FACTSHEET: TERMINATION OF OPEN ENDED CONTRACTS BY NOTICE

Termination of your employees is a complex area. The law is often not 100% clear and interpretations of the law can change following court decisions. This section of the Employers’ Guidebook sets out the current situation is intended to give general guidance rather than legal advice. As termination of employment is the main reason why disputes between employers and employees arise, if you are terminating staff and are not sure of procedures we strongly recommend seeking advice from a labour officer, a more experienced employer or a lawyer.

Open ended contracts are employment contracts that have no termination or completion date. That means that once commenced, they continue until terminated by either the employer or the employee.

1. DO I HAVE TO INFORM A LABOUR OFFICER BEFORE GIVING AN EMPLOYEE NOTICE?

No you do not have to inform a labour officer before giving an employee notice however if you think that there may be a dispute over the termination or you are terminating a large number of staff, then it is strongly recommended you involve a labour officer. As with all staff management, but especially termination, we recommend you keep full and thorough records of all termination decisions.

2. MY EMPLOYEE IS EMPLOYED ON AN OPEN ENDED CONTRACT. DO I NEED TO HAVE A REASON IF I WANT TO TERMINATE HER EMPLOYMENT BY NOTICE?

At the moment Vanuatu’s law allows termination at will – or termination for no particular reason. You do not need to give the employee reasons for terminating a contract by notice (Kelep v Sound Centre [2008] VUSC 13 [para 34]).

Case law suggests that it is better to not state any reason related to performance in case you are then considered to have unjustifiably dismissed an employee by not giving them an opportunity to reply to allegations of poor performance (Nin v Torres and Banks Provincial Council [2011] VUSC 22). It is not good practice to arbitrarily terminate employees without following good process and employers who do so may reasonably expect to have such decisions disputed by the terminated employees.

3. HOW MUCH NOTICE MUST I GIVE?

Unless something different is stated in the employment contract, the length of notice varies depending on how long the employee has been working for, and the length of their pay interval.

For employees who have worked for less than 3 years notice depends on the pay interval:

- Employees who are paid at any interval which is less than a fortnight are entitled to a notice period that is equal to their pay period (section 49(3)(b)(ii))
- Employees who are paid at intervals of a fortnight or longer must be given notice of at least 14 days before the end of the month in which notice is given (section 49(3)(b)(i)).

For employees who have worked for more than 3 years the Act provides that notice shall be not less than 3 months (section 49(3)(a)).

Note: The law also provides a probation period, or trial period, of 15 days at the beginning of all open ended contracts. This trial period can be extended to up to 6 months by agreement (section 14(1)). Either party can terminate the contract at any time during this probation period without giving notice (section 14(2)).

John a Bizniz employee had a trial period included in his open ended contract. The end of the trial period is arriving and Bizniz does not wish to continue his contract. Can Bizniz terminate him without notice?

Yes – just so long as termination happens within the trial period, and not immediately after the trial period has finished Bizniz can terminate John without notice.
4. **Can I ask my employee to leave immediately and give a payment instead of notice?**

The law permits you to do this (section 49(4)).

- **Annie** has worked for Bizniz for 4 years on an open ended contract. The manager of Bizniz needs to take some unexpected leave, and wants to terminate all staff as soon as possible. How quickly can Bizniz terminate Annie?

Bizniz can terminate Annie today, if it gives a payment of 3 month’s salary in lieu of notice (and also pays out all other entitlements owing on termination).

5. **Is there any particular procedure I must follow to terminate employment by notice or payment in lieu of notice?**

The law says notice can be given orally or in writing and can be given at any time (section 49(2)). However, it is good practice for the employer to give notice in writing, and also write down calculations of the payments that will be given on termination.

It is particularly important to write down the payment calculations if you are giving the employee a payment in lieu of notice, otherwise you might become liable for damages for instantly dismissing the employee without cause and without following procedures for instant termination for serious misconduct that are laid out in section 50.

6. **My employee left without giving me notice. Are there any situations where an employee can do this? Can I recover any money from him or her?**

- **Ill-treatment of the employee by the employer:** Unless the contract permits it, the main situation where an employee can leave without giving notice is where an employer ill treats an employee or commits some other serious breach of the terms and conditions of the contract of employment (section 53(1)). In common law this situation is known as a **constructive dismissal**. In this situation the employee can leave immediately and claim payment for the notice period that the employer would have had to give if the employer had actually dismissed the employee (section 53(1)). He or she may also be able to sue you for breach of contract for other amounts (section 53(1)).

As this is an **employment grievance** situation and subject to legal interpretation, the Employers’ Guide does not cover this in detail.

- **Sickness of the employee:** If an employee leaves without notice because he or she has become too ill to work, the contract has probably become **frustrated**, which means it can no longer be performed due to an external event, so comes to an end. In this situation the employee is not liable to pay damages for breaching the contract, but nor is the employer liable to pay to end the contract. It would be reasonable for an employer to expect the employee to provide medical certifications showing that it is impossible for the employee to continue working.

It should be noted that a **severance allowance** needs to be paid when the contract comes to an end due to sickness which has been certified by a doctor, if the employee is otherwise eligible for it (section 54(1)(e)).

- **Other:** If the employee leaves without giving notice and there is no reason relating to your misconduct as an employer or frustration then the Act says that you can deduct the sum the employee would have earned during the notice period from any payments on termination (section 49(5) **Employment Act**, as amended by **Employment Amendment Act 2008**).