Termination of Employment

Our guide for Employers and Managers

SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS

Termination of Employment

Our guide for Employers and Managers

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Overview

There are different circumstance which an employment relationship can be 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

The purpose of this **A-Z Guide** is to summarise the considerations that arise when an employment relationship ends.

In this guide, the decision to terminate the employment relationship has been made, but there are 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 the information below, 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, the first consideration must be the employment agreement that binds you and your employee. If that 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 either before the decision to terminate employment has been made or, the employment has terminated by operation of law; those steps are covered in the following **A-Z Guides**:

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

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The starting point in this guide is a discussion of the different terms used in describing terminations of employment in different circumstances.

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 that occurs at the initiative of the employee. If an employee resigns, it may be because:

- The employee wishes to pursue alternative employment; or
- 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 the resignation.

Where an employee advises of their intention to resign, rather than clearly communicating that the employee is resigning, it can be risky to treat the communication 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 considered that the communication could not be treated as a 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.

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When faced with a resignation in the 'heat of the moment' best practice would be 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, Mr Taylor walked off the job following an argument with a colleague. In this case, 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 that occurs at the initiative of the employer. If an employer dismisses an employee, it may be because:

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

There is also a term known as 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 has agreed that 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.

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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 decision to exercise their right to resign under their employment agreement should be 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 has followed a course of conduct with 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:

> "[T]he 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 that it is the employee's intention 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.

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

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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

In this instance, 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 by the time the termination becomes effective 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 in the effort to correct them before they leave.

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Job dissatisfaction because of the work, and/or the remuneration, and/or the environment and/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 on which the decision to terminate the employment is communicated and the date on which the employment actually ends, when the employee is no longer employed by the employer.

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:

…the term to be implied requires a period of notice which is reasonable in the situation as it exists at the time notice of termination 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 assist the new employee in coming to terms with the performance of the employment.

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 provides a notice periods. 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 in respect of any notice period applicable to a termination of employment, you must understand the mechanism that is bringing the employment to an end.

Frequently, employment agreements provide for different notice periods when employment terminates:

- 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, as against serious misconduct
- If the employee chooses to leave on their own terms

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Alterations

If an employment agreement specifies a minimum period of notice, and a resigning employee gives more notice than is specified in that agreement, the employer and employee may agree that the notice period will be adjusted. If an employee gives a longer notice period than stipulated in the employment agreement, the employer is not required to accept a longer notice. However, keep in mind to check the wording of the clause in the employment agreement. If no notice period is given in the employment agreement and both the parties are unable to agree on the matter, then the employer should accept the notice period given.

If an employment agreement does not limit the permissible period of notice beyond the specified minimum period of notice, and the employer does not accept the resigning employee's more generous period of notice, either by forcing the employee to leave earlier or accept a payment in lieu, the employer exposes itself to a claim of unjustified dismissal.

The consent to a reduction of a notice period which was not freely given, but imposed, was found to be a constructive dismissal at best, and actual dismissal at worst; but either way an unjustified dismissal in *Coca Cola Amatil (NZ) Ltd v Kaczorowski* [1998] 1 ERNZ 264.

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 to the employment relationship may determine the matter unilaterally.

Garden leave

If an employment agreement provides in relation to a period of notice, that 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 the employee will be paid his or

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her normal wages or salary, then the employer and employee may agree to that. The employment relationship continues during the period of garden leave and 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 and will be 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 the employee's 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 (agreement) will depend on the terms of the particular contract, including those terms properly to be implied into it, in each case: *Ogilvy and Mather (New Zealand) Ltd v Turner* (above).

Forfeited

If the employment agreement contains what is commonly referred to as a forfeiture/deductions clause and notice is not worked or given, but it is required to be given and/or worked 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 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 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.

Final Pay

The provisions of the Wages Protection Act 1983 state that, subject to the exceptions permitted by the Act, 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, to make any deduction from wages than otherwise permitted by the Wages Protection Act 1983. A breach of this Act is 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.

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If the employee terminates on notice, and the employer and employee agree that the employment will terminate immediately and the employee will be paid a sum of money in lieu of the notice period, then 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 a date specified in the employment agreement; however, it is recommended that the payment of the final pay coincide with the last day of the employee's employment.

What is payable

Final pay usually constitutes at least, payment of wages or salary for the last pay period, and holiday pay. It may also include compensation for redundancy and/or 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 / 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 that period is not given, 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. But 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. For example; 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 was obligated to pay the employee the arrears of wages and holiday pay.

Holiday pay

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

This balance is deemed to be taken from the date of termination on days that would be otherwise working days for the employee; if any of these days, deemed to be taken as annual holidays, are public holidays then the employee is entitled to payment for the public holiday and the annual holiday extends by one day for each public holiday.

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' final pay. In this instance, because there is no entitlement to annual holidays, the payment does not attach to days which are deemed to be taken after the termination of employment. Hence any public holiday falling after employments ends would not be paid. 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

The information that appears under this heading 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.

If an employee's employment is terminated, and for whatever reason, the employee does not collect his or her final pay and that final pay exceeds $100, and if the employee does not claim that final pay for 6 years, then you are obliged to pay that final pay to the Inland Revenue Department (which represents the Crown).

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

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If the account has been frozen, then 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 this person's or agency's identity, then you can pay the employee's final pay to this person or agency.

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 there had been no dismissal in a case involving a mutual termination agreement. It had found that because the exiting employee had 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 by way of 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 who have not agreed otherwise in employment agreements, are under no obligation to supply employees with character or professional references.

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

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

Privacy Considerations

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

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If the termination of an employee's employment is 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, then the fact that an employee's employment has terminate or is to terminate, is a matter that you may disclose. However, this does not involve disclosure of the reasons for that employment terminating.

Conclusion

When an employment relationship terminates there are many questions; in most instances those questions will be answered by reading the employment agreement but in other instances it will be case of understanding the law which includes the 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, before they are taken, that are to be taken in respect of the ending of that employment.

There are many technical considerations that may apply when an employment relationship ends; this **A-Z Guide** has covered most of them.

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

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 courses and conferences designed for those who manage employees.

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