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New Zealand
Employment and Labour Law

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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in New Zealand.

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New Zealand: Employment and Labour Law

1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

Yes, an employer must have a justifiable reason to lawfully terminate an employment relationship and follow a fair and reasonable process in doing so. The only exception is if the employment agreement contains a valid trial period provision, and the termination is effected in accordance with this provision and the applicable legislation.

Termination may be without notice (summary dismissal) if the employee commits serious misconduct. Generally, serious misconduct is an act or omission that destroys or significantly undermines the trust and confidence that underpins the employment relationship. Some examples of serious misconduct that may erode trust and confidence include dishonesty (e.g. theft or fraud), violence, gross negligence or gross insubordination. A summary dismissal will (except in the rarest of circumstances) require a process to be followed prior to termination.

Where the employee's action or omission involves a lesser level of misconduct or poor performance the employer must follow a formal warning or performance management process before termination can occur.

Other grounds for the termination of employment include abandonment, medical incapacity, incompatibility, redundancy and (very rarely) frustration of contract. The Employment Relations Act 2000 and the Human Rights Act 1993 prohibit an employer discriminating against employees, including by way of terminating employment on a number of prohibited grounds of discrimination. This includes a prohibition on forced retirement for employees, except in limited industries / roles.

The question of whether a dismissal or other disciplinary action is justified is determined by reference to section 103A of the Employment Relations Act 2000. The test requires consideration of whether an employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. To satisfy the test, the employer must be able to show that it had both substantive grounds for the decision to dismiss and followed a fair process to arrive at its decision.

2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

There are no specific or additional provisions for redundancies that affect a large number of employees.

The term “redundancy” is not defined in the Employment Relations Act 2000. The courts have defined a redundancy as a situation where employment is terminated due to an employee's position becoming surplus to the needs of the employer.

Although redundancy is classed as a no-fault termination, the law applicable to termination for cause applies. Termination on the basis of redundancy must be substantively justified. The business decision underpinning the redundancy must be measured against what a fair and reasonable employer could have done in the circumstances.

A redundancy must be carried out in a way that is procedurally fair. Any process agreed to in an employee's employment agreement must be strictly followed, as well as any specific considerations which may be captured by internal policies. Employees must be informed that their jobs are in jeopardy, be consulted about the reasons for the proposed change, and allowed to provide their feedback and have it considered, before any decision is made to disestablish their role. The employer must consider any alternatives to redundancy before a final decision is made to terminate employment. Where head count reduction is contemplated, the selection of an employee for redundancy must be carried out using fair and objective criteria, and those criteria must be the subject of consultation with the potentially affected employees. The employer must be able to show that it has considered any possibility of redeploying the employee to any vacant roles within the organisation that are reasonably within an employee's capability (even if some training may be required). It is important that employers do not presume an employee's ability to perform, or be interested in, vacant roles.

Once a final decision has been made to implement redundancy:

- an employee's employment agreement may provide for compensation upon redundancy, but otherwise there is no statutory entitlement to redundancy compensation.
- notice of termination must be given to an employee who is being made redundant. A notice period of termination for redundancy is usually specified in the employee's employment agreement. If there are no provisions relating to notice, reasonable notice must be given.

The employer should consider what assistance it can provide to redundant employees, such as providing a reference, support in searching for alternative employment, curriculum vitae development, and access to counselling.

3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

Every employment agreement must contain an employee protection provision. The purpose of an employee protection provision is to provide protection for the employment of employees affected by a restructuring. In this context, a restructure is defined in the Employment Relations Act 2000 as contracting out or selling or transferring the employer's business (or part of it) to another person.

An employee protection provision must include:

- a process that the vendor employer must follow in negotiating with a potential purchaser about the restructuring, to the extent that it relates to potentially affected employees; and
- the matters relating to the affected employees' employment that the vendor employer will negotiate with the purchaser, including whether the affected employees will transfer to the purchaser on the same terms and conditions of employment; and
- the process to be followed at the time of the restructuring to determine what entitlements, if any, are available for employees who do not transfer to the purchaser.

Under the Employment Relations Act 2000 there is also a specified category of employees, commonly referred to as 'vulnerable employees'. They are afforded a higher level of statutory protection in the event of a restructure.

