**Employment law - Dismissing Staff**

**Unfair dismissal – steps to avoid it**

The requirements of unfair dismissal are set out under s 385 of the *Fair Work Act 2009* (Cth) (“**Act**”). The Fair Work Commission (“**FWC**”) will be satisfied that a person has been “unfairly dismissed” provided that:

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

**1. Has the person been dismissed?**

The first step in determining that an unfair dismissal occurred requires the employee to have been dismissed in accordance with s 386(1) of the Act. This involves a situation where:

1. The employee has been terminated at the employer’s initiative, or
2. The employee was forced to resign because of the conduct or course of conduct engaged in by the employer.

Essentially, there must be action by the employer that “either intends to bring the relationship to an end or has that probable result”[[1]](#footnote-1). In determining this, consideration is given to all of the circumstances surrounding the dismissal, including the conduct of both employer and employee.

A forced resignation will occur when an employee has no real choice but to resign[[2]](#footnote-2). The onus is on the employee to prove that they did not voluntarily resign and that the employer forced their resignation[[3]](#footnote-3).

Section 386(2) of the Act provides a list of examples where an employee is not deemed to have been dismissed i.e. where a person was employed for a specified period of time, or demotion (but employee retains the same or similar remuneration and duties):

* A person was employed for a specific period of time (fixed term contract);
* A person was employed for a specific task and that task is completed;
* A person is demoted (but employee retains the same/similar pay and duties); and
* A person was employed for training only and that training was completed.

It is important to note that demotion may constitute dismissal where an employee is demoted without consent and suffers a significant reduction in pay and/or duties. If the employee accepts the employer’s repudiation, the contract is then terminated[[4]](#footnote-4).

**2. Was the dismissal “harsh, unjust or unreasonable”?**

The criteria for determining whether a dismissal was “harsh, unjust or unreasonable” are set out in s 387 of the Act. The criteria below forms the foundation of our checklist of things which an employer should take into account when dismissing an employee; however there are other factors which play a crucial role in the dismissal process.

This checklist is set out chronologically and is not reflective of each step’s level of importance:

Dismissal checklist

1. **Policy and Procedure**
* The first step employers should take to avoid unfair dismissal is to implement clear and unambiguous policies on issues such as dismissal. For example, a dismissal policy should specify any conduct which would constitute breaches of the employment contract as well as the consequences and resolution process. The prudent employer will have a long non-exhaustive list of conduct that will amount to serious misconduct.
* Once the policy has been drafted, employers must ensure that the policy known to employees. This can be easily achieved by making the policy known and available to all employees. Provided the policy is known and followed, an employee will have fewer reasons to challenge their dismissal on this basis.
1. **Staff records**
* Employers should keep a record of all the information relevant to their relationship with employees. The employer should note any major events, such as, grievances, disputes, or conversations during meetings. Keeping a record of this information will help refresh the employer’s memory, particularly when making critical decisions relevant the employee’s employment.
1. **Valid reason for dismissal relating to the person’s capacity or conduct (s 387(a))**
* According to case law, the reason for dismissal must be “sound, defensible or well founded.” A reason which is “capricious, fanciful, spiteful or prejudicial” cannot be a “valid reason” for the purposes of s 387(a) of the Act[[5]](#footnote-5).
* The appropriate test for capacity is whether the work was performed satisfactorily when looked at objectively[[6]](#footnote-6).
* To determine a valid reason relating to the conduct of an employee, the FWC must determine whether, on the balance of probabilities, the conduct allegedly engage in by the employee actually occurred[[7]](#footnote-7).
1. **Avoiding summary dismissal (where possible)**
* There are very few situations in which an employer can summarily dismiss an employee. However, in the event an employee commits “serious misconduct”[[8]](#footnote-8), a policy should (hopefully) be in place to deal with it.
* For example, if an employee assaults another employee, the employer should carefully hear and record both parties recollection of the incident, before coming to any rash decision.
* In cases involving summary dismissal, the proportionality of the dismissal may be considered to determine if the penalty was disproportionate to the conduct complained of (s 387(h)).
1. **Notification of reason for dismissal (s 387(b))**
* If the employer has determined a valid reason for dismissal, the employer is required to notify the employee of the valid reason to dismiss the employee:
	+ Before the decision to terminate is made;
	+ In explicit terms; and
	+ In plain and clear terms
* The threshold for satisfying the notification requirements is not a high one. The FWC considered that sending a letter to an employee without advising failure to respond may result in termination was valid notification[[9]](#footnote-9).
* However, simply dismissing an employee via email without first attempting to contact the employee will not satisfy the notification requirements[[10]](#footnote-10).

