

# Employment Law

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## Employees - your greatest asset and your biggest headache?

Good staff can be a tremendous asset but when things go wrong it can be a nightmare. One of the most important things you can do is get it right from the beginning. This means working out what employment arrangements you need for your business and documenting these through a written employment agreement.

### Types of employment:

#### ***Permanent Employment***

Permanent employment is where employees stay employed until they choose to resign or until the employer has justification to terminate their employment. The employment does not come to an end automatically at the end of a season. Employees who are not temporary or casual are usually permanent employees, even if they only work part time.

Likewise, employees who have been on fixed term contracts that are renewed annually are probably permanent and not fixed term, despite the contract saying otherwise. The reason why the position is only for a fixed period must be a genuine business reason. You cannot use a fixed term agreement to trial a staff member. Examples of genuine reasons could be the employer's general contract is for a dairy season period of ten months, and the employer will not require the employee's services when that contract comes to an end. However, note that to tie in with the end of a dairy season is not a sufficient reason in itself.

#### ***Fixed Term Agreements***

In a fixed term agreement, the duration of the agreement may be either fixed by the date or by an event. If the fixed term is for genuine reasons, which both employee and employer understand, they will be lawful. In practice, genuine reasons as accepted by the Courts appear to be those where the employer was able to refer to operational reasons, to justify a fixed term. If an employer fails to show that the fixed term was genuine, reasonable, or that the reason was in writing, then the fixed term appointment is turned into a permanent appointment of indefinite duration.

The Employment Relations Act includes a requirement that the fixed term employment agreements must state in writing the way in which the employment will end and the reason for ending the employment in that way. Failure to comply with these requirements means that the fixed term arrangement is ineffective to end the employee's employment.

### ***Casual Employment***

The third and final type of employment agreement is a casual employment relationship. This is when an employer requires an employee on an 'as and when required' basis. Casual employments are used to engage an employee to work for a specific and short period of time. For example, to cover a staff member on annual leave or sick leave. Although there may be subsequent engagements beyond the first engagement, the key principle is that there should be no continuing expectation of work on the part of either party. If the term of an engagement exceeds a week or two, you should consider a fixed term agreement instead.

It is a good idea to fill out a schedule at the back of the Federated Farmers' casual employment agreement for each new engagement that is agreed to. This should be done before the employee starts work.

If the employer offers the employee any further engagements in the future then each engagement is a standalone engagement with no expectation of continuing employment and the terms of the agreement apply to the new engagements. The employee may, but is not obliged to, accept future work. However, once work is accepted, the employee is committed to that work. Either party can terminate an agreement by giving one working day's written notice to the other party at any time unless the agreement is terminated summarily by the employer for serious misconduct.

Casual arrangements are tricky, as when the work develops a sense of continuity and regularity it can become a permanent employment arrangement. This means that discontinuing the employment may amount to a dismissal with the potential for a personal grievance claim. In many instances, what happens is that over time, and with familiarity, the employment pattern will become regularised.

Also, if the casual employee is given a great deal of responsibility or reliance, this could be an indication it is no longer casual. Examples could be:

- the employee having sole responsibility of an area on the farm
- Having keys to unlock property or equipment, or
- the employee has information that no one else has and is needed by the employer.

### ***Summary - types of employment***

Remember:

- 1 Permanent employment is where the employment is ongoing and not for a definite period. It can be brought to an end by the resignation of the employee, or termination by the employer under the agreement terms (eg misconduct or redundancy).
- 2 A fixed term - this is for a defined period. It has a definite start and end date and the reason for this must be stated in the agreement.
- 3 Casual - this is suitable when the employment is on an 'as and when required' basis with no continuing expectation of employment.

## **Written employment agreement**

Under the Employment Relations Act, an employer must have a written employment agreement for new employees. An employer must:

- provide the employee with a copy of the intended agreement,
- advise the employee that he or she is entitled to seek independent advice about the intended agreement, and
- give the employee a reasonable opportunity to seek that advice and consider any issues the employee raises and respond to them.

Failure to comply can result in a fine. Not having a written employment agreement also opens an employer up to risk if there is a dispute about an employee's entitlements or about the correct procedure to follow if there are problems.

As at March 2010 last year about a quarter of farm owners still did not have written employment agreements for their staff - this is concerning given the requirement that employment agreements be in writing has been around for a decade.

