

Why a written individual employment agreement is important

Firstly—it's essential under the Employment Relations Act 2000 to have one! An individual employment agreement ("IEA") forms the basis of the employment agreement between employer and employee. It is the principal document referred to in any dispute between employer and employee. In most cases, if a power or right is not granted to the employer or employee by statute or contained in a workplace policy or the IEA it cannot be enforced.

Therefore it is crucial that the IEA provided to employees is clear, precise, includes all provisions required by law, and refers to any powers upon which the employer may wish to rely (eg, restraint of trade, no fault trial period). If there is ambiguity or uncertainty in the drafting, the risk is that the ambiguity may be resolved by a finding against the employer's original intentions.

I found an IEA on the internet! Will it work for my business?

The difficulty with pre-made employment agreements is that they

are often very general in nature and may not be tailored to the particular requirements of your business. A "one size fits all" approach works poorly for many employers, as there tend to be matters specific to each individual business that need to be considered.

In addition, "free" IEAs are sometimes poorly drafted, with missing or inconsistent definitions and missing or inconsistent cross references. To rely upon such a document in the heat of a legal dispute can be extremely dangerous.

Also, once you have used an internet IEA it does not tell you if/when it needs to be updated.

A tailored agreement

A tailored agreement is designed specifically to meet the needs of your business and can cover:

- No fault trial periods;
- Restraints of trade;
- Confidentiality and intellectual property issues;
- Incentives for senior employees;
- Procedures for physical and mental incapacity;
- Non-standard hours of work or pay;
- Other considerations specific to the needs of your business.

At Bartlett Law, we realise that it is not enough to simply give you a blanket agreement, but that it is necessary for you to understand how it operates and what steps you need to take if issues arise. We stand behind the IEAs we create (unlike those provided by anonymous websites) and we are available to help you make the most of your tailored agreement.

Revising existing IEAs

The law continues to evolve and change over time, just as the requirements of your business will change and evolve. At Bartlett Law, we will work alongside you to ensure your IEAs are kept up to date and meet the changing demands of today's business world.

Workplace policies

To be effective, an IEA needs to be streamlined, concise and easy to understand. It is simply not possible to cover every possible contingency which may arise.

This is where workplace policies can be of assistance. Whether they are take the form of a policy document, a rule book or a handbook, they provide employers with the flexibility to regulate aspects of the

relationship without having to constantly renegotiate the IEA.

Policies can cover:

- Use of company vehicles;
- Email and internet policy;
- Health and safety procedures;
- Guidelines for use of social media;
- Drug and alcohol testing;
- Working from home.

Policies seldom exist in a vacuum. Typically, there will be a number of common law, statutory or contractual obligations and requirements which must be considered. Compliance with these obligations will ensure that the new policy is effective and enforceable.

What Bartlett Law can do for you

We are specialists in workplace law. We can:

- Determine the unique features of your business that need to be addressed in your IEAs;
- Draft IEAs tailored to the operational needs of your business;
- Review and update your existing IEAs;
- Draft and update policies tailored to your operational needs;
- Analyse whether your existing policies comply with your legal and statutory obligations;

- Guide you through some of the common pitfalls encountered when introducing policies.

For more information, see our publication "Individual Employment Agreements for New Employees: The First Steps".

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Individual Employment
Agreements: A Tailored
Approach

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First steps are important

The start of an employment relationship is like a dance. If the correct steps are taken in the correct sequence it appears effortless and elegant. Conversely, if you start off on the wrong foot, or attempt to skip steps, things can quickly turn into a tangled mess.

Have a plan

Before starting to recruit, an employer should consider a number of factors, such as:

- Will the worker be an employee or independent contractor? - this publication covers employment relationships only;
- Does the work fall within the coverage of a collective agreement with an on-site union?;
- Having a job description/outline;
- Will there be a trial or probationary period?;
- Is the position is for a fixed term?;
- Are there any special/unusual factors relating to the position? (eg, skills, health etc).