1. **Opportunity to respond (s 397(c))**
* In addition notifying the employee of the reason for dismissal, the employee must also be given an opportunity to respond to the reason before the decision to terminate is made[[11]](#footnote-11).
* It is said that where an employee is aware of the employer’s concern about his or her conduct or performance and has a full opportunity to respond to this concern, this is enough to satisfy the requirements of s 397(c) of the Act[[12]](#footnote-12).
* The FWC has determined that an employer reading out a termination letter in a meeting to an employee, failed to provide the employee with an opportunity to respond[[13]](#footnote-13).
1. **Unreasonable refusal of support person (s 387(d))**
* An employer has no obligation to offer an employee the opportunity to have a support person. This will only be relevant in situations where an employee asks to have a support person and the employer unreasonably refuses.
* The FWC has held that an employer refusing to reschedule a disciplinary meeting with an employee to allow a union representative to attend, which was not an unreasonable burden on the employer, amounted to an unreasonable refusal of support person[[14]](#footnote-14).
* It should be noted that a support person does not act as an advocate, or present or defend a case on behalf of the employee. The support person merely provides physical support and can take notes and discuss matters with the employee.
1. **Warnings – unsatisfactory performance (s 387(e))**
* This criterion relates to where an employee is dismissed for unsatisfactory performance and the FWC must take into account whether there was a period of time between an employee being warned about unsatisfactory performance and a subsequent dismissal.
* This period of time is designed to provide the employee the opportunity to understand their employment is at risk and try and improve their performance[[15]](#footnote-15).
* While no warning is necessarily required under the Act, providing such and being open with employees will allow the employees to better understand and achieve their performance targets.
* In certain instances however, the FWC has deemed a failure by an employer to provide an employee with a warning for alleged poor performances and then terminating their employment on that basis, was harsh, unjust and unreasonable[[16]](#footnote-16).
* A warning must identify the relevant aspects of the employee’s performance which is of concern to the employer and must make it clear that the employee’s employment is at risk unless the performance improves[[17]](#footnote-17).
1. **Size of employer’s enterprise and human resources specialists (s 387(f) and (g))**
* This criterion looks at factors that might have impacted the ability of an employer to follow a fair process in effecting a dismissal and whether the employer was a small business or a larger employer.
* While a small business may not have the same resources as a larger business, the procedure followed in dismissing a person cannot be devoid of any fairness[[18]](#footnote-18)
* The AIRC has held that common sense courtesies of conduct ought to exist in any workplace, whatever the size[[19]](#footnote-19).
1. **Any other matters (s 387(h))**
* Some examples of the other matters that are relevant in the context of the circumstances of the particular case include:
* The differential treatment of an employee to other employees[[20]](#footnote-20).
* The impact of the dismissal on the employer’s personal or economic situation i.e. the ability of the employee to find alternative work in a small town where the employer employs the majority of the population[[21]](#footnote-21).
* The employee has a long unblemished work performance or history[[22]](#footnote-22).

**3. Does the Small Business Fair Dismissal Code apply?**

Section 385(c) applies in respect of a small business employer. A small business employer is an employer who employs less than 15 employees at the relevant time (including employees who are dismissed at the time). Casual employees are not included unless they are employed on a regular and systematic basis.

In the case of a small business employer, a person has not been unfairly dismissed if the FWC is satisfied that the dismissal was consistent with the Small Business Fair Dismissal Code (“**Code**”). A dismissal will be consistent with the Code if:

* Immediately before the time of the dismissal or at the time the person was given notice of the dismissal (which ever happens first), the person’s employer was a small business employer, and
* The employer complied with the Code in relation to the dismissal.

**4. Was the dismissal a genuine case of redundancy?**

The final aspect of the unfair dismissal process is set out under s 385(d) of the Act. An employee is prevented from making an unfair dismissal application if the dismissal was a case of genuine redundancy. The meaning of genuine redundancy is set out under s 389(1) of the Act and will occur where:

1. The employer no longer requires the person’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise, and
2. The employer has complied with any obligation imposed by an applicable modern award or enterprise agreement to consult about the redundancy.

Where there has been a reorganisation in the employer or a redistribution of duties, the question is whether the employee has any duties to discharge. If there is no longer any function or duty to perform by that person, their position becomes redundant[[23]](#footnote-23).

