

INDUSTRIAL RELATIONS STAND DOWN SUMMARY FAIR WORK COMMISSION AUSTRALIA



INTRODUCTION

Under the current business challenges caused by the COVID-19 outbreak, many employers are having to consider applying the 'stand down' provisions within the Fair Work Act 2009. Standing down an employee is usually an option of last resort, however in these times is being used more commonly.

Employers will need to ensure they satisfy all relevant criteria and have considered any and all other available options before proceeding.

STAND DOWN TERMS OF FAIR WORK ACT

Refer *Fair Work Act s.524–525*

An employer may stand down an employee during a period in which the employee cannot usefully be employed because of a number of circumstances including:

- > industrial action (other than industrial action organised or engaged in by the employer)
- > a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown, or
- > a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

PAYMENTS DURING A PERIOD OF STAND DOWN

If an employer stands down an employee during a period in accordance with *s.524 of the Fair Work Act* then the employer is not required to make payments to the employee for that period.

Section 524 is intended to relieve an employer of the obligation to pay wages to employees who cannot be usefully employed in certain limited circumstances. The consequences of a stand down can be severe for an employee as the employee may be deprived of wages for a lengthy period.

Whether a particular employee can be usefully employed is a question of fact to be determined having regard to the circumstances that face the employer.[1]

STAND DOWN UNDER TERMS OF ENTERPRISE AGREEMENT OR CONTRACT OF EMPLOYMENT

An employer may not stand down an employee under *s.524 of the Fair Work Act* if:

- > an enterprise agreement, or a contract of employment, applies to the employer and the employee, and
- > the agreement or contract provides for the employer to stand down the employee during the relevant period if the employee cannot usefully be employed during that period because of industrial action (other than industrial action organised by the employer), or a breakdown of machinery or stoppage of work for which the employer cannot reasonably be held responsible.

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Note: An enterprise agreement or a contract of employment may also include terms that impose additional requirements that an employer must meet before standing down an employee (for example requirements relating to consultation or notice).

If the terms of an enterprise agreement or contract of employment provide for the standing down of employees, then the employer will generally need to rely upon the terms of the enterprise agreement or contract of employment to effect a stand down of an employee.[2]

CASE EXAMPLE:

STAND DOWN – EMPLOYEES COULD BE USEFULLY EMPLOYED

Show CEPU & Anor v FMP Group (Australia) Pty Ltd

EMPLOYEE NOT STOOD DOWN DURING A PERIOD OF AUTHORISED LEAVE OR ABSENCE

An employee is not taken to be stood down during a period when the employee:

- > is taking paid or unpaid leave that is authorised by the employer, or
- > is otherwise authorised to be absent from his or her employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the employee would otherwise be stood down.[3]

CONCLUSION

Standing down an employee should never be considered lightly. The Fair Work Ombudsman has recently stated that, when the dust settles from the current situation, they will pursue employers who inappropriately applied the stand down provisions onto employees.

Following the rules and maintaining written communication is important to ensure all parties are well informed and your business is compliant.

FOR FURTHER INFORMATION CONTACT

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Resource hub: www.therealmediacollective.com.au/covid-19

REFERENCES

1. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia & Anor v FMP Group (Australia) Pty Ltd [2013] FWC 2554 (Gostencnik DP, 26 April 2013) at para. 31. 2. *ibid.*, at para. 17. 3. Fair Work Act s.525. Last updated / 26 March 2020

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