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The Legal 500 Country Comparative Guides

New Zealand

EMPLOYMENT & LABOUR LAW

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

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NEW ZEALAND
EMPLOYMENT & LABOUR LAW

1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

The Government has introduced various wage and leave support schemes (and extensions). These schemes have been in place, changed, and been removed, as the nature of the pandemic has changed. Generally, employers who met the schemes' criteria could apply for lump sum payments to subsidise their employees' remuneration when employees could not safely attend work as a result of Covid-19, were required to isolate, and/or were awaiting the results of a Covid-19 test, and the employee could not work from home.

Employers who received such payments had to agree to declarations that set out certain obligations. These declarations varied depending on the time the application was made, but included requirements such as using the employer's best endeavours to retain employees in employment, and pay at least 80% of their ordinary wages/salary.

Other restrictions have been put in place at various times during the pandemic, including, in relation to the operation of certain businesses, requirements for employees to physically distance, the requirement for some employees to wear masks, and requirements for workers in some sectors (including education, health, aged care, and hospitality) to be vaccinated against Covid-19 in order to carry out that work.

2. Following the covid-19 pandemic, have new employee rights or protections been introduced in respect of flexible or remote working arrangements?

There are no specific Covid-19 related changes to flexible work conditions for employees, although many employers have introduced remote-working policies to help restrict the spread of the virus in the workplace. The "future of work" is a hot topic in the employment sphere as businesses emerge and transform from Covid-19.

The general position in the Employment Relations Act 2000 is that an employee can request, and the employer must consider, flexible working arrangements (including reduced, increased, or flexible hours, working remotely, or job sharing). The employer can refuse such a request for specific stated reasons, including that it:

- cannot reorganise work among existing staff or recruit additional staff;
- would have a negative impact on quality, performance, or ability to meet customer demands;
- would not have not enough work during the proposed periods of work;
- has planned structural changes; or
- would be burdened with additional costs.

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

An employer must have a justifiable reason to lawfully terminate an employment relationship. The employer must also 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 the provision and 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. Serious misconduct may 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 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.

The Government has recently introduced legislation providing that an employer may give four weeks' paid notice to an employee who has not been vaccinated, and whose work requires it (which is set out in the statute). The test of justification outlined above is still applicable, and such a dismissal is still open to challenge by the employee using the normal personal grievance procedures.

4. 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?

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. The term "restructuring" is defined under the Employment Relations Act 2000 and includes situations where an employee's duties are contracted out or contracted in, and the sale or transfer of whole or part of a business.

The law applicable to termination for cause also applies to no-fault termination for redundancy. Termination on the basis of redundancy must be substantively justified. The business decision underpinning the redundancy has to be measured against what a fair and reasonable employer would have decided to do 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 (if any) must be strictly followed. Employees must be informed that their jobs are in jeopardy,be consulted about the reasons for the change, and allowed to provide their feedback before any decision is made to disestablish their role. The employer must consider any alternatives to redundancy before a final decision is made. Where head count reduction is contemplated, the selection of an employee for redundancy must be carried out using fair criteria. The employer must be able to show that it has considered any possibility of redeploying the employee.

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 including matters such as providing a reference, support in searching for alternative employment, curriculum vitae development, and access to counselling.

The process outlined above applies no matter how many affected employees there might be.

5. 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 a restructure.

The specified categories of employees are set out in the Employment Relations Act 2000 and are employees who provide specified services in the specified sectors, facilities, or places of work. Services can include: cleaning services, food catering services, caretaking, laundry services or orderly service. Sectors can 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 workers', 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.

6. 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 statutory minimum.

Most employment agreements contain a notice period provision. Notice for waged employees is typically one to two weeks. Salaried employees in supervising and management positions often have notice periods of four weeks or one calendar month. Senior, management and executive employees can expect notice anywhere from three to 12 months (or longer). Most employment agreements also require notice to be given in writing to avoid any doubt as to an employer's or an employee's intention.