The Employment Relations Act sets out the minimum terms and conditions which an agreement must include, namely:

- the names of the parties,
- description of the work to be performed by the employee,
- an indication of where the employee is to perform the work,
- an indication of the arrangements relating to the times the employee is to work,
- the wages or salary payable to the employee, and

- a plain language explanation of services available for the resolution of employment relationship problems, including a reference to the period of 90 days within which a personal grievance may be raised.

Also, under the Holidays Act 2003, an employer is required to inform its employees that they can obtain further information about the entitlements under the Act from the Department of Labour or the union if applicable.

There are also a number of clauses that are important to include. For example, if you are providing accommodation to your employees as part of their employment, this needs to be included in the employment agreement. Other clauses might include the use of work vehicles, meal breaks, process for salary review, and medical examination and drug testing.

Employees have comprehensive rights within the ERA, but employers have few, therefore it is important to agree on such terms from the outset to help maintain a healthy employment relationship than trying to negotiate problems that develop after the relationship has broken down.

### ***Trial Periods***

In permanent and fixed term agreements, there is the availability of a trial period or probationary period. These permit you to dismiss the employee providing you give the employee reasons for the dismissal when giving notice of the dismissal within the 90 day period. You can only use the trial period clause if you have not employed the employee before (this includes part time and casual employees, as well as employees who have worked for you even one day before accepting the agreement).

You must make sure that the employee is aware of the clause before signing and they have sufficient time to seek independent advice about the clause before accepting the agreement.

It is important to remember that if you want to take advantage of the 90 day trial period, the employee must sign the contract and agree to the clause before the start of employment, otherwise the clause is not effective.

### ***Summary - written employment agreements***

Remember:

- 1 You **must** have a written signed employment agreement. Keep it safely filed.
- 2 There are some minimum statutory requirements - you must get the agreement right.
- 3 Get it signed before the employee starts work.

4            Include a trial period if you want, but don't let the employee start before it is signed.

### ***When things go wrong***

If an employee is performing poorly or does something wrong, an employer must manage the situation carefully, and follow a proper process that complies with the rights and obligations of both parties.

The same basic principles of natural justice apply in each scenario but there are differences in the processes that need to be followed. This presentation focuses on misconduct/serious misconduct and poor performance. Other common situations include redundancy and termination of medical incapacity grounds.

### ***Misconduct/serious misconduct***

Whether the employer believes that an employee's behaviour amounts to misconduct or serious misconduct, a full and fair investigation should always precede any decision about what, if any, action would be appropriate to take in the circumstances. An investigation must be carried out in a manner that is fair to the employee and must be commenced promptly (otherwise you may find yourself in a position where the passage of time precludes you from pursuing an investigation or taking action).

### ***Suspension***

In some instances where serious misconduct is alleged, it may be appropriate to suspend the employee prior to instigating an investigation. This is a serious issue because it interferes with an employee's right to work. Further it is normal to suspend an employee on full pay, and that a situation would have to justify why you might decide to suspend an employee without pay.

You should always check the employee's employment agreement and your policies, and before an employee can be suspended they must be given the opportunity to comment on the proposed suspension.

### ***Investigation***

The next step is for the employer to commence an investigation. In the first instance you will need to let the employee know about your concerns and meet with the employee to hear their side of the story.

Therefore, the first step is for you to write to the employee, and you must include the following:

- Advise the employee of the allegations, and provide an explanation of the facts giving rise to your concerns,
- Clearly explain what he or she has alleged to have done and provide recent and specific examples where relevant,
- include all copies of the information generated from your enquiries, including but not limited to any emails or letters that may be relevant and/or statements from witnesses or copies of customer complaints.
- indicate that you have not formed a final view on the matter because you want to hear from the employee first
- Indicate that you have set up a meeting to enable the employee to provide a response, that is their opportunity to provide an explanation or to comment on the issues
- tell the employee that a possible outcome of the meeting is that there will disciplinary action taken, that dismissal may ensue or some less disciplinary action, such as a warning may be given
- that the employee is entitled to have an advocate or support person with him at the meeting.

#### *Meeting at first instance*

At the meeting the facts giving rise to the allegation of misconduct should be briefly explained to the employee. You should also explain the process that you intend to follow in carrying out your investigation, that is, what is likely to happen after the meeting.

