

# Employment Agreements

## For a Small Business

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This guide brings together basic information from the many laws which deal with the workplace. It outlines the main rights and obligations of employers and employees.

### Who needs this information?

Anyone who has a paid job or who employs other people in paid work. Both employees and employers need to know what they can and cannot do in the workplace.

Anyone who is thinking of becoming an employee or an employer will also find it useful.

### Employment agreements, who has one?

All employers and employees have employment agreements with each other. This is the case even if there is no agreement in writing. It is also the case if work conditions have not been discussed in detail.

### Who is an **employee**?

An employee is anyone who has agreed to be employed for some form of payment. This can include wages, salary, commission and piece rates.

The agreement involved is an **employment agreement**. It is sometimes referred to as a **contract of services**.

The term "**employee**" does not include self-employed people who work for others under agreements to do particular jobs or services. This is known as a working under a **contract for services**.

It is up to the people involved to decide which kind of agreement they want to negotiate. Sometimes it is not clear whether a person is an employee or is self-employed. Where there is disagreement about this, the Courts will look at the agreement and surrounding circumstances. The Courts have developed guidelines over many years to decide whether someone is an employee or self-employed.

The two boxes on page 2 show some of the main points often found in employment agreements and agreements for self-employed people. If you are not sure what kind of work relationship you have you may need to get advice, especially if your agreement is not clear.

### Rights and obligations

It is important to be clear about what sort of agreement you have. The law is different for employer-employee agreements from when a person gets a self-employed contractor to do work for them. This guide covers the main rights and obligations of employers and employees.

### Homeworkers

Anyone who works for somebody else in a private home (other than work on the house or its fittings or furniture) is classed as an employee under the Employment Relations Act. This is so, even if their agreement does not seem to be a agreement of service.

For example, a person who works at home and buys in material to make a product which is sold back to the provider could be considered a homeworker.

### People intending to work

The Employment Relations Act says that anyone who has been offered and accepted work is an employee. This applies even if they have not actually started to do the work.

### Casual, temporary, seasonal, or part-time work

The Employment Relations Act and other employment laws do not define part-time, casual, temporary, seasonal or other sorts of work.

No matter what term you use to describe a job, the basic rights and obligations of employees and employers still apply.

### Employees' organisations

Employees have the right to decide for themselves whether or not to belong to an employee's organisation, such as a union. Employees may also choose which organisation they wish to join. These rights can be enforced through the Employment Court.

#### EMPLOYMENT AGREEMENT

If all or most of these features are present in a work relationship, it is likely to be an **employment agreement** between employer and employee -

- the intention of the employer and employee is to form an employment agreement - and this is shown in the agreement and/or by the behaviour of the parties to it;
- the employer or their agent has the right to say how the job is done;
- the employer or their agent controls the hours worked;
- the employer or their agent has the power to hire and fire;
- the employer makes the profit or loss from the enterprise;
- the employer deducts ACC levies and PAYE tax on behalf of the employee;
- the employer supplies materials for the work;
- the employer owns or leases the equipment needed;
- the employee is bound to one employer at a time and expected not to compete or offer their skills to competitors of the employer.

If many of these are true in your case, the information in this guide is likely to be helpful to you.

### Offering employment

Some laws cover how a job can be **offered**. The **Human Rights Act** applies to job advertisements, application forms, interviews, and job offers.

In most cases, jobs must be open to anyone, whatever their colour, race, ethnic or national origins, disability, sex, (including pregnancy or childbirth), marital or family status, age, religious or ethnic belief, political opinion, employment status, or sexual orientation.

#### SELF-EMPLOYED CONTRACTOR

If all or most of these features are present in a work relationship, it is likely to be a **self-employed contractor** for services involving a self-employed contractor -

- The Human Rights Commission deals with complaints under the Human Rights Act.
- The **Employment Relations Act** says that jobs withheld from anyone **because** they do not belong to an employees' organisation (eg. a union). Employers may not offer different terms and conditions of work to different applicants because they are or are not members of an employees' organisation. Breaches of these sections of the Act can be taken to the Employment Court.
- The contractor can choose who does the job and can hire other people without approval from the contractor.
- The contractor is liable against the **Fair Trading Act** to act in a misleading or deceptive way in advertising or offering employment. For instance, you must not make misleading statements about the type of work, work conditions, rates of pay and promotional prospects.
- The contractor supplies equipment and materials.
- The contractor is free to accept similar work from a number of sources at the same time;

#### Making an employment agreement

The information in this guide does **not apply** to self-employed contractors. The **Employment Relations Act** sets out most of the rules for making an employment agreement.

This section looks at the main provisions of the Act in this area.

