Sensible responses to unfair dismissal laws

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One of the most talked-about aspects of Australia's new labour laws is termination of employment. Currently, the number of inquiries from ALIA members about new dismissal provisions is probably greater than on any other topic.

By now, most Australians know that since March this year it has become much more difficult for many of them to make a claim for unfair dismissal. Employees of organisations with fewer than 100 workers can no longer do so. Many employers have loudly welcomed the abolition of the old laws, believing it has freed them from time-consuming documentation and record keeping.

This is understandable and the new system certainly does remove administrative burdens for some. But decisions to terminate employment must still be handled very carefully. Otherwise, employers remain highly vulnerable to legal action for unlawful termination. Previously, the difference between 'unfair' and 'unlawful' dismissal was not well understood and rarely needed to be, since once a termination was shown to be unfair, for practical purposes it became, ipso facto, unlawful. Remedies could then be granted by the Industrial Relations Commission and the courts. Under the new federal legislation, however, the distinction becomes critical, because *only* unfair dismissal is quarantined – and only for smaller employers.

The concept of harsh, unjust or unreasonable termination formed the basis for the right of most employees to claim *unfair* dismissal before March 2006. To defend against such a claim when an employee was sacked, employers needed to be able to show that due process had been followed. Some of the characteristics of correct procedure include proper warnings, a genuine opportunity to reach well-defined standards of performance, the chance to respond to employer assertions and, vitally, documentation of action taken. If these were not in evidence, employers potentially faced damages or even reinstatement of the employee. For organisations with 100 or more workers nothing has changed. These legal protections remain. Only smaller employers now escape them.

Unlawful termination is a different concept altogether and remains fully in place for all employers. An unlawful dismissal is one that breaches statutory provisions preventing termination on specified discriminatory grounds. These include race, colour, gender, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; temporary absence from work due to personal ill health or injury; absence from work during maternity leave or other parental leave; temporary absence from work to carry out a voluntary emergency management activity, where the absence is reasonable; 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 union; seeking office, acting or having acted as an employee representative; filing a complaint or taking part in proceedings against an employer for alleged violation of laws and regulations; and refusing to negotiate or sign an Australian Workplace Agreement.

In this context the law defines 'temporary absence from work due to personal ill health or injury' as occurring if the employee provides a medical certificate within 24 hours or other 'reasonable period'. If sick leave without a certificate is available the employee must notify the employer and substantiate the reason for the absence. Where physical or mental disability is involved, an exception to the ban occurs where the reasons for termination are based on the inherent requirements of the particular position concerned. If the disability prevents an employee completing essential tasks that are part of the position, this prohibition will not prevent termination. But the employer would need to determine the inherent requirements of the employee's pre-injury position and be sure the employee is unable to meet those requirements. While the law makes termination on the grounds of religion unlawful, it is not illegal if the discrimination is against a member of staff of a religious institution and is done in good faith because of the teaching or belief requirements of that institution.

Obviously then, any idea that all Australian organisations can now simply fire people at will is well wide of the mark. Sensible employers will maintain fair and careful approaches to terminating employment. To do that they will need, above all, to retain a thorough approach to managing performance, since poor performance is always likely to be the major reason for dismissals. In this regard, it is absolutely essential that 'performance' is properly defined. Unless it can be shown that employees have failed to achieve standards made clear to them, suggestions of unsatisfactory performance are always going to cause serious workforce morale problems at least and legal vulnerability at worst. Performance requirement standards should be communicated to and understood by employees as a fundamental first step in any employment relationship.

Thoughtful consideration of recent changes to unfair dismissal laws in Australia confirms they need have little effect in organisations committed to sound workplace relationships. Not for the first time, sensible people will see that that there is no natural dichotomy between industry's need for efficiency and workforce calls for equity. Often, the fairest way is also the most efficient. ■

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