# Guide to Termination of Employment

If you watch The Apprentice or Shortland Street you could be misled that it is easy for an employer to say, "you're fired" or "I'm giving you a warning". In reality, New Zealand employment legislation and case precedent requires employers to follow rigorous procedures before they confirm a written warning or terminate employment.

In this guide we outline both common and less common grounds for termination of employment. The guide is not designed to be fully comprehensive, but to provide principles and considerations for employers or employees when they are faced with potential termination of employment.

When either an employer or an employee is considering ending an employment relationship, it is recommended that they seek legal or expert advice on their rights and obligations.

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# Grounds for termination of employment

## Resignation

An employee can resign at any time. The resignation process starts with the employee handing in their notice. The employer should then:

a. Ensure they have received the notice in writing, including the intended last date of work. If the employee has not provided notice in writing, the employer can consider summarising the employer's understanding in writing (e.g. a letter or email) back to the employee, and asking the employee to correct or confirm that understanding.
b. Check the employee's Employment Agreement for any conditions of resignation e.g. length of notice, restraint periods, equipment/property to return, final deductions (for example bonds for training) etc.
c. Discuss any conditions with the employee and agree on a last working day.
d. Respond in writing to the employee to accept their resignation, outlining any agreements or requirements of the employee. Note, unless otherwise stated in the Employment Agreement, if an employee does not wish to work their full notice period then the employer has no obligation to pay the employee for any unworked days. If the employer wishes the employee not to work their notice period (or any part of it), for which the employee is available, then the employer must still pay the employee for any unworked days during their notice period.
e. Calculate the employee's final pay, and once paid, provide the employee with a payslip. This will include any outstanding wages or salary, as well as any annual leave entitlements, or other provisions in the Employment Agreement. Less any deduction amounts agreed in writing.
f. Once the employee no longer requires company property for work purposes, the employee will ensure they return it (before the last working day)
g. The employer is obligated to provide the employee with a Certificate of Service, which outlines the dates of employment and roles held.
h. The employer may also choose to conduct an Exit Interview to understand any areas in which the company can improve going forward.

If an employee has resigned in the heat of the moment, or in emotional or tense circumstances, then the employer should provide the employee with a set period of time in which the employee could reconsider and withdraw their resignation. Examples of this may include an employee who resigns after an argument, or an employee who resigns after disclosing allegations of bullying in the workplace. An employer who does seek to rely on a resignation in such circumstances, without first providing an opportunity for the employee to reconsider their resignation (and in the case of allegations of bullying – confirms these will be investigated), risks later facing a personal grievance for constructive dismissal.

# Redundancy

If an employee's position is disestablished as the result of a change consultation process (often called a restructure), then the employer will provide the notice period in the employee's Employment Agreement. The Employment Agreement may also provide for additional redundancy compensation.

The change consultation process involves:

a. presenting to the potentially impacted employee, the rationale for why the company proposes that the employee's position is disestablished;
b. giving the employee a reasonable opportunity to provide critical feedback on that decision or suggest alternatives;
c. the employer considering all feedback and alternatives; and
d. then (and only then) making a decision on whether the position will or won't be disestablished. A disestablished role is no longer required by the organisation. This decision relates solely to the role requirements, and not the incumbent of the position.

The initiation of a change consultation process could be because of internal drivers e.g. growth or decline of an organisation, a change in strategic direction, or alternatively a response to an external stimulus e.g. a response to new technologies or regulations.

There may also be a proposal that all or part of the business is sold, outsourced or transferred to another party. If this occurs, the employer must consult with the other party following the process set out in the "Employee Protection Provision", a mandatory clause in every employees' employment agreement. If the employee is part of a specified group of workers, referred to as 'vulnerable workers' (includes certain cleaning, catering, laundry services, and security workers), then they are afforded additional protections. In brief, where a vulnerable employee's work will be taken over by a different employer, the rules give these employees the right to transfer over to the new employer on their existing terms and conditions of employment. These clauses do not apply in instances of the sale or transfer of shares in a company or when the employer is bankrupt, in receivership or in liquidation.

