



Managing The Risks - Termination of Employment

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15 February 2011

About Us

- Part of The EI Group
- An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- Our services include:
 - Industrial Relations
 - Enterprise Agreement Making
 - Equal Employment Opportunity and Anti Discrimination
 - Terminations and Adverse Action
 - Staying Compliant
 - Legal Advice and Representation

About the Presenter

- Patricia Ryan – Practice Manager of EI Legal
- Solicitor with over thirty years post admission experience
- Qualifications in Human Resource management and Industrial Relations

Topics Covered

- Unfair Dismissal
- Adverse Action (dismissal)
- Redundancy
- Notice



Unfair Dismissal

Meaning of Dismissal

- The employment was terminated at the initiative of the employer or;
- The person resigned but was forced to do so by conduct of the employer
- However the person has not been dismissed if they were demoted and remains with the employer and the demotion does not involve a 'significant' reduction in remuneration or duties

Who is Eligible?

- Employee must meet the minimum qualifying period

Exemptions

- Employee engaged for a specified time or task
- Certain high income employees
- Genuine redundancy

Time for Making an Application

- The claim must be filed within 14 days of the dismissal

Substantive and Procedural Fairness

- Substantive fairness is about the reason(s) for the dismissal
- Procedural fairness is about the process surrounding the dismissal

Substantive Fairness

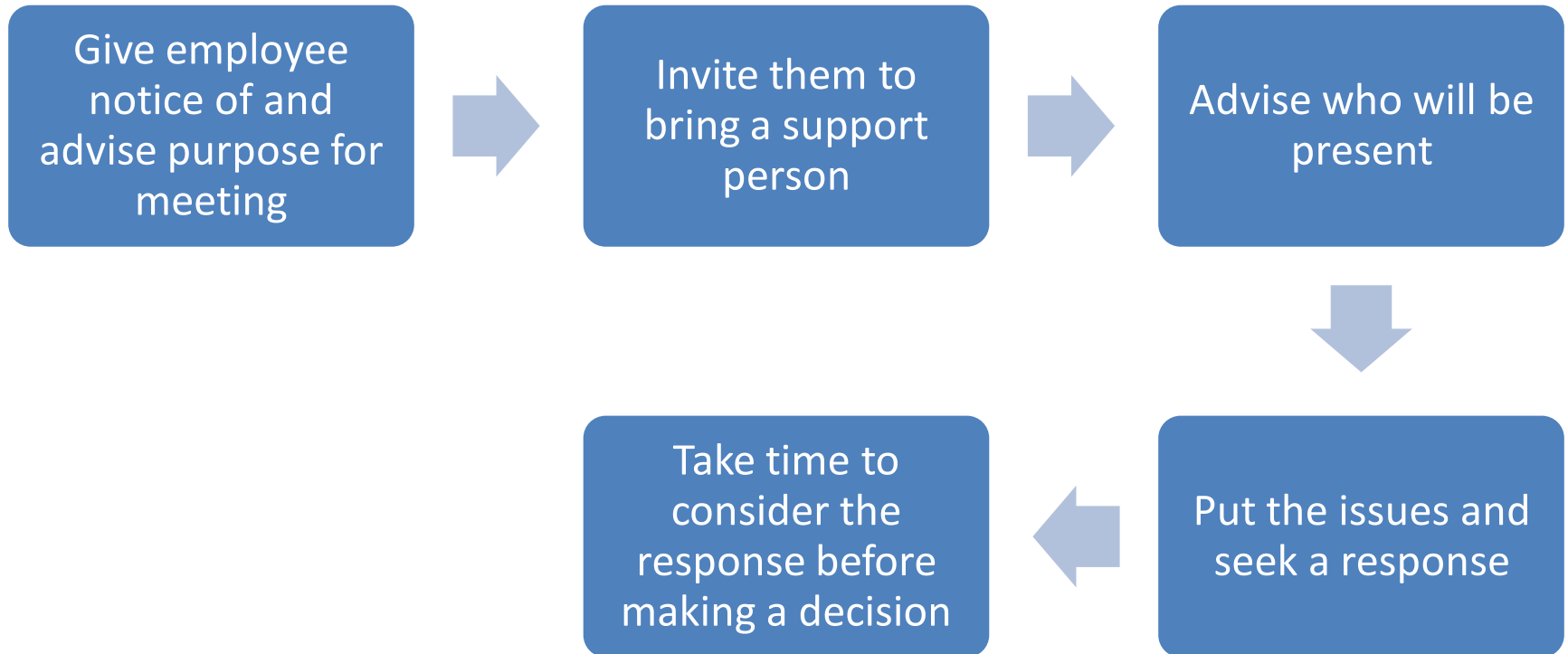
- What are the grounds for dismissal?
- Are they harsh, unreasonable or unjust?

Reasons for Dismissal

- Performance
- Misconduct
- Redundancy



Procedural Fairness



Criteria for Considering Harshness

S387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (h) any other matters that FWA considers relevant.

Small Business Employers

- An employee in a small business is precluded from bringing an unfair dismissal claim in the first 12 months of employment with the “small business employer”.

What is a “Small Business Employer”?

The Act defines “small business employer” as an employer employing fewer than 15 employees at the time of the dismissal. For the purposes of calculating the number of employees employed by the employer at the particular time:

- all employees employed by the employer at the time are to be counted
- a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis;
- associated entities are to be taken as one entity; and
- the employee or any other employee who is being dismissed or terminated is also counted

Small Business Fair Dismissal Code

- Provides a checklist to guide small business employers



Small Business Fair Dismissal Code Checklist

1. How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

- Under 15 full-time equivalent employees
 15 full-time equivalent employees or more

[If under 15 full-time equivalent employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?

