



WORKPLACE LAW UPDATE – HAPPY NEW YEAR EDITION

January 2007

Developments in HR & IR Law in Australia

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Unfair Dismissal and Unlawful Termination

“Talented Manager” Feature – Roger Hawke



Welcome to the **New Year Edition** of Workplace Law Update. As the festive season draws to an end, I would like to take this opportunity to thank you for your support over 2006 and to wish you a happy and prosperous 2007.

I am very excited to advise that this month is the launch of the “Talented Manager” feature. Given I have the privilege of dealing with some exceptionally talented, driven, and successful managers, I thought it only fair they should be interviewed, and we can all learn their secrets of success and good management!

This month, our feature manager is Mr. Roger Hawke, CEO of his own Bookmaking business, and employer and manager of 30 staff.

But first, let’s examine unfair dismissal and unlawful termination with WorkChoices.



Unfair and Unlawful Termination under WorkChoices

Unfair Dismissal

As you know, some of the changes in the federal government's WorkChoices legislation are with respect to unfair dismissal provisions. In summary, these changes include:

1. An expansion of the number and type of employees that are excluded from being able to make an application for unfair dismissal with the Australian Industrial Relations Commission ('the AIRC'), to include:
 - a. Seasonal employees;
 - b. Employees serving a qualifying period (or probationary period), which may now be up to 6 months';
 - c. Employees terminated on the grounds of a bona fide redundancy; and
 - d. Employees engaged in a business with 100 or less employees in total at the time of termination.
2. Many of the jurisdictional matters, such as whether an employee is excluded because they work in a business with fewer than 100 employees, are now to be determined administratively by the AIRC, rather than via a formal hearing;
3. The AIRC is to take into account the employee's misconduct (if any) in awarding monetary compensation for an unfair dismissal. The AIRC is unable to award compensation to an employee on the basis of shock and humiliation; and
4. The AIRC may award costs against advocates/representatives who encourage their clients to pursue vexatious and/or frivolous claims.

Unlawful Termination

It is important to note that the expansion to the exclusions for unfair dismissal do not apply to unlawful termination. An unlawful termination is a termination that is discriminatory in nature, and/or for an unlawful reason (for example an employee is terminated on the basis of the employee's race, colour, gender, absence from work due to illness or injury, or parental leave).

With the door closing on many employees being able to bring a claim for unfair dismissal, it is foreseeable that there will be a shift towards claims for unlawful termination. So let's have a look at an example that examines unlawful termination.

An Example to Consider

A hotel has 6 employees. Of the hotel's 6 employees, one is a female, and the other 5 are males.

Given the hotel has less than 100 employees, its employees are exempt from making an application for unfair dismissal with the AIRC.

The owner of the hotel has received a number of complaints from its patrons about the one female employee's attitude toward them in the bar. She's been overbearing to the point of rudeness in serving drinks, she hassles the customers that don't have the correct change, and she refuses to assist in re-stocking the fridges. The publican, knowing that his employees are exempt from unfair dismissal, decides to terminate the female employee without providing any warnings, and with no records regarding her poor performance and behaviour.

The female employee lodges an application with the AIRC for unlawful termination. She claims that the publican has terminated her employment because she is a woman, not because of her performance. She claims that the publican has a preference for male staff members and that the publican has discriminated against her and treated her less favourably because she is a woman.

How will the publican defend this claim without any records about the female employee's poor performance and behaviour?

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It is very difficult for the publican to defend this claim without any records.

Remember that the AIRC must consider each application on its merits based upon the evidence that is presented. For this reason, it is imperative that employers continue to address work performance issues in the same formal counseling process they have been applying up until the commencement of WorkChoices.

EMPLOYERS SHOULD:

- Discuss the perceived performance issues with the employee in a counseling session;
- Provide the employee with the opportunity to respond;
- Consider the most appropriate course of action to address the performance concern, which may include provision of training, or warnings;
- If a warning is provided, it should be clearly documented and a copy provided to the employee (get the employee to sign the warning);
- Provide the employee with adequate opportunity to demonstrate an improvement in their work.
- Keep clear notes of all discussions with staff about performance management issues;
- Have a witness when holding counseling sessions with staff.
- Take minutes of counseling sessions and provide the minutes to the employee.

