A-Z Guide

TERMINATION OF EMPLOYMENT

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Overview

Different circumstances can lead to an employment relationship being terminated. Each circumstance has different implications for notice periods and payments of wages or salary.

Exit interviews may provide you with important information about the position and your organisation, and provide closure for the employee.

Most employment relationships terminate on notice. An employer and employee may agree to treat that notice in a variety of different ways.

Employers are under no general obligation to provide character references.

When an employment relationship terminates, personal information about the employee must not be disclosed without the employee's consent.

Introduction

This **A-Z Guide** summarises the considerations that arise when an employment relationship ends. This guide covers once the decision to terminate the employment relationship has been made, with some matters that require discussion and agreement.

Every employment relationship is bound by an employment agreement. Most of the issues that arise when the employment terminates are covered in that agreement. When reading this information, it is important to keep the wording of the employment agreement in mind.

If you have a question about your obligations or your employee's obligations when an employment relationship is ending, first consider the employment agreement that binds you both. If the employment agreement is not in writing, and a particular issue has not arisen before, then you will need to reach an agreement on what should happen.

This guide does not cover any of the steps that may take place before the employment is terminated, either from a decision or by operation of law. Those steps are covered in the following **A-Z Guides**:

Abandonment of Employment	Incompatibility
Absenteeism	Incapacity
Discipline	Trial and Probationary Periods
Fixed Term Employment	Restructuring and Redundancy
Frustration	Retirement
Full and Final Settlements	

The starting point in this guide is a discussion of the different circumstances of termination these terms refer to.

Termination of Employment

As already indicated, an employment relationship may be terminated by one of three ways:

- Resignation
- Dismissal
- Operation of law

Resignation

A resignation describes a termination of employment at the initiative of the employee. It may be because:

- The employee wishes to pursue alternative employment
- The employee is retiring.

If it is unclear or there is some ambiguity as to whether an employee is resigning, best practice would be to make further inquiries as to the employee's intention, rather than relying on what you presume to be a resignation.

Where an employee advises of their intention to resign, rather than clearly resigning, it can be risky to treat the communication of intention as a notice of a resignation. In *Nelson v Air New Zealand International Ltd* ERA Auckland AA81/06; 22/03/2006, the employee notified Air New Zealand of her *"intention to leave*", however she did not state when she would finish or that she was providing her contractual notice period. The Authority found the communication could not be treated as notice of resignation.

Heat of the moment resignations

If an employee's resignation is tendered in the 'heat of the moment' it can become difficult to infer that the employee had the requisite intention to resign. The Employment Court in *Boobyer v Good Health Wanganui Ltd* EmpC Wellington WEC3/94; 24/02/1994 noted that:

> *That is where an employer seizes upon words neither intended to amount to a resignation nor reasonably capable of doing so or takes advantage of words of resignation known to be unwitting or unintended and the employee promptly makes it plain that the employee's communication was not meant to be a resignation and should not be treated as if it were. In that kind of case, the employer cannot safely insist on its interpretation of what the employee said or wrote. This is also the position where words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once "the heat of the moment" had passed and taken with it any "influence of anger or other passion commonly having the effect of impairing reasoning faculties": Chicken and Food Distributors (1990) Ltd v Central Clerical Workers Union [1991] 1 ERNZ 502, 507.*

When faced with a resignation in the 'heat of the moment', best practice is to allow the employee a cooling-off period, following which you can inquire whether the employee actually intends to resign.

In *Taylor v Milburn Lime Ltd* [2011] NZEmpC 164, the employee walked off the job following an argument with a colleague. Here the Employment Court held that the company's decision to rely on the resignation without further investigation was an unjustified dismissal. The Court noted that:

> *Where such doubt exists, the good faith obligation to be "active and constructive in ... maintaining a productive employment relationship" requires an employer to investigate the situation further before responding to the supposed resignation. Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee's actual intentions rather than on what might be inferred from equivocal words and conduct.*

Dismissal

A dismissal describes a termination of employment at the initiative of the employer. The employer may dismiss because:

- The employee's position is redundant
- The fixed term employment has reached the specified term
- The employee was dismissed for cause:
  - Incapacity
  - Incompatibility
  - Misconduct or serious misconduct

There is also the term 'constructive dismissal', which is covered below.