The specified categories of employees are set out in schedule 1A of the Employment Relations Act 2000 and are employees who provide specified services in the specified sectors, facilities, or places of work. Specified services include: cleaning services, food catering services, caretaking, laundry services or orderly service. Specified sectors include: education sector, health sector, age-related residential care sector, public service or local Government sector and services in relation to any airport facility or for the aviation sector. Employees who carry out cleaning services or food catering services in relation to any workplace are also included. These workers may have special rights, including the right to certain information about the restructure, the right to elect to transfer to the purchaser employer on their existing terms and conditions, or bargain for alternative entitlements.

In relation to those employees who are not 'vulnerable employees', the employer must follow the process set out in the employees' protection provisions which, at a bare minimum, will involve consultation with the affected employees, and determination of what entitlements (if any) are available to them, negotiations with the purchaser employer about whether employees will transfer, and considering how to deal with employees who do not transfer to the purchaser employer.

4. Do employees need to have a minimum period of service in order to benefit from termination rights? If so, what is the length of the service requirement?

There is no statutory minimum period of service which provides benefits to employees upon termination.

An employee's employment agreement or an employer's policies may provide service-related benefits that are payable on termination. These provisions are typically utilised to acknowledge and recognise an employee's tenure and can be common in certain industries and professions.

An example of these service-related benefits are redundancy compensation provisions that calculate the compensation based on the number of years the employee has been employed by the same employer. It is not uncommon for the compensation to be capped at a maximum amount.

Long service leave provisions provide employees additional leave entitlements after an employee has remained employed for a prescribed amount of time. Some long service leave provisions are treated by employers as an extension of an employee's annual leave

entitlement, which means that it may be payable upon termination. However, this will always be dependent on the provision in the employment agreement and any relevant policy.

5. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

There is no minimum notice period to terminate an employee's employment in New Zealand.

While there is no minimum notice period, employees in senior positions, such as a Chief Executive Officer, or other Senior Executive, tend to have longer notice periods. This is to allow employers more time to recruit employees to fill these positions. The market for such candidates tends to be smaller, and more competitive, meaning the longer duration employers have to search for new employees to fill these roles, the better.

6. Is it possible to make a payment to a worker to end the employment relationship instead of giving notice?

Notice must still be given but an employment agreement may give the employer the right and ability to pay an amount instead of an employee working out some or all of the notice period: this is commonly referred to as paying in lieu of notice.

In these circumstances an employer exercising that right will terminate employment prior to the expiry of the notice period by making such payment, i.e. it is in lieu of or 'instead' of the employee working out all or part of the notice period. An employer is only able to pay in lieu if the employment agreement provides for it, or if the employer and employee agree.

If there is no contractual ability to make a payment in lieu of notice, and an employer ends the employment relationship by giving less than the required amount of notice, then it has not given notice at all and will likely be in breach of the employment agreement provisions. This can only be remedied by giving new notice for the correct period.

Where the employer is wishing to end the employment relationship, any ability to terminate on notice or pay instead of notice does not absolve an employer of the requirement to provide reasons and justify a termination under section 103A of the Employment Relations Act 2000.

7. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during their notice period but require them to stay at home and not participate in any work?

A period of garden leave can only be imposed for part or all of the notice period if the employee has agreed. An employee's agreement is commonly given in an express provision of an employment agreement. During a period of garden leave, the employee continues to be bound by the terms and conditions of employment (including the employee's common law duty of fidelity, and the duty of good faith under the Employment Relations Act 2000).

If an employee's employment agreement does not include a garden leave clause, and the employee refuses to provide consent to remain away from the workplace, an employer cannot force the employee to do so.

8. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

In addition to substantive cause, the Employment Relations Act 2000 requires that an employer follow a fair process prior to termination. A fair process requires that prior to terminating employment the employer must, at a minimum:

- investigate allegations against the employee sufficiently (as appropriate);
- raise any concerns with the employee;
- give the employee a reasonable opportunity to respond to the employer's concerns; and
- consider the employee's explanation in relation to the allegations before making a decision.

The process is underpinned by a statutory duty of good faith which requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment to provide any affected employee with access to information relevant to the continuation of employment, and provide the affected employee with the opportunity to comment on the information before making a final decision.

