

EMPLOYMENT LAW BASICS

This article provides general information only and is not intended to constitute legal advice.

Introduction

Mostly, employment law isn't hugely intellectual. It is a nuts and bolts area that can penalise employers for getting things wrong and that seems to undergo regular change, thanks to constant revision of our law by successive governments. It's vital that employers stay up to date and that they seek legal advice wherever they are unsure as to what to do.

For employees, the law gives fairly extensive recognition to the fact that employees are not "chattels", to be dealt with callously and arbitrarily by employers, and that they have rights.

Whether the law achieves the right balance between the interests of employers and employees is debatable. Most employers employ 5 or less employees and it is not easy or cheap for these type of employers to keep up to date and to pay for legal advice.

In my view, the days of short one or two page agreements have gone. There are simply too many issues to deal with. The cost of a well thought out agreement, that can be used repeatedly, will prove to be minor when compared to the potential cost of not having any agreement or having an inadequate agreement. There is no substitute for working with your lawyer to produce an agreement that should meet your needs.

Note that every employee is entitled to obtain a copy of their employment agreement – how will an employer do this if there is no written agreement?

Trial Periods

Trial periods, are now permitted under the Employment Relations Act (*ERA*) s67A. However, they are permitted only for businesses with less than 20 employees and the term is limited to 90 days. Certain basic requirements must be met for a trial period to be valid.

Trial periods are different to probationary periods under s67, which are somewhat illusory.

Fixed Term Agreements

Fixed term agreements are permitted under s66 of the ERA.

A fixed term agreement has to be justifiable, in the sense that there must be a legitimate reason for requiring a fixed term agreement. For example, it might be that an employee is required to undertake a particular project. It might be that the employee is to replace (temporarily) an employee on parental leave.

What isn't legitimate is to employ an employee on a fixed term agreement to avoid having to go through the normal counselling and disciplinary processes and terminating the employment as a result. There have been many cases where employers have tried this approach and where it has been transparent. One ploy has been to roll fixed agreements over, employing someone on one fixed term after another, simply to try to avoid having to go through the normal processes if there are difficulties with the employee.

Casual vs Part Time Employees

It isn't always easy to determine whether an employee is casual or part time, especially if an employer hasn't sought advice on this at the outset. In essence, a casual employee is someone who works if needed, when called upon, and who has the right to accept the work or to turn it down. The more regular and ordered their work, the more likely that they are part time employees rather than casual.

Misconduct vs Poor Performance

The distinction between misconduct and non performance or poor performance is often not understood.

Misconduct would include refusing to do what the employee is employed to do, abusing leave provisions, assaulting someone in the work place (and so on). Non performance or poor performance relates, as you would expect, to performance that is not up to scratch.

Where there is misconduct, a full and fair investigation may result in a warning and ultimately dismissal. The warning process is the formal process by which the employee is given the opportunity (in the absence of serious misconduct) to improve i.e. to improve or rectify their conduct.

Where there is a performance issue, it may be necessary to counsel the employee, to get to the bottom of why their performance is lacking, and to assist them to attain the necessary performance level. That might include training, attending seminars etc. After a reasonable time, if the employee's performance hasn't satisfactorily improved, it may be appropriate to terminate their employment. Strictly speaking, a warning process is irrelevant - it is the counselling and assistance that gives the employee the chance to improve. However, misconduct and non performance are often lumped together and many, including some judges, assume that the warning process is relevant to performance issues.

There may be circumstances where the employee has represented that they have certain skills, abilities or qualifications, upon which you have relied, but the employee's representation is untrue. Where it is materially untrue and you relied on it when employing the employee, you may be able to terminate their employment.

I am often asked in the case of misconduct, should a warning be verbal or written and how many warnings must be given. There is no prescribed process. The best approach is to have a stand alone disciplinary policy that sets out what is your standard procedure. The policy should be followed pretty rigorously. I recommend that all employers have a disciplinary policy.

The reason for the policy being a stand alone policy i.e. not being included in the employment agreement, is because you may want to change it from time to time. If the policy or procedure is set out in the agreement, you won't be able to change it without the consent of your employees. (Adding these kinds of procedures to employment agreements also makes them longer.)

