

## Spike in unfair dismissal cases

THE Fair Work Commission has advised VACC of a sharp increase in unfair dismissal and general protections claims during the economic downturn and COVID-19.

Justice Iain Ross has advised that unfair dismissal claims in April 2020 show an increase of 60 percent in comparison with April 2019, and general protections matters have also increased by 20 percent.

As members navigate through the COVID-19 pandemic, the key message from VACC Industrial Relations is that process and procedure will be a focal point of any operational changes involving staff.

Many employees within the industry are covered by Modern Awards which provide strict requirements on how operational change must be handled. When it comes to under performance, employers should have evidence of providing procedural fairness to the employee in question.

### A valid reason and a fair dismissal process

Even where a valid reason for termination of employment exists, failure to provide an employee with procedural fairness throughout the termination process could amount to an unfair dismissal.

Employers are reminded that when considering whether a termination is unfair, the Commission has regard to the following factors:

- was there was a valid reason for termination
- was the employee notified of that reason
- was the employee offered a support person in meetings with the employer
- were there warnings about unsatisfactory performance, and
- did the employer have HR personnel to carry out the process.

In a recent case, an employee of a steel production company, who had his employment terminated after allegedly repeatedly over-ordering stock and generally underperforming in his duties, was awarded compensation of \$20,000.

The employer claimed to have provided several verbal warnings and a written "warning" given to the employee in a single email stating he had given him the opportunity to perform "many tasks" effectively, but that feedback from "everywhere" showed he was not performing.

The Commission found that the email gave no "meaningful information as to how his performance had been deficient" and no deadline for improvement. No training or assistance followed, and when the employee received no reply to an email pledging to align his efforts "with whatever is required to make the business succeed" he assumed the matter was resolved.

Although the employer claimed to have given verbal warnings, the Commission found that they were "very general in nature". Having found no indication the employee received any "clear or specific

warnings" about the employee's alleged unsatisfactory performance, it was held that his dismissal was "devoid of any fairness".

In another recent case, a meatworks boner was sacked just shy of his tenth work anniversary for stealing a can of coke from a vending machine. The abattoir boner was one of two workers sacked after being separately captured on a security camera stealing coke from a vending machine left open at the site.

After being confronted the employee showed remorse and apologised, stating it was out of character, having had an unblemished record during his 10 years' service. The employer however, dismissed him for serious misconduct for breaching the agreement and company code of conduct in stealing the coke.

The Commission found the employers' response to be harsh and therefore the employee will receive almost \$30,000 in compensation plus accrued long service leave.

These two cases are a striking reminder that even where employers believe there is a valid reason to terminate employment, they must not act hastily. A decision to dismiss an employee must follow a fair termination process and for the termination to be valid it must not be harsh, unjust or unreasonable.

When faced with any operational or staff changes, please call VACC Industrial Relations for further assistance on 03 9829 1123.

### Contact us

Industrial Relations 9829 1123 [ir@vacc.com.au](mailto:ir@vacc.com.au) | OHS&E 9829 1265 [ohs@vacc.com.au](mailto:ohs@vacc.com.au)

VACC House 464 St Kilda Road, Melbourne VIC 3004 1300 013 341 [vacc.com.au](http://vacc.com.au)

# Fair Work Information Statement

MEMBERS are reminded that the Fair Work Ombudsman has updated the Fair Work Information Statement to make it easier to understand minimum workplace entitlements, and employers must provide the Fair Work Information Statement to all new employees when they start a new job.

It contains information about the National Employment Standards, the right to request flexible working arrangements, modern awards, agreement making, individual flexibility arrangements, the right to freedom of association and workplace rights (general protections), termination of employment, right of entry, and the

role of Fair Work Australia and the Fair Work Ombudsman.

The Fair Work Information Statement is available via the Fair Work website.

Direct link: [fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement](https://fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement)

## Minimum employment periods

VACC regularly receives calls from members advising that an employee is not working out and they want to terminate the employment. Many members are totally unaware that a business has an opportunity to make this decision without going down a formal disciplinary process during a minimum employment period.

There are two minimum employment periods. A business employing over 15 employees has a six-month minimum employment period and a business with less than 15 employees, a 12-month period.

