



A-Z OF EMPLOYING

Abandonment

Our guide for Employers and Managers

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Abandonment

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Contents

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It should not be a
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from our AdviceLine
Team if you require
specific assistance.

Overview	3
Introduction	3
Employment Agreements / Policies	3
Abandonment clauses	4
Notice.....	5
Forfeiture of wages.....	5
Breach of contract.....	5
Presumptions	5
Sample Procedure	6
Best Practice	7

Abandonment

Our guide for Employers and Managers

Overview

Abandonment occurs when the employer is forced to assume that the employee has resigned because the employee has been absent for an extended period without authorisation or good reason. This assumption must not be made without sufficient information and facts.

Abandonment is not disciplinary action. Any punitive action should be via the organisation's discipline policy.

Where the reason(s) for the employee's absence are known to the employer, the situation is usually not one of abandonment.

Abandonment of employment is the termination of an employee's employment by the operation of a contractual clause. It may be invoked by the employer when an employee's prolonged and unauthorised absence is unexplained.

An abandonment clause of an employment agreement does not release the employer from their obligation to attempt to find out the employee's whereabouts and their intentions in relation to their employment. The employer is not entitled to simply 'cross the employee off the books' after the specified time has elapsed, without making sufficient attempts to find out the employee's whereabouts.

An effective 'abandonment of employment' clause, complemented by relevant internal policies, will ensure that employers and employees mutually understand their obligations. A policy should set out how an abandonment situation should be managed.

Failing to act in good faith, or acting in a manner that appears to be contrary to good faith, may ultimately lead to a claim that the employee was unjustifiably dismissed.

Introduction

Employers often underestimate the weight of their obligations in the situation of abandonment. An employer has an obligation to enquire into the reason(s) for an employee's absence before concluding that the employee has abandoned their employment. By failing to meet the obligation to enquire, an employer may risk increasing their vulnerability to a personal grievance claim of unjustified dismissal or unjustified disadvantage, under the Employment Relations Act 2000.

Internal policies and procedures should contain guidelines for how abandonment situations should be managed. These policies and procedures should complement your employment agreements to ensure that all parties are clear on what is expected of them.

Continuous communication between HR and line-managers should help employers make good, justifiable decisions.

Employment Agreements / Policies

It is advisable that your employment agreements contain an abandonment clause. Where your employment agreement does contain a clause, it should be both appropriate and enforceable.

Abandonment

Our guide for Employers and Managers

Employment agreements need to be drafted carefully so that they are consistent with policies and procedures. By having complementary policies and agreements you can be assured that both you and your employees understand your respective obligations and the consequences of failing to meet those obligations.

Policies should set out how you or your management staff should respond to a prolonged and unauthorised absence, and should specify the steps that need to be taken to establish that the employee truly intended to abandon their employment.

Abandonment clauses

It is common for clauses of this kind to prescribe a period of time after which the employee will be presumed to have abandoned their employment, if the employee:

- ▶ Has been absent without authorisation;
- ▶ Has not been heard from; and/or
- ▶ Has not notified the employer

Such clauses that have been tested include:

“Where an employee absents himself from work for a continuous period of at least three days without notification to the employer, or without the consent of the employer, or without good cause, he shall be deemed to have terminated his employment”: *NZ Food Processing, Chemical etc IUOW v Expandite Ltd* [1989] 1 NZLR 251.

“Where a worker absents himself/herself from work for more than four working days without notification to the employer, he/she shall be deemed to have terminated his/her service without notice: Provided that it shall be the duty of the employer to make all reasonable efforts to contact the employee during this period: Provided, further, that where a worker was unable through no fault of his/her own to notify the employer, he/she shall not be deemed to have abandoned his/her employment. In the event of any dispute, the question shall be referred to a disputes committee...”: *Chicken & Food Distributors (1990) Ltd v Central Clerical Workers Union* [1991] 1 ERNZ 502.

For a termination by abandonment clause to be justifiable, it must be correctly executed. For instance, when tested in Court the first example of an abandonment clause was held not to apply for three reasons. Firstly, the employer knew of the reason for the absence. The employee had suffered back injuries. Secondly, the employer had consented to the absence. Thirdly, the employer had been advised by the employee’s doctor that the employee had not returned to work because of the injuries, and that the medical certificates issued by him had gone straight to ACC instead of via the employer with the employer’s consent.

The second example was relied on by an employer to justify the termination of an employee after her absence for an hour immediately following a heated exchange. The Labour Court stated that the clause itself showed that the employer could not reasonably have deemed the employee to have abandoned her employment. When the employer did not reconsider the situation on the opportunities that followed, and replaced the employee within the time it took for her to cool down, it was held that the employer had unjustifiably constructively dismissed the employee.

In *Pitolua v Auckland City Council Municipal Abattoir* [1992] 1 NZLR 6; the Court of Appeal stated that where employment is abandoned, an employer is not free from their obligation to justify why employment did not resume. The Court held that, while the clause in this case expressly stated that

Abandonment

Our guide for Employers and Managers

the employment of the worker would be deemed to have terminated after the prescribed event, this did not diminish workers' rights under the personal grievance procedures contained in the agreement.

For an example of an abandonment clause please see our sample employment agreements.

Notice

Notice is the period of time often utilised to recruit replacement employees and familiarise those new employees with the workplace and their role before the outgoing employee departs. Where an employment agreement fails to provide an express notice provision a reasonable period of notice may be implied. An employee who abandons their employment and fails to work out a period of notice deprives the employer of an opportunity to recruit and train a replacement.