An employment agreement or an employer's policy may contain additional procedural requirements or

consultation obligations which must be complied with prior to terminating employment.

An employee is entitled to be represented throughout a termination process by a union or other representative.

9. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

The employee may raise a personal grievance in respect of the termination of employment, claiming unjustifiable dismissal on the basis of a failure to comply with procedural fairness/due process.

The personal grievance is determined in the first instance by a specialist employment tribunal, the Employment Relations Authority (Authority). The Authority is an investigative body that is tasked under the Employment Relations Act 2000 to resolve employment relationship problems by establishing facts and making a determination according to the merits, without regard to technicalities.

The consequences for the employer can include reinstatement of the employee (which is the primary remedy), an award for loss of earnings, compensation for loss of benefits and compensation for injury to feelings (or a combination of those remedies). Reinstatement must be provided for wherever practicable and reasonable, however, it is rarely requested, and even more rarely awarded.

Before investigating a matter, the Authority is required to consider whether it should direct the parties to mediation or further mediation unless there are good reasons not to do so. Mediation is arranged through the Ministry of Business, Innovation, and Employment's confidential and free mediation service. Most employment relationship problems are required to go to through the mediation process.

If a party is dissatisfied with all or part of a determination of the Authority, it may elect to have the matter heard by the Employment Court, either by way of a full rehearing of the entire matter, or a challenge based on a question or error of law or fact.

Where any party to a proceeding before the Employment Court is dissatisfied with the decision, the party may apply for leave to appeal to the Court of Appeal.

10. How, if at all, are collective agreements relevant to the termination of employment?

A collective agreement must comply with certain statutory requirements, including:

- being in writing;
- being executed by the employer(s) and union(s) that are parties to the collective agreement;
- having a 'coverage clause' stating the work that the collective agreement covers;
- having the rates of wage or salary payable to the employees; and
- a plain language explanation of the services available for the resolution of employment relationship problems.

Other than the statutory requirements, the parties decide what is included in the collective agreement (unless the Authority is requested to, and agrees to, fix the terms of collective agreement in the event that bargaining has broken down). A collective agreement will often contain provisions that include the process to be followed prior to the termination of employment. This process may be over and above the minimum requirements for a fair process that an employer would be required to follow under the Employment Relations Act 2000.

There are no additional statutory protections or statutory requirements relating to termination where this takes place under a collective agreement.

11. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

No. The validity of the termination of the employment is subject to the test of justification contained in section 103A of the Employment Relations Act 2000.

12. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

The Employment Relations Act 2000 and the Human Rights Act 1993 prohibit discrimination on the basis of:

- age;
- race or colour;

- ethnic or national origins;
- sex (including pregnancy or childbirth);
- sexual orientation;
- disability;
- religious or ethical belief;
- marital or family status;
- employment status;
- political opinion;
- an employee's union membership status or involvement in union activities, including claiming or helping others to claim a benefit under an employment agreement, or taking or intending to take employment relations education leave.

Sexual harassment, adverse treatment in the employment of people affected by family violence, and racial harassment are further prohibited by the Human Rights Act 1993. It is relevant to note that a trial period does not preclude a claim for discrimination or harassment of any kind. During a trial period, an employer cannot take action (including terminating employment) on the basis of the aforementioned grounds.

13. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

An employee who considers that he or she has suffered unlawful discrimination during employment (including where this results in the termination of employment) can either:

a. Raise a personal grievance and resolve this via mediation, the Employment Authority, or the Employment Court; or
b. Make a complaint to the Human Rights Commissioner (who will attempt to resolve the complaint by a confidential and free mediation service) or a complaint can be made to the Director of the Office of Human Rights Proceedings in the Human Rights Review Tribunal.

An employer who is found to have engaged in discrimination or harassment against their worker can be subject to an order for reinstatement of a dismissed employee, an award for loss of earnings, compensation for loss of benefits and compensation for injury to feelings (or a combination of any of those remedies).

14. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

While a fair process and good faith obligations must be maintained in relation to the termination of any worker's employment, there are categories of employees that have additional protection.

a) Parental Leave

With very limited exceptions, an employer may not terminate employment of any employee by reason of pregnancy or state of health during pregnancy. It is unlawful to dismiss or disadvantage an employee on the basis of pregnancy or parental leave. Where an employee has indicated that he or she wishes to take parental leave, they are protected from termination under the Parental Leave and Employment Protection Act 1987.

Subject to certain special defences, an employer cannot terminate employment based on the employee's absence on parental leave or during the period of 26 weeks commencing with the day after the date on which the employee's parental leave ended.

Termination of employment for cause (namely, termination for a satisfactory reason), is not affected by the Parental Leave and Employment Protection Act 1987.

b) Employees Affected by Family Violence

Employees who are affected by family violence are entitled to up to 10 days' paid leave per annum, once employees have been employed continuously for six months. Family violence leave is not cumulative, is not paid out at the end of employment and can be taken in advance by agreement with the employer.

Employees who are affected by family violence can also request short term changes to their working conditions, including work location, duties, contact details that the employee gives to the employer, or any other term of the employment agreement.

Section 108A of the Employment Relations Act 2000 makes it unlawful for an employer to adversely treat an employee on the grounds that the employee is, or suspected or assumed or believed to be, a person affected by family violence. Adverse treatment includes: dismissal, or refusal or omitting to offer or afford an employee the same terms of employment, conditions of work, fringe benefits, opportunities or training and promotion, made available for other employees with the same or substantially the same qualifications, experience

or skills, and employed in the same or substantially similar circumstances.

c) Fixed Term Employment

Employers can offer fixed-term employment if there are genuine reasons based on reasonable grounds for the fixed term, which may include, for example, seasonal work, project work, or where the employee is covering another employee's absence. The employer must, in the employment agreement, advise the employee of when and how their employment will end and the reasons for his or her employment ending in that way.

If the employment agreement does not comply with these requirements, the employer may not rely on any fixed term to end the employee's employment or to justify termination of employment, where the employee elects, at any time, to treat that term as ineffective.

d) 'Vulnerable' Employees

Employees providing the 'Specified Services listed in Schedule 1A Employment Relations Act 2000 i.e. those involved in cleaning services and food catering services in any workplace; caretaking or laundry services in the education sector; orderly or laundry services in the health sector and aged-related residential care sectors. These employees are entitled to transfer their employment and any minimum entitlements if their work is replaced with contractors, contracted out, or their business or part of the business is sold.

e) Public Health Sector

There is a code of good faith for the public health sector that provides some additional protection to employees in the sector, including employees of employers that provide services to the public health sector. This includes employees of employers who contract services to the public health sector being entitled to transfer to a new employer if the service provider is changed.

15. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

The Protected Disclosures (Protection of Whistleblowers) Act 2022 provides statutory protection to employees who complain about serious wrongdoing. Serious wrongdoing includes unlawful, corrupt, or irregular use of public money or resources, any criminal offence, any act or omission that puts the health and safety of an individual at serious risk, or gross negligence by public officials.

If the disclosure of information is made in accordance with the Protected Disclosures Act 2022, no civil, criminal, or disciplinary proceedings can be taken against a person for making the protected disclosure. This legislation seeks to enhance protection for these employees within the workplace and to ensure that the confidentiality of the person who has made the disclosure is also protected.

An employee who suffers retaliatory action or victimisation by their employer for making or indicating an intention to make a protected disclosure, can take personal grievance proceedings under the Employment Relations Act 2000. It is also unlawful under the Human Rights Act 1993 to treat whistle-blowers or potential whistle-blowers less favourably than others in the same or similar circumstances.

16. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

In the event of financial difficulties, an employer may be able to justify terminating employment for redundancy. As with other types of termination, the employer will need to meet the requirements of section 103A Employment Relations Act 2000 including having substantive reason for dismissal and following a fair process.

If financial difficulties mean that an employer is proposing to disestablish an employee's position, the employer must be able to justify why that particular position is affected (as opposed to any other position or positions) and to show that the employer has taken other steps to deal with the financial difficulties (for example, cost savings in other areas, or endeavours to increase revenue).