# Trial period

Employers with 19 or fewer employees (at the beginning of the day on which the employment agreement is entered into) may employ a new employee on a trial period for the first 90 calendar days of their employment. "Entered into" means the date a non-conditional verbal offer has been accepted, or the day both the employer and a candidate have signed the Employment Agreement. A "new employee" means one who has never previously been employed by the company in any capacity, including as a casual employee.

If an employer is not satisfied with the employee's progress or delivery during the trial period, the employer may utilise the trial period clause of the employee's Trial Period to terminate their employment. The notice must be given to the employee before the 90-day notice period concludes. The employer must pay the employee for the length of the notice period in the Employment Agreement but may choose for the employee not to work all or part of that notice period.

The employer does not have to give the employee reasons why they are deciding to terminate employment during the trial period, nor give the employee a chance to comment, however, the employer must treat the employee in Good Faith, which means being communicative throughout their employment. This might look like giving regular feedback and providing reasonable training. It is recommended that if the employer is thinking of terminating under the Trial Period, they let the employee know what the areas of concern are that may lead to that decision.

A trial period is only valid if:

a. The employee has not worked for that employer before.
b. The employee's Employment Agreement contains a valid Trial Period clause.
c. The Employment Agreement is signed and returned before the employee's first working day.
d. The employee has adequate time (usually between 5 to 7 working days) to seek legal advice between when they receive their Employment Agreement, and when they are required to return a signed Employment Agreement.
e. The Trial Period clause is not inconsistent with a Collective Employment Agreement that covers the employee's role.

If an employee is terminated in accordance with a valid Trial Period, the employee cannot bring a personal grievance against the employer for unjustified dismissal; however, they can bring a claim unrelated to their termination, such as for a breach of Good Faith obligations, discrimination, harassment, bullying, pressure regarding union membership, breach of health & safety requirements, or unjustified disadvantage.

When terminated the employee has all minimum employment rights and responsibilities e.g., payment for accrued annual leave.

If the employer does not give the employee notice by the end of the trial period, then they are no longer on trial and their employment will continue.

A trial period is significantly different to a **Probationary Period**. An employee could take a personal grievance for unjustified dismissal if they terminated under a Probationary Period clause in their Employment Agreement. Therefore, please refer to Misconduct or Poor Performance below for guidelines around the principles that the employer will have to consider before proposing termination of employment in these circumstances.

# Misrepresentation

Where the employer relies on the employee to provide accurate and complete information (e.g., an employee's criminal convictions or their skills and experience) in their decision to make an offer of employment, and the employer later discovers that the information was inaccurate or incomplete, then the employer may have grounds for terminating employment, based on misrepresentation.

For this to occur, the information must be something that the employer would have relied about in their decision making to make an offer i.e., relevant to the role that they are being employed for. The Employment Agreement (and any supporting or included offer or application documentation) must be clear the employer reserves the right to rely on pre-employment misrepresentation to terminate the employment relationship. Any conditions on the offer of employment (such as it being subject to a criminal record check) should be outlined in the offer letter, and the Employment Agreement should contain a 'misrepresentation clause' which gives the employer the ability to justifiably terminate an employee who makes pre-employment misrepresentation/s.

If the employer has reason to believe that there is misrepresentation, they should still carry out a formal process in good faith to present the information giving rise to their belief to the employee, share their concerns, and inform the employee they are considering termination due to misrepresentation. The employer would then provide the employee the opportunity to seek legal advice and provide further information or provide explanation. The employer would then consider this information before proceeding to a decision.

# Repetitive misconduct

Misconduct is conduct or behaviour that is inappropriate or unacceptable. It can be one-off or repeated. It will usually have impacts on business continuity, financial outcomes, health and safety, customer satisfaction etc. It may breach the rules or regulations (policies or procedures) of the organisation, or it may breach rules or regulations external to the organisation e.g., Road code, Privacy Act etc.

Where there is an allegation of misconduct, the employer firstly needs to ensure that they have been clear in their expectations, and have provided all relevant information, training and support that the employee requires to understand and met the required standards.

