PINNACLE
PEOPLE SOLUTIONS

Fact Sheet

Unfair Dismissal

To view the webinar associated with this fact sheet, visit
https://www.youtube.com/watch?v=QWmFf77xJ2g

What is this?

Under the Fair Work Act, a dismissal is defined to mean the employee's employment was terminated at the employer's initiative or where the employer's conduct, or form of conduct, forced the employee to resign (constructive dismissal).

A resignation by an employee has to be a voluntary act.

When has a person been unfairly dismissed?

The Fair Work Act provides that a person has been unfairly dismissed if the Fair Work Commission (FWC) is satisfied that:

- the person has been dismissed;
- the dismissal was harsh, unjust or unreasonable;
- the dismissal was not consistent with the Small Business Fair Dismissal Code; and
- the dismissal was not a case of genuine redundancy.

Who can bring an unfair dismissal claim?

The FWC must determine the following matters before the merits of the application can be heard:

- whether the application was made within 21 days after the dismissal took effect;
- whether the person had completed the relevant minimum period of employment (six months if employer employs 15 employees or more or 12 months if employer employs fewer than 15 employees);
- whether the person was covered by a modern award or an enterprise agreement; and
- if an award/agreement-free employee – was the person's annual rate of earnings less than the high income threshold $153,600 from 1 July 2020)

Who can't bring an unfair dismissal claim?

In addition to those applicants who fall outside the above coverage, the following categories of employee are excluded from claiming unfair dismissal:

- the employee was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment was terminated at the end of the period, the completion of the task, or at the end of the season;
- the person was an employee to whom a training arrangement applied, and the employment was terminated at the end of the training arrangement;
- the person was demoted in employment but the demotion did not involve a significant reduction in his or her remuneration or duties and the employee remained employed by the same employer that effected the demotion;
- the person was dismissed for serious misconduct,
- a person's dismissal was a case of genuine redundancy, and
- an employee who has not completed the relevant minimum period of employment; and

Last updated 26 August 2020

- contractors.

Are casual employees covered by unfair dismissal laws?

Casual employees are generally excluded from bringing an unfair dismissal claim unless they have been employed on a regular and systematic basis for at least six months and they have a reasonable expectation of continued employment.

What is serious misconduct?

Serious misconduct is defined by the Fair Work Regulation 2009 to include:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment, and
- conduct that causes serious and imminent risk to the health or safety of a person, or the reputation, viability or profitability of an employer's business.

It includes an employee engaging, in the course of their employment, in theft, fraud or assault, being intoxicated at work or refusing to carry out lawful and reasonable instructions that are consistent with an employee's contract of employment.

What is a genuine redundancy?

The Fair Work Act defines genuine redundancy to mean the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise and the employer complied with the consultation requirements under the modern award or enterprise agreement (if applicable).

The following are possible examples of a change in the operational requirements of an enterprise:

- a machine is now available to do the job performed by the employee;
- the employer's business is experiencing a downturn and therefore the employer only needs three people to do a particular task or duty instead of five people; and
- an employer is restructuring its business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.

It is not a genuine redundancy if it would have been reasonable to redeploy the applicant(s) within the employer's enterprise.

Are there different rules for a small business employer?

A small business employer must have complied with the Small Business Fair Dismissal Code. The code is a less stringent requirement on an employer than the rules imposed on an employer who employs 15 employees or more.

The code provides a checklist for small business employers, which serves as a tool which may be used in the event of a future unfair dismissal claim in which an employer relies on compliance with the code to oppose the claim. It is not mandatory for an employer to complete the checklist. Even if an employer did not expressly comply with all the code's requirements, or at all, this may not result in a finding of unfair dismissal.

Therefore, whatever reliance is placed by the applicant upon an employer's failure to comply with the code, the basis for determining an unfair dismissal matter still hinges on those matters in the Fair Work Act which the FWC is required to take into account. That is, a valid reason for the dismissal, and the harshness of the dismissal.

