

Discipline - Former Employees

Commissioner's Instruction 4

Statement of intent

This Commissioner's instruction sets out the circumstances in which an employing authority may commence or continue a disciplinary process in relation to a person who is no longer an employee of the employing authority, and the manner in which that process is conducted.

It is intended that disciplinary proceedings in relation to persons no longer employed in an organisation be taken only in exceptional circumstances, and this instruction sets out the public interest considerations to be taken into account by an employing authority, where relevant, in determining whether to take such action.

Scope and application

This instruction applies to the taking, by an employing authority, of disciplinary proceedings in relation to a person who is no longer employed by the employing authority but who was:

- employed by the employing authority at the time that the suspected breach of discipline occurred; and
- subject to the disciplinary provisions of Part 5 of the *Public Sector Management Act 1994* (PSM Act) at the time that the suspected breach of discipline occurred.

This instruction sets out the considerations and procedures that are to be observed by the employing authority, in addition to those contained in Commissioner's Instruction No. 3: Discipline – general, when undertaking a disciplinary process in relation to such persons, according to whether the person is now:

- no longer employed in the public sector; or
- employed by another employing authority in a public sector body.



References

When acting under Part 5 of the PSM Act (Divisions 1 and 3), employing authorities must comply with the principles of procedural fairness, the Discipline Standard (Public Sector Standards in Human Resource Management), the PSM Act, Commissioner's Instruction No. 3: Discipline – general and this instruction.

Supporting materials produced by the Public Sector Commission may assist employing authorities in dealing with disciplinary matters. Any such material is explanatory only and does not form part of the regulatory framework. A list of these materials is available at the end of this instruction.

This instruction only relates to disciplinary action commenced on or after 28 March 2011. Disciplinary action commenced prior to 28 March 2011 is required to be conducted in accordance with the PSM Act as it existed prior to that date and this instruction has no specific application.

Terminology

The following terminology in this instruction should be read as defined in section 3 of the PSM Act:

- employing authority
- employee
- public sector
- public sector body.

A note on terminology used in relation to former employees and former employing authorities

In using the PSM Act and this instruction, it is important to understand the different terminology that applies, depending on the status of the person subject to the disciplinary process.

Situation 1: person the subject of proceedings remains with the employing authority

If a disciplinary process is undertaken when the person the subject of proceedings is employed by the employing authority where the breach of discipline occurred, then that person is termed an 'employee'. The disciplinary process in this situation is governed by Commissioner's Instruction No. 3: Discipline – general and this instruction has no application.

Situation 2: person no longer employed in the public sector

If a disciplinary process is continued or commenced when the person the subject of proceedings:

- has left the employing authority where the suspected breach of discipline occurred; and
- is not employed by another employing authority in a public sector body,

that person is no longer an employee for the purposes of the PSM Act.



In these situations, section 76(4) of the PSM Act refers to this person as a ‘former employee’ and deems that for the purposes of discipline, in the circumstances specified in this instruction (at clause 1 below), the ‘former employee’ is considered to be an employee of the employing authority where the suspected breach of discipline occurred.

Situation 3: Person now employed in another public sector body

If a disciplinary process is continued or commenced when the person the subject of proceedings:

- has left the employing authority where the suspected breach of discipline occurred; but
- is employed by another employing authority elsewhere in the public sector,

that person is still an ‘employee’ for the purposes of the PSM Act.

In these situations, section 76(7) of the PSM Act refers to the employing authority where the breach occurred as the ‘former employing authority’ and deems that for the purposes of discipline, in the circumstances specified in this instruction (at clause 2 below), the ‘former employing authority’ can act as if it is the actual employing authority of the employee.

Instruction

1. Former employee – person no longer employed in the public sector

An employing authority may commence or continue a disciplinary process in relation to a person believed to be a former employee in circumstances where:

- a. the suspected breach of discipline occurred when the person was an employee of the employing authority; and
- b. the employing authority considers it appropriate to commence or continue a disciplinary process having regard to public interest considerations, some of which may be:
 - i. the seriousness of the suspected breach of discipline
 - ii. whether it is an isolated incident
 - iii. the status and position held by the employee
 - iv. the length of time that has elapsed since the suspected breach of discipline occurred
 - v. the likely impact upon public confidence in the public sector or the relevant public sector body if the suspected breach of discipline is not dealt with as a disciplinary matter
 - vi. any mitigating factors relating to the personal circumstances of the person
 - vii. whether the person is, or is likely to be, re-employed in the public sector in the future
 - viii. the likely cost and administrative burden involved in dealing with the suspected breach of discipline as a disciplinary matter.



1.2 Should the employing authority find, after following the procedures set out in Commissioner's Instruction No. 3: Discipline – general, that a person believed to be a former employee has committed a breach of discipline and decides to take action, the only action that can be taken is a fine and/or reprimand. The decision on which action is appropriate is to be taken after following the procedures set out in Commissioner's Instruction No. 3: Discipline – general.

2. Former employing authority – employee is employed elsewhere in the public sector

A former employing authority may commence or continue a disciplinary process in relation to a person believed to be a public sector employee, in circumstances where:

- a. the suspected breach of discipline occurred when the person believed to be a public sector employee was an employee of the former employing authority;
- b. the current employing authority decides not to treat the matter as a disciplinary matter under section 81(1) of the PSM Act; and
- c. the former employing authority considers it appropriate to commence or continue a disciplinary process, having regard to public interest considerations, some of which may be those considerations contained in 1.1(b) of this instruction.

2.2 Should the former employing authority find, after following the procedures set out in Commissioner's Instruction No. 3 – Discipline – general, that the person believed to be a public sector employee committed a breach of discipline and decides to take action, he or she must consult the current employing authority of that person before taking any sort of actions available under Part 5 of the PSM Act.