A–Z OF EMPLOYING

Leave Entitlements

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

BusinessCentral

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Contents

Annual Leave

The Holidays Act 2003 provides employees with a minimum of 4 weeks annual leave every 12 months of continuous employment. The purpose of this minimum entitlement to annual leave is to provide employees with the opportunity for rest and recreation.

An employer and employee should agree on how the entitlement is to be met based on what genuinely constitutes a working week for the employee. If an employee's work pattern changes (eg from part-time to full-time employment) the parties should agree on how the employee's entitlement will be calculated taking into account the change in circumstances. Where a dispute arises a Labour Inspector will use an accrual method of 4/52 of time worked to calculate an employee's annual leave entitlement.

An employee becomes entitled to 4 weeks' annual holidays upon an anniversary date of employment that falls after 1 April 2007. An employee's entitlement to annual holidays remains in force until the employee has taken all of the entitlement as paid holidays; or been paid out in accordance with the Holidays Act 2003.Continuous employment

For the purpose of ascertaining when an employee becomes entitled to annual leave 'continuous employment' includes any period during which an employee was:

- On paid holidays or leave under the Act;
- On parental leave;
- On protected voluntary service or training;
- Receiving weekly compensation from ACC;
- On unpaid sick leave or unpaid bereavement leave;
- On unpaid leave for any other reason for a period of no more than 1 week.

A period of unpaid leave of longer than 1 week does not have to be included in an employee's 12 months' of continuous employment. Where more than 1 week of unpaid leave is taken by an employee in a year the employer can shift the employee's entitlement date for annual holidays. For example if an employee took a 12 week period of unpaid leave their entitlement date could be shifted by up to 11 weeks.

However, if an employer agrees to include unpaid leave greater than 1 week in the period of continuous employment, the 52-week divisor for the purpose of calculating average weekly earnings will reduce by the number of whole or part weeks greater than one that the employee was on unpaid leave.

If an employer dismisses an employee and then re-employs them within 1 month, the employment will be treated as being continuous unless a Labour Inspector is satisfied that the employer acted in good faith and not for the purpose of evading their obligations under the Holidays Act.

Payment

Employees are entitled to be paid while on annual leave at the higher of their average weekly earnings or their ordinary weekly pay. An employee is entitled to be paid for an annual holiday before it is taken unless it is otherwise agreed. Many payroll systems automatically calculate annual leave payments. However it is useful to have an understanding of these calculations to ensure that payments are accurate. Below are the key definitions in the Holidays Act which are used to calculate annual leave payments.

Gross earnings

Gross earnings are all the payments that an employer is required to pay an employee under their employment agreement, including –

- Salary or wages;
- Allowances; (except non-taxable payments to reimburse the employee for any actual costs incurred by the employee related to their employment)
- Payment for an annual holiday, public holiday, alternative holiday, sick leave, bereavement leave;
- Productivity or incentive-based payments (including commission); Payments for overtime;
- The cash value of any board or lodgings;
- The first week of compensation paid by the employer under ACC.

It excludes payments that the employer is not bound by the terms of the employment agreement to pay, for example:

- Any discretionary payments;
- Any weekly compensation payable by ACC;
- Any weekly compensation payable by ACC;
- Reimbursements;
- Employer contributions to superannuation schemes.

Gross earnings also exclude any payments made when cashing-up a portion of the statutory annual leave entitlement.

Discretionary payments

A ‘discretionary payment’ is defined as:

- A payment that the employer is not bound, by the employee’s employment agreement, to pay the employee; but
- Does not include a payment that the employer is bound, by the employee’s employment agreement, to pay the employee, even though:
    - The amount to be paid is not specified in that employment agreement and the employer may determine the amount to be paid; or
    - The employer is required under that employment agreement to make the payment only if certain conditions are met.

Average weekly earnings

'Average weekly earnings' is an employee's gross earnings (defined above) over a 52 week period divided by 52.

Ordinary weekly pay

Ordinary weekly pay is the amount of pay that an employee receives for an ordinary working week under his or her employment agreement. It includes:

- Incentive-based payments (including commission);
- Overtime payments;
- The cash value of any board and lodgings if it is a regular part of the employee's pay.

It excludes:

- Productivity and incentive-based payments that are not a regular part of an employee's pay;
- One-off exceptional payments;
- Any discretionary payments not required by the employment agreement;
- Payment of any employer contribution to a superannuation scheme.

If it is not possible to determine what constitutes ordinary weekly pay for an employee, this must be calculated by taking an average on the basis of total gross earnings, less any of the payments excluded above, for the previous four weeks (or if the normal pay period is longer than 4 weeks, for that pay period immediately before the calculation is made) divided by four.

Leave in advance

An employer can allow an employee to take annual leave in advance. Payment for annual leave in advance is at the rate of ordinary weekly pay or, if it is greater, average weekly earnings for:

The 12 months up to the end of the last pay period before the annual holiday; or

The period of employment up to the last pay period before the annual holiday, if the employer has worked for less than 12 months (and the divisor reduced accordingly).

Cashing up annual leave

An employee may request, and an employer may agree, to cash up one week of their statutory annual leave. An employee can make a request only during their current entitlement year. An employer may adopt a policy stating it will not consider a request to cash up for all or part of its business. In this situation there is no obligation for the employer to consider and respond to a request if one is made.

Maximum cash up for each entitlement year

One week can be cashed-up for each entitlement year. An entitlement year is the period of 12 months continuous employment beginning on the anniversary of the employee's employment. An employee who has large amounts of leave from previous years cannot back date the cashing up. An employee can request less than one week and within the same year make a further request provided the total request for the entitlement year does not exceed one week.

An employee who does not make a request or does not request the maximum in one year, cannot carry the balance over and request more than one week the following year. If an employee did not actually make a request, the portion of annual holidays cashed-up will remain as if the payment had not been made. In addition there are penalties for breaching the Holidays Act.

Process for cashing up annual leave

- The employee makes a request to the employer in writing. An employer cannot request an employee to cash up annual leave.
- The employer must consider the request within a reasonable time and reply in writing.
- The employer is under no obligation to agree to a request.
- If the employer agrees to the request:
    - The payment must be made as soon as practicable.
    - The rate of payment is the greater of:
- Ordinary weekly pay; or
- Average weekly earnings for the last 12 months.
    - The employer must keep records of the portion of annual leave cashed-up in each entitlement year, the date and amount of payment.
- If the employer declines the request, they must advise the employee in writing. The law specifically states the employer is not required to give a reason.

