Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

ISSUE 6 | APRIL 2012

The Termination Issue

A message from our Managing Principal

While the mantle of the "go-to firm for difficult exits" may not be the most uplifting accolade PCS has received, we are grateful for the acknowledgement. We have not achieved this recognition through merely identifying legal issues for clients when effecting dismissals; it has been earnt through a demonstrated capacity to achieve win-win outcomes that do not set dangerous precedents for our clients.

Having co-authored two editions of one of the few publications worldwide specifically on "Managing Termination of Employment" it has become a niche area of mine of the last 15 years and is fast-becoming so for the entire PCS team.

Given the credibility our firm has in this space, coupled with an uncertain economic environment generating great interest in this area, this edition of *Strateg-Eyes: Workplace Perspectives* deals exclusively with various aspects of law, practice and strategy involving terminations of employment.

My thanks in particular to my good friend John Dakin from Directioneering who has graciously contributed a piece on career transition management, a facility that should be considered in nearly every termination scenario.

Joydeep Hor, Managing Principal

Inside this issue:

People + Culture Strategies

People + Culture Strategies
Level 2, 56 Clarence Street
Sydney NSW 2000

Phone: +61 02 8094 3100
Fax: +61 02 8094 3149

Email: info@peopleculture.com.au
Web: www.peopleculture.com.au

"Other" protected grounds and termination of employment

KIRRYN WEST,
ASSOCIATE

Key learnings from recent discrimination cases

A number of recent cases serve as a timely reminder to employers to improve their awareness of the "other" grounds of discrimination, particularly in a termination of employment context.

While most employers are well aware of the traditional protected grounds of discrimination such as race, sex, age and disability, there is generally a lower level of awareness in relation to what is largely referred to as the "other" grounds of discrimination. These "other" grounds of discrimination include religious and political conviction, criminal records, carer's responsibilities, physical features and industrial activity.

There have been a string of recent cases where employees have successfully claimed they have been discriminated against on the basis of an "other" protected ground. These cases reinforce the need for employers to be aware of the "other" grounds of discrimination and ensure any termination of employment is not triggered by one of these protected grounds.

Political beliefs: *Carey v Cairns Regional Council [2011] QCAT 26*

This case was a particularly interesting case because the employee, Mr Carey, did not bring a claim on the basis that he had been discriminated against because of his own political belief, but rather, the political belief of two people with whom he was closely associated.

Mr Carey was employed as the General Manager of the Douglas Shire Council. While Mr Carey was away on leave, a motion was proposed and approved by the Councillors to terminate Mr Carey's employment. At the time of termination, while Mr Carey was notified of the termination of his employment, he was not provided with any reasons as to why his employment was being terminated.

Mr Carey brought a claim in the Queensland Civil and Administrative Tribunal against the Cairns Regional Council (who the Douglas Shire Council had since merged with) on the basis that the termination of his employment was unlawful and involved direct political belief discrimination under the relevant state anti-discrimination legislation.

Specifically, Mr Carey claimed that his employment was terminated on the basis of his relationships with two prominent individuals in the local political community. These individuals were the Mayor of the Douglas Shire Council (whom the Councillors of the Douglas Shire Council often opposed on political issues), and his de-facto partner Roisin Allen (who was a high profile and vocal supporter of the Mayor and was also in her own right actively involved in local environment causes and groups to which the Councillors were often opposed).

The Council opposed Mr Carey's arguments and claimed that his employment was terminated for reasons of poor performance.

The Tribunal, in rejecting the Council's argument that Mr Carey's employment was terminated for reasons of poor performance, held that there was evidence of direct discrimination on the basis of political belief or activity. What is so interesting about this case is that the Tribunal held that:

> *"even if it were shown that Mr Carey himself had absolutely no political beliefs nor engaged in any political activities himself, the fact that he might be perceived to be favourably disposed to or even work for someone who was seen as the political opponent for the discriminatory party would be sufficient to meet the test."*

This case is also significant because of the large sum of damages awarded. Mr Carey was awarded $368,033.06 which included payment for past loss of income, future loss of income, forced early repayment of a loan, hurt, embarrassment, humiliation and loss of reputation, pain and suffering and medical expenses.

Pregnancy/carer's responsibilities: *Cincotta v Sunnyhaven Limited [2012] FMCA 110*

This case involved an employee, Ms Cincotta, who had been employed as a direct support worker by Sunnyhaven. Upon becoming aware of Ms Cincotta's pregnancy, her employer made the decision not to renew her 12 month fixed-term contract and also declined to offer her any permanent position following the completion of her contract (which was the employer's usual practice). When Ms Cincotta returned to work she was only offered casual employment before she was constructively dismissed.

Ms Cincotta brought a claim in the Federal Magistrates Court for discrimination on the basis of pregnancy and family responsibilities under the Federal anti-discrimination legislation. Ms Cincotta alleged that her employer's treatment towards her amounted to discrimination on the basis of pregnancy and carer's responsibilities.

The Court accepted that the treatment of Ms Cincotta throughout her employment did amount to discrimination and, in relation to the termination of her employment, stated that:

> *"... at least a part of the reason for Ms Cincotta's dismissal, and certainly the vehicle by which is was achieved, was her childcare responsibilities. This also was influenced by her earlier pregnancy and maternity leave"*

The Court found that Ms Cincotta's employer had discriminated against her and she was awarded $30,000 in compensatory damages and $9,000 in general damages. Interestingly, the Court also ordered the Board of Directors to issue a formal apology after it failed to conduct an investigation following a complaint being made by Ms Cincotta in relation to her treatment.