### Who may be covered by an employment agreement?

All employers and employees have employment agreements with each other. This is so, even if there is nothing in writing, or if work conditions have not been discussed in detail.

### What kind of agreements?

Employment agreements may be **individual**, covering only one employee, or **collective**, covering more than one employee.

An employee covered by a collective agreement can negotiate individual terms as well, so long as the individual terms are not less favourable than any terms in the collective agreement. The collective agreement will continue to apply.

It is also possible for more than one employer to sign up to a collective employment contract. Employers do not have to negotiate together with other employers, or join in a agreement with other employers, if they do not wish to do so.

It is up to the employer and the employee to work out what type of agreement they need. This is part of negotiating for a agreement.

### You can choose

You do not have to use a bargaining agent or representative. Employers and employees may negotiate for themselves if they wish.

### Contents of the agreement

#### What MUST be in an employment agreement?

Certain things must be included in employment agreements:

- effective personal grievance procedures;
- effective disputes procedures;

- an expiry date for collective employment agreements - individual agreements do not have to have an expiry date.

### Minimum employment conditions

The following employment conditions apply by law to employees. The conditions still apply, even if they have not been included in employment agreements. Employers and employees cannot agree to do away with any of these entitlements. They can agree to better provisions.

The main legal requirements are:

- minimum wages for employees aged 20 or more;
- minimum wages for employees aged 16-19;
- an employer must pay male and female employees equally if the only difference is their sex;
- four weeks paid annual leave after being in the job for a year;
- 11 paid statutory or public holidays per year, when these fall on days of the week an employee would otherwise work;
- after 6 months employment, 5 days of sick leave for the next year;
- after 6 months employment, 3 days of bereavement leave for close family members and 1 day of bereavement leave for other persons if the employer is satisfied the employee has suffered a bereavement;
- up to 12 months of unpaid parental leave;
- leave for defence forces volunteers.

### Employee Protection Provision

All employment agreements, except for agreements for those workers in protected industries such as cleaning (discussed in section **Protected Employees**), must contain an employee protection provision that specifies the

procedure that will be followed when the employer's business is restructured.

These rights are explained in more detail later in this guide.

### **What MAY be in an employment agreement?**

The following list (ending on page 10 with what must **NOT** be in an employment agreement) sets out a number of conditions which are found in many employment agreements agreed to by employers and employees. When you make a agreement you may include or leave out whatever you choose, as long as you meet the standards set out in the law.

### **Duties/responsibilities**

The employer and employee need to agree on what it is the employee is actually being employed to do.

### **Term of the agreement**

The employment agreement may include a date on which the agreement will start. Collective agreements must by law include a date on which they will end.

### **Probation period**

An employment agreement may include a probation period. A probation period provides time for the employee to prove that they are suitable for the position.

If a probation period is included in the employment agreement, the employer still has to go through proper dismissal procedures if the employment does not work out and the employee is not going to be made permanent.

### **Trial period**

Employers who employ 19 or fewer employees can employ new employees on a trial period of up to 90 calendar days.

An employer and employee may agree to a trial period only if the employee has not previously been employed by the employer.

An employee who is dismissed within the trial period cannot raise a personal grievance on the grounds of unjustified dismissal. The employee may, however, raise a personal grievance on other grounds, such as discrimination or harassment.

### **Pay rates**

The agreement may provide for payment by any one or more of these methods:

- hourly, weekly, fortnightly rate;
- commission;
- piece rate;
- linking pay to individual or group performance;
- linking pay to skill levels; or
- some other way agreed on by the employer and employee.

### **Other payments**

Employees and employers may wish to take into account payment for:

- gaining specific qualifications or skills;
- performance or production bonuses;
- overtime - whether this is to be at the ordinary rate or a higher rate;
- penal rates for working weekends or statutory holidays;
- working shifts or at night;
- special requirements of the job, eg. tools or motor vehicle use;
- contributions to superannuation schemes, life or health insurance;
- provision of, or help with, child care;
- membership fees of professional organizations;

- anything else the employer and employee can agree on.

### Pay day

When deciding the days on which the employee is to be paid, the employer and employee may wish to think about what is important to each party. For example, will the employee have time to get to the bank before the weekend? Should pay days be weekly or fortnightly or at some other interval?

### Method of payment

Employees have the right to be paid in cash with some exceptions. Any other arrangement, for example direct credit or cheque, must be by agreement.

### Pay review

You may want pay to be reviewed on a regular basis. You may decide to negotiate about:

- how often a pay review will take place;
- what criteria will be used.

