

TERMINATION OF EMPLOYMENT IN THE BRITISH VIRGIN ISLANDS

1. INTRODUCTION

There are several ways by which the contract of employment may be terminated in accordance with the Labour Code, 2010 (the “**New Labour Code**”) when it comes into force by proclamation of the Governor. These include termination of employment based on the terms of the contract (for example, an internship agreement), as a result of retirement, as a result of notice given by either party to the other which can be considered a resignation if given by the employee or a dismissal if given by the employer. If the proper procedure is not followed for each type of termination it may either result in the employee forfeiting certain rights or the employer being found guilty of “unfair dismissal” or “constructive dismissal”.

For the purpose of this bulletin each type of termination will be treated with very broad strokes under the New Labour Code. Any reference in this bulletin to “employer” also includes a reference to any type of partnership and the expulsion of partners from that partnership.¹

2. NOTICE PERIODS

Typically an employment contract will be terminated by a notice of resignation given by the employee to the employer or a notice of dismissal given by the employer to the employee. The period of notice would normally be included in the contract of employment, or if none is provided then the statutory notice periods under the New Labour Code, which are also the minimum requirements for the contract of employment would apply. The statutory notice periods, except on a summary dismissal, are as follows:²

LENGTH OF SERVICE		
0 – 7 YEARS	7 – 15 YEARS	OVER 15 YEARS
Interval between pay days	1 month	2 months

¹ Section 121(1)(b) of the New Labour Code. Unless otherwise indicated, references to sections in this Guide are to sections of the New Labour Code.

² Section 90(1).

Therefore, for an employee who was employed for less than 7 years and receives payment on a monthly basis, but now seeks to resign, that employee must give notice of resignation to the employer at least 1 month before the termination date. Also, where an employee has worked for 15 years with the same employer and the employer wants to dismiss the employee, the employer must give notice of dismissal to the employee at least 1 month before the termination date. It should be noted, however, that the employer cannot give a notice of dismissal for any reason other than for a valid and fair reason connected with the capacity or conduct of the employee,³ and includes mental or physical incapacity,⁴ an operation of law,⁵ or redundancy.⁶ Additionally, an employer cannot give a notice of dismissal while the employee is on any leave to which they are entitled under the New Labour Code,⁷ for example, if the employee is on vacation, or on sick leave, or on special leave for jury service or on paternity leave, or on maternity leave.⁸

If an employee earned vacation leave which remained pending on the termination date the employer must pay that employee for those vacation days.⁹ The vacation pay along with any other remuneration owed to the employee must be paid by the last working day before the termination date.¹⁰ The dismissal notice may include a determination of this vacation pay, and any other remuneration to be paid, but it should include whether the contract of employment is to come to an end at the end of the notice period or with immediate effect (in the case where the employer opts to pay wages, vacation pay and other remuneration due to the employee in lieu of notice). Where adequate notice is given, there is no need to provide a written statement of the reason for the dismissal¹¹ as in the case of a summary dismissal¹² or termination for misconduct,¹³ but failure to provide reasons that are valid and fair may result in the dismissal notice being considered unreasonable.

3. INTERNSHIP

Some professions require a period of temporary employment with another member of that profession, for example, in the fields of medicine, engineering, accounting and law, while some businesses provide a means of mentorship as part of their professional development strategy or corporate social responsibility. They may refer to this period of mentorship by various names, whether “on-the-job training”, “pupillage” or “summer work programme”, but may be generically referred to as an “internship”, which is a form of employment caught by the New Labour Code.¹⁴ Therefore, all internships in the BVI must be paid internships.

³ Section 89(1).

⁴ Section 89(2)(a).

⁵ Section 89(2)(b).

⁶ Section 89(2)(c).

⁷ Section 90(3).

⁸ Section 76.

⁹ Section 69.

¹⁰ Section 92(1).

¹¹ Section 81(2).

¹² Section 101(3).

¹³ Section 103(3).

¹⁴ See, section 3 where paragraph (b) of the definition for “employee” makes it clear that a person who is merely hired for the purpose of their own training is also an employee.

An internship may be short term employment, but does not have to be. If it is short term employment, i.e., not exceeding 4 months, then it is an implied term of the employment contract that the employer can terminate the employment contract by giving 24 hours notice if the employer has a valid and fair reason for doing so.¹⁵ Therefore, where an employer hires a student for the purpose of on-the-job training, who is at least 16 years (or if between 14 – 16 the work is approved by the Minister before employment) and after an appropriate medical examination certifying fitness for work, the employer may dismiss that student-employee with 24 hours notice if the internship period is 4 months or less. However, if the internship period is to exceed 4 months then the normal rules of termination of employment by notice will apply.

