

## TERMINATION TIPS

**Termination of employment deserves consideration at all stages of an employment relationship, not just when it comes time to part company – and even in the best of employment relationships. You must take into account the possibility of the changing nature of the relationship and review the position as time goes on. The following information is for ABL members only.**

### YOU CAN'T ASSUME THAT:

- the relationship will continue forever according to the original terms agreed;
- if the relationship goes off the rails a simple resolution will be found;
- there will be amicable agreement as to what are reasonable terms; and
- there will be amicable agreement that the relationship has in fact been terminated.

### THERE ARE FIVE PHASES IN AN EMPLOYMENT RELATIONSHIP:

1. **Recruitment** – the process and decisions relating to the employment of new or replacement staff.
2. **Contract of employment** – as it changes over the course of the employment relationship;
3. **Management and application of the rights and responsibilities** of employees and employers in relation to increasing responsibilities, training and disciplinary matters;
4. **Actual occurrence of termination of employment** initiated by either the employer or the employee. This could be due to: Resignation, Retirement, Abandonment of employment, Dismissal, Constructive dismissal, Expiration of a contract (either by the ending of the term of the contract, or the completion of the task), Redundancy (either forced or voluntary), Force of events (for example, winding up of a business); and
5. **Post-employment phase.**

On a final note: The vast majority of termination problems can be avoided with the recruitment of the right person.

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### FOR MORE INFORMATION...

- The above Business Tip is part of a broad collection of Business Tips that provide invaluable information to ABL members. You can access them at [www.australianbusiness.com.au](http://www.australianbusiness.com.au).
- For specialist, indepth information on unfair dismissals and terminations, go to [www.workplaceinfo.com.au](http://www.workplaceinfo.com.au) and sign up for a free 21-day trial or phone **ABL** on **13 26 96** and we'll register you.
- If you need to talk to someone about terminations & unfair dismissals, in particular Awards, call the **ABL Workplace Advice Line** on **13 26 96**.
- And or legal advice on terminations and unfair dismissals, call **AB Lawyers** on **13 26 96**.

**The following is a sample from the *Employers Toolkit CD*, a collection of 200 draft forms for managing staff, published by Australian Business Limited. The CD contains expertly drafted sample correspondence, contracts and policies ready to save to your computer and customise to suit your company's needs. This sample looks at written warnings.**

## FIRST WRITTEN WARNING

*[Notes for employers:*

The first written warning to an employee about poor performance or failure to meet standards should:

- reinforce the standard of performance or conduct expected, the employee's failure to meet the standard and the severity of the situation;
- ask for the employee's response. The response and the employer's consideration of the response should be noted and recorded in the warning;
- nominate a suitable review period to monitor performance/conduct;
- outline the consequences of continuing the unsatisfactory performance/conduct; and
- make reference to previous oral warnings and their dates.]

## FIRST WRITTEN WARNING

*[Date]*  
*[Name]*  
*[Address]*

Dear *[Name]*,

### **First official warning re: conduct/performance**

As you know, *[XYZ Pty Ltd]* has been attempting to improve your performance over recent months. Your poor performance is, unfortunately, still an issue.

This is your first official warning for *[specify details of unacceptable conduct/performance]*.

This warning follows the counselling/disciplinary interview held on *[date]* in relation to this issue.

During this interview, you made *[the following]* or *[no]* comments in relation to your *[misconduct]* or *[performance]*. *[Insert response if applicable.]*

*[Repetition of this conduct or Failure to improve]* may result in the termination of your employment.

Your *[conduct/performance]* will be reviewed on *[date]*.

This warning will be placed on your personnel file.

If you would like to discuss this matter further, please do not hesitate to contact the undersigned.

SIGNED:

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*[Relevant officer]*

*[Employee]*

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## FOR MORE INFORMATION...

- If you have a concern about your employees and the procedures regarding warnings, contact **ABL** on **13 26 96**. You can also ask for more information about the Employers Toolkit CD.
  - And for legal advice on terminations, particularly warnings, call **AB Lawyers** on **13 26 96**.
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## NINE STEPS FOR AVOIDING DISMISSAL PROBLEMS

The following is extracted from an article on [www.workplaceinfo.com.au](http://www.workplaceinfo.com.au), the website for employee relations professionals, published by Australian Business Limited.

### 1. The pre-employment communication; the letter of offer and company policies and procedures

- *Be careful in specifying what you want and expect when you hire new employees* – have clear, unambiguous policies in place - and make them known to all staff. These policies, on a range of relevant workplace issues (including termination of employment), should be put in writing and made available to all staff. Make sure you refer to termination of employment provisions, at least stating the agreed period of notice (also flag any behaviour that would constitute a serious breach of the employment contract and indicate the consequences).
- *It's best to compile a policies and procedures manual*: Keep a file and note the rules and practices you want followed in your business when recruitment and termination are concerned. You do not have to incorporate policies manuals into employment contracts. All you need do is to refer to the existence of the policies and be confident that the employee (or prospective employee) knows of their existence.