### Hours of work

You can negotiate about:

- the number of hours worked each day or week; start and finish times;
- the days of the week to be worked;
- when any meal or rest breaks should be, and how long they should be;
- how any shift work is to be arranged (eg. rosters);
- how overtime or extra work is to be dealt with.

The agreement may set out specific hours of work, eg. 8.30 am to 5.00 pm. Other options include the employee and employer agreeing on a range of hours.

### Training

Employment agreements can include agreements about what training will be provided by the

employer or otherwise undertaken by the employee, for example:

- training under the Industry Training Act;
- in-house training courses;
- outside training or education.

Agreements can also deal with payment during training.

### Annual leave

Employees are entitled by law to a minimum of four weeks of paid annual leave **after** being in the job for a year.

You may wish to negotiate additional rights such as:

- will employees have more than four weeks of annual leave?
- will there be arrangements for the employee to take some annual leave in advance of their entitlement?
- will the annual leave be taken at a particular time of the year?

### Public or statutory holidays

The employee has an entitlement to 11 public holidays as set out in the Holidays Act.

An employer may require an employee to work on a public holiday if:

- the public holiday falls on a day that would otherwise be a working day for the employee; or

- the employee's employment agreement provides for the employee to work on the public holiday.

If an employee works on a public holiday the employer must pay the employee time and a half. If an employee works on a public holiday and the public holiday falls on a day that would otherwise be a working day for the employee the employer must give the employee another day's holiday.

### Sick leave

Matters you may wish to negotiate about include:

- will there be more sick leave than the legal minimum?
- what happens to unused sick leave—can it be added on to the next year's entitlement, or used for other purposes?
- what happens in the event of a prolonged illness or injury?

### Domestic leave

Domestic leave usually means time off for family responsibilities. The Holidays Act allows sick leave to be used to care for sick family members.

Matters you may wish to negotiate about:

- will there be more domestic leave than the legal minimum?
- will the leave be able to be used in more ways than the legal minimum?
- will employees be able to take domestic leave before they have been in a job for the six months provided by law?

### Bereavement leave

Matters you may wish to negotiate include:

- when can paid bereavement leave be taken?
- how many days paid bereavement leave will be available?
- will this be additional to or inclusive of the statutory entitlement?
- will unpaid bereavement leave be available when all paid leave has been used?
- how often can bereavement leave be taken?

### Parental leave

You may negotiate additional entitlements. For instance, you may agree that some part of the parental leave will be paid leave.

### Other types of leave

You may agree that other kinds of paid or unpaid leave will be included in the agreement. For example:

- **long service leave:** a block of paid leave for employees who have worked for the same employer for a number of years.
- **study leave:** paid or unpaid time off work to study or attend courses.
- **unpaid leave:** letting an employee take unpaid time off for a particular purpose without resigning from their job.

### Sorting out problems

By law, all agreements should contain disputes procedures and personal grievance procedures. If an agreement does not have these, the procedures in the Employment Relations Act will apply.

Employees and employers can negotiate their own versions of these procedures. They must be effective and not go against the minimum provisions set out in the law.

You may wish to use an agreed approach towards specific problems in the workplace, eg. sexual harassment, health and safety issues, or performance issues. Remember such procedures should take any relevant laws into account and also be fair and reasonable.

See the sections on **Disputes**, and **Personal Grievances** for more details.

### Health and safety

Employers and employees may wish to include some safety and health issues in their employment agreement.

### Consultation

Employers and employees may agree to consult about particular issues. You may wish to negotiate about how this will be done, or how often.

### Company policies/codes of conduct

Some companies publish company policy statements, codes of conduct or similar documents. These may set out the behaviour expected of employees by the company. They may also state the way in which matters relating to staff will be dealt with, and so on.

These statements may often contain important conditions of employment which may not always be included separately in a written employment agreement. They should be available to employees.

### Restraint of trade

Sometimes employment agreements say that employees must not work in a certain occupation, a particular area, or with certain clients for a certain time after they have left a job. It may be called a "restraint of trade" clause. This kind of restriction is not always lawful and may not be able to be enforced. You should seek qualified advice before including this kind of arrangement in an agreement.

### When the job ends

Many problems can be avoided if employees and employers agree beforehand about what should be done when something happens to end a person's employment.

You may want to consider dealing with the following issues in your employment agreements:

#### Notice

- how much notice should be given before the employee leaves or is dismissed?
- what happens if the agreed notice is not given?

#### Retirement

- are any retirement provisions consistent with the Human Rights Act 1993?
- is there a special retirement leave or money entitlement for employees who retire?

#### Abandoning employment

- how long can an employee be absent, without informing the employer, before being considered to have left the job?