Cashing up clauses in employment agreements and company polices

The law specifically provides:

- An employment agreement must not make requesting cash-up a term and condition of employment.
- An employment agreement must not make paying out annual holidays a term and condition of employment.
- Cashing up statutory annual holidays must not be raised in negotiations for an employment agreement relating to salary or wages.
- The process by which a request is made may be included in the employment agreement or company policy.

Pay as you go holiday pay

An employer can pay holiday pay as part of an employee's pay at 8% of gross earnings if they are:

- Employed under a fixed term agreement of less than one year; or

- Employed so intermittently or irregularly that it is impracticable to provide four weeks' annual holidays; and
- The employee agrees in his or her employment agreement; and
- The annual holiday pay is paid as an identifiable component of the employee's pay.

If an employer incorrectly pays an employee "pay as you go holiday pay" in circumstances not permitted by the Act, and the employee's employment continues for 12 months or longer, then despite those payments the employee becomes entitled to annual holidays and annual holiday pay without reduction.

Annual leave pay when employment ends

Less than 12 months employment

An employee will be entitled to 8% of their gross earnings less any payment made to them for annual leave taken in advance, if they have worked for less than 12 months at the time their employment ends.

More than 12 months employment

If an employee has worked more than 12 months and they have an entitlement to annual leave owing to them at the time their employment ends, the employer must pay the employee for that entitlement at the greater of average weekly earnings and ordinary weekly pay. Annual leave entitlement is only what an employee receives on their anniversary date (e.g. four weeks) and not what they have "accumulated" or "accrued" through an employer's payroll system throughout the year.

All employees who have worked more than 12 months are also entitled to 8% of their gross earnings since their last entitlement date (their "accrued leave") less any payment made to them for annual leave taken in advance. Note: any payment of 'entitled leave' should be added to the employee's overall gross earnings for the purpose of calculating 8%.

Annual leave and parental leave

Annual leave that an employee becomes entitled to while on parental leave or in the 12 months after returning from parental leave is paid only on the basis of average weekly earnings as at the date the holidays are taken (see "Holiday Pay" heading under the Parental Leave section of this guide).

Taking annual leave

An employee and employer should first try and reach an agreement as to when annual holidays will be taken. However, an employer must not unreasonably refuse consent and must allow employees to take the leave within 12 months of becoming entitled to it. Employees are entitled to take at least two weeks of their annual holidays in a continuous period. Where an agreement cannot be reached an employer can direct an employee to take annual leave by giving 14 days' notice in writing.

Public holidays & annual leave

A public holiday that occurs during an employee's annual holidays must be treated as a public holiday and not as annual leave. An employee who has an entitlement to annual leave at the time their employment ends will be entitled to be paid for any public holiday that would have occurred had they taken their remaining entitlement immediately after the date on which their employment ended. An employer only has to project forward by the amount of entitlement to annual leave an employee has and not by the amount of annual leave an employee has "accrued" through an incomplete year.

Illness or bereavement during annual leave

If an employee falls sick or su ers a bereavement before they are scheduled to go on annual leave the employer must allow them to use the leave as sick or bereavement leave. Once a period of annual leave has started, if an employee falls sick the employer may allow them to take the time as sick leave. However, if an employee su ers a bereavement during a period of annual leave the employer must allow them to take the time as bereavement leave. If an employee's sick leave or bereavement leave has been exhausted the employer may allow them to use their annual leave.

Closedowns

Employers can have one closedown period each year during which they may require their employees to discontinue working regardless of whether they have leave to cover the period of the closedown. Employees must be given 14 days' notice of the closedown. It is recommended that notice is given in writing. Different parts of the business may have different closedown periods. The employer and employees may agree that there will be more than one closedown period each year, and on the arrangements that will apply during those times.

An employee who is entitled to annual holidays at the commencement of a closedown must, if the employer requires them to, take their annual holidays whether they agree to or not. If an employee does not have enough entitlement to cover the whole period of the closedown, the employer and employee may agree that the employee can take the remaining period of the closedown as annual leave in advance.

An employee who is not yet entitled to annual leave at the start of the closedown must discontinue their work. An employer must pay that employee 8% of their gross earnings since they started working or since their last entitlement date less any amount paid to them as leave in advance. An employee will not be entitled to any other remuneration for the period of the closedown however an agreement can be reached that the period of the closedown will be taken as leave in advance.

If an employee without any entitlement to annual leave is required to discontinue their work for a closedown the employee's anniversary date for annual leave must be changed to the date on which the closedown began. To avoid having a different date each year a date may be nominated to be the anniversary date which is reasonably proximate (within a few days) to the actual beginning of the closedown.

Closedowns and public holidays

If a public holiday falls during a closedown, the employer must consider whether the day would otherwise have been a working day if the closedown were not in effect. This means employees may be entitled to paid public holidays during closedown periods.

Company anniversary dates

Some employers nominate a company anniversary date to make it easier to allocate employees' entitlements to annual leave. The only time an employer is entitled under the Holidays Act to change an employee's entitlement date for annual leave is when there is a closedown. In that case, an employer may nominate a date sufficiently proximate (e.g. within a few days) to the closedown to avoid having a different entitlement date every year. In no other situation is there a right under the Holidays Act to nominate a company anniversary date.

Public Holidays

Employees are entitled to 11 public holidays per year, which include:

Christmas Day, Boxing Day, New Year's Day, the second day of January, Good Friday, Easter Monday, ANZAC Day, Labour Day, the birthday of the reigning sovereign, Waitangi Day and the relevant provincial anniversary day.

Otherwise working day

An employer will need to ascertain whether the day on which the public holiday falls is "otherwise a working day" for that employee to determine their entitlements.

All employees for whom the day is otherwise a working day will be entitled to payment for the public holiday regardless of whether they have just commenced employment or whether they are permanent, fixed term or casual employees.

An employer and employee should consider the following factors with a view to reaching an agreement on the issue if it is not clear whether a day is otherwise a working day:

- The employee's employment agreements;
- The employee's work patterns;
- Any other relevant factors including:
    - whether the employee works for the employer only when work is available;
    - the employer's rosters or other similar systems;
    - the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
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Payment

An employee will be entitled to have the day off and to be paid their "relevant daily pay" (defined below) if a public holiday falls on a day that is otherwise a working day for them. An employer can only require an employee to work on a public holiday if this is provided for in their employment agreement.

