



Workplace Relations Update

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What is reasonable notice of termination?

There has been controversy in Australian Courts as to whether section 117 of the *Fair Work Act 2009* (Cth) (**FW Act**) operates so as to preclude an implied term of 'reasonable notice' into a contract of employment.

A recent decision by the Federal Circuit Court of Australia in *McGowan v Direct Mail and Marketing Pty Ltd* [2016] FCCA 2227, however, has clarified that an implied term of 'reasonable notice' can still operate regardless of the operation of section 117.

Section 117 of the FW Act

Section 117(1) of the FW Act provides that employment is not to be terminated without the *employer giving written notice of the day of termination*.

Section 117(2) requires that the time between *giving the notice and the day of the termination* is to be at least the period set out in subsection 117(3), being the minimum period of notice of between one to five weeks, depending on age and length of continuous service.

'Reasonable notice'

Generally, contracts of employment that do not contain an express term for notice of termination or payment in lieu of notice will be regarded as containing an implied term that either party can terminate by giving the other party 'reasonable notice' of their intention.

Background

The Applicant had been employed by Direct Mail and Marketing Pty Ltd (**Direct Mail**) since 1999. On 7 October 2014, the Applicant made a number of employment-related complaints to an external Human Resources Consultant engaged by Direct Mail. The Applicant was subsequently advised that his employment was to be terminated on 17 November 2014. The Applicant was paid five weeks' notice in accordance with section 117(2) of the FW Act.

The Applicant brought a claim for adverse action in the Federal Circuit Court on the grounds that his employment had been terminated on the basis that he had exercised his workplace right, under section 340(1)(a)(ii) of the FW Act, to make complaints relating to his employment.

The Applicant further argued that five weeks' pay was inadequate and reasonable notice in the circumstances was a period of twelve months.

Along with the adverse action claim, the key issue to be resolved was whether section 117 of the FW Act precluded the existence of an implied term in a contract of employment that reasonable notice of termination be given.

In this edition we review:

In *McGowan v Direct Mail and Marketing Pty Ltd* [2016] FCCA 2227, the Federal Circuit Court of Australia provided clarification as to whether an implied term of 'reasonable notice' can operate alongside section 117 of the *Fair Work Act 2009* (Cth).

This decision highlights the importance of employers being vigilant about ensuring the quality of termination clauses in their employment contracts.

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Federal Circuit Court decision

In dismissing the Application, Justice McNab held that while section 117 of the FW Act is intended to provide a minimum period of notice of termination, it does not operate to displace a right to reasonable notice when a contract of employment is silent on notice.

His Honour held that while an employer may have satisfied the National Employment Standards (**NES**) by paying or giving the minimum notice prescribed under section 117 of the FW Act, and will not be liable for a breach of those standards, the payment or notice period will not necessarily satisfy a claim for 'reasonable notice'.

In comparing an employee who has worked five years in a mid-range role to an employee who has worked 25 years in a high-level role, His Honour stated that it is unlikely that Parliament intended to provide the same notice period to both employees under section 117 of the FW Act.

Key take-away points

- Section 117 of the FW Act provides a minimum period of notice of termination only. It does not displace an implied right to 'reasonable notice' where a contract of employment has made no provision for notice of termination.
- In some instances employers are still obliged to provide notice of termination beyond the requirements of the NES.
- Failing to provide an express notice period in an employment contract leaves the issue of adequate notice period open to interpretation in the Courts.
- Ensure your organisation has well drafted contracts of employment with clearly defined notice periods covering termination of employment so that notice periods can be provided (or paid) in accordance with the express terms of your employees' contracts.

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