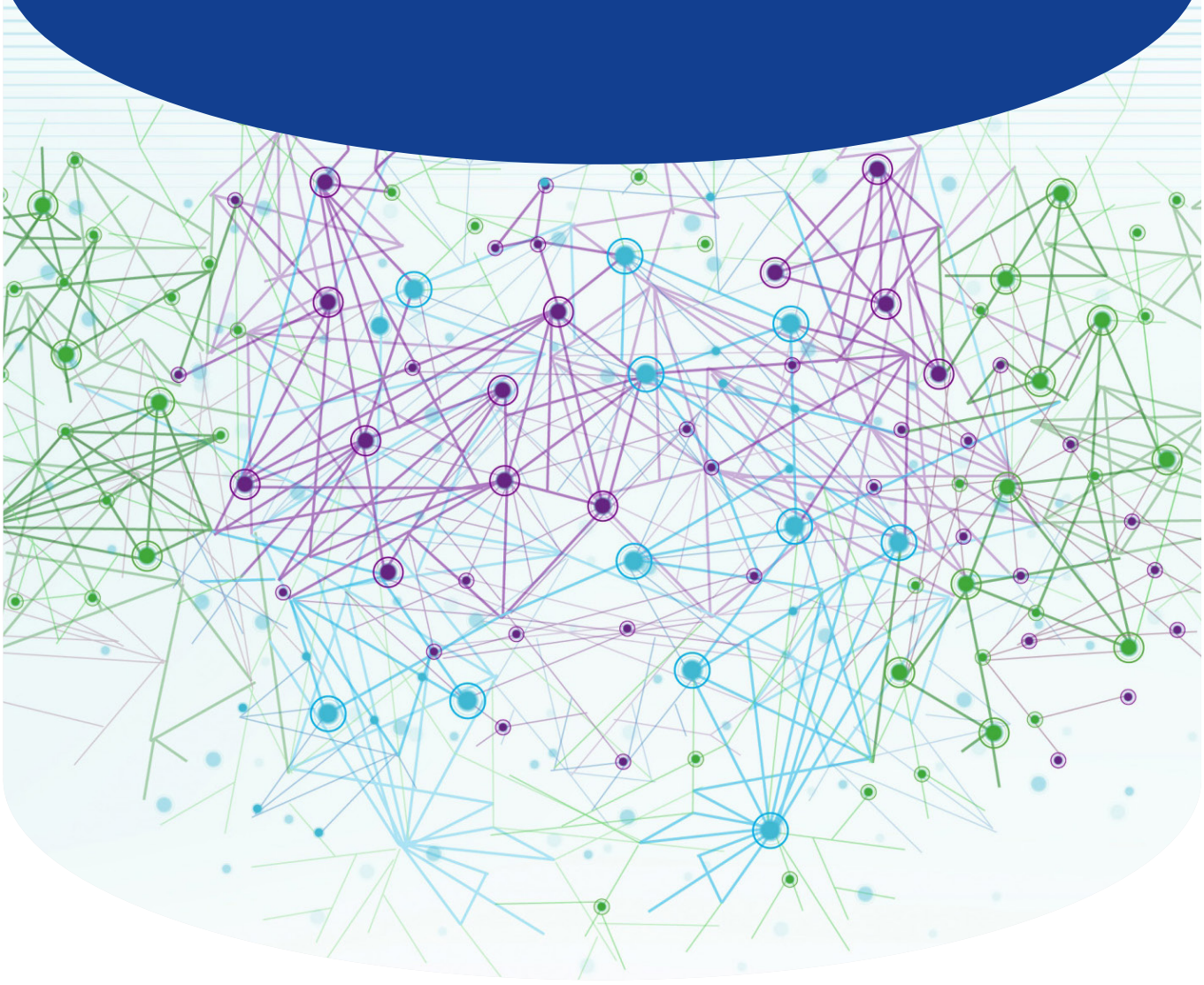
Exercise Association of New Zealand

Representing the Exercise & Fitness Industry

Employment Resoures for the Exercise Industry



REPs NZ Register of Exercise Professionals

FitEX The Science & Business of Fitness & Exercise

HAUORA Yoga Conference

New Zealand Exercise Industry Awards

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Introduction

Disclaimer

This resource is designed to be a general guide on issues related to employment within the fitness and exercise industry. It is not designed to replace independent legal advice. We strongly recommend obtaining independent legal advice on all areas of employment law, particularly where it may involve disciplinary action and/or dismissal. ExerciseNZ and Cullen – The Employment Law Firm assume no legal responsibility for members' own application of this resource.

How to use this resource

This ***Employment Resources for the Fitness Industry Resource*** (referred to as ***the/this resource***) can be used to guide exercise facilities on employment related matters.

While you are welcome to pick and choose parts of this resource to read and/or use, we strongly recommend that you read the entire resource at least once to ensure you are aware of all the issues that need to be covered.

While each facility will have their own unique situation, there are common elements of all employment law agreements and common issues that need to be considered. However, no one membership agreement can cover the needs for every club, and as such this resource should be viewed as a starting point on which to base your own.

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Employment Agreements

ExerciseNZ recommends you build your own employment agreements using the services of a lawyer, or other suitable expert in the employment field. The Ministry of Business, Innovation and Employment also provides a free online resource that can be used to build employment agreements. The link to this can be found from the members' section of the ExerciseNZ web site, or email info@exercisenz.org.nz

Acknowledgements

This resource has been developed by ExerciseNZ in conjunction with Cullen – The Employment Law Firm. Cullen – The Employment Law Firm is a specialist in employment law. They are based in Wellington, but can provide services to any part of New Zealand, and may be contacted on (04) 499 5534 or email david@cullenlaw.co.nz.

Employment

The laws that affect the relationship between an employer and employee are found in a variety of sources, including the:

- Accident Compensation Act
- Employment Relations Act;
- Equal Pay Act
- Holidays Act;
- Human Rights Act;
- Health and Safety in Employment Act;
- Minimum Wage Act;
- Privacy Act;
- Parental Leave and Employment Protection Act; and
- Protected Disclosures Act.

It is important to keep up to date with changes to the law. For example, the Health and Safety in Employment Act is set to be replaced later this year with the Health and Safety at Work Act.

The courts also make decisions about the laws that govern the relationship between an employer and employee.

Employment law has become increasingly complex, and is subject to change.

This section outlines some of the main points an employer should consider.

Meaning of employee

The definition of an employee is wide. It includes any person of any age employed by an employer to do any work for hire or reward, and includes a person intending to work (that is a person who has been offered and has accepted work as an employee). It does not include:

- A volunteer; or
- A person engaged as a contractor (please also review ExerciseNZ's resource ***ExerciseNZ Common Industry Issues Resource*** and refer to the section on ***IRD, Contractors and Employees*** to help determine the employer/contractor relationship).

