

19 MAY 2020

**ON-SHORE AND OFF-SHORE MIGRANT WORKERS
EMPLOYMENT INFORMATION**

**GETTING THE EMPLOYMENT RELATIONSHIP BACK ON TRACK
Particularly regarding redundancy termination of employment agreements**

It is understood that everyone – employers and employees alike - have been placed under major financial stress and shock due to the effects of Covid-19 and the lockdown. That we are facing a worldwide pandemic is not the fault of anyone. When under stress and in such situations poor decisions can be made. We also understand that incorrect advice has in some cases been given to employers.

Employment law is based on good faith and it is always possible to remedy situations through good faith discussions and agreement between the employer and employee – even if there has been a termination, it is possible to reinstate an employee (for example if the situation has changed or wrong advice was followed).

This information guide is to assist employees and employers to get things back on track for their employment relationship, even if a termination or redundancy has already occurred.

Why resolving the employment situation is important for the employer: engaging in good faith discussions can avoid a personal grievance being raised or other claims being brought

A personal grievance or other claim against an employer can lead to legal action by the employee and possible serious penalties by MBIE such as losing the ability to support visas in the future or being on a list of non-compliant employers.

Additionally, as New Zealand slowly starts to normalize after Covid-19, you will need employees again! By retaining your employees, you will not need to go through the entire recruitment and visa application process again for when you need to staff your business again.

Why resolving the employment situation is important for migrant visa holder: losing an employment position leads to a cancellation of their visa. Keeping their employment is extremely valuable and important to the employee.

FOR EMPLOYERS

Before you lay off your employee, consider the following:

1. Can you apply for the wage subsidy from the government to help pay your employee's wages?
2. Do you qualify for small business assistance from the government?
3. Is your landlord willing to reduce or renegotiate your rent or lease?
4. Is your bank willing to extend your loans or offer new ones at the current low interest rates?
5. Can you approve unpaid leave for your employee until they are able to start work again?
6. If you have no other options, have you gone through a proper and fair redundancy process?
 - a. Told the employee what you're proposing and why?
 - b. Given the employee time to consider your proposal and give you feedback, including proposing alternatives?
 - c. Genuinely considered their feedback before making a decision?
 - d. Offered them support?
 - e. Considered alternative positions or other options such as reduced hours?
 - f. Paid the employee's notice period and entitlements (e.g. accrued annual leave and Kiwisaver)?

Remember you need to follow a proper redundancy process and cannot make the decision by yourself. It needs to be discussed with your employee and a proper process followed. Otherwise, you may be opening yourself up to personal grievances, possible Employment Relations Authority action and/or not being allowed to support future visas by Immigration New Zealand.

If you have already laid off your employee without consultation, it's not too late to try to fix this, if your former employee is also willing to try!

1. If your employee is stuck offshore, discuss with them the option of them taking unpaid leave until they can come back to New Zealand and work again.
2. If your employee is in New Zealand, but you cannot pay their wages due to a drop in income:
 - a. Apply for the wage subsidy, or small business assistance.
 - b. Discuss the possibility of unpaid leave.
 - c. Discuss the possibility of reduced hours and pay.
3. Remember, employees must agree to any changes to their employment terms – you cannot change them unilaterally.
4. Employees have 90 days to raise a personal grievance (complaint) against employers.
5. Your best option is always to negotiate with your employee and resolve matters through agreement. Employment is a relationship – keep it positive.
6. Check the wording of the employee's contract to see what your options might be, especially if there is a Collective Employment Agreement check to see what it says about unpaid leave.

FOR EMPLOYEES

Why resolving the employment situation is important for migrant visa holder: losing an employment position leads to a cancellation of their visa. Keeping their employment is extremely valuable and important to the employee.

If you have been laid off without consultation:

1. You have **90 DAYS** from the date of your termination (including redundancy) to raise a personal grievance (a complaint) against your employer. This timeframe can only be extended in exceptional circumstances.
2. Send your employer this factsheet and start a conversation about your redundancy and whether there's a good alternative.
 - a. Your employer needs to discuss the possibility of redundancy with you, explain why it's necessary, and take your comments into account before making any decisions
 - b. Discuss the option of you taking unpaid leave and staying employed while you are not able to return to New Zealand because of border closures
 - c. If you are in New Zealand, ask your employer if they can apply for the wage subsidy, or whether you can take unpaid leave until the business reopens, or is able to pay a bit less than your usual wage on a temporary basis. Discuss the possibility of reduced hours; 30 hours per week is generally considered full time by Immigration New Zealand (although we recommend you check any specific condition of your visa with INZ or your advisor).
3. If you can, obtain legal advice as soon as possible, and/or talk to your union.

DRAFT EMAIL FOR EMPLOYEES

Dear [EMPLOYER'S NAME]

I am writing to you to discuss the termination of my employment. My employment as [TITLE] with [BUSINESS NAME] was terminated by [DESCRIBE METHOD] on [DATE]. I do not think that the way my employment was terminated followed New Zealand employment law requirements. I would like to meet with you and discuss my employment in your business to see if we can resolve this situation in a positive way.

[if very close to 90 days]

I wish to raise a personal grievance against the business. Proper termination/redundancy process was not followed [explain details] and I would like to discuss this with you and explore my options for reinstatement.

[if not close to 90 days]

I would prefer not to go down the legal route of raising a personal grievance against the business. I want to discuss my termination with you and explore options for reinstatement.

I look forward to talking with you about my possible reinstatement with the business.

Kind regards,

[YOUR NAME]

USEFUL LINKS FOR EMPLOYEES

Frequently asked questions

- <https://communitylaw.org.nz/coronavirus-and-the-law/faqs-for-employment>

Personal grievances

- <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/personal-grievance/>
- <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/personal-grievance/unjustified-disadvantage/>

Legal help

- <https://communitylaw.org.nz/>

USEFUL LINKS FOR EMPLOYERS

Wage subsidy

- <https://www.workandincome.govt.nz/covid-19/wage-subsidy/who-can-get-it.html>
- <https://www.workandincome.govt.nz/covid-19/wage-subsidy/how-to-apply.html>

Covid-19 Small Business Cashflow Loan (SBCS)

- <https://www.ird.govt.nz/covid-19/business-and-organisations/small-business-cash-flow-loan/applying-for-the-sbcs-loan>

NZ Employment Law - Redundancy

- <https://www.employment.govt.nz/ending-employment/redundancy/>
- <https://www.employment.govt.nz/workplace-policies/workplace-change/workplace-change-process-outline/>

Possible penalties

- <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/labour-inspectorate/employers-who-have-breached-minimum-employment-standards/>
- <https://www.immigration.govt.nz/employ-migrants/explore-your-options/your-responsibilities-obligations/law-immigration-employment/employment-law>
- <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/personal-grievance/>

