affect any other employees?
- Has there been any discussion about the dispute with other employees?
- What mitigating actions have been taken to resolve the dispute?
- How effective have they been?

Common areas of dispute

Some common employment disputes are:

- disputes about the interpretation, application or operation of the employment agreement
- disputes relating to alleged breaches of the employment agreement
- whether a person can be considered an employee
- unfair bargaining of the employment agreement
- disputes relating to redundancy agreements
- recovery of wages

Dispute resolution methods

It is in the best interests of both the employer and the employee to resolve any dispute quickly. An employer or employee may rely on several methods to resolve a dispute, as discussed below.

Raising the issue early through an initial meeting

In cases of small disputes the first step can be a meeting between the two parties. The goal is to develop a common sense solution that both can agree on. One party can raise the issue and the other party can then respond. There does not need to be an independent third party present in the meeting. Once matters are discussed, the two parties can agree on a plan to resolve the issue. As a matter of good practice, the matters discussed at the meeting should be recorded in writing, agreed by both parties, and filed.

If the situation gets worse, the parties may consider mediation.

Contact the Labour Inspectorate

The Labour Inspectorate ensures that minimum conditions of employment laws are applied correctly (e.g. minimum wage is paid, holiday pay is paid). If the dispute relates to a minimum condition of employment then the employee may complain to the Labour Inspectorate, who will then investigate the complaint.

If the Labour Inspectorate finds that there might be breaches of the law, the inspector might do any of the following:

- Provide educational information to both parties, which may include any information the parties may need to become compliant with the law. This information can be useful in situations in which a breach may have been inadvertent. The information can also accompany any notice given to the parties (such as those set out below).
- Issue an enforceable undertaking, which is a voluntary commitment given by the parties recorded in writing. An enforceable undertaking may be withdrawn with the agreement of the labour inspector.
- Issue an improvement notice (which requires a party to take steps to improve the issue).
- Issue a demand notice (which requires compliance by a party).

Other forms of dispute resolution

You can resolve disputes using the mediation service provided by the Ministry of Business, Innovation and Employment, or if that doesn't work then Employment Relations Authority and Employment Court processes set out in "How an employee raises a personal grievance", below.

Personal grievances

A personal grievance is a complaint made by an employee about their employer.Personal grievance claims can be made by all employees.

Grounds for a personal grievance

To raise a personal grievance, all an employee needs to do is make the employer or a representative of the employer aware of the facts that give rise to the grievance, with enough information that the employer can act on the issue if they want to. A grievance can be raised by a letter, an email or verbally.

The grounds for a personal grievance are discrimination, sexual harassment, racial harassment, unjustified dismissal, unjustified disadvantage, duress related to unionism and issues related to vulnerable workers and redundancy. The most common of these grounds are discussed below.

Discrimination

An employer has a duty to treat all employees fairly and equally. Discrimination occurs when an employee is treated unfairly and to their detriment, in comparison to the other employees, under one or more of the prohibited grounds of discrimination.[8] The prohibited grounds of

discrimination are listed in the recruitment section of this chapter.

The employer will be acting unlawfully if one of the following has occurred in the workplace because of one of the prohibited grounds of discrimination:

- the employer offers the employee less favourable terms of employment, conditions of work, fringe benefits or opportunities for training, promotion and transfer than are made available for other employees of the same or substantially similar qualifications, experience or skills employed in similar circumstances
- the employee has been subjected to some form of detriment or dismissal in circumstances where another employee in a similar situation would not have been subjected to such detriment or dismissal
- the employee has been forced to retire or required to resign

Sexual harassment

Sexual harassment may be any of the following:

- An employer or representative of the employer (e.g. a manager or senior management team member) makes a request, either directly or indirectly, of an employee for sexual contact or other form of sexual activity. This request may be accompanied by:
    - an implied or overt promise or threat of preferential or detrimental treatment
    - an implied or overt threat about the employee's future employment status (e.g. threatening to dismiss)
- An employer or the employer's representative uses language (written or spoken), visual material or physical behaviour of a sexual nature that is unwelcome and/or offensive, and is either repeated, or is so significant that it has a detrimental effect on the employee's employment, job performance or job satisfaction.

The sexual harassment does not have to come from an employer or its representative. It may come from a co-worker, client or customer. The employer will be liable for such harassment only if it fails to take reasonable and practicable steps to prevent the harassment from occurring. This means that if an employer is informed of the sexual harassment of an employee by co-workers, clients or customers, the employer should take immediate action to protect the employee from such harassment and prevent it from happening in the future.

Racial harassment

Racial harassment occurs when an employer or its representative uses language, visual material or physical behaviour that directly or indirectly:

- expresses hostility against, brings into contempt or ridicules the employee on the basis of race, colour, ethnicity or national origins
- is hurtful or offensive to the employee
- has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance and/or job satisfaction

As with sexual harassment, the harassment does not have come from the employer. An employer may be held liable if they fail to take reasonable steps to stop racial harassment against an employee.

Racial harassment can include, but is not limited to, the following:

- derogatory comments made against the employee on the race, colour, ethnicity or national origins
- the existence in the workplace of written or visual items that are racially offensive and/or hurtful
- racial jokes that are made at the employee's expense, or otherwise
- judging an employee or making decisions relating to the employee based on racial stereotypes
- sharing racist emails.

Unjustified dismissal

A dismissal can be unjustified if:

- The reason for an employee's dismissal is not justifiable:
    - an employer must have sufficient evidence to establish that there are good grounds to dismiss an employee
    - the reason for dismissal must be one that a reasonable employer would consider to be a justifiable reason for dismissal (e.g. misconduct, incapacity, bringing employer into disrepute, poor performance)

    - prohibited grounds of discrimination as a basis for dismissal is unjustified
    - a redundancy is not genuine (job still exists)
    - there is a breach of an employer's duty through a constructive dismissal
- The procedure used for dismissal is procedurally unfair:
    - any issue that results in dismissal must be properly investigated
    - if an employer is unhappy with the employee's performance, it must tell the employee
    - the employee must be given an opportunity to respond to the employer's concerns
    - the employer must have an open mind when considering the matter and act in good faith
    - before an employer resorts to dismissal, it should consider other options:
        - meeting with the employee
        - additional supervision of the employee
        - giving a formal warning
        - suspension

Employers are bound to follow the 'fair and reasonable' test when dealing with a potential dismissal.[10] That is, an employee should be dismissed only if dismissal is an action that a fair and reasonable employer could take, considering the circumstances of the individual employee.

Unjustified disadvantage

An unjustified disadvantage could encompass many things, and occurs when:

- an employee's employment or the conditions of employment have been affected
- the effect is disadvantageous to the employee
- the disadvantage was caused by the employer

Bullying

Bullying is a form of unjustified disadvantage and can be a breach of health and safety legislation. Broadly, bullying is characterised by actions that are repeatedly carried out with the desire to gain power or exert dominance, or with the intention to cause fear and distress. A

harsh management style alone will not constitute bullying.

Bullying can immediately create grounds for a personal grievance if the employer, or a representative of the employer, is the one subjecting an employee to bullying. If a co-worker is bullying an employee, the employee should inform the employer or employer's representative of this. If the employer or its representative does nothing or acts inadequately, this may give rise to grounds for a personal grievance.

If an employee informs you that they are being bullied, you should take this seriously and investigate the issue. If an employee is undertaking bullying behaviour, then this can be grounds for misconduct.

How an employee raises a personal grievance

An employee with a grievance needs to take reasonable steps to raise a grievance with his or her employer. This can be done verbally or in writing. It is recommended that an employee does both, but they do not need to for it to be legally binding on the employer.

The grievance must be raised no later than 90 days from when the grievance occurred or when the employee became aware of the grievance, whichever is later. A personal grievance can be raised outside this time limit if the employer agrees to this,, if you wish to respond to a personal grievance raised outside the 90 day time limit – seek legal advice before doing so.

When raising a grievance, the employee should cover the following matters:

- Who the employer is
- Details of the issue leading to the grievance. The employee should set out the relevant events chronologically (or make their best attempt to do so). Specify the following details:
    - what happened?
    - when did it happen?
    - who did it involve?
    - how did it become an issue?
    - why does this warrant a personal grievance claim?
- Whether the issue been raised before with the employer. If possible, the employee should provide dates, times and places. The more detail an employee can add, the more credible the grievance

- Whether there are documents that support the employee's claim, such as:
    - written evidence of sexual or racial harassment
    - the employment agreement
    - documents resulting from meetings relevant to the issue
    - file notes of telephone calls relevant to the issue
    - documents that outline the reasons for the employer taking disciplinary action (if any)
- Any other information that could support the employee's claim
- The remedy the employee is seeking, which might be:
    - reinstatement
    - interim reinstatement
    - compensation
    - acknowledgement that the employer contributed to the issue
    - an apology
    - a change in working conditions/workplace policy and/or procedures

Dispute resolution process for personal grievance

If an employee raises a personal grievance, the employer can choose to try to resolve the issue informally or go through mediation.

Informal resolution

As an employer, if you are made aware of a personal grievance, it is a good idea to adopt a common sense approach. It is important to have a clear idea of the issues and what the facts are, which should involve some investigation. You should also ensure both you and the employee have time to think through the issues and get legal advice or other support if need be.

You should ensure you are following any process set out in the dispute resolution clause of the employment agreement.