Section 389(2) of the Act provides that a genuine redundancy will not occur where it would have been reasonable in all the circumstances for the person to be redeployed within:

1. The employer’s enterprise; or
2. The enterprise of an associated entity of the employer.

The FWC has held that assigning an employee’s duties to other employees was not a genuine case of redundancy, as the duties of the job were merely being distributed to other employees[[24]](#footnote-24).

**5. Who is protected from unfair dismissal?**

Section 382 of the Act provides that a person is protected from unfair dismissal at the time if:

1. The person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period, and
2. One or more of the following apply:
3. A modern award covers the person;
4. An enterprise agreement applies to the person in relation to the employment; or
5. The sum of the person’s annual rate of earnings, and such other amount (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold (currently $136,700).

The minimum period of employment is set out under s 383 of the Act. This period is six months, or where an employer is a small business, one year.

The period of employment runs from the date the employee commences work until the date the employee is notified of the dismissal, or immediately before the dismissal, which ever is earlier.

A resignation will break the employment period[[25]](#footnote-25).

**Horror Stories**

*Keenan v Leighton Boral Amey Joint Venture* [2015] FWC 3156

Facts

During a Christmas party organised by the employee’s employer, the employee became heavily intoxicated and verbally abused a number of his colleagues. Throughout the party, the employees were served unlimited alcohol.

What did Mr Keenan do and/or say?

Told a Director to “F\*\*\* off mate!”

Asked a female senior employee: "What do you even do? No seriously. Who the f\*\*\* are you? What do you even do here?".

He then turned his attention to a female Manager and said "I want to ask for your number, but I don't want to be rejected". She did not respond to this or the three or four subsequent requests.

Asked another female employee "Why the f\*\*\* are you talking to Kevin?", and later telling her "I used to think you were a stuck up bitch, but Ryan says you are alright. If Ryan likes you then you must be ok".

Grabbed his fifth victim by the head and kissed her on the mouth. Later telling her: "I'm going to go home and dream about you tonight".

Finally, he told another female employee that: "My mission tonight is to find out what colour knickers you have on".

The employer’s response

Following the incident, the employer scheduled an informal meeting with the employee. A subsequent meeting ensued, where the employer gave the employee and his representative the chance to respond. During the second meeting, the employer failed to explain the dismissal in clear terms and identify the factual content of most of the allegations in a way which the employee could provide an informed response. The employee was subsequently dismissed.

The FWC’s decision

The FWC determined that the allegations against the employee where not clearly communicated to employee in the second meeting (see: s 387(b)). As a result, the FWC found that the employee was denied the opportunity to respond to the allegations and further, he was denied the presence of a support person during the first meeting (see: s 387(d)).

The FWC also considered similar incidents and how the employer had handled them in the past. In contrast to the action taken by the employer in response to the employee’s behaviour, the employer took no action against another employee after he apologised for his actions. The FWC reiterated the well established principal that differential treatment of similar misconduct by an employer may provide a legitimate basis to find that a dismissal is unfair (see: s 387(h)).

*Cannon v Poultry Harvesting Pty Ltd* [2015] FWC 3126

Facts

The employee was a chicken farm worker and fell asleep while operating machinery the morning after Melbourne Cup. As a result, the employee smothered approximately 50-60 chickens. Prior to commencing her shift, the employee had admitted to drinking alcohol. However, the employee denied being intoxicated.

The employer’s response

Shortly after hearing about the incident, the employer called the employee and told her to go home and said her conduct was enough to fire her. However, a few hours later, the employer called the employee again and dismissed her over the phone. The employer claimed that the employee was intoxicated and would cause a “serious and imminent” health and safety risk.

The FWC’s decision

The FWC determined that the employer had insufficient knowledge regarding the employee’s condition (having not been on site at the time the incident occurred) to form a view that she was intoxicated. Therefore, the employer took no steps to objectively assess her condition before dismissing her. As a result, the employee was never provided with an opportunity to respond to the allegations against her (see: s 367(c)).

The FWC also considered a number of the employer’s policies, finding that there was insufficient evidence to show the employee was bound to a zero-tolerance alcohol policy at work. This serves as a friendly reminder to employers to ensure company policies are known and available to employees.

