

A Practical Guide to Employment Matters

Types of Employment Contracts

- Individual contract between employer and employee;
- Contracts covered by Common Rule Awards;
- Australian Workplace Agreements;
- Certified collective agreements.

Conditions of Employment Contracts

- Found within terms of individual contracts, Australian Workplace Agreements and certified collective agreements;
- If applicable, Common Rule Awards specify minimum employment conditions, such as rates of pay, annual leave, sick leave, long service leave, notice periods for termination, redundancy payments;
- Individual contracts should be in writing (but may be partly oral and partly implied by performance and conduct of the parties). Contracts should contain terms and conditions of employment, including position title and description, hours of work, remuneration, confidentiality provisions, restraint of trade provisions if appropriate, termination provisions (for both employer and employee) and period of employment contract (open-ended or for specified period).

Jurisdiction for Employment Matters in Victoria

- Victoria has referred all powers in relation to industrial relations to the Commonwealth. The *Workplace Relations Act 1996* and *Regulations* made under that Act apply to all employees and covers matters in relation to Common Rule Awards, Australian Workplace Agreements and certified collective agreements.
- Australian Industrial Relations Commission and Federal Court of Australia have jurisdiction to hear and determine disputes in relation to employees covered by Common Rule Awards, Australian Workplace Agreements and certified collective agreements.

- Victoria state courts (Magistrates Court, County Court and Supreme Court) have jurisdiction to hear and determine disputes in relation to individual contracts that are not covered by Common Rule Awards, Australian Workplace Agreements and certified collective agreements.

Termination of Employment

- Individual contracts may contain provisions for either employee or employer to terminate in specified circumstances and on giving notice of termination. They may also contain provisions for summary termination by the employer in cases of serious misconduct, with matters that constitute serious misconduct being clearly set out in the contract. Be sure to follow any provisions in individual contracts in relation to termination.
- The *Workplace Relations Act 1996* prohibits "unfair dismissal" in certain circumstances. The Act prohibits employers with 100 employees or more from termination of employees in circumstances where the dismissal would be **harsh, unjust or unreasonable**. The Act does not define what constitutes harsh, unjust or unreasonable, but lists factors that must be taken into account. Those factors include:
 - whether there was a valid reason related to the **capacity or conduct** of the employee *or* the **operational requirements** of the business;
 - whether the employee was **notified** of that reason;
 - whether the employee was given the **opportunity to respond** to any reason;
 - if the termination relates to unsatisfactory performance, whether the employee **had been warned** about the unsatisfactory performance;

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- the degree to which the size of the employer's business would be likely to impact on the procedures followed in effecting the termination;
- the degree to which an absence of dedicated human resource management specialists or expertise in the business would be likely to impact on the procedures followed in effecting termination.
- Employees not covered by "unfair dismissal" provisions:
 - employer employing less than 100 employees;
 - employees covered by period of probationary employment (commonly 3 months but can be up to 6 months);
 - employees engaged on contract for specified period or task;
 - casual employees, unless engaged for at least 12 months;
 - trainees under the National Training Award or approved traineeship agreements and apprentices where the employment is limited to the duration of the traineeship or apprenticeship;
 - employees not covered by a federal award or agreement and earning a total remuneration package of more than \$90,400.00 (amount indexed on 1 July each year).
- Remedies available to employees for "unfair dismissal":
 - compensation of up to 6 months pay;
 - reinstatement;
 - legal costs associated with successful claim.
- The *Workplace Relations Act 1996* prohibits **unlawful termination**. Unlawful termination is termination based on any of the following discriminatory grounds:
 - temporary absence from work (up to 3 months) because of illness or injury;
 - temporary absence from work to carry out a voluntary emergence management activity, where the absence is reasonable in all the circumstances;
 - membership of a trade union 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 as, a representative of employees;
 - filing a complaint, or participation in proceedings against an employer, involving alleged breaches of laws or regulations;
 - race, colour, gender, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin (unless the reason for termination is based on the inherent requirements of the job, or if it relates to an employee of a religious institution and it is done in good faith and because of the teaching or belief requirements of that institution);
 - refusing to sign or negotiate an Australian Workplace Agreement;
 - being absent from work on maternity leave or other parental leave.
- Onus is on employer to show that reason for termination was not based on any of the prohibited grounds.
- Remedies available to employees for unlawful termination:
 - compensation (not limited to 6 months pay);
 - reinstatement;
 - legal costs associated with successful claim.