Ideally, a draft individual employment agreement ("IEA") should be prepared before candidates are interviewed. This helps participants understand

precisely what is expected of them.

Why does this matter?

The law imposes a number of obligations on employers, including requiring IEAs (and intended IEAs) to be kept and recorded in writing before the employment begins. Failure to comply may make the employer liable to pay a penalty.

The terms and conditions of the employment relationship are determined when offer and acceptance take place (and this should be done in writing). It is not possible to introduce new terms into the IEA after offer and acceptance have taken place without the consent of both parties.

This is particularly important if an employer wishes to have a no-fault trial period, because the law requires agreement to a trial period to be recorded in writing before the employment starts.

If an employer fails to promptly record the terms of employment in a written IEA and permits an employee to begin working for them then they breach the Act and run the risk that the employee may be deemed to be employed on the basis of a verbal agreement.

Example: Peter interviews Duncan, who is clearly the outstanding candidate for the position. After agreeing on the hours and the starting salary, Peter shakes Duncan by the hand, telling him "you will be perfect for the job, I'd like you to start on Monday".

On his second day of work (Tuesday) Duncan finds an IEA containing a trial period clause placed on his desk. He is told it is "standard".

Duncan refuses to sign the agreement, saying that a verbal offer of employment has already been made and accepted and that he does not agree to the inclusion of the trial period.

Unfortunately for Peter, Duncan is correct. It is too late to add a trial period. Under the Employment Relations Act 2000 a trial period has to be agreed upon in writing before the employment starts.

How employers can protect themselves

If considering hiring a new employee, have the intended IEA ready to use

before the offer of employment is made. The IEA must be in writing, contain the clauses required by the Employment Relations and Holidays Acts, and include any no-fault trial period.

The employee should be provided with a copy of the intended IEA (this is often the "offer" of employment) and told when the offer will lapse if not accepted. The employee must be given sufficient time to obtain advice and consider (and respond to) the offer. It should be clear that the employer will not be bound until it signs the intended IEA.

The terms of employment must be agreed and documented before the employee starts work.

What Bartlett Law can do for you

We are specialists in workplace law. We can assist you in preparing IEAs that are appropriate for your requirements and guide you through the steps necessary to begin the employment relationship on terms of your choosing. We can:

- Draft your IEA for you;
- Provide and advise on no-fault trial provisions;
- Draft employment policies;

- Vet IEAs for prospective employees;
- Provide advice on updating existing agreements;
- Provide contracts for independent contractors.

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Why have I been given a draft employment agreement for my new job?

Before you start work with a new employer, that employer must:

- Give you the intended agreement for your job;
- Give you a reasonable opportunity to seek independent advice about it;
- Respond to any issues you raise about it;
- Document and agree on your terms of employment.

What do I do with the agreement?

You can (and usually should) have a lawyer check the agreement for you.

The lawyer will ensure the agreement contains all the matters required by law, and can advise you on other important clauses, or matters that are perhaps not in the agreement.

The lawyer can also advise you about pre-employment disclosure (e.g. of medical conditions or criminal convictions), reference checking, pre-employment medicals etc.

You can then ask your prospective employer about the agreement, or sign it if you are happy with it.

What must the agreement contain?

The Employment Relations and Holidays Acts list what must be covered in an employment agreement, including:

- Names of the parties;
- Description of duties, hours of work;
- Remuneration for the work;
- Location of work;
- If there is to be a no-fault trial period or probation period;
- If the employment is for a fixed term;
- Time and a half for work on a public holiday;
- If work on a public holiday will be required;
- Employee protection clause;
- References to services available to resolve employment relationship problems and the 90 day period for raising a personal grievance.

How long is "reasonable" for me to get advice?

The legislation does not answer this. We would be happy to provide advice urgently, to ensure that you can respond quickly to the offer of employment, and one of our lawyers would usually be able to discuss the offer with you within a day or two of you receiving it.

What else might the lawyer tell me about?