#### Dismissal

- what kind of things will result in summary (instant) dismissal?
- what steps should be taken before an employee is dismissed?

#### Redundancy

- what happens when an employee is made redundant?
- what kind of notice are they entitled to?
- is there any redundancy compensation?

- how is any redundancy compensation worked out?

See the section on **Ending the Agreement**, from page 13, of this guide, for more information about these issues.

### What must NOT be in an employment agreement?

Employment agreements must not include anything which goes against any law, whether employment, civil or criminal law. Unlawful provisions in an employment agreement cannot be enforced.

Employees can ask the Employment Court to set aside any part of an employment agreement which they believe:

- is harsh and oppressive; or
- was obtained by harsh and oppressive behaviour, or by undue influence or by duress.

### Other points about employment agreements

#### Must the agreement be in writing?

Collective employment agreements and individual employment agreements must be **in writing**.

#### Disputes Procedures

All employment agreements must have effective ways to sort out any disagreements about:

- what any part of a agreement means; or
- how the agreement should be applied; or
- how the agreement should be operated.

You have the right to have a representative when using these procedures.

Your representative could be, for example, an employees' or employers' organization, a lawyer or an industrial relations consultant.

### Standard procedures

If an employment agreement does not have an effective disputes procedure, then the standard **Employment Relations Act** procedures are used. The main steps are:

#### Telling the other party

All parties to the employment agreement must be told about the dispute. If the dispute is a personal grievance it must be raised within 90 days of the facts which caused the dispute arising or coming to the employee's attention.

The parties will then try to establish the facts of the problem and discuss possible solutions.

#### Next Steps

If parties are not able to resolve the problem by talking to each other, a number of options exist:

- (a) either party can contact the Employment Relations Infoline, who can provide information and/or refer the parties to mediation;
- (b) depending on the nature of the problem, the issues involved may also be ones that the Labour Inspectors employed by the Department of Labour can assist with, i.e. minimum statutory entitlements such as holiday, leave or wages provision;
- (c) either party can take part in mediation provided by the Employment Relations Service (or the parties can agree to get an independent mediator);
- (d) if the parties reach agreement, a mediator provided by the Employment Relations Service can sign the agreed settlement, which will then be binding on the parties;
- (e) the parties can both agree to have the mediator provided by the Employment

Relations Service decide the problem, in which case that decision will be binding;

- (f) if mediation does not resolve the problem, the parties can refer the problem to the Employment Relations Authority for investigation;
- (g) the Authority can direct the parties to mediation, or can investigate the problem and issue a determination;
- (h) if one party is not happy with the Authority's determination, they can refer the problem to the Employment Court.

In limited cases, there is a right to appeal a decision of the Employment Court to the Court of Appeal.

### Changing the agreement

A collective agreement may be changed while it is current, if all the parties agree in writing.

Individual agreements can also be varied by agreement between the parties.

**One party to an employment agreement cannot change any part of an employment agreement, without the agreement of all other parties to the agreement.** This means, for example, that an employer cannot decide to change the agreed hours of work, or rate of pay, without the agreement of any employees concerned.

If one party does change any of the conditions of employment, it is important that the other party makes it clear if they do not agree to the change. If a change to a agreement is not challenged at the time it is made, silence may be taken to mean agreement.

**Changes to an agreement which are imposed without agreement from all parties are breaches of the agreement.**

### Enforcing agreements

All employment agreements can be enforced through the Employment Court. These include:

- oral and written agreements;
- employment agreements for part time and casual workers;
- apprenticeship and technicians' agreements;
- the parts of an employment agreement relating to industry training.

### How to enforce employment agreements

You must keep to the employment agreement you have agreed to, whether it is written or oral.

Employees and employers who believe that their employment agreement is not being kept to, or has been changed without their agreement, should first talk to the other party to try and solve the problem.

If this does not work, then you can take either of these actions:

- when there is a disagreement about what a agreement means, or how it should be applied or operated, you should use the disputes procedures set out on page 11,
- if there is no disagreement about what the agreement says, you can ask the Employment Court to order the other party to keep to the agreement.

When enforcing your employment agreement, you have the right to use a representative (for example, a lawyer or an employers' organization, or an employees' organization such as a union).

You can call the **Employment Relations Infoline freephone on 0800 800 863** for advice and information on how to enforce your agreement.

### Remedies for breaches of agreements

The Employment Court can:

- order the payment of money owed to an employee under the terms of an employment agreement;
- order the other party to comply with any part of an employment agreement in the future. This is called a compliance order;
- impose a penalty (like a fine) on an employer or employee who has breached an employment agreement by not doing what the agreement says.