**Liquidators Rules –**

**[57] For the above reasons, I find that, in accordance with s.500(2) of the Corporations Act, Ms Stocker is required to seek leave of the Court as defined in s.58AA of the Corporations Act, before the Tribunal can continue with these proceedings.**

*Stocker v A.B.C. Developmental Learning Centre Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) t/as A.B.C. Learning Centre [2011] FWA 2326 (16 May 2011), quoting Australian Liquor, Hospitality & Miscellaneous Workers’ Union v Home Care Transport Pty Ltd (in liquidation) [2002] FCA 497 - paras 22 and 23*

*Followed in NSW Nurses & Midwives' Association v SOS Nursing & Home Care Service Pty Ltd & Anor [2015] FCCA 2181 (14 August 2015) as applied to section 471B*

*However, decisions to the contrary in Letizia v Australian Music Group T/A Allans Billy Hyde Music [2012] FWA 9609 (9 November 2012) and Hamilton v Bwanolar Pty Ltd [2014] FWC 7056 (15 October 2014) and Krebs v [2015] FWC 1232 (6 March 2015)*

**Employee dismissed by liquidator is not entitled to sue the Liquidator’s firm;**

*Woo v Ferrier Hodgson [2015] FWCFB 3993 (25 June 2015)*

**Employee was not offered employment by the Purchaser of a business and unsuccessfully sued that Purchaser for redundancy, after the Vendor had been liquidated**

*McDonald v Super Butcher Australia Pty Ltd [2013] FWC 985 (14 February 2013)*

**If the voluntary administrator continues to trade the business, they must pay, out of the assets available to them, ongoing wages for services provided and other employee entitlements that arise after the date of their appointment. These payments are treated as an expense of the voluntary administration.**

**The appointment of a voluntary administrator does not automatically terminate the employment of the company’s employees. As a result, unless the voluntary administrator adopts the employment contracts or enters into new contracts of employment with employees, they are not personally liable for any employee entitlements that arise during voluntary administration.**

[**http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-employees/employees-voluntary-administration/#3**](http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-employees/employees-voluntary-administration/#3)

6 The starting point is to deal with the effect of the appointment of a receiver on a contract of employment. Surprisingly, the law is still in a state of uncertainty. It is generally accepted that the appointment of a receiver by the court terminates the contract: *Reid v Explosives Co Ltd (1887) 19 QBD 264; James Miller Holdings Ltd v Graham (1978) 3 ACLR 604.* This view is not, however, universally accepted: *eg International Harvester Export Co v International Harvester Australia Ltd [1983] VicRp 50; [1983] 1 VR 539; Sipad Holding DDPO v Popovic (1995) 14 ACLC 307.* The rationale for the predominant view is that a court appointed receiver does not operate the concern on behalf of the company, but adverse to it. Speaking generally, the opposite is true in the case of **a privately appointed receiver who is the company's agent. In that event, the rule is that the contract of employment is not terminated:** *Foster Clark Ltd's Indenture Trusts, Loveland v Horscroft [1966] 1 WLR 125; Nicoll v Cutts [1985] BCLC 322.* **There are several exceptions to this rule**, which are discussed in *Griffiths v Secretary of State for Social Services [1974] QB 468.* The exceptions are: (1) Where the appointment is accompanied by the sale of the company's business; (2) Where the receiver enters into a new employment contract which is inconsistent with the employee's old contract; and (3) Where the continuation of the employment contract is inconsistent with the role of the receiver. A contract with a chief executive officer might be an example of such an inconsistency.

7 There is a similar dichotomy in the case of a winding up. **The publication of a compulsory winding up order amounts to a dismissal of the company's employees** *(Re General Rolling Stock Co (Ltd); Chapman's case (1866) LR 1 Eq 346; In re Oriental Bank Corporation; MacDowall's case (1886) 32 ChD 366),* though the contract of employment still remains on foot. The situation is probably different in a voluntary winding up. I say "probably different" because the position is not settled and, in any event, there is no justification for any difference. Be that as it may, the preponderance of authority favours the view that a voluntary winding up does not disturb a contract with an employee: *Midland Counties District Bank Ltd v Attwood [1905] 1 ChD 357; Re Matthew Brothers (In Liq) [1962] VicRp 39; [1962] VR 262.*

*McEvoy v Incat Tasmania Pty Ltd [2003] FCA 810 (1 August 2003)*

**The effect of the resolution to wind up in circumstances where the company was no longer solvent was apt to amount to notice of termination of Mr Larcombe’s employment from the date of the resolution to wind up**: ss.493 and 513B of the Corporations Act 2001.