In terms of process, the employer must consult with the potentially affected employee or employees, providing information about what is proposed (for example, the disestablishment of the employee's position) and the rationale for this – the financial difficulties, and why the employee's position is the one proposed for disestablishment. With limited exceptions, the statutory duty of good faith provides that the employee is entitled to all information relevant to the proposal. The employer must provide financial information if this is relevant to the rationale. The employee must then be given a real opportunity to comment on the proposal and suggest alternatives. The employer must genuinely consider the employee's feedback, before making a decision. Where an

employer decides to disestablish an employee's position, there is an obligation to consider alternatives to termination for that employee – for example, redeployment into a vacant role, the possibility of creating a part time role, etc.

If an employer is proposing to reduce the number of the same or similar positions, it must propose and consult about both the reduction (and the rationale for it) and the proposed selection criteria. This will allow the employer to determine who retains the remaining roles.

An employer could potentially propose disestablishing a role, and creating another role that is paid less, works fewer hours, or has less responsibility. However, the justifiability of this would depend on the 'new' role being substantially different from the old role. It is very unlikely to be lawful if the role does not change, and the employee is expected to do the same role, for less remuneration.

17. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

Some employment processes are being increasingly automated through use of artificial intelligence (AI). Examples include filtering and shortlisting candidates during the recruitment process and developing software that predicts which employees are likely to leave the company AI is likely to play an increasing role in the management of employment processes.

As yet, there has been very little specific formal regulation on the use of AI in New Zealand. Currently, there are no Employment Court or Employment Relations Authority decisions that have considered the use of AI in relation to termination of employment.

Possible legal risks that an employer should be cognisant of include privacy concerns (if employees' or candidates' personal information is uploaded into the AI programme), indirect bias or discrimination (if the algorithm favours or discounts employees or candidates based on prohibited grounds) and lack of transparency as to how decisions are made, in a legal framework which requires good faith, and the disclosure of information. Two of these areas are discussed below.

a) Recruitment

Section 22 of the Human Rights Act 1993 makes it unlawful for employers to make decisions in an employment context on the basis of prohibited grounds. This includes employing, promoting or dismissing on the basis of prohibited grounds (sex, sexual orientation, marital or family status, religious and ethical beliefs, political opinion, race, colour or ethnicity, disability, age and employment status). There is a risk that AI may base its decision on one or more of these unlawful grounds. This can occur when automated rejections of candidates are based on prejudicial data that is inputted into the automated programme, such as data modelled on former or existing employees which represent, for example, a majority of one gender or ethnicity. When using AI in recruitment, employers should proceed with caution by ensuring data inputted is not biased, and human reviews take place regularly to assess diversity and ensure that any indirect or inadvertent discrimination is identified and corrected.

b) Termination

It is difficult to see how AI could assist employers with a decision that would result in a lawful termination. As above, any termination must be for justifiable reasons, and can only take place following a fair and reasonable process. If AI is being used to assist with selection decisions in a redundancy situation, the criteria for selection needs to be transparent and non-discriminatory. In the case of a redundancy, selection must be carried out in a way that is procedurally fair and substantively justified. Risks of using AI to make or assist with termination decisions may arise if an employer is not able to justify how the software came to its decision on who to terminate. Use of AI may also restrict or remove an employee's ability to comment on the information as to why their role is proposed for disestablishment (if the information simply does not exist), which is likely to render the employer's decision unjustified. If AI technology assists a human decision, the decision-maker needs to be able to substantiate and justify its decision, in line with its duty of good faith as employer.

18. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

There is no statutory requirement for an employer to pay redundancy compensation or any other 'severance' pay on termination. However, employees are entitled to a reasonable notice period, which they may work out, or salary to be paid in lieu of notice, if there is a provision in the employee's employment agreement. Employees will

also receive statutory entitlements related to untaken leave pursuant to the Holidays Act 2003.

Redundancy compensation or severance pay may be provided for in an individual or collective employment agreement, or in an employer's policy.

Rarely, an employer may have a custom or practice of making such payments or may choose to make an ex-gratia payment.

Compensation may be awarded by the Authority or Employment Court if it finds that the termination of an employment relationship was unjustified.

19. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Yes, subject to limitations. An employee can partly or fully settle issues arising from a personal grievance or breach of contract and forbear from or forego enforcement of their rights at law in consideration for payment or other benefits. There must be some form of employment relationship problem that needs to be resolved. In almost all cases when the parties enter into a settlement agreement, they will agree to the terms of the settlement agreement, and discussions leading up to settlement, being strictly confidential.

A settlement agreement, however, must not compromise an employee's minimum entitlements under minimum entitlement legislation including the Minimum Wage Act 1983, the Holidays Act 2003, the Home and Community Support (Payment for Travel Between Clients) Settlement Act 2016, or the Care and Support Workers (Pay Equity) Settlement Act 2017.

However, in New Zealand, the Authority and Employment Court have held that in order to have a genuine without prejudice conversation (one that is legally 'off the record') there must first be a dispute between the parties. Legal proceedings or a personal grievance do not have to be raised, but there must at least be a significant difference in views about the lawfulness of an action or proposed action. Accordingly, proposing a deed of release (as is common practice in other jurisdictions) prior to any dispute having arisen, is not likely to be covered by without prejudice protections and can used to support an argument that the employer was threatening dismissal or unfairly pressuring an employee to resign.

20. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Restraint of trade covenants are not illegal under the illegal contracts provisions of the Contract and Commercial Law Act 2017, but are prima facie unenforceable at common law for public policy reasons. They will only be enforceable to the extent that they are reasonable and otherwise lawful.

The courts, however, have consistently signalled that restraint of trade covenants are to be taken seriously by the parties that have expressly entered into them. Both the Authority and Employment Court have the power to issue interim and interlocutory injunctions to prevent breaches of restraint of trade covenants, as well as damages for breach.

Restraint of trade covenants typically take two forms: 'non-competition' and 'non-solicitation'.

A non-competition restraint will generally seek to prevent direct or indirect competition (to varying degrees) by preventing an ex-employee being employed or engaged with a competitor of the employer's business for a specified period, and often in respect of a specified geographical area. Such restraint will only be enforced to the extent that it is necessary to protect an employer's legitimate proprietary business interest, such as a trade secret, goodwill, client relationships, client lists or financial information. A restraint will not be allowed to operate to protect an employer against mere competition.

A non-solicitation restraint will generally seek to prevent canvassing, soliciting, or accepting business or work from customers / clients or suppliers of the employer with whom the ex-employee had dealings, or from soliciting or enticing an employee of the employer to cease employment.

Consideration is required for a restraint. Where the restraint is entered into at the same time as the employment relationship, it is not necessary that any consideration over and above the remuneration for the underlying agreement be provided. However, if a new restraint is proposed during the employment relationship, 'fresh' consideration will be required.

In determining whether a provision is enforceable, the

courts will consider several factors, including the nature and significance of the proprietary interest that is sought to be protected, the reasonableness of duration and the geographic scope of the restraint, the context of the employment agreement, and the background and circumstances that existed when the clause was entered into.

Non-solicitation clauses are, generally, more likely to be upheld than non-competition clauses on the basis that that they are less restrictive. The enforceability of a non-competition or non-solicitation clause increases with the employee's seniority, along with factors that increase the access which an employee has to the employer's confidential information, clients or other proprietary interests.

On the 22 September 2022 the Employment Relations (Restraint of Trade) Amendment Bill was introduced to Parliament. The Bill passed the first reading and the Select Committee Report was presented on 24 May 2024. The Bill is unlikely to pass its second reading as the current Government did not support the Bill when they were in Opposition.

However, if passed, this Bill would cover non-compete, non-solicitation and non-dealing restraint clauses. The proposed Bill would amend the Employment Relations Act 2000 to provide that restraints of trade will have no effect if an employee earns less than three times minimum wage. Further, it would limit the use of restraints to situations where the employer has a proprietary interest to protect which must be described in the agreement, require employers to pay half the employee's weekly earnings for each week the restraint of trade remains in effect, and limit the duration of restraints of trade to no more than six months.

21. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes. Most written employment agreements contain a clause expressly setting out the employee's obligations in respect of confidential information following termination.

In the absence of a contractual provision, an implied duty not to disclose confidential information survives the termination of an employment agreement, but in a restricted form. An employee who has been privy to and maintains (via memory or otherwise) information which is of a sufficiently high degree of confidentiality as to amount to a trade secret will be subject to an ongoing duty not to use or disclose the information.