If you are discussing the issue with the employee, it can be a good idea to have a third party

present as a witness and to help prevent misunderstanding. You should advise the employee that they are entitled to bring a support person, union delegate or other representative. Both the employee and employer should take notes in any meetings and have a copy of any agreement reached.

Mediation

Employment relationship problems may also be resolved through mediation. Mediation is a flexible procedure that can result in a binding settlement. An employer or employee may initiate mediation with the other party and get mediation for free through the Ministry of Business, Innovation & Employment (MBIE), provided that the issue is related to an employment relationship. Mediation is a voluntary process, and both parties must agree to attend mediation. (In some circumstances, the Employment Relationship Authority may require the parties to attend mediation. This is discussed below).

Mediation allows both the employer and employee to discuss their issues fully and without fear of ramification, as the process is completely confidential. For mediation to work efficiently, both parties should participate in good faith, with an open mind and a desire to resolve the matter.

Parties may be legally represented, but this is not a requirement. They may also take support people to the mediation.

The employer and employee can also choose to use a private employment mediator or arbitrator. However any agreement that is reached may not be enforceable in the Employment Relations Authority or Employment Court unless it is later signed off by a mediator from MBIE.

Role of the mediator

The mediator's primary role is to facilitate and encourage discussion. The mediator is impartial and does not impose a binding decision on the parties unless the parties give the mediator the authority to do so. Mediators appointed by MBIE are experts in dealing with employment relations disputes. They also have the full authority to sign settlements that are legally binding under the Employment Relations Act 2000.

A mediator will pay careful attention to the discussion between the parties. They may identify issues that are not apparent to the parties and manage risks as they appear during the process.

Some strategies a mediator may use are set out below.

Before the mediation, the mediator may:

- Summarise their role in the mediation process, which could include information about how the mediation process will be managed.
- Begin the session by outlining common grounds that the parties have.

During the mediation the mediator may:

- Ensure that the discussions between the parties are civil and respectful. A good mediator should have some strategies to manage heated or irrelevant discussions.
- Encourage the parties to seek settlement. However, a mediator should not pressure parties to settle. Instead the mediator could direct the parties to:
    - examine their investment in the employment relationship
    - consider the nature of the problem
    - weigh this against the circumstances of the parties
    - examine the behaviour of both parties
    - think about the relevant law and how it affects the current situation
    - consider the other party's situation and views
    - reality test each party's options if settlement is not reached.

Outline of a mediation process

The following is a general outline of the mediation process that is followed in respect of employment relationship.

1. **Parties agree to mediation:** Because it is a voluntary process, one party cannot compel the other to go for mediation. However if one party files in the Employment Relations Authority ("ERA"), the ERA can compel both parties to attend a mediation. If a party refuses to attend a voluntary mediation, this may reflect poorly on that party.
2. **Speak to an information officer:** A party can talk with the MBIE contact centre (0800 20 90 20). An information officer will discuss with the party whether or not mediation is the best process for the parties. The officer will then refer the parties' contact details to an area office.
3. **Mediator contacts both parties to discuss the issue:** A mediator from the area office will decide whether the issue should be mediated or if alternative actions are more

appropriate.

1. The parties should tell the mediator if they will need additional assistance in the mediation process (e.g. interpreter, legal representation, senior staff member).
2. Either party may be required to send the mediator a written agreement that states it is willing to undertake mediation.
3. If the parties would like the mediator to make a binding decision on their behalf, they must give the mediator written consent to do so. Each party must be aware that it cannot appeal the mediator's decision if it is unhappy with it.
4. **If mediation is to go ahead**, the mediator will confirm in writing a time and place for the mediation. All parties involved will receive this information from the mediator.
    a. While a written submission from either party is not required for mediation, it can be helpful if you prepare a submission that sets out your key arguments. That way if you get confused or flustered you can refer to your submission in the mediation.
5. **During the mediation session:** the parties will have an equal opportunity to express their concerns. For the mediation process to be successful, the parties should mediate in good faith and with an open mind.
6. **The outcome of mediation:** This is dependent on the parties involved.
7. If a settlement is reached, the mediator will write up a 'Record of Settlement agreement'. The parties involved will receive a copy. The Record of Settlement is a legally binding document once it is signed by the parties. This also bars the parties from going to court on the same issue.
8. If settlement is not reached, the parties may make a separate or joint application to the Employment Relations Authority to resolve the issue, as set out below.

See the Ministry of Business, Innovation and Employment's website for a Record of Settlement template.

Employment Relations Authority

The Employment Relations Authority ("ERA") is an investigative body. Its role is to resolve employment relationship problems. When an application is made, the ERA will review the issue. It may suggest alternative forms of dispute resolution first (e.g. mediation). However, if initial steps taken by the parties have failed, then the ERA will investigate.

Applying to the Employment Relations Authority

To apply to the ERA, a party must fill in a prescribed form that can be found on the ERA's

website. The fee of $71.56 must be provided with the application, along with copies of supporting documents. These could include:

- the employment agreement
- meeting notes/minutes
- emails, letters or facsimiles
- diary notes
- file notes of discussions by the parties
- payslips

The ERA website has other forms for the general public to access. These forms include:

- Application for interim reinstatement: An employee who has been dismissed and wishes to continue working for his or her former employer while the case is before the ERA can apply for interim reinstatement by filling out this form. The form should be attached to the application.
- Statement of Reply: when the ERA contacts the responding party, that party must fill in a Statement of Reply. There is a prescribed form on the website.
- Application for investigation to be reopened: If a party would like to reopen their case with the Employment Relations Authority, they must fill in this form and pay a fee of $153.33.
- Application for removal of matter to the Employment Court: If a party would like a matter to be heard in the Employment Court instead of the ERA, it must fill out a prescribed form and pay a fee of $153.33.

Forms can also be requested from the Ministry of Business, Innovation, and Employment on 0800 20 90 20.

Case management conference

When the ERA receives an application and payment, it will begin the investigation process. A case management conference file is created for the parties, and a case management conference is held. This is a brief process which normally takes place over the phone.

The purpose of a case management conference is to:

- outline a procedure for the investigation process

- have a clear understanding of the issues
- formulate strategies to resolve the dispute
- ensure that the correct evidence is used to resolve the dispute
- agree on a date, place and time for an investigative meeting

Investigation meeting with the Employment Relations Authority

Meetings are held at the ERA's office. Parties are welcome to bring support people to the meeting. They may also have representatives (e.g. a lawyer or employment advocate) present at the meeting.

The process of the meeting:

- Introductions and outlining a process: The ERA member who runs the meeting will introduce him/herself and give a brief outline of the process that will be followed
- 'Statement of Problem' and 'Statement of Reply': The ERA member will then check the facts set out in both the 'Statement of Problem' and 'Statement of Reply' with the parties
- Presenting evidence: the parties may be asked to verbally present evidence during the meeting. Parties may also have to submit a written statement of evidence
- Witnesses: Witnesses who have provided a statement to the ERA must attend the investigation meeting. The Authority member may ask them questions regarding their statement. They will have to verify that the information given on the statement is true
- Conclusion: The parties will have an opportunity to summarise their key points

Determinations

A determination is a decision that the ERA will make after considering all of the evidence. This decision is legally binding on both parties, although can be appealed as set out below. Determinations are public, and are issued in writing to either parties or their representatives.

Remedies

The ERA has the legal authority to grant the following remedies:

- Interim reinstatement: the ERA may issue an order to an employer to temporarily reinstate the employee while there is an investigation

- Reinstatement: the ERA can reinstate an employee if it finds he or she has been unjustly dismissed
- Compensation: compensation is normally given to parties who have suffered loss or humiliation
- Compliance: the ERA can compel the parties to fulfil their obligations towards each other
- Costs: often the parties can decide who pays for the costs for the ERA. If they disagree, the ERA can make a binding decision as to costs
- Reimbursement of loss of wages: if the employee has been dismissed or subject to an unjustified action, the ERA may find the employee is entitled to a reimbursement

Employment Court

If either party is unhappy with a decision made by the ERA it may apply to the Employment Court. A party must apply to the Employment Court no later than 28 days after the ERA's decision. A party may specify if it wants to have the matter considered again or if only specific aspects of the ERA's decision should be considered again. The Employment Court follows a formal process and stricter rules of evidence than the ERA, so it is strongly recommended that both parties are represented by a lawyer.

Employees

Paid workers

An employee is a person employed by an employer to do work for hire or reward under a contract of service, often called an employment agreement. There are two types of employment agreements: Individual Employment Agreements and Collective Agreements.

Permanent employees

A permanent employee is an employee whose employment does not have an end date. This is the most common form of employment. Permanent employment may cover part time, full time or rostered workers.

Fixed term employees

A fixed term employment agreement lasts for a specified period that is agreed by the employer and the employee. The employee's end date, the event on which the employment ends, or the project that the person is being employed for must be specified in the employment agreement.

For the fixed term period of the person's employment, the employee has all the rights and obligations of a permanent employee. If an employee works past the fixed term end date or event and there is no sign of the agreement ending soon, it may be considered a permanent agreement.

Casual employees

In a casual employment arrangement, the worker is only employed on an "as needed" basis. There is no regular work pattern and no expectation of ongoing work for the employee. A casual employee has all the rights and obligations of a normal employee when they are working.

