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DIFFICULT EMPLOYEE

WHAT DO I DO ABOUT A PROBLEM WORKER?

EMPLOYMENT LAW

EMPLOYER RELATIONS

commitment to make a difference

DIFFICULT EMPLOYEE?- WHAT DO I DO ABOUT A PROBLEM WORKER?

There is a frequently stated statistic that managers double their risk of a heart attack after they dismiss an employee. Even when you know it is in the best interests of your business it is a task to be dreaded. It is also very easy to get wrong.

If you handle your problem employee poorly then you are in for a lot of pain!

Whilst hoping for the best (that they turn around their performance and become a valued employee), you should plan for the worst. If the "worst" happens then you may need to prove to the Fair Work Commission (**FWC**) that your actions were both procedurally and substantively fair.

How to avoid a claim

Be clear

You need to tell the poorly preforming employee in clear terms what it is about their performance that you are not prepared to accept.

You must be ready to give precise particulars of the behaviours(s) about which you are concerned. It is not good enough to be general in what you say. If the employee is getting to work late, you should be able to tell them which days they were late and specify their times of arrival. If they are not returning clients calls in a timely manner – tell them which clients have complained and give details of the calls they made which went unreturned.

Be fair

If complaining about particular performance or behaviors, make it clear what amounts to acceptable performance or behaviour.

Give them a fair amount of time to improve before you assess them again.

Don't set them up to fail. If the employee says that they can't make it to work by 8.30am because they can't drop their child off to school before that time, be prepared to change their working day so that perhaps they start 15 minutes later and finish 15 minutes later.

Allow them support

Make sure that they are aware of their right to have a support person present if you think that your meeting with them could have any possible consequences for their employment. That person is not to be an advocate, but rather to make sure your process is fair and to be a witness to what occurred during that meeting.

Be prepared to be flexible in scheduling meeting times to accommodate their wish for the person of their choice to attend as their support.

Listen

Even if you have a strongly held view about the employee's behaviour or performance – listen! We live to be surprised. If you give the employee a fair hearing you may find that things are not as you thought them to be or that the problem can be resolved and they have the answer.

Be firm

Make it clear that there will be consequences for failing to do what you require of them.

After telling them what the consequences are, don't take the edge off it by wanting to end on a cheery note, giving them an actual or metaphorical soft matey punch on the bicep.

Having done the hard work of confronting the employee with their problem performance issue or behaviour, don't undermine it by giving them the impression that you don't really mean it and that failure to comply is optional.

Be supportive

If they need training or coaching or monitoring – give it to them. The money spent on getting this employee right is likely to be far less than what you will pay if this employee has to be removed from your workforce and a new one engaged.

Document it

Put it in writing. It will help you if things later go sour if you have a clear documentary record of the fair and reasonable steps you have taken to assist the employee in turning their performance around. Give them some documentation. It will make it more "real" to them. Better still get them to sign something which acknowledges the need for improvement and commits them to taking steps to improve.

There is no legal requirement for an employee to be given a certain number of warnings before termination occurs, unless the employer is seeking to take advantage of the Small Business Fair Dismissal Code. The Fair Dismissal Code applies to small business employers with fewer than 15 employees (calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis). The small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job. The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement. The small business employer must provide the employee with 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. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations. If the Code is followed then this should be a good defence to any claim.

Be consistent

Make sure that if you are on an employee's case about their "poor performance" that you are not giving another employee a pass for the same or similar poor behavior or performance. It is only human nature to have little difficulty in administering discipline to employees we don't like or are indifferent toward, but to be prepared to cut slack to those we like. Step back and see if you are being consistent. Ask someone else to independently review your thinking if you are in doubt.

Follow your own processes

If you have polices or procedures for handling disciplinary procedures, grievances, complaints etc – make sure you follow them. Lawyers will always call for your policies and then try to make the case that you have not dealt with your employee, their client, in a procedurally fair way because you have not applied or have misapplied your own policy.

Make the hard decisions

There is no substitute for making hard decisions! Not many employees get dismissed too early. For the most part their employers have agonised for a very long time before acting, fearing the worst, but hoping for the best. Some are concerned that by taking disciplinary action and/or dismissing an employee that the rest of their workforce will be discouraged or demoralised. This may in fact be the opposite of the case! In reality your "good" employees may be considering working somewhere else because poor behavior is being tolerated or condoned. Alternatively they may start to absorb some of your poorly performing employees' work habits, thinking that they are the accepted norm.

Making the right decision at the right time is crucial to the success or possibly the survival of your business.

… and after you have done all of that!

If you have done all of the above then you have either converted a poorly preforming/behaving employee into an employee who performs/behaves in the way you require or they have exited your workplace, but are in no doubt that they had "a fair go all around".

However, in the event that you haven't got it right or your employee just can't see it, then you may find yourself facing an application by the employee, lodged in the FWC.

How to deal with a claim

There are 2 forms of claim that an employee might bring in the FWC – they may bring a claim for "unfair dismissal" or they make a "general protections" claim that adverse action has been taken against them in their employment. To make an application to the FWC you must be a "national system" employee –which encompasses most employees save for public sector employees.

"Unfair Dismissal"

A dismissal will be unfair if it (section 385 of the ***Fair Work Act 2009*** (the Act)):

- was harsh, unjust or unreasonable;
- was not consistent with the Small Business Fair Dismissal Code; or
- was not a case of genuine redundancy.

The criteria for deciding whether a dismissal was harsh, unjust or unreasonable, set out in section 387 of the Act, include:

a. whether there was a valid reason for the dismissal related to the person's capacity or conduct;
b. whether the person was notified of that reason;
c. whether the person was given an opportunity to respond to the reason;
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;
e. if the dismissal related to unsatisfactory performance – whether the person had been warned about the unsatisfactory performance before the dismissal;
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;
g. The degree to which the absence of any 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 the FWC considers relevant.

