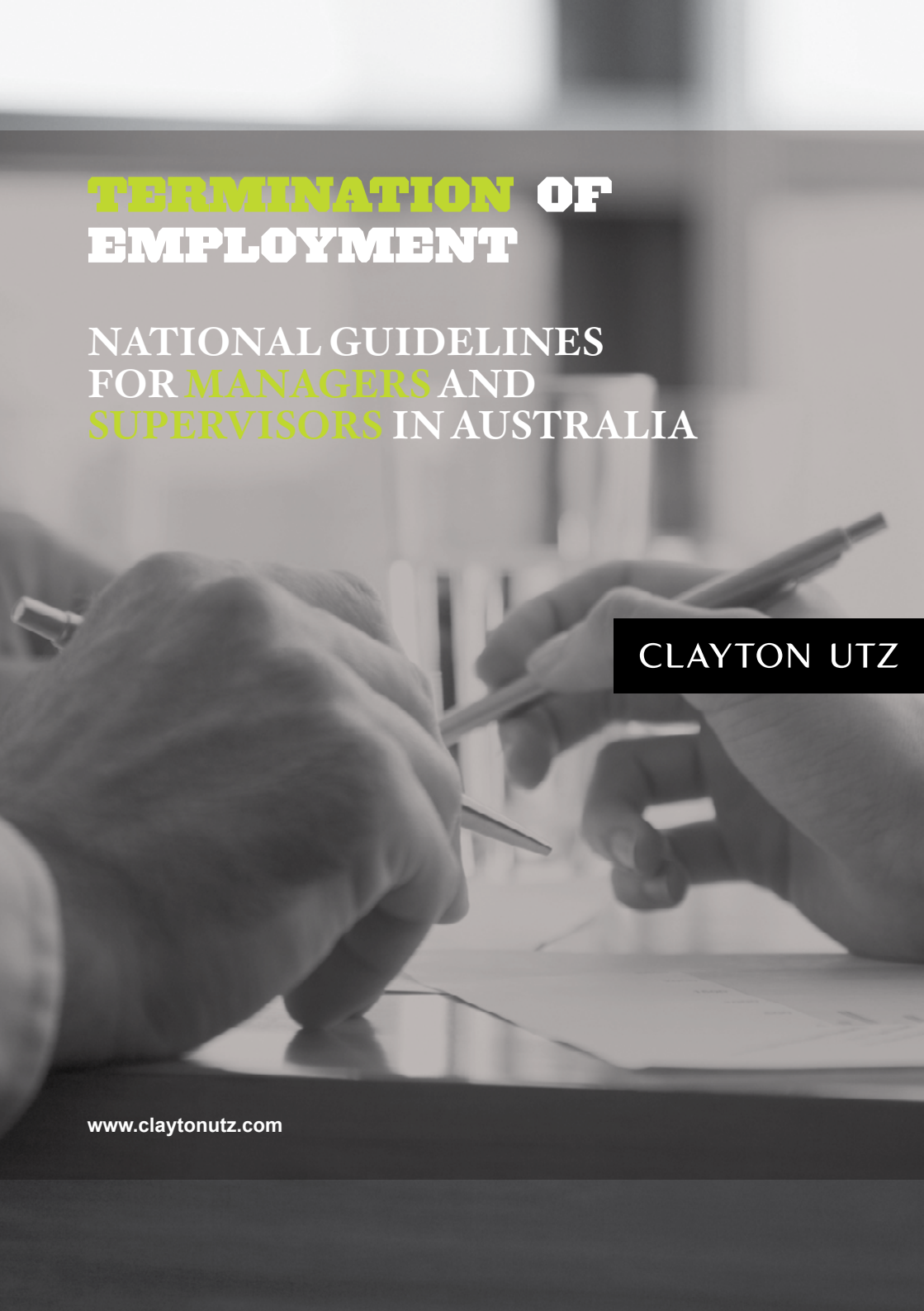
TERMINATION OF EMPLOYMENT

NATIONAL GUIDELINES FOR MANAGERS AND SUPERVISORS IN AUSTRALIA



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CONTENTS

Part 1: Introduction 4
Sources of legal obligation 5
Some key concepts 6
- Summary dismissal and serious misconduct 6
- Dismissal by notice or payment instead of notice 7
- Redundancy/retrenchment and severance pay 8
- Dismissal/constructive dismissal 10
- Corporations Act requirements 11

Part 2: Unfair dismissal claims 12
What is an unfair dismissal 12
Persons who may not make unfair dismissal claims 13
Commencement of an unfair dismissal application 15
Process 15
Remedies 15
- Reinstatement 15
- Compensation 16

Costs 17

Part 3: Other forms of termination of employment claims 18
Unlawful termination of employment claims 18
- Unlawful termination claims under the FW Act 18
- Unlawful termination claims under State laws 20

Equal opportunity claims 20
Common law claims 21
- Breaches of express contractual terms 21
- Breaches of implied contractual terms: “Mutual trust and confidence” 22
- Breaches of implied contractual terms: “Reasonable notice” 23

Claims under the Competition and Consumer Act 2010 (Cth) (Australian Consumer Law) 24
Unfair contracts claims: State System employees only 24

Part 4: Guidelines 26
Unsatisfactory performance 26
Serious misconduct 29
Redundancy requirements 30
Incapacity 33

Part 5: Conclusion 36
Training 36
Small business fair dismissal code 36
Commencement 36
Summary dismissal 36
Other dismissal 37
Procedural matters 37

Part 6: Key contacts 38

PART 1: INTRODUCTION

For over a century, Australian employers have been restricted in their ability to terminate an employee's employment without fear of reprisal. Further to this, unfair dismissal laws (laws which allow an individual to challenge their dismissal on the basis of unfairness) have existed in most Australian States since the 1970s.

In 1994, for the first time the Commonwealth introduced its own unfair dismissal laws by amending the former Industrial Relations Act 1988 (Cth) (the IR Act). This led to a complex system of rules for determining whether an unfair dismissal claim could be brought under either the State or Commonwealth law, or both. This state of affairs continued when the IR Act was replaced by the former Workplace Relations Act 1996 (Cth) (the WR Act).

However, the situation changed significantly when the WR Act was amended by the Workplace Relations Amendment (Work Choices) Act 2005 (WorkChoices). WorkChoices, unlike previous Commonwealth industrial relations legislation, drew on the corporations power under the Australian Constitution. Use of the corporations power enabled the Commonwealth to subject a larger group of employees to the Commonwealth unfair dismissal laws.