A casual arrangement has the potential to become a permanent agreement if it is determined that the relationship between the employer and employee suggests that the person is actually a permanent employee.

Individual Employment Agreements

An Individual Employment Agreement is negotiated by the employer and employee. An employer must provide the employee with a copy of the Individual Employment Agreement.

An Individual Employment Agreement must include the following, under the Employment Relations Act 2000 and the Holidays Act 2003:

- the names of the employer and the employee (stated in full)
- the position that the employee will fill
- the list of duties and responsibilities of the employee, as set out in the job description
- an indication of the place(s) of work
- an indication of the hours and days of work
- the employee's salary or wages, and how this will be paid

- how much the employee is entitled to be paid if they work on a public holiday
- the employer's leave policy, including sick leave and bereavement leave
- provision for how the employee's job will be affected by a restructuring and/or transfer,[5] such as whether the employee:
    - can negotiate a similar position with a new employer
    - will be made redundant under a redundancy clause
- a plain language explanation of the services available to resolve employment relationship problems, including:
    - how and when to lodge a personal grievance
    - a reference to the period of 90 days within which a personal grievance must be raised

For assistance with drafting an employment agreement, see the Employment Agreement builder, which is provided by the Ministry of Business, Innovation and Employment.

Collective Agreements

A Collective Agreement is an agreement negotiated between an employer and a union, and covers the work that is to be performed by the new employee. A collective agreement must include:

- a coverage clause that identifies the employee positions (and/or types of work) that are covered by the agreement
- a clause stating how the agreement can be varied
- an end date, or an event that will trigger the agreement to expire
- a plain language explanation of the services available to resolve employment relationship problems, including how and when to lodge a personal grievance
- provision for the employer to, with the employee's consent, deduct union fees from the salary or wages of the employee who is a member of the union on a regular basis[8]

A Collective Agreement is binding on the employer and the union who are party to the agreement as well as the employees who meet the following requirements:

- are employees of the employer stated in the Collective Agreement

- are employees who are members of the union stated in the Collective Agreement
- are employees whose work is covered by the coverage clause in the Collective Agreement

An employer cannot put undue influence on an employee to either join or not join a union.

An employer should give the employee a reasonable time to seek legal advice about the terms of their employment agreement, even if this is a Collective Agreement.

Recruitment

Pre-recruitment considerations

Defining the role

It is important for a community organisation to define each role they have available for employment before the recruitment process is started. This role description should be included in an employment agreement relevant to the position. A clear description of the role will enable job evaluations and performance management to take place, and will make any amendments to the agreement easier. Any descriptions or changes should be approved by a senior person in the community organisation (e.g. management).

Things to think about when defining a role:

- Is the role clearly defined?
    - Is each task defined and explained clearly?
    - Does it include information on how each task will be evaluated?
    - Does it explain how the role fits in the context of the community organisation?
- Has the particular role changed?
    - is there still a requirement for the role?
    - What changes could be made?
- Are there any additional skills an employer expects from an applicant? (i.e. what new skills are required that the previous employee did not have?)
- Does the role still reflect the values and principles of the community organisation?

Budgeting

Allocate a budget for the recruitment of employees. The costs associated with recruitment of employees include:

- the time spent interviewing, training and inducting employees
- time (or money) spent on reference checks and background checks
- set up costs such as computers, software licences and business card printing
- advertisements

Legal requirements

A request for an applicant's criminal history may be undertaken with the applicant's permission. It should be noted that:

- an applicant's criminal record will only include charges that have resulted in a conviction
- an individual who has had a minor conviction and has not reoffended for seven consecutive years does not have to declare this information in most circumstances
- persons convicted of "specified offences", which includes a range of sexual offences, must declare this information even if they have not reoffended for some time
- For information about the Vulnerable Children Act 2014 see the relevant section of the Community Law Manual.

The community organisation must not discriminate against applicants. If your community organisation discriminates against applicants on any of the prohibited grounds of discrimination, you could be subject to a complaint under the Human Rights Act 1993. The grounds of prohibited discrimination are:

- sex
- marital status
- religious belief
- ethical belief
- colour
- race

- ethnic or national origins (including nationality or citizenship)
- disability (including mental, physical and physiological disability)
- age
- political opinion
- employment status
- family status
- sexual orientation

Where an applicant is qualified for work, it is unlawful for an employer or their representative, on the basis of a prohibited ground of discrimination, to:

- refuse or omit the applicant on work that is available
- offer less favourable terms of employment or benefits of employment than those offered to other applicants and/or employees
- terminate the employment of the employee or subject the employee to detriment
- retire the employee, or to require or cause the employee to retire or resign

Recruitment process

The first step in the recruitment process is to advertise the position and request that applicants submit their CV and/or complete an application form. Once the application period has closed, the community organisation can commence shortlisting candidates for the position to be interviewed.

Shortlisting candidates

The most efficient method of dealing with a large number of job applications is to shortlist the candidates that the employee wishes to interview for the position. Shortlisting will save time and increase the likelihood of choosing the most suitable person for the role advertised.

The number of shortlisted candidates can be decided by the selection panel based on the number and quality of applications received. Five candidates will generally provide a good base from which they can select the person for the role. Some considerations when shortlisting can include whether the applicant:

- has the requisite skills and experience required for the role
- has been hired for a similar role before
- has the required qualifications, which is particularly important for any specialist positions (e.g. accountants, lawyers or teachers)

Arranging an interview with shortlisted candidates

Once the shortlisting is completed the shortlisted candidates should receive an invitation to interview.

The Interview

Different interviewing techniques may be appropriate depending on the role the community organisation is advertising. If there are several candidates for the same role, the interview technique should be the same for all candidates to ensure that the candidates' responses and/or conduct can be compared, and so that there is no bias.

Appoint a small interview panel (usually two or three people).

- When selecting a panel, consideration should be given to gender and cultural balance, and conflict checks conducted to reduce any potential bias in the interview.
- A decision will need to be made as to how the panel will work together and what internal policies or procedures need to be consulted to guide recruitment.
- The panel members can agree on roles before the interview, for instance choosing one person to ask the questions and another to take notes.

Interview guidelines

- welcome the candidate and their support people and introduce the panel. Offer tea or coffee or water, etc.
- open the interview in a manner that reflects your organisation's approach to gathering together, then explain the interview process, including how long it will take, and that you are taking notes
- invite them to ask any questions before the interview begins
- explain the objectives of the community organisation and what your organisation provides to the community

- explain the expectations that the community organisation has of the potential employee
- mention a trial period in the employment agreement (if applicable)
- interview questions:
    - **Career experience:** use their CV as a guide. How will their previous jobs help them in the role offered by the community organisation? What have they struggled with in their previous jobs, and how did they cope with those things? What skills they can improve on for the role that they have applied for?
    - **Achievements:** What is the candidate proud of? Do they have the relevant qualifications?
    - **Skills:** Are they a good communicator? Can they work independently and as part of a team? Are they assertive? Are they diligent? Ask the candidate to give examples that demonstrate this. Ask them to identify their own strengths and weaknesses.
    - **Problem solving:** Pose the candidate particular problems that are likely to come up in the role.
    - **Work ethic:** Does their work ethic reflect the community organisation's constitution? Are they likely to contribute positively to the community organisation?
- discuss the benefits of joining the community organisation including any any benefits aside from the wages / salary (e.g. fringe benefits, bonuses, additional holiday, etc.)
- invite the candidate to ask questions that they have about the role and/or the community organisation
- close the interview: explain what will happen next, including when the candidate can expect to hear about the results of the interview, whether there will be a second interview process and whether the candidate is happy for their references to be checked

Reference checks

After the interview, talk to at least two referees, with at least one referee being a current or former employer and another reference being a character reference. Have the candidate's CV on hand when contacting the referee. When contacting the referee:

- introduce yourself and let them know what the purpose of the call is
- briefly describe the role
- ask them relevant questions about the candidate, such as:

    - how long the candidate has / had worked for them
    - what the candidate's strengths and weaknesses are
    - what their working relationship is like
    - what are some areas for the candidate's future development
    - would they consider hiring the candidate again in the future
- ask them if there is anything further to add, or if they have any questions

Offer of employment

If the candidate is successful, they should be notified as soon as possible. Make a written offer of employment and attach the employment agreement. If there is a trial period in the employment agreement the offer of employment should draw attention to this. In the written offer, it is important to let the candidate know that they must read and agree to the terms of the agreement.

The candidate should also be informed that they are welcome to seek independent advice regarding the employment agreement within a reasonable timeframe.

Unsuccessful candidates

Unsuccessful candidates should be informed by the community organisation. Do this when the successful candidate has officially accepted the offer of employment.

Unsuccessful candidates may be informed by phone or email, but also confirmed in writing. The employer should ask the candidate whether they would like to have their information retained for future opportunities or returned to them. This information should be treated with the utmost care and confidentiality. It should only be stored for six months and then destroyed securely.

Record keeping

Keep records of the steps taken and decisions made in relation to the recruitment and selection process. This can create a base for designing future recruitment processes, but it will also help if someone decides to challenge the process that has been used.

Induction process

Use the induction process to make the new employee feel welcome before starting their new role.

