



Dismissal of Injured Workers

Employer rights and responsibilities

Presented by Sam Kennedy, Partner, TurksLegal

- At common law, an employer may dismiss employees subject only to compliance with any contractual term or obligations imposed by law
- Contractual terms most commonly relate to:
 - providing notice of dismissal
 - procedure to follow
 - specified grounds for dismissal
 - payments to be made

- Obligations imposed by law (express or implied):
 - mutual trust and confidence
 - minimum period of notice
 - minimum severance pay on redundancy
 - dismissal must not be unfair or unlawful

- Federal *Fair Work Act* 2009
 - s117 minimum notice period (applies to employer)
 - s118 notice under Modern Award (applies to employee)
 - s119 severance pay on redundancy
 - s340 general protections re workplace rights
 - s351 adverse action on discriminatory grounds
 - s352 temporary absence due to illness or injury
 - s382 – s405 unfair dismissal
 - s772 unlawful dismissal (*cf* s351 – s352)
- NSW *Workers Compensation Act* 1987
 - s248 no dismissal within 6 months of incapacity

- Is there a valid reason for dismissal?
 - Inability to perform inherent requirements of the job
- Have you complied with injury management obligations?
- If reason is related to incapacity, do you have objective evidence?
- Have proper procedures been followed?
- Are there any special provisions in the relevant award/agreement?

What if the Employee's Role is made Redundant?

- Justified on the basis of genuine operational reasons?
- Fair selection of the person to be made redundant
- Notice must be given or payment made in lieu
- Severance pay in addition to notice
- No severance pay if fewer than 15 employees (unless award-derived)
- Accrued leave must be paid out
- Redundancy exemption re unfair dismissal

- Unfair dismissal claim?
- Unlawful dismissal claim?
- Discrimination/victimisation claim?
- Adverse action claim?

- Consultation with the worker
- Consider redeployment
- Informing the worker of the decision
- Giving notice or payment in lieu
- Confirmation in writing

- Severance payment, if applicable
- Payment of accrued leave entitlements
- Statement of service
- Notify workers compensation insurer
- Payroll changes (including super fund)

- *NSW Workers Compensation Act 1987*
 - s241– s242 application by injured worker (whether or not still entitled to compensation)
 - must be supported by medical certificate
 - obligation to provide employment of the kind for which the employee has applied, or employment no less advantageous
 - s247 duty to inform replacement worker
 - applies within 2 years of dismissal of injured worker

- Some award/agreement derived provisions regarding redundancy are preserved
- NES represent minimum standards – check for more generous contractual or award/agreement provisions

- *Forbes v Brisbane City Council* (8 September 2010) — inability to return to work without risk of further injury
- *Pili v NSW Department of Health* (17 September 2010) — excessive sick leave
- *Meffert v Paperlinx Australia* (26 October 2010) – following the proper procedure

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