

Hiring and Firing Employees in Asia and the Pacific

1. WHAT TERMS MUST BE INCLUDED IN THE EMPLOYMENT CONTRACT?

- Employment agreements must be in writing
- They can be in the nature of individual or collective employment agreements (if a union covers the work)

(a) Individual agreements:

- Pursuant to s 65(2) of the Employment Relations Act 2000 (ERA), individual employment agreements must include:
 - Names of parties
 - Description of work
 - Location(s) of work
 - Times of work
 - Salary

(b) Collective agreements:

- Must be signed by the union and the employer
- Must contain (per s 54(3) of the ERA):
 - A coverage clause
 - A clause providing how the agreement can be varied
 - An expiry date
- Every collective and individual employment agreement must contain an "employee protection" provision (per s 69OJ of the ERA) setting out the process to be undertaken in the event of a restructuring (as defined in the ERA), eg in a sale of business situation
- Employers must also provide an explanation of how to resolve employment problems with reference to the 90-day period set out in s 114 of the ERA and provide an explanation of the employee's rights to leave under the Holidays Act 2003

(c) Fixed Term agreements:

- Pursuant to s 66 ERA, they must set out:
 - Genuine reason for the fixed term
 - Expiry date
 - Reason why it will end then (e.g. project will have finished or employee will be back from maternity leave)

2. DO OFFERS OF EMPLOYMENT TYPICALLY INCLUDE NON-DISCRIMINATION CLAUSES OR PROBATION PERIOD?

(a) New Zealand employment agreements do not generally include non-discrimination clauses

- This is covered by the ERA and the Human Rights Act 1993 which set out prohibited grounds of discrimination.

(b) Probationary v trial periods

- Employment agreements in New Zealand do typically include a probation period.
- There are two types available under the ERA (per ss 67 and 67A):
 - A general probationary period:
 - Usually 1-3 months
 - Case law confirms that employers need to manage performance fairly during that period
 - Employees can bring a claim if believe they have been treated unfairly
 - Statutory trial period:
 - Can be up to 90 days
 - Employees cannot bring a claim if dismissed during the trial period
 - Employers need to be careful to ensure the employee signs an agreement containing the trial period clause and agrees to it at the time he/she is offered employment, to avoid difficulties in being able to rely on the clause

3. ARE NON-COMPETES ENFORCEABLE?

(a) Non-compete clauses are prima facie invalid in NZ because they attempt to prevent employees from living for a period BUT will be enforceable, so long as they are reasonable as to:

- Length – eg 3-6 months
- Area – if limited to a specific geographic area (eg. such as Auckland)
- Industry – limited to type of industry employee has specific skills in
- Type of employee being restrained – usually needs to be someone with specific skills or relationships etc
- Not usually unskilled workers covered
- Recommend there is consideration, eg in the salary OR a separate payment at time non-compete to be enforced
- Must be in writing
- Can get an injunction to enforce breaches of non-compete clauses

**4. ARE THERE MANDATORY BENEFITS BY LAW?
DO BENEFITS DIFFER BY JOB LEVEL?**

(a) Holidays Act 2003:

- 4 weeks' annual leave, 11 public holidays
- 5 days' sick leave
- 3 days' bereavement leave on the death of an employee's spouse, parent, child, brother, sister, grandchild, grandparent, and spouse's parent
- 1 day's bereavement leave on the death of any other person if the employer considers they have suffered a bereavement

(b) Minimum Wage:

- Adult rate - currently NZ\$13.50/hour gross

(c) Superannuation:

- KiwiSaver Act – provides for a voluntary work-based retirement scheme
- New employees are automatically enrolled but can opt out within eight weeks
- Participating employees must contribute a minimum of 2% gross salary (or 4 or 8%) to scheme of their choice
- Employers must contribute 2% on behalf of all participating employees

(d) Parental Leave:

- Female employee – if been employed for 10 hours/week in past 12 months – can take up to 52 weeks off
- Entitled to 14 weeks' paid leave from Government (max amount is currently NZ\$458.82 p/wk before tax)
- Partner can take 2 weeks' unpaid leave

(e) No statutory redundancy compensation

(f) Benefits differ by job level on a negotiated basis

5. TERMINATION FOR POOR PERFORMANCE OR SERIOUS MISCONDUCT – PROCESS AND ENTITLEMENTS?

(a) Test in NZ:

- What a fair and reasonable employer could have done in all of the circumstances

(b) Poor performance – in New Zealand employers must go through a fair process, have good cause, give warnings/opportunity to improve

(c) Serious Misconduct:

- Again, need good cause to terminate
- Warnings not necessary for serious misconduct
- But – fair process essential (s 103A(3) – new test for justification):
 - Set out concerns
 - Invite them to a meeting
 - Offer support person
 - Consider their explanation
 - Give them a reasonable opportunity to respond
 - Resources of employer will be relevant

(d) Entitlements:

- Any entitlements upon termination are dependent on the written employment agreement
- All employees other than those covered by a trial period under s 67A ERA) have the right to bring a personal grievance to challenge an unjustified dismissal

6. TERMINATION WITHOUT CAUSE (TERMINATION-AT-WILL CONCEPT) – PROCESS AND ENTITLEMENTS? (WHERE RELEVANT)

Not relevant in New Zealand

**7. DOWNSIZING FOR EFFICIENCY REASONS OR ECONOMIC LOSSES –
PROCESS AND ENTITLEMENTS?**

(a) Restructurings are common in New Zealand:

- Again, process and good cause are important – must consult, set out reasons (e.g. whether it is for downsizing, surplus roles etc)
- No statutory entitlement to redundancy compensation or notice in NZ
- Depends on terms agreed in the employment agreement.

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