Summary dismissal

Summary dismissal means instant dismissal. No period of notice is given or required to be worked. Even with a summary dismissal, employers need to keep in mind that a clear process still needs to be followed. Refer to the **A-Z Guide** on **Discipline.** Generally, where an employee is summarily dismissed, the employee's employment terminates on that date of the dismissal. The Court of Appeal said it is a mixed question of fact and law as to when an employment relationship terminates, and that a payment in lieu of notice is not determinative: *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

On notice

In most instances, employment relationships terminate on notice; one party to the agreement communicates to the other party its unequivocal intention to end the employment relationship after a specified or agreed period.
Notice is discussed in greater detail below.

Constructive dismissal

Constructive dismissal involves a resignation by an employee, which the employee then establishes was brought about by the action or inaction of the employer. The underlying issue with an employee being forced to resign is that the employee's right to resign under their employment agreement should be exercised without duress or coercion.

In *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, the Court of Appeal outlined that constructive dismissal could include, but was not limited to, the following scenarios:

- An employer gives an employee a choice between resigning or being dismissed
- An employer's course of conduct had the deliberate and dominant purpose of coercing an employee to resign
- A breach of duty by the employer causes an employee to resign

In *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168, the Court of Appeal shed further light on what questions might be considered when determining whether there has been a breach that caused an employee to resign. The Court of Appeal noted that:

> *The first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach."*

Operation of law

Abandonment
In this instance, the employment relationship terminates owing to the passage of time, and the employer meeting its obligation to establish in fact the employee intended to abandon the employment.

Refer to the **A-Z Guide** on **Abandonment of Employment** for a fuller explanation of abandonment.

Frustration
The doctrine of frustration applies to all contracts, including employment agreements.

Here, before the parties to a contract have been able to complete its performance, a supervening event beyond the control of either of the parties occurs, rendering further performance and completion impossible or substantially impossible.

When the doctrine applies, and the contract is said to be frustrated, then the parties are released from their obligations under the contract to complete it. There is no allocation or apportionment of fault under this doctrine.

Refer to the **A-Z Guide** on **Frustration** for a fuller explanation of this doctrine as it relates to employment.

Discipline
Here, the employment relationship may be terminated due to a disciplinary action. This can be misconduct, or serious misconduct. Discipline means holding an employee responsible and/or accountable for their action or failure to act.

Refer to the **A-Z Guide** on **Discipline** for a fuller explanation of discipline.

Exit Interviews

Exit interviews provide for an excellent opportunity to gather useful information about the position, your organisation, and to tie up any loose ends with the employee who is departing.

Filling the position

If the requirement to fill a position has arisen because of a termination, then it is often an appropriate opportunity to evaluate whether in fact, a replacement is required. It is plausible that the work done by that former employee could be absorbed by other staff, or that a restructure of the work was being contemplated resulting in an entirely new position being created. There may be other changes about to occur within the make-up of the workforce that could impact on the decision to fill that new or vacant position immediately and permanently.

An exit interview with the outgoing employee can assist you to evaluate the position from a structural perspective. It can also assist your understanding of what will be required of the new employee and what skills and qualifications that will be both necessary and desirable for the new employee to have.

Closing doors

An exit interview may be the formal conclusion to an employment relationship that enables you to address with an outgoing employee any issues that have remained outstanding. Matters left unresolved upon termination of employment could result in the employee lodging a personal grievance claim, so an exit interview may prevent that. In this sense, the exit interview is a risk management initiative.

If an employee raises matters that indicate that their employment was materially affected by negative elements in the workplace or workforce, then their concerns or complaints can be heard and investigated by you to try correct them before they leave.

Job dissatisfaction because of the work, remuneration, the environment, or the people is a staff retention issue which can be analysed by the information received from an outgoing employee at an exit interview.

Notice

Notice period

Notice refers to the period of time that an employer and employee must give each other, between the date of communicating the decision to terminate the employment, and the date the employment actually ends, upon which the employee is no longer employed.

If a period of notice is not specified in a written employment agreement, and the parties to the employment relationship are unable to agree, the law implies a term of reasonable notice *"in the situation as it exists at the time notice... is given": Ogilvy and Mather (New Zealand) Ltd v Turner* [1995] 2 ERNZ 398 (CA).