Forfeiture of wages

An employment agreement (in writing and signed) can provide for forfeiture by the employee of an amount of money for the notice not given or worked. Forfeiture clauses must be in a written employment agreement to have any effect. The clause must clearly state that notice either not given, or not worked, may be forfeited from the employee's final pay or wages.

Forfeiture of wage clauses may not be enforceable if the amount forfeited is unreasonable in the sense that it is not proportionate 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. Therefore employers may be required to justify any monies deducted with reference to actual or predicted business loss.

Additionally, the Wages Protection Act 1983 provides that before making any deduction in accordance with a general deductions clause, the employer must first consult with the employee.

For an example of a clause please see our sample employment agreements.

Breach of contract

Abandonment of employment is a breach of contract by the employee entitling the employer to cancel, or repudiate, the contract. In some circumstances employers may consider recovery actions for this breach of contract, particularly where there have been flow-on losses. Recovery actions can be brought in the Employment Relations Authority under the Employment Relations Act. However, whether a recovery action will succeed will depend upon whether there has been a breach of contract; damages have flowed from the breach; and a reasonable employer would know that damages were likely or would flow from the breach.

Presumptions

When an employee's absence from work is unusual and unexpected, abandonment of employment should not be the employer's first presumption. In these circumstances, making enquiries as to the

Abandonment

Our guide for Employers and Managers

whereabouts of the absent employee achieves two ends. Firstly, the employer has demonstrated that they are a fair and reasonable employer in the circumstances, behaving in a manner towards the employee that is more likely to encourage trust, confidence and good faith. Secondly, the employer is behaving in a manner consistent with principles set out in case law, in seeking to communicate with the absent employee to ascertain their true intentions and reasons for the absence.

Treating abandonment as a rebuttable presumption is not only good practice from a legal perspective, but it engenders confidence in the employment relationship. There are a multitude of reasons why an employee could be absent and unable to make contact with the employer for consecutive days, and that if the employer had knowledge of those, the employer would agree that the employee did not intend to abandon their employment. Sometimes emergency situations coupled with social isolation and a lack of familial ties can mean an employee is unable to communicate with the employer in a normal manner.

Sample Procedure

Where an employee is absent from work and fails to contact their employer to report their absence, the employer should follow a number of steps on that very first day:

- ▶ Consider whether the employee was aware that they were required to work on that day
- ▶ Consider whether the employee has been made aware of the policies and procedures relating to abandonment
- ▶ Make all reasonable attempts to contact the employee on all available methods of contact. This may include attempting to contact the employee:
 - on their landline
 - on their cellphone
 - via email
 - via their next of kin or emergency contact

Where attempts to get in contact with the employee are successful, an employer may consider querying the reason for the employee's absence and the company's policy with regard to reporting absence from work.

If contact is not able to be established by phone, voice mails should be left where possible to outline on what telephone number the employee can contact the company.

Every day that the employee is absent without notice or a known reason, the employer should make all reasonable attempts to contact the employee.

If the employee concerned has been absent for the number of days stated in the abandonment clause in the employment agreement, and despite your repeated attempts to establish contact, we advise that you should:

- ▶ Advise the employee that their employment is in jeopardy via all available means,
 - including in writing (usually to the last known address),
 - contacting next of kin if possible

Abandonment

Our guide for Employers and Managers

- advising them that unless they contact you by a specified date and time, on a specified number, their employment may be deemed to have terminated by reason of their abandonment
- If there is still no contact, the employer should write formally advising the employee that it is considered that they have abandoned or terminated their employment without notice and advise final pay arrangements.

It is a good idea to courier the letter, via signature only delivery, to the employee to ensure it is delivered to the employee's known address and a corresponding record kept.

If there is no response, advise the employee including in writing that by operation of their employment agreement, their employment is deemed to have terminated by reason of abandonment. Advise the date of when the employee's final pay will be processed.

If the employee (now terminated) challenges your decision within a reasonable time, you should consider the employee's explanation and reconsider your decision. What amounts to a reasonable time will depend on the circumstances.

You should reconsider your decision to invoke an abandonment clause if your employee has a reasonable explanation for their absence. There may be a plausible explanation for the absence, e.g. employee was incapacitated in a hospital. However reconsideration is only a consideration, it means no more than a fair inquiry into the circumstances and allowing the employee an opportunity to state their case. An employer may still believe that the decision to invoke the abandonment clause should stand. You may have to justify your decision if it is challenged, even if the employment agreement did not require you to reconsider a reasonable explanation.

Best Practice

The employment agreement should be in writing and contain an abandonment of employment clause, a forfeiture clause and a deductions clause. The abandonment clause in the employment agreement will need to be followed as the failure to do so may result in any termination amounting to an unjustified dismissal or unjustified disadvantage.

Even if an employee's employment is terminated on the grounds of abandonment, it may not be the end of the matter. If the employee makes contact during or after termination, with a reasonable excuse for their absenteeism, the termination may need to be reconsidered.

Where an employee's termination for abandonment is set aside, and the employee is permitted to resume working, it may still be appropriate to consider disciplining the employee where they, unreasonably, failed to follow their employer's policies and procedures to report their absence. It may also be appropriate to discuss with the employee what step can be taken in the future to avoid this type of situation reoccurring.

You can contact one of our employer advisors for telephone advice and assistance: **0800 800 362 if**; or email the AdviceLine at advice@businesscentral.org.nz

Abandonment

Our guide for Employers and Managers

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact 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.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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