

Termination of Employment

(A reprint of a circular sent to ministers and churchwardens on 31 March 1995.)

Contents

	<i>Item</i>
Introduction	1
Termination Provisions	2
To which employees do the termination provisions apply	3
Consequences of a Failure to Comply with the Act	4
Practical Applications	5
And Finally	6



1. Introduction

The Industrial Relations Act 1988 (the "Act") limits the circumstances in which employment may be terminated by an employer and sets out the procedures which must be undertaken before employment may be terminated. Churchwardens, who usually are the employers of parish employees, must be aware of the requirements of the Act. You may not need this circular now, but please keep it for future reference.

2. Termination Provisions

The termination provisions in the Act apply to all employees other than as specified in item 3. It is important to remember that the termination provisions only apply if there is a termination of employment by the employer. If the employee resigns of his or her own free will, then the termination provisions of the Act do not apply.

The termination provisions include the following rules -

- (a) Employment may be terminated only for a valid reason connected with the employee's capacity or conduct or based on the operational requirements of the parish. Further, the termination must not be harsh, unjust or unreasonable. This latter requirement means that the procedures adopted by the employer for performance review, warnings, counselling etc must not be harsh, unjust or unreasonable in all the circumstances.
- (b) Employment may not be terminated on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin unless the termination of the employment is effected in good faith in order to avoid injury to the religious susceptibilities of adherents to, or creeds of, the Anglican Church or if the reason for terminating the employment on one of those

grounds is based on the inherent requirements of the particular position.

- (c) An employee must be given the opportunity to respond to allegations about misconduct or poor performance prior to the termination of the employment.
- (d) An employee must be given not less than the prescribed period of notice of termination (or paid compensation in lieu), except in the case of serious misconduct where no such notice is required. The prescribed period of notice is worked out using the following table -

Employee's period of Continuous Service	Period of Notice
Not more than 1 year	At least 1 week
More than 1 year but no more than 3 years	At least 2 weeks *
More than 3 years but no more than 5 years	At least 3 weeks *
More than 5 years	At least 4 weeks *

- * The period of notice is increased by 1 week if the employee is over 45 years old and has completed at least 2 years continuous service.

3. To which employees do the termination provisions apply?

The termination provisions set out in paragraphs (a) to (d) of item 2 apply to each employee except -

- (a) an employee engaged under a contract for a fixed term of less than 6 months entered into after 16 November 1994 (unless the purpose of entering into the fixed term contract was to avoid the legislation);
- (b) an employee engaged for a specific task (unless the purpose of entering into the employment contract was to avoid the legislation);
- (c) an employee serving a period of probation where the period of probation is determined in advance and is reasonable having regard to the nature and circumstances of the employment; and
- (d) a casual employee engaged for on a regular or systematic basis for a sequence of periods of employment during a period of less than 6 months or who does not have a reasonable expectation of the employment continuing.

Further, the notice requirement set out in paragraph (d) of item 2 does not apply to -

- (e) casual employees other than those in (d); and
- (f) an employee engaged under a contract for a fixed term of 6 months or more.

Lay ministers (that is, persons employed on a full time basis to assist the minister who hold an authority under the Deaconesses, Readers and Other Lay Persons Ordinance 1981 - for example deaconesses, parish sisters and youth workers), secretarial staff and other paid workers are employees to whom the termination provisions apply unless one of the above paragraphs in this item 3 applies.

The Act does not apply to office holders so the termination provisions do not apply to assistant ministers (who are clergy). The tenure of an assistant minister is regulated by the Assistant Ministers Ordinance 1990.

4. What are the consequences of failing to comply with the Act?

The Industrial Relations Court may order the reinstatement of the employee and/or order the employer to pay damages to the employee. The maximum amount of damages is \$30,000 or 6 month's remuneration if an award applies.

5. Practical Applications of the Termination Provisions

This section attempts to give guidance on the application of the termination provisions.

What steps are involved in terminating an employee's employment on the basis of misconduct or lack of capacity?

The suggested steps are as follows -

- (a) The churchwardens must establish the facts.
- (b) The employee must be advised of the allegations and be given an opportunity to respond.
- (c) The churchwardens must take into account any explanation or mitigating factors raised by the employee and any other relevant factors.
- (d) If the decision is taken to terminate the employment, the decision must not, in the circumstances, be harsh, unjust or unreasonable.
- (e) Except for serious misconduct, no employee should be dismissed for a first offence.
- (f) Records must be kept of counselling sessions, prior warnings and the termination interview.
- (g) The churchwardens must objectively monitor performance.
- (h) Except for serious misconduct the prescribed period of notice must be given (or payment made in lieu). If the employee is a lay minister, clause 16 of the Deaconesses, Readers and Other Lay Persons Ordinance 1981 requires that 3 months notice be given or payment made in lieu.

Can the employment of an employee be terminated on the basis that a new minister has been appointed and the employee "does not fit" with the new minister?

No. The employment of the employee can only be terminated on the basis of the conduct or capacity of the employee or operational requirements of the parish. Then the decision to terminate must not be harsh, unjust or unreasonable and the termination can only take place after the other requirements (such as notice and giving the employee opportunity to respond to allegations if conduct or capacity is an issue) have been satisfied.

What if a parochial unit decides that it now needs an assistant minister rather than a lay minister?

In these circumstances, the employment of the lay minister can be terminated on the basis of a change in the operational requirements of the parochial unit provided -

- (a) the duties of the assistant minister are significantly different from those which the lay minister could perform (otherwise the termination could be harsh, unjust or unreasonable); and
- (b) under clause 16 of the Deaconesses, Readers and Other Lay Persons Ordinance 1981, 3 months notice is given or payment made in lieu; and
- (c) the treatment of the employee is procedurally fair and not harsh, unjust or unreasonable in all the circumstances.

What if the parochial unit can no longer afford to pay an employee?

In these circumstances, the employment can be terminated on the basis of a change in the operational requirements of the parish. The inability to pay must be genuine and not a pretence for terminating the employment. If the churchwardens were to terminate the services of an employee on the basis of lack of funds and shortly thereafter employ another person, the termination of the services of the first employee could be challenged. The termination is subject to the necessary period of notice being given.

6. And Finally

The Act is complex and cannot be fully detailed in a circular. Churchwardens should obtain professional advice in preparing employment contracts and if they want to terminate the employment of an employee.

For and on behalf of the Standing Committee

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Legal Officer

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