

GUIDANCE FOR ESCALATION OF MATTERS TO THE LABOUR INSPECTORATE

NOVEMBER 2018

IDENTIFICATION OF MATTER

Identification is determining whether a matter is appropriate for escalation to the Labour Inspectorate. There are *only two mandatory criteria* that need to be met for escalation:

THE MATTER MUST BE WITHIN JURISDICTION OF THE LABOUR INSPECTORATE

The matter:

- must be **confined** to minimum employment standards; *and*
- there must be a **clearly identifiable breach** of minimum employment standards (i.e. one that the complainant believes has occurred or is occurring, not one which may be about to occur).

FURTHER CRITERIA FOR INDIVIDUAL ONE-OFF BREACHES

If the matter presents as an individual one-off low-level breach (as opposed to a serious or systemic breach), then ensuring the employee (i.e. not the person who may be calling on behalf of the employee) has

- a correct understanding of the legislation pertaining to their issue;
- taken reasonable steps to attempt to resolve the problem themselves; and
- does not have any formal representation.

GUIDANCE

The following tables outline examples of matters which may be referred to the Labour Inspectorate and those which should not be referred.

TABLE 1 – MATTERS WHICH MAY BE ESCALATED TO THE LABOUR INSPECTORATE

The following matters containing identifiable breaches of minimum employment standards may be referred to the Labour Inspectorate:

Criteria	Details
Situations that are confined to minimum employment standards	Any matter (including matters of exploitation and systemic issues) that is referred to the Labour Inspectorate must be confined to minimum employment standards legislation. Labour Inspectors have no jurisdiction to investigate or enforce contractual issues (including disputes and personal grievances).

<p>Situations where there is serious exploitative conduct</p>	<p>Calculated abusive conduct that marks serious departure from legislated standards in respect of vulnerable workers (even if only in respect of individuals or small numbers). Examples include:</p> <ul style="list-style-type: none"> ▪ An employee has paid an employer a substantial amount of money to secure employment with that employer (a premium). ▪ An employer is regularly paying his employees at a rate clearly under the minimum wage. ▪ An employer is regularly making substantial deductions meaning his employees are in effect working for very little, or no pay.
<p>Mid-to-large systemic breaches</p>	<p>Which in themselves do not have large consequences for individuals, but when aggregated across a workplace have large consequences. Examples include:</p> <ul style="list-style-type: none"> ▪ Employees in an medium sized takeaway food franchise are not receiving time and a half for working public holidays (there are 20 or more employees affected); ▪ Employees in a nationwide home electronics store are not receiving time and a half for working public holidays (the value of arrears for these unpaid entitlements would likely be \$100,000 or more).
<p>Individual one-off low level breaches</p>	<p>A breach of minimum employment standards which is an individual issue (i.e. affects three or less employees) and is limited to the particular individual circumstances. There is an expectation that the complainant has:</p> <ul style="list-style-type: none"> ▪ a correct understanding of the legislation pertaining to their issue; ▪ taken reasonable steps to attempt to resolve the problem themselves; and ▪ does not have any formal representation. <p>Examples include:</p> <ul style="list-style-type: none"> ▪ An employee has not received holiday pay upon termination of employment; ▪ An employee has had a deduction made from their pay without their written consent; ▪ An employee has been paid a training wage despite being eligible for the adult minimum wage.

TABLE 2 – MATTERS NOT TO BE ESCALATED TO LABOUR INSPECTORATE

The following matters, although they may contain minimum employment standards matters, *are not to be referred* to the Labour Inspectorate.

Criteria	Details
<p>The same matter has been previously dealt with by LSERT / The same matter is currently being dealt with by another part of Employment Services e.g. mediation.</p>	<p>If LSERT has already dealt with the matter we likely would have suggested that the parties seek mediation. If another part of ES branch is dealing with the matter or the matter is with the ER Authority, then best the matter continue to be dealt with by that unit or the Authority as a whole matter.</p>
<p>There are no details of the employer</p>	<p>The Labour Inspectorate requires details (including identification and contact details) of the employer in order to conduct any kind of follow-up.</p> <p><i>If there are no details of the employer, then it is not a matter to be referred to the Labour Inspectorate.</i></p>
<p>The matter is <i>not confined</i> to minimum employment standards</p>	<p>Labour Inspectors have no jurisdiction over matters beyond minimum employment standards. As the LSERT is effectively triaging for Labour Inspectors, the jurisdiction of this team does not stretch beyond this either.</p> <p>Minimum employment standards issues are often intermingled with other employment relationship issues. The most common examples here are</p> <ul style="list-style-type: none"> • non-payment of final contractual wages and holiday pay upon termination • the employee has already raised a personal grievance with their employer for unjustified dismissal and subsequently has not received holiday pay. <p>These matters are best dealt with as one issue in the Employment Relations Authority, via mediation.</p> <p><i>If the matter involves contractual issues as well as minimum employment standards (i.e. it is not confined to minimum employment standards), then it is not a matter to be referred to the Labour Inspectorate.</i></p>
<p>There is <i>not a clearly identifiable breach</i> of minimum employment standards</p>	<p>There must be a clearly identifiable actual breach of any minimum employment standards matter raised by employees.</p> <p><i>If there does not appear to be a breach of minimum employment standards, or it is a potential breach which has not occurred yet (e.g. the final pay day when payment is due has not occurred), then it is not a matter to be referred to the Labour Inspectorate.</i></p>