Before induction of an employee

Before the employment period begins, there are several administrative steps that an employer must take:

- ensure that there is an adequate work station for the new employee
- set up any email and phone requirements
- organise passwords, access keys, alarm codes, etc
- ensure the community organisation has the resources that the employee requires for their work
- inform the employee of the dress code
- plan the induction process
- prepare an induction pack for the employee with:
    - relevant manuals, troubleshooting procedures, useful contact details and answers to frequently asked questions
    - a timetable of any relevant activities or social events
    - a copy of the community organisation's constitution and code of conduct
- ensure that all the requisite paperwork is completed:
    - the employment agreement is accepted by the employee and both the employee and the employer retain a signed copy
    - all the requisite IRD documents
    - required documentation for salary / wages and KiwiSaver

Guideline for employee induction

A community organisation may decide on a pōwhiri, mihi whakatau or a morning tea as a way of welcoming a new employee. An employer should introduce the new employee to the other staff members as early as possible. If possible the employer can assign a temporary mentor for

the new employee.

A community may decide on a pōwhiri, mihi whakatau or a morning tea as a way of welcoming a new employee.

Estimated timeline for an induction

Settling into a new job can take some time. An induction pack allows the employee to grasp basic procedures independently. Other staff members should be available for more complex issues or questions that the new employee may have. If possible, the employer can assign a mentor for the new employee.

In the first week:

- go through job description, and explain the employee's position and duties
- advise the employee when regular meetings are and where they are held
- show the employee your business or annual plan
- discuss all of the policies or procedures relevant to the employee's position
- discuss any health or safety issues that the employee may face in their role

In the first month, expect to:

- discuss any training needs, and start looking at options for training
- discuss the performance appraisal system with the employee
- discuss health and safety issues in more depth (e.g. explaining evacuation procedures)

Volunteers

Who is a volunteer?

Health and Safety at Work Act 2015, s 16 (definition of "volunteer"); **Human Rights Act 1993, s 2 ("employer")**

The word "volunteer" isn't defined in most legislation, but it's generally used to mean a person who chooses to work for the good of the community or some public benefit, and who isn't paid or otherwise rewarded for this work and doesn't expect to be. The term isn't used to include people doing on-the-job training.

The Health and Safety at Work Act 2015 defines a "volunteer" as someone who is "acting on a voluntary basis (whether or not the person receives out-of-pocket expenses)". The Act then distinguishes between two different categories of volunteers – casual volunteers, and those who work on a regular and ongoing basis (called "volunteer workers"). The Act imposes different duties on employer organisations for each type of volunteer, all of which are discussed in this section.

The protections in the Human Rights Act 1993 against discrimination in employment also cover people doing "unpaid work". (For the Human Rights Act generally, see the chapter "Discrimination".)

Community organisations' obligations to their volunteers

Health and Safety at Work Act 2015, ss 17, 19, 36

Whether your organisation owes its volunteers any duties under the Health and Safety at Work Act depends on the organisation and the type of volunteer:

- **If your organisation doesn't employ any staff,** it's not covered by the Health and Safety at Work Act at all and so has no duties under that Act to its volunteers (the Act calls these non-employer organisations, "volunteer associations"). But it will owe all its volunteers a general duty of care under the common law (law made by the courts).
- **If your organisation employs one or more staff,** then it will owe duties under the Health and Safety at Work Act to its volunteers as well as to those employees, as follows:
- Regular, ongoing volunteers will generally be owed the same duties as employees.
- More casual volunteers will be owed a lesser duty, the same as for visitors, customers and others who don't do any work for the organisation but who are in the workplace or the organisation's premises for a time.

For more details, see the chapter "Employment conditions and protections" of the Community Law Manual.

Note: Community organisations that don't employ any staff and so aren't covered by the health and safety laws should adopt good practices to make sure their volunteers are safe. Volunteers working independently outside any organisational structure should also use those practices for themselves.

Some of the other Acts that protect employees also provide protections to volunteers,

including:

- the Criminal Records (Clean Slate) Act 2004 (see the chapter "The criminal courts")
- the Human Rights Act 1993 (see the chapter "Discrimination")
- the Privacy Act 1993 (see the chapter "Privacy and information").

Responsibility for volunteers' actions

Health and Safety in Employment Act 1992, s 2 "volunteer"; Human Rights Act 1993, s 2 "employer"

An organisation will be liable (legally responsible) for the negligence or other torts (civil wrongs) of a volunteer who is acting in the course of his or her activities on the organisation's behalf.

It's not relevant that the volunteer isn't an employee and isn't being paid. The key issue is whether the person was acting on the organisation's behalf at the relevant time. For example, the organisation may be liable for the negligent conduct of a volunteer driver while the driver is doing deliveries for it. However, the organisation won't be liable for the volunteer's conduct when he or she is driving home at the end of the day.

An organisation should use all reasonable care when taking on volunteers for specialist or expert roles, otherwise it may find itself liable for loss or damage caused by a volunteer. For example:

- Although social workers aren't required to be registered under the Social Workers Registration Act 2003, it's good practice to ensure that volunteers in this role are in fact registered because this gives an assurance of their competence.
- Under the Health Practitioners Competence Assurance Act 2003, health practitioners must act within their scope of practice, which is defined by the relevant authority for the particular profession. Certain practices and health services may be performed only by registered health practitioners (some health practitioners will also be required to hold a practising certificate). You should therefore ensure that any health-related service your organisation provides is performed by an appropriate person.
- Council permits are required for particular activities, such as working on roofs or fundraising in the street.

Reimbursing volunteers for their expenses

Organisations often refund expenses incurred by their volunteers while carrying out their volunteer duties. For instance, a volunteer may be reimbursed for the actual cost of buying a bus ticket for work-related travel, or be paid $5 for each working day for the estimated cost of buying lunch.

As a general rule, it's always best to refund actual and reasonable expenses for which the volunteer has receipts, rather than giving an allowance. Organisations should reasonably estimate the cost of mileage when refunding expenses to their volunteers who use their own vehicle for travel. As a guide, organisations can use the rates published by a reputable independent New Zealand source representing a reasonable estimate, such as the Automobile Association's mileage rates. Organisations can also use the rates published by the Inland Revenue, available here.

Whether your organisation refunds volunteer expenses, and how it does this, is relevant to a number of significant legal provisions – for example:

- **Tax laws** – Reimbursement payments are treated as tax-exempt income (the volunteer will not need to pay income tax), provided the payment is based either on actual expenditure or on a reasonable estimate of the likely cost. Further, some organisations make "honorarium" payments to their volunteers: these are payments paid for volunteer services where no fixed payment (such as wages) would normally be made. Honorariums aren't tax-exempt and are treated as taxable income.
- **Immigration** – If a visitor to New Zealand receives a "gain or reward", they must hold a work visa. If expenses reimbursed to a volunteer are not "actual and reasonable", they may be considered to be a "gain or reward".
- **Driver licensing** – You must hold a passenger service licence and have a "P" (passenger) endorsement on your driver licence if you carry passengers in your own car, are reimbursed for your expenses, and are not doing this for an area health board, local council or incorporated charitable organisation (see the NZ Transport Agency's Factsheet 18, "Volunteer Drivers and Exempt Passenger Services", available from: www.nzta.govt.nz)
- **Benefits** – If your volunteer is on a benefit, Work and Income may decide that reimbursement of expenses that aren't "actual and reasonable" in fact amounts to income. If the volunteer's income is more than a certain amount, the level of their benefit could be affected (see "Benefit rates and how earnings affect them" in the chapter "Dealing with Work and Income") of the Community Law Manual.

A volunteer is legally defined as a person who does not receive any reward for the work they have agreed to do. They are not employees under the Employment Relations Act 2000. Reimbursements made to volunteers for expenses do not fall within the legal definition of 'reward'. A person who receives training and works for the purposes of gaining experience is not a volunteer under the Health and Safety at Work Act 2015.

Contractors

Contractors are different from employees. Contractors do not have the same rights as employees and must resolve their disputes with your community venue through the Disputes Tribunal, or another avenue that has been agreed between you (e.g. independent mediation).

Whether someone will be considered an employee or contractor depends on the "real nature of the relationship", rather than what the contract or agreement says. Some factors that the courts will consider in determining whether a person is an employee or contractor are:

- what the intention of the parties was
- who controls how and when the job is done
- whether the person is paid in instalments or at the end of the job
- whether the person can employ someone else to undertake work for them
- who pays the tax, ACC levies and/or insurance relating to the person
- whether the person can make a profit or loss directly
- who supplies the equipment and materials for the work
- if the person is free to accept similar work from other sources at the same time

If you wish to have a contractor relationship with a person who will do work for your community venue rather than an employee relationship, you should seek further legal advice about how to do this.

Youth Workers

Who is a youth employee?

New Zealand does not have general minimum age requirement for employees who are employed as youth employees. However, there are some differences in management of youth

workers. The Ministry of Youth Development (Te Manatū Whakahiato Taiohi) promotes the interests of young people aged between 12 and 24 years inclusive. The Ministry promotes the government's Youth Development Strategy Aotearoa.

Younger employees are often employed to be youth workers because they identify with and can be more easily accepted by the young people they work with.

What is youth work?

Some community venues in the city employ youth workers and run projects and programmes for young people in their communities. Youth work is about working with young people and supporting their positive development. It is centred around helping young people connect with and contribute to their whānau and communities and to feel comfortable with their own identity.

Employing a youth employee

Recruitment

Youth employees should be treated with the same courtesy and protocol afforded to regular employees.