- Yes
 No

[If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?

- Yes
 No

If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered

4. Do any of the following statements apply?

I dismissed the employee because I believed on reasonable grounds that: YES NO

- a. The employee was stealing money or goods from the business.
 b. The employee defrauded the business.
 c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.
 d. The employee committed a serious breach of occupational health and safety procedures.

5. Did you dismiss the employee for some other form of serious misconduct?

- Yes
 No

If Yes, what was the reason?

If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

- Yes
 No

If Yes

a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed? YES NO

b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct?
 If yes, how much time was given?

c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?

d. Did the employee subsequently improve his or her performance or conduct?

e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?

f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.

7. Did you dismiss the employee for some other reason?

- Yes
 No

If Yes, what was the reason?

8. Did the employee voluntarily resign or abandon his or her employment?

- Yes
 No

If Yes, please provide details

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Possible Outcomes of a Claim

- Reinstatement
- Monetary compensation
- Reinstatement and monetary compensation



Remedy- Compensation s392(2)

Criteria for Deciding Amounts

s392 (2) In determining an amount for the purposes of an order under subsection (1), FWA must take into account all the circumstances of the case including:

- (a) the effect of the order on the viability of the employer's enterprise; and
- (b) the length of the person's service with the employer; and
- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that FWA considers relevant.

Recent Cases

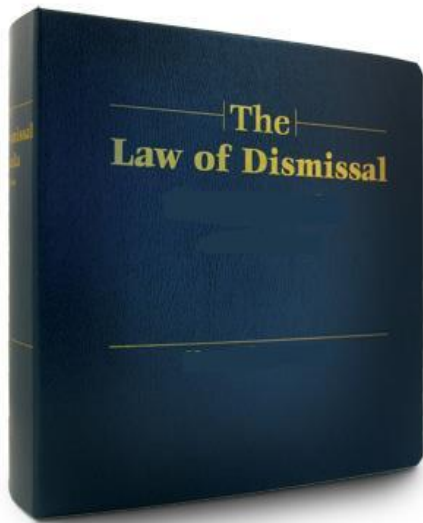
- Hillbrick v Marshall Lethlean Industries [2010] FWA 7044
- Deng v Inghams Enterprise Pty Ltd [2010] FWA 8797
- Bashit v Versace Australia's Best Tyres, Automotive Services & Repairs Pty Ltd [2010] FWA 8790

Questions?



Adverse Action

An employer must not take adverse action (dismissal) because the employee has a workplace right, engages in industrial activity or for discriminatory reasons.



Onus Of Proof

- This falls on the employer- it is a reverse onus of proof



Time for Bringing a Claim

- Claims must be lodged within 60 days of the dismissal



Possible Outcome of a Claim

- If not resolved at FWA, referral to Federal Court
- Interlocutory orders, injunctions, damages, reinstatement, civil penalties

Recent Cases

- Barclay v The Board of Bendigo Regional Institute of TAFE [2011] FCAFC 14
- Phillips v Phillips Engineering Pty Ltd [2010] FCA 611
- LHMU v Arnotts Biscuits Limited [2009] QUD 304

Tips for Employers

- Make sure decisions are transparent, fair and reasonable and not for some other reason related to the employee's workplace rights.
- Provide training to managers on the new general protection provisions that include adverse action.
- Keep records of the decision making process.

Tips for Employers

- Revisit procedures for dealing with disciplinary matters and grievances. Make sure any policies are supported by procedures or guidelines for how matters will be dealt with.
- Give employees reasons for decisions that impact on work.

Redundancy

S389 defines a dismissal as a genuine redundancy if:

Step 1: The employer no longer requires the job to be performed by anyone because of changes in the operational requirements of the employer; and

Step 2: The employer has complied with consultation obligations in an award or EA

Step 3: A dismissal will not be a genuine redundancy if it would have been reasonable for the person to be redeployed.

Recent Decisions

- Chaiprasroet-Wall v Standom Smallgoods Butchers Pty Ltd [2010] FAW 5263
- Kekeris v A Hartrodt Australia Pty Ltd t/as a.hartrodt [2010] FWA 674
- Ulan Coal Mines Limited v Honeysett and others [2010] FWAFB 8022

Redeployment

- Employers and associated entity employers require practical redeployment procedures
- Document the fair implementation of those procedures
- Scope the vacancies of the employer and associated entity employers
- Advise affected employees of the vacancies and details of their nature, location and qualifications

Redeployment

- Employees must indicate interest
- Assist employees to pursue the vacancies
- Ensure affected employees are fully considered for the positions
- Be able to show sound reasons if an employee is unsuccessful

Redundancy

Be Aware Of

- Consultation Provisions
- Redeployment opportunities
- Severance pay and notice
- Document all decision making

Notice

What is the Entitlement to Notice?

- The National Employment Standards (“NES”) provides:

Period of continuous service	Notice period
Not more than 1 year	1 week
More than 1 year but no more than 3 years of service	2 weeks
More than 3 years of service but not more than 5 years of service	3 weeks
More than 5 years of service	4 weeks

Notice

- If the employee is over 45 years of age and has completed at least 2 years of continuous service the notice period is increased by one week.

How is Notice Provided?

- Notice must be provided to an employee in writing.
- Notice may be provided by delivering the letter personally to the employee, leaving it at the employee's last known address or sending it by pre-paid post to the employee's last known address.

Notice

Rate of Pay if Payment-In-Lieu

- Notice must be paid at the full rate of pay the employee would have received for the hours they would have worked until the end of the notice period.
- The full rate of pay includes incentive based payments and bonuses, loadings, monetary allowances and overtime or penalty rates and any other separately identifiable amounts.

Questions?

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