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- Jurisdiction for "unfair dismissal" and unlawful termination claims:
 - Australian Industrial Relations Commission;
 - Federal Court for claims for unlawful termination that do not settle at conciliation conference held by Australian Industrial Relations Commission

- The Workplace Relations Act 1996 requires employers to give **minimum periods of notice or payment in lieu** (except in cases of serious misconduct) The period of notice is increased by 1 week if the employee is aged more than 45 years and has more than 2 years of continuous service with the employer. Notice periods required by the Act are:
 - employment not more than 1 year - at least 1 week notice;
 - employment between 1 and 3 years - at least 2 weeks notice;
 - employment between 3 and 5 years - at least 3 weeks notice;
 - employment for more than 5 years - at least 4 weeks notice.

- **Serious misconduct**
 - wilful or deliberate behaviour inconsistent with continuation of the contract of employment;
 - conduct that creates an imminent and serious risk to health or safety of any person, or the reputation, viability or profitability of the employer's business;
 - theft, fraud, assault, intoxication or refusal to carry out a lawful and reasonable instruction consistent with the employee's contract of employment

Severance pay for redundancies. In addition to notice or pay in lieu of notice, many awards and agreements contain provisions requiring employers to pay severance pay for termination of employment in redundancy situations (i.e. where employer no longer requires any person to do the job carried out by the employee whose employment is being

terminated). It compensates employees for the loss of their jobs. The following are current community standard severance pay provisions:

- employment not more than 1 year - nil;
- employment between 1 and 2 years - 4 weeks pay;
- employment between 2 and 3 years - 6 weeks pay;
- employment between 3 and 4 years - 7 weeks pay;
- employment for 4 years and more - 8 weeks pay.

Change of ownership of business

Where an employer buys a business, transmission of entitlements will depend on any conditions of sale and the award or agreement that covers employees of the business. Sometimes only long service leave entitlements transmit. The situation may be more varied for personal leave or annual leave depending on the award or agreement that applies.

If the entitlements do not carry across to the new employer, the former employer will usually be required to pay out the leave entitlements accrued by employees up until the time of sale, other than sick leave.

Sexual Harassment & Discrimination in the Workplace

Sexual Harassment

Sexual harassment is expressly prohibited in the workplace pursuant the Sex Discrimination Act 1984 (Cth) and the Equal Opportunity Act 1995 (Vic) [the Acts].

Sexual harassment under the Acts occurs where a person:

- makes an unwelcome sexual advance; or

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- makes an unwelcome request for sexual favours; or
- engages in other unwelcome conduct of a sexual nature

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that other person would be offended, humiliated or intimidated.

The legal definition contains three distinct elements:

1. the **behaviour must be unwelcome** - considerations include
 - was the conduct solicited or invited;
 - the respective ages and level of experience of the parties;
 - the power relationship between the parties.
2. conduct of a **sexual nature**
3. **reasonableness** - would a reasonable person anticipate that the conduct would be unwelcome? - objective test

Sexual harassment will usually fall into one of three categories:

- behaviour which is accompanied by a direct or implied threat, benefit or promise;
- behaviour which creates a sexually permeated or hostile working environment;
- behaviour which is also an offence under the criminal law

Who must not harass or be harassed?

- employers;
- employees;
- contract workers and commission agents;
- a person carrying out duties in the same workplace;
- a client, customer or any other person during the course of supplying goods, services or facilities

Liability and duties of employers

Employer may be vicariously liable for an incident of sexual harassment by an employee or agent. Employers have a duty to take all reasonable steps to prevent sexual harassment. Lack of awareness

will not discharge liability. If claim made against employer on basis of vicarious liability, onus is on the employer to prove that all reasonable steps have been taken.

Remedies

- compensation based upon an assessment of loss or damage suffered;
- compensation for diminished earning capacity;
- costs of medical care or psychological counselling (including future costs);
- compensation for emotional injury;
- aggravated damages;
- punitive damages;
- legal costs

Minimising the Risk

- establish a clear policy - explain what sexual harassment is and that it is against the law and will not be tolerated - detail circumstances where sexual harassment can arise and what the consequences are of breaching the policy - include information as to whom employees should contact should they require further help or wish to report an incident (include alternative contact persons, preferably male and female);
- effectively communicate the policy to staff and management;
- establish procedures to deal with harassment and discriminations complaints - perhaps both formal and informal;
- document all allegations/complaints including each step taken to resolve the matters;
- appoint sexual harassment/discrimination officer and an investigations officer;
- review new policy and procedures on a regular basis

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Discrimination in the Workplace

In both Victorian and Commonwealth jurisdictions, there exists legislation which prohibits discrimination in the workplace. Most of the anti-discrimination legislation that exists covers two categories of discrimination, *direct* and *indirect discrimination*, which must be linked to a field of activity covered by the legislation. That is, the discrimination must be both prohibited under the relevant legislation (for example, discrimination because of race, colour or sexual preference) AND discrimination that is either direct or indirect.

