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HUMAN RESOURCES & INDUSTRIAL RELATIONS

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Preventing Unfair Dismissals and Adverse Actions

Introduction

There have been over 200,000 unfair dismissal applications made to the Fair Work Commission (and its predecessors) since the advent of this law in 1996. In the first three months of this year (2019) alone, there have been 3,500 applications so far. The main beneficiaries are the "No-win, No-fee" brigade that lure in sacked employees with a very simple business model: that you will pay "go away money" (this is an average of $10,000) as a commercially viable outcome than fighting the case to arbitration. **This is a $multi-billion industry**.

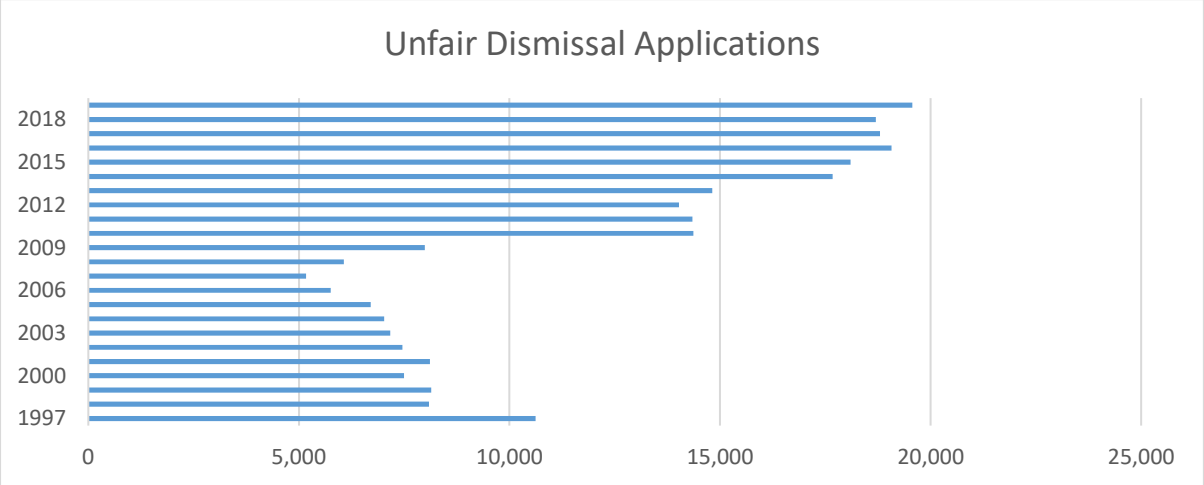

Table: Unfair dismissal application per year 1997 to 2019

This checklist is designed to prevent a successful unfair dismissal claim ("No-win, no-fee" businesses don't want to see that you have dismissed their potential client the right way).

Already received a "unfair dismissal" claim? Don't despair, I have also included a few tips on how to minimise the potential damage.

Whilst almost all of "unfair dismissals" are finalised at or before mediation (you pay "go away money"), if you stick to your guns or the applicant is unhappy (read: the :no-win, no-fee person cannot see a pay day),then the matter may proceed to arbitration, where the Fair Work Commission can make one of more of the following orders:

- Reinstatement of the person to their former position (VERY BAD);
- The payment of compensation to the person (this payment is considered "income" for taxation purposes and therefore superannuation payments will also be applied);
- Payment of an amount to the person for remuneration lost;

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- Maintain the continuity of the person's employment;
- Maintain the period of the person's continuous service with the employer.

