

## Termination during probation – Understanding minimum employment periods

The hiring and management of staff is both a challenging and time consuming process. Whilst most employment contracts set out a probation period, it may come as a surprise to businesses that these contracts may not be effective if they are different to the terms of the *Fair Work Act*.

Understanding the nature of the probation period is important when making decisions in relation to managing your staff.

### So what is probation?

Under the *Fair Work Act* an employee can apply for unfair dismissal only after working for a business for the 'minimum employment period'. This period is set at 6 months for large business or 12 months if you are a small business employer (less than 15 staff).

This time is commonly referred to as the probation period and it is essential to use this time to ensure the employee is a 'good fit' for your business.

The importance of the minimum employment period is central to the hiring and development of new staff. This is the time where the company and the employee starts to build a relationship and provides the opportunity to address any growing pains that may develop.

If, during the 'minimum employment period', it is determined that an employee is not a good fit for the business you can end their employment without risk of an employee claiming unfair dismissal.

Unfortunately the risk does not end there!

Dismissal during this period prevents a worker from claiming unfair dismissal, however other risks may arise. Specifically if the worker is dismissed after exercising a workplace right or for a discriminatory reason, they may be able to make a claim under the general protection provisions of the *Fair Work Act*.

The law surrounding the minimum employment period is very complex and business need to ensure they are protected from all risks when considering termination. This is where the **VANA Employment Relations Team** can assist by providing you immediate expert advice and ensure you take the right steps to protect your business.

**For more information on understanding the termination process in the workplace please contact the VANA Employment Relations Team on (02) 9083 0091.**

## **Employer obligations when it comes to an employee's return from parental leave.**

The New Zealand Prime Minister's recent pregnancy announcement made headlines across the world this month as the female Prime Minister setting a clear plan to take 6 weeks off after the birth of her child.

We thought we would take this opportunity to answer some key questions when it comes to employers obligations when an employee returns from parental leave.

### ***What happens when my employee is set to return to work?***

One of the most fundamental obligations employers need to be aware of when it comes to parental leave is the employees return to work guarantee. Under the National Employment Standards (**NES**) an employee returning from unpaid parental leave has the right to return to work into the position they held immediately prior to commencing the leave.

Employers are reminded that if the position no longer exists the return to work guarantee provides the employee is entitled to return to an available position for which he or she is qualified and suited nearest in status and pay to the pre-parental leave position.

It is important to note that the return to work guarantee only exists where the employee is eligible for unpaid parental leave. For more information on your employees eligibility for parental leave members can contact the Employment Relations Team on 1300 368 041.

### ***Do I have any obligation to replacement employees?***

Did you know you also have obligations when it comes to replacement employees who cover the employee taking unpaid parental leave?

Before you engage a replacement employee section 84A of the *Fair Work Act 2009* requires you to notify the replacement employee the engagement is temporary and of the rights of the employee on leave and the employer, including the right of the employee on parental leave to return to the position at the end of their leave.

### ***What if the employee wants to return part-time?***

An employee returning from a period of parental leave has the right to make a request for a flexible working arrangement, such as requesting to return part time or a change to their start and finish times.

While an employee with child care responsibilities has a right request flexible working arrangements, an employer may refuse the request on reasonable business grounds set out in [section 65\(5A\)](#) of the *Fair Work Act 2009*.

Reasonable business grounds include the new working arrangements being excessively expensive for employer, likely to result in a significant loss in efficiency or productivity and likely to have a significant negative impact on customer service.

### ***What if the employee wishes to return from leave early?***

Under the NES an employee on unpaid parental leave can shorten their leave and return to the workplace before their planned return date only if the employer agrees. If an employer refuses an early return the employee must return to work on the planned date.

**For more information on your obligations as an employer when it comes to parental leave rights and obligations please phone the VANA employment relations line on (02) 9083 0091.**

### **Australia Day sickies! Where do employers stand?**

It has been 35 years since then Prime Minister Bob Hawke uttered the infamous words "any boss who sacks anyone today for not turning up is a bum." Whilst the workplace laws have changed significantly since 1983 the culture surrounding the 'sickie' has not.

This is especially true as Australia Day falls on a Friday this year and some employees may look to take an extra day off and make the most of a four day weekend.

As an employer trying to run a business this can be very frustrating and may put you in a situation where you are short-staffed. However significant protections exist for employees when exercising a right to take sick leave and it is important to know where you stand when dealing with Australia Day sickies.

#### **When can an employee take sick leave?**

Under the *Fair Work Act 2009* (Act) permanent employees are entitled to paid sick leave (referred to in the Act as personal leave) where they are not fit for work because of illness or personal injury affecting the employee.

Whilst employees may hope to score an extra-long weekend this Australia Day long weekend, you have the right to request evidence to establish the leave was taken for a genuine reason. A medical certificate stating that the employee is not fit for work will satisfy the evidence requirements.

The Act also stipulates that an employee must give notice to the employer as soon as possible and provide information of the expected length of leave.

If an employee fails to comply with the notice and evidence requirements in the Act they are not entitled to paid sick leave under the Act.

#### **Be careful not to take adverse action!**

Whilst you have every right to request medical evidence, there are significant safeguards in place to ensure that action is not taken by an employer against an employee for exercising a workplace right such taking sick leave.

These safeguards, known as general protections, require an employer who takes action (such as disciplining or terminating an employee) to prove that the action they took was in no way related to the employee using their sick leave.

Claims under the general protection provisions have no limit for monetary damages which means if the employee can show they were fired for genuinely taking sick leave this can be a very costly mistake.

#### **Dealing with the "sickie"**

As this can be a risky area it is important to get things on your end are in order. Take steps to ensure that your employees know they are required to comply with the notice and evidence requirements under the Act.

The best way to do this is by implementing a clear policy outlining what is expected of employees when they are legitimately ill. Having this in place will ensure employees know what is expected of them when using sick leave.

Dealing with staff calling in sick can be a very frustrating experience, however when considering the risks attached to sick leave it is important to take the right steps to protect your business.

**To get immediate advice on the best practice way to deal with this situation contact the VANA Employment Relations Team on (02) 9083 0091.**