4. RETIREMENT

The New Labour Code introduces for the first time under BVI law a mandatory requirement for the payment of retirement benefits for permanent employees.¹⁶ Where the employer does not have a retirement plan for employees, then any employee who attains the age of 65 or any other retirement age which be over the age of 65 or any other retirement age which may be over the age of 65, after working for the employer for at least 10 years must be paid based on the wages paid each year of entitlement¹⁷ as follows:¹⁸

YEARS OF SERVICES	PRIOR TO COMMENCEMENT OF CODE				AFTER COMMENCEMENT OF CODE
	Over 30	20 – 30	10 – 20	1 – 10	
FORMULA	<i>6 days pay x number of year</i>	<i>5 days pay x number of year</i>	<i>4 days pay x number of year</i>	<i>3 days pay x number of year</i>	<i>9 days pay x number of year</i>

Within the first 5 years after the commencement of the New Labour Code the employer may make 6 equal payments over a 2 year period for all the retirement benefits that became due prior to the commencement of the New Labour Code.¹⁹ However, within 2 years after the commencement of the New Labour Code the employer must make a lump sum payout of all retirement benefits due to an employee within 1 month following their retirement.²⁰ In either case, if the employer is unable to pay an employee the retirement benefits then an appeal must be made to the Minister, who has the power to vary the obligation.²¹

¹⁵ Section 88(2).

¹⁶ Section 111. Although the New Labour Code does not define “permanent employees”, it may be construed as persons whose employment contract, or any renewal, is for a period of 12 months or more, which is considered an indefinite period for purposes of the New Labour Code by virtue of section 44(2).

¹⁷ Section 111(4).

¹⁸ Section 111(3).

¹⁹ Section 111(5).

²⁰ Section 111(6).

²¹ Section 111(8).

Upon an employee becoming entitled to a payment under any retirement plan by the employer or upon reaching 65 years for Social Security purposes, their retirement date may be agreed.²² It should be noted that retirement is not a mandatory requirement under the New Labour Code, and if there is no contract term dealing with retirement, or the employer and employee fail to make a determination when the entitlement to the retirement benefit occurs then the New Labour Code makes no default retirement provision or establishes any consequences for failure to set a retirement date. However, at any time where a retirement date is agreed the normal rules of termination of employment by notice will apply.

5. PAYMENT IN LIEU OF NOTICE

In some circumstances the employer may consider it more beneficial to make a payment in lieu of giving a notice of dismissal. Therefore, the termination would be immediate, but the employee would be in no less a situation had due notice been given since the employer must pay the employee all the wages and other remuneration that would have been due to the employee on the termination date had due notice been given.²³

The alternative to payment in lieu of notice is the practice of continuing to have an employee on the payroll, usually an employee with access to critical information or systems, but restricting them from returning to work during the notice period, otherwise known as “garden leave”. This is achieved since the employer is permitted to stop an employee from working if they are paid.²⁴ Therefore, the employer can stop the employee from working after giving the notice of dismissal and continue to pay the employee with all their benefits until termination. In some cases the contract of employment may provide for 6 months notice, in which case the employer may consider the harm that could be done by allowing the employee to work for a competitor to be more costly than continuing to pay the employee during the notice period. However, this should not be confused with a suspension due to disciplinary action,²⁵ and garden leave is not vacation leave or cannot be used as vacation leave, since there was no mutual agreement in the taking of garden leave as required for vacation leave.²⁶ Additionally, it is important for the contract of employment to have an effective non-competition clause prohibiting the employee from working with a competitor while on garden leave for this to be effective.

6. VALID AND FAIR REASONS FOR DISMISSAL

Although an employee has the statutory right not to be dismissed without due notice and for valid and fair reasons,²⁷ except on summary dismissal, it is for the employer to prove the reasons for the dismissal.²⁸ Failing to establish that the reason for the dismissal was a valid and fair reason may render the dismissal to be unfair. The

²² Section 87.

²³ Section 91(1).

²⁴ Section 51.

²⁵ Section 102(2)(b).

²⁶ Section 68(1).

²⁷ Section 81(1).

²⁸ Section 85(1).

employer must, therefore, show that one of 3 elements are present in the reason for the dismissal which includes capacity, conduct or operational requirements.²⁹

(a) Capacity

There is no definition in the New Labour Code for “capacity” and its literal interpretation would involve a reference to the employee’s ability to perform the job requirements, which can include both mental and physical ability, as well as academic or professional qualification or skills necessary to perform the job. Therefore, it would be valid and fair to dismiss an employee if the job requires a certain capacity and the employee while having qualified for the job no longer possesses the capacity required for the job.

