

## Workplace Law Fact Sheet

### Dismissal Dos and Don'ts A need to know guide for employers and employees

New rules about dismissing employees came into force as part of the new *Fair Work Act* reforms. This is the most recent in a series of significant changes to dismissal laws over the last few years, and many employers and employees now feel confused about what their rights and obligations are. However, the rules fit into a basic framework which is fairly straightforward to follow.

Firstly, employees can never be legally dismissed for an *unlawful* reason, such as a reason which amounts to discrimination. Any employee who is *unlawfully* dismissed can make a claim against their employer. It does not matter how long they have been working, how much they are paid, or how many employees the employer has. This means that employers need to be very careful to document and explain the reasons for any termination, in case a claim is made.

The more difficult issue is *unfair* dismissal. This is where an employee's dismissal is "harsh, unjust or unreasonable", and is not a case of genuine redundancy. Unlike unlawful dismissal, only some employees can claim against their employer for unfair dismissal. To make an unfair dismissal claim, an employee must:

- Have worked for that employer for at least six months; and
- Be covered by a modern award, be covered by a registered workplace agreement, or be earning less than \$113,800.00 per year.

If an employee is dismissed within their first six months, they cannot make a claim for unfair dismissal during this initial period of employment. If the employer has fewer than 15 full-time equivalent employees, this period is extended to a full 12 months as they are deemed to be a small business.

There are certain steps a small business can take to minimise the chance that a dismissal is not unfair, including keeping written records of the circumstances of a dismissal. Employers who qualify as small business must comply with the "Small Business Fair Dismissal Code" and if these steps are followed, then the dismissal may not be deemed unfair even if the employee makes a claim.

#### What does this mean for employers?

There are two main things to remember:

- (a) Keep written records of all performance management; and

- (b) Use the initial employment period to assess each new employee carefully.

Whenever a performance issue arises, discuss it clearly with the employee. This gives the employee a chance to sort out the problem. Set targets and timeframes, and keep a written record of those on file. Any warnings should also be recorded. If a dismissal becomes necessary, these records will show the true reasons for it, and may protect against a claim that the dismissal was harsh or unreasonable.

It is also a good idea to make use of the initial employment period. The purpose of this period is to give employers time to gauge whether a new employee is right for the job. If not, the employee may be terminated without the risk of an unfair dismissal claim.

#### What about employees?

Any employee who thinks they have been unfairly or unlawfully dismissed needs to act quickly. Timeframes for making a claim are very short – only 14 days for unfair dismissal, and 60 days for unlawful dismissal. Keeping written records of performance management is important so that there is evidence to support the claim. If a claim is successful, an employee may be reinstated or compensated.

Fair Work Australia provides information to employers and employees by telephone and on its website. However, for specific advice, it is always best to see a solicitor as early as possible.

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