
Client Information Bulletin

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Terminating an employee for genuine operational reasons

Unfair dismissal claims only apply to companies with 100 employees or more. In those instances the claim is heard by the Industrial Relations (IR) Commission. Irrespective of the company size however an employer can terminate an employee 'for genuine operational reasons or for reasons that include genuine operational reasons' under Section 643(8) of the *Workplace Relations Act 1996 (Cwlth)*. The IR Commission has no jurisdiction here.

In *Carter v Village Cinemas Australia Pty Ltd [2007]*, Mr Carter was an employee of Village for almost 20 years. He was terminated when the Village complex he managed in Doncaster was closed. He was a well-performing manager and there was no issue as to his capability or his standards of performance.

Mr Carter argued that when he was notified about the imminent closure of the complex he suggested that Village grant him his accrued long service leave of six months. His purpose for doing that was to allow the company time to redeploy him to another area.

The request for long service leave was rejected and Mr Carter's employment was terminated. Mr Carter went to the IR Commission and claimed unfair dismissal. He brought proceedings under s.643 of the *Workplace Relations Act* claiming that the termination of his employment was 'harsh, unjust and unreasonable'.

Village argued that the claim was outside the jurisdiction of the Commission because the employee's employment was terminated for genuine operational reasons. Village's arguments were rejected in the first instance by the Commission but succeeded on appeal to the Full Bench. The Full Bench rejected the argument that it should consider other options available to the employer such as redeployment. It said:

'Here the situation is clear. The cinema complex was closing and there was no longer a position for a manager. That circumstance led to the termination of Mr Carter's employment. The closure of the cinema was at least one of the operational reasons for the termination of Mr Carter's employment. Indeed, it seems to us that it was **the** reason.'

Furthermore the Full Bench rejected Mr Carter's claim he was terminated because Village failed to allow Mr Carter to avail himself of the long service leave to which he was entitled and thereby remain employed for at least another six months. That decision by Village was a refusal to allow Mr Carter to take long service leave and thereby delay the implementation of its decision to terminate his employment.

The Full Bench decision does not mean employers can simply terminate employees claiming genuine operational reasons in order to avoid unfair dismissal claims. Employers have to prove that genuine operational reasons exist in order to establish the Commission does not have jurisdiction to deal with the matter. What evidence will suffice will vary from case to case depending on the circumstances.

Checking up on a company

When dealing with a company or investing in one, it often pays to check the public record for recent documents that the company has sent the Australian Securities and Investments Commission (ASIC) as the documents available on public record can be insightful.

To check the public record go to www.search.asic.gov.au to do a company name search using the ASIC 'National Names Index'. As some companies have similar names, check the 'Australian Business Number' or 'Australian Company Number' to ensure you have the correct company.

Once the correct company is found in the Index you will see a list of documents and a link to the 'Complete Document Listing'. The document list is a good indicator as to whether there is anything of interest regarding that company and whether further investigation is required.

According to ASIC doing the name search should prompt the following questions:

1. How long has the company been in business under its current name?

- The list of documents indicates whether any company name changes have occurred
- This may give you some idea about the history and stability of the company.

2. What's the company's status? Is it registered, deregistered or under external administration?

- Deal only with a registered company
- If the company is deregistered, then it cannot legally operate. If the

company is under external administration (shown as EXAD in the search), it indicates the company has run into financial trouble and you should be cautious about dealing with it.

3. Has ASIC imposed a 'stop order' or 'interim stop order' on any of the company's offerings of securities (including shares, debentures, unsecured notes or options)?

- A stop order (either interim or final) means that ASIC considered the prospectus failed to say something important to potential investors and, in the public interest, made an order that stopped the company from going ahead.

If the problem is fixed through a supplementary or replacement prospectus, the order will be lifted or 'revoked'.

- Stop orders can present a dilemma for potential investors. On the one hand, if they are later lifted the prospectus presumably then reveals everything an investor reasonably needs to know. On the other hand, if something important had been left out in the first place, investors must question whether the company's directors are sufficiently careful and diligent to look after their money.

To answer this dilemma, potential investors are encouraged to either dig more deeply into the company's history or else find another investment.

4. Has the company or director offered an enforceable undertaking to ASIC?

- ASIC accepts enforceable undertakings from directors and companies when they have reason to believe that

a company may have broken the law. In an enforceable undertaking, a company or a company director undertakes that they will stop the particular conduct or alleged breach and will not recommence the conduct. For example, a director may undertake to stop acting as a director or taking part in the management of a company for a certain time

- An enforceable undertaking indicates a past problem. It may now have been fixed, but if it's relevant to your interest in the company, you may wish to investigate further
- Copies of enforceable undertaking documents are available on the ASIC website.

5. Has the company sent ASIC any financial details?

- If the company is a small proprietary company, it does not have to prepare or send financial statements to ASIC. Small proprietary companies are prohibited from offering shares to the public or from running investment schemes offered to the public
- If it is a large proprietary company, a public company, a disclosing entity, or a registered investment scheme, the company should have sent ASIC financial statements within four months after the end of their financial year (three months for a disclosing entity or registered scheme).
- Copies of these financial statements are sent to ASIC. For those interested these can be purchased from an ASIC information broker or from one of its service centres.