A statement describing the nature of the relationship does not determine whether the person is an employee or a contractor. The Employment Relations Authority (the Authority) is required to consider all relevant matters to determine the real nature of the relationship. Inland Revenue also have their own criteria to establish whether the relationship is independent, and not that of employer and employee.

The distinction can be difficult to differentiate between at times. For example, a cleaner could be engaged as an employee or a contractor. Businesses in the fitness industry should take care if they wish to engage contractors. If the contractor is considered to be an employee by the Authority or Inland Revenue, then the "employer" can become liable for matters such as PAYE and claims of unjustifiable dismissal.

Type of employee

The needs of the business will affect the terms on which an employee is employed on. There are various terms used to label the type of employee required, including:

- **Permanent** – where there is an expectation that employment will continue until it is lawfully terminated;
- **Full-time** – generally an employee who is required to work over 30 hours a week;
- **Part-time** – generally an employee who works less than 30 hours a week on a fairly regular or rostered basis;
- **Casual** – an employee that works on an "as required" basis. This will generally be intermittently (eg. covering for a sick employee), but it can also be for a period of time (eg. to provide services over a busy period); and
- **Fixed-term** – an employee that works for a specified period of time, or until the occurrence of a specified event or the conclusion of a specified project (there is more information on fixed-term employment below).

It can sometimes be difficult to determine the status of the employee (for example, a casual employee may receive work in accordance with a roster, however, if the employee regularly receives work in accordance with a roster then the employee could be considered part-time). The status of an employee can also change over a period of time (for example, a casual employee may originally have received intermittent work on a roster, and then later regularly works a number of days a week - then the relationship can change from casual employee to part-time employee).

It is important to establish the type of employment as different laws may apply (such as "pay as you go" holiday pay for casual employees, or terminating employment for permanent employees as opposed to fixed term employees).

Employment agreement

It is mandatory to have a written employment agreement for employees. The employment agreement can be:

- An individual employment agreement (between 1 employer and 1 employee); or
- A collective employment agreement (an agreement that can be between 1 or more employers and 1 or more unions that binds 2 or more employees).

There are different requirements for the 2 types of employment agreement:

An **individual employment agreement** must include:

- The names of the employer and the employee;
- A description of the work to be performed;
- An indication of where the employee is to work;
- An indication of the arrangements relating to the times the employee is to work;
- The wages/salary payable to the employee;
- A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance claim must be raised; and
- An "employee protection provision".

A **collective employment agreement** must include:

- A coverage clause (specifying the work that the agreement covers, whether by reference to the work or type of work, or employees or type of employees);
- A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance claim must be raised.
- A clause providing how the agreement can be varied;
- The date on which the agreement expires (or the event on which the agreement expires) - but not for a term of more than 3 years; and
- An "employee protection provision".

Otherwise, employment agreements can contain anything that is not contrary to law.

As a generalisation, most employers in the fitness industry are not parties to a collective employment agreement. An employee will only be bound by a **collective employment agreement** if:

- The employer is party to a collective employment agreement;
- The employee is, or becomes, a member of a union party to the collective employment agreement; and
- The work to be done comes within the coverage clause.

For most employers in the fitness industry, the following procedure should be followed. Before an employee enters into an **individual employment agreement**, the employer must:

- Provide the employee with a copy of the intended employment agreement;
- Advise the employee that the employee is entitled to seek independent advice;
- Give the employee a reasonable opportunity to seek that advice; and
- Consider any issues that the employee raises and respond to those issues.

Trial period

Employers of any size may employ NEW workers on a trial period of up to 90 days. Note: Anyone who you have employed in the past is not able to be employed on a trial period, even if they have only been employed for a few hours. This rule is strictly applied by the Courts. If an employee has been working for only a few hours before they sign the agreement the 90 day trial period will not apply.

The trial period must be agreed to by the employer and employee in writing as part of the employment agreement.

The trial period is to provide the employer an opportunity to assess the employee's suitability. If the relationship does not work out the employee can be dismissed. An employee dismissed during a trial period cannot raise a personal grievance on the grounds of unjustified dismissal. The employee may still raise a claim on other grounds, such as discrimination or harassment or an unjustified action by the employer that disadvantaged the employee.

If an employee agrees to a trial period, this does not affect the employee's entitlements to holidays and leave.

Probation period

There are a number of myths and misconceptions regarding probationary periods. It should not be confused with the trial period provisions above.

For employers with 20 employees or more it is prudent to include a reasonable probationary period in an employment agreement. The only requirement for a probationary period to be enforceable is that it must be specified in writing in the employment agreement.

A probationary period can be used to:

- Assess the employees suitability for employment against the reasonable standards of the employer's workplace;
- Provide a process of assessment that does not require a process of formal warnings that may otherwise apply; and
- Provide a lesser period of notice if the employee is unsuitable for continued employment.

However, a probationary period does not affect the law relating to unjustifiable dismissals. This means that the employer:

- Must monitor and review the employees performance and advise the employee of any concerns during the probationary period;
- Must follow a fair procedure if the employer proposes to terminate the employee's employment (see more detailed advice later regarding dismissals);
- Must not "dump the employee" at the end of the probationary period, or otherwise take action that would come as a surprise to the employee.

Fixed-term agreements

While fixed-term employment agreements are not common in the fitness industry, they can be useful to cover situations where it is necessary to have temporary employment (for example, to cover a period of parental leave). A fixed-term employment agreement can provide that employment will end:

- At the close of a specified date or period;
- On the occurrence of a specified event; or
- At the conclusion of a specified project.

For a fixed-term employment agreement to be enforceable:

- The employer must have genuine reasons based on reasonable grounds to have a fixed-term employment agreement; and
- The employee must be advised of when or how their employment will end and the reasons for it ending in that way (while there is no legal requirement to record this in writing, it would be prudent to do so).

Notice period

The notice period refers to the period of notice that an employer and employee must give if they wish to terminate the employment relationship. If a notice period is not agreed, the law will imply that a reasonable period of notice must be provided (based on matters such as seniority of the position, length of service, age etc).

It is generally accepted that an employer can dismiss an employee without notice if the employee has engaged in serious misconduct.

There are no precise requirements on what notice needs to be provided. However, when determining what an appropriate notice period should be, employers should consider matters such as:

- How quickly can a replacement employee be obtained;
- Whether it would be better to get the employee out of the business quickly;
- Whether a longer period of notice would help protect the business (for example, to transition clients to another employee).

