

A-Z Guide

LAWFUL AND REASONABLE INSTRUCTION



Contents

Use this guide to understand	2
Introduction	2
Direct Disobedience	2
Indirect Disobedience	3
Insubordination	3

Use this guide to understand

- What lawful and reasonable instructions are and how they relate to your business
- Whether instructions are reasonable or unreasonable
- Circumstances where it is appropriate to discipline employees for failing to follow a fair and reasonable instruction
- Refusing an employee's leave request
- When employees can be summarily dismissed for failing to comply with a fair and reasonable instruction

Introduction

Lawful and reasonable instructions refer to an employer's right to require an employee to carry out the terms of their employment. Instructions must be within the scope of an employee's contractual obligations under their employment agreement, and cannot require the employee to do anything contrary to law or demand the performance of an impossible or dangerous task. Instructions must also be given in good faith.

A failure to follow an instruction can be disobedience, indirect disobedience or insubordination.

Direct disobedience

Usually this is an open and deliberate refusal to obey a lawful and reasonable instruction given by a person in authority.

An instruction will generally be regarded as lawful and reasonable if it:

- Does not require the servant to perform any act contrary to law
- Is within the scope of the servant's contractual obligations
- Does not demand the performance of any impossible or dangerous task

An employee can be required to perform any duties that form part of the employment agreement, even if those duties are not explicitly stated in the job description. However, you must consider whether the employment agreement allows you to require the occasional performance of additional duties. Another consideration is whether the employee has performed the additional duty before, or whether the duty could reasonably be said to fall within the general scope of the role, for example through custom and practice. It is also unreasonable to expect your employees to follow an instruction inconsistent with the terms of a collective agreement.

Where an instruction could expose employees to a risk of serious harm, the employer cannot reasonably expect employees to follow it. An example is that City Council employees refused to comply with an instruction to wear name badges displaying their first and last names. The Courts acknowledged that, whilst the Council's instruction could not be considered unlawful or unreasonable, the manner of its implementation was unreasonable. Complying with the instruction would have exposed Council employees to the hazards of potential violence and personal harassment from the public. Therefore they had good reason for refusing the instruction.

The process of employees carrying out the instructions must also be undertaken in a reasonable manner. For example, a decision to implement fingerprint scanning as a means of timekeeping was in itself an adequate basis for a lawful and reasonable instruction. The employer, however, still needed to comply with its obligations to consult employees in a timely and appropriate manner about the change. If the employer failed to do so, the instructions could be unlawful because they were in breach of contractual and statutory obligations.

General examples:

- A duty that may not be explicitly stated in the employment agreement is the duty to follow the instruction of a judicial officer, such as a police officer. An employee who willfully fails to follow the instruction of a judicial officer will be engaging in direct disobedience. It is advisable to inform employees that they are expected to follow instructions from judicial officers, which could be covered in company policy.
- In drug testing policies in safety-sensitive areas of work: if an employee refuses to participate in on-the-job random testing, and the testing was part of an approved health and safety or drug and alcohol policy, the refusal would be disobedience to a lawful and reasonable instruction. However, you must consider whether the employee has good reason for refusing to take such a test, so whether they were justified or unjustified. You should also consider reasons for returning a positive sample. Therefore, you should keep an open mind on whether disciplinary action is appropriate.

Indirect disobedience

This generally occurs where an employee had a reasonable belief that their actions, which breached instructions, were permissible. It commonly arises where questioning the employer's ability to unilaterally impose changes to an employee's terms and conditions of employment. For example, an employee refuses to comply with changes to their roster.

Discipline, for failure to comply with the instruction, may not be appropriate in these circumstances. The key is to resolve the dispute, using the dispute resolution process set out in the agreement, before issuing the employee with an instruction to comply with the change or initiating disciplinary action for non-compliance.

Instructions should be clear, and employees should be informed of possible consequences of non-compliance. In contrast, if an employer gives an instruction that could reasonably be interpreted as a suggestion, then it would not be appropriate to discipline an employee for non-compliance, because the disobedience would not be willful.

Examples:

- You decline an employee's application for leave, but the employee subsequently takes the leave on the advice of their union representative. The employee cannot be said to be disobeying a lawful instruction, because they genuinely believed they were entitled to take the leave.
 - Your refusal of an employee's leave request must be reasonable. Declining a leave application without genuinely considering it could be unreasonable. Therefore, it would be inappropriate to discipline an employee for taking leave in defiance of an unreasonable refusal.
 - The consequences of unreasonably refusing leave requests can be significant. For example, an employer dismissed an employee who took leave when their leave application had been refused. The Court held that the employer's refusal to grant the leave was "unjustified" and the instruction not to take the leave was "unreasonable and unlawful". The dismissal was considered substantively unjustified because the employee had not disobeyed a lawful instruction, so the dismissal had no basis.
- An employee is advised by their union to attend a delegates' meeting, but the employer had specifically instructed the employee not to attend. Discipline may not be justified here, because the employee had an honest belief that they were entitled to attend the meeting.

Insubordination

Insubordination can include public criticism of an employer, and disobedience or abuse directed at supervisors or managers. It is generally reasonable to discipline employees for insubordination. The Courts consider that in some circumstances it is also reasonable to dismiss. One example where dismissal was reasonable is where an employee distributed pamphlets that tended to bring the employer into disrepute; disregarded the employer's clear instruction not to distribute the pamphlets; and attempted to strike unlawfully.

If an employee is employed by but also criticises their Council, discipline may not be appropriate; the employee could be entitled to express their criticism as a ratepayer where it was reasonable. In such circumstances, it is advisable to have internal mechanisms set up for employees to express criticism.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

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