The determination of what constitutes a trade secret is determined on a case-by-case basis having regard to the nature of the employment, the nature of the information, whether the employer impressed upon the employee the confidential nature of the information, and whether the relevant information is easily isolated from other information which the employee is free to use.

22. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

There is no legal requirement to provide an employee a written or verbal work reference unless it is provided for in the employee's employment agreement.

Under the Privacy Act 2020 an employer can only release personal information about an employee, including a work reference, to a third party if authorised by the employee to do so.

The courts have held that an employer must provide a record of the types of work carried out by an employee, if required.

23. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The most common difficulties arise around the natural justice / fair process requirements. Issues tend to arise in this area when employers are confident in their view of what has taken place, are eager to dismiss an employee, and overlook or minimise procedural fairness as a result. The requirements of good faith and procedural fairness require the employer to:

- fully investigate the concerns;
- raise their concerns with the employee;
- give the employee a reasonable opportunity to respond; and
- genuinely consider the employee's explanations (if provided).

Failing to satisfactorily meet these requirements is the most common reason terminations are found unjustified.

To mitigate and minimise procedural errors, the employer should:

- ensure a full, investigation is carried out, taking into

account any additional information provided by the employee;
- ensure the decision-maker is as impartial as possible;
- advise the employee to seek independent advice at the start of the process;
- advise the employee of their right to have a representative or support person at any formal meetings;
- not make the decision on what action to take until after considering the employee's response to the proposed course of action;
- take into account any similar situations that have occurred previously so that like situations can be treated alike;
- carefully consider all options before making a final decision.

24. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

The Government have announced its plans to make various reforms to the Employment Relations Act 2000, which will likely have a significant impact on how employers approach termination of employment. The detail of these proposed reforms is still being developed.

a) Trial Periods

The Employment Relations (Trial Periods) Amendment Act 2023 (Act) came into force on 23 December 2023.

The amendment enables all businesses to include a 90-day trial period in a new employee's employment agreement. Previously only small-to-medium sized businesses that employed less than 20 employees were able to include this provision. However, the amendment does not impact any other conditions necessary for a 90-day trial period clause to be valid.

b) Termination by Agreement

The Employment Relations (Termination of Employment by Agreement) Amendment Bill is a Member's Bill which was introduced on 7 November 2024.

This bill would allow employers to offer a specified sum to an employee in exchange for an employee agreeing to end the employment relationship by signing a full and final settlement agreement. The settlement agreement would prevent the employee from bringing a personal grievance claim for any cause of action arising from the employment relationship.

Currently it is only lawful to make an offer to end an employment relationship and sign a settlement agreement if an employer and employee first establish that there is an existing employment relationship problem and agree to hold a “without prejudice” conversation (i.e. a confidential conversation that is inadmissible in any future proceedings relating to the employment relationship).

If the Bill is passed, employers would be able to make an offer on a “without prejudice” basis, regardless of whether there is an existing employment relationship problem. This means that an employee would not have grounds to raise a personal grievance claim if an offer was made to them in this setting (even if they do not accept the offer). The Bill provides for exceptions to this, including that the employer must advise the employee that they have a right to seek independent advice before signing any settlement agreement.

The effect of this Bill is that an employer could potentially terminate employment, in exchange for monies, without following the pre-requisite steps required under section 103A of the Employment Relations Act 2000 or without the existence of an employment relationship problem.

As this is an ACT member's Bill, and ACT are currently a coalition partner, it is likely that this Bill may get some support however the Bill will not be heard with any urgency as it can only be heard on “Member's days” which occur less frequently than other sitting days.

c) Restriction on high-earning employees from raising a personal grievance

Workplace Relations Minister Brooke van Velden has released details about an upcoming Bill which would prohibit employees who earn over $180,000 per annum base salary from raising an unjustified dismissal claim against their employer. The Bill originates from a policy under the ACT-National coalition agreement and would seek to amend the Employment Relations Act 2000.