Talented Manager Feature: Roger Hawke



Your Current Position?

I am the CEO of a Bookmaking business in NSW that has been operating since 1974.

What is Bookmaking?

A bookmaker, bookie or turf accountant, is an organisation or a person that takes bets and may pay winnings depending upon results and, depending on the nature of the bet, the odds.

How many people do you currently manage? And what type of roles do they perform?

I employ 30 staff. We operate at racetracks at Randwick, Rosehill, Canterbury Park, Warwick Farm, and provincial race clubs in NSW. My staff answer phone calls for telephone betting from clients, take cash bets from on-course punters, record bets in computers, provide punters with tickets, and of course pay winning customers. All jobs are important and require courtesy and accuracy.

At Randwick Races on Saturdays I have 16 staff working and 6 computers in use. We do 1500 to 4500 transactions (bets) a day, which all happens in a period of 5 to 6 hours. Turnover here is between \$250,000 to \$400,000 a day. At Rosehill Races on Saturday I employ at least 25 staff. Ticket sales here would range from 2,500 up to as high as 8,500 and turnover would range from \$300,000 to as much as \$900,000 per day.

What does your job require on a daily basis?

I ensure that all clients are treated fairly and efficiently. Organising the staff, monitoring the risk side of the business and trying to make the business profitable is naturally a constant task.

What was your first job?

My first job was a summer vacation job in 1964 - I worked at the end of a production line assembling MG and Austin Healey motor cars.

What led you into management?

I completed a Bachelor of Commerce Economics Degree at NSW University, with a major in Industrial Relations. I won a scholarship from the Kellogg Foundation to do a Masters Degree in Health Administration in USA. I worked in the Department of Prime Minister and Cabinet, helped set up the Department of the Media, the Film and Television School, and the Film Development Corporation FM licenses. My father and

brother were both Bookmakers and I decided to try my hand at 'Turf Accounting', and here I am.

What do industrial relations / human resources mean for you?

They are essentially about workplace rules and agreements, including those that are legally required, and those that are formally and informally agreed to by the employer and the employee.

How Do You Manage Staff?

I am a bit old fashioned and have a fairly paternalistic approach with most of my staff. I have a great affection for most of them. I have hardly ever had a serious staff problem. I have dismissed a few staff for gross inefficiency, unreliability, and dishonesty, but over all, I have had a wonderful team of people work with me.

What motivates you?

I enjoy what I do - I think of it more as a game, or fun, than work.

How do you motivate your staff? Does money talk?

I never have any trouble recruiting new staff and I am sure money is important to them, but I think many of them enjoy the buzz of working at the races.

What are the benefits of happy staff?

Happy staff make the workplace a good place to be for everyone concerned, clients, other staff, and me.

Who or what is the greatest influence in your approach to management?

At a low point in my career I was very pleased I read a book by Edward De Bono, "*Strategies for Success*". Also, once, when I was broke, I bought an American product from a company called *The Success Motivation Institute*. The program looked like American BS, but it was great and helped me a lot. One thing in particular, the idea that success is the progressive realisation of pre-determined goals - sounds simple but it really does work.

Highlights of your career in managing people?

Watching many of the younger employees grow up and complete their studies and go into so many interesting careers.

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What are your thoughts on Work Choices (if any)?

I have not thought carefully about "Work Choices" and what it all means.

What is the last book you read?

"Shantaram" by an Australian, Gregory Roberts.

Any regrets?

No regrets. I rarely look back I am too interested in today and tomorrow.

Last Word?

The best assets a manager can have is a good sense of humour - if you haven't got one, go out and get one immediately!

Please check out Roger's website at <http://www.rogerhawke.com.au>.

If you would like more information on any of the issues raised in this Update, please do not hesitate to contact Brooke Pendlebury on 02-9231 0250, mobile 0403 818 912, or by email info@pendlebury.com.au.

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