

UNFAIR DISMISSAL IS THE NEW BLACK!

These days it seems that every employee that is dismissed feels justified in lodging a claim for unfair dismissal against their previous employer. The *AAAA Employer Assist* team regularly assist members to defend such claims in the Fair Work Commission (FWC) and the numbers are on the increase. As such we felt it timely that we should again revisit the unfair dismissal process to assist members to prepare should such a claim be made against them.

If a former employee believes they has been unfairly dismissed, they can lodge what is called an 'application for unfair dismissal remedy' with the Fair Work Commission (FWC). Remedies include reinstatement to their previous role, or compensation from their employer where reinstatement is not appropriate. But what is "unfair" and how can you best manage such a claim should one arise ...

What is an "unfair dismissal"?

Unfair dismissal occurs when an employee's dismissal is considered harsh, unjust or unreasonable by the FWC. In determining whether a dismissal is harsh, unjust or unreasonable, the FWC will take into account any matter the FWC considers relevant including:

- Whether there was a valid reason for the dismissal that related to the employee's performance or conduct.
- Whether the employee was notified of that reason and given an opportunity to respond before being dismissed.
- Any refusal by the employer to allow the employee to have a support person present.
- Whether the employee was provided with a warning regarding their poor performance or conduct (NOTE: 3 warnings are not necessary but the employer will need to clearly establish that the employee held a reasonable belief that if their performance did not improve their employment would be terminated).

Who is eligible to make an unfair dismissal claim?

All federal system employees are covered by the unfair dismissal laws under the *Fair Work Act 2009* (Cth) (**Act**). To be eligible to make an unfair dismissal claim under the Act:

1. The employee must satisfy the minimum employment period (i.e.: 6 months or 12 months where the employer employs less than 15 employees); and
2. One or more of the following applies:
 - a. The employee is covered by a Modern Award.
 - b. An enterprise agreement applies to the employee.
 - c. The employee earns less than the 'high income threshold' (currently **\$133,000** per year).

The unfair dismissal process

Step 1: Employee's application for unfair dismissal is received

To commence proceedings for unfair dismissal, the ex-employee (Applicant) must lodge an application with the FWC **within 21 days of their dismissal**. The application should set out the Applicant's version of events including why they believe they were unfairly dismissed.

The FWC will notify the employer of the application and provide information about the process, a copy of the application and a "Notice of Listing" which provides written notice of the time and date of the conciliation conference.

Step 2: Employer's Response

Within 7 days of receiving the application, the employer is required to complete and file a response (Form F3—Employer's Response) and serve a copy on the Applicant or if applicable the Applicant's representative.

The Employer's Response is a crucial document – it allows an employer the opportunity to clearly state its position and should outline the key reasons for the dismissal and the process followed. It also provides the employer with the opportunity to refer to any jurisdictional objections (e.g. application made out of time or Applicant not eligible to make an application).

Best Strategy – seek advice early

The Employer's Response is the first opportunity that an employer has to present its side of the argument before the conciliation conference takes place. If it is poorly written, then the employer faces an uphill battle before the conciliation conference has begun, as the Conciliator will not clearly understand the employer's position. This may mean that the employer will be forced to waste time trying to justify their decision at the conciliation conference rather than focussing on how the dispute can be resolved.

Step 3: Prepare for the conciliation conference

A conciliation conference is scheduled usually within 3 weeks from the date the application is made and in most cases is via telephone. The conciliation conference is an informal, private and confidential process designed to assist the parties in reaching an agreement to resolve the unfair dismissal claim.

The conciliation conference is managed by a FWC Conciliator – a professional who is experienced at dispute resolution and has extensive knowledge about employment law, but they do not decide who is right or wrong – they simply seek to settle the dispute to avoid it proceeding to a hearing before a FWC Commissioner (ie a court).

During the conciliation conference:

- the Conciliator will explain their role and the manner in which the conciliation is to be run;

- each side briefly outlines their story including what happened, any relevant facts and what they want as an outcome of the dispute;
- the Conciliator will usually ask questions of each of the parties to ensure they fully understand the circumstances of what occurred;
- the Conciliator will usually ask to speak separately with each of the parties and their representatives, suggesting possible options and engaging in some reality testing around each party's position;
- at this point the Conciliator will often seek a settlement offer from the employer in exchange for the applicant withdrawing their application (ie to avoid the dispute proceeding to a hearing before a FWC Commissioner);

Important Note: most applicants are looking for 3 – 6 month's pay in compensation – if the employer does not have representation then this can be a costly exercise. Remember the Conciliator is not interested in who is right or wrong – only to have the matter settled which usually means the employer paying money to the Applicant!

- if an agreement is reached, the Conciliator will provide the parties with a binding Deed of Settlement and monies will need to be paid within 7 days.

Step 4: Hearing before a FWC Commissioner

If no agreement has been reached at conciliation, the matter will usually progress to a hearing before a FWC Commissioner. The Applicant and employer will need to prepare formal witness statements and evidence etc. just like any other formal court process. Each party's witnesses are often required to attend the Commission and can be subject to cross examination by the other side if necessary.

To prepare for a full hearing requires quite a few days of preparation by each party. The hearing then often takes 1 or 2 days before the Commission. The time, effort and monetary outlay is a substantial drain upon all parties – although in some states Applicants are eligible for legal aid and can be represented at no cost.

After the hearing, the Commissioner will consider all of the evidence and testimony before them, issue a written decision that determines whether or not the Applicant was unfairly dismissed and if so determine an appropriate remedy.

Unfair dismissal remedies

If an employee is unfairly dismissed, the FWC can order the employer to:

- Reinstatement the employee and pay the employee for any lost remuneration; or
- If reinstatement is not possible or reasonable in the circumstances, pay the employee compensation of up to 6 months' pay (maximum amount of \$66,500.00 as at July 2014).

Also, if the matter does not settle at the conciliation stage and proceeds to a full hearing, the employer will most likely incur considerable financial expense defending the claim. Although it is very rare the FWC may order either party to pay all or some of the costs of the other depending on the outcome. Such orders will usually only be made if the FWC considers the

application or response was frivolous, vexatious or made without reasonable cause and/or had no reasonable prospect of success.

Need Assistance?

Following a water tight performance management and terminations process is the best way to avoid the liabilities associated with an unfair dismissal claim. If you are unsure on how best to manage a poorly performing employee or how to manage a potential termination please contact the **AAAA Employer Assist** team on **1300 735 306**.

Also, if you would like further information on how to reduce the risks of unfair dismissal, the AAAA Employer Assist team will be presenting a seminar on “How to Avoid Unfair Dismissal” at the Aftermarket Expo in Melbourne on Friday 17 April 2015 at 11.00am. See you there.