Other points for employers to consider regarding notice include:

- A shorter period of notice may be appropriate while an employee is subject to a trial period;
- A longer period of notice may be appropriate where employment needs to be terminated through no fault of the employee (redundancy, long term illness);

Employment agreements should also record that an employer can pay out some or all of the employee's notice period (to get the employee out of the business if necessary). Likewise, there should be a 'damage" clause where the employer can retain wages if the employee does not provide the required notice.

Minimum leave entitlements

Employees are entitled to certain minimum leave entitlements. With limited exceptions, these include:

- **Annual leave** –an employee is entitled to a minimum annual leave period of 4 weeks for each year of employment. Annual leave is calculated under the *Holidays Act* by reference to the employee's "anniversary date" or starting date. (**Employees** are now able to request for up to 1 week per year leave to be "cashed up". They work the week as normal, but are paid holiday pay, on top of their regular pay (effectively doubling their income that week). There however is no obligation on the employer to allow the cashing up of holidays. There is also no ability for the employer to force a staff member to take cash in lieu of their weeks leave nor solicit employees to cash up leave.
- **Sick leave** – after 6 months continuous service, an employee is entitled in each subsequent 12 month period to 5 days sick leave. Up to 15 days unused sick leave may be carried over each year so that an employee may accumulate up to 20 days entitlement. Sick leave may be used in the event that:
    - The employee is sick or injured;
    - The employee's spouse is sick or injured; or
    - A person who depends on the employee for care is sick or injured.
- **Proof of sickness or injury –** the employer may require proof of sickness or injury:
    - If the employee is sick or injured for 3 or more consecutive days (at the employee's expense) of that sickness or injury; or

- If the employer suspects that the illness or injury is not genuine (at the employer's expense) provided that the employer:
    - has reasonable grounds to suspect that the illness or injury is not genuine; and
    - Informs the employee of the requirement to provide the proof as soon as possible after the employer has formed the suspicion.

- **Bereavement leave** - after 6 months continuous service, an employee is entitled to take up to:
    - 3 days bereavement leave in the event that a member of the employee's immediate family dies (i.e. spouse, parent, child, sibling, grandparent, grandchild, or spouse's parent); and
    - 1 days bereavement leave where the employee otherwise suffers (taking into account the closeness of the association between the employee and deceased, any significant responsibilities for the arrangements for the ceremonies relating to death and any cultural responsibilities of the employee).

Public holidays

Employees are entitled to up to 11 public holidays each year paid in accordance with the *Holidays Act*. If an employee is not required to work on a public holiday by their employer, the employee must be paid their "Relevant Daily Pay" or "Average Daily Pay" for that day.

If an employee is required to work on a public holiday, the employee must be paid at a rate based on one and a half times of their Relevant Daily Pay for the time actually worked. In addition, if the public holiday is a day that would otherwise be a working day for the employee, the employee is entitled to an alternative day off.

Relevant Daily Pay means the amount of pay the employee would otherwise have received on that day (it includes usual payments for overtime, and productivity or incentive based payments such as commissions).

Average Daily Pay is used where you can't determine the Relevant Daily Pay or where an employee's daily pay varies within the pay period when the holiday or leave falls. The formula for calculating Average Daily Pay is set out in the *Holidays Act*.

Breaks

The legal requirements for providing rest and meals breaks have changed. Under the *Employment Relations Act* an employer must provide rest and meal breaks that:

- Provide the employee with a **reasonable opportunity**, during the employee's work period, for rest and refreshment, and attention to personal matters; and
- Are appropriate for the duration of the employee's work period.

Time of breaks are by agreement. If the employer and employee cannot agree, the employer can specify reasonable times and reasonable durations for breaks. An employer can specify breaks that enable the continuity of service or production, but they must have regard to the operational environment or resources and the employee's interests.

Break times can be restricted if those restrictions are;

- Reasonable and necessary, having regard to the nature of the employee's work; or
- Reasonable and agreed to by the employer and employee.

Restrictions can take the following shapes:

- the employee needing to be aware of their duties or continuing to perform their duties during the break;
- the circumstances when a break may be interrupted; or
- the employee taking a break in the workplace or at a specified place within the workplace.

In some cases an employer can be exempt from providing rest and meal breaks but employees should be compensated for this. Compensatory measures can be agreed on with an employee. Otherwise, an employer does not need to provide rest and meal breaks if the nature of the work performed does not make it reasonable to do so.

Employers are also required to provide appropriate breaks and facilities for employees who wish to breastfeed or express breast milk while at work or during work time where this is reasonable and practicable under the circumstances. In determining what is reasonable and practicable, employers can take into account their operating environment and resources. These breaks are to be paid only if the employer and employee agree they will be. Employers and employees can agree to use a rest or meal break for the purposes of infant feeding.

Flexible working arrangements

All employees have a statutory right to request a variation to their hours of work, days of work, or place of work.

Employers must consider such requests but can refuse them when they have reasonable grounds to do so (such as a small workforce where the flexibility cannot be reasonably accommodated).

Ending an employment relationship

One of the most difficult things for an employer to deal with is a situation where an employment relationship needs to be brought to an end. Not only will difficult decisions have to be made, but the employees will often be resistant. If a decision is made to terminate an employee's employment, and the decision is not fair, employers can face having to pay significant amounts in compensation, or even having to reintegrate the employee back into the business.

The *Employment Relations Act* has an objective statutory test for establishing whether or not a dismissal is justified. To be justified the employer's actions, and how the employer acted, must be what a **fair and reasonable employer** could have done in all the circumstances.

If the Authority is required to determine whether a dismissal is justified, it will consider 2 aspects of the dismissal:

- The reason (which must be sufficient to justify dismissal);
- The process (was a fair process followed);
- Whether having regard to the resources that the employer had available, the employer sufficiently investigated any allegations before making a decision to dismiss;
- Whether the employer raised its concerns before making the dismissal;
- Whether the employer gave the employee reasonable opportunity to respond to the allegations; and
- Whether the employer genuinely considered the employee's response to the allegations.

Reason for dismissal
Dismissals need to be undertaken in a variety of situations, including:

- Misconduct;
- Poor performance;
- Long term illness or injury; and
- Redundancy.

There are a number of myths and misconceptions regarding warnings in the dismissal process.

Some dismissals are for reasons so serious that they do not require any prior warnings having been given to an employee. While it is not possible to give an exhaustive definition of the kind of conduct that will constitute serious misconduct justifying instant dismissal, what is usually required is conduct that is deeply destructive of the basic confidence or trust that is essential in the employment relationship. Dishonesty is an obvious example of conduct that breaches the trust in an employment relationship.

Some employers consider that a set process of warnings must be undertaken for conduct that does not justify instant dismissal. Unless an employer is contractually bound by a set process in an employment agreement, all the employer is required to do is take action that is fair in the circumstances. While it may be prudent to undertake a process of 2 or more warnings where an employee is repeatedly late for work, only 1 warning may be justified where an employee is dismissed for being rude to a customer.