*Larcombe v Mackereth [2015] FCCA 2646 (18 August 2015)*

**2. The defendants admitted the plaintiff’s claim for “unpaid salary” in the sum of $995,973.10, but concluded that the plaintiff was a “Class C Creditor”. Class B Creditors’ claims will be paid in full while Class C Creditors will be paid pari passu in accordance with the level of their admitted claims.**

40. … the defendant’s reliance on the decision of Young J in Irons v Merchant Capital Ltd (1994) 116 FLR 204 (“Irons”), as long-standing authority that **damages for wrongful dismissal are not “amounts payable...by virtue of an industrial agreement”**,

46. It is not obvious to me that the plaintiff’s claim is an “amount payable by the company”. I would prefer to characterise it as an amount which the liquidator has estimated to be the value of the plaintiff’s unadjudicated claim for unliquidated damages for the purpose of distributing the deed fund.

47. In my view, although there is an obvious connection between the employment contract and the plaintiff’s claim, **that claim cannot be described as an amount payable “by virtue of” the contract because the plaintiff’s claim arose only upon the termination of the contract**

*Schmitt v Carter [2014] FCA 1370 (15 December 2014)*

1. see: *O’Meara v Stanley Works Pty Ltd* (2006) 58 AILR 100 at [23] [↑](#footnote-ref-1)
2. see: *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200 [↑](#footnote-ref-2)
3. see: *Australian Hearing v Peary* (2009) 185 IR 359 at [30] [↑](#footnote-ref-3)
4. see: *Charlton v Eastern Australia Airlines Pty Ltd* (2006) 154 IR 239 at [34] [↑](#footnote-ref-4)
5. see: *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371 [↑](#footnote-ref-5)
6. see: *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 [↑](#footnote-ref-6)
7. see: *Edwards v Giudice* (1999) 94 FCR 561 [↑](#footnote-ref-7)
8. see: *Fair Work Regulation 1.07* [↑](#footnote-ref-8)
9. see: *Villani v Holcim (Australia) Pty Ltd* [2011] FWA 141 [↑](#footnote-ref-9)
10. see: *Gooch v Proware Pty Ltd t/a TSM (The Service Manager)* [2012] FWA 10626 [↑](#footnote-ref-10)
11. see: *Crozier v Palazzo Corporation Pty Ltd* (2000) 98 IR 137 at [75] [↑](#footnote-ref-11)
12. see: *RMIT v Asher* (2010) 194 IR 1 at [14-15] [↑](#footnote-ref-12)
13. see: *Ryan v Logan & Co Pty Ltd* [2011] FWA 161 [↑](#footnote-ref-13)
14. see: *Laker v Bendigo and Adelaide Bank Limited* [2010] FWA 5713 [↑](#footnote-ref-14)
15. see: *Johnston v Woodpile Investments t/a Hog’s Breath Café – Minadarie* [2012] FWA 2 [↑](#footnote-ref-15)
16. see: *Martin v Donut King Chirnside Park t/a Hersing Pty Ltd* [2012] FWA 2905 [↑](#footnote-ref-16)
17. see: *Fastdia Pty Ltd v Goodwin* (unreported, 21 August 2000 [↑](#footnote-ref-17)
18. see: *Williams v The Chuang Family Trust t/a Top Hair Design* [2012] FWA 9517 (unreported, Clogan C, 12 November 2012) at [40] [↑](#footnote-ref-18)
19. see: *Sykes v Heatly Pty Ltd t/a Heatly Sports* (unreported, AIRC, Grainger C, 6 February 2002) PR914149 at [20] [↑](#footnote-ref-19)
20. see: *Sexton v Pacific National (ACT) Pty Ltd* (unreported, AIRC, Lawler VP, 15 May 2003 PR31440 at [33] [↑](#footnote-ref-20)
21. see: *Ricegrowers Co-operative Limited v Schliebs* (unreported 31August 2001) PR908351 [27] [↑](#footnote-ref-21)
22. see: *Streeter v Telstra Corporation* (2008) 170 IR 1 [25] [↑](#footnote-ref-22)
23. see: *Jones v Department of Energy and Mineral* (1995) 60 IR 304 at [308] [↑](#footnote-ref-23)
24. see: *Rosenfeld v United Petroleum Pty Ltd t/a United Petroleum* [2012] FWA 2445 (unreported, Ryan C, 22 March 2012 [↑](#footnote-ref-24)
25. see: *Trebble v Rizmas Pty Ltd* [2011] FWA 6853 (unreported, Roe C, 5 October 2011 [↑](#footnote-ref-25)