Year ending	Applications	x $10,000*	Legislation
1997	10,621	106,210,000	*Workplace Relations Act 1996*
1998	8,092	80,920,000	
1999	8,146	81,460,000	
2000	7,498	74,980,000	
2001	8,109	81,090,000	
2002	7,461	74,610,000	
2003	7,171	71,710,000	
2004	7,024	70,240,000	
2005	6,707	67,070,000	*Workplace Relations Amendment (Work Choices) Act 2005*
2006	5,758	57,580,000	
2007	5,173	51,730,000	
2008	6,067	60,670,000	
2009	7,994	79,940,000	*Fair Work Act 2009*
2010	14,366	143,660,000	
2011	14,342	143,420,000	
2012	14,027	140,270,000	*Fair Work Amendment Act 2012*
2013	14,818	148,180,000	*Fair Work Amendment Act 2013*
2014	17,676	176,760,000	
2015	18,099	180,990,000	
2016	19,069	190,690,000	
2017	18,801	188,010,000	
2018	18,704	187,040,000	
2019	19,568	195,680,000	
TOTAL	**265,291**	**$2,652,910,000 (heading towards $3 billion)**	

*Estimated average payment to employee (conservative).

Finally, (to my mind anyway), if you supervise/manage employees – always diarise all interactions. "Contemporaneous notes" (ie notes taken at the time, not added later) can be invaluable evidence to support a dismissal. Of course, notes should be kept of good as well as bad behaviours!

The following checklist is set out in the following order:

- I'm too busy, it'll just go away…

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- Small Business Dismissal Code.
- But the person involved is a contactor
- So, you are thinking of sacking one of your workers
- Must be fair and reasonable
- Unfair dismissals do not apply to certain situations
- Adverse Action claims
- Contracts of Employment
- Abandonment of employment
- Frustration
- If you receive an unfair dismissal application (preferably ring me), but check that the application was made in accordance with the requirement under the act
- But I have the right of appeal if I don't like the decision…

I'm too busy, it'll just go away…

No, it won't. Ignore unfair dismissal applications at your own peril. If you do not comply, the Fair Work Commission will (in all the cases that I have read), will order the maximum payment of 26 weeks' pay. Still ignore? 12 months jail can be prosecuted.

Small Business Dismissal Code

- **Note: For the purposes of the Fair Work Act, you are a small Business if you employee fewer than 15 employees** (by simple head count – which may include casuals if they have worked "regular and systematic" hours) at the time the dismissal took place. Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair, you need to go the Fair Work Commission website and comply with the Small Business Dismissal Code or click here for a free download.

But the person involved is a contactor

- Just because you describe a person as a contractor (or "subbie"); this may not be so in the eyes of the law.

- Contractors cannot bring an unfair dismissal claim within the Fair Work Act, but this is a very complex area and seek advice before taking any action.

So, you are thinking of sacking one of your workers

- **NEVER** do this on the heat of the moment. Sleep on it and get advice (eg **telephone advice from me is free (ie priceless)**. This also applies to **resignations**. The "Hobson's Choice" of "resign or be

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sacked" is the same as a dismissal in the eyes of the law. Stop, think, and start again – when cool heads prevail.

- If you want to dismiss an employee for some reason, there must be **proof**. Acting upon mere suspicion or hearsay is not enough. However, unlike TV crime dramas, the test is not to prove beyond reasonable doubt, but **on the balance of probabilities**.

- I you need to reduce you employee numbers; you may need to ensure that you picked the person for **redundancy** in a fair manner. The Fair Work Act defines a genuine redundancy as:

  *"A person's dismissal was a case of **genuine redundancy** if:*

  (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

  (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

  *A person's dismissal was not a case of **genuine redundancy** if it would have been reasonable in all the circumstances for the person to be redeployed within:*

  (a)the employer's enterprise; or

  (b)the enterprise of an associated entity of the employer."

- For there to be a genuine redundancy within the meaning of the Fair Work Act, a business must comply with any obligation in an applicable modern award or enterprise agreement to consult about the redundancy.

- Is there a **valid reason** for the dismissal? In other words, does the punishment fit the crime? A well written final warning might save you a lot of hassle in the long run.

- For example, **serious misconduct may** be a valid reason, but it also may be unfair, harsh or unreasonable when all the circumstances are balanced. The Fair Work Regulations define serious misconduct as:

  - Wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment.
  - Conduct that causes serious and imminent risk to:
    - The health or safety of a person; or
    - The reputation, viability or profitability of the employer's business.