Criminal record: *Mr Steve Leigh aka Wilson v Nestle Australia Limited T/A Uncle Tobys [2010] FWA 4744*

Mr Wilson was a casual employee who, while employed by Uncle Tobys, was charged and convicted of various criminal offences including harassment, stalking and possession of child pornography. After being convicted, Mr Wilson alleged that he was not offered any further work from Uncle Tobys and had his security card de-activated.

Mr Wilson contended that he had effectively been dismissed because of his criminal record. While this case was brought before Fair Work Australia as an unfair dismissal claim, these types of scenarios have previously arisen in the discrimination context.

Fair Work Australia found that even though the employee's criminal convictions were a valid reason for termination, the employee had not been afforded procedural fairness (such as, the opportunity to respond and put forward mitigating factors), and awarded the employee compensation.

Importantly, Fair Work Australia commented that a criminal record does not automatically justify termination of employment and that:

"There is no general presumption that a criminal conviction is a valid reason for termination of employment. It is a matter to be decided on the facts of each case"

This case is a reminder that employers should carefully consider the inherent requirements of a position prior to making the decision to terminate an employee's employment on the basis of a criminal record.

"Other" protected grounds of discrimination in the different jurisdictions

Australia's anti-discrimination laws operate to prevent employers discriminating against an employee on the basis of a protected ground of discrimination. While there is uniformity amongst the jurisdictions in relation to the traditional grounds of discrimination, when it comes to the "other" grounds of discrimination, each jurisdiction has its own approach. The table below is an overview of the "other" protected grounds in each state, territory and the Commonwealth. ●

Top 5 Tips for Employers

1. Ensure that all employees (particularly employees with decision-making responsibilities such as Senior Management and HR) receive Behaviour + Culture training at least every two years.
2. Develop clear internal guidelines and practices in relation to termination of employment.
3. Take discrimination claims on "other" grounds extremely seriously. Awards of damages can be significant and Courts have the power to impose a broad range of penalties including apologies.
4. Ensure that there is always a valid reason for termination that can be demonstrated to a Court or Tribunal. For example, if a termination is performance related, ensure that this can be demonstrated through warnings and performance-related documentation.
5. Ensure familiarity with the "other" protected grounds of discrimination so that a decision to terminate an employee's employment is not made on the basis of a protected ground.

	Religion	Political conviction	Medical record	Criminal record	Sexual preference	Industrial activity	Transgender vilification	Lawful sexual activity	Physical features	Carer's responsibilities
NSW					✓		✓			✓
QLD	✓	✓			✓	✓	✓	✓		✓
VIC	✓	✓			✓	✓	✓	✓	✓	✓
TAS	✓	✓	✓	✓	✓	✓		✓		✓
SA	✓				✓		✓			✓
WA	✓	✓	✓		✓	✓	✓			✓
NT	✓	✓	✓	✓	✓	✓				✓
ACT	✓	✓		✓	✓	✓	✓			✓
CTH	✓	✓	✓	✓	✓	✓				✓

Increasing number of claims by employees

NICHOLA CONSTANT, DIRECTOR

DIMI BARMILI, GRADUATE ASSOCIATE

Recent figures released by Fair Work Australia indicate that since the introduction of the *Fair Work Act 2009* (Cth) unfair dismissal claims and other claims relating to dismissals have been steadily increasing.

In the past twelve months, the number of claims has grown by approximately 100 claims each quarter, bringing the total number of unfair dismissal claims in the October-December quarter 2011 to 3505.

Adverse action (or "general protection") claims account for around 15% of total dismissal claims, with rapid growth in the past year. These claims have become an attractive alternative to the unfair dismissal regime for employees wishing to take action in respect of the termination of their employment. The adverse action jurisdiction prevents an employer from taking adverse action against an employee in response to their exercise of a workplace right, engagement in industrial activities, or on the basis of discrimination. Adverse action can take a number of forms including dismissal, reduction in salary or other entitlements, changes to seating arrangements, changes to working hours and failure to appropriately respond to an employee complaint.

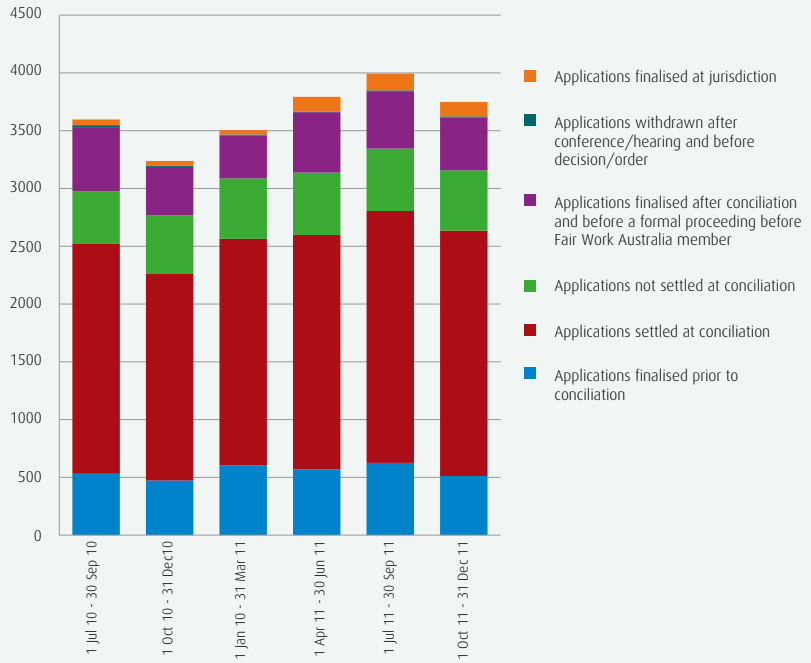
The rapid growth in the use of adverse action claims in response to a dismissal can be attributed to a number of factors including:

