**Assessment 2: Roleplay Scenario**

You have been approached by the mediation centre to mediate an employment dispute between XYZ Legal and a former employee.

The history of the dispute is as follows:

1. XYZ Legal employed two paralegals (Mary Collins and Janine Smith) at the same time after they graduated from the Diploma of ATSILA at Tranby. The two had been working together for around 6 months when the Practice Manager, Anne Henderson, noticed that major differences had developed between them which were affecting the entire paralegal department.
2. Anne Henderson had been approached by both the employees at different times and also by their supervising solicitor and was spending increasing amounts of time speaking to them, taking notes of their comments, meeting with their supervising solicitor and generally finding it difficult to get on with her own job, so time consuming were the conversations.
3. The supervising solicitor attempted to deal with the issue in informal conversations but ultimately Mary Collins made a complaint of harassment and bullying against Janine Smith. The matter was dealt with internally and ended in a disciplinary warning against Janine Smith which simply led to matters disintegrating further.
4. The rest of the paralegals inevitably fell into two camps and relations between staff reached an all-time low when Janine Smith refused to pass important client information to Mary Collins and a complaint to the NSW Legal Services Commissioner (NSW LSC) ensued from the client.
5. Following the client complaint to NSW LSC, XYZ Legal drafted a resignation letter which Janine Smith signed and then left her employment with XYZ Legal. Shortly after Janine Smith commenced Tribunal proceedings for constructive dismissal. In employment law, constructive dismissal occurs when an employee resigns as a result of the employer creating a hostile work environment. The rationale is that since the resignation was not truly voluntary, it is, in effect, a termination.
6. Almost a year after the proceedings began, Anne Henderson suggested to their lawyers that a mediation might help – XYZ Legal Service had spent quite a bit in legal costs up to that point hiring a specialist employment lawyer and Anne was becoming extremely anxious about her annual budget as the year end approached.
7. The two parties (Anne Henderson on behalf of XYZ Legal and Janine Smith) have now agreed to a mediation in an attempt to resolve the matter before more costs are incurred by both sides.

**Statement of the Law regarding constructive dismissal**

Under the *Fair Work Act 2009* (Cth) the term ‘dismissed’ is defined where a person’s employment has been ended at the employer’s initiative or a person was forced to resign because of the conduct or course of conduct engaged in by the employer.

A forced resignation, also referred to as a ‘constructive dismissal’, is when an employee has no real choice but to resign and thus, the onus is on the employee to prove that their resignation was not voluntary.

The test is whether the employer engaged in conduct with the intention of bringing the employment to an end or whether dismissal of the employment was the probable result of the employer’s conduct such that the employee had no effective or real choice but to resign.

**Items for negotiation in the mediation**

**Item 1: Whether the dismissal was unfair?**

**Issue to consider:**

* Was Janine forced to resign as a direct result of employer’s conduct
* Ask if the dismissal was harsh, unjust or unreasonable.

**Position of the Parties**

1. Janine’s position is that her dismissal was unfair and that XYZ Legal acted in a harsh, unjust and unreasonable manner.
2. XYZ Legal’s position is that there was a valid reason for Janine’s dismissal including her abusive and threatening behaviour towards Mary Collins and her failure to hand over the client information.

**The Law**

When assessing whether a constructive dismissal is harsh, unjust or unreasonable, the Fair Work Commission will look at:

* Whether there was a valid reason for the dismissal which relates to the employee’s capacity or conduct.
* Whether the employee was notified of this reason.
* Whether the employee was given any opportunity to respond to that reason.
* Whether there was any unreasonable refusal by the employer to allow the presence of a support person for any discussion relating to the dismissal.
* Whether the employee was warned about unsatisfactory performance prior to the dismissal, if this was the reason for the dismissal.
* The degree to which the size of the employer’s enterprise would likely impact on the procedures followed in making the dismissal.
* The degree to which the absence of a dedicated human resource manager or specialists or expertise in the employer’s enterprise would be likely to impact on the procedures followed in the dismissal; and
* Any other matters the Commission considers relevant.
* If dismissal was not harsh, unjust or unreasonable, ask if employee engaged in abusive behaviour and had a threatening attitude towards fellow employees? (In Grundy v Brister and Co although the Fair Work Commission noted procedural failings, such as preparing the resignation letter for the employee, the Commission held this did not outweigh the seriousness of the employee’s misconduct).

**Item 2: Compensation/reinstatement**

**Issues to consider:**

* Is reinstatement appropriate?
* Is XYZ Legal willing to compensate without admitting unfair dismissal?
* What losses are reasonably attributable to the dismissal?

**Position of the Parties**

1. Janine is claiming maximum compensation available under the Fair Work Act 2009 (Cth), including compensation for humiliation and distress, saying she has been unable to work since.
2. XYZ Legal will agree to pay Janine 13 weeks considering that Janine had only worked at XYZ Legal for 6 months and had not taken steps to find employment since leaving.
3. XYZ will not admit to unfairly dismissing Janine.

**The Law**

* Compensation awarded for unfair dismissal if reinstatement inappropriate.
* Compensation for losses reasonable attributable to the dismissal.
* No compensation for shock, humiliation, disappointment, distress.

When awarding compensation, the Fair Work Commission takes into account the following:

* the employees’ length of service;
* the remuneration the employee would have received, or would have been likely to receive, if they had not been dismissed;
* the efforts of the employee to mitigate the loss suffered because of the unfair dismissal, such as looking for alternative work; and
* the amount of remuneration earned by the employee from employment or alternative work during the period between the dismissal and the making of the compensation order.
* The compensation cap for an unfair dismissal claim is the lesser of the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher), in the 26 weeks before the unfair dismissal, or half the amount of the high-income threshold immediately before the dismissal.