



MEMBER UPDATE

AFPA Industrial Dispatch #45 26 August 2019

Welcome to edition 45 of the AFPA Industrial Dispatch, a regular bulletin from the Legal and Industrial Team to keep our members up to date with significant industrial issues.

CURRENT SIGNIFICANT ISSUES

Probation Period

Over the last several months, we have noticed an increase in members facing termination during their period of probation. As such, we consider it timely to remind both employees and supervisors of their rights and responsibilities during this time.

The standard AFP probation period begins on an employee's commencement date and concludes after a duration of six months. The exceptions to this rule are casual employees, contractors, secondees, special members and locally engaged overseas employees. In these cases, the length of probation will be determined by the formal letter of offer, in line with the National Employment Standards or other relevant legislation. However, for the overwhelming majority of AFP employees, your probation period is 6 months.

The purpose of a probation period is to give employers the opportunity to assess whether newly hired employees are suitable and can perform the duties and functions of their position. It also gives employees the chance to decide whether their new job is the right fit for them.

Employees on probation are eligible to receive the same entitlements as permanent employees, as prescribed by the *AFP Enterprise Agreement 2017-2020* or *AFP Executive Level Enterprise Agreement 2019-2021*. However, it is important to note that employees on probation are **NOT** able to challenge termination decisions through an unfair dismissal claim, as set out in the *Fair Work Act 2009*. This is because you cannot bring an unfair dismissal claim if you have not been employed by your employer for more than 6 months.

Notwithstanding this fact, if a probationer believes their dismissal was discriminatory or in contravention of the general protection's provisions of the *Fair Work Act 2009* (i.e. you were dismissed because you exercised a workplace right), there are legal avenues to hold their employer accountable.

Employee Obligations

During a period of probation, an employee is expected to:

- participate in mandatory AFP and job-specific training;
- discuss and follow expectations set out by their supervisor for their role and position in the team;
- ensure that they follow the job-specific duties;

- act in accordance with Commissioner’s Order on Professional Standards (CO2), security principles, and all other governance related to their role;
- seek feedback and assistance where necessary, to ensure they meet the required standards; and
- participate in the probation process, including meeting with their supervisor and fulfilling all reporting/documentation requirements (e.g. PDA processes and feedback exchange).

Supervisor Obligations

When managing staff members on probation, supervisors are obligated to:

- ensure the probationer understands their duties, responsibilities, standard of work, attendance requirements and expected conduct;
- inform the probationer how their performance will be measured and assessed;
- monitor and assess the probationer’s performance, including the ability to act in accordance with the AFP Core Values, security principles and their capability against specific job duties;
- enter into a PDA or charter of performance with the probationer within two weeks of commencement and give ongoing appropriate feedback to ensure the probationer is provided with natural justice and is given the opportunity to address any identified issues;
- complete initial and final probation reviews;
- take the appropriate action and seek advice and assistance if the probationer is not meeting performance, behaviour or attendance expectation; and
- advise the probationer when they have met the requirements of their probation period.

We encourage all members on probation to familiarise themselves with the *Better Practice Guide on Probation (MPS057)* to ensure they understand their rights and responsibilities, as well as the obligations of their supervisor. This can be located on the HUB or provided by the AFPA on request.

We encourage members on probation who are facing termination of employment to contact the AFPA as soon as possible to ensure your supervisor has followed the correct procedures. We encourage all members to support probationers and assist them in understanding their workplace rights.

Update on AFPA Litigation

As mentioned in previous communications, the AFPA are currently engaged in several court matters on behalf of our members. Below is a summary of where the matters currently stand:

Validity of the “Reduction in Classification” clause – Federal Court

On 16 April 2019, the Federal Court heard our application regarding the validity of the “Reduction in Classification” clause of the *AFP Enterprise Agreement 2017-2020* (the EA). We are seeking a declaration that the Commissioner does not have the power to reduce an employee’s classification due to an established category 3 conduct issue.

We expect to receive judgment from the Court very soon. After receiving judgment, we will provide an update to all members regarding the outcome of the proceedings.