While some employers try to identify misconduct that they consider will justify dismissal in their employment agreements and policies, it should be noted that these may not always be able to be relied on. For example, an employment agreement may provide that insubordination is serious misconduct. There are a range of behaviours that could be considered insubordination, and they will be coloured by matters such as provocation, past behaviour etc.

Some dismissals are necessary even where there is no fault on the employee (for example, redundancy and long term illness or injury). In such circumstances, the employer should endeavour to undertake a procedure that is fair and open.

This resource includes **flowcharts** from pages 17 to 19 to assist employers to undertake a fair procedure to deal with a variety of common reasons that could justify dismissal:

- Poor performance/misconduct flowchart;
- Redundancy; and
- Long term illness or injury.

This resource also includes **checklists** from pages 20 to 25 to assist employers dealing with potential:

- Dismissals generally; and
- Redundancies.

Fair procedure

A dismissal may still be considered to be unjustified by the Authority if the employer fails to follow a fair procedure. This will justify an award of compensation to an employee (even if the employer has a good reason to justify the dismissal). The importance of undertaking a fair process cannot be emphasised strongly enough, and employers should err on the side of caution in endeavouring to make the process fair.

The process is likely to require the following minimum requirements:

- Notice to the employee of the allegation or proposal (including any likely consequences if the allegation is established or the proposal goes ahead);
- An opportunity for the employee to be heard (where the employee can address the allegation or proposal, and raise matters that the employee wants the employer to consider); and
- Advice to the employee that they are entitled to have a representative or support person present.

Discrimination

The *Human Rights Act* specifies a number of prohibited grounds of discrimination, including:

- Sex (including pregnancy and childbirth);
- Marital status;
- Religious and ethical beliefs;
- Colour, race and ethnic or national origins;
- Disability (including physical impairment or illness, psychiatric illness etc);
- Age;
- Political opinion;
- Family status; or
- Sexual orientation.

It is unlawful to discriminate on the prohibited grounds of discrimination in relation to employment by:

- Refusing employment;
- Offering less favourable terms of employment;
- Terminating employment (including retirement).

There are limited exceptions to this. It is possible to dismiss an employee for medical reasons (disability) as long as the employer can show that:

- It is not reasonable to provide special services and facilities for the employee; or
- That the employment of that employee would create an unreasonable risk of harm to that employee (or to others) and that reducing that risk to a normal level would be unreasonably disruptive; or
- Any adjustment of activities to allow other employees to take on that employee's task would be unreasonably disruptive.

The prohibited grounds of discrimination also apply more widely. It is generally unlawful by reason of any of the prohibited grounds of discrimination to:

- Refuse to provide goods, facilities or services to the public (or section of the public); or
- To treat any person less favourably in connection with the provision of goods, facilities or services.

There are again certain exceptions that may be applicable, such as:

- The provision of separate facilities or services on the ground of public decency or safety;
- Participation in any competitive sporting activity in which strength, stamina or physique of competitors is relevant.

Sexual Harassment

An employer can also be held responsible for sexual harassment under both the *Employment Relations Act* and the *Human Rights Act.* There are generally 2 types of sexual harassment:

- Inappropriate requests for sexual favours;
- Unwelcome or offensive behaviour of a sexual nature.

An employee is sexually harassed when the harasser:

- Directly or indirectly makes a request for sexual intercourse, sexual contact or other form of sexual activity that contains an implied or overt:
    - Promise of preferential treatment in employment;
    - Threat of detrimental treatment in employment;
    - Threat about the present or future employment status of the employee;
- Directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to the employee (whether or not that is conveyed to the harasser) and that, either by its nature or through repetition, has a detrimental effect on the employee's employment, job performance or job satisfaction, through:
    - The use of language (whether written or spoken) of a sexual nature;
    - The use of visual material of a sexual nature;
    - Physical behaviour of a sexual nature.

The employee will have a personal grievance where the employer or a representative of the employer (generally a manager or supervisor) sexually harasses the employee.

Where the employee is sexually harassed by a co-employee or client or customer of the employer, the employer has a second chance before the employee has the right to bring a personal grievance claim. The employee can only bring a personal grievance claim against the employer if the employee has previously made a complaint to the employer about the harassment and the employer has failed to take all practicable steps to prevent further harassment, and the harassment reoccurs.

Under the *Human Rights Act*, the employer's liability is potentially greater. That Act imposes liability on employers for sexual harassment carried out by their employees regardless of whether the employer was made aware of the behaviour (unless the employer can show that it took reasonable steps to prevent sexual harassment).

If employers wish to minimise the risk of discrimination and sexual harassment complaints in their workplace, they should have a strategy that includes:

- Clear policies and procedures;
- Getting the message across to employees;
- Equipping managers to respond appropriately;
- Providing information and support;
- Developing an environment where discrimination and sexual harassment are discouraged.

Health And Safety

The *Health and Safety in Employment Act* was introduced to shift the cost of compliance for identifying and addressing health and safety issues in the workplace from central government to organisations and the people working in them.

A new health and safety law is working through Parliament and should be in force by late 2015. The possible changes that will be introduced are discussed below.

It is important for employers to be on top of their obligations under this Act and to know what is intended with the new law. Courts have imposed very high penalties when employees and others have been injured in an employer's workplace.

The current Health and Safety in Employment Act

Some of the main duties under the *Health and Safety in Employment Act* include:

- **Employer** – every employer is required to take all practicable steps to ensure the safety of employees at work, which includes:
    - Providing a safe working environment;
    - Ensuring the equipment used by employees is safe (and is maintained in that condition);
    - Developing procedures for dealing with emergencies that may arise while employees are at work;
- **Employee** – every employee is required to take all practicable steps to ensure:
    - Their safety at work (including using protective equipment and clothing provided by the employer);
    - That through their action or inaction that they do not cause harm to others.

While these duties at face value seem reciprocal, it should be noted that it is rare for an employee to be prosecuted (let alone found guilty) by MBIE Seemingly stupid acts by employees (such as removing a safe guard, or not wearing a harness at heights after being given a written warning) have been considered breaches of the employer's duty rather than the employee.

To assist in providing a safe workplace, employers are required to have in place **effective** methods for:

- Systematically identifying existing hazards;
- Systematically identifying (if possible before, and otherwise as they arise) new hazards;
- Regularly assess each hazard identified, and determining whether it is a significant hazard.

As part of this, an employer is required to maintain a register of accidents.

Where there is a significant hazard, the employer is required (on a sliding scale) to take all practicable steps to:

- Eliminate it (and where this is impracticable);
- Isolate it (and where this is impracticable);
- Minimise it, and other wise protect the employee.