As a result of WorkChoices, from 27 March 2006 the Commonwealth unfair dismissal laws effectively replaced the State unfair dismissal laws for all employees of constitutional corporations, for employees in the Commonwealth public sector and for Victorian employees (because of Victoria's reference of its industrial relations powers to the Commonwealth). Work Choices meant that these employees were now unable to make claims under State unfair dismissal laws.

On 1 July 2009, the WR Act was replaced by the Fair Work Act 2009 (Cth) (the FW Act). The FW Act continues to draw upon the corporations power in the Australian Constitution. Under the FW Act, Commonwealth unfair dismissal laws continue to apply to the same employers and employees as they did under the WorkChoices system. These employees do not have access to claims under State unfair dismissal laws. Those employees who are covered by Commonwealth unfair dismissal laws are referred to in this booklet as National System employees. The majority of Australian employees are now National System employees.

However, State unfair dismissal laws still exist. They apply to the remaining employees who are not National System employees. These employees are referred to in this booklet as State System employees.

This booklet provides an overview of other types of claims that employees may make in relation to termination of employment, including:

- Claims of unfair dismissal. As most employees are National System employees, this booklet concentrates on Commonwealth unfair dismissal laws. However, there is also some discussion in this booklet of the situation for State System employees;
- Claims under Commonwealth and State laws which prohibit termination on discriminatory and other proscribed grounds;
- Claims for breach of contract; and
- Claims for breaches of the Competition and Consumer Act 2010 (Cth).

The booklet also examines other obligations that arise on termination of an employee's employment, for example in terms of the amount of notice required and obligations to consult with employees and/or their unions.

Finally, the booklet contains a selection of practical tips for dealing with employee performance, conduct, capacity and redundancy issues.

It is important that employers understand their obligations to employees regarding termination of employment, and the benefits of seeking early strategic advice to minimise the likelihood of successful claims being made against them.

Sources of legal obligations

Generally speaking, a manager who is considering terminating an employee's employment should always have regard to the relevant rights and obligations contained under:

1. Legislation which provides remedies for unfair dismissal claims, being the FW Act or any State unfair dismissal laws if they apply;

2. Legislative minimum terms and conditions of employment under the FW Act, or under State laws such as the Minimum Conditions of Employment Act 1993 (WA), Fair Work Act 1994 (SA), Industrial Relations Act 1984 (Tas), Industrial Relations Act 1996 (NSW), Industrial Relations Act 1999 (Qld) and any relevant State and Territory annual leave and long service leave legislation;

3. State workers' compensation legislation, relevant Commonwealth and State occupational health and safety legislation, Commonwealth and State anti-discrimination legislation, the Corporations Act 2001 (Cth) and the Competition and Consumer Act 2010 (Cth);

4. Industrial instruments including awards, individual registered agreements (sometimes referred to as "workplace agreements") and collective registered agreements (also referred to variously as "industrial agreements", "certified agreements" and "enterprise agreements"); and

5. The particular employee's contract of employment, whether verbal, in writing, or both, including any contractually binding policies.

It is surprising how often one or more of these sources of rights and obligations are overlooked by managers when terminating an employee's employment.

Some key concepts

Summary dismissal and serious misconduct

Summary dismissal means instant dismissal or dismissal without notice. An employer may summarily dismiss an employee who commits serious misconduct.

Depending on the circumstances of a particular case, the following are examples of actions which may amount to serious misconduct:

- Obscene language directed towards the employer, staff or customers;
- Intoxication at the workplace;
- Dishonesty, including for example theft or fraud;
- Criminal conduct whilst at work;
- Criminal activity outside of work where such activity is inconsistent with the employee's contract of employment;
- Fighting at the workplace; and
- Refusing to carry out a lawful and reasonable instruction given by the employer.

As each case is different, conduct which amounts to serious misconduct in one case may not amount to serious misconduct in the circumstances of another case.

Care should be taken when terminating an employee's employment for serious misconduct because it is the harshest form of discipline an employer can impose. In addition to the stigma of instant dismissal, an employee dismissed for serious misconduct may in some cases also suffer financial penalties, such as loss of pro rata annual leave or long service leave payments and other entitlements (depending on their particular conditions of employment).

Dismissal by notice or payment instead of notice

Dismissal on notice occurs where an employer dismisses an employee by providing the employee with the notice required by legislation or by making the applicable payment in lieu of notice.

In order to determine the required notice, we suggest the following steps:

(a) First, check to see whether the notice periods in the FW Act apply (they do not apply to casual employees, employees dismissed for serious misconduct, and other particular categories of employees). The FW Act sets out minimum notice periods in accordance with the following table:

Employee's period of continuous service with the employer	Period of notice
Not more than 1 year	At least 1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	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 with the employer at the end of the day the notice is given.

(b) Check to see whether the employee's contract of employment and any applicable industrial instrument, including an award or collective registered agreement, prescribes a notice period;

(c) If there is more than one applicable notice period (for instance, both in the FW Act and an award), the longer notice period applies; and

(d) If the contract of employment is silent on notice and no Award or Agreement applies, then the employee will be entitled to "reasonable" notice. In some cases, reasonable notice may be necessary even if an Award or Agreement applies. What constitutes "reasonable" notice is discussed further below under the heading "Common law claims".

Notice will usually be required in all cases, other than a dismissal involving serious misconduct.

Redundancy/retrenchment and severance pay

Redundancy occurs when an employee is dismissed through no fault of his or her own but because the employer no longer requires the particular job to be performed by anyone and this leads to the termination of the employee's employment.

Since 1 July 2009, a National System employee cannot be found to be unfairly dismissed if the dismissal was a case of "genuine redundancy". There are particular steps which must be taken to satisfy this test, which are dealt with in Part 4 of this booklet.

In the event of a redundancy, an employee may be entitled to severance pay pursuant to:

- For National System employees, the National Employment Standards (NES) contained in the FW Act (see the scale over page). Further, please note that for some employees, only service from 1 January 2010 will be counted towards the entitlement;
- For State System employees, any relevant State legislation; and
- For all employees, any applicable awards or orders of, or agreements registered by, an industrial tribunal, and the employee's contract of employment (including any contractually binding policies).

Where more than one entitlement arises, the most favourable must be provided.

