

Goodbye is never easy

The decision to release employees from an organisation is never easy. *Human Capital* looks at how career transition and outplacement services can help

At some point in their career an HR professional will have the unfortunate task of terminating an employee's work contract. Whether it is for poor performance over a prolonged period of time, summary dismissal for serious offences, or a result of corporate downsizing, that meeting between manager and employee is always going to be difficult. It is important to know what the options are and where both parties stand. Before examining those options, it is useful to go back to first principles and analyse where the parties' entitlements come from.

The employment relationship

As most HR professionals will know, there is a legally binding employment contract between every employer and employee. That contract might be a written contract – but even if the parties have not recorded it in a comprehensive written document, the contract will exist either as an oral agreement, or as a combination of written and oral agreements. “The contract of employment is the agreement, whether or not it was ever articulated in any detail, which causes you – as an employee – to

turn up for work and your employer to pay you for doing so,” says Jacquie Seemann, partner and head of employment and industrial relations at Cutler Hughes & Harris. “The contract contains the terms that the parties have agreed will govern the way that the employer/employee relationship works.”

Sometimes, terms like annual leave entitlements and working hours are discussed and agreed, and outlined in a written document, and sometimes they are not. If the contract is not explicit about particular terms, then they may be provided for as a matter of law – either statute or common law. In addition, if the parties have been explicit on an issue, but their agreement is inconsistent with a statutory standard, then the statutory standard usually overrides the agreement.

Statute laws (Acts of Parliament) set certain minimum entitlements. For example, the Commonwealth *Workplace Relations Act 1996* entitles all regular (full-time and part-time) employees to a minimum of four weeks’ paid annual leave – and no agreement between employer and employee (whether or not in writing) can undercut that entitlement. So, if a contract is silent on the question of

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annual leave, the employee will have this entitlement anyway – and if the contract tries to give the employee only three weeks’ leave, the statute will override the contract. Industrial awards are made under statutory powers, and these might also create minimum conditions which the employer must provide.

Common law is a different story. “Common law is judge-made law; the principles of law that we understand from decisions of courts over the years and (sometimes) centuries,” says Seemann. Common law “implies” certain terms into any employment contract if (but only if) the contract is silent. In other words, if the contract could not operate without certain obligations being imposed on either the employer or the employee, but the contract is silent about those obligations, the courts will deem the contract to contain those obligations anyway, and enforce them. Seemann explains: “Perhaps the employer only got as far as saying ‘you will turn up to work between 9.00am and 5.00pm, and I will pay you \$X for it’, and the employee did in fact turn up for work on the first day and kept coming after that. Even if nothing else was ever said about rights or obligations, the common law would say,

in order to make this relationship work, we imply certain terms into the contract which impose rights and obligations.

“So the employer has obligations to do certain things for the employee – for example, to keep the workplace safe. The employee also has certain obligations – for example, to protect the employer’s confidential information,” says Seemann.

When it comes to termination of employment, any explicit agreement between the employer and employee will have to comply with the statutory minimum notice periods set out in the *Workplace Relations Act 1996*, and/or any award provisions which apply, and in the

absence of any agreement, the statute/award and common law will dictate certain conditions. If, for example, the parties forgot to agree what notice they would need to provide if either of them wanted to end the relationship, the Act will impose a minimum period and in addition the common law will say that ‘reasonable notice’ was required. What is reasonable notice? It depends on the circumstances of the case – how old you are, how long you have been there, how you came to be in that organisation’s employment and what the circumstances of termination are.

Summary dismissal

Another important term of the employment contract is that “if an employee does something which is fundamentally inconsistent with the relationship continuing, the employer has the right to sack the employee without notice, or payment in lieu of notice. This is called summary dismissal,” Seemann says.

Summary dismissal can be used for serious breaches of the employment relationship, for example, stealing or inappropriate behaviour such as in cases of sexual harassment.

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Poor performers

If there is no serious misconduct, but an employee is just not meeting performance standards, there are other issues.

However, if handled correctly, it may not be as difficult to dismiss someone for poor performance as one might think. “Most of the time, you need to take care and use common sense,” says Seemann. “You need to know what your standards are, be confident about applying them, and communicate with your employees. Employees need to know what they need to do to meet those standards, and they need to be given reasonable opportunity to meet them – and it needs to be clear to them that if they don’t meet the standards, they won’t have a future with

the organisation.” But not everyone follows these rules all the time – and that is when the problem situations arise.

Seemann notes that one of the pitfalls might be a lack of forward planning – for example, failing to think ahead to a time when a restructure of the business might be required. Many managers also have a natural fear of being confrontational and tackling a problem early and head-on. But this can have undesirable consequences down the track. “You might have someone who hasn’t been performing for years, but nothing’s been said or done about it. Now you’re going to restructure and make his position redundant; and you’ll have to pay him a large redundancy package because you didn’t sack him for poor performance some time ago,” she says.