This depends on the type of employment and the job. Topics that are frequently covered are:

- If the job offer is conditional or unconditional;
- If the work is part-time, temporary or casual;
- Shift work /flexible hours;
- On-call, overtime and allowances;
- Training;
- Relocation/transfer expenses;
- Ability to transfer to another location;
- Travel and reimbursement of expenses;
- Use of company car or reimbursement for use of private motor vehicle;
- Pay and performance reviews;
- Bonus and incentive schemes;
- Notice period for termination;
- No fault termination;
- Redundancy provisions (including redundancy pay);
- When the employer can request a medical examination;
- Confidentiality obligations;
- If there is a restraint of trade and what it means;
- Implications of non-solicitation and non-dealing clauses;
- Policies - eg. for Internet use;
- Conflicts of interest;

- Restrictions on outside work that can be done while an employee;
- Parental leave;
- Study leave;
- Leave without pay;
- Leave entitlements—annual holidays, pay as you go holiday pay, sick leave, bereavement leave;
- Closedown periods;
- Suspension and disciplinary processes.

What Bartlett Law can do for you

We are specialists in workplace law. We can assist you to understand the terms of the employment you have been offered so you are well informed before you sign up to a new job. Our services include:

- Checking employment agreements for legislative compliance;
- Advising on terms in employment agreements;
- Advising on pre-employment disclosure obligations;
- Drafting/checking employment agreements and policies.

We also provide advice on contracts for independent contractors, including:

- Checking/drafting contracts;
- Advice about restraint provisions;
- Advice about intellectual property ownership.

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Vetting Individual Employment
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What is a personal grievance?

It is any grievance listed in s 103 Employment Relations Act 2000 (the Act) that an employee has against their employer/former employer, including claims of:

- Unjustifiable dismissal;
- Unjustifiable action by the employer disadvantaging the employee's condition/s of employment;
- Sexual/racial harassment;
- Discrimination.

The Act provides ways to resolve personal grievances, such as mediation and Employment Relations Authority investigations.

It is often important to address a personal grievance quickly, or the parties risk incurring substantial legal and other costs.

This publication describes steps an employer can take to deal with an issue before a grievance is raised, and then what to do if one is raised. It is a brief and general summary only and is not a substitute for legal advice. You should seek legal advice before taking any further action in relation to matters dealt with in this publication.

Detering a personal grievance

(a) Get it right first time

As workplace law specialists, we ensure our clients' procedures, processes and documentation are consistent with best legal practice. It is far better to act from the outset to avoid potential problems, than to try to deal with them once they occur.

We cannot of course guarantee that an employee will not raise a personal grievance. But if an employer's actions are fair and reasonable it will be difficult for an employee to succeed with a personal grievance and it will be easier for the employer to defend its actions.

Employers should obtain legal advice as soon as there is an employment issue that needs to be addressed.

(b) Talk about it

If there is an employment relationship problem, consider talking to the employee about it. (Check with your lawyer first.) An employer is legally obliged to act in good faith, including being open and communicative. Most individual employment agreements require employer and employee to discuss and attempt to resolve problems.

This is a golden opportunity to resolve a matter before it escalates—possibly to a personal grievance.

How a personal grievance is raised

The employee must make the employer aware he/she has a grievance, of the nature of the grievance, and he/she wants the employer to address it. This is usually done in writing.

Time is on your side

There is a 90 day time limit for raising a personal grievance. This can be difficult to calculate (eg. if a grievance relates to a sequence of events such as bullying). You should obtain legal advice on whether the 90 day period has expired.

Preparation for mediation

Personal grievances are often resolved in mediation. Do not underestimate the need to prepare thoroughly for mediation, covering:

- Relevant facts and documents;
- Applicable law;
- Strengths and weaknesses of each party;
- Each party's needs and interests;

Employment Relations Authority

- Costs and risks of not settling at mediation; and
- The employer's ability (financial and non-financial) to make a settlement.

How mediation works

Mediation is often the last chance a party has to control the outcome of their case. Much can be achieved if the parties work together and try to problem solve.

