


progressing business



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Avoiding unfair dismissal claims...

Dominique Lamb, McKays Solicitors



This is the first in a short series to help employers to minimise the risk of a time consuming, frustrating and (possibly) expensive unfair dismissal claim.

STEP 1 IS UNDERSTANDING HOW THE SYSTEM WORKS

The majority of unfair dismissal claims come about simply as a result of employers not knowing how to correctly terminate staff.

To know how to do it correctly, you have to have a basic understanding of the Fair Work Act 2009. This article sets out the basics and it is worth reading and keeping on file as a guide.

When has an employee been unfairly dismissed as opposed to just being dismissed.

It is a common misconception that an employee has to have been dismissed in order to claim for unfair dismissal. An employee can also make a claim against a business if they feel that they have no choice but to resign from their position.

The word “dismissed” is defined by the Fair Work Act 2009 (Cth) to include the termination of a person’s employment and also where a person has been forced to resign due to the conduct or because of the course of conduct engaged in by the employer.

An employee is deemed to be unfairly dismissed if they have:

- been dismissed by their employer;
- the dismissal was harsh, unjust and unreasonable; or
- the dismissal was not consistent with the Small Business Dismissal Code; and
- the dismissal was not a case of “genuine redundancy”.

WHAT DOES “HARSH, UNJUST AND UNREASONABLE” MEAN?

To determine whether a dismissal is “harsh, unjust and unreasonable” you need to look at the following factors:

- whether there was a valid reason for the dismissal by the employer based on the individual’s capacity or conduct (including the effect on the safety and welfare on other

- employees);
- whether the person was notified of that reason;
- whether the employee was given an opportunity to respond to any reason for termination given by the employer, relating to the capacity or conduct of the employee;
- any unreasonable refusal by the employer to allow the person to have a “support person” present to assist at any discussion relating to the employee’s dismissal;
- if the dismissal related to unsatisfactory performance by the employee, whether the employee was warned about their unsatisfactory performance;
- the degree to which the size of the employer’s enterprise would impact on the procedures followed in effecting the dismissal;
- the degree to which the absence of a dedicated human resource specialist or expert in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- other matters that Fair Work Australia considers relevant.

UNFAIR DISMISSAL FOR SMALL BUSINESS EMPLOYERS

Small businesses have special protections, which we will outline in our next article.

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7th Annual Conference

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Theme

*Strategic Insights from Research and Practice in Lean Six Sigma
Streams: Deployment and Project Delivery*

Call for Papers

(Close 28 February 2012)

Keynote Speakers

Elizabeth Keim

Master Black Belt, Past Chair ASQ

Professor George Cairns

Head of School of Management, RMIT University

Craig Fox

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Pharma2012

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