



Mediation and Employment Relations Service

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Risk Management Strategies for Unfair Dismissal Claims

There is a growing trend for employees whose employment has been terminated for poor performance, to lodge unfair dismissal claim and then withdraw that claim, and lodge a worker's compensation claim. Consequently, there are some processes and procedures that need to be considered by employers when contemplating employee termination. The following is a brief guide to assist employers considering terminating a worker's employment.

This update will be split into the Fair Work Act requirements and the Return to Work SA (worker's compensation) requirements.

A worker's compensation claim that is likely to be lodged is for psychological injury (commonly referred to as a 'stress claim') alleging that the employer took unreasonable action in an unreasonable manner that has given rise to a claim precluding the ex-employee from seeking employment.

Fair Work Act 2009

The unfair dismissal legislation in the Fair Work Act separates small employers (less than 15 employees) and large employers (15 or more).

An employee with a small employer does not have the right to lodge an unfair dismissal claim during the first twelve months of employment. Employees of larger employers do not have that right within the first six months. This exemption doesn't apply to unlawful termination (e.g. discrimination).

Unfair dismissal claims (subject to the above prerequisites) must be lodged within 21 days of the date of termination.

There have been instances when employers have terminated employment for good reason and unfair dismissal claims have been lodged by the employee with the Fair Work Commission. Some of these cases were subsequently dismissed or withdrawn, however, in some instances workers' compensation claims have subsequently been lodged if the unfair dismissal claim is not upheld or unlikely to be upheld.

If an unfair dismissal claim is successful, the Fair Work Act 2009 enables payments of up to six months' pay. However, for an employee to receive the maximum they will need to be a long-term employee with an otherwise exemplary work record and the employer acted unfairly in its termination process. Quite often the payment is likely to be between a few weeks to two to three months.

Workers' Compensation Claims

An employee who pursues a worker's compensation claim ('stress claim') instead of an unfair dismissal application usually does so on psychological grounds.

For the basis of a psychological claim to be successful, the worker must show that the workplace significantly caused the injury. This may include an employer taking what otherwise would be reasonable action in an unreasonable manner.

If the claim is accepted (successful) the worker will be eligible for 100% of their notional weekly earnings for the first twelve months of their absence and then 80% for the following twelve months. It is unlikely that there will be any further payments after two years.

The cost of the worker's compensation weekly payments to the employee are substantially recoverable by Return to Work SA through the levy system which impacts on the employer and, the industry at large. The longer the absence, the higher the cost impact will be on that employer and the industry. Other costs such as medical, mediation, psychological etc. are all borne by the Workers' Compensation Scheme and ultimately impact on the industry as a whole.

Redundancy

A redundancy arises when a position (rather than the person) is no longer required to be performed in the way it has in the past. If alternative employment is not found, the employment may be terminated. Whilst the Fair Work Commission does not have the jurisdiction to hear an unfair dismissal claim in these circumstances, the consultation process must be meaningfully undertaken by the employer and, in a reasonable manner or it may result in a worker's compensation claim.

Small employers are exempt from redundancy payments should a position (rather than the employee) become redundant. Large employers are required to pay severance payments when a redundancy occurs for an employee who has been employed for more than two years as a full time or part time employee.

There are no unfair dismissal rights when a genuine redundancy occurs and if the consultative process is not adequate a claim may be lodged that the redundancy was not *bona fide*.

Summary

There will be instances when workers will find the financial benefits of the Workers' Compensation Scheme more attractive than pursuing an unfair dismissal claim. It is rare for an employee to receive six months' pay because of a successful unfair dismissal claim but, an employee in receipt of worker's compensation payments can be paid for up to two years.

How do you minimise your risk?

You can minimise your risks by;

1. Prior to engaging an employee seek referee comments from previous employers and others

2. Ask questions appropriate to the position, conduct pre-medical examination but limited to the individual's capacity to perform the job,
3. Issue a letter of offer of employment before you agree to engage the employee.
4. Include in the letter whether the engagement is on a fulltime, part-time or, casual employment BEFORE the employee commences
5. The letter should also state the commencement date, the immediate supervisor, rate of pay, payday etc. and the employee should sign accepting the offer
6. The letter should also have attached a copy of the Job Description – the new employee must have a clear understanding of what is expected
7. Immediately on commencement of employment conduct a structure induction process and the employee must sign that they read your company policies and procedures.
8. Provide all Employees on commencement with the Employee Information Statement which can be downloaded at www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement
9. Arrange regular "toolbox" meetings to discuss workplace health and safety processes, operational requirements including working in a harmonious team environment, animal husbandry obligations etc.
10. Encourage early reporting of workplace issues and workplace hazards, near misses and accident
11. Ensure that you have an Incident Reporting System and that all entries are acted on promptly.

If you are a small business contemplating termination of employment, contact MERS advisory service on 8331 2422 or at www.mers.com.au

Pork SA members are entitled to a free consultation with MERS for the first half an hour and a reduced rate thereafter.

You can also visit

<https://www.fairwork.gov.au/search.aspx?ModuleID=13&keywords=Small%20Business%20Fair%20Dismissal%20Code%20Checklist&multiSite=False>.

For further information, please contact:

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