



KELLY  
WORKPLACE  
LAWYERS

## Employment Separation Payments

By Joseph Kelly, Solicitor, Kelly Workplace Lawyers

Recent comments by Treasury about the way in which reality television renovation shows have created housing price bubbles illustrate the ways in which reality TV has the potential to alter our perceptions. Every homeowner is now expected to have the skills to knock up an ensuite over the weekend. The humble home cook now has to create a food journey that fits a flavor narrative. And, thanks to shows like *The Apprentice*, employees are to consistently perform at their peak or risk being told “you’re fired”.

But in life the reality is different. Employees do not always perform at their peak. The reasons for this can be many and complex but the solution always starts from the same place – good management. Good management requires the one ingredient that is always missing in reality TV: time. Time to isolate the issue, time to consult with staff, time to reallocate resources, time to retrain and reskill, time to create and generate more work for staff. Unfortunately, time is not always in great supply and employers are sometimes tempted to take the shortcut of offering to “pay out” employees to end the employment relationship. In this article we will look at your rights as an employee when you are offered a “Golden Handshake”.

### **What is a “Golden Handshake”?**

Sometimes it may be the best offer you have heard – work has been getting harder to manage, the boss is looking over your shoulder constantly, you’ve started thinking that you’d like to be rid of the pressure and look for another job. Just as you’re contemplating your options your boss suggests to you that if you decided to leave you will be paid one months salary on top of your entitlements to annual leave and any accumulated long service leave. While this negotiated outcome is not illegal, it may offend certain laws in relation to unfair dismissal, redundancy and some contractual entitlements.

### **Unfair dismissal**

The *Fair Work Act 2009* (“the Act”) tries to walk a fine line between the rights of employers to hire and fire staff based on the needs of their business and the right of employees to not have their employment terminated in circumstances that are harsh, unjust or unreasonable. Section 387 of the Act sets out some of the matters that the Fair Work Commission will take into consideration in deciding whether a dismissal is harsh, unjust or unreasonable.

If an employer is proposing a Golden Handshake because an employee’s performance has not been up to standard, the unfair dismissal laws require that the employer must provide you a warning in relation to your performance. In practice, the employer must specifically outline the areas of concern and give you a reasonable opportunity to address those concerns by providing you with time, training and any necessary resources (usually as part of a formal performance improvement plan). What constitutes a “reasonable” time to allow an employee to improve their performance will change depending on the type of work performed but would generally require a period greater than one month.

If an employer is proposing a Golden Handshake because of an employee’s misconduct, then the employee needs to be notified of that reason and provided an opportunity to respond. The employer bears the onus of proving that the behavior occurred and that it constitutes misconduct. In most cases the employer will need to dedicate resources to investigating the matter such as engaging third party workplace investigators. It may be tempting to an employer to have certainty of the outcome by asking the employee to accept a payment in exchange for the employee signing a deed that prevents them from bringing an unfair dismissal claim against the employer. There is nothing unlawful in this, provided no duress is applied and the employee is not misled about their rights or options.

### Redundancy

Sometimes the pace of change in an industry means that a job that was once essential is no longer required, either due to technological advancement, changing business needs or outsourcing. In these circumstances, where the employer has made a decision that the job being done by the employee is no longer to be done by that employee or any other employee, then the employer owes a duty to the employee in redundancy. The duties in redundancy include the duty to consult, the duty to consider alternative positions and the duty to pay a redundancy payment if the employee cannot be relocated. The amount of payment in redundancy depends on what is set out in either the employee’s contract or collective agreement, but the Act sets out the following minimums:

Employee’s period of continuous service with the employer on termination	Redundancy pay period
At least 1 year but less than 2 years	4 weeks
At least 2 years but less than 3 years	6 weeks
At least 3 years but less than 4 years	7 weeks
At least 4 years but less than 5 years	8 weeks
At least 5 years but less than 6 years	10 weeks
At least 6 years but less than 7 years	11 weeks
At least 7 years but less than 8 years	13 weeks
At least 8 years but less than 9 years	14 weeks

At least 9 years but less than 10 years	16 weeks
At least 10 years*	12 weeks*

\* There is a reduction in redundancy pay from 16 weeks to 12 weeks for employees with at least 10 years continuous service. This is consistent with the 2004 Redundancy Case decision made by the Australian Industrial Relations Commission.

The above table sets out the minimum payments – these may be higher depending on the applicable industrial instrument. Redundancy payments also attract far more beneficial tax treatment than Golden Handshakes.

The duties imposed on employers in redundancy, such as consultation and relocation, can appear onerous to some employers who prefer the certainty of outcome that Golden Handshakes provide. However, employees may be better off in the long run by retraining and transitioning to a new role with their employer rather than facing an uncertain labour market, and employees have a right to be considered for alternative employment. Also, while the amount being offered in a Golden Handshake may seem attractive, if it is not properly characterized as a redundancy it would lose any beneficial tax treatment and be taxed at the higher Employee Termination Payment rate of 31.5%.