Seemann provides another example: “You’ve got someone who’s been performing badly and it’s been classified as ‘too hard’ – you don’t want to deal with it head-on. And all of a sudden that employee announces she’s pregnant and she’s going on maternity leave for six months. You know perfectly well that you should have sacked her for poor performance a year ago, but you haven’t done it. But now it’s doubly hard because if you try to do something now about dealing with performance issues or terminate her employment, you may be accused of discrimination. The risks mount up.”

Another pitfall is lack of performance management records. For example, an employee may have been receiving performance counselling for poor performance but then there has been no accurate records kept of that counselling process. This makes it very difficult to prove that the employee has been given reasonable opportunity to improve.

The key to the performance management process is fairness. “People often think that giving people a fair go necessarily means a structured process with three written warnings, but that’s not necessarily the case. It might be a good idea to give three written warnings, but there may be circumstances where what’s ‘fair’ is either longer or shorter than that. It depends – everything

about employment law depends on the circumstances of the case. It can be a slow process and can be frustrating for the manager responsible. But with a bit of careful management it doesn’t have to take forever,” Seemann notes.

Once an employee has been through a performance management process, has been warned about the need to improve and has still not made that improvement, the employer can then decide to terminate the employment. In most cases, however, the employer will still have to give notice in accordance with the contract and/or the statute or award provisions.

Corporate downsizing

The rules change again in the case of corporate downsizing or restructure. It may be necessary to pay a severance or

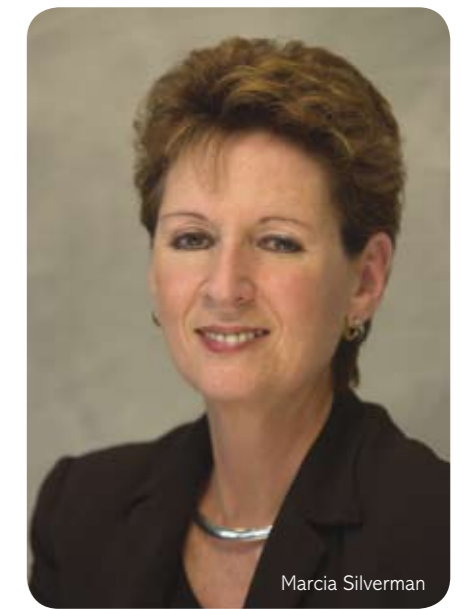
“They’re never going to love you, but if they can at least say ‘they looked after me’ – that’s what is critical” – Marcia Silverman

redundancy package in addition to giving notice – however this does not happen all the time. “That will be the case if there’s an award or contract or an employment policy that creates that entitlement,” says Seemann. “However, in the absence of any of those things then employees generally don’t have a right to a redundancy payment.”

Quite apart from payment, there might be other notification and consultation obligations, depending on the size of the organisation and the number of people to be made redundant. If the employer employs 15 or more employees, then it might be necessary to notify Centrelink or another authority about the jobs that will be made redundant. The relevant union may also have to be notified.

Unfair dismissal

Since WorkChoices, things have become a little easier for employers. Before WorkChoices, all employees in Australia who earned less than around \$100,000 had the right to bring an unfair dismissal claim – a claim that ‘you have dismissed



Marcia Silverman

me from my employment in a way which was unfair’. Under WorkChoices, workers generally no longer have a right to bring an unfair dismissal claim if they have been employed for less than six months, or are employed by an employer with less than 100 employees. Even if there is no unfair dismissal claim, they may still have other rights, for example, to bring a discrimination claim (for example, that they were dismissed on the basis of age, disability, gender, religion, race or pregnancy), or a claim that they have not been given enough notice.

Flexible guidelines

Seemann has some advice for employers that need to terminate employment contracts. “I don’t recommend that employers have termination policies as such because they can become part of the employment contract and bind the employer in a way that they don’t want to be bound. What I do recommend, though, are guidelines about choices that need to be made or procedures that need to be followed. However, these should be flexible guidelines, open to

variation in particular circumstances. Also, employers should definitely consider getting external advice about particular circumstances that might lead to termination," she concludes.

Easing the process

The decision to release people from an organisation as a result of corporate downsize or restructure is never an easy one to make. The employee will likely experience a diverse range of emotions when this happens. "It's not uncommon for them to feel anger, some panic and fear about what the future may hold, and a loss of confidence and control around their ability to make informed decisions," says Marcia Silverman, director and principal consultant at career outplacement and career transition specialists, The Donington Group.

