

Termination of employment – is it good to lack initiative?

Everyone values initiative, right? Well, almost right. In the context of the termination of employment, the question of who has taken the initiative may determine whether an employee's claim against their employer can succeed.

Employers need to be careful in deciding to initiate termination of employment. Even where the employer considers that there is no choice but to end the employment, making the choice that there is no choice may still involve the employer's initiative – making the employer more vulnerable to a legal claim.

The Fair Work Act 2009 provides that an employee is dismissed if their employment is terminated "on the employer's initiative." The question of whether there has been a dismissal is important because, unsurprisingly, one element of a claim for unfair dismissal requires the employee to establish that there has been a dismissal. It's also important in establishing "adverse action" in the case of an employee who brings a general protections claim.

In fact, employment can be terminated "on the employer's initiative" even if their decision was influenced by external factors outside their control. This issue arose in a



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case decided recently by the Full Federal Court, concerning two unfair dismissal claims brought against the NSW Catholic Employment Office.

Each of the claimants was a teacher who had been charged with criminal offences and then granted bail. In each case, the effect of the charge was that the teacher was unable to comply with the "working with children check" in the NSW child protection legislation. Obviously, a teacher who is unable to lawfully work with children is in a bit of a tricky position. Accordingly, the employer ended the

employment of each teacher. Did this amount to termination "on the employer's initiative" and, thus, a dismissal?

Well, the employer said that it didn't. In the first claim, the employer argued that the contract had come to an end by "frustration." This isn't the frustration of having a teacher that can't teach. Frustration is a principle of contract law that operates to end contracts that, as a result of an unforeseen event, have become impossible to perform (or where the only possible performance is radically different from that which the parties originally had in mind). The death of an employee will frustrate an employment contract (as, in most cases, will an employee's incarceration). But the teacher in this case was very much alive (and out on bail).

In the second claim, the employer tried a different argument; that the termination of the teacher's employment was not "on



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Even when the decision to terminate the employees was required by another law, the court deemed it a deliberate and considered act of the employer.

About the Author

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the employer's initiative" because the child protection legislation gave the employer no lawful choice but to terminate the teacher's employment.

Both arguments failed. The Full Federal Court found that both teachers were dismissed "on the employer's initiative." The court held that even if the decision to terminate the employees was one which was required by another law, the termination was nonetheless the "deliberate, considered act" of the employer – it was them and not the child protection legislation which terminated the employment.

One way for employers to avoid a finding that employment has ended by a dismissal is to use fixed-term contracts. This was illustrated in another recent decision (this time in the Federal Circuit Court). The former general manager of the Brisbane Bandits baseball team brought a general protections claim alleging that he had suffered adverse action as a result of complaints he had made about workplace issues.

However, to get to "first base," the employee had to show that he had been dismissed. His contract was for a fixed-term of one year. The employer had the option to renew the contract for a further period (but was not obliged to do so). Ultimately, the employer told the employee a month before the end date that the contract would not be renewed (and that the employee was not required to work for the last month).

It was held that this situation did not involve a dismissal. Termination of employment occurred when the fixed-term expired, and a true fixed-term contract expires by agreement, not by the initiative of one party or the other.

Of course, fixed-term contracts for every member of your staff is rarely feasible. So it's best to be aware of the law regarding dismissal, and remember that even if the decision to terminate seems like it's out of your hands, that doesn't mean it's not your responsibility. ■

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