

Employment Law: Termination of Employment

The changes to the *Industrial Relations Act 1988*, by the *Industrial Relations Reform Act 1993*, has major ramifications for employers in regards to dismissing an employee. Employers must be aware of these changes to avoid an allegation of unfair or wrongful dismissal.

Originally, the Act envisaged the exemption of employees:

- on fixed term contracts;
- serving a period of probation or a qualifying period; or
- engaged on a short-term, casual basis

However, the changes potentially apply to all employees.

The Requirements for lawful termination of employment

1. The circumstances in which termination can take place

An employee can only be dismissed where the employer has a valid reason:

- connected with the employee's capacity or conduct; or
- based on the operational requirements of the business (Section 170DE(1) of the Industrial Relations Act 1988, as amended).

To be valid, the reason must not be harsh, unjust or unreasonable (Section 170DE(2)).

2. The reasons for which termination cannot take place

The reason for termination cannot be based on the following grounds (Section 170DF):

- temporary absence from work because of illness or injury;
- absence from work during maternity or other parental leave;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- union membership or participation in union activities outside working hours or, with the employer's consent, during work hours;
- the filing of a complaint, or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- non-membership of a union; or
- seeking office as an employee's representative.

3. Employee's opportunity to respond

If the reason for termination relates to the employee's conduct or performance, an employer must not dismiss the employee unless the employee is first given the opportunity to respond to and defend himself or herself against the allegations (Section 170DC).

4. Notice of the termination

An employee cannot be dismissed unless the employee was given:

- the appropriate period of notice (Section 170DB(1)) which is dependant upon the employee's length of employment and age (Section 170DB92)); or
- compensation instead of notice (Section 170DB(1)) which equals or exceeds the total amount of wages the employee would have received if the employment had continued until the end of the required period of notice (Section 170DB(4)).

However, the employer may dismiss an employee guilty of serious misconduct, conduct of such a kind that it would be unreasonable to require the employer to continue the employment during the notice period (Section 170DB(4)).

5. Termination of fifteen or more employees

If an employer decides to terminate fifteen or more employees for reasons of an economic, technological, structural or similar nature, termination cannot take place before the employer gives written notification to the Commonwealth Employment Service of:

- the reasons for the termination;
- the number and categories of employees likely to be affected; and
- the time when, or period over which the employer intends to carry out the terminations (Section 170DD)

Employee's remedies in respect of unlawful termination

The amendment created a new Court, the Industrial Relations Court of Australia. In respect of a contravention of the termination provisions, the Court is granted power to order the employer:

- to reinstate the employee; or
- pay the employee compensation (Section 170EE).

1. Reinstatement

The employer may be ordered to reinstate the employee to:

- the same position; or
- another position on terms and conditions no less favourable than those on which the employee was employed prior to the termination (Section 170EE(1)(a)).

Furthermore, the Court may order the payment of wages lost by the employee because of the termination and any other order necessary to maintain the continuity of the employee's employment (Section 170EE(1)(b)).

2. Compensation

If the court thinks that reinstatement is impracticable, the employer may be ordered to pay compensation to the employee. The compensatory amount will not exceed six months wages that the employee would have received if the employment had not been terminated.

Conclusion

Set out above are the salient points that each Australian employer as well as employee ought to know with respect to the law of termination of employment. The consequences of not observing the law can be very harsh to the employer (as shown above).

Comasters is able to advise clients in employment law issues.

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Comasters Law Firm and Notary Public

Suite 101, Level 1, Capitol Terrace
743-755 George Street
Sydney NSW 2000, Australia
Phone: (612) 9288 0300 Fax: (612) 9288 0399
Email: comasters@comasters.com.au
Website: www.comasters.com.au