Currently, an employee can raise an unjustified dismissal claim if the employee establishes that the employer's actions were not substantively justified (i.e. what a fair and reasonable employer could have done in the circumstances) and procedurally fair. Section 103A of the Employment Relations Act 2000 establishes the test which the court applies when determining if there is a valid grievance, which considers whether:

- The employer, having regard to the resources

available, sufficiently investigated the allegations against the employee before dismissing; and
- The employer raised concerns with the employee before dismissing; and
- The employee was given a reasonable opportunity to respond to the employer's concerns before the dismissal; and
- The employer genuinely considered the employee's explanation (if any) to the allegations against the employee before dismissing.

While it is unknown what specific changes will be made to the Employment Relations Act 2000, the Minister has said that the Bill would allow employers to terminate the employment of an employee earning over $180,000 base salary and the affected employee would not be able to raise an unjustified dismissal grievance in respect of the dismissal. Currently, a successful unjustified dismissal grievance may result in an employee being reinstated to their role, being awarded remedies for lost earnings, loss of benefits and compensation for injury to feelings.

Employees who earn over this amount may still be able to raise an unjustified disadvantage grievance because of their employer's actions throughout their employment.

It has been indicated that the bill will be introduced in 2025.

d) Change to Personal Grievance Remedies

Another upcoming Bill is the change the potential remedies an employee may be awarded because of a personal grievance. While the Bill has not yet been released, there have been indications that the Bill may amend the Employment Relations Act 2000 as follows:

- Remove all remedies for employees whose behaviour amounts to serious misconduct.
- Remove an employee's eligibility for reinstatement to a role and compensation for hurt and humiliation when the employee's behaviour has contributed to the issue, for example where an employee has committed an act of serious misconduct.
- Allow the courts to make remedy reductions of up to 100 percent where an employee has contributed to the situation which gave rise to the personal grievance.
- Require the courts to consider if the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations.
- Increase the threshold for procedural error in cases where the employer's actions in relation to the employee are considered fair.

Currently, employers that terminate employment on the grounds of serious misconduct must ensure that the termination was substantively justified, and the process was fair. It is unknown what specific changes will be made to the Employment Relations Act 2000, however, the changes may mean that employers who are confident that an employee's behaviour amounts to serious misconduct could short-cut the termination process and face little risk of a personal grievance.

e) Other Bills

There are several Bills dealing with various aspects of employment law that are somewhere in the parliamentary process and/or expected to be introduced in 2025. These include:

Bill	Stage	Overview	Likelihood of becoming law?
Crimes (Theft by Employer) Amendment Bill	Awaiting Third Reading stage	Clarifies that not paying an employee their wages amounts to theft, and introduces an offence for employers who intentionally withhold wages.	Likely, as the Bill passed its Second Reading.
Employment Relations (Protection for KiwiSaver Members) Amendment Bill	Not agreed	Provides better protection against discrimination of workers enrolled in KiwiSaver.	While National supported the Bill at its first reading, the Bill was confirmed as not agreed on 21 August 2024.
Employment Relations (Restraint of Trade) Amendment Bill	Second Reading stage	Introduces certain criteria that must be met for restraints of trade provisions to be lawful.	Unlikely, as neither National nor Act supported the Bill at its first reading.
Human Rights (Prohibition of Discrimination on Grounds of Gender Identity or Expression, and Variations of Sex Characteristics) Amendment Bill	Introduced	Adds two new grounds, gender identity or expression, and variations of sex characteristics, to the list of prohibited grounds of discrimination.	Unclear, as the Bill is yet to have its First Reading.
Employment Relations (Collective Agreements in Triangular Relationships) Amendment Bill	Introduced	Allows employees who are employed by one employer, but working under the control or director of another business, to be covered by a collective agreement of the work being performed for that other business or organisation.	Unclear, as the Bill is yet to have its First Reading.
Employment Relations (Pay Deductions for Partial Strikes) Amendment Bill	Select Committee stage	Allows employers to deduct employees' pay in response to partial strikes.	Possible, as this is a Bill that was introduced by the Government.
Gateway Test for Contractors and Businesses	Not yet introduced	Creates criteria that businesses can use when responding to a claim that a person is an employee and not a contractor. If the criteria are satisfied, the worker would be considered a contractor. The criteria may be used at both the start of the working relationship or when employment status is challenged under the Employment Relations Act 2000.	Possible, however the Government has not yet introduced the Bill.

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