Some considerations when employing a youth employee may include:

- How well will the youth employee fit with the rest of the team?
- Are there many youth employees already within the community venue?
- Are there roles which suit youth employees?

When employing youth employees, the Human Rights Act 1993 protects employees from unlawful discrimination in a number of areas of life, including when applying for jobs.

Employment agreements

Youth employees employed by the community venues should have a written employment agreement.

- employers have a statutory duty to deal with their employees in good faith
- youth employees have a right to join a union

- they have legal entitlements to sick leave and annual leave

Wages

As of 1 April 2019, the adult minimum wage is $17.70 per hour, which for a 40-hour week is $708.

A lower minimum wage of $14.16 an hour (or $566.40 for 40 hours) applies to “starting-out workers” and trainees.

Starting-out workers are those who are:

- 16 or 17 and in their first six months of work with you, or
- 18 or 19, have been on the benefit for six or more months, and since starting the benefit, are in their first six months of work with any employer, or
- 16, 17, 18 or 19 and doing at least 40 credits a year of industry training as part of their employment agreement with you.

That lower rate of $14.16 ($566.40) also applies to trainee workers – that is, someone who is 20 or older and doing at least 60 credits a year of industry training as part of their employment agreement with you.

The minimum wage rates are usually adjusted in April each year.

Workers under 16: Their hours and wages

If your community venue employs someone under 16, the young person’s hours of work will be limited. First, school-aged children (under 16) can’t work during school hours. They also can’t work on school nights – that is, between 10 pm and 6 am (they can work during those hours if there’s a government-approved code of practice allowing it, but as of January 2018 there’s no such code of practice).

There are no minimum wage rates for workers under 16. However, your organisation could use the starting out minimum wage as a guideline.

Types of work available for young employees

Every employee’s work environment must be safe. However, there are some additional restrictions that apply to workers under 15. There are certain types of work and activities they

can't do, including:

- construction work
- heavy lifting
- working with machinery (or helping others who are working with machinery)
- working with or near hazardous substances (things that are flammable, corrosive or toxic for example)
- any other kind of work that's likely to cause them harm.

A person under 15 also can't be present as a bystander in any areas where those kinds of work are being done, unless an adult is directly and actively supervising them. They can, however, work in the office or retail area of an organisation or business that does those kinds of work.

People under 18 can't work in pubs, bars and bottle stores (called "restricted areas" in the Sale of Alcohol Act 2012). However, that ban doesn't apply if the young person is preparing or serving meals, doing cleaning or maintenance, or checking or removing cash.

Youth workers' Code of Ethics

A Code of Ethics sets out the commitments youth workers make in order to ensure safe and ethical youth work practice. A copy of the Code of Ethics for Youth Work in Aotearoa is available here.

The Code of Ethics includes many clauses, some of which relate to the training and supervision of youth workers, including:

- Youth Workers should make it a high priority to participate in formal and informal training and professional development
- Youth Workers will participate in regular and on-going external supervision for the purposes of professional development, personal support, and familiarisation with all organisational and practice issues

Police checks on workers under 16

There is no legal requirement for employers to conduct police checks on employees under 16 years of age. The exception is if they are working with vulnerable people.

Management of youth employees

Boards have a responsibility to ensure that youth employees have the time and capacity to attend training, networking and supervision meetings, to enable them to meet their necessary commitments. This means that when a youth employee is employed, budget considerations should include not only the wages and project costs of a youth employee, but also training and supervision costs. Sufficient additional hours should be incorporated into a youth employees' paid weekly work hours to allow them to attend these extra activities.

Communication, accountability and support

For most youth employees the relationship between themselves and young people is a voluntary one. Youth work involves working with young people where and when they are available. This may mean working evening and weekend hours at a venue other than a community venue. Youth workers may not be seen very often at the community venue, and this may increase feelings of isolation in their job. To provide support, a process should be established whereby the youth employee has a space to regular meet with the venue coordinator and other appropriate support, such as a designated member of the management committee. This time can be used to discuss projects, timelines, issues, concerns and successes.

Termination of employment

There are several methods for terminating an employment agreement. Aside from being dismissed by an employer, an employee can choose to terminate their employment agreement by resigning, or a position may be made redundant.

Resignation

A resignation occurs when an employee voluntarily terminates their employment agreement. The reasons for resignation can be varied. An employer should be open to the reasons given by the employee for their resignation. If the reasons given by the employee are serious, such as workplace bullying, an overly stressful environment or harassment, then an employer must take steps to resolve the problem.

Resignation procedure

The legislation does not set out a procedure that employers and employees must follow if an employee resigns. The first place to check to determine what procedure should be followed is

the employee's employment agreement. An employment agreement should set out:

- That the employee can terminate the agreement by resigning
- How the employee may resign, which could be:
    - verbally
    - verbally and in writing (this is the recommended option)
    - in writing only
- If there is a notice period for resignation, and if so, what the notice period is (some employers do not have a notice period, in which case, the employee must give "reasonable notice" to the employer of their resignation. Employers can use their discretion when deciding what notice period is "reasonable". This depends on a few factors, including:
    - the employment agreement
    - type of work
    - seniority of the role
    - salary level
    - what sort of notice periods are common in the industry
- What would happen if the employee gives less notice than the specified notice period or gives no notice. This could include deduction of wages owed.

An employee may have to work the full notice period before resigning. Alternatively, if the employee agrees in writing, or the employment agreement allows it, the employer may pay out some or all of the notice period in lieu of the employee working for that period. If an employee resigns and gives the required notice, the employer must pay the employee in full. The employee's final pay must include any holiday pay owing to that employee.

If the employee's employment agreement states that the employer can deduct wages if the notice period is not complied with, then the employer should check whether or not the employee has withdrawn consent for this before deducting wages. An employee can withdraw consent to deductions from wages at any time by giving written notice to the employer, even if they have signed an employment agreement giving consent. The Employee's signature will satisfy the written consent requirement of section 5 of the Wages Protection Act 1983. In such a case, the employer may still be legally entitled to a payment from the employee, but cannot deduct it from the employee's wages.

Constructive dismissal

A constructive dismissal occurs when an employer directly or indirectly pressures an employee to resign.

Examples of a constructive dismissal include where an employee resigns because:

- the employee is told to resign or else they will be dismissed
- the employer has made working conditions for the employee intolerable
- the employer has embarked on a course of conduct deliberately aimed at making the employee resign (e.g., bullying the employee)
- there has been a breach of the employment agreement by the employer, or the employer has breached the duty of fair and reasonable treatment, such that the employee feels that they cannot remain in the job

If an employee has been subjected to a constructive dismissal, the employee may have an actionable personal grievance (discussed below).

Redundancy

Redundancy happens when a position within an organisation either becomes non-essential or its nature changes so much that the position is no longer relevant. When that happens, the organisation may remove the position altogether. This often occurs during restructures or mergers.

Redundancy versus dismissal

A redundancy is different from a dismissal. An employer must have a genuine work-related reason for a dismissal. A redundancy must be about the employee's position, not the employee personally.

An employer cannot use redundancy to get rid of an employee if the employer has other motives for wanting to end the employee's employment. That means:

- if a position has been removed and an employee made redundant, the employer cannot re-advertise the same position or a position that is substantially the same
- poor performance cannot form any part for the decision to remove a position and make an employee redundant

- an employer may not make someone redundant for being pregnant or for applying for parental leave
- if an employee suspects that they has been made redundant unfairly, the employee may raise a personal grievance (discussed below)

An employee cannot raise a successful personal grievance in relation to a redundancy if the redundancy is genuine, reasonable and the process used is fair.

A fair process for redundancy

The employer needs to ensure the reasons behind the redundancy are reasonable and based on correct information. An employment agreement should include a robust redundancy clause that makes it clear to both the employer and employee what will happen if the employer wishes to make, or is considering making, the employee redundant. If an employer intends to make an employee redundant, the employer must follow any redundancy process set out in the employee's employment agreement. A redundancy process should include the following considerations:

- The employer should consider other options before making an employee redundant. Other options include:
    - redeployment of the employee to another role
    - having the employee working reduced hours
    - changing the employment agreement to reflect a new role if the previous role is abandoned.
- If the employer is still considering making an employee redundant after considering other options, then the employer must tell the employee.
- The employer must provide information to the employee about the process relating to their redundancy, including the period of time they can expect to remain employed by the employer.
- The employee should be given the opportunity to express their views and concerns about the redundancy
    - Often the employee is best placed to offer input about their role, and should use this opportunity to advocate for retaining the role
    - An employee should be open to participating constructively in the consultation process. If the employee is able to come up with some alternative solutions to a

redundancy, those solutions should be communicated to the employer.

- An employer is not bound to take the advice of the employee. The employer is however required to offer the employee the opportunity to provide input and consider the options given by the employee.
- If, after speaking with the employee, the employer still wishes to make the employee redundant, the employer should give notice of the redundancy to the employee in writing. The notice should also be given to the bargaining officer or the union if the employer is terminating a collective agreement.
- When assessing the fairness of a redundancy process, a court is likely to consider:
    - whether notice was given in writing
    - whether the employer consulted with the employee prior to making its decision
    - the quality of the information given to the employee about the redundancy
    - the employer's level of resources (e.g. if the employer is a small organisation with few resources, the court will take this into account when evaluating the fairness of its process).
- An employer may offer the redundant employee an exit package, which may include:
    - help with drafting the redundant employee's CV
    - counselling services
    - career guidance
    - a letter of recommendation or a reference
    - severance pay (if the employee is eligible).
- An employer is not legally required to give compensation to an employee it has made redundant unless there is a compensation clause in the employment agreement. However, an employer may decide to give compensation to the employee it is making redundant before or after the employment relationship has been terminated. If an employer has, or is planning to have, a compensation clause in its employees' employment agreements, it should ensure that it has sufficient funds to pay any amounts owed.