As the minimum employment period is set out in the Fair Work Act, it will apply irrespective of whether it is set out in a contract of employment. By using a minimum employment period, a business can terminate the employment of an employee on performance

grounds and the employee cannot file an unfair dismissal claim.

The business is required to pay one week's notice in lieu and unused accrued annual leave and leave loading where they exercise the option to terminate under a minimum employment period. It is also a statutory requirement to confirm the termination in writing.

The minimum employment period provides an employer with the best opportunity to make an assessment as to whether an employee will be suitable for the long-term needs of the business. It is important to bear in mind where a casual employee, on a regular and systematic basis, transfers to full-time or part-time employment, the time employed as a casual counts as part of the minimum employment period.

### Should an employer give reasons for the termination?

Whilst there is no obligation to do so, it is recommended that the employer

keep a record of any meetings and dates where performance issues were discussed, as there are other remedies available to the employee which are not protected by the minimum employment period. An employee can bring a general protections claim or a discrimination claim and, if there is no paper trail to demonstrate that the termination was solely based on performance grounds, a business can become embroiled in messy and protracted proceedings.

### Do not forget the end date of a minimum employment period

Members need to be aware that where an employee goes one day beyond the expiry of the minimum employment period, the business will have to go down a formal disciplinary process with written warnings.

### How do I calculate the relevant 6 or 12-month minimum employment period?

The minimum employment period must be completed immediately before the beginning of the corresponding day of the sixth month (or twelfth month) following the date on which the employee's employment commenced.

### Example

An employee who commenced employment on 26 February and is terminated at 5.30pm on 25 August has not completed 6 months employment and would not be able to claim unfair dismissal.



# What is the role of a support person in a disciplinary meeting?

VACC members are reminded of the importance of providing procedural fairness to an employee during the disciplinary process. Where a dismissal process is unjust, the employee may have grounds for bringing an unfair dismissal claim.

In unfair dismissal proceedings, the Fair Work Commission has regard to a range of factors including whether the employee was offered a support person in any discussions relating to their dismissal. Offering an employee the opportunity to have a support person present is considered an

element of affording the employee procedural fairness during their termination procedure.

The Fair Work Commission has clarified the role of the support person and the ambit of their power in the dismissal process. A support person cannot act as an advocate for the employee and is restricted to providing the employee with assistance.

VACC advises that in disciplinary procedures with employees, members must:

- notify the employee they are entitled to a support person
- not unreasonably refuse the employee's request to have a support person, and
- indicate that the support person's role is only to assist in any discussions relating to dismissal.

Members are also reminded of their obligations in respect of giving the employee the opportunity to respond to any allegations before a final decision in respect of their ongoing employment is made.

**“I’ve already recommended it to a couple of the guys across the road”**

**Tyson Selig**  
Workshop Manager  
Drysdale Motors  
Victoria

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**E: info@motortech.com.au**  
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**Haynes**  
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# Public holiday: Queen's birthday 2020

The Queen's Birthday, Monday, 8 June 2020, is a holiday throughout Victoria and Tasmania.

Trading hours and penalty rates of pay for Queen's Birthday are as follows:

Service stations and roadhouses, towing, roadside assistance and car hire	New and used car showrooms and yards, motorcycle establishments, workshops, car washing, car parking establishments, tyre retailers, boats, caravans, trailers, dismantlers and recyclers
May trade	May trade

## Penalty rates of pay

Vehicle Manufacturing, Repair, Services and Retail Award 2010

Penalty rates of pay apply to employees required to work on the noted public holidays:

- All employees except console operators,

driveway and roadhouse attendants and casuals employed in any classification:

- Double time and a half
- Console operators, driveway and roadhouse attendants employed on a full-time basis (i.e. weekly hired): Double time
- Casual console operators, driveway, and

roadhouse attendants: Flat rate applicable to

Saturday, Sunday and public holidays is payable  
 Vehicle salespeople: By mutual agreement a day off in lieu, otherwise double time and a half rates applies  
 Other casuals (working in any class of work): 175 percent loading

Double time	'Single time' extra for the hours actually worked in addition to the day's wages paid for the week.
Double time and a half	'Time and a half' extra for the hours worked in addition to the day's wages paid for the week.
Double time and a half (salespersons)	If more than half a day is worked, half of the salesperson's weekly rate of pay calculated as follows: Weekly wage rate is \$862.50, they get an additional \$258.75 (which is \$862.50 divided by 5 = \$172.50 x 1.5) If half a day or less is worked, one quarter of the salesperson's weekly rate of pay calculated as follows: Weekly wage rate is \$862.50 they get an additional \$129.38 (which is half of \$258.75).