An employee for whom the public holiday is not otherwise a working day and who does not actually work on the day is not entitled to any payment for the public holiday.

Every employee who works on a public holiday is entitled to be paid “time and a half” regardless of whether the day is otherwise a working day or not. Time and a half is defined in the Holidays Act as being the greater of:

- The portion of the employee’s relevant daily pay (less any penal rates) that relates to the time actually worked on the day plus half that amount again; or
- The portion of the employee’s relevant daily pay (including penal rates) that relates to the time actually worked on the day.

A penal rate is an identifiable additional amount that is payable to compensate an employee for working on a particular day of the week or a public holiday but does not include, for example, an additional payment for a sixth or seventh day of work.

Alternative holiday

An employee who works on a public holiday that is otherwise a working day is entitled to a whole working day off known as an alternative holiday (regardless of the amount of hours actually worked on the public holiday). Employees who are on call on a public holiday may also be entitled to an alternative holiday if the nature of the restriction of them being on call on their freedom of action is such that for all practical purposes, the employee has not had a whole holiday. The alternative holiday reflects the full paid day off the employee would have been entitled to had they not been required to work on the public holiday. An employee is not entitled to an alternative holiday if they work only for the employer on public holidays.

An alternative holiday must be taken on an identified day that is agreed between the employer and the employee that is an otherwise working day for that employee. If the employer and employee cannot agree when the day is to be taken, the employer can determine the date on a reasonable basis. The employer must give at least 14 days’ notice.

An alternative holiday is paid at the employee’s relevant daily pay for the day which is taken as an alternative holiday. If an employee has not taken their alternative holiday before the day their employment ends, the alternative holiday is to be paid at the rate of the employee’s relevant daily pay for his or her last day of employment.

An employee may request the employer to exchange their entitlement to an alternative holiday for payment if 12 months have passed since the entitlement to an alternative holiday arose. If the employer agrees to this request the alternative holiday can be paid out at the amount agreed to between the employer and the employee.

Sickness or bereavement on a public holiday

If an employee who had agreed or was required to work on a public holiday does not work due to sickness or bereavement, the public holiday must be treated as a public holiday and not as sick or bereavement leave. An employee will not be entitled to be paid time and a half as part of their relevant daily pay for the day.

Transfer of public holidays to any 24 hour period

The law allows employers and employees to agree to transfer a public holiday to another 24 hour period.

This means a public holiday may be agreed to be transferred:

- By a few hours to match shift arrangements
- To a completely different day (and not necessarily midnight to midnight)

In the absence of a written agreement, a public holiday is observed midnight to midnight on the traditional day.

Transfer of public holidays over Christmas and New Year

If Christmas Day, Boxing Day, New Years Day or 2nd January fall on a Saturday or Sunday then those holidays are transferred to the following Monday or Tuesday for those employees who do not usually work on a Saturday or Sunday. Employees who usually work on Saturday or Sunday will observe the public holiday when it falls.

Transfer of ANZAC Day and Waitangi Day

If Waitangi Day or ANZAC Day fall on a Saturday or Sunday then those holidays are transferred to the following Monday for those employees who do not usually work on a Saturday or Sunday. Employees who usually work on Saturday or Sunday will observe the public holiday when it falls.

Public holiday falling during unpaid leave

If you have an employee who is on agreed unpaid leave when a public holiday falls, you may not be required to pay them for the public holiday. If an employee is already on unpaid leave, then the day would not be considered to be a day that they would otherwise have worked as the parties have already agreed that the employee is not expected to be at work during that period.

Sick Leave

All permanent employees become entitled to a full 5 days of sick leave after six months' current continuous service regardless of how many hours they work each week or whether they are full-time or part-time employees. Sick leave is paid at the rate of "relevant daily pay" (defined below).

A "casual" employee will become entitled to 5 days' sick leave if they have, over a period of 6 months, worked for an employer for:

- At least an average of 10 hours a week during that period; and
- No less than 1 hour in every week or no less than 40 hours in every month

Employees who qualify for sick leave will be entitled to a further 5 days' sick leave every 12 months of employment after their initial entitlement has arisen (eg at 6 months, 18 months and 30 months). An employee may carry over up to 15 days' sick leave so that it accumulates to a maximum of 20 days' current entitlement. An employee is not entitled to be paid for any unused sick leave when their employment ends.

An employer may allow an employee to take sick leave in advance. The amount of sick leave taken in advance can be deducted from an employee's entitlement when they next become entitled to sick leave. The employer should ensure that a deductions clause exists in the employment agreement to recover the cost of providing sick leave in advance, should the employee leave their employment before reaching their next entitlement date.

An employee who intends to take sick leave should notify their employer as early as possible on the day that is intended to be taken as sick leave or if that is not practicable, as early as possible after that time.

An employee is entitled to take sick leave if:

- They are sick or injured; or
- Their spouse is sick or injured; or
- A person who depends on them for care is sick or injured.

Medical certificates

An employer can require an employee to provide a medical certi cate if they wish to access paid sick leave and have been sick or injured for 3 or more consecutive calendar days. If the employee has been sick or injured for less than 3 days an employer can still request a medical certi cate if they:

- Inform the employee as early as possible that proof is required; and
- Agree to meet the employee's reasonable expenses in obtaining that proof.

ACC and sick leave

An employer is not required to pay an employee sick leave and cannot force an employee to take sick leave when they are receiving compensation from ACC. However, an employee can use sick leave for the first week of incapacity if they suffer a personal injury that is not work related. If the employee suffers a work related injury the employer will be liable for 80% of lost earnings for the first week of incapacity and cannot deduct this from the employee's sick leave. However, an employer can "top up" the difference between compensation from the employer for the first week of a work related injury or ACC compensation and the employee's ordinary weekly pay and deduct 1 day of sick leave for every 5 days they make that payment.

Bereavement Leave

All permanent employees become entitled to bereavement leave after six months' current continuous service regardless of how many hours they work. Bereavement leave is paid at the rate of "relevant daily pay" (defined below).

A casual employee will become entitled to bereavement leave if they have, over a period of 6 months worked for an employer for:

- At least an average of 10 hours a week during that period; and
- No less than 1 hour in every week or no less than 40 hours in every month.

An employee will be entitled to 3 days of bereavement leave for each bereavement they suffer on the death of their:

- Spouse;
- Parent;
- Child;
- Brother or sister;

- Grandparent;
- Grandchild;
- Spouse's parent.

