

# MANAGING THE WORKPLACE

## UNFAIR DISMISSAL & UNLAWFUL TERMINATION

### SUMMARY OF THE LAW AS AT 13 OCTOBER 2004

The *Workplace Relations Act 1996* (the Act) prohibits unfair dismissals and unlawful terminations.

#### Unfair dismissal

Unfair dismissal = dismissal that is harsh, unjust or unreasonable. The Act does not define 'harsh, unjust or unreasonable', but lists factors that must take into account:

- whether there was a valid reason for the termination 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 an **opportunity to respond** to any reason
- if the termination related to unsatisfactory work performance, whether the employee **had been warned** about that unsatisfactory performance before the termination
- 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 the termination.

#### Unlawful termination

The Act also lists a number of discriminatory grounds upon which it is unlawful to terminate a person's employment. These are:

- temporary absence from work because of illness or injury
- being temporarily absent from work to carry out a voluntary emergency management activity, where the absence is reasonable in all the circumstances
- 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 as, a representative of employees
- filing a complaint, or participation in proceedings, against an employer, involving alleged breaches of laws or regulations
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction, or social origin

- (It is not unlawful to terminate an employee for one of these reasons if the reason is based on the inherent requirements of the job, or if the discrimination is against a member of staff of a religious institution and it is done in good faith and because of the teaching or belief requirements of that institution.)
- refusing to negotiate or sign an Australian Workplace Agreement
- being absent from work on maternity leave or other parental leave.

### **Remedies available to employees**

- compensation
- reinstatement
- legal costs associated with successful claim

### **Who is covered by the Act?**

The following employees are covered by the unfair dismissal provisions of the Act:

- those employed in the Commonwealth public sector
- employees in Victoria
- employees covered by a federal award, certified agreement or Australian Workplace Agreement and employed by a trading, financial or overseas corporation
- certain employees involved in interstate or overseas commerce such as waterside workers or flight crew officers.

All employees nationally are covered by the unlawful termination provisions of the Act, except those in the categories outlined below.

### **Who is not covered by the Act?**

- all employees are excluded from the unfair dismissal provisions for the first three months of their employment (this period can be varied by written agreement). In addition, the following categories of employees are not covered by the unfair dismissal or unlawful termination provisions of the Act:
- employees engaged on contract for a specified period or task, unless a substantial purpose of this form of contract is to avoid an employer's obligations under the legislation
- employees on probation where the probationary period is determined in advance and is either no more than three months duration or, if longer than three months, is reasonable given the nature of the employment
- casuals, unless engaged by a particular employer for at least 12 months
- trainees under the National Training Wage Award or approved traineeship agreements and apprentices where the employment is limited to the duration of the traineeships or apprenticeship
- employees not covered by a federal award or agreement and earning more than \$90,400 (total remuneration package). This amount is indexed and varied on 1 July each year.

## What are employees entitled to when their employment is terminated?

### Notice requirements - payments

The Act requires employers to give a minimum period of notice of termination to employees, or pay in lieu. The period of notice is increased by one week if the employee is aged more than 45 years and has more than two years of continuous service with the employer.

Period of continuous service	Period of Notice
Not more than 1 year	at least 1 week
More than 1 year but not more than 3 years	at least 2 weeks
More than 3 years but not more than 5 years	at least 3 weeks
More than 5 years	at least 4 weeks

These notice requirements do not apply to the categories of employees excluded from the unfair dismissal and unlawful termination provisions (listed earlier on pages 3-4). In addition, they do not apply to:

- casual employees (whether short or long term)
- daily hire employees
- weekly hire employees performing work in, or in connection with the meat industry, whose term is determined solely by seasonal factors.

### Notice requirements for Victorian employees

Victorian employees are required to give their employers notice based on the period of notice required by the relevant employment agreement or other contract of employment. If this is not applicable, a period of notice equal to the employees usual pay period; i.e. if paid weekly, one week's notice, if paid fortnightly, two week's notice.

### 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. It compensates employees for the loss of their jobs. The following table shows current community standard severance-pay provisions.

Period of continuous service	Severance Pay*
1 year or less	Nil
1 year and up to the completion of 2 years	4 weeks pay
2 years and up to the completion of 3 years	6 weeks pay
3 years and up to the completion of 4 years	7 weeks pay
4 years and over	8 weeks pay

\*ordinary time rate of pay

You should check the provisions in the award or agreement that applies to your business.

### **Serious misconduct**

Notice or pay in lieu of notice is not required in cases of serious employee misconduct.

Under the Act, serious misconduct includes, but is not limited to:

- wilful or deliberate behaviour inconsistent with continuation of the contract of employment
- conduct that creates an imminent and serious risk to the 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 (unless the employee can show that in the circumstances the conduct did not make employment in the notice period unreasonable).

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### **Disclaimer**

This information has been provided by Maddens Lawyers by way of general guidance and should not be treated as advice on the circumstance of any particular case. The relevant law is set out in the *Workplace Relations Act 1996* and the *Workplace Relations Regulations*.