

Concerns some employers taking advantage of COVID-19

While many employers are doing it tough as a result of COVID-19, concerns have emerged that some employers are using the situation to exploit vulnerable workers.

The Employment Law Centre of WA (ELC), a community legal centre that helps vulnerable employees in WA, has been overwhelmed with phone calls from workers who have been affected by COVID-19. Many of these workers are reporting that their employers are not treating them fairly or are taking advantage of the situation.

One particular area of concern for ELC has been the abuse of the JobKeeper scheme by some employers.

ELC Solicitor Michael Geelhoed says: “We have seen instances of employers threatening not to put individual employees on JobKeeper unless they agree to permanent changes to their contract.

“Other employers have tried to force employees to perform extra hours under JobKeeper, even where they have a second job or family responsibilities that prevent them from doing so. There seems to be a perception from some employers that workers they put on JobKeeper are indebted to them, and therefore required to do more than their contracted job.”

Geelhoed also noted that a large proportion of clients were reporting sham redundancies and stand-downs, suggesting employers may be using the perception of general business down-turn to punish or remove unwanted employees.

“Unfortunately there’s always a small group of employers that will use business re-structuring as a smokescreen for otherwise unlawful actions – like firing women on maternity leave because they don’t want to have to deal with carer’s responsibilities. COVID-19 appears to be exacerbating these issues.”

Other issues of concern noted by ELC include:

- Employees dismissed for raising safety concerns about COVID-19;
- Employees punished or dismissed due to a false perception of exposure to COVID-19;

- Employers unlawfully withholding entitlements under the excuse of business downturn; and
- Employees punished for making legitimate inquiries about JobKeeper and other entitlements.

Geelhoed was careful to add that many employers want to do the right thing, but that all employers are ultimately responsible for complying with the law, and for keeping employees informed about necessary changes to the business.

“Nearly all of our clients with COVID-19-related issues report some degree of procedural unfairness – like a lack of consultation before a redundancy, or a failure to communicate properly on the length of a stand down. This can leave employees confused, and sometimes cornered into lodging a legal claim to resolve the issue. Many of these problems could be avoided by employers providing more information on decisions and including employees in the decision-making process.”

Below are some key statistics and case studies reflecting ELC’s experience.

KEY STATISTICS

- ELC has recorded a 45% increase in services delivered for the month of April, compared to the same period last year, despite significantly reduced service capacity as a result of moving to remote operations.
- Two thirds of all ELC’s clients in April reported a workplace legal issue directly attributable to COVID-19.

Of those matters involving COVID-19, the main issue reported was redundancy (34%) followed by unpaid stand-down (31%), reduction in pay or hours (26%) and issues related to the JobKeeper scheme (24%).

CASE STUDIES

Below are some case studies from ELC clients who have been affected by COVID-19. Names and minor details have been changed to protect employees’ privacy.

Case study 1 – Rachel

Rachel is a single mother who works in sales on a permanent full-time basis.

In late-March, her employer stood her down without pay without consultation and asked her to sign a new contract of employment. The new contract proposed to cut her entitlements and sought to place conditions on her that would make it difficult for her to find work if her employment ended.

Rachel questioned her employer about the stand down and lack of consultation, as she had not experienced a decline in her sales and believed there was still useful work for her to do. Rachel also questioned the new contract and whether her employer intended to apply for JobKeeper. Rachel indicated that she would be seeking legal advice.

The employer informed Rachel that she would remain stood down without pay and they would not apply for JobKeeper while she was considering legal action against them.

ELC provided comprehensive legal advice to Rachel on negotiating with her employer, as well as her legal options if negotiations failed. ELC also completed a legal wellness check, which revealed Rachel was experiencing other legal issues with credit and debt resulting from her employment issue. ELC provided Rachel with a referral to another Community Legal Centre for information and assistance with these additional issues.

Case study 2 - Ying

Ying is a migrant worker from a non-English speaking background. She works on a permanent full-time basis in a logistics role.

In late March, she received a call from the employer requesting that she take a 35% pay cut so that they didn't have to fire anyone due to decreased revenue. This request was made to all employees of the business.

In Ying's case, the pay cut would mean that she was receiving less than minimum wage. Ying felt she had no other option but to agree to the pay cut, as she feared losing her job if she didn't.

ELC provided legal advice to Ying on her rights and options in the circumstances.

Case study 3 – Mary

Mary is a 54-year-old permanent part time hospitality worker. She has worked in her employer's business for over 7 years.