- no remuneration threshold (the unfair dismissal threshold is currently $118,100);
- longer time limits for applications - adverse action claims can be lodged within 60 days after dismissal, as opposed to within 14 days for a statutory unfair dismissal claim;
- broader coverage - covering employees, independent contractors and small businesses; and
- awards of damages are not capped.

In 2011, the number of dismissal cases proceeding to arbitration has averaged just under 1.5%, with a recent growth to over 3% over the final quarter of 2011. Although the majority of claims (54.9%) are still being resolved at the conciliation stage this growth in the proportion of claims arbitrated as well as the number of claims is significant. ●

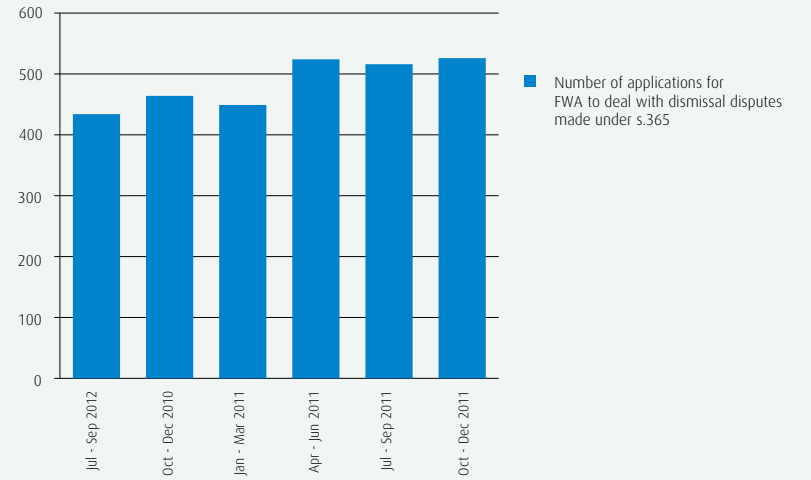
Graph 1 – Method of Resolution Unfair dismissal claims

Method of Resolution for Unfair Dismissal Matters from June 2010 to Dec 2011



Graph 2 – Adverse action claims

Comparision of all quarters
Total Number of Adverse Action Claims from July 2010 to Dec 2011



Disposing of employee property

SIOBHAN ANDERSEN,
SENIOR ASSOCIATE

When an employment relationship ends, most employees will take their stapler, spare suit jacket and family photos with them. However, some employees leave their belongings behind at the workplace for months or even years, which is at least an inconvenience and at worst, can expose an employer to liability – for instance if an employee's property is lost, stolen or damaged. This article sets out a series of "steps" for an employer to follow to dispose lawfully of any remaining employee property.

Step 1: Reach agreement with employee and check impact of employment arrangements

Although an employee will usually take their personal property on their departure, this will not always be the case, for instance, if an employee's employment ends unexpectedly such as in a situation involving serious misconduct. In these circumstances, if possible, an employer should agree with their employee about what will happen to their personal property. An employer should also consider whether the employee's contract of employment, any applicable modern award or enterprise agreement, or its policies and procedures specify how it should deal with the property.

Step 2: Securely store any remaining personal property

While any personal property remains with an employer, an employer should consider what arrangements are necessary to secure that property. This is particularly important as an employer can be liable for any loss or damage suffered by an employee in connection with their personal property. For example, the Building and Construction General On-site Award 2010 provides that if an employee is absent because of injury or illness and their tools are lost or stolen, their employer must compensate the employee a certain amount.

While an employer retains custody, it should itemise and securely store the employee's property to minimise any risk of it being lost, damaged or stolen. Otherwise, an employer may be obliged to compensate the employee or (at worst) risk a claim for breach of award or agreement, or possible union disputation.

Step 3: Sell or dispose of any remaining personal property

An employer may not be able to make arrangements or reach agreement with an employee about how to return any remaining personal property. In those situations, various "uncollected goods" legislation sets out a framework for an employer to dispose of any employee property.

The legislation provides that an employer can sell or dispose of any remaining employee property, depending on the property's value and nature, by providing notice and using

specified methods of disposal. It is important for an employer to comply with these procedures, as monetary penalties may flow from failing to do so.