If an employment agreement does not specify a notice period, then reasonable notice must be provided having regard to seniority/salary level, the nature of the role, length of service, company or industry practice and personal factors such as age, qualifications, and job mobility. A common misconception is that the notice period is equal to the duration of the pay period, but this is not, of itself, determinative. The reasonableness of the notice period is determined at the time that notice is given, not at the time the employment agreement was entered into.

7. Is it possible to pay monies out 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 gives less than the required amount of notice, then it has not given notice at all: notice has not been legally affected and 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 (see question 2).

8. Can an employer require a worker to be

on garden leave, that is, continue to employ and pay a worker during his notice period but require him 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.

9. 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.

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 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 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.

10. 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 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 awarded.

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 prior to the Authority's investigation meeting (if required).

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.

11. 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, and having a 'coverage clause' stating the work that the collective agreement covers.

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). A collective agreement will usually contain a provision that includes the process to be followed prior to the termination of employment.

There are no additional statutory protections or statutory requirements relevant to collective agreements.

12. 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 s103A of the Employment Relations Act 2000.

13. 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;
- ethnicity 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 employment of people affected by family violence, and racial harassment are also prohibited by the Human Rights Act 1993.

14. 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 culminates in the termination of employment) can either:

- raise a personal grievance and resolve this via mediation, the Authority or the Employment Court; or
- 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.

The consequences for the employer can include reinstatement of the 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).

15. 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?

The following categories of employees have some additional protection:

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.

An employer cannot terminate employment by reason of the employee indicating the he or she wishes to take parental leave 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 period of parental leave ends.

Termination of employment for cause is not affected by the Parental Leave and Employment Protection Act 1987.

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 6 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.

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 parental leave. The employer must, in the employment agreement, advise the employee of when and how his or her 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.

Vulnerable employees

Employees 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 are entitled to transfer their employment if their work is replaced with contractors, contracted out, or their business or part of the business is sold.

Public health sector

There is a code of good faith for 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.

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

The Protected Disclosures Act 2000 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, or gross negligence by public officials.

If the disclosure of information is made in accordance with the Protected Disclosures Act 2000, no civil, criminal, or disciplinary proceedings can be taken against a person for making the protected disclosure.

An employee who suffers retaliatory action by their employer for making 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 favorably than others in the same or similar circumstances.

17. 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 or any other 'severance' pay on termination.

Redundancy compensation or severance pay may be provided for in an individual or collective employment agreement.

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.

18. 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, 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 his or her 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, may 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.

19. 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.

The courts, however, have previously signalled that restraint of trade covenants are to be taken seriously by the parties that have expressly entered into them. Such covenants are amenable to enforcement by injunction to the extent that they are reasonable and otherwise lawful. Both the Authority and Employment Court have the power to issue interim and interlocutory injunctions to prevent breaches of restraint of trade covenants.

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) with 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, a trade secret, 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.

In determining whether a provision is enforceable, the courts will consider several factors, including the nature 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.

20. 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 obligations of an employee 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. 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.

21. 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.

22. 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. 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, independent investigation, 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 to have a representative or support person at any disciplinary 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;
- carefully consider **all** options before making a final decision.

23. Are any legal changes planned that are likely to impact on 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 has introduced legislation amending the Holidays Act 2003 to include an additional public holiday for the rising of Matariki, which marks the start of the Māori New Year in Aotearoa.

The Government has accepted the Holidays Act Taskforce's recommendations which are intended to provide certainty to employers and help employees receive their leave entitlements. Legislation for the changes is expected in 2022.

The proposed amendments include:

- entitling eligible employees to bereavement leave and family violence leave from their first day of employment;
- giving eligible employees one day's sick leave from their first day of employment, with an additional day given per month until the minimum entitlement is reached;
- extending bereavement leave to include more family members, including cultural family groups and more modern family structures;
- removing the current parental leave 'override' to address discrimination against parents who take time off to care for their young children. Removing this provision will mean that employees returning to work following parental leave will be paid at their full rate for annual holidays; and
- requiring payslips, so employees know what their used and remaining leave entitlements are, and how these were calculated.

Employers will be given plenty of time to prepare for these changes, as they will have to work closely with their payroll teams to ensure renewed compliance.

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