The employee must be given the opportunity to be heard. This is his chance to explain or comment on the issues of concern. You can ask any questions that you may have. You should never go to a meeting with a warning or dismissal letter already prepared or indicate to the employee that you have already made your decision.

After the meeting you must consider the employee's explanation with an open mind and take due notice of what is said. This does not necessarily mean that you have to believe the employee but rather that the employee's comment should be carefully considered before you form a view about what may have occurred.

Subject to what the employee said you may need to make additional enquiries as necessary for example additional witnesses may need to be interviewed. The employee must

also be given the opportunity to comment on any information uncovered by these further enquiries before you can form a view about what may have occurred.

Like the previous disciplinary meeting discussed it is recommended that you take at least overnight to consider the employer's explanation before issuing a decision. Remember that if it is appropriate you can make a tentative decision and give the employee the opportunity to comment on that decision either in writing or at a meeting.

What an appropriate outcome is would depend on whether the employee's behaviour amounts to misconduct or serious misconduct. This will depend on:

- the context and circumstances of each case and the fact and degree of the alleged misdemeanour
- any relevant provisions in the employment agreement that may have indicated certain types of behaviour as amounting to either, or
- Repeated instances of misconduct can amount to serious misconduct.

### *Misconduct*

If after the meeting you decide that the employee's behaviour amounts to misconduct, at least one warning should be issued to the employee before any action to dismiss is taken. Depending on your employment agreement you may have to issue a primary warning and then a secondary and final warning.

- The Federated Farmers employment agreement edition prior to April 2011 provides for a written warning followed by a final written warning before dismissal is an option.
- The Federated Farmers agreement dated 11 April 2011 onwards does not set out procedure and therefore allows more flexibility such as issuing only one warning.

Ordinary misconduct will be conduct that is harmful to trust and confidence but to a lesser degree. It will not justify a dismissal although it may lead to a warning which, when considered with other warnings may justify dismissal.

Examples of such conduct may be:

- negligence,
- failure to follow processes and instructions,

- conflict of interest,
- swearing,
- bringing the employer into disrepute,
- personal activities outside the workplace, and
- Wasting of company time or resources.

Remember that the employment agreement and policies may only prescribe a minimum procedure, ultimately your decision should be based on what is reasonable.

The warning must include what the employee has done that is unsatisfactory, how the employer *expects the employee's behaviour to change, and if there is a repeat of the behaviour the employee is liable to be dismissed.*

#### *Serious Misconduct*

If you decide that the employee's behaviour amounts to serious misconduct then you can move to dismiss even if the employee has not previously received a warning.

The Court of Appeal has suggested that in order for a instant dismissal on the basis of serious misconduct, the employee's conduct will have to be such that a fair and reasonable employer could see as deeply impairing of the basic confidence and trust essential to the employment relationship. Some examples of this could be things like:

- theft,
- dishonesty,
- sexual harassment,
- lawful disobedience,
- intoxication at work,
- insubordination and threats.

We recommend that where you do decide that dismissal may be appropriate you present it as a tentative decision to the employee in the first instance. This is because the employee can then be invited to comment on your reasoning and the proposed dismissal before a final decision is made, which has the advantage of ensuring that if there are any inaccuracies or gaps in your facts the employee can correct them

The tentative decision can be conveyed to the employee in writing and the employee can be given a timeframe within which to respond. Alternatively you can offer or employee can



request a meeting to provide their comments. After you have considered the employees comments a final decision can be made.

Best practice is when the employee is asked to attend a meeting where you convey your decision to dismiss so that a decision is communicated to the employee face to face. A written copy of your decision can be given to the employee in writing subsequent to the meeting.

A relatively common ground upon which dismissals will be found to have been unjustified is where the treatment of the employee was disparate to that of another employee. This can invalidate a dismissal that was otherwise justifiable. Thus whatever action against the employee is being considered, employers should consider comparable circumstances in the past and treat a present employee in the same manner.

