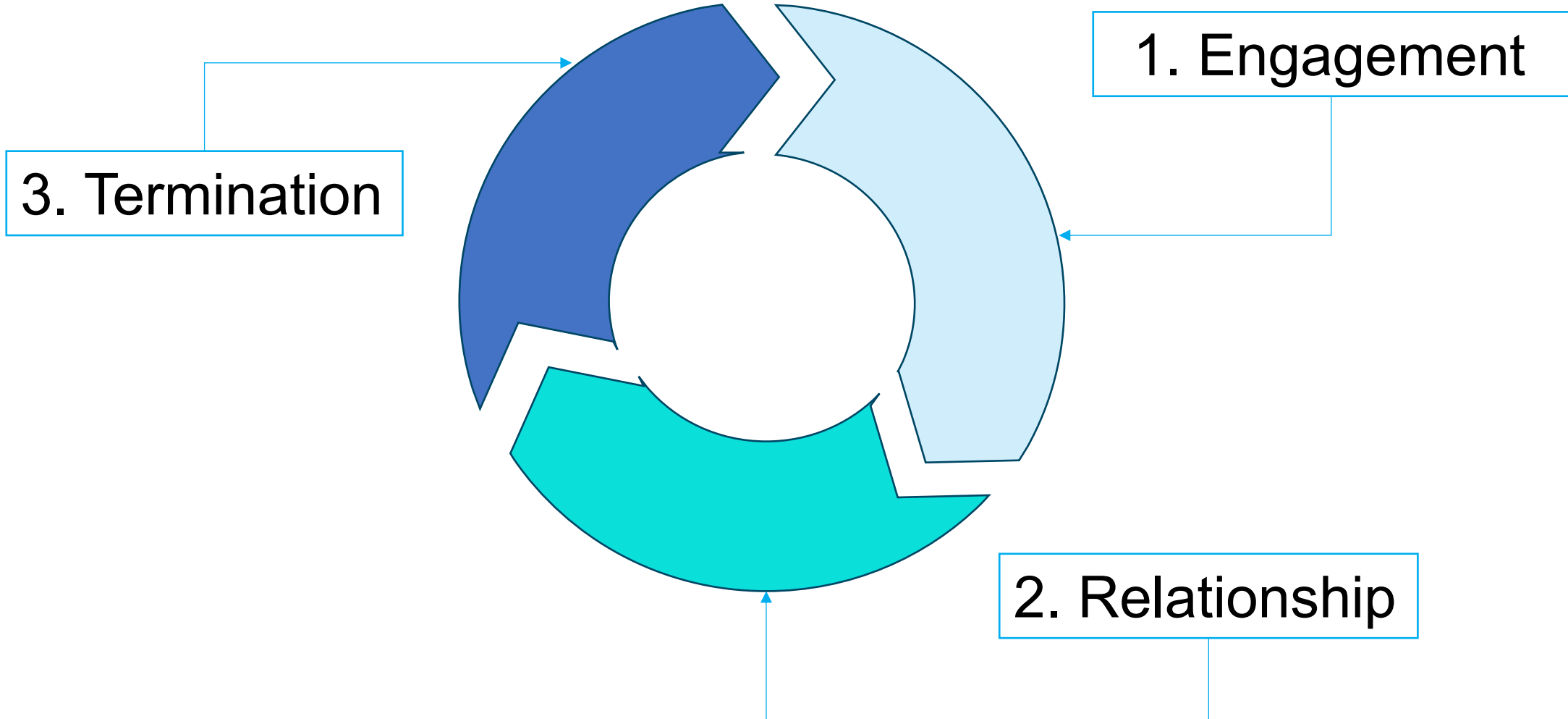


# Tips, Tricks & Traps in Managing Employees

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# Lifecycle





# 1. Engagement



- Status
- Contract
- Policy



- Employee or Contractor
- Casual or Permanent
- Part-timers
- High income employees



- High Court clarity:
  - Personnel Contracting
  - Jamsek
  - What does the contract say?
  - Has the contract been varied?
  - Is the contract a sham?
- Totality confusion restored
  - Section 15AA
  - Regard must be had not only to the terms of the contract, but also to other factors including how the contract is performed



- High Court clarity
  - Rossato
  - Absence of firm advance commitment
  - What does the contract say?
  - Has the contract been varied?
- Totality confusion restored
  - Section 15A
  - Firm advance commitment may be inferred from conduct after entering into the contract or from how the contract is performed



- **Clause 10.4**
  - Must agree in writing on the number of guaranteed hours, the days of the week, and the hours on those days
- **Clause 10.5**
  - Any change to guaranteed hours requires written consent
  - Short or long term change?
  - Administrative challenges



# High Income Employees



- \$183,100 guaranteed remuneration
- Excluded from unfair dismissal unless Award or EA covered
  - Primary purpose test
- Still not excluded from Award operation, unless a guarantee of annual earnings
- Guarantee of annual earnings
  - Contract sufficient guarantee
  - Query about standing guarantee
  - Also must notify employee that Award will not apply
  - Confusion if coverage is not conceded – back a horse?