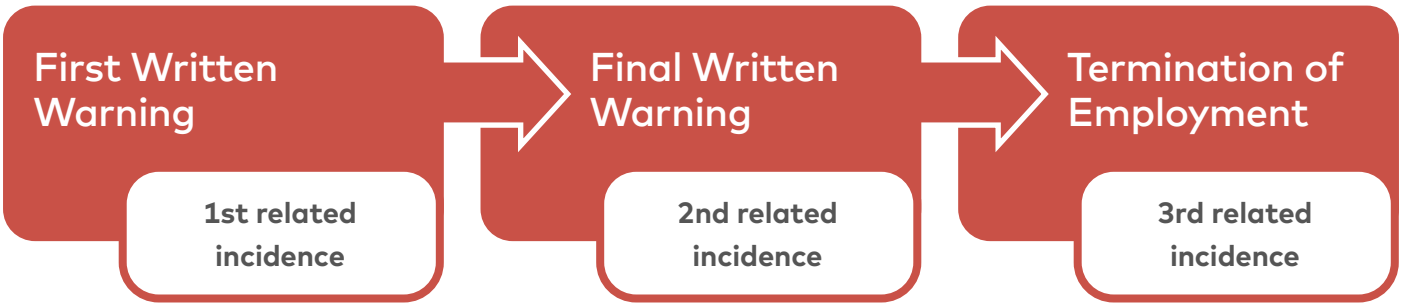
When alleging that misconduct has occurred, having followed a fair process (for each incidence), the employer may propose that the employee is issued a warning. Refer to the employee's Employment Agreement or the employer's Policy and Procedure documents to understand what process the employer is required to follow.

If the employer does not have a documented process, a fair investigation and disciplinary process may include:

a. Investigating to gather all relevant information on the matter.
b. Providing all relevant information to the employee, with a written invite to a formal disciplinary meeting asking them to provide explanation at the meeting, along with the potential outcomes of the formal disciplinary process.
c. Allowing the employee to seek legal advice before the meeting and attending the formal disciplinary meeting with a support person or legal representative.
d. Giving the employee an opportunity to provide any further information or explanation for the matter.
e. Considering all available information, including the employee's explanations, and the employee's employment history.
f. Presenting a proposed outcome to the formal disciplinary meeting and giving the employee an opportunity to provide feedback on this proposal.
g. Having taken all matters into account, making a decision on the outcome of the matter and confirming this to the employee.
h. Following through on any commitments made during the meeting e.g., training, support etc.

The employee's Employment Agreement or the employer's Policy and Procedure documents could also include what Formal Disciplinary Outcomes could be applied after each investigation and disciplinary process. If the employer does not have a documented process a commonly accepted progression is a First Written Warning, then a Final Written Warning, and then Termination of Employment.

Example progression of outcomes:




The progression of outcomes must be related. For example, if an employee receives a First Written Warning for authorised absence from work, and then they are found to have used inappropriate language for the workplace, these incidents are unrelated, and therefore, under the example progression of outcomes above, the employee would be issued another First Written Warning, this time for this inappropriate behaviour.

Under the example progression of outcomes above, a Final Written Warning would only be issued if the employee is found to have a second incidence of authorised absence or displayed inappropriate behaviour again. Therefore, under the example process above, termination of employment is only considered after a third related incidence.

When considering termination of employment, refer to the employee's Employment Agreement for the relevant notice period. The majority of Employment Agreements require that termination will be with notice (except in the case of serious misconduct – discussed below), meaning that the employer has to pay the employee for their notice period, even if the employee does not work any part of their notice period.

## Serious misconduct (instant or summary dismissal)

Serious misconduct typically is measured by the impact or potential impact the action or behaviour has on the employer, property or other people, is often deliberate in nature, and/or can have the effect of destroying or undermining the relationship of trust and confidence between an employee and employer. The employer's policies or the relevant Employment Agreement may detail examples of what the employer considers serious misconduct.