An employee will be entitled to 1 day of bereavement leave for each bereavement they suffer on the death of any other person if the employer accepts that the employee has suffered a bereavement as a result of the death. An employer should consider the following factors:

- The closeness of the association between the employee and the deceased person.
- Whether the employee has to take significant responsibility for all or any of the arrangements for the ceremonies relating to the death.
- Any cultural responsibilities of the employee in relation to the death.

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Relevant Daily Pay

Relevant daily pay is the amount an employee is entitled to be paid for each day they are on sick or bereavement leave or on a public holiday, or alternative holiday. Relevant daily pay is the amount of pay an employee would have received had they worked on the day concerned. It includes:

- Productivity or incentive based payments (including commission);
- Payments for overtime;
- The cash value of any board or lodgings provided.

Average Daily Pay

If it is not possible or practical to determine an employee's relevant daily pay because they have irregular work patterns, it is calculated by using the Average Daily Pay calculation:

Average Daily Pay =

Gross earnings for the last 52 calendar weeks

Number of whole or part days worked

(including paid leave but excluding other days not worked)

Holiday and Leave Record

An employer must keep a holiday and leave record that contains:

- The name of the employee;
- The date on which the employee's employment began;
- The number of hours worked each day in a pay period and the pay for those hours;
- The employee's current entitlement to annual holidays;
- The date on which the employee last became entitled to annual holidays;

- The employee's current entitlement to sick leave;
- The dates on which any annual holiday, sick leave, or bereavement leave has been taken;
- The amount of payment for any annual holiday, sick leave, or bereavement leave that has been taken;
- The dates of and payments for any public holiday on which the employee worked;
- The number of hours that the employee worked on any public holiday;
- The number of hours that the employee worked on any public holiday;
- The details of the dates of, and payments for, any public holiday or alternative holiday on which the employee did not work but for which the employee had an entitlement to holiday pay;
- The cash value of any board or lodgings as agreed;
- The details of any payment an employee was paid in exchange for an alternative holiday;
- The date of the termination of the employee's employment;
- The amount paid to the employee as holiday pay upon the termination of the employee's employment.

The amount paid to the employee as holiday pay upon the termination of the employee's employment.

These records must be kept for not less than 6 years and it is recommended they be kept for the duration of an employee's employment. A sample holiday and leave record can be found at the Ministry of Business, Innovation and Employment website here.

Enforcement

The Holidays Act can be enforced by an employee, an authorised representative, a representative of the employee's union, an employer or a Labour Inspector. Failure to comply with the Act's provisions may attract penalty, and pecuniary penalty can also be ordered up to a maximum of:

- $50,000 for an individual employer; and
- for a body corporate $100,000 or 3 times the financial gain made by the body corporate from the breach.

A Labour Inspector is the only person who may bring an action against an employer in the Employment Relations Authority to recover a penalty for noncompliance with the Act.

Parental Leave

Leave entitlement

Parental leave is a form of employment protection for employees who are having or adopting children. Up to 52 weeks parental leave is available on the birth of a child or on the adoption of a child under the age of 6 years to employed parents and others who fulfil the Parental Leave and Employment Protection Act's eligibility requirements. An employer will have to keep the employee's position open during parental leave however the leave is not paid for by the employer. An eligible primary carer is also entitled to a parental leave payment for 18 weeks, which is administered by the Inland Revenue Department.

Leave eligibility

There are two categories of eligibility, with different entitlements depending on the length of employment. To be eligible for parental leave, an employee must meet either the 6-month employment test or the 12-month employment test.

- 6-month employment test: an employee meets the 6-month employment test if they have worked for the employer for at least an average of 10 hours a week in the six months immediately before the expected date of delivery or assuming responsibility for the care of the child.
- 12-month employment test: an employee satisfies the 12-month employment test if they have worked for the employer for at least an average of 10 hours a week in the twelve months immediately before the expected date of delivery or assuming responsibility for the care of the child.

An employee will be taken to have worked the required 10-hour weekly average if he or she works no less than an average of 10 hours a week during the 6 or 12 month period and for either no less than 1 hour every week or 40 hours every month. An employee normally expected to be at work will be considered to have worked for 1 hour if he or she would normally have been at work but was:

- On leave with pay;
- On leave without pay with the employer's agreement (other than on parental leave);
- On ACC;
- On volunteer's leave under the Volunteers Employment Protection Act;
- On maternity leave before the expected date of delivery;
- For any other reason accepted by a Labour Inspector as not disrupting the employee's normal work pattern.

Hours when the employee would normally have been at work are calculated in terms of the employment agreement.

Payment eligibility

To be eligible for the parental leave payment, a different criteria applies.

An employee meets the parental leave payment threshold test if he or she will have been employed as an employee for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding:

- The expected date of delivery of the child (in the case of a child to be born to the person or his or her spouse or partner); or
- The first date on which the person, or his or her spouse or partner becomes the primary carer in respect of the child (in any other case)

Multiple employments

Previously, if a person had multiple employments, each employment was treated separately for the purpose of establishing entitlement to parental leave and parental leave payments. A 2016 amendment to the Act allows these separate employments to be added together, for the purpose of determining the person's entitlement to the parental leave payment. It is therefore possible for a person with multiple employments to be eligible for the payment, but not to meet the criteria for parental leave from each separate employer.

Negotiated carer leave

If an employee is entitled to the parental leave payment, but not to parental leave, they may request negotiated carer leave. There are formal requirements for a request, and an employer may refuse the request if it cannot be accommodated on any of the following grounds:

- Inability to reorganise work among existing staff
- Inability to recruit additional staff
- Detrimental impact on quality
- Detrimental impact on performance
- Planned structural changes
- Burden of additional costs
- Detrimental effect on ability to meet customer demand

Types of leave

There are three kinds of parental leave: primary carer leave, extended leave and partner's leave. Leave is not available beyond a child's first birthday or beyond one year from the date that the employee assumes care of the child. An employee is restricted from taking a further period of parental leave if less than 6 months have elapsed since the day after the date on which their most recent period of parental leave ended.