If the employer has a serious harm accident at its workplace, it is required to notify Work Safe NZ. Should this happen, the attached **checklist** on pages 24 and 25 will assist the employer to deal with the procedure required.

The proposed Health and Safety Reform Bill

The *Health and Safety Reform Bill* will create the *Health and Safety at Work Act* (referred to as ***the/this new law***). This will replace the Health and Safety in Employment Act.

Overall the new law introduces a higher duty of care on employers. It is important to be familiar with the main elements of this new law and what it will mean for health and safety in the future. These elements include:

- A new primary duty of care – so far as reasonably practicable PCBUs must ensure the health and safety of workers and other persons.
- New concepts such as:
    - PCBU - this replaces "employer";
    - Worker - this replaces "employee";
    - Consultation between PCBUs and their workers, and between PCBUs with a shared duty in relation to the same matter; and
    - Director liability.

PCBU
A PCBU means a person who conducts a business or undertaking:

- Whether the person conducts a business or undertaking alone or with others; and
- Whether the business or undertaking is conducted for profit or not.

PCBUs include persons who:

- Manage or control workplaces; or
- Manage or control fixtures, fittings or plants at workplace; or
- Design, manufacture, import, supply, or install plants, structures or substances that are to be (or could reasonably be expected to be) used as or within a workplace.

For the fitness industry, PCBU includes those who design and manufacture exercise equipment and those who control exercise areas.

Worker
A worker means a person who carries out work in any capacity for a PCBU, including work as:

- An employee;
- A contractor or subcontractor;
- An employee of a contractor or subcontractor;
- An employee of a labour hire company who has been assigned to work in the business or undertaking;
- An outworker (including a homeworker);
- An apprentice or a trainee, a person gaining work experience or undertaking a work trial; or
- A volunteer.

Consultation
Under the new law there is strong focus on consultation with workers and other PCBUs that share a duty. Other PCBUs may include contractors, equipment manufacturers, or other businesses that provide services to an employer's premises.

A PCBU must also consult with the health and safety representative(s) on health and safety matters. This includes providing health and safety representatives access to health and safety information.

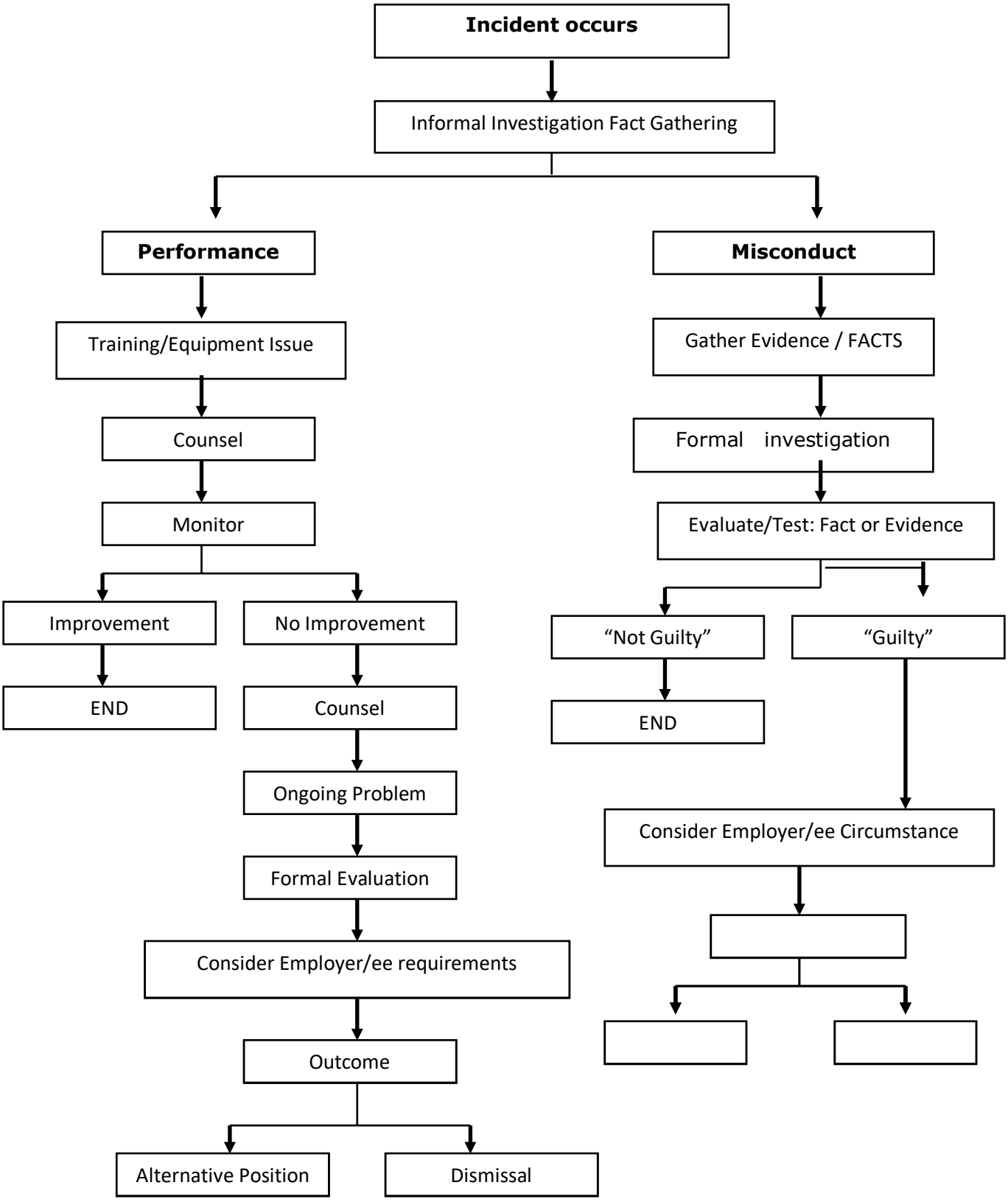
Director liability
The new law will introduce a positive duty on "officers" of a PCBU to exercise due diligence to ensure the PCBU complies with duties or obligations under Act.
"Officers" includes directors, chief executives and other senior managers. Volunteers are not included in the definition.