### ***Summary - misconduct***

Remember:

- 1 Consider if suspension is appropriate but you need to discuss this with the employee first.
- 2 Investigate the misconduct thoroughly and provide the employee with all relevant information.
- 3 Meet the employee and allow him or her the opportunity to explain. Provide time for this and allow the employee to bring a support person.
- 4 Consider all relevant circumstances and the explanation provided before making the decision.
- 5 Consider any alternatives to dismissal.
- 6 Get advice if necessary before taking the final step.

### ***Poor Performance***

If an employee is performing poorly, he or she should be given a reasonable opportunity to improve before disciplinary action (eg a warning) is considered.

An employer should tell the employee that there are concerns with his or her performance. Be specific: telling an employee that they need to pull their socks up without providing any specific examples or further explanation will not get either party very far. Consider whether there is a way for the employer to assist the employee in meeting required standards - is training an option?

A common way to manage poor performance is to place the employee on to a performance improvement plan with set review periods. At the end of each review period the

employer may consider a disciplinary process if the employee's performance still does not meet the required standards.

If, for example, an employee is placed on a three month performance improvement plan, then the first review period would be at the end of the first month. The employer should give the employee regular feedback during the month on their progress against the objectives set for them. If at the end of the first month the employer is not satisfied with the employee's performance then a disciplinary process would be appropriate.

#### *Disciplinary process for performance*

In the cases of poor performance a warning must always precede any action to dismiss. Therefore, the first outcome of a disciplinary process, if any, would be a warning.

Warnings must be administered in a procedure fair way. Giving notice involves the following stages:

- 7 notification letter
- 8 a meeting to hear what the employee has to say
- 9 Decision, with another letter confirming the outcome.

#### *Notification Letter*

The notification letter will advise the employee that you have concerns, provide an explanation of the problems or issues, and provide specific examples where possible. It will also have to have detail about any specific allegation against the employee along with any supporting documentation.

When you advise the employee that you have concerns and you provide examples in accordance with the advice provided today, note that the concerns should be as recent and/or current examples of non-performance as possible. Performance concerns have a short shelf life and if they are not raised straightaway then they may expire. You should not stockpile lots of different issues and raise them all at once - concerns should be addressed as they occur or as they come to your notice. A failure in this regard may render any warning given unjustified and result in a successful personal grievance claim.

Reference should also be made to any informal approach by which you may have attempted to deal with the performance concerns in first instance if this has occurred. Reference to this information will show that you have been reasonable and not have rushed into institute a disciplinary process, and that you have genuinely attempted to assist the employee in reaching the standard that you require.

Indicate in the letter you have not formed a final view on the matter because you want to hear from them first, and you have set up a meeting to enable them to do that. This is the employer's opportunity to provide an explanation or comment on the issues at hand.

Tell the employee in the notification letter that a possible outcome of the meeting is that disciplinary action will be issued, such as a primary or secondary warning. You should also tell the employee that they are entitled to have representation or a support person at the meeting.

### *Meeting*

At the second stage, the meeting, you must consider the employee's explanation and consider the employee's comments with an open mind and take due notice of what is said. This does not mean you have to accept the view of an employee but rather the employee should have a chance to comment and that comment should be taken into account.

It is recommended that you take at least overnight to consider the employee's explanation. This is to ensure that you do not react in the heat of the moment but rather have some space in which to consider the situation and the best way to proceed. After you consider the employee's explanation you need to make a decision and convey your decision to the employee in writing.

If you decide that all the employee needs was just some extra support and training, you can write to the employee to inform them of your decision not to issue a warning and what they are required to do in terms of training and support. However, after hearing from the employee you decide that a warning should be issued then you need to draft a warning letter and meet with the employee to provide that warning in the letter.

### *Decision, supported by a further meeting and letter*

The letter must include:

- what the employee has done or not done that is unsatisfactory,
- what you expect the employee to do to meet your required standards (a good idea is to set easily measurable standards because they can be easily tested later, ie become at least 99.5% accurate in each stock take is much easier to test and much fairer),
- the time period the employee has to meet the standards along with an indication that the matter will be reviewed then,
- indicate that the training or other assistance will be given to the employee, depending on what assistance that has already been provided in the past,

- indicate that should the employee fail to meet the required standards they may be dismissed, and
- that the warning will expire when the employee improves to the standard required.