When alleging that serious misconduct has occurred, having followed a fair process, the employer can propose to terminate employment, despite no previous similar incidents. If allowed for in the employee's Employment Agreement, the employer may consider suspending the employee while the process is carried out (although the employer should allow the employee fair opportunity to respond to any proposal to suspend).

Where serious misconduct is substantiated, refer to the employee's Employment Agreement for the relevant notice period. Most Employment Agreements state that termination will be without notice, meaning that the employer has no obligation to pay the employee for any part of their notice period, nor will the employee work any notice period.

# Poor performance

Poor Performance is performance that has not met the required standards of the position that the employee is employed in. It is usually ongoing or sustained over a period of time. It can impact their effectiveness to the organisation, their productivity, other team members, customer service etc. It is assessed in relation to their Job or Position Description or another clearly articulated responsibility to which the employee has agreed e.g., a Project Charter.

When alleging that poor performance has occurred, the employer will have to show evidence that the employee has been given clear work instructions, constructive feedback, as well as time and support for improvement. It is helpful, to both the employer and employee, if these conversations are clearly documented. A common format that is used to capture these discussions is a Performance Improvement Plan (PIP).

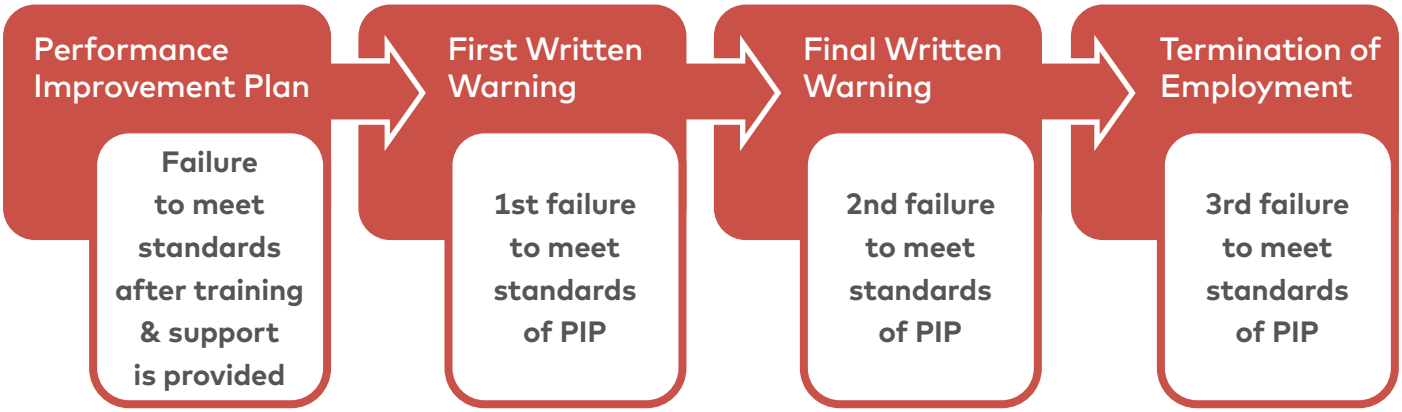
Refer to the employee's Employment Agreement or the employer's Policy and Procedure documents to understand what process the employer is required to follow where performance is below the expected standard. Ideally these should be objectively measurable.

If the employer does not have a documented process, a fair disciplinary process would include:

a. Evidence of Induction and/or Training
b. A Performance Improvement Plan, with clear consequences if performance standards are not met, and timelines for improvement
c. A written invite to a formal disciplinary meeting, providing all relevant information to the employee, asking them to provide explanation at the meeting, along with the potential outcomes of the formal disciplinary process.
d. Allowing the employee to seek legal advice before the meeting and attending the formal disciplinary meeting with a support person or legal representative.
e. Giving the employee an opportunity to provide any further information or explanation for the matter.
f. Considering all available information, including the employee's explanations, and the employee's employment history.
g. Presenting a proposed outcome to the formal disciplinary meeting and giving the employee an opportunity to provide feedback on this proposal.
h. Having taken all matters into account, making a decision on the outcome of the matter and confirming this to the employee.
i. Reset of a Performance Improvement Plan (if relevant)
j. Following through on any commitments made during the meeting e.g., training, support etc.