Technical redundancies

A technical redundancy occurs when a position is made redundant as a result of the sale of the

business, or when the business merges with another business. If employees are offered similar positions on similar terms as their previous roles by the purchaser of the business (or a new entity created out of a merger), then those employees are not entitled to compensation.

Vulnerable workers

A different redundancy process must be followed in respect of vulnerable workers. Vulnerable workers have rights beyond what regular employees have with regards to redundancy.

Vulnerable workers include persons who carry out:

- cleaning services and food catering services in any place of work
- laundry services for the education, health or age-related residential care sector
- orderly services for the health or age-related residential care sector
- caretaking services for the education sector

Vulnerable workers have the right to access resources and have the time to make an informed decision about their future prospects, and:

- if there is a sale of the business or a merger of the business with another business, transfer to the purchasing business or the merged entity on the same terms and conditions
- choose to stay with their current employer
- take on a role with a third party (in which case the employee will be made redundant by the current employer

Retirement

Retirement occurs when an employee voluntarily terminates their employment agreement, and either does not seek another job, or moves on to another profession. If an employee wishes to retire, they must resign from their role in accordance with the usual resignation process.

An employer cannot generally force an employer to retire because of their age. There are, however, exceptions to this general rule, including where:

- the employee has a written employment agreement with the employer that was in force on 1 April 1992 and remains in force

- that agreement specifies a retirement age, which has been confirmed by the employer and the employee in writing on or after 1 April 1992

Underperforming employee

If your community venue is concerned about an underperforming employee, the centre should check the community venue's code of conduct or the employee's employment agreement to see if there is a procedure for dealing with underperforming employees. If your community venue does not have one, consider creating one. As always when dealing with an employee, an employer must engage with the employee in good faith throughout the entire process.

The process set out below is a formal one that covers all the procedural requirements of the law. This process is necessary if the result of the process could potentially be disadvantageous to the employee's employment (e.g. a verbal/written warning, some form of privilege taken away, job description changes) or result in a dismissal. If the issue is minor and will not result in a disadvantage to the employee's employment, a more informal process is likely to be adequate to address the issue.

Poor performance

Poor performance occurs when an employee fails to meet the standards required of a person in their job. It is different from misconduct (which involves some form of wrongdoing) or incapacity (where an employee is unable to do their job for a reason such as illness).

If an employee is failing to perform their job to the level required, the employer should go through a performance management process before undertaking a formal disciplinary procedure described below.

Identify the gap

First, the employer should identify the gap in the employee's performance. What is the employee not doing that they should be doing as part of the job? Make sure that the gap is determined and measured objectively, which can be done by referring to the duties or job description in the employee's employment agreement. Other places to consider when determining whether the standard is an objective one are the code of conduct or procedural documents in your workplace. Once identified, the employer should discuss the gap with the employee.

Develop a performance management plan

Once the employer has started the discussion with the employee, the employer should develop a performance management plan with the employee. The employer should work out what standards it wants the employee to achieve. The employer must ensure the standards are practical, reasonable and are objectively measurable, allocate a reasonable time frame for improvement by the employee, and consider whether additional training or other support is necessary to meet those standards.

If further training or support is necessary, the type of training or support will depend on the employer's resources and the nature of performance that needs improving. If it has limited resources, having another employee provide training might be adequate. The employer might also need to provide additional support for the employee, such as ensuring that the employee has adequate resources and support from other employees and/or volunteers.

A performance management plan should also require regular check-ins with the employee. The employer should set up a regular meeting to discuss how the employee is improving or, if they are struggling to achieve the targets, why that might be and if further support should be provided.

When the time that the employee was given to improve has passed, the employer should again evaluate the employee against the standard it set in the performance management plan. If the employee has:

- improved, then this should be the end of the process
- improved a little but not fully, the employer should evaluate whether further action is required or if more time would be appropriate
- not improved their performance to an adequate degree, the employer should begin a formal disciplinary procedure (as discussed below)

Formal disciplinary procedure

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

"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 serious misconduct (i.e. gross negligence or recklessness).

“Serious misconduct” involves serious wrongdoing. Where, after a fair process (e.g. the performance management 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).

Before the meeting

Before advising the employee that they are being formally disciplined, the employer must know what the issue is. This must be defined and tangible, and the employer must think about the issue objectively.

An employer can discipline employees only for work related issues. An employer cannot discipline an employee because of issues that are only personal. The employer must be open to considering any explanations the employee might provide. If the person responsible for the employee, such as a manager, feels they are too close to the issue, or if there is a conflict of interest, the employer should arrange for someone else to carry out the procedure (e.g. an employment subcommittee or representative of the management committee).

If there is alleged serious misconduct and there is a safety risk in keeping an employee at work, the employer might be able to stand the employee down. The employer should check the employee’s employment agreement to see if there are any requirements as to how to stand down the employee. Standing an employee down can be considered a disadvantage to employment, so an employee should only do this when it is within the range of options a fair and reasonable employer could undertake. Generally a stand down will need to be on full pay.

Before meeting with the employee, the employer must give the employee an explanation of the issue or behaviour in question and the nature of the meeting. This will give the employee a chance to provide an explanation and to seek advice if it is appropriate. 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 pre-warned about.

The employee must have enough time before the meeting to consider the information provided and to prepare their response and be told that the response can be made orally or in writing, or

in both ways. The employee must also be told who is coming to the meeting, and of their right to bring a support person or representative with them. A good way of communicating the arrangements for a meeting is by sending a letter or email.

When an employer raises the issue with the employee, the issues outlined should be the only issues that are discussed. An employer should not raise past issues unless they are relevant. If an issue from the past has already been dealt with, an employer cannot raise it again.

During the meeting

During the meeting, the employer should explain the issue tactfully and respectfully. It will be helpful for both the employer and employee to keep a record of all discussions, agreements and meetings held.

The employee should be given a reasonable time to explain their situation. If an explanation is satisfactory, the employer should note this on the employee's file and consider the issue dealt with. The employer cannot then raise the issue again. An explanation may, however, require further investigation by the employer. If this is the case, the meeting should be adjourned and further investigation carried out. Another meeting may then be required to put the results of the investigation to the employee.

If the explanation provided by the employee is unsatisfactory, the employer should explain why this is the case and the possible consequences. The employer should then end the meeting, so that it can fully consider the employee's explanation and whether disciplinary action is appropriate.

Consideration and disciplinary choices

The employer should ensure that any consequences are proportionate to the issue. The employer should also consider whether there are any mitigating factors (such as the employee being a long-serving employee with a clean record).

If the employee's behaviour has changed positively, this should be taken into account by the employer. The employer could decide that the issue has been resolved or that a lesser consequence would be appropriate.

Some disciplinary options that are available include:

- verbal warning

- written warning
- final written warning
- dismissal
- change of role or responsibilities
- change of location (good for separating employees that are in conflict with each other)
- requiring additional training or education

When deciding what disciplinary action is appropriate, the employer should check the employment agreement. Some employment agreements will set out a hierarchy of disciplinary actions e.g. a verbal warning may need to be given before a written warning. In that case, the employer must follow the hierarchy. The employer must also comply with any other requirements relating set out in the employment agreement. If there is nothing in the agreement, the employer can decide itself what disciplinary action to take, so long as that action is reasonable and that the employer acts in good faith.

Communicating the outcome to the employee

Once the employer has made a decision, the employer should arrange a meeting with the employee. The employee should be given the opportunity to bring a representative or a support person. The disciplinary meeting template letter referred to above can be adjusted to include this information.

In the meeting the employer should outline its decision and the disciplinary action it believes is appropriate. The employee should then be given a chance to respond to this. The employer should consider this response; it is a good idea to adjourn the meeting to ensure there is adequate time to do this. The employer's final decision must then be communicated to the employee and appropriate follow up action taken e.g. write and record any warning given, or make arrangements for dismissal and give notice (if required).

An employer must not write a warning or dismissal letter before the meeting. Doing so can indicate that the employer had a closed mind and did not genuinely consider the employee's response.

Vicarious liability

Community venues should also be aware of the principle of 'vicarious liability' commonly found

in employment issues. When an employee or a volunteer in the course of doing work 'integral to the business' commits an offence, the employer is held accountable.This is called 'vicarious liability'. To minimise liability, a community venues should identify common risk factors, formulate risk management plans and implement regulation policies (e.g. a Code of Conduct).

Employee grievances and dispute resolution

Grievances arise when an employee considers the employer has done something that is unfair to the employee, which could include an action that unjustifiably negatively affects employment conditions, discrimination, harassment, or the employer having undue influence relating to unionism. Disputes are disagreements about the interpretation, application or operation of an employment agreement.