Primary carer leave

Employees who meet the 6-month or 12-month employment test are entitled to 18 weeks of primary carer leave. Primary carer leave can, if necessary, begin up to 6 weeks prior to the expected date of delivery or the date that the employee intends to assume care of the child. Taking primary carer leave prior to the birth of a child reduces the period of leave available after the birth. However, if a doctor or midwife directs the leave to be taken earlier, an employee will still be entitled to take at least a further 12 weeks of primary carer leave following the birth. The primary carer leave taken in excess of the usual entitlement in this situation will not reduce the amount of extended leave available to an employee. The leave payment will still be available for only 18 weeks, whether the leave begins early or not, however there may be entitlement to further payments if the baby is born prematurely.

An employee who is eligible for a parental leave payment can receive additional payments for up to 13 weeks if the baby is born before the end of the 36th week of gestation. The additional weekly payment is made for each week between the actual date of birth and what would have been the 36th week of gestation.

An employee who wants to begin primary carer leave early can do so by giving 21 days' written notice, although notice of intention to take parental leave should previously have been given. An employer can direct a pregnant employee to begin primary carer leave early (if necessary by more than 6 weeks prior to the expected date of delivery), if she is unable to perform her work adequately or safely and no other suitable work is available. An employer can also temporarily transfer a pregnant employee to another job if, because of her pregnancy, she cannot perform her work adequately or safely (to the safety of herself or others). However, an employee who disagrees with such an action is entitled to take a parental leave complaint.

Special leave

Pregnant employees are entitled to 10 days' unpaid special leave before their primary carer leave begins for reasons connected with the pregnancy (visits to the doctor or midwife, for example). Special leave is not counted as part of the available 52 weeks.

Partner's leave

A pregnant employee's partner or the partner of an employee who intends to adopt a child under the age of 6 years and who meets the 12-month employment test is entitled to take a continuous 2 week period of unpaid partner's leave around the time of the birth or adoption. A partner who meets the 6-month employment test is entitled to 1 week of unpaid partner's leave.

Leave may begin at any time during the 21 days before the mother's expected delivery date or the date that the employee intends to assume responsibility for the care of the child, up to the 21st day following delivery or on any date by agreement between the employee and the employer.

Extended leave

Extended leave is a period of unpaid parental leave of up to 26 or 52 weeks depending on which eligibility test the employee satisfies. The 26 or 52 week period of extended leave available is reduced by the total period of the primary carer leave taken. However, if a period longer than 6 weeks is taken on a doctor's or the employer's say so or where the baby arrives early, that extra time is not deducted and at least 12 weeks will be counted as primary carer leave following the birth.

An employee who meets the 6-month employment test is eligible to take up to 26 weeks of extended leave. An employee who meets the 12-month employment test is eligible to take up to 52 weeks of extended leave. If both the employee and his or her partner are eligible for extended leave, the parties may share the entitlement at the same time or consecutively.

Extended leave can be taken by the eligible employee in one or more periods, up to the employee's maximum entitlement. The dates for taking the extended leave must be agreed between the employee and employer.

For example, a female employee may take primary carer leave, return to work while her partner takes extended leave, and then take her own period of extended leave. Or her partner may take extended leave while she takes primary carer leave. It is possible if the child's mother is not eligible or decides to take no leave, for her partner to take the full 26 or 52 weeks as extended leave. How leave is shared is for the partners to decide (provided the eligibility and notification criteria are met).

Leave application process

Employee's notice

An employee intending to take leave under the Act must give his or her employer written notice at least 3 months before the expected date of delivery or the date the employee intends to assume care of the child, stating when leave is to begin and how long it is to last.

Female employees must provide a medical certificate confirming their pregnancy and stating the expected date of delivery. If also applying for leave, a pregnant employee's spouse must provide the employer with a medical certificate confirming the pregnancy and expected date of delivery as well as a written assurance that he or she is the pregnant employee's spouse and intends to assume care of the child.

Where the child is not the employee's (or their partner's) biological child, notice must be provided to the employer within 14 days of the date the employee intends to become the primary carer. A letter from the Ministry of Social Development stating that the employee will become the primary carer for the child must accompany the notice. Where the court has made an interim custody order, a copy of the order must be provided. In all other situations, the employee must attach a statutory declaration in the required form.

If the leave requested includes extended leave, the notice given must state whether the employee's partner will also be taking extended leave (or primary carer leave), the name of the employee's partner, the address of his/her employer and the dates on which it is proposed leave will begin and end. The employer must also be given an assurance that the leave requested does not in total exceed 26 or 52 weeks, excluding partner's leave.

Employer's response

Within 21 days of receiving a leave request the employer must reply stating whether the employee is eligible to take leave (and if not, why not) and whether or not the employee's position can be kept open. If the position cannot be kept open the reply must note that this may be disputed.

If the employee's position cannot be kept open, the employer's notice must state that for a 26-week period from the time leave ends, the employee will have preference in employment in any similar vacant position.

In granting a leave request the employer must refer to the employee's rights and obligations in taking leave and, in particular, must point out the Act's provisions with regard to extended leave (if relevant) and the employee's right to determine when primary carer or partner's leave will begin.

If the employee's notice was incomplete, the employer must, within 7 days of becoming aware that more information is needed, reply pointing this out and stating what else is required. The employee must provide any further material required within 14 days of being notified by the employer that he or she has given an incomplete notice.

Sample letters for the employee's notice and the employer's response are provided on the Ministry of Business, Innovation and Employment website.

Reasons for refusing leave

Except where a genuine redundancy occurs, an employer must keep an employee's position open if leave notification has been given and the employee takes a continuous period of leave no longer than 4 weeks.

Where an employee takes a longer period of parental leave, the employer shall be presumed to be able to keep the employee's position open until the end of that leave period. The Act provides only 3 grounds for refusing leave, namely:

- The employee does not fulfil the eligibility criteria (which includes the fact that fewer than 6 months have elapsed since the most recent period of leave ended)
- The employee's job is a key position
- The occurrence of a redundancy situation

In determining whether or not a job is a key position account is to be taken of the size of the enterprise and the required skills or training period. The term "key position" has, however, been defined so narrowly by the courts that it is difficult, if not impossible, to establish that a particular job is a key position.

Where the employer states that the employee's position cannot be kept open because it is a key position or because of a redundancy situation the employer must, for a period of 26 weeks after the parental leave, give the employee preference over other applicants for any position which is vacant and which is substantially similar to the position held by the employee at the beginning of the parental leave.

Leave to be treated as continuous service

Where leave is taken, employees are to be credited with unbroken service for the purposes of any rights and benefits conditional on unbroken service. This applies to both the parental leave period and the preference period. The parental leave and the preference period are also counted as continuous service for the purposes of any superannuation scheme, provided the employee pays required contributions.

