

Employment Matters & Disputes

Presentation to:



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*Solving problems & providing
solutions for Employers*



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103A Test of Justification

- (1) For the purposes of [section 103\(1\)\(a\)](#) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (3) In applying the test in subsection (2), the Authority or the court must consider—
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.
- (4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.



103A Test of Justification

- (5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
- (a) minor; and
 - (b) did not result in the employee being treated unfairly.

Section 103A: substituted, on 1 April 2011, by [section 15](#) of the Employment Relations Amendment Act 2010 (2010 No 125).



The Investigation Process

It must be an unbiased investigation without pre-determination of the outcome.

- Maintain an Independent assessment
- Inform the Employee of the Investigation
- Carry out investigation
- Provide all relevant facts to the Employee
- Provide information on the process you intend to follow
- Advise the seriousness of it
- Seek explanations from the Employee – listen and clarify
- Make decisions based on the explanations supplied against known facts
- Advise the outcome of your investigation and proposed action to be taken
- Ensure the employee has the option of Support or Representation



Good Faith

4. Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

- (a) must deal with each other in good faith; and
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
- (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
- (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the employment of 1 or more of his or her employees to provide to the employees affected—
 - (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
 - (ii) an opportunity to comment on the information to their employer before the decision is made.

Discrimination

104 Discrimination

- (1) For the purposes of [section 103\(1\)\(c\)](#), an employee is *discriminated against in that employee's employment* if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in [section 105](#), or by reason directly or indirectly of that employee's refusal to do work under [section 28A](#) of the Health and Safety in Employment Act 1992, or involvement in the activities of a union in terms of [section 107](#),—
- (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
- (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
- (c) retires that employee, or requires or causes that employee to retire or resign.
- (2) For the purposes of this section, *detriment* includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.
- (3) This section is subject to the exceptions set out in [section 106](#).

Compare: 1991 No 22 s 28(1)

Section 104(1): amended, on 5 May 2003, by [section 33\(1\)](#) of the Health and Safety in Employment Amendment Act 2002 (2002 No 86).

Sexual Harassment

108 Sexual harassment

- (1) For the purposes of [sections 103\(1\)\(d\)](#) and [123\(d\)](#), an employee is *sexually harassed in that employee's employment* if that employee's employer or a representative of that employer—
- (a) directly or indirectly makes a request of that employee for sexual intercourse, sexual contact, or other form of sexual activity that contains—
 - (i) an implied or overt promise of preferential treatment in that employee's employment; or
 - (ii) an implied or overt threat of detrimental treatment in that employee's employment; or
 - (iii) an implied or overt threat about the present or future employment status of that employee; or
 - (b) by—
 - (i) the use of language (whether written or spoken) of a sexual nature; or
 - (ii) the use of visual material of a sexual nature; or
 - (iii) physical behaviour of a sexual nature,—directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee (whether or not that is conveyed to the employer or representative) and that, either by its nature or through repetition, has a detrimental effect on that employee's employment, job performance, or job satisfaction.
- (2) For the purposes of [sections 103\(1\)\(d\)](#) and [123\(d\)](#), an employee is also *sexually harassed in that employee's employment* (whether by a co-employee or by a client or customer of the employer), if the circumstances described in [section 117](#) have occurred.

Compare: 1991 No 22 s 29

Racial Harassment

109 Racial harassment

•For the purposes of [sections 103\(1\)\(e\)](#) and [123\(d\)](#), an employee is *racially harassed in the employee's employment* if the employee's employer or a representative of that employer uses language (whether written or spoken), or visual material, or physical behaviour that directly or indirectly—

(a) expresses hostility against, or brings into contempt or ridicule, the employee on the ground of the race, colour, or ethnic or national origins of the employee; and

(b) is hurtful or offensive to the employee (whether or not that is conveyed to the employer or representative); and

(c) has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance, or job satisfaction.