Test for Dismissal

The ERA now requires an objective test to justify a dismissal – what would a fair and reasonable employer have done in the circumstances?

That means that it's not enough that you consider, even in good faith, that there are grounds for dismissal. Technically, it also means that it won't be enough that there is good reason to dismiss if a fair and reasonable employer wouldn't dismiss. For example, merely stating in your standard agreement that abusive behaviour will constitute serious misconduct won't entitle you to dismiss an employee if the fictional reasonable employer standing in your shoes wouldn't dismiss the employee.

Conversely, if there are a range of options open that a fair and reasonable employer might take, and you select one of them (being dismissal), but another employer might select a different option, then you shouldn't be able to be criticised for taking the option that you did.

Employment Protection Provisions

Every employment agreement must contain employment protection provisions. Many agreements don't.

The intent is that an employment agreement should set out what the employer will do on behalf of employees if the employer **restructures** their business e.g. sells the business or contracts out all or part it. (The definition of restructure is a bit more extensive than this.)

Existing agreements must be amended to include such a provision. Clearly, employees would only wish to agree to a provision that they consider to be fair.

For specific types of employees such as cleaners and caterers (vulnerable employees), they have much more extensive rights. They have an absolute right to transfer to the

new employer or contractor. That includes the following situations (called contracting out and subsequent contracting out):

You engage an independent contractor to clean your offices. Previously, you employed a cleaner. The cleaner has an absolute right to transfer to the contractor i.e. the contractor must employ them, on the existing terms.

Later, the cleaning contract comes up for tender and you then engage a new contractor. The employees of the first contractor have an absolute right to transfer to the new contractor, on their existing terms.

Redundancy

Leaving employment protection provisions aside, the general law is that there is no requirement to pay redundancy compensation. Accordingly, an employment agreement may state that no redundancy compensation will be paid.

Note though, if the agreement doesn't deal with that issue, it can't be assumed that this means that the employee has no entitlement to redundancy pay. It then becomes a question of what a fair and reasonable employer acting in good faith would do in the circumstances.

Apart from the question of redundancy pay, there is also the question of notice. Sometimes, employment agreements simply apply the standard notice period for termination for misconduct. Sometimes, a longer period of notice is provided.

An important aspect of redundancy is the need to consult with affected employees. In all but the most dire or severe situations, the best approach is to assume that there will always be a need to consult with affected employees. That may range from simply advising them that their employment will be terminated where say, the employer is about to go into liquidation (especially an insolvent liquidation), to advising an employee or some employees what is on the cards and to see whether they have any suggestions that might be relevant. The circumstances will determine which employees should be consulted, what should be discussed with them and how much time they should be given to consider any relevant matters.

Policies

In my view, any policies or rules should not be contained in employment agreements. Policies may need to be changed from time to time and that would be much easier if they are stand alone policies. (The employment agreement should require an employee to comply with all policies in existence from time to time.)

There is some case law that suggests that an employer will find it difficult to defend a personal grievance based on sexual harassment if they do not have a policy on sexual harassment that has been communicated to staff. In my view, a clause in an agreement stating that sexual harassment is entirely unacceptable and providing a clear procedure for reporting complaints probably should suffice. Some employers have extensive policies, which are often stand alone policies.

In practical terms, the second policy (and one which in many respects might be the most important), would be a computer and communications policy. So much havoc, can be created by an employee in different ways that it is simply good sense to set out what an employee may and may not do when using your equipment and what are your rights of inspection etc. The policy should be comprehensive and cover remote access and the use of phones (including employees' own cell phones during business hours). The policy should also cover time wasting.

The third policy would be a disciplinary policy. It would set out what procedures will be followed in relation to performance and misconduct issues. The persons responsible for such matters (management staff) would therefore have a set of rules to follow and employees would know what to expect. It would not be possible for the rules to provide all answers as to what should happen in every circumstance, but they set out the basics. Where difficulties arise, legal advice should be sought.

The fourth main policy would be a policy on health and safety matters. Every employer should have one but it is a reality that many businesses relate to office situations (where the risks or hazards are much less than say on industrial sites) don't have one.

Steven Dukeson LL.M. (Hons.).
Dukesons Business Law
steve@dukesons.co.nz