Officers will be required to take reasonable steps to:

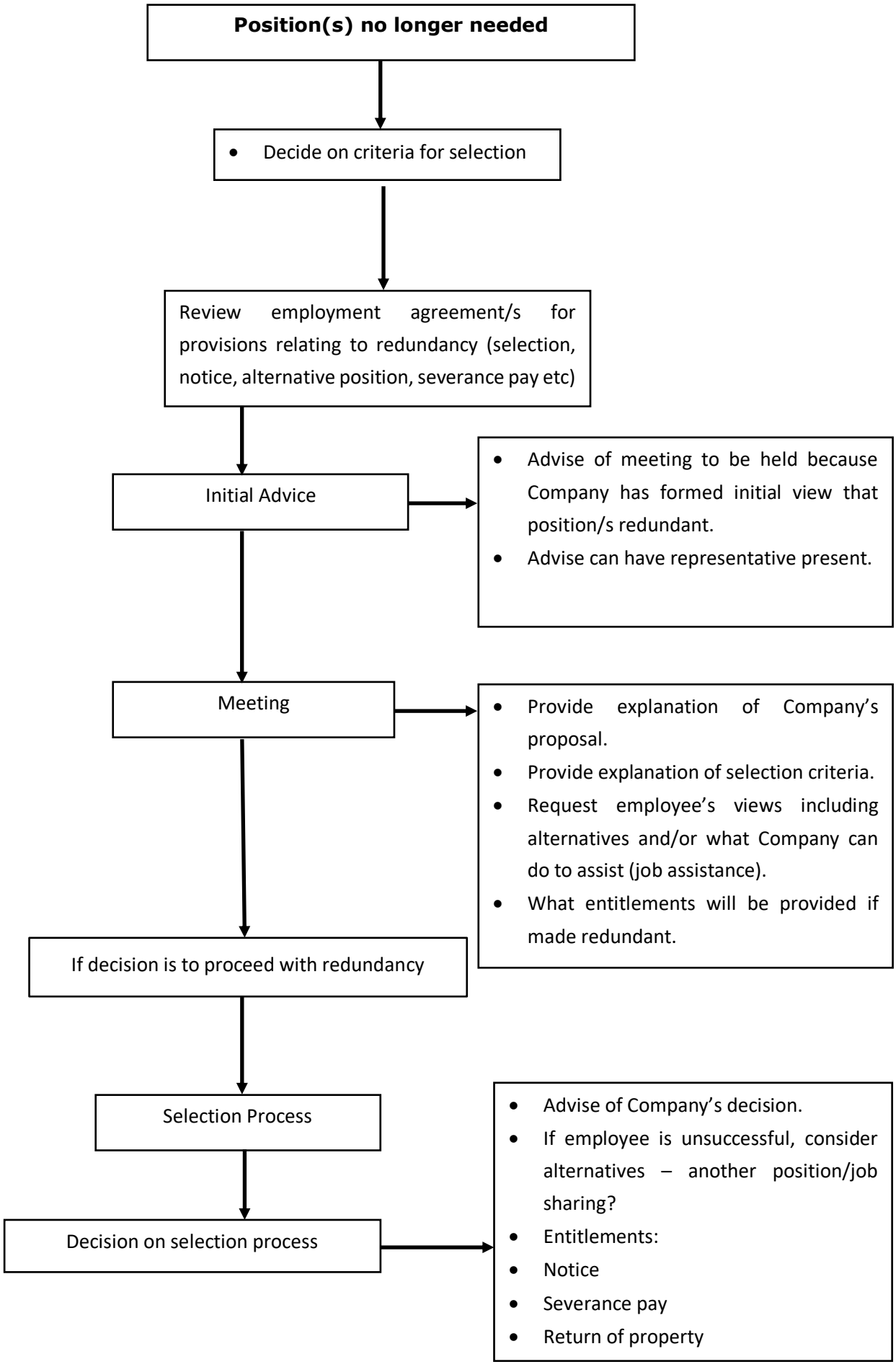
- Understand the PCBU's operations and associated hazards
- Ensure that the PCBU has, and implements, appropriate health and safety processes, and that these processes are sufficiently resourced and verified.

Flowcharts

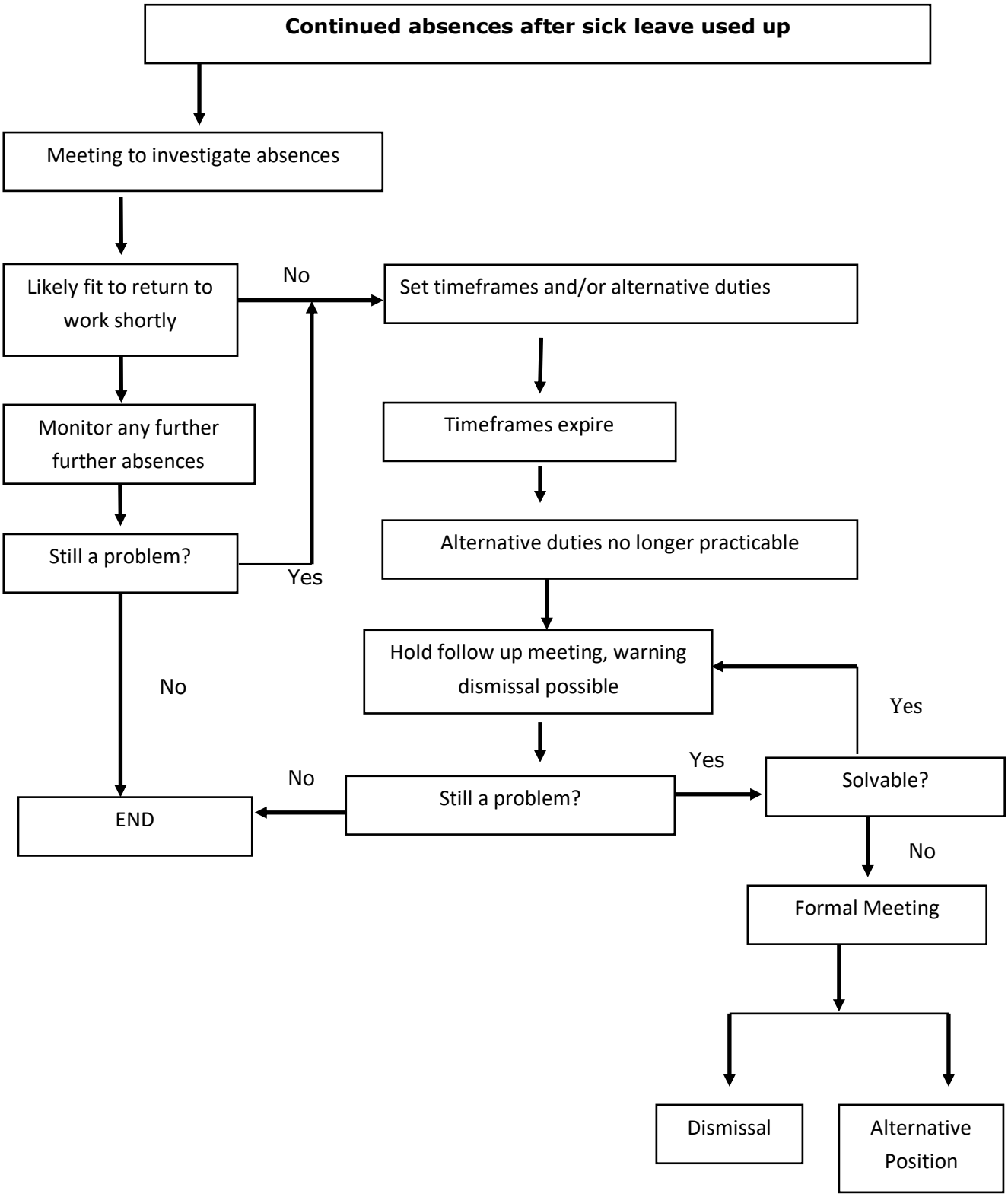
Poor Performance / Misconduct Flow Chart



