

Managing Terminations - *Forward With Fairness* Legislation

Introduction:

From 1st July, 2009, the *Fair Work Act 2009*, gives access to unfair dismissal laws to a larger population by removing the 'more than 100 employees' limit imposed under the former Work Choices Regime and replacing it with a new '15 or more employee' standard. Concurrently, employees earning up to \$106,000 p.a (indexed), also have rights to seek redress under the new legislation.

This section touches upon the main aspects of the new system, but notes that some areas, particularly regarding representational rights and 'general protections' are yet, (as at May 2010), to be fully tested.

Unfair Dismissals:

To address the concerns of small business, the federal government has limited the operation of the "*Unfair Dismissal*" regime. Certain employees are precluded from making an application to *Fair Work Australia* (FWA) for redress of their termination:

Employees excluded from making a claim:

- ❖ Employees of businesses of 15 or more employees who have been employed for **fewer than 6 months**;
- ❖ Employees of businesses with less than 15 employees, employed for **fewer than 12 months**;
- ❖ Employees dismissed due to *genuine redundancy;
- ❖ Employees of a business of less than 15 full-time equivalent employees, (or "simply 15" employees after 1.1.11), employed for **more than 12 months, where the employer can demonstrate that they have followed the 'Small Business Fair Dismissal Code'**, (a copy of which is incorporated in this Module). Concurrently, the "*Unsatisfactory Work Performance/Conduct Policy*", incorporated in this Module is designed to meet the Employer's obligations under the Code and the Act;
- ❖ Casuals who do not meet the requisite minimum employment period as permanent employees **and** who are not engaged on a regular basis with a reasonable expectation of continuing employment;
- ❖ Persons making a claim more than 14 days after being dismissed, (although FWA has some discretionary powers).

FWA will seek to mediate matters, with an emphasis on re-instatement, although they have power to make orders for compensation of up to 26 weeks pay.

FWA will conduct an "inquiry" at the workplace or through teleconferencing, in a timely fashion. During the 'conciliation stage the employer and employee may be represented (in the employer's case, by a paid agent, industry association or lawyer). However, the Act precludes representation generally by Lawyers or Paid Agents in the case of matters going to formal submissions (see note in introduction).

N,B: Within this system procedural fairness is to the fore, with every opportunity to be given to the employee to be made aware of their short-comings and to be given reasonable opportunity to address them, before their employment is terminated. All steps must be well documented, to avoid an 'unfair dismissal' claim being sustained.

***Redundancy:**

A person's dismissal will be a case of *genuine redundancy* if:

- (a) The person's employer no longer required the person's job to be performed by anyone because of changes in operational requirements of the employer's enterprise; and
- (b) The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

However, a person's dismissal will not be a case of *genuine redundancy* if it would have been reasonable in all circumstances for the person to be redeployed within:

- (a) The employer's enterprise; or
- (b) The enterprise of an associated entity of the employer.

Under the National Employment Standards, applicable from 1.1.10, employees of employers having **15 or more employees** will have obligations to pay severance pay, based on the employee's length of service and age, up to a maximum of 16 weeks pay.

Further, an employer making 15 or more employees redundant, must notify *Centrelink*.

Unlawful Dismissals:

Employees have a range of protections from an employer taking *unlawful actions* to either terminate or "harm" their employment.

Under the *General Protections* provisions of the *Fair Work Act 2009*, employee's workplace rights are guaranteed, through the provision of effective relief of persons who have been *discriminated against, victimised or otherwise adversely affected*.

Indeed a *prospective employee* is taken to have rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Adverse action includes, but is not limited to:

- Altering the position of the employee to the employee's prejudice; or discriminates between the employee and other employees of the employer;
- Refuses to make use of, or agree to make use of, services offered by an independent contractor; or
- Refuses to supply, or agree to supply goods or services to an independent contractor.

"Unlawful Terminations" relate to:

- An employee's temporary absence from work due to illness or injury
- Trade union activity
- Non-membership of a trade union
- Filing a complaint against the employer
- Race, colour, sex, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- Community service
- Maternity or paternity leave

N.B In relation to allegations of ***unlawful terminations***, the onus of proof remains on the employer to prove that the dismissal was not because of, or did not include, one or more of the previously listed grounds.

Claims are heard by the *Fair Work* divisions of the *Federal Court and Federal Magistrates' Court*.

In relation to ***General Protections*** applications, there is a 60 day limit on lodgements; further costs can be ordered by the Courts, with few limitations on damages awards.

Small businesses are not excluded from “*Unlawful Termination*” claims.

Best Practice – Managing Performance

There is a strong link between the steps taken to:

- Recruit new staff
- Manage the performance of staff
- In the event that the employment relationship fails, manage the termination of the individual.

Appropriate action in all phases will minimise the risk to both the reputation of the Employer, through avoiding unnecessary litigation, and to the morale of the workforce.

Accompanying is a set of sample letters with explanatory memorandum relating to each of, appointment, performance management and termination of staff. They, due to their very nature, cannot anticipate all contingencies; therefore some discretion is needed to reflect the circumstances. For instance, should the employee's action warrant it, there is no restraint on the C.E.O or other authorised person, instantly terminating an individual for criminal action or other wilful misconduct.

All current employees and future inductees, should be issued a copy of the '*Unsatisfactory Work/Performance /Conduct Procedures*', template document contained herein, to ensure that all team members understand how and why actions they take in their employment will be addressed by the Organisation.