The employee's Employment Agreement or the employer's Policy and Procedure documents could also include what Formal Disciplinary Outcomes could be applied after each investigation and disciplinary process. If the employer does not have a documented process a commonly accepted progression is a First Written Warning, then a Final Written Warning, and then Termination of Employment.

Example progression of outcomes:

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## Abandonment

Abandonment is where an employee:

a. does not attend work, and there is no clear indication of their intent to return to work, and;
b. the employee fails to make contact with the employer to notify them of their absence or the expected duration of their absence, or;
c. (depending on the wording in the clause in the Employment Agreement) the employee has notified the employer they will be absent, but that absence has not been approved e.g. an employee decides to take annual leave without prior approval.

The employer must make all reasonable efforts to contact the employee, using firstly their direct contact details, and then their emergency contact details. It is recommended that on the second day of absence, the employer sends a letter (usually via courier and email) to the employee notifying them that the company is considering abandonment of employment and giving the employee an instruction to contact the employer or return to work (where safe to do so). If the employer still does not hear from the employee, the employer can notify the employee that they have terminated their employment for that reason.

The employer must be open that, an employee may, at a later date, provide the employee with a reasonable explanation as to why they could not attend work nor make contact. In Good Faith the employer must consider this, and they may reinstate employment, but may also conduct a disciplinary process when the employee returns e.g. for failure to follow the right absence notification process.

Some employment agreements have a clause which states that the employee's employment may be terminated after a specific number of days of unauthorised absence. There is no legal number of days before they are considered to have abandoned their job, but it's usually three days or more.

## Misconduct outside of the workplace

In limited circumstances, conduct outside of work could lead to termination if the conduct:

a. damages the relationship of trust and confidence between the employer and employee, or;
b. the conduct brings the employer into disrepute, or;
c. the conduct is not appropriate for the employee to perform their job properly e.g. they have responsibility for significant financial transactions and have been convicted of fraud (in a financial setting).

An employer should follow a fair process such as described under Misconduct or Serious Misconduct.

## Frustration

Frustration of contract occurs when an event happens which significantly changes the nature of the contractual rights and obligations from what the employer or employee could reasonably have thought they would be required of them, that it would be unjust to hold them to those terms and conditions of employment. For example, a fire destroyed a specialist premises that work was conducted in, and it would be unreasonable for the employer to provide an alternative premise in a timely manner for where that work could be conducted. If this occurred, both the employer an employee may be treated as having been released from their obligations under the Employment Agreement. A transparent and reasonable process should be followed. There is a high threshold that must be crossed before an employer can successfully claim the employment contract has been frustrated. The viability of such a position will depend on the individual circumstances of the role and parties, and employers should obtain legal advice before proceeding.

## Irreconcilable breakdown or incompatibility

Ideally, any problems between employers and employees can be resolved through discussion, or mediation. In rare and unusual cases, the employment relation is beyond repair. This normally occurs when a breakdown in the relationship has happened over a period of time, the breakdown is largely due to the employee's behaviour, and it becomes unworkable for the employee to stay in their role. This should not be confused with misconduct or poor performance, which need to be proactively managed, and all reasonable steps need to be taken, by the employer, to resolve the issue before termination is considered.

In these circumstances disciplinary action or termination of employment is possible. Justifiably issuing a warning or terminating employment for incompatibility is very rare. This is also an area where legal advice should be taken by both the employer and employee. The employer will need to consider very carefully any alternatives to the proposed action.

## Mutual consent

As a starting point, parties to an employment agreement can agree at any time that the employment relationship should come to an end. The agreement must, however, be truly mutual.

The employer and employee may choose to capture the terms of their agreement in a written document (Record of Settlement). If so, both parties should explicitly be given the right to seek legal advice before signing the document, and it is recommended that the document is certified by a mediator from the Employment Mediation Services, a service offered by the Ministry of Business, Innovation and Employment (MBIE).

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