### 2. Probation period

- *It is usual to provide for a probationary period - usually three months* (this applies to wages staff). The probationary period allows both the employer and the employee to assess each other and the job and decide if they wish to continue the relationship (there is no penalty for either party terminating the contract in the probationary period).
- *It is sometimes difficult to specify a reasonable probationary period for executives*: If an executive took three months to find a job, it may be viewed as unfair to allow for termination of employment without compensation within the first three months of employment. Courts may consider that the employer in this case should have been more thorough in the selection process.

### 3. Make sure that it's clear who has the power to hire and fire

- This allows all managers to know what they can and cannot do in relation to recruitment, discipline and termination. Employees likewise know who to answer to and who has the responsibility for what.

### 4. Keep a 'staff notes' journal or similar document

- Record information relevant to your relationship with your staff (get into the habit of keeping this sort of diary on a daily basis, noting any events, exchanges, promises, other undertakings and questions resolved or unresolved that may impact on employment relationships).
- Otherwise, adopt the practice of taking down some brief notes whenever you have a private meeting with an employee (this serves to jog your memory and clear up any confusion in the future).

### 5. Give your line managers/supervisors some guidance and training

- *Some dismissals arise out of a simple clash of personalities*: To avoid any clashes, lead a new recruit into the management ranks by talking about what you expect and give the new manager a chance to ask questions.

- *Allow the new manager to absorb the approach of a manager* who does his/her job well, that is, the new manager 'tags' along with the manager who is leaving. It means that the new manager may take a little time to settle in but it's a lot cheaper than fighting an unfair dismissal claim!

#### 6. Try to avoid on the spot or summary dismissals

- An employee who commits a gross breach of his/her contract of employment will not be able to substantiate a case for unfair dismissal (what is considered a gross breach is a matter to be argued). The employer who has a *clear policy* on what constitutes a 'summary dismissal' offence is in a *stronger position* than those employers without such policies.
- *When such an event occurs* (eg. an employee physically attacks a manager) there should be a procedure in place requiring another manager to become involved. If an incident occurs on a union site the relevant union official should be involved. The event(s) should be carefully spelt out and a record of the meeting kept. The senior manager should make a decision after hearing all parties.
- *Where an employee's actions are not wilful and deliberate*, but rather constitute 'gross stupidity', summary dismissal may not be justified even if a valid reason exists for the termination of the employee.

#### 7. Do not delay the decision

There are four possibilities when considering dismissal. Determine which is appropriate and act promptly:

1. Summary dismissal is justified;
2. Dismissal with notice is justified, but not summary dismissal;
3. Dismissal is not justified but a warning/reprimand in writing is justified; and
4. There is no cause for dismissal and an apology is due to the employee.

#### 8. Issue warning letters and keep copies and follow-up

Try counselling and guidance to improve performance. If this does not work you must express your concerns in writing (if you do not put your concerns in writing then it is hard to complain later if the problem occurs again).

**How many warning letters:** It is advisable to give two warning letters plus a final warning letter. If there is no improvement then the letter of dismissal is the final step. Make sure you've made genuine attempts to improve the employee's performance in the areas outlined in the letters.

**Try to avoid relying on verbal/oral warnings:** It's easy to forget or leave out important issues when giving a verbal warning, or for the message to be misinterpreted by the employee.

**Counselling and genuine assistance to employee:** Employers are expected to *genuinely* attempt to improve the performance of an employee who is subject to a warning. A considered approach and a proper monitoring of performance would be expected of the employee.

#### 9. Give the employee a chance to state his/her case

Federal law requires this. Think about a dismissal as a court-room situation (it emphasises proceedings must be fairly conducted and must be seen to be so). The employer puts forward the reasons for dismissal and the employee has a chance to respond. This should happen at each stage of the disciplinary process leading to dismissal (if that is where it leads).

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#### FOR MORE INFORMATION...

- Need more info on dismissals? Go to [www.workplaceinfo.com.au](http://www.workplaceinfo.com.au) and sign up for a free 21-day trial or phone **ABL** on **13 26 96** and we'll register you.
- Need advice on dismissals? Call the **ABL Workplace Advice Line** on **13 26 96**.
- Need legal advice on an unfair dismissal claim? Call **AB Lawyers** – Ph: **13 26 96**.

## TERMINATING A CASUAL

**The following article from *Australian Business News* not only looks at what employers can do to reduce their exposure to claims (particularly where casual employment is concerned), but also shows the power of Australian Business Industrial as a lobbying entity serving the policy interests of its members.**

**ABL** believes there is no good reason why employees are subject to different unfair dismissal provisions on the basis that they work under a federal industrial instrument or a state one. There should be one national consistent unfair dismissal law with well understood application and exclusions.

