Employers Good Faith Obligations

All employers will at some time be faced with the difficult task of terminating an employee’s employment. Quigg Partners look at the importance of employers observing good faith obligations in the termination process.

by Quigg Partners

There are a variety of reasons that an employer may seek to terminate the employment relationship, ranging from medical incapacity, to the conclusion of a trial period, to a redundancy situation.

The most common issues affecting an employment relationship are instances of poor performance or misconduct. But regardless of these different processes, an employer must always adhere to its good faith obligations.

Good faith

This important, but often misunderstood, principle is set out in section 4 of the Employment Relations Act 2000. The duty requires parties to an employment relationship to deal with each other in good faith and not do anything which will, or is likely to, mislead or deceive. The section further provides that:

- the parties must be active and constructive in establishing and maintaining a productive employment relationship; and
- an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee’s employment, must provide the affected employee with access to relevant information and an opportunity to comment on the information before a final decision is made.

But what does this all mean?

The duty of good faith generally requires that the employer:

1. Refrain from conduct which is likely to mislead or deceive the employee;
2. Be active and constructive: this includes an obligation to be responsive and communicative, and means that the employer must communicate any concerns to the employee and also pro-actively investigate any complaints brought to its attention;
3. Provide the employee with relevant information: relevant information may not be restricted to written material but may also include information within the mind. What is ‘relevant’ will depend on the particular circumstances;

Example 1: When addressing performance issues, the implementation of a formal performance management process, may be a decision that is likely to have an adverse effect on the continuation of the employment relationship. After providing further assistance and training, the employer may give the employee a warning for under-performance (which does bring an employee “closer” to potential termination) and may eventually terminate the employment relationship if the employee does not improve over a reasonable period of time. The employer must however ensure that it conveys all relevant information to the employee, especially the employer’s expected standard of performance.

Example 2: When an employer is conducting an investigation into misconduct by way of a disciplinary process, termination of the employment relationship may be a possible outcome. Accordingly, the employer must provide the employee with all relevant information obtained and relied on during such an investigation, such as interview notes with potential witnesses. The employee must also be advised at the outset of the process that disciplinary action may result at its conclusion.

4. Comment and opportunity to provide comment: it is vital that the employer ensures the employee has sufficient time to review such information before being required to provide comment;
5. Consider information with an open mind: employers must ensure that when they receive comments from
an employee they consider them with an ‘open mind.’ This means that they need to take the employee’s comments into consideration and allow them to influence any possible decision, before any decision regarding guilt is made;

6. **Make decision and propose disciplinary action:** a final decision regarding an employee’s guilt or “breach” should be communicated to the employee. Before making a final decision as to what (if any) disciplinary action may be appropriate, the employer should propose any disciplinary action to the employee. This provides the employee with an opportunity to comment on what action is proposed (but not again on the substantive issue), and to perhaps suggest why a different form of disciplinary action (or none at all) is appropriate in all the circumstances. Once the employer has taken any comments into account they are then able to make a final decision as to the appropriate penalty.

These steps will need to be repeated at each step of a performance management process e.g. when progressing from a final warning to dismissal for continuing poor performance.

**Guidelines**

There are no strict “one size fits all” rules or protocols to guide employers in exercising their duty of good faith. Rather, what is fair and reasonable in the circumstances will depend on the facts and as such employers need to ensure that they are able to justify their actions, and how they acted, against what a fair and reasonable employer could have done in all the circumstances at the time.

**Positive implications of compliance**

An employer who complies with its duty of good faith will likely experience employment relationships that are more productive and harmonious. As such, employees will be happier in their jobs and this will have positive flow on effects for worker productivity. It may also prevent personal grievances from arising which can be costly in both time and money, especially for small businesses.

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