

New fair work laws – Unfair dismissal

Executive Director of Hair and Beauty Australia, Gregory Christo, provides us with an insight into the new laws.

The new Fair Work laws have passed through Parliament, and will slowly replace WorkChoices. These new laws will only generally apply to corporations (i.e. proprietary limited companies).

Most of the new Fair Work laws will start on 1 January 2010, however, the unfair dismissal laws summarised below will take effect from 1 July 2009.

UNFAIR DISMISSAL

Under the Fair Work laws, an employee who has been dismissed by you may be able to make a claim for unfair dismissal against you if they can show that the dismissal was "harsh, unjust or unreasonable".

WHO CAN MAKE A CLAIM?

All employees employed by a company can claim that their dismissal was harsh, unjust or unreasonable, EXCEPT:

- If you employ:
 - > less than 15 employees – the person cannot make a claim in the first 12 months of their employment; or
 - > 15 or more employees – the person cannot make a claim in the first 6 months their employment
- if the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of that period, upon the completion of the task, or at the end of that season;
- if the person was employed under a training contract (i.e. an apprenticeship).

WHEN IS A DISMISSAL 'HARSH, UNJUST OR UNREASONABLE'?

In determining whether the dismissal was harsh, unjust or unreasonable, the following factors will generally be taken into account:

- 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
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- 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
- if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal.

WHEN IS A DISMISSAL NOT 'HARSH, UNJUST OR UNREASONABLE'?

A dismissal is not considered to be 'harsh, unjust or unreasonable' if:

- it is a genuine redundancy, which means that you no longer require the person's job to be done by anyone because of changes in the operational requirements of your business (remember you must also comply with any Modern Award or Enterprise Agreement in relation to redundancy that applies to your business); or
- you employ less than 15 employees, and you complied

with the Small Business Fair Dismissal Code.

WHEN MUST THE EMPLOYEE MAKE A CLAIM?

An employee who claims to have been unfairly dismissed must make a claim within 14 days after the dismissal (or within a further time period as allowed by Fair Work Australia).

IF IT IS FOUND THAT THE EMPLOYEE WAS UNFAIRLY DISMISSED, WHAT CAN FAIR WORK AUSTRALIA DO?

- REINSTATEMENT
If FWA finds that the employee was unfairly dismissed, it can order that the employee be reinstated to his or her former position on wages and conditions that were at least the same as before the employee was dismissed.
- COMPENSATION
If FWA considers that

reinstatement would be impracticable, it may order the employer to pay the employee an amount of compensation. However, generally the amount of compensation cannot be more than the amount that the employee would have earned in 6 months after the dismissal (i.e. 6 months wages).

UNFAIRLY DISMISSING AN EMPLOYEE CAN MAKE YOU LIABLE FOR THOUSANDS OF DOLLARS IN COMPENSATION, AND THEREFORE IT IS STRONGLY ADVISABLE THAT YOU CONTACT HAIR AND BEAUTY AUSTRALIA AND GET ADVICE FROM OUR TRAINED ADVISORS BEFORE YOU TAKE STEPS TO TERMINATE AN EMPLOYEE FOR ANY REASON.

*Gregory Christo
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