

## Factsheet – Resolving Fair Treatment Issues and Grievances

### Why It Matters

Your employees need to know that if they have a problem at work they can bring it to your attention, that the problem will be given serious consideration, and an attempt made to fairly resolve the issues. If this does not happen, the effects can be seen in poor workplace behaviour, reduced productivity, tension between employees, employee health issues, increased turnover and legal action. It is better to deal with employee concerns as soon as you become aware of them and try to resolve problems with the people directly concerned in a way that makes them feel they have been treated fairly, even if they are not that happy with the outcome. In this way you can be seen to treat employees fairly both within your workforce and by a tribunal or court if unresolved issues escalate.

### The Basics

There are two main ways of dealing with fair treatment issues and workplace grievances.

Fair treatment issues are usually managed in line with an employer's policy or practice. Policies may vary from employer to employer but usually involve an issue raised by an employee being investigated and dealt with entirely within a business.

On the other hand, all awards and enterprise agreements must have a dispute or grievance resolution clause. It is a legal requirement. The disputes clauses in awards are usually the same and allow an employee with a grievance about a matter dealt with in the award or National Employment Standards (NES) to raise it with their supervisor and escalate it within their organisation and if still unresolved ultimately to the Fair Work Commission (FWC) for resolution. Enterprise agreement dispute resolution clauses can vary but there is a model clause that many use. The model clause also details an escalation process and ultimately refers disputes about agreement or NES matters to the FWC for resolution.

In addition, an employee can take bullying, discrimination and harassment claims to a range of government agencies and tribunals for a remedy.

## The Detail

### Fair Treatment Process

The scope of fair treatment is much broader than award, and most enterprise agreement, dispute resolution procedures which are limited to award and NES matters. Fair treatment covers any workplace issue where your business has stated how it will treat its employees or your business is obliged to behave in a certain way by law. It includes things like:

- Bullying
- Discrimination
- Harassment, including Sexual Harassment
- Victimisation
- Vilification
- Being refused flexible work arrangements without reasonable business grounds
- Having annual and long service leave applications unreasonably refused
- Not having access to different types of work or overtime without a valid reason
- Being passed over, without a valid reason, for promotion, pay rises, training, or career opportunities, etc. that were available to others
- Unreasonable management action such as undeserved disciplinary action

Adopting a fair treatment process is a great way for your business to show your employees that you are serious about creating a workplace free of threats, where people are supported and encouraged to be the best team member they can be. It is far better that your team members look to you solve their problems than turn to external assistance.

Having a fair treatment process does not replace any award or enterprise agreement dispute resolution procedures. Your employee will still be able to use them and access any legal process for addressing certain complaints.

If you adopt a fair treatment process the issues that need to be covered off are:

- ☛ **Mean It:** It is good business practice to give team members who believe they have not been treated fairly, a path to raise their concern, have the concern investigated, and corrected if unfair treatment happened. However, if you adopt this as a business practice, you need to mean what you say and seriously consider with an open mind all issues genuinely raised by an employee. Fair treatment means that if a team member has been treated unfairly, you must be prepared to be honest and acknowledge that and try to fix the situation as best you can. Failing to follow your own policy will only discredit your authority and place you and your business in a difficult to defend position in any subsequent legal proceedings.
  
- ☛ **Tell Your Team:** Your employees have to know:
  - Your workplace standards like your policies and procedures – basically how you treat people.
  - Your approach to fair treatment issues, how they have their concerns considered, and what outcomes are possible.
  
- ☛ **Document It:** Have your fair treatment process in writing, record how you have informed your employees about how it all works, get team members to put their concerns in writing, have a paper trail for the investigation, and put the outcomes in writing. Documenting everything means you have a record to compare with later concerns to see if there are recurring issues. It is also preparing your business in case the employee's issues cannot be resolved and you need to demonstrate to a court or tribunal that you have fulfilled your legal obligations.
  
- ☛ **Investigate:** Investigate all issues raised by an employee no matter how big or small. How you investigate should be matched to the nature of the issues. For some concerns a suitably qualified person from within the business, such as senior manager, would be appropriate. In other cases, it might be necessary to bring in external assistance like an experienced workplace investigator or someone with expertise in a particular subject.

Your business, and you as an owner or manager, is legally liable for the actions of your employees that you know of or should have known of. So,

it is important to respond to concerns about unfair treatment you become aware of, even when raised by someone not directly affected. Suspected or potential fair treatment issues must not be ignored.

☛ **Respect:** Employees should be encouraged to raise concerns and participate in investigations and other actions attempting to resolve fair treatment issues. This means not taking any action against a team member for raising a concern about fair treatment or helping in an investigation if they are honest, tell the truth, and are as helpful as they can be.