Redundancy Procedure Flowchart



Managing Long Term Illness Flowchart



Checklist for Dismissal Procedures

This summarises some of the main points an employer should bear in mind when considering or initiating dismissal or disciplinary action against an employee. It should be remembered that dismissal is only one of a number of disciplinary steps and that alternatives should always be considered.

1. Investigations

1.1. Familiarise yourself with any company warning and dismissal procedures and check whether there are any procedures in the relevant employment agreement which must be followed for disciplinary action.

1.2. Ensure that any rules relied on are well known to the staff and have not recently been changed.

1.3. Ensure that all relevant facts are obtained by questioning all involved. Check that no other persons could be involved or associated with the matter (eg: where a co-employee lives with an employee who is suspected of unauthorised possession of company products).

1.4. Check the employee's personal file for age, years of service, past work history, and previous warnings. The years of service have some bearing on the benefit of doubt to be given to the employee.

1.5. Check on all previous warnings to ensure that they are justified.

1.6. Ensure that sufficient time has elapsed since the last warning so that the employee has had time to improve.

1.7. Ensure that any warnings relied upon have not expired or become “stale”.

1.8. Make your own enquiries without relying on hearsay.

1.9. Examine all possible explanations, to ensure that you have investigated all relevant matters.

1.10 Check past company practices for similar offences to ensure there will be no disparity in the treatment of employees.

1.11 Assess the credibility of witnesses, particularly in respect of their personal relationships with the employee in question (ie: no hidden motives).

1.12 Determine whether any industrial relations issue or dispute is involved with the employee's action which may affect your decision.

1.13 Consider whether the employee should be suspended pending an inquiry (but only if you have an express clause in the relevant employment agreement).

2. Interview

2.1. Ensure that you comply with any applicable procedural requirements set out in the employment agreement or a relevant policy.

2.2. Ensure that the employee is informed of the purpose of the interview and that dismissal could be a consequence.

2.3. Give the employee the opportunity to be represented by a support person including a union delegate or lawyer, but if this is not possible, ensure that the employee has access to their representative prior to a final decision being made.

2.4. Ensure that the company has at least one witness in attendance at any interviews and that good notes are taken.

2.5. Ensure that the employee is informed of the identity of all persons at the interview and their status.

2.6. Put all matters and evidence relied upon before the employee and ask for the employee's version or account of events.

2.7. Do not set up a trap for the employee and use this as the basis for dismissal.

2.8. Ensure that the employee adequately understands the allegations, particularly if there is a language difficulty.

2.9. Ensure that the employee has adequate time to respond to the allegations, if necessary by allowing an adjournment or consultation with a union official or representative.

2.10. If other witnesses are being relied upon ensure that the employee is fully informed of their account of events. If there is a conflict, ensure that you take an adjournment to re-question the witness upon whom you are relying. If appropriate you should also consider allowing the employee to hear that witness or perhaps know the identity of an accuser. This will depend on the circumstances.

2.11. Ensure that you are not relying on facts on which you have not informed the employee. These cannot usually be relied upon later on.

2.12. Discuss the employee's explanation, seek motives and reasons for his or her conduct, and seek confirmation of that explanation.

2.13. If the employee raises issues or evidence not presently available, give him or her the chance to obtain or present this and ensure that the employee is given a fair hearing.

2.14. Consider suspension on full pay to give the employee such an opportunity (but only if you have an express clause in the relevant employment agreement – you can suspend in limited circumstances without a contractual provision but only in limited circumstances). Suspension may also be appropriate where the continued presence of the employee at the workplace may give rise to significant issues. This may include the hampering the investigation or risk of continued harm to the employer.

2.15. Make inquiries to see if the employee has any personal problems which could have caused stress and may, to some extent, explain his or her actions.

2.16. Ask the employee if he or she has seen the Company Rules and if he or she is aware of the penalty for such misconduct.

2.17. Ensure that you are seen to have considered and discussed the employee's explanation before reaching any decision on the matter.

3. Decision

3.1. Ensure a reasonable time is taken to consider the employee's explanation and that you are seen to have an open mind as to the action to be taken.

3.2. Never have a written notice of dismissal or final pay made up in advance. This indicates a predisposition to dismiss.

3.3. Decide whether the action to be taken is summary dismissal, dismissal on notice, final warning, or demotion or transfer. If necessary discuss the appropriateness of this action with the employee, or his or her representative.

3.4. Consider whether the company is partially at fault, eg: by lack of supervision or training or confusion over house rules.

3.5. Ensure that you comply with any procedural or notice requirements.

3.6. Explain holiday pay and final pay arrangements.

3.7. Ensure that glowing references are not written for an employee who is dismissed for misconduct or incompetence.

4. Specific advice

The comments in this document are general in nature. If there is any doubt, the employer should obtain specific advice.

Checklist for Redundancy Procedures

This checklist summarises some of the main points an employer should bear in mind when considering making an employee redundant.

1. Preparation

1.1. Familiarise yourself with the businesses redundancy procedures/policies and check whether there are any procedures in the relevant employment agreement/s that need to be followed.

2. Definition

2.1. A redundancy occurs when an employee's employment is terminated by the employer, the termination being attributable, wholly or mainly, to the fact that the position filled by the employee is, or will become superfluous to the needs of the business.

2.2. In order to avoid the possibility of a personal grievance claim, the business will need to establish the **genuineness** of the redundancy/ies and to ensure that the redundancy/ies is carried out in a **procedurally** fair manner.

3. Genuineness

3.1. Generally, a redundancy will be considered genuine if it is made for valid commercial or strategic reasons.

4. Procedural fairness

4.1. The business has a duty to deal with its employees in good faith. This means that the process of making employee/s redundant must be fair. The business also owes its employees certain other duties. There is the duty to consider alternatives, such as redeployment, the duty to give reasonable notice and the duty to consult.