Early return to work

An employee or employee's partner who suffers a miscarriage, or whose child is stillborn or dies is entitled to return to work earlier than the agreed ending of primary carer/parental leave. This is also the case if some other person assumes primary care of the child, the employee ceases to care for the particular child, or the employer consents to an earlier return. A female employee who wants to return before the first 18 weeks of primary carer leave have ended may be required to provide a medical certificate regarding her fitness for work.

Leave extension

An employee who has worked for 6 or 12 months may, with the employer's consent, extend the period of parental leave initially requested but not beyond the maximum 26 or 52 week period, inclusive of primary carer leave but exclusive of partner's leave.

Notification requirements

Once parental leave begins

Twenty-one days after parental leave begins the employer must write to the employee stating the date on which the leave is to end and the date the employee must return to work (the next working day after leave ends). Where a position cannot be kept open, the notice must state the date on which the 26-week period of preference for employment in a similar position will begin. The notice must also state the employee's obligation to notify the employer of his or her intention to return to work and set out the employee's rights with regard to an early ending of parental leave.

Before parental leave ends

The employee must notify the employer, in writing, 21 days before parental leave is due to end, whether or not the employee will be returning to work. The employee must also give the employer 21 days' written notice of the date of an early return to work or early commencement of the period of preference for employment, where that option has been chosen.

Replacement/fixed term employees

The fact that someone is replacing an employee on parental leave is a genuine reason for fixed term employment. Under the Employment Relations Act an employee must be provided in writing with the reason for the fixed term (e.g. to cover a period of parental leave) and the way in which their employment will end. A replacement employee must also be told in writing that employment may terminate at an earlier date if the employee taking parental leave exercises the right to return to work sooner than originally intended. A fixed term agreement should state that employment will end on a specified date, on the return of the employee from parental leave or on the resignation of the employee on parental leave, whichever is sooner. Business Central has a sample clause reflecting these criteria available on the Business Central website.

Parental leave payments

Every person who meets the parental leave payment threshold (see page 19) is entitled to receive payments for an 18 week period. The payment is a maximum amount and is reviewed each year. This means that an eligible employee earning less than the prescribed maximum will be entitled to receive the full amount she would otherwise have earned. The payment is provided to the primary carer but can be transferred wholly or partly to an eligible partner. Multiple births do not increase either the amount of leave available or the amount of the leave payment.

Once employers have received notice of an employee's wish to take parental leave employers must within 21 days give employees information regarding parental leave payments in the form prescribed by the Ministry.

The employer must give an eligible employee any information needed to enable the employee to fill in the appropriate form (such as the amount of wages or salary the employee earns). The employee must then send the payment application form (or payment application transfer form if the leave is to be transferred to a partner) to the Inland Revenue Department before returning to work or before the leave period otherwise ends.

The employer must respond within a "reasonable period" if asked by the Ministry for information about an employee's entitlement or continued entitlement to a leave payment. Statutory leave payments are additional to anything payable under an employment agreement and any employer who reduces any other entitlement (without the employee's agreement) because of the employee's entitlement to a parental leave payment under the Act commits an offence for which the Employment Relations Authority may impose a penalty.

Entitlement to a parental leave payment ceases if the person receiving it returns to work before the 18 week paid leave period has ended, or if they cease to be the primary carer of the child. A mother who transfers her entitlement to her partner loses her own entitlement. However, entitlement to a parental leave payment is not lost if the employee has a miscarriage, or ceases to care for the child, or if the child dies, provided that the employee does not return to work during the 18 week payment period.

Preterm baby payments

If the employee's, or their partner's, baby is born prematurely (before the 37th week of pregnancy) and the employee or their partner are entitled to a parental leave payment, they are also entitled to a "preterm baby payment". This is an additional weekly payment that is paid in a continuous period that corresponds to the number of weeks, up to a maximum of 13, between the date of birth of the child and the date on which the 36th week of gestation would have ended had the child not been born prematurely.

The payment will end sooner if the person returns to work (not including any Keeping-In-Touch days) or if they cease to be the primary carer in respect of the child

Keeping-in-touch ("KIT") days

An employee receiving a parental leave payment can perform up to 40 hours of paid work for his or her employer while they are receiving the parental leave payments. An employee can only use KIT hours if the employee and employer consent to it.

This work cannot be performed within 28 days of the baby's birth, and more than 40 hours of paid work cannot be undertaken, otherwise the employee will lose their ongoing entitlement to the payment and the amount already paid will be recoverable.

An employee who receives preterm baby payments is also entitled to an additional three KIT hours for each week that the preterm baby payment is received. The employee can only use the KIT hours if both employee and employer consent. The KIT hours could be used, for example, to allow an employee to perform handover where this did not occur due to the baby's early arrival.

Holiday pay

Annual holiday pay, where the holiday entitlement arises whilst an employee is on parental leave, during the preference period, or during the 12 months following a return to work, is paid at the rate of average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday is taken. This means that the value of the annual leave will increase the longer the employee has been back at work before taking the annual leave.

From 1 June 2017, an employee may take a period of annual leave at the start of his or her parental leave, and can elect to start their parental leave payment period the day after the annual leave ends. Prior to 1 June 2017, an employee cannot be on both parental leave and annual leave at the same time.

Parental leave complaints

Employees may use the procedure set out in the Act to resolve any parental leave complaint relating to dismissal or action to the employee's disadvantage (including transfer to alternative employment or a direction to begin leave early).

Complaints must be taken within 26 weeks of the date when the subject matter of the complaint arose, within 26 weeks of the expected date of delivery or the date on which the person became the primary carer for the child, or within 8 weeks of the expiry of any parental leave period, whichever is the later. They should be made first to the employee's immediate supervisor and be settled as rapidly and as near to their point of origin as possible. Unsettled complaints can go to the Employment Relations Authority for mediation and/or investigation and determination, together with a written statement of the facts. Employees may act on their own behalf or through a representative. All parties have a duty to promote a settlement.

Termination of employment

Every employee is entitled to security of employment during pregnancy (whether or not eligible for primary care /parental leave) and parental leave. No employee may be dismissed on grounds of pregnancy, state of health (unless affected by causes unrelated to the pregnancy), because of wanting to take parental leave, during leave or during the leave preference period. However dismissal is permissible for a substantive reason unrelated to the pregnancy, care of the child, or the exercise of rights under the Act.

