



**Head Office**

Address: Level 1  
 19-21 Argyle Place South  
 Carlton, Victoria, 3053  
 Tel: (03) 9349 4655  
 Fax: (03) 9349 3955  
 Email:  
 elenad@workstreams.com.au

**NSW Office**

Address: Unit 20  
 45-51 Huntly Street  
 Alexandria, NSW, 2015  
 Tel: (02) 9516 2033  
 Fax: (02) 9516 2577  
 Email:  
 taniap@workstreams.com.au

**Man impaled on forklift prongs**

A 56-year-old man was in a critical condition after becoming impaled on the prongs of a forklift truck and pinned against a trailer in Broken Hill last week. He remains in a critical condition in Broken Hill Base Hospital. Both the Police and WorkCover are investigating the accident.

**Ombudsman attacks WorkCover**

Victorian WorkCover Minister Tim Holding has defended WorkSafe, despite an ombudsman's report slamming its handling of claims that Police Association secretary Paul Mullett bullied other union staff.

The damning ombudsman's report tabled in Parliament found Victoria Police had bounced the bullying claims to WorkSafe and WorkSafe had failed to properly investigate.

The allegations arose after two police officers used the Whistleblowers Protection Act to raise concerns about Mr Mullett's actions and other complaints followed.

The ombudsman found WorkSafe's handling of the complaint was inadequate and ignored important evidence.

The ombudsman has recommended police and WorkSafe renew their investigations.

Mr Holding concedes there were some shortcomings in the handling of the claims and says WorkSafe will adopt the recommendations.

"The ombudsman clearly found that they hadn't acted improperly, it's just that they hadn't conducted a full and thorough investigation," Mr Holding said.

"He's made some pretty clear recommendations as to how they can sharpen up their processes and WorkSafe have indicated that they're willing to take on board those recommendations."

Both WorkSafe and Victoria Police have agreed to the ombudsman's recommendations.



**WORKSTREAMS NEWS**

April 2007

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**How to write an employment contract**

As the confusion with Work Choices keeps growing, customers are repeatedly asking questions relating to employment contracts and what guarantees can be written in to it to prevent legal issues from arising.

An employment contract is legally enforceable through the courts in the same way as any other contract. So what should it include? This little guide has been compiled to assist you. If in doubt please don't hesitate to call us for clarification.

**1. Work out which sources of employment obligations apply**

For most Australian businesses (employing less than 100 employees) the Workplace Relations Act 1996 applies. This imposes minimum entitlements and certain termination obligations.

Additionally, an award or workplace agreement may apply. Remember that it is not possible to "contract out" of applicable award, agreement and legislative obligations.

**2. Decide what terms and conditions the contract will include**

A written contract can be as detailed or as brief as an employer wishes. As a general rule, if an employee is senior and not covered by an award, the contract will be more detailed. It may be appropriate to develop a policy in relation to certain matters, rather than including them in the contract.

**3. Decide on format and style**

An employer may wish to use either a basic letter of appointment or a more comprehensive service agreement for senior executives. Employers still prefer to provide less senior employees, with an informal letter. This is perfectly fine.

**4. Watch for legal pitfalls**

If you feel unsure of the legal effect of each provision in the contract, you may wish to have the contract reviewed by ACH. Alternatively, you can engage a lawyer to prepare the contract. It is important to emphasize that the contents of the contract comprise the actual offer of employment.

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## 5. Termination of employment

Including this clause is a crucial protection against legal exposures when the employment comes to an end. Where an employee is covered by an award, that award will usually set down the parties' rights and obligations in the termination context. However, where an employee is award-free an employer has greater freedom in determining the content of the contract or agreement's termination provisions.

**Termination provisions may address any or all of the following:**

- pre-termination procedures
- notice of termination
- summary termination
- termination during a probationary or qualifying period
- redundancy etc.

# Labor promises to reintroduce unfair dismissal

A Federal Labor government would introduce a new process for unfair dismissal claims, creating an umpire who can make decisions about whether the dismissal is unfair and award compensation to employees. There would be a seven day limit for making a claim and no lawyers allowed

If a company has under 15 employees, then the employees with one year service would be able to claim unfair dismissal. If there are over 15 employees, then employees with six months service could claim unfair dismissal.