Relevant provisions of the *Uncollected Goods Act 1995* (NSW)

Value and nature of property	Type of notice* required about property	Method of disposal if employee does not collect property
Perishable goods	• Oral or written notice of intention to dispose of property • Reasonable opportunity for employee to collect property	In such manner as employer considers appropriate
Non-perishable goods Up to $100	• Oral or written notice of intention to dispose of property • At least 28 days' notice to collect property	In such manner as employer considers appropriate
Non-perishable goods Between $100 and $500	• Written notice of intention to dispose of property • Three months' written notice to collect property	Public auction or private sale for a "fair value"
Non-perishable goods Between $500 and $5000	• Written notice of intention to dispose of property • Six months' written notice to collect property • Publish copy of notice in a state-wide daily newspaper at least 28 days before disposal	Public auction
Non-perishable goods More than $5,000	Not applicable	Application to court for an appropriate order
Motor vehicles only	• In addition to any required notices and notice periods, obtain a certificate from the Commissioner of Police to confirm that the motor vehicle is not presently recorded as being stolen. • Application for certificate must specify make, model, type, colour, registration number (if any), chassis number (if any) and engine number (if any) of the motor vehicle and be served on the Commissioner at least 28 days before the vehicle will be sold.	Dependent on value of motor vehicle

*The employer must deliver any requisite written notice to the employee in person or by post to the employee's last known address. The notice must include the employee's name, a description of the property, an address where the property may be collected, a statement that the property will be disposed of unless collected and any charges due to the employer (for instance, for storage), and confirmation of whether the employer will retain charges from the proceeds of sale.

After disposal, the employer must within seven days, prepare (and keep for six years) a record outlining a description of the property, the date and manner of disposal and (if the goods have been sold) the name and address of the purchaser, the proceeds of sale and the amount retained by the employer for storage, and (if applicable) the details of any auctioneer.

An employer may retain some charges from the proceeds of sale and otherwise proceed as if the proceeds were unclaimed moneys. If the employer is left out of pocket, it may be able to recover any deficit as a debt from the employee. ●

What should an employer do?

To minimise any troubles long after the farewell (at least with property):

- **reach an agreement** for the employee to take or collect their property or for the employer to deliver it;
- **comply** with any industrial instruments and policies and procedures (where applicable);
- **secure and itemise** any remaining employee property; and
- **dispose** of any remaining employee property in accordance with the legislative framework.

Career Transition

JOHN DAKIN, DIRECTIONEERING

When are Career Transition services mostly used?

Organisations provide Career Transition (outplacement) services for individuals who are departing, usually as a result of a restructure and redundancy process. We must not underestimate the impact of job loss.

It is one of the most stressful situations that can happen to an individual, particularly in times of economic stress - such as we are currently experiencing. Losing a job can be a major blow to one's self esteem and most people who lose a job will experience grief associated with the separation. Anger over job loss can be intensified if the termination is not handled sensitively. Providing career transition services helps to ensure that directly impacted individuals are treated fairly as they negotiate career change. Many remaining employees are also impacted by departures and knowing that their organisation has a culture of care for employees helps to ensure individuals remain positive and can decrease disruption to the business. Issues of unfavourable media exposure and potential discrimination or unfair dismissal claims can be managed more effectively through a fair termination process.

Who arranges these services?

Typically the head or director of human resources initiates contact with their Career Transition provider well ahead of the proposed restructure date. The HR team and the Career Transition provider then begin to plan the process to ensure as seamless a process as possible. Managers need to be trained in how to deliver a termination message effectively - with empathy and dignity. The business message must be clear and consistent at every level so that impacted individuals gain an unambiguous understanding of their situation and those remaining have a clear vision of their role in the new structure.

JOHN DAKIN
DIRECTIONEERING

Perfect planning prevents poor delivery. Planning an effective restructuring exercise is complex and best approached with a detailed checklist, best broken down into:

Before the Announcement

Think about:

- rationale for restructure;
- roles impacted;
- timing;
- level of outplacement support;

About John Dakin, Director at Directioneering

John has worked in career management since 1996 with Australian and international career transition firms. He works with senior candidates from all sectors and has project managed many downsizing exercises. John joined Directioneering as a Director three months after its inception. Prior to working in the human resources area John spent over twenty years in the education sector as a teacher in Australia and the United Kingdom and then in school management. He has a Degree in Earth Sciences, a Masters in Education Administration and has completed studies in Coaching from the Jansen Newman Institute. John served on the Board of the Royal Rehabilitation Centre, Sydney and was Chairman of its Foundation.

- manager training;
- communication strategy;
- room bookings;
- frequently asked questions;
- contingency plans;
- documentation;
- legal checks;
- policies; and
- security

On The Announcement Day

Think about:

- press release and communications strategy;
- room set-up;
- meeting schedule for managers and career transition consultants;
- debriefing session; and
- team meeting agendas;

Post Announcement

Think about:

- team re-focus strategy; and
- farewells

How Career Transition services are provided

Typically, consultants from the Career Transition provider will be on site to meet immediately with those who have been just had the news of their retrenchment communicated. While it may seem an imposition to have a provider organisation attending, there are several good reasons for providing this support. A retrenched employee will often be more open with an external consultant when talking about their personal situation. The focus of this meeting is to help the employee begin to focus on the future, by discussing their well-being and how they will communicate job loss to their family.

Ideally, the retrenched employee will be able to attend the Career Transition facility within a day or two of getting the news. A good provider will offer a dedicated, high quality consultant with that rare mix of empathy and practicality, who will work with the candidate through the ambiguity of job loss and assist them to adjust to change. The ability of the consultant to build a trusting relationship with the individual is vital for a successful transition.

Assessments of motivators, interests, values and work/life balance should be carried out before the candidate sets clear targets for long term career and immediate job targets. They also need to be aware of what makes an effective marketer as they approach the professional and hidden job markets – this will include effective, professional resumes, using different styles for different opportunities, and increasingly, the need for a focused LinkedIn profile. When interviewing, the candidate must be comfortable articulating goals, style, achievements and the reason for retrenchment – knowing what to say and how to say it is a vital skill and is best honed by undertaking video interview training. Managing referees is a key skill to be learned.