Where an employee fails, without good cause, to return to work or, before parental leave ends, tells the employer that he or she has decided not to return to work, the employment will be deemed to have been at an end from the day on which the period of parental leave began (subject to any agreement between the employer and employee).

Similarly, the employment of an employee who is in the 26-week preference period and does not, on the date specified by the employer or within 7 days of that date, take up any position substantially similar to that formerly held, will be deemed to have been at an end as from the day on which the period of parental leave began.

Forms

Parental leave forms and applications for paid parental leave are available from the Ministry of Business, Innovation and Employment website:
http://employment.govt.nz/er/holidaysandleave/parentalleave/

Volunteers Leave

Introduction

Volunteers employment protection legislation has been in place since 1973 but now provides employment protection not only for employees engaging in 3-month or 3-week periods of whole or part-time service or training in the territorial or reserve forces but also for territorial or reserve force members involved in service in the national interest or undertaken in times of war or emergency. Provisions relating to the two latter forms of service are along the lines of those applying to employees eligible for parental leave under the Parental Leave and Employment Protection Act.

When employment protection is available

Unpaid "volunteers' leave" is available to members of the territorial or reserve forces in the following three circumstances:

- For periods of whole and part-time voluntary service or training of, respectively, 3 months and 3 weeks in any training year. Service of this kind is called "protected voluntary service or training." A training year runs from 1 July in one year to 30 June the following year.

  An employee who takes 3 months "whole-time" service is entitled to an extended leave period not exceeding 7 days when service ends. The leave may be further extended because of sickness or other reasonable cause. An employer can apply to the Ministry for the postponement of voluntary service or training upon the ground that this will cause undue hardship but postponement will not necessarily be granted

  The employer can refuse to allow a casual, temporary or seasonal employee to return to employment if, having regard to general conditions applying in the industry concerned, his or her work would not normally have continued until the end of the leave of absence period. Otherwise the employee is entitled, on returning to work, to be re-employed in the job he or she was doing at the time leave began. All employees are eligible for leave of this kind, regardless of how long they have worked for their employer.

- If called out for continuous service – in New Zealand or elsewhere – in time of war or emergency (including any state of emergency declared under the Civil Defence Emergency Management Act 2002). Leave in this circumstance is for an unspecified period of time.

Eligibility for employment protection in this situation requires employees to be employed by their employer for at least 10 hours a week. An employee does not have to have worked for a continuous period for the same employer over the previous 12 months.

- Where an Order in Council has declared that it is in the national interest for members of the territorial or reserve forces to offer themselves for special service. Those who respond are protected by the Act for a period of up to 12 months. Leave must be taken as a continuous period and is unpaid.

To be eligible for employment protection under this section of the Act employees must have been employed for 12-months for at least an average of 10 hours a week and no less than 1 hour every week or no less than 40 hours in every month.

If an employee is absent on special service in the national interest for a period exceeding 28 days, the employer, will, in respect to a leave period longer than 28 days, be entitled to be paid (by government – regulations made under the Act are to provide for this) an amount equal to the highest minimum wage rate for the days or hours, or both, during which the employee would usually perform work for the employer.

With service in the national interest employees are treated as being employed for an hour if, though normally expected to be at work, they were:

- Absent on leave with pay for that hour;
- On leave without pay for that hour (other than volunteers' leave) with the employer's agreement;
- Entitled to payment of weekly compensation under the Injury Prevention Rehabilitation and Compensation Act 2001;
- On parental leave under the Parental Leave and Employment Protection Act 1987; or
- Absent in any other circumstances that a Labour Inspector considers did not disrupt the employee's normal work pattern.

Hours when the employee would normally have been at work are calculated in terms of the employment agreement or by reference to hours of work before the leave without pay began, if the period of leave without pay started more than 12 months ago.

Continuous service

When an employee takes leave under any of the three categories of volunteers leave outlined above, the employee's service is treated as unbroken in respect to any rights and benefits conditional on unbroken service and any period of leave is treated as time served under the employee's employment agreement (with certain exceptions in relation to annual and public holidays and superannuation – required contributions must still be paid).

Leave applications

An employee intending to undertake 3 months' or 3 weeks' voluntary service or training must give his or her employer not less than 14 days' notice.

Where the employee is responding to a Proclamation under which he or she is called out, or is liable to be called out, for continuous service in a time of war or emergency, written notice must be given as soon as practicable, indicating which situation applies (i.e. that the employee has been called out for service or is liable to be called out). The employer must also, as soon as practicable, be given notice of the duration of the leave.

Where the employee wants to take leave for special service in the national interest written notice must be given at least 28 days before the proposed date for leave to begin. The notice must state the proposed date on which the leave is to commence and how long the leave is to last.

Employer response to leave applications

Within 21 days of receiving the employee's notice seeking leave for special service in the national interest or in time of war or emergency, the employer must respond in writing (a form is prescribed for this purpose) stating whether:

- The employee is entitled to leave, and if not, the reasons why not;
- The employee's position can or cannot be kept open.

If the position cannot be kept open the reply must note that the employee may dispute the employer's decision.

Where there are genuine reasons why the employee's job cannot be kept open, the employer's response must indicate that for a 26-week period from the time leave ends the employee will have preference over other applicants for any substantially similar vacant position.

In the case of special service in the national interest, the response must also tell the employee about:

Leave eligibility and entitlements;

- The duration of the leave (leave in the national interest cannot be longer than 12 months);
- The right of the employer and employee to determine a leave commencement date; and
- The ability to end leave early or to extend it with the employer's consent (but not beyond 12 months in the case of special leave in the national interest).

In the case of a call-out in time of war or emergency the response must tell the employee about:

Leave eligibility and entitlements;

- When leave will begin (either the date when the employee is called out for service or an earlier or later date agreed with the employer);
- The need for the employee, where there is a superannuation scheme, to keep on paying required contributions if the leave period is to be counted as continuous service for that purpose;
- The right to end leave early or extend it with the employer's consent or where an extension is required by Proclamation.

Requirement to keep eligible employee's job open

An employer must keep an employee's position open when they are on protected voluntary service. The employer is required to keep open the job of an eligible employee undertaking service in the national interest or called out for service in time of war or emergency, unless it can be shown that a temporary replacement is not reasonably practicable because:

- The employee's position is a key position;
- A redundancy situation has subsequently occurred, in which case when leave ends, the employee, must be allowed a 26-week period of preference for employment in any position substantially similar to the one previously held.