	Any “heads-ups” or “tips” received from members of the public about workplace issues which <i>may</i> be occurring should be recorded in CRM by CSA’s. This information should then be extracted from CRM to supplement any reporting the Service Centre provides to Employment Services Branch.
The employee wishes to recover wages which have been <i>negotiated above the minimum wage</i>	The Labour Inspectorate is unable to recover wages for employees who have agreed to a rate higher than the minimum wage, including those who only want to recover an amount up to the minimum wage. Wages agreed above the minimum are essentially a contractual matter. Non-payment of contractual wages is not a breach of minimum employment standards.
The employee wishes to recover contractual wages which have been withheld by the employer.	Withholding of wages is not a deduction, rather it is a breach of contract and therefore not a breach of minimum employment standards.
The matter involves contractual entitlements over and above the corresponding minimum standards	Labour Inspectors only have jurisdiction to enforce minimum standards legislation. <i>If the matter involves contractual entitlements over and above the corresponding minimum standards, then it is not a matter to be referred to the Labour Inspectorate.</i>
The issue is a dispute between individuals or family members	Where there is an indication that the matter, despite containing minimum employment standards breaches, is beyond that of an employment relationship and the issue is more to do with a familial or interpersonal relationship breakdown. For example: <ul style="list-style-type: none"> • A family member or relative (including by affinity) working in the family shop who believes, because of the long hours they perform, that they are not receiving their minimum payment entitlements; • An employer is withholding payment of final holiday pay from the employee because the employee owes the employer a private debt outside of the employment relationship. <i>If the matter involves a dispute between individuals beyond the employment relationship, then it is not a matter to be referred to the Labour Inspectorate.</i>
The issue involves minimum employment standards, but there is a <i>contractual matter or dispute</i> as to why the minimum employment standards have been breached	Examples here include <ul style="list-style-type: none"> • The employee has not received holiday pay upon termination. The reason the employer has not paid is because the employer believes the employee needs to reimburse the company money as a result of an employment issue • The employee has not received holiday pay upon termination. The reason the employer has not paid is because there is dispute

	<p>as to how much notice was required to be given</p> <ul style="list-style-type: none"> The employee has not received holiday pay upon termination. The reason the employer has not paid is because the cheque presented to the employee bounced. <p><i>If the issue involves minimum employment standards, but there is a contractual matter or dispute as to why the minimum employment standards have been breached, then this is not a matter to be referred to the Labour Inspectorate.</i></p>
<p>The employee has <i>formal representation</i></p>	<p>Formal representation is a professional person or organisation which represents an employee in matters concerning their employment and employer. Formal representation includes</p> <ul style="list-style-type: none"> being a member of a union having immediate access to a lawyer or employment advocate. <p>Free legal advice provided by Citizens Advice Bureaux or Community Law Centres, or family/friend representation does not constitute formal representation.</p> <p><i>If the employee has formal representation, then they have the means to pursue the matter themselves via mediation / ER Authority, and it is not a matter to be referred to the Labour Inspectorate.</i></p>
<p>The employee is employed on a <i>collective employment agreement</i></p>	<p>Labour Inspectors do not have jurisdiction over collective employment agreements. Additionally, if an employee is covered by a collective agreement, they will have formal representation (i.e. the union party to the collective). The employee should be encouraged to raise the matter with their union.</p>
<p>The employee wants his/her name withheld from their employer</p>	<p>The regional Labour Inspectorate may provide confidentiality under limited circumstances. However, the matters LSERT deal with are typically individual one-off breaches, and in order to liaise with the employer and raise a breach then LSERT need to disclose who the complainant is. See also Anonymity below.</p>

ESCALATION OF MATTER

The matter is escalated to the Labour Inspectorate using TIKA (web version). Guidance for TIKA and business processes can be found [here: \[insert link\]](#)

INFORMATION REQUIRED

Once the matter has been identified as suitable for escalation to the Labour Inspectorate, the matter then needs to be escalated to the Labour Inspectorate using TIKA. The Labour Standards Early Resolution Team (LSERT) receives **all** matters in the first instance. Complaints taken should be *submitted immediately* upon taking the complaint.

