### COVID19 :Ending employment?

*A guide for employers and employees*

*July 2020*

Ending an employment can be difficult, especially during the COVID-19 pandemic.

The Ministry of Internal Affairs is issuing the following guidelines to assist employers and employees in regards to ending employment.

**GENERAL INFORMATION**

The employer and employee have a mutual obligation to deal with each other in good faith, using fair processes and doing things for the right reasons.

**SPECIFIC INFORMATION**

**Resignation**

An employee can resign freely from their employment by providing one week’s notice at minimum. (Section 43 of the Employment Relations Act 2012.)

***Termination***

An employer can only terminate an employee’s employment if:

1. it is in accordance with the redundancy process:
2. the employee no longer has capacity to carry out the duties required by the employment agreement:
3. the employee’s conduct warrants termination (either due to misconduct or serious misconduct):
4. other grounds that may be specified in a person’s employment agreement or at common law.

Before terminating an employee’s employment, the employer is advised to seek legal advice as wrongful termination or repudiation of employment could make them liable for damages. Employers are also required to notify the employee of the intention to terminate and the reasons for it. This process also includes the opportunity for the employee to be heard in relation to the termination before any final decision is made.

In the event of termination, an employee is entitled to be paid out their accrued annual leave, any outstanding pay and any other entitlements as set out under their employment agreement or under the ERA. An employer should also provide to the employee a written letter setting out the termination and the reasons for it.

***Redundancy***

Any redundancy must be as a result of a genuine restructuring of an employer’s business that means the employee’s position is no longer available. Before engaging in the redundancy process the employer should give consideration to discussing with the employee changes to their work arrangement and the ability to access the wage subsidy.

Any redundancy must be carried out in accordance with proper redundancy processes which includes consultation with the employee through all stages of the process.

The employee is entitled to the benefits and entitlements otherwise applicable on them being made redundant.

***Furlough***

Furlough is defined as an extended leave with or without pay. But it is not a recognised practice under the Employment Relations Act 2012. Instead of furlough, employers and employees can agree to an extended leave with or without pay and the conditions attached should be agreed upon by both parties.

COVID 19 Leave with pay as a form of furlough:

The wage subsidy can also be used for the continued payment of the wages to the employee on minimum rate if there is no new work program available for the employee. The employee can go on leave and continue to receive the wage subsidy in order to maintain the employment relationship. If the COVID 19 leave with pay option is applied, the employer shall not be required to top up and can treat it as leave without pay for the purpose of assessing the accrual of other leave entitlements.

This COVID 19 leave with pay option is primarily available in circumstances where no work is presently available for the employee but the employer believes that it is likely work for the employee will be available in the future. Should the situation not improve and work is still unavailable, redundancy or leave without pay may then become appropriate considerations for the employer to have in these cases.

This option is unlikely to be appropriate where the business can otherwise provide some other form of employment to the employee but the employee has chosen to reject this. Redundancy or leave without pay may then become appropriate considerations for the employer to have in these cases.

In cases where the business is closing down and unlikely to reopen, redundancy/termination are appropriate options to be considered and discussed between employers and their employees.

If the employee has agreed to the COVID 19 leave with pay, then they are still officially employed by the employer and should continue to notify their employer of any change in their circumstances (i.e. a new job, resignation etc).

Accrual of leaves continue during period of leave with pay.

Leave without pay:  An employer and employee can still agree that an employee can have leave without pay.

Ideally, this should only be used if there is agreed work available for the employee to do but the employee is otherwise taking leave (in the normal course of their employment) and does not have sufficient paid leave entitlements to cover the leave period.

Accrual of leaves cease during the period of leave without pay.