The NES prescribes the following scale of redundancy payments:

Period of continuous service on termination	Redundancy pay
At least 1 year but less than 2 years	4 weeks' pay
At least 2 years but less than 3 years	6 weeks' pay
At least 3 years but less than 4 years	7 weeks' pay
At least 4 years but less than 5 years	8 weeks' pay
At least 5 years but less than 6 years	10 weeks' pay
At least 6 years but less than 7 years	11 weeks' pay
At least 7 years but less than 8 years	13 weeks' pay
At least 8 years but less than 9 years	14 weeks' pay
At least 9 years but less than 10 years	16 weeks' pay
At least 10 years	12 weeks' pay

These redundancy payments under the NES do not apply to National System employees where an award which contains an industry-specific redundancy scheme applies.

The NES redundancy payments also do not usually apply to National System employees of a small business employer (those with less than 15 employees on a simple head count); fixed term, seasonal or casual employees; trainees and apprentices; or employees dismissed for serious misconduct. In some cases, employees may not be entitled to severance pay if they accept employment with the new employer in a transfer of business situation.

However, it is important to note that these exemptions may not apply to State System employees or where an Award, Agreement or contract provides for redundancy payments.

For State System employees, the minimum entitlements for redundancy pay are contained in:

- For Western Australia: the General Order that was issued by the Western Australian Industrial Relations Commission on 1 June 2005;

- For South Australia: the Fair Work Act 1994 (SA);
- For Tasmania: the Industrial Relations Act 1984 (Tas);
- For Queensland: the Industrial Relations Act 1999 (Qld) (however this only provides for redundancy payments in limited circumstances); and
- For New South Wales: the Employment Protection Act 1982 (NSW).

As Victoria has referred its industrial relations powers to the Commonwealth, the minimum redundancy entitlement for almost all Victorian employees is that in the NES.

Employers should check each instrument under which the redundancy payment entitlement arises for exclusions and conditions. Exclusions may apply to particular categories of employees such as casuals and fixed-term employees, where the employer has fewer than 15 employees, and in cases of transmission of business. An employer may also have a right to apply to the relevant industrial tribunal to reduce its redundancy pay liability in some circumstances.

More information on dismissal for redundancy is contained in Part 4 of this booklet.

Dismissal/constructive dismissal

Under the FW Act, for dismissal to have occurred the termination of employment must have been a "termination at the initiative of the employer". That is, the termination must principally be a result of the employer's conduct.

"Constructive dismissal" occurs where an employer commits a fundamental breach of the employee's contract of employment and the employee resigns as a consequence of the employer's unilateral breach. An example is where an employer unilaterally decides to require an employee to perform the work at another location not contemplated by the contract, or unilaterally decides to reduce the employee's salary. In these circumstances, if the employee chooses to resign, a court or tribunal may construe their resignation not to be a true voluntary resignation and instead deem that a constructive dismissal has occurred. A "constructive dismissal" may also occur when an employee is, in effect, forced to resign by the employer. For example, a "constructive dismissal" might occur in a situation where the employer says to the employee "you either resign or you will be sacked".

We recommend you seek advice if you have any doubts about whether a particular termination constitutes a "constructive dismissal" or a "termination at the initiative of the employer".

Corporations Act requirements

Additional laws apply to the resignation, retirement and removal of directors. These laws are set out in the Corporations Act 2001 (Cth). Provisions in the Act which facilitate the removal of directors do not remove any rights to compensation or damages which the director may have pursuant to their contract of employment.

It is also important to be aware that the Corporations Act imposes limitations on the giving of benefits in connection with retirement from a board or managerial office. The concept of "retirement" is broadly defined and includes loss of office and resignation. The provisions have wide application. They extend, among other things, to the giving of benefits to intermediaries such as a spouse, the giving of a benefit to a related company or superannuation fund and the giving of a benefit that is required to be given under a contract of employment.

Given the legal complexities of this legislation, we recommend that you seek legal advice before you remove any director from office or terminate the employment of a member of the board or a holder of a managerial office.

PART 2: UNFAIR DISMISSAL CLAIMS

As discussed in the Introduction, National System employees must now bring any unfair dismissal claim they wish to pursue under the FW Act. The tribunal that deals with unfair dismissal claims under the FW Act was formerly called the Australian Industrial Relations Commission and then Fair Work Australia. It is now called the Fair Work Commission (FWC).

In the National System special rules now apply to a small business employer. A small business employer is an employer who employs less than 15 employees.

State System employees can continue to pursue their unfair dismissal claims in State tribunals in Western Australia, South Australia, Tasmania, New South Wales and Queensland.

We note that any employee's right to bring any unfair dismissal claim in the FWC or a State tribunal is limited by certain statutory exclusions.

What is an unfair dismissal?

In the National System, a dismissal by a small business employer is fair if the employer complied with the Small Business Fair Dismissal Code. A copy of the Small Business Fair Dismissal Code can be found at the back of this booklet.

In the case of:

- State System employees;
- National System employees who are not employed by a small business employer; and
- National System employees who are employed by a small business employer who has not complied with the Small Business Fair Dismissal Code;

the employer must give the employee "a fair go all round".

Whether or not this test is met is determined by taking into account a range of factors. For a claim under the FW Act, factors that must be taken into account include:

- Whether there was valid reason for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees);
- Whether the person was notified of that reason;
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person;
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal;
- If the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal;
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal;
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- Any other matters that the FWC considers relevant.

Other factors that may be relevant include:

- What the employee is paid by the employer on termination;
- The age of the employee;
- The length of service of the employee; and
- Compliance with the employee's contract, legislation and industrial awards or other instruments (if applicable).

Similar factors to those above are generally taken into account by State unfair dismissal tribunals.

Persons who may not make unfair dismissal claims

The following National System employees are excluded from bringing claims for unfair dismissal before the FWC:

- Employees who have not completed a "qualifying period" of continuous service. The length of the qualifying period is:
- For employees of a small business, 12 months; and
- For employees of any other business, 6 months.

It is important to note that where an employer takes on an employee in some transfer of business situations, the qualifying period starts again:

- Casual employees, except for those who have been employed on a regular and systematic basis for 12 months (with a small business employer) or 6 months (for other employers), and have a reasonable expectation of continuing employment;
- Employees who earn more than $133,000 per year (inclusive of superannuation and indexed each year) unless they are covered by an award or enterprise agreement,
- Employees who have been demoted but remain in employment with no significant reduction in remuneration or duties;
- Trainees or apprentices whose employment ends at the end of the traineeship or apprenticeship;
- Employees employed for a fixed period, project or season and whose employment ends at the end of the fixed period, project or season; and
- Employees who are dismissed because of a "genuine redundancy" (this is discussed further in Part 4 of this booklet).