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- Theft; or
- Fraud; or
- Assault;
- Being intoxicated at work: an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform. **[Have got an Alcohol and other drugs policy?]**
- Refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

- ☐ Social Media: The Fair Work Commission has denied unfair dismissal applications based on employees denigrating their employer and/or its employees. [Tip: have in place a social media policy].

- ☐ The same goes for bullying, discrimination and sexual harassment. Make sure you have policies in place and each matter is investigated by (preferably an independent person.

- ☐ **Serious misconduct?** Do NOT, I repeat, do not pay termination pay. You must pay out all accrued entitlement (not sick leave) – but otherwise keep this money in you back-pocket to use at any unfair dismissal application that may follow.

- ☐ **TIP**: If you do pay any additional monies, then insist on a **Deed of Release.** This will ensure that the person is unable to bring any actions against you (except workers compensation and superannuation matters).

Must be fair and reasonable

- ☐ Meet with the employee and get their side of the story? Set out what you are your concerns (preferably in writing) before the meeting. Approach this issue in a business-like manner and note their response(s). If they wish to bring a support person, allow this, but remember the support person is not there to advocate on behalf of the employee.

- ☐ Unless circumstances prevent it, ALWAYS dismiss a person face-to-face. Text messages and emails just won't do.

- ☐ Suspending an employee on full pay, whilst you investigate your options, may save you time and money in the future.

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- If you decide to carry out the dismissal ALWAYS do so face-to-face and put the reasons in writing (you might need help for this).

- If you are unhappy with the **employee's performance**, a warning system which includes a Performance Improvement Plan, should be implemented. Remember, each warning must relate to the reason for the poor performance. For example, if the warning is for being late, then you cannot rely on this warning if the employee's performance is lacking for other unrelated reasons. I unsure, seek advice. Notwithstanding, a number of performance issues may be cause for a pattern of behaviour.

- The Fair Work Commission also considers the impact any decision it makes will impact on your business, and whether the business employees a Human Resources person.

- But s/he has a poor Attitude…
    - Poor attitude does not = dismissal.
    - Must be "observable" and "measurable."

Unfair dismissals do not apply to certain situations

- 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 the period, on completion of the task, or at the end of the season; or

- To whom a training arrangement applied; and

- Whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement and the employment has terminated at the end of the training arrangement; or

- Was demoted in employment but:
    - The demotion does not involve a significant reduction in his or her remuneration or duties; and
    - He or she remains employed with the employer that effected the demotion.

Adverse Action claims

This is a very tricky issue that has been exploited by the "No-win, No-fee" businesses (of which there a many), in that such a claim can be brought against a business because they have "discriminated in some way. Such claims do not need to satisfy the "minimum employment requirements. This also includes contractors, and "prospective employee". That is, employee who applied for job but had not yet commenced employment.

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Further, unlike unfair dismissals where compensation is capped at 26 weeks' pay; Adverse Action claims are dealt with in the Federal court of Australia and there is **no** upper limit to what can be awarded in compensation.

Examples include:

- A prospective employer against a prospective employee. the prospective employer:
  - Refuses to employ the prospective employee or other candidates; or
  - Discriminates against the prospective employee or other candidates in the terms or conditions on which the prospective employer offers to employ the prospective employee.
- A person (the principal) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor the principal:
  - Terminates the contract; or
  - Injures* the independent contractor in relation to the terms and conditions of the contract; or

    *Legal definition: any harm done to a person by the acts or omissions of another. Injury may include physical hurt as well as damage to reputation or dignity, loss of a legal right or breach of contract.
  - Alters the position of the independent contractor to the independent contractor's prejudice; or
  - Refuses to make use of, or agree to make use of, services offered by the independent contractor; or
  - Refuses to supply, or agree to supply, goods or services to the independent contractor.
- A person (the principal) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor. The principal:
  - Refuses to engage the independent contractor; or
  - Discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or

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- Refuses to make use of, or agree to make use of, services offered by the independent contractor; or
- Refuses to supply, or agree to supply, goods or services to the independent contractor.