- Award/EA content rarely enough for one on one expectations
- Notice – if there is one clause you include...
- Compliance with directions (policy)
- Suspension/stand down rights
- Scope of role/flexibility
- Right to information, e.g. health information
- Confidential information & IP



- Granularity beyond contracts
- Basis of giving a direction
- Careful language
  - Express contractual exclusion
  - Express reference to flexibility in operation
  - Express right to amend, vary or replace
  - Source of disciplinary conduct

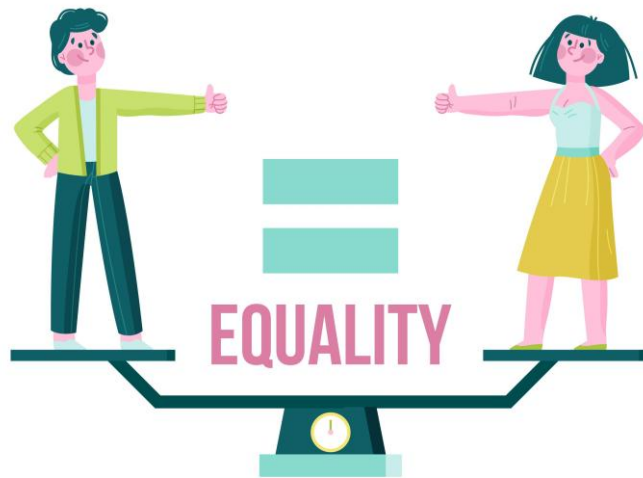
## 2. Relationship



- Custom & practice
- Equality of treatment
- Right to disconnect
- Ill/injured employees
- Investigations



- Not merely doing something repeatedly
  - Temporary work arrangement
  - Unilateral changes at employee initiation
- Species of waiver
  - Requires knowledge and acquiescence by employer
  - Knowledge and passage of time not necessarily enough
  - Must be genuine reset based on the ongoing status quo



- “Everyone is doin’ it”
- Are they really?
- Does the employer know about it?
- Species of estoppel
  - Knowledge and acquiescence
  - Employee effectively led by the employer to assume certain conduct is not (if it ever was) improper
- Two to tango scenarios
  - Are the circumstances truly indistinguishable?
  - Fighting at work



- Not a ban on making contact after hours
- The right is to ignore contact outside hours unless it would be unreasonable
- No disciplinary action can be taken if right properly exercised (adverse action)
- Another one for the contract
- Clause 15A – Clubs Award
  - Right to disconnect affirmed
  - Excluding emergency roster change (clause 16.3) or call back (clause 23)



- Could do a whole conference on this topic
- 2 topics of interest
  - Can you manage an employee while on extended sick leave? Are sick leave certificates capable of challenge?
    - Essendon Football Club learning
    - IMEs
    - Scope of certificate
  - When is the employee no longer temporarily ill or injured – ‘for the duration of the absence’?



- Most overdone institution in modern workplace management
- What is an investigation anyway?
- When would you commence an external investigation?
  - Skillset
  - Resourcing
- External versus Independent
- Conflicts



## 3. Termination



- Fairness
- Lawyers, unions, support persons
- Redundancy selection and redeployment
- General protections
- Casuals



- Opportunity to respond
  - Only an opportunity
  - Must be reasonable
  - Relates to the reason, not the evidence
  - Useful for the employer as well; dishonesty as a valid reason
- Bias
- Sick Leave as a life buoy



# Lawyers, Unions, Support Persons



- Subject to EA or Award, no right to be represented
- Clause 34 – Clubs Award – dispute resolution; Clause 31A – Clubs Award – Delegate rights
- Factor in assessing unfairness whether allowed to have a support person - if requested
- Applies only to discussions “relating to dismissal”



- Provided not discriminatory, selection not reviewable
- Careful of a void
- Redeployment
  - Associated entities
  - Within the employer's 'enterprise'



# General Protections



- Never too early to get ahead of a workplace right
  - Sequences are irresistible
  - The worst employees seem to exercise the most workplace rights
- Always set up a reason
  - High income earners
  - Redundancies
- Whose decision? Veto or recommendation?



- Short term casuals – excludes:
  - “Regular” casuals – employed on a regular and systemic basis
  - Reasonable expectation of continuing employment
- Reduction of hours
  - *Balgowan v City of Sydney*
  - Compare changed hours with intent not to offer any hours
- Adverse action?



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