Please note that an employee who is excluded from bringing an unfair dismissal claim may nevertheless still be able to bring a different kind of claim, such as a claim that the termination of their employment was unlawful because it was for discriminatory or other protected reasons.

Under the FW Act, the powers of the FWC when dealing with unfair dismissal claims are broad. In particular, the FWC can make orders (including final, binding orders disposing of the application) without first holding a formal hearing on the matter. This was not the case under previous legislation.

Many groups of State System employees are also excluded from making unfair dismissal claims. If you are dealing with an unfair dismissal application in a State tribunal you should seek advice on whether any relevant exclusions apply, especially if the State System employee is award free, is a high-income earner, was serving a qualifying period (including probation), the employment arrangement lacks permanence or the employment arrangement is limited in duration.

You should seek advice on the best way to structure a State System or National System employee's salary package, having regard to any relevant high income threshold for access to an unfair dismissal claim.

Commencement of an unfair dismissal application

Depending on whether the employee is a National System employee or State System employee, the employee may commence an unfair dismissal application by completing the prescribed form and filing it with the FWC or the relevant State tribunal.

An employee has a time limit from the date of termination to commence an application. This is currently 21 days for applications to the FWC, but can be up to 28 days for applications in some State tribunals. Applications can be accepted outside the specified time limits in some circumstances.

An employer then has a specified time limit to file a response to the claim.

Process

Under both the State and Commonwealth unfair dismissal schemes, the first formality will usually be a conference before a tribunal member to attempt to resolve the unfair dismissal claim.

If the claim is before the FWC, the claim is firstly listed for a conciliation conference with a FWC conciliator. At this stage, the conciliator does not have the power to make any binding orders, and the matter can only be resolved through the agreement of both parties. If the matter is not resolved at the conciliation stage, the matter is listed before a FWC member for either a conference or formal hearing, At this stage, the FWC is empowered to order a remedy if it is satisfied that jurisdictional requirements are met. Parties are not required to be legally represented in relation to an unfair dismissal claim, and in fact legal representatives are required to request permission to appear (if the matter progresses beyond the initial conciliation stage). However, it is still important to get advice before attending a conference before the FWC in terms of what is required .

Remedies

Reinstatement

If the FWC considers it appropriate it may make an order requiring the employer to reinstate a National System employee by:

- Re-appointing the employee to a position in which he or she was employed immediately before the dismissal; or

- Appointing the employee to another position on terms and conditions no less favourable than those in which the employee was employed immediately before the dismissal.

The State tribunals also have the power to order reinstatement or reemployment of State System employees.

If the FWC or a State tribunal orders reinstatement it may also:

- make any order that it thinks appropriate for maintaining the continuity of the employee's employment; and
- order the employer to pay the employee an amount for the remuneration lost or likely to have been lost by the employee because of the termination.

Compensation

If the FWC finds that reinstatement of a National System employee is not appropriate, it may order that the employer pay the National System employee compensation instead of ordering reinstatement. The FWC will do this only if it considers it appropriate to do so in all the circumstances of the case.

State tribunals also have the power to award compensation in lieu of reinstatement for State System employees in certain circumstances.

The FWC is required to reduce the amount of compensation that it would otherwise order if the employee's misconduct contributed to the employer's decision to terminate the employee's employment.

Generally, compensation will include an amount for lost wages. The FWC cannot provide any additional compensation to a National System employee for any shock, distress, humiliation or other analogous hurt caused by the manner in which the employer terminated the employee's employment. The maximum compensation which may be awarded by the FWC is six months' remuneration.

There is usually a similar monetary cap on awards of compensation for State System employees.

Costs

In the Commonwealth system, and in most State systems, there is a limited ability for an employer to recover its legal costs where an employee has made an unsuccessful claim. For instance, (depending on the relevant jurisdiction) it may be possible to recover costs against an employee who has pursued a claim which is without merit, vexatious or has no reasonable prospect of success. If you wish to consider making a costs application you should seek advice.

Except in these limited circumstances which rarely apply, each party is generally responsible for their own costs. It is therefore important to get strategic advice, as costs including legal fees and interruptions to business and management time can run into thousands of dollars when defending a claim.

PART 3: OTHER FORMS OF TERMINATION OF EMPLOYMENT CLAIMS

Unlawful termination of employment claims

Unlawful termination and general protections claims under the FW Act

For both National System and State System employees, the FW Act enables certain categories of employees to apply to the FWC (at first instance) for relief on the basis that the employer terminated their employment for one or more prohibited reasons. If the FWC cannot resolve the matter, it will be dealt with by a court.

The following constitute prohibited reasons under the FW Act:

- Temporary absence from work because of illness or injury. A "temporary absence" is defined by the Fair Work Regulations 2009 as an unpaid absence, or a number of unpaid absences, of a total three months' duration within a 12 month period. Time spent on workers' compensation counts as an unpaid absence for this purpose. Other conditions also apply for an absence to be considered "temporary";
- Trade union membership or participation in trade union activities outside working hours or with the employer's consent during working hours;
- Non-membership of a trade union;
- Seeking office as, or acting, or having acted in the capacity of, a representative of employees;
- The filing of a complaint or the participation in proceedings against the employer involving alleged violation of laws or regulations, or recourse to competent administrative authorities;
- (Subject to some exceptions) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (please note that an employee may also bring a claim in the relevant equal opportunity tribunal if terminated on the basis of any of these (and other) prohibited grounds);
- Absence from work during maternity leave or other parental leave; and
- Temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

This part of the FW Act applies to both National System employees and State System employees because it is based on the external affairs power under the Australian Constitution, not the corporations power.