What factors are considered in determining if a dismissal is unfair?

The following factors must be considered by the FWC when determining the fairness, or otherwise, of a dismissal:

- whether there was a valid reason for dismissal;
- whether the employee was notified of that reason;
- whether the employee was given an opportunity to respond to the reason given;
- was a support person present if requested by an employee;
- whether the employee had been warned of any unsatisfactory performance;
- the likely impact the size of the employer's business has on procedures followed in effecting the dismissal;
- the likely impact an absence of dedicated HR personnel may have on procedures followed effecting the dismissal; and
- any other matters considered relevant.

Is a valid reason sufficient to defend an unfair dismissal application?

While an employer may have a valid reason to dismiss an employee, a dismissal can still be deemed by the FWC to be harsh, unjust or unreasonable. For example, poor leadership skills may be a valid reason to dismiss a manager however, if a manager was not warned of their poor performance and that their employment may be at risk, the dismissal could be viewed as harsh and unfair.

What is meant by harsh, unjust, or unreasonable?

Each of these terms means:

- 'harsh', because of its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the alleged offence;
- 'unjust', because the employee was not guilty of the alleged offence on which the employer acted; and
- 'unreasonable', because it was decided on inferences which would not reasonably have been drawn from the material before the employer.

It may be the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the alleged misconduct, it may be unreasonable because it was decided on inferences which could not reasonably have been drawn from the material before the employer, and it may be harsh because the consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.

The FWC has ultimate discretion in arriving at a decision.

How many warnings must an employee receive before dismissal?

There is no specific number of warnings that need to be issued by an employer to an employee before dismissal can occur. When a written warning is issued to an employee it should contain the following details:

- details of the performance or the conduct deficiency, stated in specific behavioural terms, e.g. details of the employee's absenteeism record;
- reference to the relevant company policies or procedures, where the performance or conduct involves a breach of them, and specific description of the breaches;

- details of corrective action required by the employee;
- timeframe – either a deadline for improvement or a date on which performance will be reviewed again;
- state the intended action if performance or conduct does not improve to a satisfactory level, e.g. termination of employment;
- reference to types and dates of any previous warnings or other disciplinary action; and
- date, names of witnesses, signatures of employee (if obtainable), manager and witnesses.

How long should a warning last before it expires?

When setting a date for review, the seriousness of the problem and the length of time it has been apparent will determine the appropriate length of a warning. Between one month and six months is usually appropriate but will vary according to circumstances. Any warning in effect for more than one year may be considered unreasonable in most circumstances.

For example, in cases of unexplained absenteeism, a shorter review period would generally apply to new employees and chronic offenders. If an employee reaches the review date without recurrences and performance is satisfactory, the warning should then be withdrawn. It would still be relevant as evidence in any subsequent unfair dismissal matter in explaining to the FWC an employee's employment history with the employer.

What circumstances could justify summary dismissal?

It can be difficult for an employer to convince the FWC that an employee's misconduct was serious enough to warrant summary dismissal. Even if the action or behaviour is considered serious misconduct by an employer, a proper investigation of the facts would need to have been undertaken before a summary dismissal occurs.

Summary dismissal for incompetence or negligence would only be justified in extreme cases.

What is the maximum amount of compensation an applicant can receive?

The maximum amount of compensation that can be awarded by the FWC is six months' pay, up to a maximum of $76,800 (from 1 July 2020 - indexed annually).

What does an employer need to do prior to dismissing an employee?

It is important for an employer to establish that before a dismissal decision, an employee is given a real and substantial opportunity to defend themselves. This means providing information to an employee so they can understand what is being alleged and can respond in a meaningful way.

That the conduct in question is so serious it should result in the employee's dismissal, rather than some other disciplinary outcome, should be canvassed with the employee so they have an opportunity to respond.

Need help? Contact Pinnacle People Solutions for tailored advice and support for your business by email to admin@pinnaclepeoplesolutions.com.au or call 1300 856 231

Last updated 26 August 2020