It is important that an employer has sound policies for dealing with issues arising in employment relationships. A dispute or grievance could arise for a number of reasons and with varying degrees of seriousness. A dispute resolution clause that sets out how disputes and grievances will be dealt with must be included in all employment agreements, including both individual and collective agreements.

How to identify problems

An issue may come to your attention through an employee making a complaint, either verbally or in writing. Alternatively, a situation may be so serious that you are able to identify an issue without a complaint being made (e.g. if you witness the bullying or harassment of an employee).

You should try and address any issues as early as possible, whether it has resulted from a complaint or has been identified more informally. This may involve asking the employee to provide you with more information so you can properly consider and address the issue.

Dealing with a dispute about the employment agreement

If an employee comes to you with a dispute or you realise there is an issue with the employment agreement, think through the key facts about the problem, and gather any relevant information. Some questions you could consider include:[7]

- What are the relevant parts of the employment agreement?
- How does the dispute relate to the employment agreement?

    - Are there any obvious breaches?
    - Are there any mistakes?
- Do I need to seek further legal advice on this issue?
- How does the dispute affect the employee?
- Does the dispute affect any other employees?
- Has there been any discussion about the dispute with other employees?
- What mitigating actions have been taken to resolve the dispute?
- How effective have they been?

Common areas of dispute

Some common employment disputes are:

- disputes about the interpretation, application or operation of the employment agreement
- disputes relating to alleged breaches of the employment agreement
- whether a person can be considered an employee
- unfair bargaining of the employment agreement
- disputes relating to redundancy agreements
- recovery of wages

Dispute resolution methods

It is in the best interests of both the employer and the employee to resolve any dispute quickly. An employer or employee may rely on several methods to resolve a dispute, as discussed below.

Raising the issue early through an initial meeting

In cases of small disputes the first step can be a meeting between the two parties. The goal is to develop a common sense solution that both can agree on. One party can raise the issue and the other party can then respond. There does not need to be an independent third party present in the meeting. Once matters are discussed, the two parties can agree on a plan to resolve the issue. As a matter of good practice, the matters discussed at the meeting should be

recorded in writing, agreed by both parties, and filed.

If the situation gets worse, the parties may consider mediation.

Contact the Labour Inspectorate

The Labour Inspectorate ensures that minimum conditions of employment laws are applied correctly (e.g. minimum wage is paid, holiday pay is paid). If the dispute relates to a minimum condition of employment then the employee may complain to the Labour Inspectorate, who will then investigate the complaint.

If the Labour Inspectorate finds that there might be breaches of the law, the inspector might do any of the following:

- Provide educational information to both parties, which may include any information the parties may need to become compliant with the law. This information can be useful in situations in which a breach may have been inadvertent. The information can also accompany any notice given to the parties (such as those set out below).
- Issue an enforceable undertaking, which is a voluntary commitment given by the parties recorded in writing. An enforceable undertaking may be withdrawn with the agreement of the labour inspector.
- Issue an improvement notice (which requires a party to take steps to improve the issue).
- Issue a demand notice (which requires compliance by a party).

Other forms of dispute resolution

You can resolve disputes using the mediation service provided by the Ministry of Business, Innovation and Employment, or if that doesn't work then Employment Relations Authority and Employment Court processes set out in "How an employee raises a personal grievance", below.

Personal grievances

A personal grievance is a complaint made by an employee about their employer.Personal grievance claims can be made by all employees.

Grounds for a personal grievance

To raise a personal grievance, all an employee needs to do is make the employer or a

representative of the employer aware of the facts that give rise to the grievance, with enough information that the employer can act on the issue if they want to. A grievance can be raised by a letter, an email or verbally.

The grounds for a personal grievance are discrimination, sexual harassment, racial harassment, unjustified dismissal, unjustified disadvantage, duress related to unionism and issues related to vulnerable workers and redundancy. The most common of these grounds are discussed below.

Discrimination

An employer has a duty to treat all employees fairly and equally. Discrimination occurs when an employee is treated unfairly and to their detriment, in comparison to the other employees, under one or more of the prohibited grounds of discrimination.[8] The prohibited grounds of discrimination are listed in the recruitment section of this chapter.

The employer will be acting unlawfully if one of the following has occurred in the workplace because of one of the prohibited grounds of discrimination:

- the employer offers the employee less favourable terms of employment, conditions of work, fringe benefits or opportunities for training, promotion and transfer than are made available for other employees of the same or substantially similar qualifications, experience or skills employed in similar circumstances
- the employee has been subjected to some form of detriment or dismissal in circumstances where another employee in a similar situation would not have been subjected to such detriment or dismissal
- the employee has been forced to retire or required to resign

Sexual harassment

Sexual harassment may be any of the following:

- An employer or representative of the employer (e.g. a manager or senior management team member) makes a request, either directly or indirectly, of an employee for sexual contact or other form of sexual activity. This request may be accompanied by:
    - an implied or overt promise or threat of preferential or detrimental treatment
    - an implied or overt threat about the employee's future employment status (e.g. threatening to dismiss)

- An employer or the employer's representative uses language (written or spoken), visual material or physical behaviour of a sexual nature that is unwelcome and/or offensive, and is either repeated, or is so significant that it has a detrimental effect on the employee's employment, job performance or job satisfaction.

The sexual harassment does not have to come from an employer or its representative. It may come from a co-worker, client or customer. The employer will be liable for such harassment only if it fails to take reasonable and practicable steps to prevent the harassment from occurring. This means that if an employer is informed of the sexual harassment of an employee by co-workers, clients or customers, the employer should take immediate action to protect the employee from such harassment and prevent it from happening in the future.

Racial harassment

Racial harassment occurs when an employer or its representative uses language, visual material or physical behaviour that directly or indirectly:

- expresses hostility against, brings into contempt or ridicules the employee on the basis of race, colour, ethnicity or national origins
- is hurtful or offensive to the employee
- has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance and/or job satisfaction

As with sexual harassment, the harassment does not have come from the employer. An employer may be held liable if they fail to take reasonable steps to stop racial harassment against an employee.

Racial harassment can include, but is not limited to, the following:

- derogatory comments made against the employee on the race, colour, ethnicity or national origins
- the existence in the workplace of written or visual items that are racially offensive and/or hurtful
- racial jokes that are made at the employee's expense, or otherwise
- judging an employee or making decisions relating to the employee based on racial stereotypes

- sharing racist emails.

Unjustified dismissal

A dismissal can be unjustified if:

- The reason for an employee's dismissal is not justifiable:
  - an employer must have sufficient evidence to establish that there are good grounds to dismiss an employee
  - the reason for dismissal must be one that a reasonable employer would consider to be a justifiable reason for dismissal (e.g. misconduct, incapacity, bringing employer into disrepute, poor performance)
  - prohibited grounds of discrimination as a basis for dismissal is unjustified
  - a redundancy is not genuine (job still exists)
  - there is a breach of an employer's duty through a constructive dismissal
- The procedure used for dismissal is procedurally unfair:
  - any issue that results in dismissal must be properly investigated
  - if an employer is unhappy with the employee's performance, it must tell the employee
  - the employee must be given an opportunity to respond to the employer's concerns
  - the employer must have an open mind when considering the matter and act in good faith
  - before an employer resorts to dismissal, it should consider other options:
    - meeting with the employee
    - additional supervision of the employee
    - giving a formal warning
    - suspension

Employers are bound to follow the 'fair and reasonable' test when dealing with a potential dismissal.[10] That is, an employee should be dismissed only if dismissal is an action that a fair and reasonable employer could take, considering the circumstances of the individual employee.

Unjustified disadvantage

An unjustified disadvantage could encompass many things, and occurs when:

- an employee's employment or the conditions of employment have been affected
- the effect is disadvantageous to the employee
- the disadvantage was caused by the employer

Bullying

Bullying is a form of unjustified disadvantage and can be a breach of health and safety legislation. Broadly, bullying is characterised by actions that are repeatedly carried out with the desire to gain power or exert dominance, or with the intention to cause fear and distress. A harsh management style alone will not constitute bullying.

Bullying can immediately create grounds for a personal grievance if the employer, or a representative of the employer, is the one subjecting an employee to bullying. If a co-worker is bullying an employee, the employee should inform the employer or employer's representative of this. If the employer or its representative does nothing or acts inadequately, this may give rise to grounds for a personal grievance.

If an employee informs you that they are being bullied, you should take this seriously and investigate the issue. If an employee is undertaking bullying behaviour, then this can be grounds for misconduct.

How an employee raises a personal grievance

An employee with a grievance needs to take reasonable steps to raise a grievance with his or her employer. This can be done verbally or in writing. It is recommended that an employee does both, but they do not need to for it to be legally binding on the employer.

The grievance must be raised no later than 90 days from when the grievance occurred or when the employee became aware of the grievance, whichever is later. A personal grievance can be raised outside this time limit if the employer agrees to this,, if you wish to respond to a personal grievance raised outside the 90 day time limit – seek legal advice before doing so.