Silverman notes that the decision to release people from an organisation is usually made with the head, yet how

people are treated should come from the heart. "How they're treated very much comes down to allowing them to retain their integrity and goodwill. You should be able to depart an organisation and leave with your head held high. That has value to the individual but on the flipside it also adds value to the organisation in that it reduces the stress on management, there'll be a smooth transition from the business, and you'll maintain productivity and morale," she says.

Silverman talks about the alumni effect – that is, the alumni who leave the organisation and think positively about their experiences. "They're never going to love you, but if they can at least say 'they looked after me' – that's what is critical. The other issue is, if it's done properly, it limits commercial risk and possible legal action. Of course, today with social responsibility it also projects a positive image both to staff and the community," she notes.

A holistic approach

Outplacement specialists like Donington work with both employers and their employees to transform what can be an overwhelmingly negative experience into something both parties can actually benefit from. "From the employee's point of view, it's very much around redundancy and managed separation, it's around redeployment, resignation, re-engagement, re-direction, retention and retirement," says Silverman.

On the employer side, pre-planning or analysis is absolutely critical. The Donington team work with their clients to create partnership objectives and project timelines. They then work with the managers and HR team who are going to be involved in the separation meetings. "Another critical step is clarification of stakeholder communication, and then determining what management the remaining employees will require to maintain productivity," Silverman adds.

Far from merely taking a look at the technical skills employees have which may be transferable, Silverman believes it is important to take a holistic approach to career transition. There are three key areas to look at: career insight, career opportunity and career resilience. "Career insight is really asking, 'what do I want from my career?', 'where are my career values and goals?' and 'what do I bring to the table?'," she says.

"Career resilience is a very important part and it's having an appreciation that everyone in their career experiences setbacks. This is about acquiring the ability to bounce back from those setbacks. We encourage the individual to take stock and work towards getting the right job – not just a job. In order to do that, we work at two levels. The first level is what we call adaptive work, and that's about making an emotional adjustment to adapt to their new circumstances and dealing with the loss of identity, loss of friends and colleagues, loss of ego, loss of confidence – because they're deeply held values and they've been threatened. That's

got to be done before they become market ready", continues Silverman.

"Once they've done that they can move onto the technical work around skills assessment and values and career options and building the resumes. Most people don't ever take stock of their careers – this process allows that to happen," Silverman concludes.

Mergers

Managing the merger of two enterprises is as much about managing the balance sheet as it is about managing the people and cultural issues. It is one of the toughest change management challenges to get on top of. "The integration is absolutely vital to the success of the ongoing business," says Silverman.

"Who do they keep? Who don't they keep and how do they integrate the skills? They have to have a clear strategy on how to integrate not just the people but the cultures," she adds.

The key is to manage people's expectations and make sure there is open and honest communication. Silverman

acknowledges that some people simply won't make the transition and that's why some mergers are doomed in the first place. "There's a likelihood of cultural conflict and it's often underestimated. As a result of that, you'll get high turnover. Even when the due diligence is done on two organisations which may be merging, often the people side is left out."

What goes around...

Most organisations want to do the right thing – they want to treat their employees well, even if it is necessary to show them the door. Silverman likens it to saying 'see you later' instead of 'goodbye'. "You never know where these people you're releasing are going to end up, or what they might be saying about you in the marketplace. Of course, it's not in the interests of those members to be out there bagging their previous employer, but some people are bitter and are unable to get over it. Our role is to help them move on but in a very positive way. Not only is it good policy but it's also good business," she says. **HC**

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Downsizing facts

A recent report from the University of Melbourne found that the trend of downsizing and restructuring is going to continue, despite the fact that these options do not always achieve what they are intended to. The following facts were discovered:

- 1 Eighty-eight per cent of the organisations surveyed had done some restructuring in the past five years
- 2 Generally, researchers found that improved productivity was not associated with downsizing
- 3 High profit firms are just as likely to downsize as low profit firms
- 4 Management positions are the common target for change

Newly Revised 4 Day MBTI® Accreditation



APP, the sole Australasian distributor of the Myers-Briggs Type Indicator® instrument, announces that from June 2007, it will present a new 4 day Accreditation program that enables consultants to administer and interpret the various versions of the MBTI instrument including Step I, Step II and the newly developed MBTI® Complete Interpretive Reports.

Completely revised following feedback from past participants, and after numerous consultations with Drs Linda Kirby, Naomi Quenk and Nancy Barger, this new program covers theory and development of the MBTI® and how to apply it to team building, coaching and leadership development. Reliability and validity of the instrument are briefly covered, as is dynamics of Type and Type development-over-life issues. Assessment is ongoing throughout the course.

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