It's also important to note that since the commencement of the general protections provisions of the FW Act, National System employees have certain "workplace rights" which protect them from any adverse action taken against them if the action was for any reason similar to but broader than those set out above. A person has a "workplace right" if the person is entitled to the benefit of, or has a role or responsibility, under a workplace law, workplace instrument or order made by an industrial body; is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or is able to make a complaint or inquiry to a person or body having the capacity under a workplace law to seek compliance with that law or workplace instrument or in relation to the employment. This could allow an employee to challenge a performance or discipline process that results in some form of discipline other than dismissal. In addition, under these provisions it is unlawful to terminate an employee's employment for the purpose of engaging them as an independent contractor to perform the same, or substantially the same, work. A defence of a claim made under these provisions requires the employer to demonstrate that it did not take adverse action because of the workplace right. That reverse onus of proof coupled with the breadth of the provisions present considerable risks and uncertainty for employers.

The FW Act allows employees to obtain an injunction from a court to prevent their employer from dismissing them unlawfully. This makes it more important than ever for employers to get the process right, including seeking advice at the right time.

If an employee is dismissed, they have 21 days from the date of dismissal to lodge a general protections claim with the FWC. Once a claim is made, similarly to an unfair dismissal claim, the matter is initially listed for conciliation. If the matter is not resolved at the conciliation stage, and the FWC is satisfied that all attempts to resolve the dispute (other than by arbitration) have been, or are likely to be unsuccessful, the FWC will issue a certificate to that effect. The parties can then either agree for the matter to be arbitrated by the FWC, or if both parties do not consent to this option, the employee has 14 days from the issuing of the certificate by the FWC to elect to progress the matter to the Federal Court or Federal Circuit Court of Australia.

Unlawful termination claims under State laws

Under State industrial laws (not including equal opportunity laws) there is no specific protection against "unlawful" (as opposed to unfair) dismissal. However, in State tribunals the legality of the reason for termination is still an important factor in deciding whether the termination was fair in all the circumstances of the case.

There are also some special types of claim that can be made in particular States.

State System employees in Tasmania, and unions on behalf of State System employees in Western Australia and New South Wales, can apply to have a dispute about termination of employment heard and determined by the relevant tribunal pursuant to its general powers to hear and determine an industrial matter. This would allow claims relating to the alleged unlawfulness of a dismissal to be brought before those tribunals.

State System employees in Western Australia can bring a claim for being denied contractual benefits. It should be noted that the Western Australian Industrial Relations Commission has determined that a denial of contractual benefits claim can also be made by National System employees, on the basis that the right to make such a claim is not prevented under the FW Act.

State System employees in Queensland can apply to the Queensland Industrial Relations Commission to resolve a dispute involving their employment as an industrial matter. This application, however, must be made whilst the employee remains employed with the relevant employer.

Equal opportunity claims

It is unlawful to terminate an employee's employment on the basis that the employee has an "attribute" that is protected by the FW Act; Commonwealth anti-discrimination laws; or State anti-discrimination laws.

The list of protected "attributes" varies between the different State and Commonwealth anti-discrimination laws. Some of the "attributes" that are protected under most anti-discrimination laws include, for example, race, sex and marital status. You should seek advice about what "attributes" may be protected in relation to your employees.

Both direct and indirect discrimination are prohibited.

Direct discrimination occurs where, for example, an employee is terminated because of his or her race.

Indirect discrimination occurs where an unreasonable requirement, condition or practice, which at first glance has an apparently neutral effect, in practice has a discriminatory effect on people with a particular attribute or attributes who cannot comply with the requirement, condition or practice. For example, it may be indirectly discriminatory to impose requirement that all staff in a business work full-time and to dismiss staff who refused to do so, unless it could be demonstrated that it was necessary that all staff worked full-time. This is because some groups of staff, for example women, may find it hard to meet the full-time requirement due to parental responsibilities.

Some of these "attributes" overlap with the "unlawful termination" grounds. However, an anti-discrimination claim is a different type of claim to an unlawful termination claim under the FW Act. These claims are first dealt with by specialist equal opportunity tribunals, rather than by the FWC. They may ultimately be referred to a State or Federal Court or tribunal.

It is important to note that some exceptions to the protections in antidiscrimination laws do exist. If you are concerned about the potential for breach of anti-discrimination laws in a particular case, we recommend that you seek specific advice on these issues and how the law applies in the relevant circumstances.

Common law claims

It is possible for terminated employees to make claims against their employer on the basis that the employer has breached a term of the employee's contract of employment. This type of litigation is relatively rare due to its high cost to the employee and is more often commenced by more highly paid employees. However, the risk of such claims does exist and employers should be aware that substantial damages have been paid in some cases.

Breaches of express contractual terms

An employee may allege a breach of an express term of a written contract, for example, an express written commitment in the contract not to terminate the employee's employment in certain circumstances.

Claims may also be made in some cases with respect to oral promises which are said to form part of the contract.

In other cases, express terms which might be argued to be "external" to the contract itself can be found to form part of the contract and a breach of the "external" term to justify a claim of breach of contract. For example, in Goldman Sachs JB Were Services Pty Limited v Nikolich [2007] FCAFC 120, the Full Federal Court confirmed a first instance Federal Court decision ordering damages of $515,869.00 to be paid to the former employee, Mr Nikolich. The Full Federal Court held that Mr Nikolich suffered psychological injury during the course of his employment. His employment was later terminated on the basis that he could not perform the inherent requirements of his role. Among other things, the employer in its policy handbook committed to providing a safe and healthy workplace. The Full Federal Court found that there was a common law duty to provide a safe and healthy workplace. There was also a contractual duty to do this, based on the fact that Mr Nikolich had been required to sign off on the health and safety part of the handbook and that handbook contained an express promise that the employer would provide a safe and healthy workplace. The handbook was found to be part of Mr Nikolich's contract of employment and a breach of a term of the handbook was sufficient to ground a claim of breach of contract.

We strongly recommend that you consider all terms of your contracts of employment and relevant policies and procedures before making a decision to terminate an employee's employment. Further, we recommend you seek advice in preparing contracts, as the possibility of this type of claim can be minimised with careful drafting.

Breaches of implied contractual terms: "Mutual trust and confidence"

Prior to the decision of the High Court in *Commonwealth Bank of Australia v Barker* [2014] HCA 32 (**Barker**), employees who were dismissed in circumstances that they believed were unfair often attempted to claim that the employer had breached an implied contractual duty of "mutual trust and confidence" between employer and employee, borrowing from a British doctrine, which has been accepted in the UK. In the previous decision which was appealed to the High Court, a majority of the Full Federal Court had found (in *Commonwealth Bank of Australia v Barker* [2013] FCAFC 83), that there did exist in contracts of employment an implied term that the employer will not, without reasonable cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee or that the employer will not to engage in conduct that is inconsistent with the employer's duty of confidence in the employee. However, the High Court ultimately overturned this ruling, determining that there is no implied term of mutual trust and confidence in Australian employment contracts. In doing so, the High Court held that such a term did not satisfy the relevant test of "necessity" for the term to be implied into employment contracts as a matter of common law.