Labor would also develop a Fair Dismissal Code to help employers work out what is

a fair dismissal. If employers comply with the Code, then the dismissal is fair and there is no compensation.

These announcements were made by opposition leader Kevin Rudd to the National Press Club last Tuesday 17th April 2007. Mr Rudd vowed not to reintroduce the state-based industrial relations regime, insisting he would create a uniform, national system.

"Some in the labour movement have argued for the return to a predominantly state-based jurisdiction. I reject that view," he said.

"A federal Labor government will achieve nationally consistent laws for the private sector."

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Rudd also announced his policy to raise the threshold for BAS from \$50,000 to \$75,000 and a plan to cut red tape. Labor would work in partnership with the states to harmonise occupational health and safety regulation, administration of payroll tax, building codes, trades and professional body recognition.

# Termination of employees on WorkCover

In the recent decision of *Lee v Hills Before and After School Care Pty Ltd* [2007] FMCA 4, the Federal Magistrates Court of Australia cleared up uncertainty about whether an absence from work due to a workplace injury for which an employee receives Workers Compensation benefits is a temporary period of absence from work under the Workplace Relations Regulations 2006.(WR Act)

In this case, Jane Lee, the applicant, had worked for Hills Before & After School Care Pty Ltd (Hills), since 1995 as a casual child care worker. In 2002, Ms Lee was injured at work and consequently claimed and received Workers Compensation benefits. Ms Lee returned to work on a return to work program in 2005, from which time she worked an increasing number of hours. As at March 2006, Ms Lee was working for 4 hours each day on 5 days of each week and was paid Workers Compensation for an additional one hour each day. On 30 March 2006, Ms Lee was absent from work because she was ill and her employment was terminated by Hills in April 2006.

Subsequently, Ms Hill brought a claim against Hills alleging that her employment was terminated unlawfully, contrary to section 659 of the WR Act, which prohibits the termination of employment in circumstances where an employee is temporarily ill or injured, within the meaning of the WR Regs.

Federal Magistrate Raphael determined that there was no reason that a workplace injury should not fall within the description of an illness or injury for the purpose of the WR Act. Further, he determined that a period of absence from work where an employee is paid Workers Compensation benefits following a workplace illness or injury is paid sick leave within the meaning of the WR Regs. In light of this, he held that Ms Hill's claim of unlawful termination should continue to trial on the remaining issues.

In *Smith, Arthur and Kimball, Brett and Moore Paragon Australia Ltd*, the Vice President Lawler of the Australian Industrial Relations Commission, the Senior Deputy President Kaufman and Commission Mansfield highlighted some of the factors that are crucial in determining whether the termination of employment of injured workers is lawful.

Please note that this list is not exhaustive.

- The terms of the contract of employment including, in particular, the extent to which the contract of employment specifies inherent requirements for the employee's contractual "position".
- The nature of the employee's incapacity and whether it prevents the employee from satisfying the inherent requirements of the employee's contractual position.
- The breadth of the contractual "position" occupied by the employee and the duties or job actually performed by the employee at the time his or her employment was terminated. Where a given "position" covers a wide range of duties and jobs within the employer's business, it is less likely that an inability to perform some only of those duties or jobs will be determinative against reinstatement.
- The practicality and reasonableness of providing modified work arrangements (including, possibly, the provision of special equipment) or modified duties to an employee so as to enable the employee to make a fully or substantially fully productive contribution to the employer's enterprise albeit within the restrictions arising from the employee's injury or illness. Clearly, it will often be impractical or unreasonable for a small employer to provide modified work arrangements or modified duties.
- The likelihood, if any, of a substantial recovery by the employee from his or her illness or injury and the consequent work restrictions. Any statutory duties falling upon the employer under workers' compensation or other legislation<sup>57</sup> and whether such duties have been complied with.

From the above list it can be seen that the nature of the incapacity, the length of service and whether the worker can fulfill the specific inherent requirements of the contract will play a major role in determining what constitutes lawful termination.

A decision to terminate a worker who is absent on WorkCover must be studied carefully under every possible aspect.