Overview

Understanding the separation/termination process is an essential part of being an effective HR manager. This resource provides an introduction to the separation/termination process and types of separations / terminations.

Key terms

**HRMIS**

Human Resources Information System—a software application for tracking and reporting on workforce and employee data.

**Industrial awards**

Historically in Australia, the main mechanism for confirming minimum terms and conditions for workers in a particular occupational group or industry.

**Redeployment**

The finishing of one contract of employment and replacement with a new contract for a different position.

**Redundancy**

When employees are laid off on a permanent basis because their work is no longer required by the company due to economic and technological reasons as well as other reasons.

**Voluntary redundancy**

When an organisation intends to lay off workers, it can ask whether any employees are interested in resigning voluntarily and taking a lump-sum payment.
Separation or termination?

Look in any good dictionary and the meanings of these two words are easily recognised. To separate is to part company; to terminate suggests causing something to end or stop. However in the world of HR management, things may not always be that simple. There are many grey areas that can sometimes lead to disputes.

These disputes can lead to legal action being taken, resulting in heavy costs - not just in terms of time and money, but also to the organisation’s reputation.

Although HR staff aren’t expected to be lawyers, it is essential for them to understand how a tribunal might interpret awards and contracts and to understand the legal obligations that they must uphold.

Legal obligations

There are various legal requirements affecting separation and termination, including:

- Commonwealth law
- State law
- decisions or laws relating to tribunals or commissions.

To ensure that your processes meet the necessary requirements, you need to know which laws apply to your organisation and how they impinge on the way it operates.

When an employee leaves or their job is terminated, employers have to meet various obligations set out by:

- the Workplace Relations Act 1996, or state workplace relations legislation
- anti-discrimination legislation
- superannuation legislation
- long service leave legislation
- occupational health and safety legislation
- worker’s compensation legislation
- taxation legislation
- annual leave legislation.

This is not a full list of the laws that apply, but it is indicative of the range of detailed information you must have access to.
Of course, an organisation can agree to give employees more than the minimum set under the law. An employee’s entitlements on the termination of their employment will depend on a number of factors, including:

- the reasons for the termination
- the applicable sources of law
- the terms of any contract of the employment and/or
- company policy.

Understanding who the law applies to

Employees are protected from unfair treatment by legislation which governs separation and termination. However, some employees are excluded from some of the legislation and therefore might have limited avenues of appeal if they leave or are fired.

Examples of these excluded employees are:

- employees serving a reasonable probationary period
- short-term casual employees
- employees engaged for a fixed term of less than six months.

Various issues can arise at the end of an employment contract, so it’s important to understand both the law and its application. For example, a Sydney-based contractor may be excluded from some of the legislation but still have remedies under NSW unfair contracts legislation.

Other considerations

Legislation is only one consideration when it comes to determining an employee’s legal rights. Awards, workplace agreements and employment contracts are also factors that should be taken into account.

Awards

There are Commonwealth and State awards, administered by separate bodies. These awards are legal documents that set out minimum wages, terms and conditions. They can operate in conjunction with agreements, such as Australian workplace agreements.
Identifying current practices

Before you can develop new processes for separation/termination, you will need to audit existing conditions to determine exactly what your organisation does now, and why. This should include reviewing current policies and benchmarks, as well as identifying potential changes in conditions.

Start by gathering information about your organisation’s current processes, and the rules and regulations you must comply with. Once you have established the boundaries, you can set your goals for change as high as circumstances will allow.

Research

What current practices exist within your organisation? Try to document both official and unofficial HR separation/termination policies and procedures that exist in your workplace.

Types of separation/termination

Retirement

The issues surrounding retirement today can be complex. The HR team needs to anticipate retirement rates so that they can plan to maintain the skill level within the organisation. When long-term workers retire, they take with them a wealth of knowledge, which may be costly or difficult to replace. As HR manager your aim is to achieve an orderly handover of knowledge and skills, with older workers mentoring younger staff to help prepare them as a replacement.

Of course, not everyone wants to retire at a given age. Some will choose early retirement if they can. Others will choose to postpone retiring and continue working for as long as they can. This makes predicting retirement more of a challenge.

Management should have a written retirement policy which has been distributed to all employees. A policy that takes into account retirement incentives could potentially reduce the need for redundancies or a frantic scramble to recruit new staff.
Redundancy

Redundancy occurs when a position is no longer required by the organisation. This can happen at all levels of the company hierarchy and describes a situation where employees are retrenched, or laid off, through no fault of their own. In such cases, the job may be terminated, rather than the employee. In fact, the employee could be offered alternative work and redeployed.

While a redundancy can also involve a termination of employment for individuals it is different from other terminations as the employer decides that the work currently being performed by the employee is no longer required.

Redundancy can come from a number of conditions:

- changes flowing from the introduction of new systems and technology—or modifications to existing systems and technology
- restructuring, relocation or reorganisation
- changing economic or market conditions.

Voluntary redundancy

Offering workers the opportunity to choose redundancy is one way to reduce disruption within the organisation when cutbacks are inevitable. Staff are advised of the organisation’s intentions and this leaves the option open for some to volunteer for redundancy.