Sexual or racial harassment by person other than Employer

117 Sexual or racial harassment by person other than employer

(1) This section applies where—

- (a) a request of the kind described in [section 108\(1\)\(a\)](#) is made to an employee by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or
- (b) an employee is subjected to behaviour of the kind described in [section 108\(1\)\(b\)](#) by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer; or
- (c) an employee is subjected to behaviour of the kind described in [section 109](#) by a person (not being a representative of the employer) who is in the employ of the employee's employer or who is a customer or client of the employer.

(2) If this section applies, the employee may make a complaint about that request or the employer. behaviour to the employee's employer or to a representative of the employer.

(3) The employer or representative, on receiving a complaint under subsection (2), must inquire into the facts.

(4) If the employer or representative is satisfied that the request was made or that the behaviour took place, the employer or representative must take whatever steps are practicable to prevent any repetition of such a request or of such behaviour.

Compare: 1991 No 22 s 36(1), (2)

Table 1: Bullying behaviours – personal and task related

Personal attacks (direct)	Task-related attacks (indirect)
Belittling remarks – undermining integrity – lies being told – sense of judgement questioned – opinions marginalised	Giving unachievable tasks – impossible deadlines – unmanageable workloads – overloading – ‘setting up to fail’
Ignoring – excluding – silent treatment – isolating	Meaningless tasks – unpleasant jobs – belittling a person’s ability – undermining
Attacking a person’s beliefs, attitude, lifestyle or appearance – gender references – accusations of being mentally disturbed	Withholding or concealing information – information goes missing – failing to return calls or pass on messages
Ridiculing – insulting – teasing – jokes – ‘funny surprises’ – sarcasm	Undervaluing contribution – no credit where it’s due – taking credit for work that’s not their own
Shouted or yelled at	Constant criticism of work
Threats of violence	Underwork – working below competence – removing responsibility – demotion
Insulting comments about private life	Unreasonable or inappropriate monitoring
Physical attacks	Offensive sanctions – eg denying leave
Public humiliation	Excluding – isolating – ignoring views
Persistent and/or public criticism	Changing goalposts or targets

Personal attacks (direct)	Task-related attacks (indirect)
Using obscene or offensive language, gestures, material	Not giving enough training or resources
Ganging up - colleagues/clients encouraged to criticise you or spy on you - witch hunt - dirty tricks campaign - singled out	Reducing opportunities for expression - interrupting when speaking
Intimidation - acting in a condescending manner	Sabotage
Intruding on privacy, eg spying, stalking, harassed by calls when on leave or at weekends	Supplying incorrect or unclear information
Unwanted sexual approaches, offers, or physical contact	Making hints or threats about job security
Verbal abuse	No support from manager
Inaccurate accusation	Scapegoating
Suggestive glances, gestures, or dirty looks	Denial of opportunity
Tampering with personal effects - theft - destruction of property	Judging wrongly
Encouraged to feel guilty	Forced or unjustified disciplinary hearings
	Lack of role clarity
	Not trusting

Documentation you **MUST** have for every **Employee:**

Prior to offering employment:

- Application Form
- Copy of a CV (Employment history)

When you offer a job to an Applicant:

- Letter of offer
- Position Description
- Employment Agreement
- Employee Detail Form
- Company Work Rules



Time & Wage Record Keeping

- The importance of keeping proper time and wage records should never be underestimated. Keeping good records is not only sound commercial sense, but also a legal requirement and is strongly enforced by MBIE as a spate of recent awards demonstrate.
- A number of businesses found out recently that the cost of getting record keeping wrong, or not keeping records, has serious financial consequences. In addition making good any underpayment that may have occurred, these businesses were also fined for failing to keep records – including time records, wages books and employment agreements.
- The fines imposed for the breach ranged between \$4,000 and \$50,000, plus tens of thousands in wage arrears. In the absence of records held by the employer any arrears of wages claim will be based on information supplied by the employee.

