FACTSHEET: PAYMENTS ON TERMINATION

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 and 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.

If termination of employment is carried out correctly there are four categories of payments on termination in Vanuatu:

1. Payment for all work done
2. Unused annual leave
3. Repatriation
4. Severance allowance

Severance allowance is dealt with in a separate factsheet within this chapter on termination.

If termination is carried out incorrectly employers may also be liable for damages payments. Damages payments are not covered in this factsheet.

Whether payments to employees are required on termination depends on the method of termination. These are summarised in the table below:

<table>
<thead>
<tr>
<th>Termination by expiry</th>
<th>Termination by notice</th>
<th>Termination for employee misconduct</th>
<th>Termination by frustration (i.e serious illness, death)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment for all work done</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Unused annual leave</td>
<td>Yes – if eligibility criteria are met</td>
<td>Yes – if eligibility criteria are met</td>
<td>Yes – if eligibility criteria are met</td>
</tr>
<tr>
<td>Repatriation</td>
<td>Yes – if eligibility criteria are met</td>
<td>Yes – if eligibility criteria are met</td>
<td>No</td>
</tr>
<tr>
<td>Severance allowance</td>
<td>Grey area – probably yes if other eligibility criteria are met</td>
<td>Yes – if eligibility criteria are met</td>
<td>No</td>
</tr>
</tbody>
</table>

1. WHAT LAW SAYS I MUST PAY FOR ALL WORK UNDERTAKEN BY A DEPARTING EMPLOYEE?

It is a common law implied term that you must pay an employee for all work undertaken under your employment agreement. Section 16(8) also requires you to pay all outstanding remuneration and allowances, including unused annual leave, as soon as employment ceases.
2. **IF MY EMPLOYEE OWES ME MONEY, CAN I MAKE DEDUCTIONS FROM HIS FINAL PAYMENT?**

Generally you can only deduct up to 1/3 of the employee’s total remuneration for costs you incurred by giving your employee salary advances or purchasing other things for him (section 21(2)). However, if you wish to recover money due to loss or damage suffered due to wilful misconduct or negligence of the employee you can do this if you have *prior written approval* of a labour officer (section 21(1)).

3. **WHEN IS AN EMPLOYEE ELIGIBLE FOR PAYMENTS FOR UNUSED ANNUAL LEAVE?**

This is discussed in more detail in the *factsheet: annual leave*, but there are two key conditions that must be met for eligibility for payments for unused annual leave:

1. An employee must be in *continuous employment*, which has been defined to mean working for more than 22 days per month.
2. If an employee resigns she must have worked for at least 6 months in order to be eligible for annual leave.

4. **HOW DO I CALCULATE UNUSED ANNUAL LEAVE?**

Unused annual leave accumulates indefinitely. You will need to go back through your leave records to determine how many days of annual leave have not been taken each year (or part year) by the departing employee.

You also need to identify the pay rate that the employee was receiving per day when the employment relationship came to an end. It is this pay rate that is used to calculate unused annual leave. If the employee’s daily rate varies, then you need to identify the average daily rate, based over a year’s wages (section 31).

Once you have identified these two facts the calculation is:

\[
\text{Number of days of unused leave} \times \text{daily wage rate at time of termination}
\]

5. **WHEN IS AN EMPLOYEE ELIGIBLE TO HAVE REPATRIATION EXPENSES PAID?**

Generally every employee whose ordinary place of residence is more than 50 kilometres away from his place of employment and who has been brought to the place of employment by the employer or his agent shall have the right to be repatriated to his ordinary residence (section 58(1)) when his contract ends by:

- Expiry (section 58(1)(a)); or
- Notice and the employee has worked more than 1 year (section 58(1)(b)); or
- Termination due to misconduct by the employer (section 58(1)(c)); or
- Termination due to employees incapacity due to sickness or accident (section 58(1)(d)).
If the employee’s contract is terminated by notice by either party and has worked less than 1 year then the employee only gets partial coverage of repatriation expenses (section 58(1)(b) and section 60)).

The employee loses the right to repatriation if:

- He does not claim repatriation within 6 months of finishing work (section 58(2))
- He is terminated by his employer for a serious breach of contract (section 63(c))
- He indicates that he does not wish to exercise the right to repatriation (section 63(a))
- He has been settled, at his own request or with his consent, at or near the place of his employment (section 63(b))
- The contract is ended for a reason other than sickness or accident of the employee and the labour officer is satisfied that the remuneration paid made allowance for the cost of repatriation and that arrangements such as a deferred pay system have been made, to ensure that the employee has the funds necessary for the payment of such costs (section 63(d))

6. **IS AN EMPLOYEE’S FAMILY ALSO ENTITLED TO BE REPATRIATED AT THE EMPLOYER’S EXPENSE?**

   If the employee is eligible for repatriation and the employee’s spouse and dependent minor children have been brought to the place of work by the employer then they are also entitled to repatriation allowance (section 59).

7. **WHAT MUST AN EMPLOYER PAY IN RESPECT OF REPATRIATION?**

   There are three main things an employer must pay:

   - Travel costs (section 62(1)(a)), with the mode of transport being determined by local usage, the employee’s position and safety and reasonable comfort (section 61)
   - Subsistence during travel (section 62(1)(a))
   - Subsistence in any time between the ending of the contract and repatriation travel commencing (section 62(1)(b)), unless delays to repatriation travel commencing have been unreasonably caused by the employee (section 62(2)(a)) or have been caused by a *force majeure* (section 62(2)(b)).