Another key to successful Career Transition is good research. Candidates need to be trained in how to research using social media and should be given access to high quality research facilities. More senior candidates are best served by having access to individual research services by a dedicated consultant.

One of the things that people miss most after retrenchment is the structure of the working day. The Career Transition provider should give them access to efficient office facilities in a high energy, positive environment where they have access to all services and may join in seminars and have the opportunity to network regularly.

How does Career Transition differ from standard recruitment practices?

When an individual is retrenched the initial reaction is most frequently that they need to find the same role with a similar organisation. This approach is one that most recruiters will follow as they are looking for the best fit for a role with their client and are therefore focusing on proven performers in similar environments.

Career Transition adopts a longer term view. When a person is retrenched he or she is facing change – the most effective way to manage that change is to ensure that it will work over time. Sometimes, going into the same role with a similar organisation may not be possible, or alternatively, it could be the wrong move if it doesn't enable future progression. A good Career Transition service will encourage discussions about possible different styles of work, such as portfolio, consulting or starting one's own business – thereby opening up possibilities for the individual, rather than consigning them to more of the same. ●

Unfair dismissal rights and remedies – reinstatement, redeployment and compensation

KATHRYN DENT,
DIRECTOR

Recent Fair Work Australia ("FWA") decisions highlight what criteria have been influential in its granting of remedies and specifically, when reinstatement (rather than compensation) will be appropriate, what "other matters" may be factored into compensation and when redeployment will not be reasonable.

The principles gleaned from these decisions are not only relevant at a final hearing in defence of an unfair dismissal claim but they are also relevant in considering whether a proposed termination will be defensible and if not, the potential ramifications for the employer.

Remedies available

If FWA finds that a person:

- was protected from unfair dismissal (as defined in section 382 of the *Fair Work Act 2009* (Cth) ("**FW Act**");
- has made an unfair dismissal application (section 384 of the FW Act); and
- has been unfairly dismissed (sections 385-388 of the FW Act)

then FWA may grant that person a remedy either of reinstatement (section 391) or compensation (section 392) (as well as other ancillary orders including restoring lost pay and maintaining continuity of service).

When the FW Act commenced, one of the greatest concerns harboured by employers about the unfair dismissal regime was that reinstatement was to be the "primary remedy". This is reflected in the wording of section 390(3) which provides that compensation "must" only be ordered if FWA considers reinstatement "inappropriate". While the inappropriateness of reinstatement generally led to a compensation order previously under the *Workplace Relations Act 1996* (Cth) ("**WR Act**"), the WR Act was not as direct in requiring the Australian Industrial Relations Commission to dismiss reinstatement as an option before other remedies were considered.

Reinstatement

It has been our experience that businesses which have made the difficult decision to terminate employment do so generally as a last resort and for reasons they genuinely believe to be legitimate, whether that reason is due to misconduct, poor performance or the operational requirements of the business. After the angst that such a decision invariably causes to all involved, the concern an employer may have about reinstatement is well-founded. Reinstatement is a remedy granted by a third party external to the employment relationship at the conclusion of adversarial action and involves the reunion of a relationship which by its very nature requires a high degree of trust and confidence between the parties.

For this reason, if your organisation is subject to an unfair dismissal claim which goes to hearing, then it is incumbent on you as an employer, if you wish to avoid the employee being reinstated should their claim be successful, to lead evidence which will convince FWA that reinstatement is inappropriate. Such evidence should also include the inappropriateness of reinstatement to your "associated entities" given that the FW Act expressly allows reinstatement to organisations that were not the original employer.

Reinstatement has been held in several recent cases to be appropriate when:

- there was no deliberate dishonesty nor a breakdown in the trust and confidence between the parties (where the employee was accused of falsifying the cause of his injury);
- the employment relationship could be sustained (the employee acknowledged he had made a shocking mistake over the sale of a federal government asset and had an unblemished 24 year record);
- an employer could not demonstrate reinstatement was impracticable (where the employee was dismissed for poor performance);
- there was a plausible basis for the conduct (altering a medical certificate) which led to the dismissal;
- there was no valid reason for termination of employment (that is the employee was exonerated) and there was no evidentiary support that the employer would act unprofessionally or unfairly towards the reinstated employee;
- an employer could not prove that the dismissed employee was involved in the incident (involving others) for which he was dismissed;
- an employee was found to have been unfairly dismissed over comments made on Facebook in circumstances where the employer did not have a social media policy;
- an employee was found to have been unfairly dismissed after filming traffic accidents with his mobile phone while driving despite knowing it was wrong (the unfairness related to harshness of dismissal given the employee's record as FWA accepted the reason for termination was valid); and
- an employee was terminated after a fight was set up with his supervisor, the employee's behaviour was out of character, he would be welcomed back and his supervisor was no longer in the workplace (as he had also been dismissed and had reached an out of court settlement).

Reinstatement was held to be inappropriate:

- in relation to an employee (held to be unfairly) dismissed for making a "throat slitting gesture" to a co-worker (and five weeks' compensation was ordered instead, that amount having been discounted on account of misconduct); and
- due to an employee's misconduct in failing to pay for goods he took from the retailer employer despite paying for the value of the goods at a later date.

