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New Zealand: Debunking Five Employment Law Myths

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With employment law ever changing, it's no wonder that employers are often unsure about what they can and cannot do. With that in mind we debunk five common employment law myths.

1. An employee must be given a first, second and third warning before dismissal

There is no specific requirement under employment legislation to give employees a series of warnings before dismissal.

In a disciplinary process, what sanction (e.g. a written warning, final written warning or summary dismissal) is appropriate will depend on the circumstances and what a fair and reasonable employer could do.

A series of warnings is likely to be more appropriate where the disciplinary action relates to poor performance (e.g. not meeting sales targets) versus situations of misconduct.

However, employers should be mindful of their employment agreements or policies which may specify that in certain circumstances a series of warnings will be given before dismissal for misconduct. In that case, the terms of the employment agreement or policy must be complied with.

2. No contract in writing means no contract

Just because there is nothing in writing does not mean that there is not a binding arrangement. Even a verbal employment contract is binding. Of course, where terms are agreed verbally this could lead to significant disputes at a later date.

Employers must keep in mind that they are required by law to provide employees with a written employment agreement containing a number of minimum provisions, including but not limited to, the hours of work, the duties the employee will be required to perform, remuneration details and an employee protection provision which relates to a restructuring situation. Where a written employment agreement is not provided, the employer is liable to a penalty.

3. It's illegal to give a bad reference

Employer must give accurate and truthful references and not make any comments which are misleading.

Along the same lines, employers should not make unsubstantiated negative statements or claims.

The author of a reference may be liable if loss is caused as a result of their inaccurate or misleading statements.

4. Serious misconduct means you can sack on the spot

Serious or gross misconduct will usually result in summary dismissal (being dismissal without notice). However, employers must still comply with the usual disciplinary procedures and the duty of good faith.

At a bare minimum, this means inviting the employee to a disciplinary meeting, setting out the allegations and concerns, giving the employee an opportunity to respond, informing the employee of their right to be accompanied by a support person or representative and telling the employee what the possible consequences are.

Where summary dismissal may result, employers should not skimp on proper procedure.

5. Deductions can be made from an employee's wages for things such as lack of notice or covering business losses

Employers can only make deductions from employees' wages in certain circumstances – for example, where the employee has agreed to or requested the deduction in writing or the deduction is required by law (income tax, child support, etc).

It is common for employment agreements to contain terms which set out that the employee agrees to certain deductions being made such as where the employee gives less than the required resignation notice.

The employee can vary or withdraw this consent by giving notice in writing at any time. The employer must then vary or stop the deduction within two weeks of receiving the notice or as soon as practicable.

Unfortunately many of these myths are not uncovered until it is too late and usually this will mean that the employer is exposed to liability.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.