In mediation the parties will usually meet together with the mediator and make their opening statements. The process may then become more fluid. The parties may move to different rooms and the mediator may conduct "shuttle diplomacy" by relaying settlement offers between rooms. The parties might stay in the same room and look for middle ground.

Sometimes a party can feel strong psychological pressure to reach an agreement. If this occurs, remember:

- The other party cannot force you to agree (and vice versa); and
- Sometimes it is better not to agree.

If the parties wish, they can request that the mediator make a written recommendation which (if not objected to) will become final, binding and enforceable.

If the problem is not resolved at mediation, the claimant (where there is a legal clause of action e.g. personal grievance) can apply to the Employment Relations Authority for it to investigate the claim. The Authority will hear the claim, listen to witnesses, consider evidence, hear legal submissions, then make a binding decision. Authority decisions can be appealed to the Employment Court.

What we can do for you

Bartlett Law specialises in employment law. We have extensive experience at mediation, in the Employment Relations Authority and Employment Court. We can assist you by:

- Introducing practices and systems to deter personal grievances;
- Dealing with problems when they arise;
- Preparing for mediations and attending mediations with you;
- Taking claims to the Employment Relations Authority and Court and defending Authority and Court claims.

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Detering and Defending
Personal Grievances

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Overview

Investigating possible misconduct can be fraught with difficulties. Timely and effective legal advice is crucial. This pamphlet outlines steps for the employer to take when investigating alleged misconduct. It is a brief outline only and is not a substitute for legal advice.

The incident

This could be the aftermath of a heated argument, an accident, the discovery of an incriminating document or the receipt of a customer complaint. Faced with such a situation, an employer should:

- Remain calm;
- Ensure staff and the public are safe;
- Preserve the evidence (for example, remove computer equipment);
- Report the matter if required (for example, to HR, Police, OSH);
- Seek legal advice if the incident might warrant disciplinary action against an employee.

The investigation

Phase one—the investigation

The employer must gather facts to determine what occurred. This may include analysing documents or data and interviewing witnesses. It is also

essential to check the employment agreement for relevant provisions and procedures.

The employer must conduct the investigation in good faith and in accordance with natural justice. This includes not predetermining the outcome or leaping to conclusions.

The disciplinary process

Phase two—the allegation

If the investigation reveals possible misconduct or serious misconduct, the employer will need to put the allegation to the employee in a clear and precise manner. The employee must be told:

- Of the details of the allegation;
- If the allegation were proved, might it be considered misconduct or serious misconduct?;
- Of the sanctions available if the employer finds there was misconduct or serious misconduct;
- Of the employee's rights during the investigation.

Phase three—the invitation

This is usually done by letter, setting out the allegations and inviting the employee to a meeting where the employee and their representative will hear and respond to the allegation. The employee must be given all

relevant information, including witness notes/statements.

Phase four—meeting to discuss the allegation

During the meeting the allegation must be put to the employee for his/her response. The employer is obliged to listen to the response with an open mind.

It can be useful to have your legal adviser at this meeting because sometimes the participants struggle to communicate with each other. For example, the employee may be anxious and stressed and their discomfort could be misinterpreted as guilt.

After hearing the employee's response, the employer must decide if the allegation has been proved to their satisfaction, and, if necessary, decide on any proposed sanction.

Phase five—meeting to discuss proposed sanction

The factors the employer needs to consider before deciding on the appropriate response to a proven allegation include:

- Does the employee have insight into their actions and their effect on co-workers?;

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Investigations and Disciplinary Processes

We can assist at all stages of the investigative and disciplinary process, including:

- Advising on the best way to conduct an investigation;
- Developing a comprehensive investigation plan;
- Advice on suspending the employee during the investigations;
- Drafting correspondence for the investigation;
- Attending disciplinary and investigatory meetings;
- Advising on sanctions.

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- Was dishonesty or deception involved?;
 - Was the employee adequately trained for the work?;
 - Has the employer's trust and confidence in the employee been affected by the employee's conduct?
- Having considered all necessary matters, the employer must then seek feedback from the employee on the proposed sanction, and listen to any matters the employee raises that could influence that decision.