Although the High Court's decision in Barker has effectively put an end to "mutual trust and confidence" claims, we would still recommend that as part of best practice, you ensure you do not breach any express contractual terms, you comply with any policies and procedures dealing with termination of employment and that you follow a fair process in terminations, as outlined in this booklet.

Breaches of implied contractual terms: "Reasonable notice"

In some cases, particularly those involving very senior employees, an employee may allege that he or she should have been paid "reasonable notice" on termination and launch a breach of contract claim on this basis. This type of claim may be successful if the employee's contract contains no notice period, or in some cases if the employee's job has changed substantially since the employee originally commenced work and the contract has become outdated. In these cases, a court may determine what constitutes "reasonable notice" and require that the employer pay that reasonable notice. "Reasonable notice" in some cases has been found to be up to 18 months' pay.

Some factors that will influence the "reasonableness" of notice are:

- seniority of the employee;
- the employee's age;
- size of the employee's salary;
- length of service; and
- standards in the industry or profession.

Nevertheless, advice should be sought in determining "reasonable notice".

To avoid this type of claim, we strongly recommend that you consider all terms of your contracts of employment before making a decision to terminate an employee's employment. Further, we recommend you seek advice in preparing contracts, as the possibility of this type of claim can be minimised with careful drafting.

Claims under the Competition and Consumer Act 2010 (Cth) (Australian Consumer Law)

Section 18 of the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act) prohibits an employer making misleading claims to a person who is seeking employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment. In some cases, on termination an employee may make a claim that the termination breaches a representation made prior to employment and therefore constitutes a breach of the Consumer Law. For example, if an employee can prove that:

- a representation was made to the employee before he or she commenced employment that he or she would never be made redundant;
- a redundancy has in fact occurred; and
- the employee relied on the representation when choosing to accept the position;

then a claim under section 18 of the Australian Consumer Law (Schedule 2 to the Competition and Consumer Act) might be successful.

Claims about unconscionable (essentially, unfair) treatment of an employee during employment or in relation to termination may also be made under the Australian Consumer Law in some cases.

These types of claims are often made at the same time as claims for breaches of express or implied contractual terms. To assist in avoiding such claims, we recommend you take care in making commitments to job applicants and ensure contracts are carefully drafted. If you believe there may be a risk of a Australian Consumer Law claim, we recommend you seek specific advice.

Unfair contracts claims: State System employees only

In New South Wales and Queensland, State System employees may make claims based on the fact that their contracts of employment are “unfair”. This is not an avenue available to National System employees.

Section 106 of the Industrial Relations Act 1996 (NSW) confers upon the Industrial Court of New South Wales the power to vary, or declare void, contracts, arrangements or collateral arrangements under which work is performed in an industry in New South Wales. Its coverage includes, but is not limited to, contracts of employment. The power of the court to make orders is dependent on a finding that the contract or arrangement is unfair, harsh or unconscionable, or contrary to the public interest.

The most common form of order made by the court is a monetary order consequent upon a variation of the contract or arrangement following a finding of unfairness. Whilst there is a legislative restriction on the use of the unfair contract jurisdiction as a direct substitute for unfair dismissal, proceedings are still most commonly commenced upon termination, with claims often being carefully framed to distinguish them from unfair dismissal proceedings. In the case of employees, claims need to be brought within 12 months of termination and can only be brought by employees earning less than $200,000 per annum.

Similarly, section 276 of the Industrial Relations Act 1999 (Qld) confers upon the Queensland Industrial Relations Commission the power, upon application by an employee, to amend or declare void a contract it considers an unfair contract, that being a contract that is harsh, unconscionable, unfair, against the public interest or a contract that provides less terms than the relevant industrial instrument or this Act. The Commission may declare a contract unfair if it considers the contract was unfair when entered into or that it became unfair after it was entered into. The Commission is entitled to make an order it considers appropriate about the payment of an amount for a contract amended or declared void. This provision, in comparison to its NSW counterpart, has not been so significantly utilised. Further, this avenue is not available if the applicant previously made an application for reinstatement for the same matter, or the applicant earns in excess of the statutory cap of the jurisdiction.

PART 4: GUIDELINES

The following are guidelines only and are provided as general information and assistance for employers where a matter has become serious and the employer is considering termination of the employee's employment. The Guidelines can be used in relation to both National System and State System employees. They are not comprehensive and in each case advice must be taken in respect of the particular circumstances. Some enterprises will need to have regard to their particular dispute resolution procedures and inquiry processes.

Small businesses with National System employees should ensure that they follow the Small Business Fair Dismissal Code (a copy can be found at the back of this booklet). Where the Code is followed, a National System employee who is employed by a small business will not be able to bring an unfair dismissal claim. However, as the National System employee may still have access to other types of termination of employment claims, it is still prudent to follow these Guidelines and seek advice.

Unsatisfactory performance

1. Check to make sure that the required standards of performance are set out in writing in the employee's contract, the employer's policies or elsewhere, and that the employee has been made aware of these standards (if not seek further advice).

2. Arrange a meeting with the employee and let them know prior to the meeting that there are serious concerns regarding their continued employment. Invite them to bring a support person with them as an observer to the meeting. Do not object to their choice of support person without seeking advice. Prepare a letter to be handed to the employee after the meeting (see step 4).

3. At the meeting:

   (a) The employee must be told in clear and precise terms exactly what you are dissatisfied with (it is not sufficient to make statements such as "we are not happy with your performance" or "your attitude (or your performance) will need to improve");

   (b) Ask the employee to respond to each allegation and carefully record and consider the responses and particularly whether they justify the poor performance; and

   (c) If you consider the responses unsatisfactory, inform the employee of the following:

      (i) that in your view the responses do not justify the poor performance;

      (ii) in clear terms the performance standards that are required;

      (iii) that failure to improve and achieve the required standards of performance may lead to termination of the employee's employment;

      (iv) that their performance will be reviewed within a specified time, or earlier, if other serious matters arise (seek advice on the appropriate period for review in each particular case); and

      (v) discuss with the employee any measures that are necessary to improve the performance (for example, further training by the employer).