#### Contractual and other entitlements

An employee who has had their employment contract terminated (either unilaterally or by mutual agreement) has a number of possible outstanding payments legally owing to them by their employer. These entitlements may be provided for in the Act, an applicable modern award, a collective agreement or by way of contractual obligations.

- *Outstanding remuneration:* An employer must pay an employee any wages outstanding to legally terminate the employment contract. This is most commonly made express by a term of the contract, but is also implied into all contracts at common law.<sup>1</sup> One caveat on that common law presumption is that an employee has no implied right for payment for part performance. This means that an employee who knows of their pending termination and decides not to perform their full range of tasks as required by their contract, may lose a claim to payment for any ‘part’ work they have actually done (*Rodgers J per Csomore*).
- *Payment in lieu of notice if applicable:* Under s117 of the Act, an employee may be entitled to be ‘put on notice’ for a period prior to dismissal. If an employee is on a fixed term contract, notice is not a requirement (s123)(1)), the contract must be fully performed and can only be terminated early if it is an express right of contract (unless a grounds for summary dismissal exists). However, if the contract is indefinite, the Act imposes an obligation of a notice period. For this period, the length of which depends on the duration of continuous employment, the employee must work out a certain period for which they are to be paid. This period can also be paid out ‘in lieu of’ the employee actually working during that period and is calculated at the full rate of pay had the employee actually worked.

---

<sup>1</sup> *Automatic Fire Sprinklers Pty Ltd v Watson* [1946] HCA 25.

- *Accrued annual leave:* Annual leave is a statutory entitlement under the Act which accrues over the period of employment. Any accrued and unpaid leave must be paid out on termination as if the employee had taken out leave pursuant to s90(2) of the Act. If stipulated by a relevant modern award, annual leave loading will be applied to that accrued figure.<sup>2</sup>
- *Long service leave:* Accrued long service leave may also be payable upon termination of employment. The quantum and eligibility to long service leave will depend on any relevant modern award applying or, if none applies, the State laws which apply.
- *Benefits stipulated under contract:* Irrespective of any statutory right to termination payments, a contract itself can provide its own set of entitlements to be paid. Some common examples include commissions, bonuses, ex-gratia termination payments and payouts of sick leave or personal leave.
- *Balance of superannuation contributions:* It is also incumbent on an employer to ensure that all employees' super contributions are up to the date effective from the date of dismissal. This may have to account for any notice period applicable, depending on whether the notice period was worked out or if the contract provided for superannuation to be paid on ex-gratia payments.
- *And a note on Fixed Term contracts:* Fixed term contracts are treated slightly differently. This is because there is an enforceable contractual date of termination, the date upon which final payments are to be made. It is not uncommon for this termination date to be based on a stipulated retirement date<sup>3</sup> or a date contingent upon the completion of a specified task or project. Practically speaking, termination by an employer prior to this date will mean that a breach of contract has occurred which will render the employer liable to either remedy the breach or pay compensation. This may include any due payments, required by the FWA or contract, up until the original termination date of the contract. For example in *Stoelwinder v Southern Health*,<sup>4</sup> a fixed-term employment contract provided that "all unpaid entitlements" were to be paid on the termination date. Even though the Act does not require an employer to pay out accumulated sick leave on termination of employment, the court interpreted the contractual term in this case to expressly include a payout of sick leave; an amount that was calculated to be \$500,000.

## Conclusion

There are a range of overlapping rights and obligations that attach to employment relationships. The consequence is that an employer who ends an employment contract by offering what appears to be a generous Golden Handshake to the employee may in fact be offering the employee less than they may otherwise be entitled to. For this reason it is always advisable to have any offers from your employer checked over by your union.

## About the Author

---

<sup>2</sup> *Centennial Northern Mining Services Pty Ltd v CFMEU* [2015] FCA 136.

<sup>3</sup> *Qantas Airways Limited v Christie* (1998) 193 CLR 280.

<sup>4</sup> *Stoelwinder v Southern Health* [2001] FCA 115.

Joseph Kelly has had extensive experience in commercial litigation and workplace law, having advised employers and employees on all issues relating to industrial relations and employment law. Joseph has advised industry bodies, unions, employers and government and continues to run training and information seminars for legal practitioners. Joseph is currently the Principal of Kelly Workplace Lawyers. [[www.kwlawyers.com.au](http://www.kwlawyers.com.au)]

Disclaimer

This advice and comments are provided as general information and should not be construed as legal advice. Separate legal advice relating to the interpretation and implication of this article for your individual circumstances should be obtained.