One drawback is that longer-serving staff often take advantage of generous redundancy payments—and this can deplete the company’s knowledge base. However, on the plus side, voluntary redundancy may lessen the likelihood of morale collapsing amongst remaining staff and prevent possible disputes.

Voluntary redundancy offers need to be carefully worded, so that they are in fact an offer from the employee to accept a redundancy package which the employer is under no legal obligation to accept. The eventual outcome will depend on the employer’s assessment of workforce needs and resources.

Redeployment

When faced with inevitable redundancies in one part of the organisation, it makes sound business sense to redeploy employees wherever possible, as both time and money will have been invested in training those employees. This course of action might also save on redundancy costs. If there are suitable positions elsewhere in the group, the HR team should be able to identify and recommend employees to fill those positions.
An offer of suitable alternative work must:

- have similar status
- be within the employee’s capability
- not cause unreasonable additional inconvenience
- provide similar earnings.

**Preparation**

Proper planning is the key to effectiveness. Use the following checklist to ensure you’re on the right track in developing your processes.

Table 1: Steps in developing separation/termination processes (1 col)

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<thead>
<tr>
<th>Steps in developing separation/termination processes</th>
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<tbody>
<tr>
<td>Research the elements of <em>best practice</em> in separation/termination systems.</td>
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<tr>
<td>Research the <em>legal requirements</em> for separation/termination practice in your organisation.</td>
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<tr>
<td>Identify problems and potential improvements in the separation/termination process.</td>
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<td>Consult with appropriate managers in the organisation. Ask for, and use, <em>feedback</em> from existing employees and their managers about the value and efficiency of processes.</td>
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<td>Develop policies, procedures and documents for separation/termination events, and <em>test</em> them in the HRIS.</td>
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<td>Establish procedures that meet all legal requirements, as well as the objectives of the organisation.</td>
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<td>Prepare and develop policies and procedures for use in the event of either voluntary or involuntary redundancies, retirement, resignation and other types of departures.</td>
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<td>Develop <em>redeployment</em> procedures that take into account the situation, performance and personal qualifications of employees affected.</td>
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<td>Allow enough time for employees to make appropriate decisions about separation/termination events that affect them.</td>
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<td>Protect <em>confidentiality</em> and ensure respect for individuals involved.</td>
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Once changes are approved, documents updated and relevant staff notified, what do you do? It’s a good idea to have management and staff (or their representatives) sign off on the revised policies, as evidence that they have been read and understood them.

Case History

A full-time employee voluntarily resigned on 2 October 2000 with effect from 20 October 2000. The applicant’s last working day was 16 October 2000.

An incident had occurred at the office Christmas party in December 1999, between the applicant and two other employees. She later claimed she had resigned out of frustration. Forced to leave because of inaction by her employer regarding what she claimed was a harassment issue, as well as occupational health and safety matters.

An unfair dismissal claim was signed by the ASU, on the applicant’s behalf, on 4 January 2001 and was lodged with the Industrial Relations Commission on 5 January 2001.

The application was lodged under section 170CE(1) of the Workplace Relations Act 1996 claiming that the employee was dismissed by her employer and that her termination was harsh, unjust and unreasonable. During the hearing it was contended that the applicant’s dismissal was a constructive dismissal. (See Glossary for ‘constructive dismissal’)

The employer’s counsel submitted that the applicant resigned voluntarily and that this was not a case of constructive dismissal. It was contended that the applicant’s letter of resignation did not include any complaints about the fact that she was resigning.

The employer’s counsel contended that the application should not be accepted as it was lodged out of time. The effective date of the applicant’s termination was 20 October 2000, however and the application was lodged on 5 January 2001—55 days out of time.

The application to the Commission was dismissed. The case report stated there were a number of complex legal issues, including the alleged constructive dismissal of the applicant. On this, the Commission was referred to a number of earlier court rulings on similar subjects, including Mohazib v Dick Smith Electronics Pty Ltd (1995, 62 IR 200).
While counsel for the employee, referred to a decision in *Kornicki v Telstra Network Technology Group* [Print P3168] as the guiding principles for extension of time applications.

Find the decision for the court case:

Australian Industrial Relations Commission

*Workplace Relations Act 1996*

s.170CE application for relief in respect of termination of employment

P Levey and Brimbank City Council

Commissioner Cribb

Melbourne, 19 October 2001

You can download this decision from the Internet. Go to [www.wagenet.gov.au](http://www.wagenet.gov.au) and search for results of decision *PR910523*. Then click on ‘first hit’ link. Print and save the transcript. You will also need to find a copy of the *Workplace Relations Act 1996* and refer to the sections mentioned in the Commissioner’s decision.

**Think**

**Read the decision that you have just downloaded from the web and answer the questions below.**

1. Take the time to reflect on the outcome of this case. Do you agree or disagree with the Commissioner’s ruling? Give reasons why.

2. Was the resignation voluntary—did the employee resign out of her own choice, or was she pressured into leaving? Also, considering the Christmas incident, was it unreasonable for the employer to accept the resignation?

3. From the detailed report of the decision, work out how many days the applicant had to lodge her complaint under the *Workplace Relations Act 1996*. 

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*Describe key concepts in separation / termination: Worksheet*

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4. What mitigating circumstances might have allowed her to delay her application?

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