6. Are any of the directors disqualified from acting in management?

- A register of disqualified directors is also available through ASIC. This register can be searched if the directors' names are known
- A disqualified director is a strong danger signal. If the search says 'NIL return' it means the directors haven't been disqualified.

ASIC recommends potential investors delve deeper to find out more about a company in which they are thinking of investing. This may mean paying for special searches or specific company documents. AISC information brokers or staff at their service centres can provide assistance.

Additional information that you may seek includes:

- Greater detail about the individuals running the company. For a fee, a personal name search is available through ASIC. This can provide information as to other companies the individual has been involved in and their business background.
- The company's share capital.

Listed public companies

If the company you are investigating is a listed public company on the Australian Stock Exchange (ASX) further information can be sought on the ASX website (www.asx.com.au). Check their 'Company Announcements' information which lists documents received by the ASX. ASIC also holds these documents.

While not an exhaustive list, the above provides a solid starting point if you are looking for further

information about a specific company and/or its officers.

Blackhole expenditure

Blackhole expenditure, as defined by the Government, occurs when business expenses are not recognised under the income tax laws.

Blackhole expenditure comprises:

- Permitting deductions for capital expenditures incurred by a business which is carried on for a taxable purpose
- Providing deductions for certain pre-business expenditure incurred by an existing business
- Recognising the expenditure in a new provision that only applies where the expenditure does not have tax treatment, or is denied a deduction, elsewhere in the tax laws. It is therefore a provision of last resort.

Under the blackhole expenditure provisions, deductions are allowed in equal proportions over a five-year period.

Some types of deductible capital expenditure allowed are set out below as they relate to:

- Commencing a business. Pre-business expenses that may be deductible include expenditure to investigate the viability of the business (for example, the costs of feasibility studies, due diligence or market research), and establishment costs (such as the costs of incorporating a company, creating a trust or forming a partnership through which the business will be carried on)

- Business restructuring. Expenditure to preserve an asset's value is included as well as expenditure to increase its value. Expenditure that relates to installing or moving the asset is also included
- Defending against a takeover
- The costs of ceasing business. Post-business expenses that may be deductible include capital expenses incurred to cease carrying on the business and expenses incurred as a consequence of the business ceasing (for example, capital expenses incurred on legal costs to terminate the services of employees).

There are other types of deductible expenditure that fall within the definition of 'blackhole expenditure'. Contact your Chartered Accountant for more information.

Standard business reporting

The Government has announced a new initiative aimed to provide a significant and sustained reduction in the business to government reporting burden.

Called the 'Standard Business Reporting' programme, it is a whole of government initiative aimed at eliminating unnecessary or duplicated reporting between business and government agencies. The programme will target:

- Reducing the number of different agencies to which businesses have to directly report the same or similar information
- Reducing the number of data elements that businesses report to government by standardising

and harmonising data definitions and eliminating duplication

- Providing options for increased automation of business reporting, including greater pre-population of forms.

Standard business reporting should reduce the volume of reporting from businesses to government, improve reporting consistency and reduce the number of different agencies that businesses have to report to.

In the long term, standard business reporting could encompass all business to government reporting however a staged roll-out will be undertaken to minimise transitional costs to businesses. Taking a staged implementation approach businesses should find they report to fewer and fewer different agencies over time.

While standard business reporting is about reducing the reporting burden for business, the Government has stated there will be no requirement for businesses to change the way they conduct their own record keeping arrangements.

Employer obligations checklist

When an employer ceases to work for you there are several obligations you must meet. They cover eligible termination payments (ETP), fringe benefits tax (FBT), pay as you go (PAYG) and superannuation.

The following article outlines your obligations as an employer within these areas:

Eligible termination payments (ETP):

- If the employee is due a lump sum payment,

determine if any component is an ETP. Only certain payments paid to an employee when terminating their employment are ETPs. They may include unused rostered days off (RDOs), unused sick leave or compensation for loss of job, among other things

- Calculate the ETP components
- Provide the employee with an ETP pre-payment statement if the gross ETP is more than \$5,000
- Pay the ETP in accordance with the employee's instructions
- If paying a cash ETP of more than \$5,000, complete an 'Employers reasonable benefits limit reporting' form. Send this to the Tax Office before the 14th day of the month after the ETP is paid to the employee
- Provide a completed ETP payment summary to the employee within 14 days of the ETP being paid to the employee
- Include the ETP payment summary information to the Tax Office in your PAYG payment summary statement
- Keep the necessary ETP records.

Fringe benefits tax (FBT):

- Include the reportable fringe benefits on the employee's final payment summary
- Keep the necessary FBT records.

Pay as you go (PAYG):

- Make any final PAYG withholding payments on the employee's behalf
- Forward a payment summary to the employee by 14 July, or earlier if requested
- Retain the employee's 'TFN declaration' for the current and next financial year
- Include the details of any final payments made to the employee in your PAYG payment summary statement
- Keep the necessary PAYG withholding records.

Superannuation:

- Calculate and pay any final superannuation contributions by the quarterly cut-off date
- Keep the necessary superannuation guarantee and superannuation choice records.

For more information about your employer obligations should an employee leave contact your Chartered Accountant.

DISCLAIMER: The contents of this publication are general in nature and we accept no responsibility for persons acting on information contained herein.