### Ending the agreement

There are several ways in which employment agreements may be ended. The most common are set out in this section.

If an employee believes that their employer acted unjustifiably in ending their employment agreement, they can challenge the employer's decision. See the section on **Personal Grievances**, from page 16, for more information.

### Temporary or fixed term agreements

Many individual employment agreements do not have a date on which they end. Others may have a fixed term (for example 6 months). Or they may last until a particular job or project is finished.

A fixed term agreement ends at the expiry of the agreed period. The parties will have no further obligations to each other.

In some specific circumstances the fixed term of the agreement may not be valid, if—

- the real intention of the parties was always to have an on-going employment relationship; or
- while the agreement was operating this became the real intention.

If you believe these circumstances apply to you, you should seek advice.

### Collective agreements

Collective agreements are a special case. They must have an expiry date by law. From that date, if no new collective agreement is negotiated, the Employment Relations Act says that employees and the employer(s), who were covered by the collective agreement, automatically have individual agreements. These are based on the collective agreement.

### Resignation

Employees may resign at any time, unless their agreement says otherwise. Many agreements require you to say ahead what date you plan to leave. This is called giving **notice**. Different agreements may require different **periods of notice**. Some have a certain number of days, or a week, others a month or longer.

Some agreements do not say how much notice is required. In these cases, employees must give a reasonable period of notice. What is **reasonable** will depend on the circumstances.

### Notice of resignation and payments

If the employee gives the required notice, the employer must pay the employee to the end of the period of notice, unless the employee is justifiably dismissed during that period. The employment agreement continues during the period of notice. The employee may be required to work for the full notice period or may be asked to stop coming to work before this date. In either case, the employee should be paid to the end of the notice. If pay is stopped before the end of the notice period, the employee may be able to claim for wages owed.

If an employee leaves work without giving notice, the employer is not required to pay for time beyond the employee's last actual working day. The employer must not deduct pay in lieu of notice from any amount owed to the employee unless the employee agrees in writing or the agreement specifically allows it.

### Forced resignation

If an employer puts pressure on an employee to resign it may be held to be a constructive dismissal in certain circumstances. It may be held to be a **constructive dismissal** if:

- there are elements of coercion, such as threats of criminal prosecution, persecution or harassment; or
- the employee is pressed for an instant decision (eg. handed a letter of resignation to sign); or
- the employee does not feel able to refuse or does not understand the situation and was not given a chance to consult anyone; or
- major changes to the employment agreement are made without the employee's agreement; or
- there is an unsafe workplace, stress or incorrect procedures in the workplace which the employer fails to remedy.

The Courts have established a two stage test for constructive dismissal:

1. Was the resignation caused by the employer's breach of duty?
2. Was the breach sufficiently serious to make it likely the employee would leave?

If both exist there is unlawful constructive dismissal.

### Retirement

In law, there is no set age to retire from work. Employers only have the right to make their employees retire at a certain age if the employment agreement says so.

Agreements negotiated from 1 April 1992 onwards may have automatic retirement only at ages the same as or above the age that **national superannuation** starts.

A agreement can provide for voluntary retirement. This can be taken up before the age for national superannuation. From 1 February 1999 it will be unlawful to force an employee to retire because of their age.

### Dismissal

There must be a **good reason** for a dismissal and the dismissal must be carried out **fairly**. Otherwise the employee may have a personal grievance claim against the employer (see page 16).

What is fair depends on the circumstances. There are some general principles which need to be kept in mind:

- any relevant provisions in the employment agreement must be followed, eg. notice periods;
- if an employment agreement does not have a notice period, then reasonable notice must be given. What is reasonable depends on the circumstances.
- the employee has the right to be told what the problem is and given a genuine opportunity to put their case before dismissal is decided on;
- the employer should investigate any allegations of misconduct thoroughly and without prejudice;
- unless there has been misconduct so serious that it warrants instant dismissal, the employee should be given clear standards to aim for and a genuine opportunity to improve;
- the employer should treat all employees in the same circumstances in the same way or be prepared to justify the difference.

It is in everyone's interests that it is clear from the start what the job requires, what behaviour is expected and what could lead to dismissal.

### Explanation of dismissal

If an employee is dismissed, they have the right under the Employment Agreements Act to ask the employer for a written statement of the reasons for dismissal. This request can be made up to 60 days after the dismissal, or 60 days after the date they find out about the dismissal if that is later.

The employer must provide the written statement within 14 days after such a request.

### Employee Protection Provision

All employment agreements, other than those discussed in the section on **Protected Employees** below, must contain an employee protection provision that specifies the procedure that will be followed when the employer's business is restructured.