Purpose of notice periods

A notice period provides an employer with the opportunity to replace the terminating employee, before that employment ends, so that the workplace is not affected by a reduction of its labour force. In some circumstances, a notice period can overlap with the employment of a new employee, enabling the terminating employee to help train the new employee.

A notice period may also provide an employee with the opportunity to seek alternative employment or make alternative arrangements before the employment ends, or manage any change in the employee's circumstances caused by the employment terminating.

Most employment agreements provide a notice period. An employment agreement may provide different periods of notice that apply to different circumstances; many employment agreements stipulate that if an employee is dismissed for serious misconduct there is no notice. Before making any decisions or considering any alternatives for any notice period, you must understand which type of termination has occurred.

Frequently, employment agreements provide for different notice periods in these scenarios:

- During or at the end of a probationary or a trial period
- Because the position has been made redundant
- When the employee is dismissed for repeated misconduct or serious misconduct
- If the employee chooses to leave on their own terms

Alterations

The wording of a termination clause will define the notice requirements of the parties, when ending employment. Usually, the employer and employee may agree if they wish to adjust a notice period from the term in their clause.

However, in some agreements, the notice period is specified as a *minimum* or *at least* its specified number of weeks. Here, the parties have already contracted to allow giving longer notice periods. If the employee's provided notice satisfies the clause's minimum, the employer does not have the choice to reject it.

If an employment agreement does not have an upper limit on notice periods; and the employer does not accept the resigning employee's more generous period, either by forcing the employee to leave earlier or to accept a shorter payment in lieu - the employer exposes itself to a claim of unjustified dismissal.

An imposed consent to a reduction of a notice period, rather than one freely given, was found to be an unjustified dismissal in *Coca Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264 - constructive dismissal at best, and actual dismissal at worst.

Worked

The presumption is that an employee will work the duration of a notice period.

- An employee should not be subject to any change in conditions or terms of employment because of a notice period unless the employer and the employee agree on such.
- Employers and employees may agree, and this agreement may be expressed in a written employment agreement, that in some or all circumstances, a period of notice will not be worked.

Payment in lieu
If the employment agreement has a notice period, and the employer does not require the employee to work the notice period, then they would need to pay the employee in lieu of the notice period. However, if there is a notice period and the employee chooses not to work this, then the employer would not need to pay in lieu of the notice period. The end of employment would be the date that is agreed on and before the payment in lieu of the period.

Agreeing to agree
If a provision requires an employer and an employee to agree on any matter in relation to notice, then neither party may determine the matter unilaterally.

Garden leave
An employment agreement may provide that for a period of notice, the employer and employee may agree, at that time, that the notice period will not be worked, but that the employee will be on garden leave for the duration of the notice period and paid their normal wages or salary. The employer and employee may then agree when faced with the situation itself. The employment relationship continues during the period of garden leave; the duties of good faith, trust and confidence, and fidelity still apply.

Any employer that unilaterally determines that an employee will not work the duration of the notice period, instead putting them on garden leave, runs the risk that the employee will consider the employment repudiated and resign. In this situation, if the employer's action is held to be a breach of the employment agreement (of any express term or the implied duty to provide work), then the employee may have a personal grievance based on unjustified (constructive) dismissal. Alternatively, the employee may have a personal grievance, because a condition of the employee's employment has been affected to their disadvantage, by an unjustifiable action of the employer.

The Court of Appeal has stated that whether or not there has been a breach of contract (employment agreement) will depend on the terms of the particular contract, including implied terms where proper: *Ogilvy and Mather (New Zealand) Ltd v Turner* (above).

Forfeited

The employment agreement may contain what is commonly referred to as a forfeiture/deductions clause. If notice was required to be worked or given but was not, then the equivalent time not worked *may* be deduct from final wages and salaries owing.

Forfeiture of wage clauses may not be enforceable if the amount forfeited is unreasonable - disproportionate to the loss experienced by the company, as a result of the inadequate notice. A deduction under a forfeiture clause cannot be used to penalise an employee. It can only be used to recover costs incurred by the employer because of the employee's failure to work out the notice period. Employers may be required to justify any monies deducted using actual or predicted business loss.

