



EMPLOYEE TERMINATION CAN BE TERMINAL FOR THE EMPLOYER

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All employers, cavalier and cautious, should review how they deal with staff terminations – the lessons from the Dobb and Avco matter.

The Dobb and Avco matter is cause for most employers to draw breath and consider their strategy on terminating employees as it was again the subject of Federal Court orders in early 2004. The matter involved an employee who was formerly employed as a district manager for the employer. The employee was employed for approximately 20 years.

The employee was employed pursuant to a “services agreement” which included the employer’s operations manual which contained detailed descriptions of termination, discipline, grievance, promotion and benefit policies, all of which were terms of the agreement.

On 12 August 1996 the employer terminated the employee. By a letter presented the same day the employer advised the employee he would receive a “termination payment” totalling \$118,860. This amount included salary, annual leave and accrued long service leave and also \$88,296 described as “Compensation Payment (10 months)”. It was said that the employee’s 1996 bonus would be paid in March the following year on a pro rata basis.

The employee protested at the termination and complained that the conduct of the employer was unlawful, harsh, unjust and wholly unreasonable.

The employee brought proceedings in the Queensland Industrial Relations Commission seeking reinstatement under section 295 of the Industrial Relations Act 1990. The Commission handed down a decision refusing the application but ordered the employer to pay the employee a further sum apparently calculated on the basis of six months base salary and superannuation.

Not satisfied with the decision the employee commenced proceedings against the employer in the NSW Registry of the Federal Court. The statement of claim made various allegations including the following:

- On 12 August 1996 (the day the employer notified the employee of his termination) the employer acted in repudiatory breach of the terms of the services agreement in purporting to terminate the employee’s employment. From about 22 July 1996 officers of the employer and lawyers employed by them conspired with the purpose of injuring the employee by unlawful means by having planned to terminate the employee without proper cause or warning. The employer set out and put into effect a plan designed to damage, devalue or destroy the employee’s employment reputation and to deny him his legal and equitable rights with manifest disregard to his physical, emotional and social welfare.
- The employer knew or should reasonably have known that by planning and putting into effect the promotion of the employee’s termination he would suffer humiliation, ridicule and loss of self-esteem and diminution of the respect and confidence held in him by his fellow employees, be held to a lower opinion in the estimation of his fellow employees by making them think the less of him and be shunned and avoided by his fellow employees.

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- The employer knew or should have reasonably known that by implementing its covert plan in the manner that it did represented a reckless disregard to the physical and mental consequences the employee was forced to deal with.
- The employer breached a fiduciary duty of trust and confidence. This duty arose because a named officer on behalf of the employer undertook at a certain meeting to represent the interests of the employee and also because the employer transferred the employee to the capital city of another state and placed him in the position where he and his family could not relocate to his city of origin without its financial and or employment support.
- If the policies referred to in the services agreement were not terms of the agreement then the employer, in trade or commerce, misled or deceived the employee into believing that they were.
- By reason of the employer's conduct the employee was deprived of the opportunity to continue his employment which he potentially would have enjoyed to the year 2020. Because of the employer's knowledge of the employee and his personal and financial circumstances it should have been foreseen that it would have caused him detriment by summarily terminating his employment, "showcasing the termination to his peers", and depriving him of his status and interfering with his right to work. The detriment to the employee that was foreseeable comprised of negative, emotional and mental impact, embarrassment, a lowering of self-esteem, vexation, distress, disappointment and frustration, negative effect to his family, social, recreational and business interests, serious injury and handicap to his future prospects for suitable alternative employment, aggravated damage to his employment reputation by being forced to pursue and persist with legal remedies to vindicate his rights and severe financial hardship and embarrassment.
- As a "direct and natural flow" of the conduct of the employer the employee has suffered personal injury, loss and damage. Since termination the employee had continually suffered from anxiety and depression, periods of mood swings, irritability, shortness of temper, insomnia, increased dosage of antidepressant medication for which he has now formed a dependency, extreme physical pain, discomfort, fatigue, abdominal disorders and fluctuations of body weight, a progressive decline in his self-esteem amongst his family, relatives and friends, destruction of his employment reputation, withdrawal from participating in taking an interest in activities that he previously enjoyed and severe financial hardship and embarrassment.
- Amounts due under the services agreement to the date of termination but unpaid at the date of judgement and also "future economic damage from being deprived from continuing his career from the prospective period from the date of judgement to 11 March 2020 (his 65th birthday), with reasonable consideration of promotions during the period".
- Damages for physical and mental injury and diminution of amenities, damages for the injury to his employment reputation, exemplary damages for the employer's deliberate and contemptuous behaviour.
- The employee also claimed interest and costs.

The employee's claim was settled as a result of mediation. The employer submitted a statement of issues for the purpose of the mediation. In its statement the employer said that its position was that the policies contained in the operations manual were never expressed or implied terms of the contract of employment. The contract was terminable summarily for misconduct or at will upon the giving of reasonable notice or payment in lieu thereof. It stated:

"The real issue from [the employer's] point of view is whether in all the circumstances of [the employee's] employment and having regard to the well established principles, 10 months total remuneration was a reasonable payment in lieu of notice, and if not what is reasonable notice in the circumstances?"

The parties agreed to settle the claim for \$788,544 "less tax calculated on the said sum as an eligible termination payment".

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The settlement sum constituted several years of the employee's remuneration and was the result of the employee suffering substantial adverse consequences as a direct or indirect result of the termination – a staggering result for the employer! The employer no doubt would deny it acted capriciously or maliciously towards the employee, however, as is recognised by the settlement sum it commercially viewed that it was prudent to settle the employee's claim for a sum substantially in excess of what were, in the circumstances, the ordinary measures of damage.

What are the lessons which can be taken from this matter?

- Be firm but fair during the termination process.
- Treat the employee with respect. Do not strip away the employee's self-esteem or pride through the termination process.
- Consider the effect of any statement or representation you may have made to the employee prior to the termination. Have you given the employee a false expectation or a false sense of his/her value to the organisation?
- Consider providing support services to a former employee, where appropriate.
- Consider the consequences of the termination process on other staff members who may observe the process.

Remember to most people their job is part of what defines them as an individual. If the individual is of a particular persuasion the simple act of termination is a sufficiently catastrophic event without it being handled badly by you.



This information has been provided by way of service to you to assist you in understanding your work relationship. Clearly there are other issues which might be relevant to your individual circumstances. Should you require any further information, please do not hesitate to contact any member of the Employment & Industrial Relations Team at The Argyle Partnership on (02) 8263 6600.