"Restructuring" is defined in the Employment Relations Act as:

- (a) the employer entering into a agreement or arrangement under which its business (or part of it) is undertaken for the employer by another person; or
- (b) the employer selling or transferring its business (or part of it) to another person.

"Restructuring" does not include:

- (a) the termination of a agreement or arrangement under which the employer carried out work on behalf of another person; or
- (b) the sale or transfer of any or all of the shares in the employer if it is a company; or
- (c) any agreement, arrangement, sale, or transfer entered into, made, or concluded while the employer is adjudged bankrupt or in receivership or liquidation.

An employee protection provision must include:

- (a) a process that the employer will follow in negotiating with a new employer about the restructuring to the extent that it affects employees; and
- (b) matters affecting employees' employment that the employer will negotiate with the new employer, including whether employees will transfer to the new employer on the same terms and conditions of employment; and
- (c) 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 new employer.

### Redundancy

Redundancy happens when:

- a position filled by an employee is no longer needed; or
- employment can no longer be continued by the employer for genuine commercial reasons.

### Compensation

There is no right to redundancy compensation unless employees and employers have agreed to it. This can be before or after an actual redundancy is planned.

It is up to employees, employers and their representatives to decide what any redundancy compensation should be.

### Challenging Redundancy

Employees can use the personal grievance procedures (set out below) if they believe that their employer has acted unjustifiably.

The Employment Court looks at each case individually, including whether—

- the redundancy is for genuine commercial reasons; and
- the provisions of existing employment agreements are observed; and
- the employer has acted reasonably and fairly, in the way they have carried out the redundancy.

### Remedies

If an employer is found to have acted unjustifiably, then the Employment Court may decide on one or more of the remedies for personal grievances (set out below). However, the Court has no power to award redundancy compensation, except where compensation is required by an employment agreement.

### Personal grievances

#### What is a personal grievance?

The Employment Relations Act gives all employees the right to use personal grievance procedures if they have any of the following complaints:

- unjustifiable dismissal;
- unjustifiable action by the employer which disadvantages the employee in their job or work conditions;
- discrimination of certain kinds; sexual harassment at work;
- duress related to membership of an employees' organisation.

#### Unjustifiable dismissal

Any dismissal may result in a valid personal grievance for unjustifiable dismissal if it is either:

- unjustified on the facts, or
- carried out in an unfair way.

See the section on ending the agreement, page 13. An employee claiming unjustifiable dismissal will need to show that they were actually dismissed. If that is accepted, it is up to the employer to show that the dismissal was justified.

#### Unjustifiable action resulting in disadvantage

The Employment Relations Act allows a claim of personal grievance if an employer does anything unjustifiable which disadvantages an employee in their job or work conditions.

An unjustifiable action may be an action that is unlawful under some other law, for example discrimination under the Human Rights Act 1993

#### Discrimination

An employee will have a personal grievance based on discrimination if an employer or their representative discriminates against them because of their:

- colour;
- race; ethnic or national origins;
- sex;
- marital status;
- age;
- religious or ethical belief;
- or their involvement in employees' organisation activities, including claiming or helping others to claim a benefit under an employment agreement.

Discrimination for the above reasons can mean:

- refusal or failure to offer an employee the same:
  - terms of employment
  - conditions of work
  - fringe benefits

- opportunities for training, promotion or transfer

as other employees with the same or similar qualifications, experience or skills working in the same or similar circumstances; or

- dismissal or negative treatment by the employer or employer's representative in circumstances in which other employees doing the same kind of work are not, or would not be, treated in such a way.

### Sexual harassment

#### By person in authority

An employee may have a grievance of sexual harassment against their employer if their employer or supervisor or a person with authority in the workplace:

- asks the employee for sex or some form of sexual activity, either promising preferential treatment in the job, or threatening worse treatment or dismissal; or
- subjects the employee to unwelcome or offensive behaviour through words of a sexual nature, or physical behaviour of a sexual nature, to the extent that it has a negative effect on the employee's employment, job performance or job satisfaction.

The grievance procedures can be used even if the promises or threats were suggested rather than stated openly. Similarly, the employee does not have to say that certain behaviour is unwelcome or offensive when it happens in order to be able to pursue a grievance.

#### Sexual harassment by co-workers or customers

An employee who is sexually harassed in any of the above ways by any co-worker, or by a customer or client, may complain in writing to the employer.

The employer must then look into the facts. If reasonably satisfied that the complaint is genuine, the employer must take whatever practicable steps they can to stop the harassment happening again.

If the harassment happens again after the employee complains and the employer still has not taken all practicable steps to prevent the harassment, the employee will have a grievance against the employer.