Notice when Employment terminated due to Covid-19 Vaccination Mandate

Employment Relations Act, Schedule 3A, clause 3:

> *(3) If the employee is unable to comply with a duty referred to in subclause (1)(a) or a determination referred to in subclause (1)(b) because they fail to comply with the relevant requirements of the COVID-19 Public Health Response Act 2020 or a COVID-19 order, or they are not vaccinated by the specified date, their employer may terminate the employee's employment agreement by giving the employee the greater of—*
>
> a. *4 weeks' paid written notice of the termination:*
> b. *the paid notice period specified in the employee's terms and conditions of employment relating to termination of the agreement.*

The Government passed legislation to provide a minimum four-week paid notice period when people have their employment agreements terminated because they were not vaccinated, and their work requires vaccination. It is possible it may extend this section to include other Public Health Responses or orders in the future.

This minimum applies to all employees who are not vaccinated, and whose work requires vaccination. It applies to employees covered by a government vaccination mandate, as well as those whose employers have decided to require vaccination following a risk assessment process.

Being a minimum, the only employees who affected are those who do not have a notice period, or whose notice periods are shorter than four weeks. Notice periods longer than four weeks continue to apply.

The termination notice is cancelled if an employee becomes vaccinated during their notice period or they become permitted to perform the work under a Covid-19 Public Health Order, unless this would unreasonably disrupt their employer's business.

Final Pay

The Wages Protection Act 1983 states (with permitted exceptions) that an employer shall, when any wages become payable to [an employee], pay the entire amount of those wages to that [employee] without deduction.

It is unlawful to withhold wages and make any deduction from wages than otherwise permitted by the Wages Protection Act 1983. A breach of this Act makes you liable to a penalty imposed by the Employment Relations Authority.

When payable

The final pay of any employee is payable when the employment is terminated.

If an employee terminates on notice, then the final pay is payable on the day agreed between the employer and employee for payment of wages. If there is no agreement, then the final pay must be available to the employee after the completion of their final day of work.

If payment is being made in lieu of notice - so the employee terminates on notice, and the employer and employee agree to payment in lieu of it - the final pay is payable on the day agreed between the employer and employee. In this instance, the employer and employee may agree to a date for the payment of the employee's final pay, other than that specified in the employment agreement; but it is recommended the payment of the final pay coincide with the last day of the employee's employment.

What is payable

Final pay is usually, at the least, payment of wages or salary for the last pay period, and holiday pay. It may also include compensation for redundancy and other forms of ex gratia payments.

Refer to the **A-Z Guide** on **PAYE** for the tax treatment of any of these components of final pay.

Wages and salary
Wages and salary are payable up until the last day of the employee's employment.

Deductions and forfeiture
No deductions may be made from an employee's final pay unless the employee has consented in writing to the deduction. A written and signed employment agreement may be evidence of this sort of consent, if there is a clause in the agreement that specifically provides for deductions from wages.

Before making any deduction in accordance with a general deduction clause in a worker's employment agreement, the employer must first consult with the worker. An employer must not make a deduction from wages payable if the deduction is unreasonable.

If an employee and employer have agreed in writing that a specific period of notice is to be given and the employee does not give it, then a sum representing the forfeited notice period may be deducted from the employee's final pay.

The forfeiture/deductions clause should not be to punish an employee for not fulfilling their contractual notice requirements. Rather, the deduction should relate to some actual loss or damage suffered by the company as a result of the employee not working out their notice. One example is the cost of hiring a temp to cover an employee who does not work out their notice or gives insufficient notice.

The Employment Court has held that a forfeiture clause, which was not reduced to writing, could not be used to calculate the wages payable, when the employee terminated her employment without notice part way through a pay-period: *Portia Developments Ltd t/a Silverstone Intercredit New Zealand v Taylor* (Unreported) AEC 100/97; 9 September 1997; Travis J. The effect of the decision, in that case, was that the employer had to pay the employee the arrears of wages and holiday pay.

Holiday pay
The employee must be paid the balance of any annual leave on termination of employment.

This balance is counted forward, from the date of termination, on days that would be otherwise working days for the employee. These are deemed as if taken as annual holidays. If any of these days are public holidays, then the employee is entitled to payment for the public holiday, and that day is not included in the annual holiday count.