**Australian Business Industrial**, **ABL's** industrial affiliate, has been lobbying both the federal and NSW Ministers to address the problem of uncertain exclusions; the problem of the unbalanced costs and the need for a single, simple national system. Most recently it wrote to

Mr Tony Abbott following the federal *Hamzy* decision and devoted part of its submission to the Ministerial review of the state act to these issues.

### **In the meantime what can employers do to reduce their exposure to claims?**

1. When employing someone you should determine the true nature of the employment that you want – is the job truly casual or is it part-time or for a fixed term or task?
2. Are you seeking to backfill a vacancy caused by someone on long-term leave (parental leave, workers compensation, leave without pay, long service leave)? People employed for this purpose should be told that they are 'filling in' for the absent person.
3. If the reason you need to engage someone as a casual is because you need them to work unpredictable hours (that is, you need the flexibility of unpredictable hours) can the person be employed as a part-time employee with identified core hours and access to additional hours by agreement).
4. If you need to engage someone as a long term casual is there a benefit in establishing a probationary period? There are differences between the NSW and federal acts but probationary periods are normally for three months, unless there is some special feature of the employment justifying a longer period. This should be agreed in advance (to obtain the full exclusion) and put in writing (to avoid doubt as to the existence of the period). The implication of a probationary period is that the employment will not be for a short period, but it provides relative certainty for the three months.
5. If you have a long-term casual – an employee not engaged on a casual basis for a short period – and you need to terminate, or not offer work to, the person you should treat the termination as for any other employee. You should terminate for a valid reason and if the termination arises from the conduct, capacity or performance of the employee, you should hear his or her side of the story.

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### **FOR MORE INFORMATION.....**

- About employing someone you want to have available for more than a short period, seek advice from **ABL's** Member Advice Unit. Call **13 26 96**.
- Regarding **Australian Business Industrial** (a State Peak Council) and its policies concerning casuals, hiring people, unfair dismissals and termination, contact **13 26 96**.
- About employment law, industrial relations, specifically unfair dismissals & terminations, contact **AB Lawyers** on **13 26 96**.

## **HYPOTHETICAL: TOO OLD TO WORK?**

**This regular column can be found in *Australian Business News* and on the ABL website at [www.australianbusiness.com.au](http://www.australianbusiness.com.au) (just follow the prompts to *Australian Business News*).**

This article outlines the issue of dismissal because an individual has reached retirement age and may be eligible for a pension. **ABL's Member Advice Line** receives over 40,000 calls a year with many of the questions relating to people and the workplace. These calls are answered by a dedicated team of eight people with a combined history of over 200 years of experience!

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Manager Jim Francis was concerned at the number of staff who were approaching 65 years of age within the next year. He confided in Supervisor Shirley Woodward as to what he could do to alleviate this. Francis said, "I'm worried that our workforce is getting too old to do the work and that we won't be able to dismiss anyone despite their age. They'd be able to draw an age pension if we dismiss them, so what's the difficulty? You'd think people want to retire anyway."

Woodward was just as forthright. "My concern is the nature of their work involves manual handling. If I give them heavy work they might have a heart attack! It restricts what work I give them because I don't want to over-exert them, and the younger staff get upset because I give them the heavier work to cover for the older employees. It's effecting our productivity."

Francis said, "The only way we can do this is by introducing a compulsory retirement age and justify it by saying that it's to comply with occupational health and safety requirements."

### **Can Francis implement a compulsory retirement age and dismiss an employee because of his or her age?**

Dismissal of an employee because the individual has reached an age where they may be eligible for an age pension from the Federal Government would be in breach of age discrimination provisions under anti-discrimination law. It is the ability of the employee to perform the tasks required under their contract of employment, and not the employee's age, that the employer must consider. Where the company has a reasonable concern in regard to the employee's health or work performance, the employee may be asked to undergo a medical examination as part of the company's OHS obligations, to determine the employee's continued suitability for the job.

The company can then decide after an examination by a medical specialist, such as an occupational physician, whether the employee can still perform his or her contracted tasks. The employer should attempt to find suitable tasks for the affected employee, where such tasks exist within the company. An employee who refuses to undergo a medical examination may jeopardise his or her continued employment. In approaching these issues, dismissal should be the last resort, not the first resort.

**You can contact ABL's Member Advice Line on 13 26 96 if you have any queries, or need advice on matters relating to a similar situation.**

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### **FOR MORE INFORMATION.....**

- Or suggestions for hypotheticals, contact the Managing Editor of **Australian Business News**.
- You can also speak to our dedicated team of experts in **ABL's Members Advice Unit**, who advise clients on a broad range of issues that affect businesses on a daily basis. Just call **13 26 96**.