# Labour hire licence applications to be accepted in Victoria before 30 June

THE Labour Hire Authority has recognised that the COVID-19 pandemic is affecting labour hire hosts, providers and workers. This has resulted in changes to the labour hire industry. The Authority has therefore made a policy decision to support providers, hosts and workers during this pandemic, while continuing to ensure a fair working environment for labour hire across Victoria.

The Authority has stated that it will not take enforcement action against a provider for providing labour hire services without a licence, or a host who enters into an arrangement with

that provider, where a complete application is submitted to the Authority before midnight on 30 June 2020 and there is no evidence of non-compliance.

Labour hire providers and hosts remain responsible for complying with Victorian and Commonwealth workplace laws such as occupational health and safety laws, workers compensation laws, superannuation laws and applicable accommodation and transportation standards.

This approach is in accordance with the guiding principles set out

in the Authority's Compliance and Enforcement Policy which is available on the Authority's website and the key objective of protecting workers from exploitation, while operating as a fair and proportionate regulator.

To support hosts, providers and workers during the coronavirus pandemic, the Authority has also published details of licensed labour hire providers and applicants including the industries to which they nominated supplying workers.

For further information please visit the Labour Hire Authority website: [labourhireauthority.vic.gov.au](http://labourhireauthority.vic.gov.au)



# Consultation: A key employer obligation in redundancy

THE Vehicle Manufacturing, Repair, Services and Retail Award 2010 and the Clerks - Private Sector Award 2010 include consultation provisions that must be followed in the case of a genuine redundancy. Employers must comply with these provisions to avoid an unfair dismissal claim even if the redundancy is a genuine redundancy.

## Redundancy

A genuine redundancy occurs where the position being made redundant either no longer exists or is incorporated into another role or a number of roles. Redundancy should not be used to avoid a procedurally correct termination process. If the redundancy is not genuine or transparent, a business could receive an unfair dismissal application or adverse action claim.

In making a position redundant it is important to ensure that all avenues have been exhausted including the possibility of the person performing another role at a similar level and/or responsibility within the organisation if it is available (redeployment). Whether an alternative job is acceptable will require an assessment of many factors including pay level, hours of work, recognition of length

of service, non cash benefits, workload, job security, impact on future careers prospects and travel distance to/from work.

## When does the obligation to consult arise?

Consultation under an Award usually requires an employer to notify its employee(s) of a decision to introduce any redundancy, or major workplace change, as soon as practicable after the decision is made and to discuss the changes with employee(s) and their representative(s).

## What to include in the discussions with the employee?

Discussion points to include:

- the introduction of the change
- the effect the change is likely to have on employee(s) and the measures being taken to mitigate any adverse effect of the change on employee(s)
- providing information to employee(s) about the proposed change in writing, and to give prompt and genuine consideration to matters raised by employee(s) or representative(s).

It is important to ensure that employees not only have reasonable time to consider the changes or if there is an offer for another position, but also what will be the outcome if they refuse any reasonable offer.

## Helpful hints

In order to achieve a positive outcome, it is important not to rush or make any hasty decisions. Take the time to consider how, where and when the employee(s) will be told the news and carefully share the reasons behind the decisions.

VACC advises members to telephone before they act when it comes to restructuring a business, particularly where redundancies are involved. Please call VACC Industrial Relations for further assistance. Call 03 9829 1123.



## Get the Health & Safety help you need

Your Health & Safety obligations don't have to be costly and complex. Our products will assist you to protect your staff and business.

T: 1300 585 136

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A photograph of a young man with dark hair, smiling, wearing a dark blue uniform. He is holding a red tool. The background is a blurred industrial setting.

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# Forklift safety

FORKLIFTS can be beneficial for the workplace as they can eliminate hazardous manual handling and make light work of loading/unloading large quantities of goods. However, forklifts do introduce another hazard in the workplace which can be far more dangerous.