Compensation

As noted above, compensation will be ordered if a dismissal is found to be unfair and reinstatement is inappropriate. The FW Act, as the WR Act did before it, sets out criteria for determining compensation which includes length of service and the effect of the order on the viability of the business. Two additions the FW Act introduced to the criteria are the amount of remuneration earned between dismissal and the compensation order and the amount of income "reasonably likely to be so earned" between the making of the compensation order and the payment.

In the list of criteria FWA may consider is the broad discretion, used rarely but significantly and recently in the *Wong v Nytro Pty Ltd trading as Nitro Gym* [2012] FWA 1927 case, "any other matter" it "considers relevant". Significantly in the *Wong v Nytro Pty Ltd trading as Nitro Gym* [2012] FWA 1927 case, the employer did not attend the hearing and so it may be presumed that there was little, if any, evidence on their behalf, regarding the appropriateness of the childcare component to the compensation. This case behoves employers to assess their exposure to a compensation

order and to factor in other types of amounts in the formulation of offers of settlement other than just a pure economic loss. While on one interpretation this decision is unlikely to impact on the decision of an employer as to whether or not it should terminate employment, on another interpretation as well as being relevant to compensation, this may also impact on the harshness of the termination which is one of the factors a court considers in its ultimate decision as to whether the termination is unfair. That is, the fact that the dismissal required the employee to incur significant other expenditure might cause the dismissal to be harsh.

It should also be noted that compensation can be reduced where the employee is guilty of misconduct (which has occurred in at least two of the above-mentioned cases) but compensation cannot include a component for shock, distress or humiliation.

In relation to the amount of compensation, FWA can only order compensation up to the value of six months' remuneration or if the employee earned in excess of the high income threshold (currently $118,100 per annum), then half that amount (currently $59,050). FWA may permit payment by installments.

Redundancies and redeployment

The FW Act significantly narrowed the exemption from unfair dismissal on the grounds of genuine redundancy, previously known under the WR Act as "genuine operational reasons". See our December edition of *Strateg-Eyes: Workplace Perspective* for our article on "Legal issues in redundancy and retrenchment".

It is now more difficult for employers to justify dismissal on this basis as the FW Act requires them to consider redeployment within their own and associated entities' organisations or risk the employee being able to challenge the dismissal as unfair (in addition to the other legislative requirements which must be proven before a redundancy can be considered "genuine"). Given that the redeployment obligation is new, we are only now seeing the evolution of case law to guide us as to what is "reasonable redeployment". From recent cases, we can ascertain that reasonable redeployment has not been undertaken where:

- the employer assumed that a lower paid position or less senior position was not going to be acceptable to an employee;
- the employer advertised a vacancy and required the dismissed employee to compete with others; or
- the employer required the employee to apply for redeployment.

However, if the employee does not have the skills and competence to perform immediately at the required standard or after a reasonable period of retraining then redeployment may not be reasonable. ●

Preparing for remedies

If one of your ex-employees brings an unfair dismissal action, consider the following preparatory steps in relation to potential remedies:

- If reinstatement is inappropriate because the reasons which led to the termination go to the heart of the employment relationship, then you should separately address in any evidence why these reasons make reinstatement inappropriate.
- If reinstatement is inappropriate because the position is no longer available either within your organisation or one of your associated entity's organisations, and there are no other positions on equally favourable terms and conditions at either organisation, then you need to provide evidence to demonstrate this.
- In defending a claim for compensation come prepared with calculations, that is, you should know the ex-employee's gross weekly wage, what period they were out of work (you might need to request this information during the litigation process) and if there is any ancillary claim (such as childcare). Be prepared with evidence to demonstrate that the cause of the claimed expense(s) was not the termination of employment.
- Consider the ability of your business to make any compensation payment ordered by FWA or whether you wish to make an application for payment by installments.
- If you wish to defend a genuine redundancy, have evidence of the attempts at redeployment or the fact that redeployment was not possible. That evidence should include the consultation you had with the ex-employee about these redeployment options as well as redeployment with associated entities.

Terminations: Dealing with performance, redundancy and bad fits

JOYDEEP HOR,
MANAGING PRINCIPAL

DIMI BARAMILI,
GRADUATE ASSOCIATE

While a termination of employment is rarely an enjoyable experience for those involved, for under-performing employees or those who are a poor cultural fit, it may be the best option. In managing such situations, human resources managers must ensure an appropriate balance is struck between achieving the right outcome, and by utilising a process which manages legal risk and commercial outcomes.

This is best achieved by taking a holistic approach to termination and performance management which contemplates the psychological factors at play. As there is often a disconnect between the reason for termination which is due to no fault of the employee, and their subsequent treatment, HR managers must avoid simply following a "tick the box" approach. For instance, although it may be appropriate in some situations (such as misconduct) to arrange immediate exit and suspension of IT systems, it will not be for other forms of termination. Poor treatment may feed into an employee's resentment, invariably dictating how far that individual will pursue a legal challenge to their dismissal.

The types of separation

Separation of employment comprises different categories with some forms proving more difficult to manage. "Neat" separation situations encompass recognised categories such as redundancy. Other situations may be less clear-cut, such as where an employee is performing at a minimum level, yet management has formed the view they are not an appropriate cultural fit. Management often seeks to address this by offering a large redundancy package. However, if an employer takes an "outside the square" approach by asking the employee what they want, this facilitates a sense of ownership over the process through collaborative discussion. This is more likely to provide a fair result which avoids exposing an employer to consequences and risks such as those below.