(b) Conduct

Although there is no definition for “conduct” in the New Labour Code, this may be the most obvious reason for dismissing an employee. In order for the misconduct to be a valid and fair reason for dismissing the employee, there must be some breach of expected conduct, whether written in a disciplinary code or expected by practice or within that particular industry. This should not, however, be confused with “serious misconduct” for which the employer is entitled to dismiss the employee without notice.³⁰ However, where misconduct is an issue for dismissal the recommended procedure to be followed is to institute disciplinary action by first issuing a written warning,³¹ as opposed to giving notice. If the employee is guilty of similar misconduct within 6 months following the written warning the employer may terminate the employee without further notice.³²

(c) Operational Requirements

Again, there is no definition in the New Labour Code for what would constitute these operational requirements. However, the most likely example of these operational requirements would be those state of affairs which create a redundancy since terminating an employee for reasons of redundancy would require a dismissal notice and must be valid and fair. It is possible for an employee to claim to have been unfairly selected for dismissal based on redundancy and it is important to ensure that during a redundancy the selection criteria is reasonable.

Before dismissing an employee, and after determining that there is a valid and fair reason to dismiss that employee, the employer must satisfy himself or herself that his or her actions are reasonable.³³ It is important to note that whether the decision to dismiss was reasonable is to be determined at the time the dismissal takes effect and not any subsequent facts that may add support to the employer’s decision.³⁴

²⁹ Sections 81(1) and 89(1).

³⁰ Section 101(1).

³¹ Sections 102(2) and 103(1).

³² Section 103(2).

³³ Section 85(3).

³⁴ See, Polkey v A E Dauton (or Dayton) Services Ltd [1987] 3 All ER 974, HL.

7. SUMMARY DISMISSAL

There are circumstances where an employee's misconduct rises to such a level that it would be unreasonable to require the employer to continue to employ that employee. In such circumstances it would be acceptable to dismiss that employee summarily without notice.³⁵ It is critical that an employer is satisfied that the restricted category of things which can be considered serious misconduct have in fact taken place before taking any steps to dismiss an employee summarily since it falls on the employer to prove that the summary dismissal was reasonable.

8. EXPIRATION OF CONTRACT OF EMPLOYMENT

It is common for a contract of employment to expire on a certain date or to be effective only during a specific period, for example, 2 years. At the end of the contract period, if the contract expires without being renewed, the employee must continue in the employment unless the appropriate dismissal notice was given. However, an employee is not obligated to inform an employer that they do not wish to renew a contract when it comes to the end of the contract term.³⁶ In every other case, however, the employee is obligated to give notice to the employer in the same manner as an employer is required to provide notice. Failure on the part of the employee to give his or her employer notice, which would typically happen when the employee fails to report to work before the termination date or "walks-off" the job, can render the employee liable to pay the employer the amount in wages that the employee would have received for the time they should have worked,³⁷ and the employer may deduct those monies due from the employee's termination package.³⁸ An employer should, however, exercise caution before deducting wages and should first be satisfied that the employee cannot claim constructive dismissal which would render the situation an unfair dismissal by the employer.³⁹

9. CONSTRUCTIVE DISMISSAL

An employee may decide to terminate the contract of employment due to the unreasonable conduct of the employer.⁴⁰ Therefore, in circumstances where the employer has breached an obligation under the contract of employment or a requirement under the New Labour Code, the employee may consider the employer's conduct to be unreasonable and terminate the contract without notice. The breach, however, should be serious enough to entitle the employee to leave without notice. If the employer's conduct was reasonable in the circumstances then it was not constructive dismissal and the employee would be liable to compensate the employer for the days the employee should have worked.⁴¹ In this case, stopping an employee from working with pay and, therefore, sending them on garden leave would not in itself be constructive dismissal.

³⁵ Section 101(1).

³⁶ Section 100(1).

³⁷ Section 100(4).

³⁸ Section 100(5).

³⁹ Section 83(2).

⁴⁰ Section 83(1).

⁴¹ Section 100(4).

10. NON-DISCRIMINATORY PRACTICES

Generally, the same rules against discriminatory practices which apply to an employer during the recruitment process also apply to the employer during the termination process.⁴² Therefore, it is unlawful to terminate the employment of a qualified and disciplined Virgin Islander or Belonger in preference to a non-Virgin Islander or non-Belonger.⁴³ Additionally, it would be discriminatory to terminate an employee for any reason based on medical status.⁴⁴

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FURTHER INFORMATION

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⁴² For a full discussion on discriminatory practices during the recruitment process, see the bulletin entitled "Key Features of the BVI's New Labour Code", August 2010.

⁴³ Section 117(1)(b).

⁴⁴ Section 114(2)(b).