Direct Discrimination

Generally, direct discrimination occurs when a person discriminates against another person on the ground of a certain attribute of the aggrieved person. To establish whether a complaint has been subject to direct discrimination, three conditions must be present:

1. the complainant was subject to less favourable treatment than persons without the attribute;
2. the treatment he or she received was by reason of that attribute; and
3. the circumstances of the treatment were the same or not materially different from those of persons without the attribute.

Intention to discriminate is **not** a necessary element and *reasonable conduct* is not a defence to an allegation.

Indirect Discrimination

Indirect discrimination occurs where a person must meet an unreasonable requirement or condition which they would have difficulty meeting and with which a substantially higher proportion of persons without the attribute comply or are able to comply and which is not reasonable. To establish whether a complainant has been subject to indirect discrimination, four conditions must be present:

1. the discriminator requires the aggrieved person to comply with the requirement or condition, which is a condition of fact, and can apply to future requirements;
2. a substantially higher proportion of persons without the attribute comply or are able to comply with the requirement or condition than persons of the same status as the complainant;
3. the aggrieved person does not or is not able to comply with that requirement or condition; and
4. the requirement to comply with the requirement or condition is not reasonable having regard to the circumstances of the case.

Examples of discrimination

An employer is prohibited from discriminating during the *job application stage* in the following areas:

1. in deciding who should be offered work; or
2. in the terms of the work offered; or
3. in failing to offer work; or
4. by denying a person seeking work access to a training program.

Further, discrimination is prohibited against employees and contract workers in that a person must not discriminate:

1. by denying or limiting access to an employee of opportunities for promotion, transfer to training or to any other benefits connected with the employment; or
2. by dismissing the employee or otherwise terminating his or her employment; or
3. denying the employee access to a training program; or
4. by subjecting the employee to any other detriment

Discrimination is also prohibited on the basis of the following attributes (note that this list is not exhaustive):

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- gender;
- sexual preference;
- pregnancy;
- marital status;
- race;
- impairment;
- political or religious beliefs

Employers should be aware that where any prohibited discriminatory acts are done by an employee in the course of employment, the employer or principal will be vicariously liable unless he or she took all reasonable precautions to ensure that the employee would not act in contravention of the prohibitions.

Exemptions

The imposition of a genuine occupational requirement for a position is not unlawful. It is not unlawful for an employer to discriminate in some circumstances, including but not limited to the following:

- determining who should be offered employment in relation to the provision of domestic or personal services in, or in relation to, any person's home;
- genuine occupational qualifications of the employment, such as having particular physical characteristics, or the need to preserve decency or privacy;
- the requirement of particular political views with respect to employment as a ministerial advisor or member of the staff of a political party or of the electoral staff of members of parliament;
- a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute;
- people who are his or her relatives in a business carried on by him or her;
- who should be offered employment if the employer employs no more than the equivalent of five people on a full-time basis (including the people to whom employment is offered);
- another person on the basis of impairment in any of the areas specified in ss 13 or 14 of the (VIC) Equal Opportunity Act 1995 (the 'Act') if:

- (a) in order to perform the genuine and reasonable requirement of the employment, the other person requires special services or facilities, and it is not reasonable in the circumstances for those special services or facilities to be provided; or
- (b) the other person cannot or could not adequately perform the genuine and reasonable requirements of the employment even after the provision of the special services or facilities;

- setting reasonable terms or requirements of employment, or making reasonable variations to those terms or requirements, to take into account the reasonable and genuine requirements of the employment; any special limitations that a person's impairment or physical features imposes on his or her capacity to undertake the employment; or any special services or facilities that are required to enable him or her to undertake the employment or to facilitate the conduct of the employment;
- the setting and enforcement of standards of dress, appearance and behaviour for employees that are reasonable having regard to the nature and circumstances of the employment;
- any of the criteria set out in ss13 or 14 of the Act if the employment involves the care, instruction or supervision of children; and the employer genuinely and rationally believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children;
- paying an employee who is under the age of 21 years according to the employee's age;
- limiting the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.

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