4. After the meeting has been concluded, give the employee a letter confirming the matters discussed and have the employee sign a copy of the letter to indicate receipt and that it truly and accurately reflects what was discussed. Invite the employee to comment in writing on the letter.

5. Monitor performance on a regular basis and conduct another formal interview at the end of the specified review period, or earlier, if other serious matters arise. Make sure the employee understands their employment is under review.

6. If there is no satisfactory improvement, repeat the counselling session as outlined above. Please note that depending upon the issue and the history, it may be necessary to hold a number of counselling sessions and give a number of written warnings (it is a fallacy that it is sufficient to simply provide three written warnings). When the employee has been given a reasonable number of opportunities to improve their performance, and they have not done so, conduct a final counselling session and issue a final warning. Make sure a time period again is specified for the employee to improve. If, after issuing a final warning, sufficient improvement has not occurred, conduct another meeting with the employee.

7. If the employee's response at the meeting is unsatisfactory as to why their employment has not achieved the required standard, tell them that you are seriously contemplating terminating their employment. Invite them to explain and put up any reason as to why they should not be dismissed. Also allow them a fair opportunity to raise any other mitigating circumstances that may warrant consideration.

8. Make sure you record your considerations given to matters raised by that employee and that you have considered other relevant matters even if not raised by the employee, such as:

   (a) alternatives to dismissal, including a transfer or demotion (if their contract permits it);

   (b) the length of service and past record of the employee;

   (c) whether the employee has been provided with appropriate training; and

   (d) the personal circumstances of the employee, particularly the effect of dismissal on them.

9. The employer should take enough time to consider matters raised by the employee and all other relevant matters.

10. If you decide to dismiss the employee, prepare a letter of termination outlining the reasons for dismissal, the effective date of termination, whether the employee is required to attend for work until the effective date of termination, that it is a requirement that company property be returned by a certain time and any other final matters that need to be dealt with. We recommend that you get advice in preparing this letter.

11. Arrange a final meeting with the employee where you advise the employee of the reasons for termination and run over the contents of the letter. Ensure that the employee is provided with the appropriate notice to terminate their employment or compensation in lieu of notice (if applicable). Do not dismiss the employee by email, telephone or letter without meeting.

12. Make sure the employee is also paid all accrued entitlements at the time their employment is terminated.

Serious misconduct

1. The types of conduct which constitute serious misconduct depend on the type of enterprise and the particular circumstances in each case. In most enterprises safety issues will be paramount, in others confidentiality is of utmost importance. The employer should therefore ensure that there is a policy defining which acts constitute serious misconduct. Employees should be trained regularly in this area so they have a clear understanding of the meaning of the policy, and employers must apply the policy consistently to all employees on all occasions.

2. Where an employer wishes to allege an employee has engaged in serious misconduct, it is essential for the employer to conduct a thorough investigation into the alleged incident or incidents of serious misconduct. This will include:

   (a) gathering evidence including interviewing all relevant witnesses (obtain original signed statements from witnesses);

   (b) putting specific details of the alleged misconduct to the employee (in a formal interview or in limited circumstances in writing);

   (c) giving the employee every reasonable opportunity to comment on the evidence and allegations against them;

   (d) considering the employee's responses;

   (e) recording all investigation details in writing; and

   (f) the employer should carry out this process as soon as possible after the alleged misconduct is discovered as any delay may be regarded as acceptance of the behaviour in question.

3. Putting the allegations specifically to the employee and giving the employee an adequate opportunity to answer the allegations is critical. If the employer is not satisfied with the employee's responses, the employee should be told that the employer is seriously considering terminating the employee's employment and should be asked to raise any reasons why their employment should not be terminated.

4. The employer should take enough time to consider any matters raised by the employee, the allegations and the evidence. You should consider the employee's responses as promptly as possible. If the

employee's contract permits, and if appropriate, the employee should be suspended on full pay while the investigation and deliberation by the employer is taking place.

5. When deciding whether to terminate the employee's employment, the employer must consider the employee's comments and the following issues:

   (a) any mitigating circumstances associated with the employee's misconduct;

   (b) the employee's work record; and

   (c) alternatives to dismissal such as a transfer to another work area or demotion (if the employment contract and the nature of the serious allegations permit it).

6. If the employer decides to terminate the employee's employment based on serious misconduct, then the employee should be informed of this at a further meeting and provided with a letter of termination outlining the reasons for the decision, the immediate effect of the termination and dealing with any other matters such as the return of company property. We recommend that you seek advice in drafting such a letter.

7. In some circumstances it may be desirable to tape record meetings, with the employee's consent, or to undertake video surveillance of the employee. Please note current legislation may restrict such activities. We recommend that you seek legal advice in these circumstances.

Redundancy requirements

1. Between 27 March 2006 and 1 July 2009, National System employees who were dismissed for genuine operational reasons, or reasons that included genuine operational reasons, could not make an unfair dismissal claim. This has now changed. From 1 July 2009 a National System employee will only be excluded from making an unfair claim on the basis of redundancy where:

   (a) their position is genuinely redundant, in that the employer no longer requires the position to be performed by anyone;

   (b) the employer complied with consultation requirements in any modern award or enterprise agreement; and

   (c) redeployment, within the employer or an associated entity, is not reasonable.

   These employees must also be paid any redundancy payment they are entitled to under their contract of employment, applicable industrial instrument, or the NES.

2. As a first step in any redundancy process, you should check and comply with any consultation requirements in applicable awards, orders or registered agreements, Commonwealth or applicable State laws, and in the employee's contract of employment (including policies). This includes provisions which require the employer to consult with employees over "major workplace changes" that are likely to have "significant effects" on employees (such provisions must be included in enterprise agreements made under the FW Act, and are included in most Commonwealth modern awards, and in some State laws such as the Minimum Conditions of Employment Act (WA), the Fair Work Act 1994 (SA), the Industrial Relations Act 1984 (Tas), the Employment Protection Act 1982 (NSW) and the Industrial Relations Act 1999 (Qld)).

3. Next, you should carefully consider whether redeployment, within your company and associated entities (which may include other companies in the same group), is reasonable. In some cases it will be prudent to get advice on this including, if applicable, your reasons for discounting any suggestions made by the employee or their union.