When raising a grievance, the employee should cover the following matters:

- Who the employer is
- Details of the issue leading to the grievance. The employee should set out the relevant events chronologically (or make their best attempt to do so). Specify the following details:
    - what happened?
    - when did it happen?
    - who did it involve?
    - how did it become an issue?
    - why does this warrant a personal grievance claim?
- Whether the issue been raised before with the employer. If possible, the employee should provide dates, times and places. The more detail an employee can add, the more credible the grievance
- Whether there are documents that support the employee's claim, such as:
    - written evidence of sexual or racial harassment
    - the employment agreement
    - documents resulting from meetings relevant to the issue
    - file notes of telephone calls relevant to the issue
    - documents that outline the reasons for the employer taking disciplinary action (if any)
- Any other information that could support the employee's claim
- The remedy the employee is seeking, which might be:
    - reinstatement
    - interim reinstatement
    - compensation
    - acknowledgement that the employer contributed to the issue
    - an apology
    - a change in working conditions/workplace policy and/or procedures

Dispute resolution process for personal grievance

If an employee raises a personal grievance, the employer can choose to try to resolve the issue

informally or go through mediation.

Informal resolution

As an employer, if you are made aware of a personal grievance, it is a good idea to adopt a common sense approach. It is important to have a clear idea of the issues and what the facts are, which should involve some investigation. You should also ensure both you and the employee have time to think through the issues and get legal advice or other support if need be.

You should ensure you are following any process set out in the dispute resolution clause of the employment agreement.

If you are discussing the issue with the employee, it can be a good idea to have a third party present as a witness and to help prevent misunderstanding. You should advise the employee that they are entitled to bring a support person, union delegate or other representative. Both the employee and employer should take notes in any meetings and have a copy of any agreement reached.

Mediation

Employment relationship problems may also be resolved through mediation. Mediation is a flexible procedure that can result in a binding settlement. An employer or employee may initiate mediation with the other party and get mediation for free through the Ministry of Business, Innovation & Employment (MBIE), provided that the issue is related to an employment relationship. Mediation is a voluntary process, and both parties must agree to attend mediation. (In some circumstances, the Employment Relationship Authority may require the parties to attend mediation. This is discussed below).

Mediation allows both the employer and employee to discuss their issues fully and without fear of ramification, as the process is completely confidential. For mediation to work efficiently, both parties should participate in good faith, with an open mind and a desire to resolve the matter.

Parties may be legally represented, but this is not a requirement. They may also take support people to the mediation.

The employer and employee can also choose to use a private employment mediator or arbitrator. However any agreement that is reached may not be enforceable in the Employment Relations Authority or Employment Court unless it is later signed off by a mediator from MBIE.

Role of the mediator

The mediator's primary role is to facilitate and encourage discussion. The mediator is impartial and does not impose a binding decision on the parties unless the parties give the mediator the authority to do so. Mediators appointed by MBIE are experts in dealing with employment relations disputes. They also have the full authority to sign settlements that are legally binding under the Employment Relations Act 2000.

A mediator will pay careful attention to the discussion between the parties. They may identify issues that are not apparent to the parties and manage risks as they appear during the process.

Some strategies a mediator may use are set out below.

Before the mediation, the mediator may:

- Summarise their role in the mediation process, which could include information about how the mediation process will be managed.
- Begin the session by outlining common grounds that the parties have.

During the mediation the mediator may:

- Ensure that the discussions between the parties are civil and respectful. A good mediator should have some strategies to manage heated or irrelevant discussions.
- Encourage the parties to seek settlement. However, a mediator should not pressure parties to settle. Instead the mediator could direct the parties to:
    - examine their investment in the employment relationship
    - consider the nature of the problem
    - weigh this against the circumstances of the parties
    - examine the behaviour of both parties
    - think about the relevant law and how it affects the current situation
    - consider the other party's situation and views
    - reality test each party's options if settlement is not reached.

Outline of a mediation process

The following is a general outline of the mediation process that is followed in respect of

employment relationship.

1. **Parties agree to mediation:** Because it is a voluntary process, one party cannot compel the other to go for mediation. However if one party files in the Employment Relations Authority ("ERA"), the ERA can compel both parties to attend a mediation. If a party refuses to attend a voluntary mediation, this may reflect poorly on that party.
2. **Speak to an information officer:** A party can talk with the MBIE contact centre (0800 20 90 20). An information officer will discuss with the party whether or not mediation is the best process for the parties. The officer will then refer the parties' contact details to an area office.
3. **Mediator contacts both parties to discuss the issue:** A mediator from the area office will decide whether the issue should be mediated or if alternative actions are more appropriate.

1. The parties should tell the mediator if they will need additional assistance in the mediation process (e.g. interpreter, legal representation, senior staff member).
2. Either party may be required to send the mediator a written agreement that states it is willing to undertake mediation.
3. If the parties would like the mediator to make a binding decision on their behalf, they must give the mediator written consent to do so. Each party must be aware that it cannot appeal the mediator's decision if it is unhappy with it.
4. **If mediation is to go ahead**, the mediator will confirm in writing a time and place for the mediation. All parties involved will receive this information from the mediator.
    a. While a written submission from either party is not required for mediation, it can be helpful if you prepare a submission that sets out your key arguments. That way if you get confused or flustered you can refer to your submission in the mediation.
5. **During the mediation session:** the parties will have an equal opportunity to express their concerns. For the mediation process to be successful, the parties should mediate in good faith and with an open mind.
6. **The outcome of mediation:** This is dependent on the parties involved.
7. If a settlement is reached, the mediator will write up a 'Record of Settlement agreement'. The parties involved will receive a copy. The Record of Settlement is a legally binding document once it is signed by the parties. This also bars the parties from going to court on the same issue.
8. If settlement is not reached, the parties may make a separate or joint application to the Employment Relations Authority to resolve the issue, as set out below.

See the Ministry of Business, Innovation and Employment's website for a Record of Settlement

template.

Employment Relations Authority

The Employment Relations Authority ("ERA") is an investigative body. Its role is to resolve employment relationship problems. When an application is made, the ERA will review the issue. It may suggest alternative forms of dispute resolution first (e.g. mediation). However, if initial steps taken by the parties have failed, then the ERA will investigate.

Applying to the Employment Relations Authority

To apply to the ERA, a party must fill in a prescribed form that can be found on the ERA's website. The fee of $71.56 must be provided with the application, along with copies of supporting documents. These could include:

- the employment agreement
- meeting notes/minutes
- emails, letters or facsimiles
- diary notes
- file notes of discussions by the parties
- payslips

The ERA website has other forms for the general public to access. These forms include:

- Application for interim reinstatement: An employee who has been dismissed and wishes to continue working for his or her former employer while the case is before the ERA can apply for interim reinstatement by filling out this form. The form should be attached to the application.
- Statement of Reply: when the ERA contacts the responding party, that party must fill in a Statement of Reply. There is a prescribed form on the website.
- Application for investigation to be reopened: If a party would like to reopen their case with the Employment Relations Authority, they must fill in this form and pay a fee of $153.33.
- Application for removal of matter to the Employment Court: If a party would like a matter to be heard in the Employment Court instead of the ERA, it must fill out a prescribed form and pay a fee of $153.33.

Forms can also be requested from the Ministry of Business, Innovation, and Employment on 0800 20 90 20.

Case management conference

When the ERA receives an application and payment, it will begin the investigation process. A case management conference file is created for the parties, and a case management conference is held. This is a brief process which normally takes place over the phone.

The purpose of a case management conference is to:

- outline a procedure for the investigation process
- have a clear understanding of the issues
- formulate strategies to resolve the dispute
- ensure that the correct evidence is used to resolve the dispute
- agree on a date, place and time for an investigative meeting

Investigation meeting with the Employment Relations Authority

Meetings are held at the ERA's office. Parties are welcome to bring support people to the meeting. They may also have representatives (e.g. a lawyer or employment advocate) present at the meeting.

The process of the meeting:

- Introductions and outlining a process: The ERA member who runs the meeting will introduce him/herself and give a brief outline of the process that will be followed
- 'Statement of Problem' and 'Statement of Reply': The ERA member will then check the facts set out in both the 'Statement of Problem' and 'Statement of Reply' with the parties
- Presenting evidence: the parties may be asked to verbally present evidence during the meeting. Parties may also have to submit a written statement of evidence
- Witnesses: Witnesses who have provided a statement to the ERA must attend the investigation meeting. The Authority member may ask them questions regarding their statement. They will have to verify that the information given on the statement is true
- Conclusion: The parties will have an opportunity to summarise their key points

Determinations

A determination is a decision that the ERA will make after considering all of the evidence. This decision is legally binding on both parties, although can be appealed as set out below. Determinations are public, and are issued in writing to either parties or their representatives.

Remedies

The ERA has the legal authority to grant the following remedies:

- Interim reinstatement: the ERA may issue an order to an employer to temporarily reinstate the employee while there is an investigation
- Reinstatement: the ERA can reinstate an employee if it finds he or she has been unjustly dismissed
- Compensation: compensation is normally given to parties who have suffered loss or humiliation
- Compliance: the ERA can compel the parties to fulfil their obligations towards each other
- Costs: often the parties can decide who pays for the costs for the ERA. If they disagree, the ERA can make a binding decision as to costs
- Reimbursement of loss of wages: if the employee has been dismissed or subject to an unjustified action, the ERA may find the employee is entitled to a reimbursement

Employment Court

If either party is unhappy with a decision made by the ERA it may apply to the Employment Court. A party must apply to the Employment Court no later than 28 days after the ERA's decision. A party may specify if it wants to have the matter considered again or if only specific aspects of the ERA's decision should be considered again. The Employment Court follows a formal process and stricter rules of evidence than the ERA, so it is strongly recommended that both parties are represented by a lawyer.