Understanding Unfair Dismissal Claims

Unfair dismissal matters can be complex and frustrating for both employers and employees alike. Since the commencement of the *Fair Work Act* in 2009, employers have had expanded responsibilities to ensure they correctly terminate employees and more employees are able to successfully make unfair dismissal claims.

At the same time employers have narrower exceptions when they're defending claims.

Terminating a person's employment is usually stressful and upsetting for everyone concerned, so it's always important to understand when and how it can be done in a fair and appropriate manner.

The issues can be complex

Unfair dismissal can also incorporate far reaching issues including employment type, award and enterprise agreement coverage, time limits for claims and the provisions of the legislation.

In addition the definition of 'dismissal' can include a situation where a person resigns but was *forced* to do so because of conduct, or a course of conduct, engaged in by their employer. This is commonly referred to as 'constructive dismissal'.

What remains after the legislative changes is that a dismissal must be harsh, unjust or unreasonable for it to be an unfair dismissal under the Act. The primary remedy is said in the Act to be reinstatement, but in practice this does remain the exception rather than the rule. More often than not, compensation is ordered - the Fair Work Commission can order compensation of up six months of the employee's salary.

Who is covered by the unfair dismissal provisions of the Fair Work Act?

- In a small business (with fewer than15 fewer employees), an employee is covered if they have worked for at least 12 months;
- For larger businesses, employees are covered after six months.
- There is an additional hurdle for employees of small business. Even if an employee has worked in it for 12 months, a dismissal will not be unfair where the small business has complied with the Small Business Unfair Dismissal Code.
- Under the Fair Work Act, a dismissal will not be unfair if an employer can show that it was a "**genuine redundancy"**.

What is a "genuine redundancy"?

There are three elements to a genuine redundancy

1. the employer no longer requires the employee's job to be done by anyone because of changes in the employer's operational requirements;
2. the employer has complied with any consultation obligations that it might have in an enterprise agreement or award;
3. it would not have been reasonable for the employer to redeploy the employee within the employer's business or the enterprise of an associated entity of the employer.

Small businesses – don't be caught out

Research by Benoit Freyens, assistant economics professor at the University of Canberra, and Paul Oslington, economics professor at the Australian Catholic University, found that in the change from the Workplace Relations Act 1996 to the Fair Work Act:

- Where unfair dismissal cases were arbitrated between 2000 to late 2010, claimant success rates have lifted from 33% under Work Choices to 51% under the current Fair Work Act.
- Claims under Fair Work against businesses with more than 100 employees have a 41% success rate, versus the 33% rate under the Workplace Relations Act.
- Claims lodged under Fair Work have jumped to 17,000 per year, from 6000 under Work Choices – in line with the increase in the number of employees able to make unfair dismissal claims (and the removal of many employees from the State industrial relations system to the Federal industrial relations system). Payouts were steady, averaging about 12 weeks' pay.

Summary Dismissal

Generally, employers should not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination. The written notice should specify the period of notice given (or payment in lieu of notice if the employee is not required to work the notice period) and the date the employment will end.

Summary dismissal for serious misconduct has immediate effect. It is a severe step to terminate an employee's employment without providing notice of termination (or payment in lieu of notice), so you should always seek legal advice about the matter before taking action.

Conclusion

Employers need to be vigilant in conforming to process while dismissing somebody. Even when the employer believes they have sufficient reasons to justify dismissal, such as theft. They need to follow the correct process – such as providing warnings and collecting documentary evidence. In the absence of this process it's very easy to formulate an unfair dismissal claim on the basis of a lack of fair process.

For employers the best way to avoid claims of unfair dismissal is to make sure that your organisation and your employees really understand their obligations under the Fair Work Act when terminating someone's employment. It also means there should be an internal review of the firm's policies.

That said, only about 1% of unfair dismissal applicants to the Fair Work Commission successfully achieve reinstatement through arbitration. The most common outcome is a conciliated settlement. Understanding unfair dismissal claims helps parties optimise their outcome in what can be a confusing system.

We represent both employers and employees so if you or your organisation needs assistance or advice on how to proceed please call on 03 9387 2424 or email info@rrrlawyers.com.au today and see how we can help.