NOTE TAKING SHOULD BE THOROUGH

Generally, enough information should be collected and recorded to enable the reader to understand the situation which will potentially be followed up on by the Labour Inspectorate, as well as an understanding of the employee's/complainant's knowledge of their entitlements. As a minimum, there should be a brief but concise description of the situation to enable the LSERT to quickly ascertain that the issue is within jurisdiction of the Labour Inspectorate and specifically what the likely breaches are.

RELEVANT QUESTIONS SHOULD BE ASKED AND DOCUMENTED

The following are types of questions that could be asked and issues that should be recorded:

- Which legislation is potentially in breach and why
- Whether there is a written employment agreement in place, and what sort
- Whether the complainant has discussed the issue with their employer/employee/other party about the situation
- The reason why the employer has taken the stance / action they have
- Whether there are others in the workplace who have similar issues
- How long the employee has been employed with the employer
- When their employment terminated
- Whether the employee is a member of a union
- What appears to be the cause of these issues (e.g. ignorance of the employer, wilful non-compliance, etc.)
- How many employees are affected
- What type of employee is affected
- How large the workplace is
- Which industry sector the employment is in
- (If employee (or employee whom the enquirer is ringing on behalf of) appears to be a migrant worker)

- When they arrived in New Zealand
- Nationality of employee/s
- Whether employee can converse in English or whether Language Line is needed
- Any other “flags”, such as prominence in the media.

The queue that the call presented in should also be noted.

THE COMPLAINANT’S EXPECTATIONS MUST BE MANAGED

It is important for the complainant to be aware that their complaint will be sent to a team within the Labour Inspectorate for assessment, but that their issue may not be investigated by a Labour Inspector. Upon receipt of information from an employee a LSO will perform an initial assessment in order to decide what action to take with a matter. The following examples can be used to set the complainant’s expectations:

“Your matter can be passed to the Labour Standards Early Resolution Team for assessment. They will assess whether this is a matter for full investigation or whether it can be dealt with by providing the employer with guidance on how to resolve it directly with you.”

Then optional or as further explanation:

“If the matter is not investigated or the LSERT is unable to resolve the matter you remain able to take action yourself through mediation or the Employment Relations Authority.”

FULL CONTACT DETAILS MUST BE OBTAINED

As a minimum, the contact telephone number of each party to the matter should be collected. CSA’s should endeavour to collect full contact details, including physical addresses and as many phone numbers and email addresses as possible.

DETAILS OF THE PLACE OF WORK MUST BE OBTAINED

It is also important to note that a matter may not be referred if there are no details of the employer or the workplace. In the case of any matter which is being reported by someone not directly connected with the organisation (e.g. a concerned member of the public reporting a suspected sweatshop or other serious exploitative practices), an address of the location of the place of work at least must be obtained.

ANONYMITY

DEFINITIONS

Term	Definition	Notes
Anonymity	The enquirer does not reveal <i>any</i> information that identifies them.	As soon as an enquirer reveals their identity, there can be no anonymous complaint.

Confidentiality	The enquirer reveals their identity but requests that their information be withheld by the Labour Inspectorate from other parties where able.	The Labour Inspectorate can never completely guarantee confidentiality. Additionally, for individual low level breaches, the Labour Standards Early Resolution Team is normally unable to attempt to resolve a matter without revealing the complainant's details to the employer. These expectations should be outlined to the enquirer.
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PROCESS

Subject to any listed exceptions (such as criteria in the Migrant Exploitation business process), *an anonymous complaint can only be taken if:*

- anonymity is specifically requested by the enquirer; **and**
- an attempt has been made to obtain the enquirer's details; **and**
- the enquirer is still unwilling to provide their contact details; **and**
- the enquirer has details of the employer or place of work.

If **any** of the above criteria are **not** satisfied, then an anonymous complaint **cannot** be taken.

Note that confidentiality and anonymity should **never** be *offered* to enquirers. The issue should be raised or prompted by the enquirer. Collection of full details of enquirers should *always* be attempted.

Per above definitions, in the event that a person has provided their details, they are no longer anonymous. This means that the Anonymity tick box on TIKa should **not** be ticked.

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