5. Duty to consider alternatives

5.1. The business should consider alternatives to redundancy. This may include considering redeployment, transferral or retraining, or expansion into related areas of endeavour.

5.2. If a new role is to be created which is substantially the same as a previous role, an employer may be obliged to redeploy the employee to that role.

5.3. Once a final decision has been made to make the employee/s redundant, it will also be necessary to give the employee/s who will be made redundant reasonable notice of the pending redundancy. Notice is designed to give the employee the opportunity to become accustomed to the change in circumstances, and to seek alternative employment.

5.4. If it can be reasonably accommodated by the business, the employee/s should be able to have reasonable time off to attend interviews during the notice period.

5.5. The employment agreement may also provide that notice can be paid out. Consider the needs of the business and any requests that the employee/s may have about whether notice is to be paid out or worked out.

6. Duty to consult

6.1. The business has a duty to consult with the employee/s before making any final decision to make the employee/s redundant. This means telling the employee in some detail what the business is proposing and providing the employee with all relevant information regarding the proposal.. The employee should be given the opportunity to express the employee/s view on the proposal. The business will then need to consider any responses the employee/s has made before deciding what to do. This does not mean that the business is not allowed to already have a proposal in mind. It means that the business must be open to the possibility of changing that proposal if another suitable one can be reached.

7. Selection criteria

7.1. There may be a need to select which employee/s is made redundant. The business must only consider criteria that are relevant.

7.2. The criteria for selection will largely be formed by the reasons for the redundancy.

7.3. The criteria should be clearly communicated to the employee/s likely to be effected, and they should be given the opportunity to discuss the criteria during the consultation process. It is always helpful if the criteria can be measured objectively, but this may not always be possible. Other selection criteria includes the "last on first off" principle.

8. Suggested process

8.1. The business should prepare a letter which will be provided to the effected employee/s. This letter should:

(a) outline in reasonable detail the background circumstances that have made the business consider redundancy;

(b) advise any selection criteria that the business is considering using;

(c) advise the process the business intends to follow for consultation (eg: a meeting with individual employees);

(d) make it clear that the employee is entitled to bring a support person to any meeting/s;

(e) detail the process after consultation has taken place and when the business is likely to respond with its decision; and

(f) confirm that while a final decision has not been made, a possible outcome is that the employee's position may be made redundant and that the employee's employment may need to be terminated.

8.2. During the consultation process the employee may request further information. Unless there are reasonable reasons to withhold that information, the information should be provided. It is important to remember that in order for the consultation process to be effective, it will require disclosure of information and meaningful discussion before any final decision is made. It is not a discussion about how the decision is going to be implemented.

8.3. At the meeting the business will discuss the background issues and will ask for a response from the employee in relation to the issues raised in the letter which require business to consider redundancy. The business should consider the employee's response, including any views on alternatives to redundancy or suggestions as to how business processes may be undertaken so as to avoid the redundancy. The employee may also make or have suggestions on redeployment and/or retraining.

8.4. After the meeting the business should consider the employee/s response. Unless there are reasons that would justify a reasonable employer changing its proposal for redundancy the business can make a final decision on whether to proceed with terminating the employee/s employment.

8.5. The process of termination must be in accordance with any terms set out in the employment agreement.

9. Specific advice

9.1. The comments and procedure set out in this document are general in nature. If there is any doubt, the employer should obtain specific advice.

Checklist for Workplace Accidents (Serious Harm)

This checklist summarises some of the main points an employer should bear in mind when someone is seriously harmed at work.

1. What is serious harm?

1.1. Serious harm includes:

(a) Permanent loss of bodily function, or temporary severe loss of bodily function (including, respiratory disease, noise induced hearing loss, neurological disease, cancer, dermatological disease, communicable disease, musculoskeletal disease; illness caused by exposure to infected material, decompression sickness, poisoning, vision impairment, chemical or hot metal burn of the eye, penetrating wound, bone fracture, laceration and crushing);

(b) Amputation of a body part;

(c) Burns referred to a specialist medical practitioner or specialist outpatient clinic;

(d) Loss of consciousness or acute illness requiring treatment from lack of oxygen or from absorption, inhalation or ingestion of any substance;

(e) Any harm requiring hospitalisation of 48 hours or more within 7 days of the harm's occurrence.

2. When serious harm occurs

2.1. When someone is seriously harmed at work, do not (unless authorised by a Labour Inspector) remove or in any way interfere with or disturb anything related to the incident, except to the extent necessary to:

(a) Prevent death, harm or suffering;

(b) Maintain essential services or facilities;

(c) Preserve property.

2.2. Do not disturb or interfere with the incident where there is an accident involving serious harm involving a motor vehicle on a public highway, or where it is being investigated by the Police.

3. Improvement or Prohibition Notices

3.1. If an Improvement Notice or Prohibition Notice is issued by a Labour Inspector:

(a) Comply with the Improvement Notice;

(b) Ensure that no action is taken in contravention of a Prohibition Notice (and do not remove a Prohibition Notice unless authorised by a Labour Inspector; or

(c) Consider appealing the Notice (application must be made within 14 days).

4. Powers of Labour Inspector

4.1. An Inspector may at any reasonable time enter the workplace and conduct examinations, tests, inquiries and inspections (or direct the employer to do so).

4.2. An Inspector may require the place of work to be not disturbed for a reasonable period pending any examination, test, inquiry or inspection.

4.3. An Inspector may require the employer to:

(a) Produce documents or information (and to take copies);

(b) Provide statements about conditions, materials or equipment.

5. Duties of the employer to the Labour Inspector

5.1. Comply with any lawful request made by an Inspector (refer to the powers of an Inspector above).

5.2. Do not without reasonable cause obstruct, delay, hinder or deceive an Inspector.

6. Right to silence

6.1. Where an Inspector is conducting enquiries that may lead to a prosecution, the Inspector is entitled to ask questions of anyone, suspected or otherwise.

6.2. Persons questioned are entitled not to answer any question or terminate the discussion.

6.3. The Inspector may assert a right to have questions answered. If so, the Inspector must advise the person of any statutory limits on his or her powers.

6.4. Importantly, no person is required to give any answer or information that may incriminate that person.

7. Reports on work accidents

7.1. The Ministry of Business Innovation and Employment only needs to be notified of workplace accidents in the event of serious harm (as defined). The proscribed form requires the employer to notify the Department as to whether or not an investigation has been carried out. The form does require the employer to provide the Department with their investigation report. If the report may incriminate the employer then the employer may withhold the report.

8. Specific advice

8.1. The comments in this document are general in nature. If there is any doubt, the employer should obtain specific advice.

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