4. You should advise the employee that you are willing to discuss with them ways to minimise the effect of redundancy by:

   (a) providing outplacement counselling if appropriate; and

   (b) assisting employees to find alternative employment by, for example, allowing them to have time off during the notice period.

   (Note that there may be a specific entitlement to paid time off during the notice period, such as that contained in some modern awards, the Minimum Conditions of Employment Act 1993 (WA), the Fair Work Act 1994 (SA) and the Industrial Relations Act 1984 (Tas)).

5. Where 15 or more employees are likely to be made redundant then you must:

(a) notify Centrelink in a letter containing the required details. We recommend that you seek advice in drafting such a letter; and

(b) notify and consult with any trade union of which any employee is a member and is entitled to represent the industrial interest of that member (there are prescribed things that must be discussed).

6. In discussions with the employees and union (if required) you should discuss with them ways of avoiding the redundancies. This could include changes in employment arrangements such as job sharing, extended unpaid leave or reduced hours. You should also ask individual employees to advise management of any personal circumstances that may warrant special consideration.

7. All responses by the employees and unions must be carefully considered and we recommend that you record such responses and the steps taken in considering the employee and union responses.

8. If particular employees have to be selected for redundancy, fair and objective selection criteria are necessary and should be documented. Selection criteria may include:

(a) skills, qualifications and experience;

(b) the employer's present and future skill needs; and

(c) operational requirements – full and part-time employees may be retained over casual and temporary requirements.

(Be careful not to use criteria that are unlawfully discriminatory.)

We recommend that, where possible, the employees be informed of the criteria.

9. Please note that if work performance is to be used as a selection criteria, employees must be given an opportunity to answer any allegations about poor performance or conduct prior to the employer's decision being made.

10. The employee should be provided with notice of termination in writing, the reasons for termination and the termination date. The employee must be given the appropriate minimum notice or payment instead of notice. The more notice of termination (in addition to the minimum) that can be provided to a selected employee, the better.

11. You should pay employees any redundancy pay they are entitled to (see the discussion of this in Part 1 of this booklet). If there is no redundancy payment entitlement prescribed by law, it may still be prudent to make a redundancy payment. You should obtain advice on the appropriate amount in such cases.

12. You should also seek specialist tax advice in respect of payments made to an employee on, or as a consequence of, termination of employment.

Incapacity

1. Sometimes because of physical or mental disability, an employee will become unable to perform the inherent requirements of the position they were employed to perform. In these circumstances, termination of the employee's employment requires careful consideration of anti-discrimination legislation and those provisions of the FW Act that deal with termination of employment on discriminatory grounds (unlawful termination). In addition, such an employee can be held to be unfairly dismissed if they are not given a "fair go all round".

2. If the employee is on workers' compensation, then seek further advice. In all Australian States there are limitations on an employer's ability to terminate the employment of an employee who is on workers' compensation.

3. It is essential that you have sufficient up-to-date medical evidence to establish that the employee is not fit to perform the inherent requirements of their position. The relevant "position" is the employee's pre-disability position, provided that any work done after suffering the disability, under a rehabilitation program or otherwise, is done on a temporary basis and is not intended to vary the position they are employed to perform.

4. However, the matter does not end there. The employer must also consider any alternative positions that the employee may be fit to perform. Therefore, the medical evidence should indicate the employee's fitness to perform not only their pre-disability position, but any other jobs that the employer has available or could reasonably create and the employee would be willing, and has the skills and experience, to perform (or through training, could acquire the skills and experience to perform).

5. The type of medical evidence required will depend on the circumstances but usually the employer should obtain an opinion from a specialist who deals with the employee's particular type of disability (if there is more than one type of complaint, it may be necessary to go to more than one specialist for an opinion). It is also useful to obtain a functional workplace assessment. Each medical practitioner needs to be very specific about the work the employee is fit, or unfit, to perform. We suggest seeking advice on the specific questions on which you should ask the medical practitioner to provide an opinion.

6. As a first step you should hold a meeting with the employee to discuss the reasons for your seeking the medical evidence, and find out from the employee if there are any alternative positions the employee would be willing to perform. Take detailed notes of the matters discussed.

7. The medical evidence should then be obtained. It is very important that any specialist who is asked to see the employee and provide an opinion, be provided with detailed information about the duties required to be performed in each particular position so they can give an opinion on the employee's capacity for those particular positions.

8. The employer should then consider placing the employee in any position determined by the medical evidence, that is within the employee's capabilities to perform. The employer also has an obligation to consider making reasonable changes to possible positions to accommodate the employee. Take detailed notes of the consideration given to these issues.

9. If there are no available positions within the employee's capabilities, then a further meeting should be held with the employee to discuss the medical evidence, and any other medical evidence the employee may have obtained. This is an opportunity for the employee to put up any reasons why their employment should not be terminated, any alternatives to termination of their employment, or any mitigating circumstances including personal circumstances and issues concerning the manner and timing of the termination of their employment. Special trauma counselling should be made available to the employee. Take detailed notes of the matters discussed at the meeting. Do not advise the employee that their employment is terminated during the meeting. Tell the employee that you will consider their responses before making a final decision.

10. Consider the employee's responses and any other relevant matters not raised by the employee. Again, record your deliberations. If, after considering all the evidence, the employee's responses and all other relevant matters, you decide to terminate the employee's employment, you should advise the employee personally and confirm your decision to terminate their employment in writing. This letter should set out the reasons for termination, the termination date (making sure the required period of notice is given), and other final matters such as the return of company property.

PART 5: CONCLUSION

Employers should take care to ensure employees receive all entitlements on termination of employment and that in all the circumstances the decision to terminate the employee is not unfair. That is, employees must be given "a fair go all round" by their employer.

Please note that the information in this booklet is current as of November 2014 and is designed as a general guide only.

Training

Clayton Utz has developed a series of comprehensive training courses for managers on minimising the risks associated with termination of employment. These courses include training in the key area of managing performance and conduct.

For a competitive price, managers can receive tailored training involving one-on-one coaching and real life simulated experience through role plays.

Small business fair dismissal code

Please note that this is an exact reproduction of the text of the Australian Government's Small Business Fair Dismissal Code. It has not been drafted by Clayton Utz.

Commencement

The Small Business Fair Dismissal Code commenced on 1 July 2009.

Summary dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police.

Of course, the employer must have reasonable grounds for making the report.

Other dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job. The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity. A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

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