Forklifts, when used in the workplace without adequate safety procedures, can be a disaster waiting to happen. Recently in NSW there was an unfortunate and preventable death of a forklift operator outside a warehouse. The forklift was found tipped over on its side and the operator pinned under it. Paramedics attended the scene, but were unable to save the young man. This is a timely reminder for employers and workers that complacency must not be allowed to creep into the workplace, as it can have devastating consequences.

The most common cause of deaths associated with the use of forklifts include:

- Pedestrians being struck by mobile powered plant

- Operator crushed under overturned forklift, and
- Operator crushed by falling load.

Below are some key things to consider when dealing with forklift safety:

- Ensure operators always hold a valid High-Risk License which they carry with them while operating a forklift
- Ensure that forklifts are only operated within the specified manufacturers recommendations and compliance plate specifications
- Conduct a daily pre-operational inspection and ensure it is documented and records maintained
- Implement a documented traffic management plan which aims to segregate pedestrians from areas where forklifts are used and consult workers on the plan
- Ensure that PPE is worn when operating a forklift or working in the vicinity of an operating forklift, including high visibility clothing or vest, and safety footwear
- Introduce a maximum speed limit for forklifts to operate, for example a maximum of 5km per hour
- Ensure the forklift is maintained as per manufacturer specifications and all safety features are functional including reversing beeper, flashing lights, side and rear vision mirrors are clean and undamaged.
- Inspect the ground regularly for potholes, loose or damaged surfaces or gradients in excess of manufacturers recommendations
- Remember that when carrying a load, reversing down a slope offers greater stability than driving forward down a slope
- Ensure operators always have their seatbelt fastened whilst driving a forklift as this can help avoid an operator being crushed under the forklift, in the event it overturns
- Ensure that keys are not left unattended in a forklift
- Ensure that operators always drive with tines lowered whether forklift is unloaded or carrying a load.

For more information about forklift safety, visit [worksafe.vic.gov.au](https://www.worksafe.vic.gov.au) or call the VACC OHSE Unit on 9829 1265.

## Member reminders

### Industrial manslaughter laws commence on 1 July

The new Victorian Workplace Manslaughter legislation commences on 1 July 2020. The new laws introduce criminal offences for industrial manslaughter and will apply to organisations (including body corporates, partnerships, unincorporated bodies and unincorporated associations), self-employed persons as well as officers of

a company or organisation.

This legislation applies to employers or officers whose actions or omissions:

- cause the death of a worker or member of the public
- involve a breach of an OHS duty, and
- were negligent.

The new offence will attract maximum fines for corporations of approximately \$16.5 million and up to \$1.65 million for officers, in addition to imprisonment for

up to 20 years for individuals.

### New modern awards commenced on 29 May

The new Vehicle Repair, Services and Retail Award Determination and the Clerks - Private Sector Award Determination will not take effect until after the first full pay period that starts on or after 29 May 2020. The new awards can be accessed on the VACC Workplace Relations website.



## Notice of VACC Divisional Elections July 2020

VACC elections for the Divisional Executive Committees will be conducted by Mr Ron Ritchie, Returning Officer in July 2020. Nominations for Divisional Office Bearers open on **Monday, 13 July 2020**.

*Note:* nominations for Divisional Executive Committee members in BRD and TOD need to be accredited in those Divisions.

Nomination forms can be lodged with the Returning Officer by:

**Mail:** Mr Ron Ritchie  
Returning Officer  
PO Box 265  
Mount Waverley Vic 3149

**Email:** [ronritchie@optusnet.com.au](mailto:ronritchie@optusnet.com.au)  
(nominees will need to scan the nomination form or send a PDF)

**Fax:** 03 9866 1168 (VACC Industrial Relations)

by 4 pm on **Friday, 31 July 2020**. Nominations cannot be withdrawn after this time.

*Note:* The VACC Constitution provides that:

***“Only a current financial member of the division who is or has been a financial Member of the Division for any period of no less than 1 year may stand as a candidate for election to the Executive Committee.”***

and

***“All such nominations shall be signed by a proposer, seconder and nominee who shall be members of the Association, division, affiliated association or branch for which the election is to be held whose subscriptions shall not be in arrears.”***

Nomination forms can be obtained by contacting the Returning Officer on 0401 524 790 or VACC on (03) 9829 1231.

The Returning Officer will acknowledge receipt of all nomination forms received.