

# TERMINATION DONE RIGHT

## Did you provide your employee with an opportunity to respond to a warning?

The recent decision of the Full Bench of the Fair Work Commission in *Adam Miller v Urban Pedaler T/A Urban Pedaler* [2018] FWCFB 4166 has determined that small businesses are required to provide employees with the opportunity to respond to warnings prior to their termination.

The length of response time provided must be sufficient in the circumstances and must provide ample time for the employee to improve their performance in an attempt to escape termination.

### A RECENT CASE ON THE ISSUE – ADAM MILLER V URBAN PEDALER

#### Facts

Mr Miller was a Workshop Manager for Urban Pedaler (a small business) for just over a year. On 16 November 2017, Mr Miller was given a warning letter based on his poor performance. Following receipt of this warning letter, on 20 November 2017, the parties conducted a meeting regarding his poor performance and the reasons behind providing the warning letter. On 22 November 2017, Mr Miller was terminated for the reasons detailed in his warning letter.

#### Issue

Mr Miller commenced proceedings against Urban Pedaler claiming that they failed to comply with the Small Business Fair Dismissal Code in not providing him ample time to respond to the warning letter and show improvement in his performance.

#### Held

On Appeal, the Full Bench held that the four days Mr Miller was provided between the receipt of the warning letter (where he was advised his employment was at risk) and the meeting held to discuss his performance issues, was not sufficient in the circumstances.

The short period did not provide Mr Miller with an opportunity to improve his performance and therefore escape termination (which followed only two days after the performance meeting), especially considering he was suspended from employment during that time.

### What does this mean for employers?

Following this decision, if you are a small business wishing to terminate an employee for performance related issues which do not amount to serious misconduct, you must:

1. provide the employee with a warning letter detailing the reasons as to why the employee is at risk of being terminated;
2. provide the employee with sufficient time to improve their performance. This could include providing the employee with a detailed description of the job expectations and/or providing additional training;
3. notify the employee that a disciplinary meeting is to be held. Advise of the location and time in advance (this may only be a few hours depending on the circumstances);
4. when directing the employee to attend the meeting, advise that they are permitted to bring a support person to the meeting if they wish;
5. prepare for the meeting – draft a clear list of the identified performance/misconduct issues and address whether the employee has or has not improved their performance since the issuing of the initial warning letter;
6. when commencing the meeting, explain the structure and agenda of the meeting and then cover the issues;
7. provide the employee with an opportunity to respond. The employee may want to confer with their support person privately before responding;



8. the employer must consider the performance/misconduct issues against the employee's response prior to making a decision (this may be a few minutes or a few days); and
9. advise the employee of your decision to terminate or continue with performance management.

Failing to adhere to the Small Business Code and the procedural fairness rules of the *Fair Work Act 2009* (Cth) may result in reinstatement or compensation orders being made.

### A BRIEF OVERVIEW OF TERMINATION UNDER THE SMALL BUSINESS FAIR DISMISSAL CODE

#### Does the Code apply to me?

If you employ fewer than 15 employees (including casuals employed on a regular basis), the Code will apply to your business.

#### What does the Code say?

For all dismissals other than those that amount to serious misconduct, employees must first be warned (verbally or preferably in writing) that they are at risk of being dismissed if there is no improvement in performance.

The employee must also be given *'an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response.'*

#### When does it apply?

It applies to small business employers dismissing an employee who has been employed for more than 12 months.



### AAAA Member Benefits

Employer Assist can assist you in drafting warning, show cause and termination letters. We also provide advice regarding termination processes and can represent the employer in relation to any claims made by the employee post termination.

If you require assistance, we encourage you to contact Employer Assist on 1300 735 306 or [aaaa@employerassist.com.au](mailto:aaaa@employerassist.com.au).