Mary took a pre-arranged period of annual leave in late-March. The employer called Mary while she was on annual leave to inform her that she would be stood down without pay due to the business temporarily closing. The employer expressed during this call that they didn't know if Mary would have a job to come back to when the business reopened.

Mary was unclear on whether she had been stood down or made redundant, so she called the employer the next day to ask them. The employer informed Mary that her role was redundant and that she wouldn't be returning to the business when it reopened.

Mary asked the employer whether it was possible for her to remain employed and stood down on JobKeeper. The employer stated they were unable to keep any of their current staff. Mary then saw on social media that her employer had announced they would be reopening with a significant positive response from customers. Mary also discovered that no other staff members had been let go by the employer.

Mary was left shocked and distressed by the circumstances of her dismissal. She also had concerns about being able to find another job at 54 years old in a declining job market.

ELC provided Mary with legal advice on her options in relation to her dismissal and entitlements. ELC also provided Mary with further assistance with drafting a legal claim form.

Case study 4 – Teagan

Teagan, a mother of four, worked at a recreation facility in regional WA. She was employed on a casual basis working regularly for the employer for several years.

The recreation facility was forced to close due to the COVID-19 pandemic and restrictions introduced by the Federal Government. Teagan was stood down without pay by the employer.

A short time later, Teagan discovered that the employer had contacted her coworker (a permanent employee) about nominating for JobKeeper. Teagan had heard about the "one in, all in" principle expressed by the Federal Government in relation to the JobKeeper scheme, so she contacted the employer to ask to be nominated JobKeeper as well.

The employer responded by terminating Teagan's employment, inviting her to reapply for her job when the recreation facility reopened.

ELC provided Teagan with comprehensive legal advice from an experienced employment solicitor on her rights and options in these circumstances.

Case study 5 – Danielle

Danielle is a young permanent full-time clerical worker in regional WA. She lives in a household with family members whose health conditions made them vulnerable with respect to COVID-19.

As the pandemic was unfolding in late March 2020, Danielle explained her family and household circumstances to the employer and requested to work from home. As Danielle's role mainly was computer and phone based, she believed it was possible to perform her role from home and her employer initially agreed.

About a week later, the employer decided that Danielle could not work from home any longer and invited her to apply for annual leave. Danielle immediately applied for annual leave.

The employer then called Danielle and declined her annual leave request. The employer informed Danielle that she was required at the office the next day. When Danielle expressed that she would not be comfortable with this due to concerns for the health of her family and household members, the employer dismissed her without notice. Danielle expressed that she was ready, willing and able to work from home or to take paid or unpaid leave, but the employer accused her of abandoning her employment.

ELC provided Danielle with comprehensive legal advice from an experienced employment solicitor on her rights and options in these circumstances.

Case study 6 – Claire

Claire is a 50-year-old sole income earner. She was working in the hospitality industry in a front of house role.

Claire's employer closed their business due to a downturn arising from government restrictions to slow the spread of COVID-19. The employer nominated Claire for JobKeeper and sought to provide her with substituted duties involving manual handling and labouring.

Claire disclosed to the employer that she was not fit to perform some of the substituted duties due to a pre-existing injury but agreed to do other duties, which she could complete safely.

The employer then terminated Claire's employment effective immediately due to redundancy. No other employees were made redundant.

ELC provided legal advice to Claire on her rights and options in these circumstances.

Case study 7 – Patricia

Patricia was a casual employee who had regularly worked three shifts a week for almost two years. As COVID-19 cases began to increase in Australia, she raised safety concerns about attending the workplace. She knew there were people with cold like symptoms at work and wanted to ensure her family was safe. Her employer stopped rostering her on for future shifts. When she inquired about the JobKeeper allowance, she was told that she wasn't eligible because she hadn't worked any shifts. After making further inquiries with her employer on her eligibility for JobKeeper, she was fired. ELC advised on unfair dismissal and general protections claims and advised Patricia to contact the ATO to clarify her entitlement for JobKeeper.

FURTHER INFORMATION

Western Australian employees having problems in the workplace can apply for ELC's legal advice services by calling 1300 130 956 or 9227 0111. Online applications for advice and information resources on workplace rights, including in relation to COVID-19 can be found on their website at www.elcwa.org.au

For further comment from ELC please contact Michael Geelhoed at 9227 0100 or michael@elcwa.org.au