If an employee's employment ends after less than a full year of employment, the employee must be paid holiday pay for that part year; this is paid as a lump sum in the employee's final pay. The counting forward rule only applies to *entitlement* to annual holidays, whereas in this situation there is none. Hence any public holiday falling after the employment's end is not paid here. Public holidays are not paid for accrued leave (but are paid when there are leave entitlements).

Refer to the **A-Z Guide** on **Annual Holidays** for more information.

Compensation for redundancy
Compensation for redundancy is not mandatory. If an employee's employment is terminated because of redundancy, the employment agreement may provide for compensation.

Compensation for redundancy is payable on the last day of the employee's employment.

Refer to the **A-Z Guide** on **Redundancy** for more information.

Unclaimed money

This information is only applicable where employees are paid in cash or by specified cheque. In many instances, an employee's final pay is paid by direct credit to the bank account nominated by the employee.

The Unclaimed Money Act 1971 stipulates that all unclaimed money becomes payable to the Crown. Money owing to an employee becomes unclaimed money under this Act after it has been payable for 6 years.

In practice: if an employee's employment is terminated and for whatever reason the employee does not collect their final pay; that final pay exceeds $100; and if the employee does not claim that final pay for 6 years - then you are obliged to pay the final pay to the Inland Revenue Department (which represents the Crown). Money held by the Inland Revenue Department may be claimed from the Commissioner of that Department.

Death

If an employee dies, the employee's final pay becomes payable.

If you normally pay the employee's wages or salary into a bank account bearing the employee's name, then you may pay the final pay into that account.

If the account has been frozen, you should retain the employee's final pay, until you are formally advised of the identity of the authorised representative of the employee's estate. When you have been advised of that person or agency's identity, you can then pay the employee's final pay to them.

If you pay an employee's final pay to any person who is not the authorised representative of the employee's estate, you may be required to pay that final pay again.

Settlements

Some employment relationships are concluded by agreement. In this instance the employee and the employer may agree that the best outcome to the differences between the parties is for the relationship to end, in a manner not foreseen by the employment agreement, but in a mutually acceptable way. More often than not, this involves a sum of money being paid to the exiting employee in exchange for the employee surrendering the right to redress through legal proceedings. Settlements of this kind are often referred to as "exit packages" and "golden handshakes".

When an agreement is reached, a record of settlement should be signed by both parties and signed off by a mediator to be legal and binding. This will eliminate the ability for the employee to bring legal proceedings against the employer following a settlement. You can obtain more information about this from the Ministry of Business, Innovation and Employment.

The Court of Appeal upheld the Employment Court's decision that in a case involving a mutual termination agreement, there was no dismissal. It found that because the exiting employee agreed to the termination of his employment, he was not dismissed when the proposed exit package was withdrawn. This limited the exiting employee's remedies (under the employment contract) to what he could reasonably have expected to have achieved in a fair and reasonable exit package: *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490.

Refer to the **A-Z Guide** on **Full and Final Settlements** for more information.

References

Employers are under no obligation to supply employees with character or professional references, except where agreed otherwise in employment agreements.

Before collecting, disclosing or using any personal information about an individual, you should first consider whether you have their consent to do so.

Refer to the **A-Z Guide** on **References** for more information on providing and receiving verbal and written references.

Privacy Considerations

Unless you have the consent of an employee who is leaving employment, you should not disclose their reasons for leaving to any other employees or persons. You should also take care that this sort of information is not disclosed by mistake.

The termination of an employee's employment can be a matter in which other employees have an interest, because it may affect the way work is to be done for a period of time. In this case, the fact that an employee's employment has terminated or is to terminate can be disclosed, but not the reasons behind it.

Conclusion

When an employment relationship terminates, parties may have many questions. In most instances, those questions will be answered by reading the employment agreement. In other instances it will be answered by the law, including case law.

A good rule of thumb, if issues arise out of the termination of an employee's employment, is that you and your employee should agree on any steps that are to be taken regarding the ending of that employment. This agreement should come before the steps are taken.

There are many technical considerations that may apply when an employment relationship ends and you should ensure you are aware of them through this **A-Z Guide**.

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.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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