Phase six—the final decision

When making the final decision on sanctions, the employer should consider:

- Mitigating factors;
- Employee's personal circumstances;
- Severity of the offence;
- Proportionality and consistency.

Sanctions may include:

- The issuing of warnings;
- Dismissal (in the case of serious misconduct).

What Bartlett Law can do for you

We are specialists in workplace law. We provide sound, pragmatic advice.

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Is the deck stacked against employers?

A common complaint from employers is that personal grievances are used by disgruntled ex-employees to “shake down” their former employers for cash windfalls, regardless of the merits of their case. Many employers claim there is no cost-effective way of preventing such claims.

We disagree.

In many cases, there are steps an employer can take to make their decision justifiable (if not entirely bullet-proof). Terminating employment in a justifiable manner ensures the employer is well positioned to resist any personal grievance claim that may arise.

An employer need not capitulate at mediation if they are confident in the integrity of their process and decision. A properly structured dismissal will withstand scrutiny by the Employment Relations Authority or Employment Court.

If employers understand the fundamentals of the termination process, their decisions are much more likely to withstand scrutiny.

Common pitfalls

It is not possible to hire and fire staff at will. Nor is it safe to alter an employee's working conditions in the hope that this will encourage them to leave. It is not possible to “get rid” of an employee you dislike if their performance is up to scratch.

Decisions to terminate must have a justification, whether that be:

- Performance (eg, production output);
- Misconduct (something blameworthy the employee has done or failed to do).

It is important to be clear on whether the justification relied on is performance-related or misconduct-related as there are different processes to follow.

Performance issues

While it is possible to terminate employment for poor performance, this is a process that may take some time.

Employees need to have:

- Deficiencies in their performance pointed out to them;
- Been given a clear set of performance targets;

- Been given a reasonable time to achieve these targets;
- Been given reasonable support to achieve the targets; and
- Been provided with feedback upon their performance.

A performance management process may progress through two or three cycles until poor performance can be treated as a disciplinary issue that might warrant a warning. Even then, the disciplinary process may not lead to an instant dismissal.

Misconduct

There are processes which must be followed by an employer in investigating and disciplining an employee for misconduct. If they are not followed, the employer's decision may be vulnerable to challenge. We discuss these processes in more detail in our pamphlet “Investigations and Disciplinary Processes”.

Justifiable decisions

Under section 103A of the Employment Relations Act the decision to discipline or dismiss must be one which “a reasonable and fair employer **could** have taken”. This means where processes are followed and decision making

processes are robust, and the outcome is fair and reasonable, the courts will uphold a decision to discipline or dismiss (even if other outcomes were possible).

"No fault" trial periods

New employees may be employed on a trial basis for up to 90 days if a statutorily-compliant trial period is included in their employment agreement.

If a new employee fails to perform to a satisfactory standard within that period, the employer may terminate their employment and the employee cannot bring a personal grievance in respect of the dismissal.

In cases where dismissals relying on no-fault trial periods have not been upheld, this is usually because the trial period did not comply with the legal requirement to be included in the individual employment agreement at the start of the employment relationship.

What Bartlett Law can do for you

We are specialists in workplace law. We are able to assist and advise employers and employees at all stages through the dismissal and personal grievance procedures. We can:

- Guide employers through all termination processes;
- Draft letters for disciplinary investigation, meetings, warnings and dismissals;
- Advise on restructurings;
- Advise employees involved in warning and termination process;
- Draft no-fault trial provisions;
- Check existing no-fault trial provisions and advise on compliance.

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Justified Dismissals

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A specialist team

Bartlett Law is a practice specialising in workplace law. Its predecessor, Bartlett Partners, was established in 1997 by Philip Bartlett and Penelope Ryder-Lewis. In the years that followed, the firm evolved a distinctive approach to employment law, drawing upon their strengths and successes in the field.

Bartlett Law builds upon that tradition of excellence, and continues to provide advice in an objective, thoughtful and discreet manner.

Why is an employment specialist required?