☛ **Outcomes:** The possible outcomes of investigating fair treatment issues should be explained up front to anyone making a complaint, or who is the subject of the complaint. Outcomes can include:

- Finding the employee has been treated unfairly, or
- That they have not been treated unfairly, or
- That there is not enough evidence to support the claim of unfair treatment.

If the employee is found to have been treated unfairly, part of the resolution is trying to correct that wrong. The corrective action needs to match the situation, but possible outcomes are that an unfair decision is reversed, an apology, mediation between the relevant employees, training for employees either directly involved or in general. In addition, you will need to decide if any discipline is appropriate for a team member that is found to have treated others unfairly at, or in connection with, work. This can include taking disciplinary action and, if serious enough, termination of employment. Whilst not always possible, fair treatment outcomes can often be quite positive and build better relationships and workplaces.

☛ **Misuse:** A fair treatment concern is not automatically considered false or invalid because it was found that the person raising the concern was not treated unfairly. People can genuinely feel they have been treated unfairly even when they have not. Sadly, though, sometimes fair treatment claims are made that are not genuine. Misusing a system that is intended to protect people is not acceptable. False claims can be damaging to the accused and

to your business. Lying about fair treatment concerns and lying, or being deliberately obstructive, in an investigation about fair treatment, can be considered misconduct.

## Dispute Resolution Procedures

If your employees are covered by an award or enterprise agreement they can use the dispute resolution procedure in that award or enterprise agreement in addition to, or instead of, any fair treatment process you have.

Award disputes resolution clauses limit the issues they can be used for to matters covering the award or NES. Whilst enterprise agreements can have broader procedures, many are also limited in the same way.

Typically dispute resolution clauses permit an employee to raise a grievance or dispute with their supervisor. If no resolution is possible, the matter escalates to higher levels of management. If resolution is still not possible, the matter can be referred to the FWC. The FWC can address the matter in a number of ways including, conciliation, mediation, alternative dispute resolution, and arbitration. There is also a right of appeal from the decision of a single commissioner to a Full Bench of the FWC. Enterprise agreement dispute resolution clause most often operates the same way but some may have different paths or possible outcomes. There is also a right for the employee and the employer to have representation through the procedure. For an employee, it is usually a union.

Traditional dispute resolution procedures often encourage an adversarial approach that can be divisive and strain workplace relationships.

The things to look out for with disputes and grievances under an award or enterprise agreement dispute resolution clause are:

- **Coverage:** Check the employee is covered by the award or enterprise agreement they are pursuing the dispute or grievance under and that the issues are capable of being dealt with through that procedure.
- **Outcome:** Examine the dispute resolution clause to find where the dispute or grievance could end up and what the possible outcomes are. For example, does it end with the FWC being able to arbitrate the matter and impose a decision on you.
- **Step By Step:** Follow the procedure to the letter. If you do not, you could be seen to have breached the award or enterprise agreement and/or not provided the employee with procedural fairness. Some enterprise agreement dispute

resolution clauses are very prescriptive about what must happen and when.

- **Documentation:** Keep records of what you do in considering the grievance. You might need to demonstrate to a commissioner what you have done.
- **Representation:** If the grievance is headed towards the FWC, you should get advice and representation.

## Alternatives

An employee has the option of pursuing claims relating to bullying, discrimination and harassment directly with federal and state bodies without going through your fair treatment process, or a dispute resolution process. For example:

- **Bullying:** Claims of being bullied can be directed to:
  - The Fair Work Commission
  - State and territory workplace safety authorities as a safety issue
  - State and territory human rights, equal opportunity and anti-discrimination commissions
  - State administrative appeals tribunals
  - Police – in some states extreme bullying is a crime
- **Discrimination:** Discrimination complaints can go to:
  - The Fair Work Commission
  - State and territory human rights, equal opportunity and anti-discrimination commissions
  - State administrative appeals tribunals
  - Australian Human Rights Commission
- **Harassment:** Harassment complaints can be made to:
  - State and territory human rights, equal opportunity and anti-discrimination commissions
  - State administrative appeals tribunals
  - Australian Human Rights Commission

If you receive notification that an employee has made an application to one of these bodies, get advice as soon as possible. Each of these bodies has different areas of authority and has the power to make certain decisions. Some can award financial penalties against employers and individuals, others cannot.

## Need More

NatRoad's advisers have substantial experience in developing fair treatment processes and advising employers and general human resource management. For more information and advice about onboarding issues, contact a NatRoad adviser on (02) 6295 3000 or [info@natroad.com.au](mailto:info@natroad.com.au).