Unfair Dismissal

Employers generally seek to avoid reinstatement by relying on the existence of continued conflict between the parties to thwart a reinstatement order. However, Fair

Work Australia often does not accept this, as it sees organisational processes as creating this conflict. Employees also capitalise on an unwillingness to reinstate, and will push for this remedy as leverage to extract a higher payout figure.

General protections

General protections claims were introduced by the *Fair Work Act 2009* (Cth), and allow employees to bring a claim against their employer for taking steps that result in a detriment or hardship ("adverse action") to the employee in circumstances where, amongst other things, that employee has sought to exercise a "workplace right". These claims are easy to initiate as the employee has 60 days to bring a claim post-termination, with no remuneration threshold applying to claimants. Consider the situation of an employee receiving robust performance management, and reporting possible bullying to a HR manager, with the employee later dismissed due to poor performance. This employee may seek to raise a claim by arguing that they were dismissed based upon their assertion of a workplace right to a safe work environment free from bullying.

Redundancy

Redundancy creates the most concern for HR professionals in the termination context. It properly arises where the employer no longer requires a position to be performed by anyone. Redundancy cannot be used to remove a particular person from a role, as redundancy is focused on the role that is substantively performed and not the person. Before offering a redundancy, extensive obligations for redeployment apply, and it is not sufficient simply to indicate to the employee that no suitable roles have been identified. Instead, by targeting psychological factors, employers can promote ownership by engaging in discussion with the employee about any preferred roles.

Are written policies useful?

Policies can be useful in providing assurances that due process will be followed in a termination scenario, as well as by providing managers with a "toolkit" to approach issues consistently. Policies can also provide ground for claims post-termination if it can be argued that they were not followed. Accordingly, a policy should provide enough latitude to tailor actions to individual circumstances. Where possible, policies should not be incorporated into the terms of the employment contract, as a breach of policy could expose an employer to a claim for breach of contract.

"Walking the talk" in performance management

Managers are occasionally promoted based upon their technical or functional skills and not managerial performance and can sometimes lack appropriate performance management skills. HR must provide training to make managers comfortable with the psychology of performance management, as they often hesitate due to fear of discrimination or bullying claims. To avoid this, limit feedback to duties, tasks and competence.

Taking a holistic approach by addressing underlying psychological factors will help minimise the risks of termination. ●

Thinking outside of termination: demotions, performance reviews and contract variations

JOYDEEP HOR,
MANAGING PRINCIPAL

MISA HAN,
GRADUATE ASSOCIATE

Termination and redundancy can be a financially and emotionally taxing experience for all parties involved.

Many organisations have started to think outside of redundancy and termination to reduce the high costs associated with redundancy payment and recruitment and training of new staff. Alternatives to termination can take various forms, such as change in responsibilities and duties, demotion, geographic relocation and increase in performance targets – all of which involve variations to the employment contract. While contract variations offer a viable alternative to termination, they also carry the risks of unfair dismissal claims, discrimination claims and damages for breach of contract.

Alternatives to Termination

Alternatives to termination could include:

- change in responsibilities and duties;
- geographic relocation;
- increase/reduction in performance targets;
- increase/reduction in remuneration;
- change of title;
- merging different roles; and
- offer of alternative employment.

Checklist question 1: Has the employee accepted the contract variations?

When an employer makes significant changes to the employment, it is important to make sure that the employee formally accepts the changes. Do not take at face value that, because the employee continued to show up to work, they have accepted the variations to their contract. In *Russian v Woolworths (SA) Pty Ltd* [1996] SAIRComm 131 a manager of a supermarket was accused of misconduct and demoted to a probationary position two grades junior to his present status. The employee did not accept the changed position and took sick leave instead. The employee continued to make use of the company car and receive sick leave payment in accordance with his entitlements under the changed position.

The court found that the proposed changes to the employment amounted to repudiation, a significant breach going to the root of the employment contract. The fact that he continued to receive sick leave payments and make use of company car did not legitimately vary his existing contract.

Lesson for employers:

It is important to make sure that the employee accepts the changes to the employment. This is because if the changes amount to repudiation i.e. fundamental breach of the contract, the employee can seek a remedy for wrongful termination or argue that the original contract remained on foot. When presenting a new contract, put some time limit (e.g. two weeks or one month) on signing the contract and encourage employees to communicate any concerns during this period.

Checklist question 2: Does the variation involve a change in the employee's role?

When proposing changes to an employee's role, it is important to make sure that the changes are within the scope of the employment contract. In *Cameron v Asciano Services Pty Ltd* [2011] VSC 36, the employer offered a Business Development Manager the role of a Customer Service Centre Manager. There was no change proposed to the employee's remuneration. The employee, believing that he was overqualified for the new role, claimed damages against the employer.

The court found that the employer's conduct did not amount to a fundamental breach of his employment contract. His employment contract provided that he might be required to undertake other responsibilities and perform other such duties or project from time to time to enable the company to meet its operating needs. The new duties were within the ambit of his employment contract.

However, a change in employee's duties could also expose an employer to the risk of a discrimination claim. In *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, a long–standing employee found that her customer portfolio had changed radically from high value to low value clients when she returned from parental leave. The court found that she had been constructively dismissed and discriminated against on the basis of her parental responsibilities. This highlights the need to consider the impact of the changes on the nature of employment overall, including work value and client status – not just remuneration or title.

Lesson for employers:

It is critical to review your standard employment contract to ensure that the contract allows flexible work allocation. When proposing changes to employment, it is important to look outside of the objective factors such as remuneration and title and consider the employment as a whole, including work satisfaction, client value and organisational structure.