Employment law requires a very different skill set from other areas of law. This is because the Employment Relations Act 2000 ("the Act") includes among its objects the goal of building productive employment relationships through the promotion of good faith and promoting mediation as the primary problem solving mechanism.

The Act reduces the emphasis on judicial intervention and promotes an approach in which employers and employees are encouraged to resolve

disputes at an early stage. Because of this, the ability to influence and persuade others is of central importance.

To be effective at mediation or before the Employment Relations Authority careful preparation is critical. There is a growing body of case and statute law specific to the employment jurisdiction which requires specialist interpretation and application. Employment law is not an area in which one can safely "dabble", nor is mediation a "soft option" where the claimant gets a guaranteed payout. To obtain the best results it pays to stick with employment law specialists.

Prevention is better than cure

The best way to avoid costly legal disputes is to have in place the appropriate structures, policies and procedures. We draft employment agreements and policies which are robust, effective and tailored to your individual requirements.

When restructurings occur or employment relationship problems arise, Bartlett Law will guide you through the processes and ensure that your legal exposure is minimised. This approach will prevent or deter potential legal challenges.

Table thumping is counter-productive

Bluster and theatrics are a staple of Hollywood legal dramas, but in practice they are often spectacularly ineffective at persuading or influencing others.

An important skill in employment law is the ability to listen. Only when you understand your client's and the other side's case (its strengths and weaknesses) does the real work begin.

Often, the very act of listening to and understanding a party's viewpoint can transform the discussions and steer matters towards resolution. At the very least, it can clarify the issues and highlight areas of dispute or risk.

Grace under fire

When you are in the midst of a legal dispute there is a risk of losing objectivity. This can lead to rash actions which you may later regret.

As your legal advisers, we have an obligation to take an objective approach. We will not over-hype the merits of your case. If there are difficulties with your case we will

advise you clearly and privately. You can rely on us to keep a level head.

Preserving your reputation

(a) For employees

We understand that your reputation is important and that your career may be affected by an adverse result. We will endeavour to take such steps as are necessary to protect your reputation and minimise the associated aggravation and distress. Where it is necessary to have a clean break, we will negotiate this in a manner that aims to preserve your long term interests.

(b) For employers

We will endeavour to take such steps as are necessary to protect the reputation of your business and manage the dispute discreetly. Where it is possible to preserve the position and reintegrate the employee into the workplace, we will aim to do so. We will also be alert to any underlying issues so we can advise you about them for the future.

Formal proceedings

Sometimes disputes can't be resolved by negotiation or mediation. In such

cases we will, if you wish, promptly issue formal proceedings on your behalf or (as the case may be) defend them.

What Bartlett Law can do for you

- Assist in establishing good employment relationships by providing tailor-made employment agreements;
- Check employment agreements for prospective employees;
- Advise on employment relationship problem resolution;
- Work with you to achieve discreet solutions;
- Plan and implement disciplinary and termination processes;
- Draft letters and reports;
- Advise on privacy obligations;
- Advise on all workplace law matters;
- Represent you in the Employment Relations Authority and the Employment Court.

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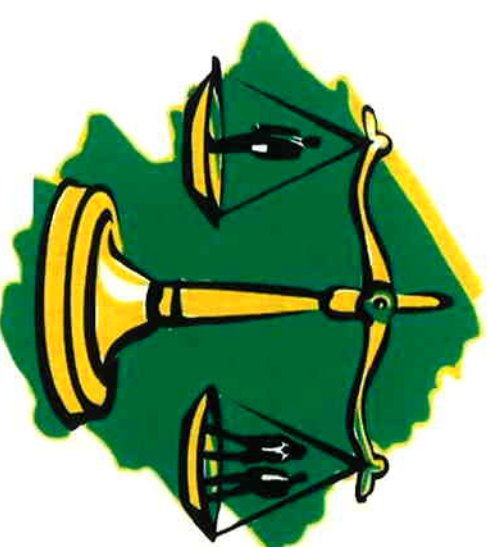
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Our Approach

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