- An employee against his or her employer. The employee:
  - Ceases work in the service of the employer; or
  - Takes industrial action against the employer.

- **Coercion:** A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
  - Exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
  - Exercise, or propose to exercise, a workplace right in a particular way.

- **Undue influence or pressure.** An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:
  - Make, or not make, an agreement or arrangement under the National Employment Standards; or
  - Make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is permitted to be included in the award or agreement; or
  - Agree to, or terminate, an individual flexibility arrangement; or
  - Accept a guarantee of annual earnings; or
  - Agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

- **Misrepresentations.** A person must not knowingly or recklessly make a false or misleading representation about:
  - The workplace rights of another person; or
  - The exercise, or the effect of the exercise, of a workplace right by another person.

Contracts of Employment

- No matter the size of your business, each and every employee should have a **letter of offer** and **contract of employment**.

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- Contracts of employment should contain provisions that are required by an award or agreement (eg classification level), and either reference the National Employment Standards (NES) or replicate them.
- Above all, contracts of employment can protect your business from unfair dismissals and other business risks by the inclusion of:
    - Employee responsibilities (at common law). Eg: Following a reasonable and lawful instruction pertaining to the scope of the employee's position.
    - A statement describing the inherent requirements of the position (eg physical requirements) to avoid unfair dismissal/adverse action claim (this is called satisfying the inherent requirements of the position).
    - Reference to an "E-Policy" (see above re social media).
    - Non-compete clause that can be enforced during employment and after the employment concludes.
    - Intellectual property, ensuring that you own all work and discoveries made by the employee.
    - Confidentiality, which can also be enforced post-employment.
    - And much more…

Abandonment of employment

- This is usually dealt with by reference to your relevant modern award. At the time of writing, all modern awards have been progressively updated to include the following:

"21 Reasonable inquiries about certain absences

21.1 This clause applies to an absence from work by an employee of 3 or more consecutive working days where the whole of the absence is not authorised or explained, or occurs without notification to the employer given before or as soon as practicable after the first day of the absence commences.

21.2 If an employee is absent from work as described in subclause 1, the employer shall take reasonable steps to:

(a) contact the employee;

(b) provide the employee with an opportunity to explain the absence from work; and

(c) give genuine consideration to any explanation provided by the employee."

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- The above amendment generally reflects decisions that have been an outcome of unfair dismissal applications. Apart from your legal obligation, there is the moral side of the equation to ensure that your employee is safe and well and confirming that the employee does not intend to return to your workplace.

Frustration

- This is a legal term known as "frustration of the employment contract" (or any contract for that matter. Whilst not technically an "unfair dismissal" consideration, but the two can overlap. Eg: an extended period of absence due to such things as illness or injury or even a jail term. Seek further advice if you believe this situation may arise in your business.

If you receive an unfair dismissal application (preferably ring me), but check that the application was made in accordance with the requirement under the act:

- The application must be made within 21 days after the dismissal took effect. The Fair Work Commission is very strict on this requirement. A recent decision of the Fair Work Commission allowed an extension based on the applicant being totally incapacitated in hospital (knee operation that got infected).
- The required application fee has been paid (the Fair Work Commission should check this before the matter is proceeded).
- The applicant meets the minimum employment criteria of 12 months for small businesses employing fewer than 15 employee or six months for businesses that employee more than 15 employees. This requirement may include casuals if they have worked "regular and systematic" hours. This provision may also include an employee who transferred to your business from "an associated business", unless you have stated in writing that service with the previous employer does not apply.
- The matter was a case of genuine redundancy.
- The person was covered by an award or agreement (ie managers may be restricted from bringing unfair dismissals in the Fair Work Commission).
- If the person earns more than $145,400 (at 1 July 2019 – indexed each year) and is not covered by an award or agreement. This is known as the "high income threshold" and includes non-cash benefits such as a company car, etc.

But I have the right of appeal if I don't like the decision…

- No, you haven't. You must apply for permission to appeal. These applications are rarely successful.
- Appeals must "enliven the public interest".

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