You should have another meeting to inform the employee of your decision and plan of action before you provide the warning letter. If your employment agreement or policy is to have a process for warnings then you should follow that process as a minimum. For example, the Federated Farmers Employment Agreement Edition dated April 2011 simply requires a warning to be given. This could technically permit a verbal warning although we would advise that such a warning is put formally in writing anyway.

The purpose of meeting with the employee is to verbally convey your decision of a warning, reasoning and expectations moving forward to the employee face to face. You can use the draft of a warning letter as your script. This is also the employee's chance to ask questions or discuss any matters that may be of concern to them, such as the provision of training and support.

If as a result of a discussion with the employee amendments need to be made to the letter, then these can be done after the meeting and before the letter is issued to the employee. You can provide the employee with a provisional warning either at the end or after the meeting if no amendments need to be made and ensure a copy is placed on their personnel record. After the warning is given you must meet with the employee on a regular basis to assess and encourage the employee's performance.

*After the time-period has expired*

If, by the end of the timeframe stipulated, the matters of concern appear to have been satisfactorily addressed the matter can end there. The employee should be told preferably in writing, that their performance has reached the standard required and no further action will be taken.

- Any warning given during the period of performance management is likely to expire when the employee improves to the standard required. A note can be made as an addendum to the warning on the employee's personnel file at the end of the performance management process when the employee's performance has reached the required standard. This is suggested as it will prevent the employee from being disadvantaged by having an open warning on their file after their performance has improved.

However, if there is little or no improvement then you will have to decide whether dismissal is warranted or the timeframe to enable additional monitoring should be extended.

You can only dismiss an employee for poor performance after a warning has been issued and the employee has been performance managed in accordance with the previous advice. Any decision to dismiss has to be in the context of the current warning, and you cannot rely on any expired warnings to dismiss - expired warnings must be referred to by way of background only.

Generally in situations where the dismissal is for poor performance, the employee works out his or her period of notice, although this can depend on the provisions of your employment agreement and could also be varied by agreement with the employee.

### **Summary - poor performance**

Remember:

- 1 Set the standard you expect and monitor proactively.
- 2 Notify employee in writing of concerns if no improvement.
- 3 Meet to discuss and hear employee's explanation.
- 4 Give warning and a time to improve. Provide support.
- 5 After reasonable period, if no improvement, meet again and listen to explanation.
- 6 Consider and decide whether final warning or termination of employment is appropriate. Consider any other alternatives (eg redeployment to more suitable role?).
- 7 Get advice if unsure.

### **Latest employment law changes explained**

One of the first main changes relates to the 90 day trial period. Now all employers will be able to use the 90 day trial period, not just employers of 20 staff or less.

However, the 90 day trial period does not automatically apply and it needs to be by written agreement and must be agreed to before employment commences. The first case in court to consider the 90 day trial period provision held that a woman, who worked for one day before signing the employment agreement, had 'previously been employed by the employer' and therefore section 64A did not apply.

If an employee is dismissed within the 90 day period the employee can still bring a personal grievance. However, this cannot be in relation to dismissal, rather in relation to:

- sexual or racial harassment,

- discrimination,
- unjustified action causing disadvantage,
- duress or
- Failure to comply in business transfer provisions.

Another latest changes is as of 1 April 2011, employers and employees are able to agree to transfer the observance of public holidays to another working day to meet the needs of the business or the individual needs of the employee. An employer and employee should make the agreement in writing. If the employee works on a day that the public holiday is transferred to, then they are entitled to be paid time and a half for hours worked and to receive a whole day's alternative holiday.

There has also been a new minimum wage set:

- As of 1 April 2011 the adult minimum wage rates, that apply for employees who are 16 or over, is \$13 per hour.
- The rates that apply to new entrants and employees on the training minimum wage is \$10.40 per hour.
- A new entrant's minimum wage applies to employees aged 16 and 17, except for those who have completed 200 hours or three months' employment in the workforce, or who are supervising the training of other workers.

As of 1 April 2011, employees are now able to ask the employer to pay out and cash out to one week of their minimum entitlement to annual holidays per year.

### ***Summary - latest employment law changes***

Remember:

- 1 90 day trial period is now available to all and can be used to establish suitability.
- 2 By agreement an employee can transfer the observance of a public holiday to another working day.
- 3 There is a new minimum wage \$13 per an hour for an adult.
4. Employees can by agreement cash out up to one week's annual leave. You don't have to agree.