In considering the meaning of the words "harsh, unjust or unreasonable" a common sense approach is adopted. Employers are required to give employees "a fair go".

Procedural fairness

To ensure that your actions will be considered to have been "procedurally fair", before terminating their employment, you must:

- Give the employee sufficient detail of the allegations against them so that they have a fair opportunity to respond to them;
- Allow the employee to have a support person present at any meeting which may potentially have disciplinary consequences;
- Ensure that they are given an adequate opportunity to respond;
- Take their response into account before making a decision;
- Not appear to have pre-judged the matter. For instance you should not have prepared a letter terminating their employment sitting on the desk as you meet with them which you hand to them at the end of the meeting!

Valid reason

The employer must have a "valid reason" for the dismissal related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees). The decision must be 'sound, defensible or well-founded' and not 'capricious, fanciful, spiteful or prejudiced'. It must also be defensible on the basis of an objective analysis of the relevant facts, and the validity is judged by reference to the FWC's assessment of the factual circumstances as to what the employee is capable of doing or has done.

Remedy

The FWC may order reinstatement unless it is impracticable to do so – in practice reinstatement is rarely granted.

The more usual form of remedy is compensation of an amount equivalent to the employee's last six (6) months remuneration. The employee has a duty to mitigate their loss, i.e. they must have made efforts to find other employment. The FWC may reduce the amount awarded to an employee if they can't establish that they have made an effort to find other employment.

Costs

Usually each party bears their own costs. The FWC can award legal costs if a claim is frivolous or vexatious or either party has acted in an unreasonable manner during the conduct of the claim.

Filing

After the employee has lodged an application with the FWC alleging that they have been unfairly dismissed the employer will be required to lodge a response which sets out:

- Any jurisdictional objections
- The employer's response to the claim

Jurisdictional objections

You may object to the employee's application being dealt with on the following grounds:

- the application was lodged more than 21 days after the dismissal took effect, unless there were exceptional circumstances for not lodging the application on time;
- the employee dismissed worked for the employer for less than six months, or less than one year if the employer was a small business employer (a small business employer is defined as an employer who employs fewer than 15 employees including casual employees engaged on a regular and systematic basis);
- the employee was not a national workplace relations system employee;
- the application was made against an entity who is not the employer;
- the employee's employment was for a specified period, task, seasonal contract or traineeship arrangement, and was dismissed at the end of the period, task, season or arrangement;
- the employee made multiple applications regarding the dismissal;
- the employee was a casual employee but was not regularly and systematically employed and had no reasonable expectation of continuing employment;
- the applicant was not an employee (e.g. the applicant was a contractor); or
- the employee dismissed was earning more than the high income threshold and was not covered by an award or enterprise agreement.

Conciliation Conference

After filing and service of the application the FWC will usually convene a conciliation conference of the parties which is mostly held by telephone with a conciliator. You can expect that the conference will be conducted within four weeks of the application being filed. At the conference the conciliator will ask each party to provide a summary of their position, hearing from the employee first, and will then assist the parties in trying to resolve the matter. Generally anything said during the conference is confidential and cannot be raised before the FWC at hearing.

Pre-hearing

If the matter cannot be resolved at the conference, it will be given a date for hearing and directions will be made about steps to be undertaken by the parties before the hearing.

The evidence each party introduces in support of their position is given by written witness statement. The other party can then require that any witness making a statement attend the hearing to be orally cross examined.

Hearing

Unfair dismissal claims are heard by a single member of the FWC. After the evidence is presented by each party, closing submissions can be made. It is not usual for decisions to be made immediately following the hearing, but rather they are "reserved" and after a period of several weeks the FWC will deliver its decision in writing.

"General Protections"

What are they?

The general protections contained in the Act are to:

- protect workplace rights;
- protect freedom of association;
- provide protection from workplace discrimination; and
- provide effective relief for persons who have been discriminated against, victimised, or have experienced other unfair treatment.

What are "workplace rights"

A workplace right exists where a person is:

- entitled to a benefit or has a role or responsibility under a workplace law or instrument or an order made by an industrial body;
- Is able to initiate or participate in a process or proceeding under a workplace law or instrument; and
- Has the capacity under a workplace law to make a complaint or inquiry to:
    i. A person or body to seek compliance with that workplace law or instrument; or
    ii. If the person is an employee, in relation to their employment.

What are the protected "discrimination" grounds?

- race
- colour
- Sex
- sexual orientation
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin.

What is "adverse action"?

Pursuant to the Act it is unlawful to take "adverse action" against a person:

- because they have a workplace right;
- have exercised a workplace right;
- propose to exercise a workplace right;
- on discriminatory grounds; or
- because they are temporarily absent by reason of illness or injury.

Adverse actions might include:

- dismissing them;
- not giving them their legal entitlements;
- changing their job to their disadvantage;
- treating them differently than others;
- not hiring them; or
- offering them different (and unfair) terms and conditions, compared to other employees.

Claim process

For claims which relate to dismissal of an employee, proceedings before the FWC are substantially the same as the process set out above with respect to unfair dismissals. Applications must be lodged within 21 days of dismissal. However claims for compensation are not limited to a sum equivalent the employee's last six (6) months remuneration as is the case for "unfair dismissal" claims.

Onus of proof

It is presumed that the employer has taken the action for the alleged reason or with the alleged intent unless the employer proves otherwise. For example if an employee has been on extended personal leave and they were dismissed whilst on personal leave, the presumption is that the employment was terminated because the employee exercised a workplace right. An employer wishing to rebut this presumption must give evidence that this was not their reason/intent for taking the action.

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