

A quick and dirty explainer to employment in the COVID-19 era: Being Stood Down, requesting annual leave, getting sacked and being made redundant.

OK, everyone's 1.5M apart? Let's begin.

Stand Down

Being stood down is temporary while being made redundant is permanent. Think of a stand down as employment purgatory: Neither sacked or working. So a person who is 'stood down' is not terminated, is not required to work and cannot claim Unfair Dismissal - and most importantly is not paid while they are stood down. Counter intuitively though all entitlements continue to accrue during a stand down.

Relevantly, the Fair Work Act provides at section 524 (1) (c):

An employer may, ... stand down an employee during a period in which the employee cannot usefully be employed because of ... a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

A consequence of that section is that alternate duties (i.e. "usefully be employed") may be the first port of call for an employer to consider providing to an employee before standing staff down.

Also a "stoppage" is required. A downturn in business is not normally enough to satisfy the term "stoppage". From that, just because, say, a pub has a one person per 4 square metre rule, but is otherwise open, it wouldn't seem to be a stoppage of the kind touched by the Stand Down scheme in the Act. Mandatory closure of the pub would seem to be a stoppage though, making a stand down lawful.

Taking Annual Leave

An employee is entitled to seek to have their accrued annual leave or long service paid out while they are stood down or at any time, but an employer may not agree to allow an employee to take leave. If that is the case, the Act provides:

(2) The employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave.

In these uncharted times where hundreds of thousands if not millions of Australians will be working for deathly quiet employers and then being stood down, it remains to be seen if the Fair Work Commission or Courts will permit an employer to refuse to allow an employee to take their annual leave pay while being stood down if it would send the business to the wall to do so. My money is on no, unless the Government changes the law.

A quick and dirty explainer to employment in the COVID-19 era.

In any event, the circumstances of a stand down can be reviewed by the Fair Work Commission particularly if an employer can reasonably get the employee to do alternative duties, or if the stand down seems to fail the all-important “pub test”. As casual staff in the hospitality and university sectors are acutely experiencing, employers are simply rostering off casual employees until further notice. In some circumstances COVID-19 or not, this may constitute an unfair dismissal, particularly if there is as a matter of fact, plenty of work to do.

Sacked

Any employee (casual, part-time or full time) who is sacked and earns less than \$148,700 per year not including Superannuation is usually able to challenge their termination by way of an Unfair Dismissal application to the Fair Work Commission if they have worked for a “small business” (14 or less employees including those employees in associated entities and including casual employees) for a year, or any larger sized business for 6 months.

As general rule, employees can only be terminated for not meeting reasonable standards of *capacity* to do a job reasonably well or being medically fit, or their *conduct* i.e. poor behaviour while doing a job or outside of work. If neither of those underlying reasons apply, then the dismissal is likely to be viewed as an unfair dismissal.

Compensation is capped at 26 weeks and a settlement payment made by the employer to the employee is the most likely outcome over reinstatement. Employees only have 21 days after they are sacked to make a claim and must demonstrate ‘exceptional circumstances’ (such as being in hospital) to explain being later than that. All accrued annual leave entitlements must be paid out on termination. Notice pay is also required unless a person is summarily dismissed for serious misconduct such as groping, fighting or drunkenness at work.

Redundancy

Unlike the temporary nature of stand down arrangements, an employer can permanently terminate an employee in circumstances where there is a down turn in business. Redundancy pay and notice as pay apply generally to all employees except casuals (but that is changing thanks to the Federal Court) and employees of small businesses. Total severance amounts provide for between 1 week and 21 weeks pay plus all accrued annual leave and sometimes long service leave entitlements to be paid out. Notice of redundancy must be in writing and cannot be backdated. Pre-redundancy consultation obligations typically apply too.

A quick and dirty explainer to employment in the COVID-19 era.

Failure to properly consult or consider reasonable redeployment can transform a redundancy into an Unfair Dismissal and or make an employer liable to injunctions and or contraventions and serious contraventions of the Fair Work Act which are penalties payable of up to \$126,000 per contravention for an individual and \$630,000 per contravention for companies. As mentioned above small businesses aren't normally required to pay redundancy pay while other businesses can apply on hardship grounds to have their redundancy pay obligations reduced.

This is broad advice and will change depending on a person's individual circumstances and the particular Award, Enterprise Agreement or contract of employment they are employed under together with the specific facts that matter.

Join or contact your Union for more advice. Or contact WorkLawyers for more information where our first discussion is always free of charge and necessarily incorporates social distancing by calling 0411 263 614 or hello@worklawyers.com.au