In determining whether or not a position is a key position regard may be had to enterprise size and the training period or skills required for the job. However, in relation to parental leave "key position" has been so narrowly defined by the courts that the task of establishing that a position is "key" may be extremely difficult

An employee's job must be kept open if the leave period does not exceed 4 weeks.

Once leave begins

Within 21 days of an employee going on leave the employer must provide a written notice stating:

- The date on which the employee's leave will end (where the employee is undertaking service in the national interest);
- The date on which the employee will be required to return to work if he or she decides to return to work (where the job can be kept open). This will be the next working day after leave ends. It is also when any preference period will begin if the job cannot subsequently be kept open;
- That the employee must, if reasonably practicable, inform the employer of the intention to return to work not later than 21 days before leave is due to end;
- The employee's rights and obligations in relation to the early ending or extension of leave (not beyond 12 months where leave is for service in the national interest), or the earlier beginning of the preference period. In such a case the employee must give the employer 21 days' notice.

When leave is due to end

An employee who has taken leave for service in the national interest or in time of war or emergency must inform the employer 21 days before leave is due to end whether or not he or she will be returning to work (unless it is not reasonably practicable to do so). If informing the employer within 21 days is not reasonably practicable, an employee who does not intend to return to work is still required to notify the employer of that intention as soon as it is reasonably practicable to do so. Where the employee intends to return to work but informing the employer within 21 days is not reasonably practicable, the employer and employee must co-operate in good faith for the purpose of agreeing on arrangements for the return to work. However, if agreement is not possible, the employee must give the employer 7 days' written notice of the date on which he or she will be returning to work.

If an employee fails to return to work when leave ends, employment is taken to have ended on the day leave began, unless the employee can show good cause for not returning. This is also the case where an employee, without reasonable excuse, fails to accept an offer of preferential employment on the date specified by the employer or within 7 days of that date.

Notification to replacement employees

Anyone employed to take the place of an employee who is on service in the national interest or called out in time of war or emergency must be notified in writing that his or her position is temporary and can be terminated on the employee's return. Replacement employees must also be told in writing that their employment may be terminated at an earlier date if the employee taking leave returns from leave early. These are genuine reasons for fixed term employment, but if they are not provided, the replacement employee's entitlement to take a personal grievance on termination will remain.

Anyone employed to take the place of an employee who is on service in the national interest or called out in time of war or emergency must be notified in writing that his or her position is temporary and can be terminated on the employee's return. Replacement employees must also be told in writing that their employment may be terminated at an earlier date if the employee taking leave returns from leave early. These are genuine reasons for fixed term employment, but if they are not provided, the replacement employee's entitlement to take a personal grievance on termination will remain.

Holidays

An employee is entitled to take all or part of his or her annual holiday entitlement (except where the employee requests otherwise) at a time that is not a period of voluntary service or training.

Where the entitlement to an annual holiday arises while the employee is on leave, during the preference period, or during the 12 months following a return to work, annual holiday pay is paid only at the rate of average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday.

Where an employee has taken 3 months' or 3 weeks' leave for voluntary service or training the period of leave of absence is to be treated as time served in the employee's employment.

For the purposes of any paid (public) holiday occurring during a 3 months' or 3 weeks' period of voluntary service or training, the employee concerned is to be treated as no longer employed. In other words, the employer is not responsible for public holidays that occur while the employee is on leave. This, it is presumed, would apply also to periods of leave for service in the national interest or in time of war or emergency.

Interim reinstatement

Employees refused leave may apply to the Employment Relations Authority for an interim reinstatement order if notice of termination is given or employment is terminated because the employee:

- Has indicated a wish to take volunteers' leave;
- Is or has been a member of the territorial or reserve forces;
- Is entitled or may be entitled as a member of the territorial or reserve forces to take volunteers' leave; or
- Is on or has taken volunteers' leave.

The Employment Relations Authority may from time to time renew an interim order for reinstatement on the application of the employee. A copy of any order made must be sent to the employer by registered letter. Reinstatement must occur immediately or when the Authority specifies, regardless of any appeal that may be made.

Leave complaints

An employee has the right to make a complaint if the employer has stated that the employee is not entitled to take leave or that the employee's position cannot be kept open. A complaint can also be made where there has been an alleged unjustified termination of employment or other action to the employee's disadvantage, or where it is claimed that the employer has discriminated against the employee. Complaints must be made within 26 weeks of the date on which the subject matter of the complaint arose, or within 8 weeks of the expiry of any volunteers leave, whichever is the later. Complaints are not personal grievances.

Complaints are to be made initially to the employee's immediate supervisor and settled as rapidly and as near the point of origin as possible. Where a complaint is not settled or is of such a nature that a direct discussion between the employee and the employee's immediate supervisor would be inappropriate, the employee must either notify a duly authorised representative of any union to which the employee belongs (in which case the union representative must first consider whether the complaint has any substance before taking the matter up), act on his or her own behalf, or appoint an agent or barrister or solicitor to take the matter up with the employer or employer's representative.

If a complaint is not settled with the employer, the facts relied on must be stated in writing. The employee's statement then establishes the nature of the complaint and the issues for any subsequent consideration of the case.

Unsettled complaints can be referred to the Employment Relations Authority which must either make provision for mediation or hear and determine the complaint after considering the written statement, any evidence or submissions the parties provide, and other matters as it thinks fit. Subsequent appeals to the Employment Court and Court of Appeal are possible (and follow the process set out in the Employment Relations Act 2000). Every party to a complaint has a duty to promote its settlement and not to do anything that might impede the effective functioning of the procedures. Remedies available are reinstatement, reimbursement of lost wages and compensation.

In the event of the employer's insolvency or company liquidation, an employee will have priority in respect to any compensation or reimbursement payment ordered as a consequence of a leave complaint.

Where employment is terminated while the employee is on leave it is a defence for the employer to prove that a redundancy occurred after the employee was told that his or her position could be kept open and that the redundancy was of such a nature that there was no prospect of the employer being able to appoint the employee to a vacant position substantially similar to that previously held. The employer must also be able to show that he or she had not, between the time of taking leave and employment termination, prejudicially affected either the employee's seniority or superannuation rights.

A similar defence applies to termination at the end of the 26-week preference period. Redundancy payments, either in terms of an employment agreement or the provisions of any Act, are not affected.

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