### Duress

Duress can include:

- an employer or representative saying an employee must belong (or must not belong) to an employees' organisation if they wish to keep their job;
- undue influence, offers of money, or threats of less money, by an employer or representative, trying to get an employee to leave or join an employees' organization;
- undue influence, offers or threats by an employer or representative to try and stop an employee from acting on behalf of employees.

### Remedies

An employee with a grievance claim may ask the employer for any remedy the employee thinks appropriate. If the grievance goes to the Employment Court the following types of remedies can be asked for.

### Reimbursement

If an employee has lost wages or other money as a result of the grievance, the Employment Court can order the employer to pay all or part of the lost amount. Unless the Court thinks that the employee was partly to blame (see **contributory fault**), it must order the employer to pay all lost money up to three months' ordinary time wages and may award more.

### Reinstatement

The Court may order that an employee be put back in their previous job or situation, or an equivalent job or situation. The employer must carry out the Court's decision, even if the decision is under appeal.

### Compensation

The Court may order the employer to pay money to the employee for:

- any effects on the employee personally, such as humiliation, loss of dignity or injury to their feelings;
- the loss of any benefit which the employee might reasonably have expected if the grievance had not arisen.

### Recommendations in cases of sexual harassment

When an employee has been sexually harassed, the Court may make recommendations to the employer on what to do about the harasser. This may include transfer, disciplinary action, or helping to change their behaviour to prevent them harassing again.

### Contributory fault

The Court must reduce the remedies if the employee is found to be partly at fault in a grievance case involving a claim of unjustifiable dismissal or a reimbursement claim.

### Choice of procedure

In some situations, employees who believe they have a personal grievance may also be able to complain under the Human Rights Act. This may happen, for example, when an employee believes they have been discriminated against, or sexually harassed. The Human Rights Act also deals specifically with racial harassment. You must choose either to take a personal grievance or to take your claim to the Human Rights Commission. You cannot use both procedures for the same complaint.

### Personal grievance procedures

Employment agreements must include effective procedures for dealing with personal grievances. The Employment Relations Act provides a standard procedure. This is part of every agreement unless the parties negotiate an alternative procedure.

### Standard procedures

The Employment Relations Act sets out the following steps—

Submission of grievance to the employer

The employee must let the employer know about their grievance within **90 days** of the action complained of, or the date the employee became aware of it, whichever is the later.

If the employer is not told about the grievance within 90 days, they need not consider it unless the Court gives the employee leave to submit it after 90 days.

### Written statement by employee

Once the employer knows about the grievance, they should discuss with the employee how it can be settled. If the grievance is not settled, the employee gives the employer a written statement setting out:

- the nature of the grievance;

- the facts leading to the grievance; and
- the remedy wanted.

### Written response by employer

If the employer is not prepared to grant the remedy named by the employee, and if the grievance remains unsettled, the employer must give the employee a written statement setting out:

- the employer's view of the facts; and
- the reasons why the employer is not prepared to grant the remedy.

This must be given to the employee no later than 14 days after the employer received the employee's statement.

### Written statements can be left out

The employer and employee can agree in writing to leave out the exchange of written statements and go straight to the next stage, if they wish.

### Referral of grievance to Employment Court

The employee may refer the grievance to the Employment Court if:

- the employer and employee have agreed in writing not to exchange written statements; or
- the employer does not provide a written statement within 14 days in reply to the employee's written statement; or
- the employee is not satisfied with the employer's written response.

### Role of Court

In most cases the Employment Court will encourage the employer and employee to find a solution themselves with the help of a mediator. In other cases, the Court may hear both sides of the

case and make a decision. This is called adjudication.

### Negotiated personal grievance procedures

A personal grievance procedure in an agreement does not have to include the same steps as the standard one set out in the Act. The parties may agree to a procedure which does not involve the Employment Court. Any such procedure may not use another tribunal or court either directly or indirectly. Any negotiated personal grievance procedure must be consistent with the Employment Relations Act provisions on:

- the definitions of personal grievance, discrimination, sexual harassment and duress;
- the right to use the procedures;
- sexual harassment procedures;
- the remedies available;
- the requirement to give reasons for dismissal;
- the employee's ability to make a complaint under the Human Rights Act instead of using the personal grievance procedure;
- privilege for statements made and information given while submitting a personal grievance;
- the ability to find that a different type of personal grievance exists from the one first claimed.

### Right to use a representative

In any personal grievance the employee and the employer both have the right to be represented by any person or organization they choose.

### Accident compensation

An employee who is injured during their work, and is unable to work, is entitled to be paid compensation by their employer for loss of earnings in the first week following the injury. This is 80% of

the earnings lost as a result of not being able to work. After the first week, ACC pays the compensation.