Checklist question 3: Does the variation involve an increase in performance targets?

Changes in business structure may demand an increase or reduction in performance targets. In *Linkstaff International Pty Ltd v Roberts* (1996) 67 IR 381, the employer, a recruitment company, offered a new employment contract which sought to increase an employee's billing target from $3,000 to $7,000 per month. Knowing that she would not be able to arrive at the figure demanded, the employee sent a letter of resignation stating that the new structure was a "drastic change from [her] original terms of employment".

The employee then brought an unfair dismissal proceeding. It was found that the employer constructively dismissed her by requiring the employee to agree to responsibilities that she was unable to comply with. The employer's conduct was a significant breach going to the root of the employment contract and it was likely to destroy or seriously damage the relationship of trust between employer and employee.

Lesson for employers:

When increasing the scope of employees' duties or performance targets, it is important to discuss the changes with the employees to make sure that the new duties or targets are realistic and suitable to the employees' skills. As a general rule, if the change involves more than 20% increase in the employee's time or duty, it is important to consider whether the changes amount to a fundamental breach of the contract and the relationship of mutual trust.

Checklist question 4: Does the variation involve geographical relocation of employees?

Employers may consider geographical relocation as an alternative to termination or redundancy. In *Kweifio-Okai v RMIT* [1999] FCA 534, the employment contract of a lecturer included a condition that he would be based at the Bundoora campus but he may be required to work at other campuses. After a breakdown of the employee's relationship with his colleagues, the employer directed him to relocate to the city campus. When the employee refused, the employer terminated his employment.

Fair Work Australia found that it was reasonable to relocate the employee to the city campus to resolve the breakdown in the working relationship between the employee and the rest of the staff members. His failure to follow the reasonable command was a valid reason for dismissal.

Lesson for employers:

As a general rule, relocation of more than 15km could raise an argument for a breach of employment contract. If an employment contract states where the role will be based, it is important to specify that an employee may be required to perform duties elsewhere from time to time.

Checklist question 5: What is acceptable alternative employment?

In redundancy situations, an employer can avoid the requirement to pay redundancy payment by offering "acceptable alternative employment". In *Vicstaff Pty Ltd T/A Stratco v Bradley May; Malcolm McFerran* [2010] FWA 3141, the employer, a metal goods manufacturer in Victoria, decided to contract out its delivery work and offer two of its truck drivers positions as machine operators, as an alternative to redundancy. The employees refused to take up the offer and demanded redundancy payment under the Fair Work Act. The employer refused to pay on the basis that it had offered "acceptable alternative employment" to the two employees.

Fair Work Australia found that the machine operator role was not acceptable alternative employment. Whether or not a role was "acceptable alternative employment" depended not only on the value of work and the employees' capacity to carry out the work, but also on whether the work was of a like nature. This involved consideration of a number of factors such as work value, nature of work performed, rates of pay and whether or not the alternative work is considered acceptable by the employee.

Lesson for employers:

When offering an alternative type of employment, employers should make sure that the alternative employment they are offering is acceptable to employees, taking into account all relevant factors such as hours of work, nature of work, rates of pay (including overtime) and the desire of employees.

Next steps

While contract variations offer a viable alternative to termination and redundancy, if not managed property, they can carry legal risks ranging from unfair dismissal claims and discrimination claims to claims for breach of contract. When proposing changes to the employment contract, employers should leave room for employee consultation. A successful contract renegotiation will be one that balances the needs and aspirations of both employees and employers. ●

Tips

- Check the validity of contracts and terms carefully – contracts are not all the same
- Remember the 20% time-spend "rule" on duties and 15km geography "rule" on location
- Engage stakeholders (e.g. unions, family members)
- Provide reasonable notice to employees
- Leave a "paper trail" and document the agreement

PCS' Legal Team

Joydeep Hor
Managing Principal
Direct: +61 (2) 8094 3101
joydeep.hor@peopleculture.com.au

Maria Crabb
Senior Associate
Direct: +61 (2) 8094 3115
maria.crabb@peopleculture.com.au

Kathryn Dent
Director
Direct: +61 (2) 8094 3107
kathryn.dent@peopleculture.com.au

Kirryn West
Associate
Direct: +61 (2) 8094 3105
kirryn.west@peopleculture.com.au

Nichola Constant
Director
Direct: +61 (2) 8094 3102
nichola.constant@peopleculture.com.au

Georgie Rutecki
Associate
Direct: +61 (2) 8094 3116
georgie.rutecki@peopleculture.com.au

Michelle Cooper
Director
Direct: +61 (2) 8094 3103
michelle.cooper@peopleculture.com.au

Dimi Baramili
Graduate-at-Law
Direct: +61 (2) 8094 3106
dimi.baramili@peopleculture.com.au

Professor Joellen Riley
Consultant
Direct: +61 (2) 8094 3100
joellen.riley@peopleculture.com.au

Misa Han
Graduate-at-Law
Direct: +61 (2) 8094 3108
misa.han@peopleculture.com.au

Siobhan Andersen
Senior Associate
Direct: +61 (2) 8094 3104
siobhan.andersen@peopleculture.com.au

If you are interested in receiving regular updates and invitations to our events please register via our website – www.peopleculture.com.au – or email our Practice Manager, Sarah Lilley, directly at sarah.lilley@peopleculture.com.au. ●

Your *Partners* in Workplace Law

www.peopleculture.com.au

120413