Dispute regarding ASO Restructure – Fair Work Commission

This dispute relates to the AFP’s refusal to apply the “workforce adjustment” provision of the EA (clause 56) following a restructure of the Air Security Officers (ASOs) program in Melbourne and Sydney. The AFPA argued that the ASOs have been made excess following a restructure in the Specialist Response Group portfolio, in which the ASO function was absorbed into new multi-skilled positions within the Discreet Operations (DO) portfolio. We asked the Fair Work Commission for a declaration that the AFP breached the EA by refusing to invoke the

workforce adjustment provision (clause 56 of the EA), which affords employees the right to either redeployment, retention or redundancy.

Prior to the initial hearing in the Fair Work Commission, the AFPA were required to make an interlocutory application to the Federal Court to prevent the AFP from filling the new DO positions until the Fair Work Commission had issued a judgment on the matter.

The matter was originally heard before the Commission on 9 January 2019. The Commission handed down a decision in favour of the AFP on 4 July 2019. A link to the decision can be found here:

<https://www.fwc.gov.au/documents/decisionssigned/html/2019fwc4646.htm> .

The AFPA has appealed this decision on the basis that the restrictive nature in which the workforce adjustment procedure has been interpreted impacts on all members of the AFP.

Dispute regarding the Air Security Officer Allowance – Fair Work Commission

The AFPA made an application to the Fair Work Commission seeking an order that the ASO allowance is payable to Discreet Operations (DO) members, consistent with clause 35(3)(a) of the Enterprise Agreement and backdated to the commencement of the EA on 24 May 2019. There are approximately 30 members impacted by this.

The AFPA has been engaging with the AFP about this issue since July 2018.

This matter was heard by the Fair Work Commission earlier this year. We are currently waiting for a decision to be delivered in that matter.

Salary Increases – Federal Circuit Court

Late last year, the AFPA filed an application with the Federal Court on behalf of several members who were paid their base salary in accordance with the salary spine of the previous Enterprise Agreement. In our assessment, this contravenes section 50 of the Fair Work Act.

Sub-section 58(1) of the Fair Work Act provides that only one enterprise agreement can apply to an employee at any particular time. We submit that it was unlawful for the AFP to refuse to provide the 3% pay rise on commencement of the new EA on 24 May 2018 and instead remunerate these employees in accordance with the previous EA.

This matter went to mediation where the parties were unable to reach an agreement. The matter will be heard by the Federal Circuit Court in early 2020.

Relationship between High Volume Operations Composite and Comcare NWE payments – Administrative Appeals Tribunal

This matter relates to several members with accepted Comcare claims who were in receipt of the High-Volume Operations Composite at the time of their injury under the previous EA. Following commencement of the EA, and the removal of the High-Volume Operations Composite, the NWE was recalculated by Comcare, which excluded the payment of that Composite. While Comcare were empowered to do this, we argued that because the High-Volume Operations Composite effectively bought the AFP 50 hours per week, that Comcare should retrospectively apply the payment of overtime to these members in calculation of their NWE.

A conciliation hearing will be heard before the Administrative Appeals Tribunal in October 2019.

If you are interested in learning more about any of these matters, please do not hesitate to contact the Team for further information.

CHANGES IN STAFF

We are saddened to announce the departure of our long-serving colleagues, Vicki Linabury and Sharon Wright. Both were employed by the AFPA since late 2016 and were instrumental in the Legal and Industrial Team. Additionally, Vicki served as Manager of the Legal and Industrial Team since August 2017.

We wish them all the best for their future endeavours.

We are pleased to announce the promotion of Matt Peterson to the position of Manager Legal and Industrial, who previously had been the AFPA's Industrial Lawyer since early 2018. Matt is looking forward to continuing to provide the best possible advice and service to members in relation to their industrial or legal issues.

We are also pleased to announce the appointment of Olivia Turner to the role of Industrial Officer and Maria Nazir to the role of Industrial Research Officer. Both come to us highly recommended and will undoubtedly add to the service already being provided by our team. They will both commence with the AFPA in early September.

Stay tuned for more information about Olivia and Maria in the coming weeks.

INDUSTRIAL QUERIES

If you have any industrial queries or queries about issues raised in this Dispatch, please contact Sam, Anish, Wendy or Chris at afpa@afpa.org.au or call us on (02) 6285 1677.



Australian Federal Police Association

Level 3/53 Blackall Street, Barton ACT 2600, PO BOX 4576, Kingston ACT 2604

p (02) 6285 1677 | **f** (02) 6285 2090 | **e** afpa@afpa.org.au

www.afpa.org.au