An employee who is injured outside work is not entitled to loss of earnings compensation from their employer for the first week.

**Ask the nearest ACC office for more information about what you are eligible for after an injury.**

### Holiday records

Employers must keep records of annual holidays for six years. The following information must be kept:

- the employee's name;
- the date on which the person's employment started;
- the date the person's employment ended;
- the date on which the employee becomes entitled to each annual holiday;
- the dates on which the employee takes the holidays;
- the amount of money paid for each holiday; and
- the amount of money paid to the employee for annual holidays when the employee ends their employment.

These records can be incorporated in the wages and time records which employers must also keep. Employees and their representatives have the right to see these records.

### Protected Employees

Certain employees specified in the Employment Relations Act are offered specific protection if their employer's business is restructured. These protected employees include, amongst others, those involved in cleaning and food catering services and laundry services for the education sector.

If a protected employee's employer's business is restructured the protected employee automatically has an election as to whether to transfer to the new employer on the same terms and conditions as their current employment. If the protected employee exercises the election and transfers to the new employer she or he will not be entitled to any redundancy compensation from the previous employer.

If the new employer then wishes to make the protected employee redundant the protected employee is entitled to bargain for redundancy compensation from the new employer.

If the protected employee elects not to transfer to the new employer the protected employee will be made redundant by the employer and will be entitled to the redundancy compensation set out in his or her employment agreement (if any).

### Parental leave

#### Who can claim parental leave?

Under the **Parental Leave and Employment Protection Act**, unpaid parental leave is available to employees who are having a child, and to their partners. It is also available to employees, male or female, who are adopting a child under 5 years old.

To apply for parental leave under the Act you must have worked at least 10 hours a week for 12 months at the expected date of birth and for the same employer or essentially the same employer.

#### How to apply for parental leave

Apply in writing to your employer, in most cases **at least 3 months in advance**. There are some exceptions for medical or work problems during pregnancy, and special provisions for adoption. You will need a certificate from your doctor.

### Types of leave

All leave under the Act is unpaid.

The types of leave available are:

#### Special leave

Up to 10 days for women during pregnancy for reasons connected with pregnancy (eg. ante-natal checks).

#### Maternity leave

Up to 14 continuous weeks for the mother, which can start up to 6 weeks before the expected date of birth or adoption. In certain cases it can start earlier.

#### Paternity leave

Up to 2 continuous weeks for the father around the expected date of birth or adoption.

#### Extended leave

Up to 52 continuous weeks, less any maternity leave taken, available in the 12 months after birth or adoption. Extended leave may be shared by both parents but the total must not be more than 52 weeks.

#### Job protection

Where an employee takes parental leave of 4 weeks or less, their job **must** be kept open. Where parental leave of more than 4 weeks is applied for, the employer may decide that the job concerned cannot be kept open because it is a key position and cannot be filled by a temporary replacement. The employee has a right to challenge this decision. Most jobs are not key positions.

If parental leave of over 4 weeks is taken and the employee has accepted that their job cannot be kept open, the employee will be entitled to a preference period of 6 months after the parental leave finishes, when the employer must offer her or

him any available job substantially similar to the previous one.

#### Alternative provisions

The above provisions of the Act, taken together, **are a minimum standard**. Your employment agreement may have different provisions.

If an employment agreement contains parental leave provisions which are overall less favourable for an employee than those in the Act, the employee can claim under the Act instead. If the agreement provisions on parental leave are better overall, the employee can claim them. The employee must choose either all the Act or all the agreement provisions, but can't use some from each source.

To be acceptable instead of the Act, provisions in an employment agreement must have effective arrangements for the following:

- who can take parental leave;
- how long the various types of leave last;
- the extent of protection for the employee's job during and after parental leave;
- whether the leave is paid; and
- the procedures required to get leave, and start and finish leave.

#### Dismissal not allowed

Employers may not dismiss an employee for being pregnant or for applying for parental leave.

Employees who are dismissed or given notice of dismissal for one of these reasons have a special right to go directly to the Employment Court. They can ask for a temporary order to give them their job back, or to cancel the notice of dismissal.

#### Complaints

Any complaints about other parental leave matters must be taken to the employer first. These can then

# Employment Agreements

## For a Small Business

go to the Employment Court if they are not settled between the employer and the employee.

### **WARNING**

Employment matters are complicated and are unique. We recommend you to contact us immediately if you have any employment related issues.

### **For More Information**

Visit our website at [www.gellertivanson.co.nz](http://www.gellertivanson.co.nz) or call us on (09) 575 2330.