



NEWSLETTER

April 2018

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Unfair dismissal and performance issues

Last month we gave a brief overview of the various triggers that may give rise to a claim of unfair dismissal. Most unfair dismissal claims likely to be encountered will centre around the performance, capacity or conduct of the employee. In this month's newsletter, we will focus on performance issues.

Section 387(e) of the Fair Work Act provides that "if the dismissal related to unsatisfactory performance by the person—whether the person had been **warned** about that unsatisfactory performance **before** the dismissal". Where performance issues exist that are unrelated to capacity, the key factor will be whether the employee was "warned" that there were issues with their performance. Performance includes factors such as diligence, quality, care taken and so on. Central to an unfair dismissal claim in this regard is the period of time that has elapsed between the employee being informed of their unsatisfactory performance, and the actual termination.

Warnings must identify the relevant aspect of the employee's performance which is of concern to the employer. A mere exhortation to improve is not sufficient. The warning must make it clear that the employee's employment is at risk unless performance improves. Consistency is also of great importance. In one case brought before the commission, an employee had their unfair dismissal claim upheld as it was found that although the employers concerns were valid, their treatment of other staff who committed similar infringements against company policy was inconsistent. The dismissal in that instance being not necessarily unjust, but certainly harsh and unreasonable on objective analysis.

Employers must allow the employee the chance to improve their deficiencies and the consideration by the employer of the employee's efforts must be genuine. A case which illustrates this point well involved an employee that was spoken to about three things they did on one particular day at work. The employee was given a written warning for each separate issue during a meeting and was then offered either a demotion, or to tender their resignation. The employer thought that as they had given three warnings, their decision was sound. However, as no time was provided to allow the employee time to remedy their performance, and not withstanding that they chose to resign, the resignation was deemed to have been forced on them and the dismissal was seen as harsh, unjust or unreasonable.

From the cases that have come before the Commission, it would appear that the best way to handle poor performance is to develop a sound, fair investigative procedure that allows for a proper discussion of the issues. Meet with the employee, outline the issue from the organisations perspective, allow them time to respond and schedule a follow up discussion. Once they have presented their response, consider it in light of the facts and if it is warranted, then issue a written warning that specifically deals with the issues raised. Establish a review period and set in place a time to meet again and discuss the employee's subsequent performance.

It is easy to allow poor-performance to go unchallenged, but ultimately, it is not fair on the organisation, or other staff who see the issues and may feel like they are "carrying the load". Develop an action plan that is procedurally fair and free from bias. This will go a long way to protect the organisation from possible unfair dismissal claims and is somewhat of a marketing tool in the eyes of your staff, and potential staff, as it demonstrates that if there is a performance issue, all will be treated fairly and equally, and will have their chance to respond.

The material contained in this newsletter is general comment only and is not intended as advice on any particular matter. Professional advice should be sought before any action is taken based upon the matters described.

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SELECTED QUALITY CANDIDATES FROM OUR DATABASE

The following is just a snapshot of the many new candidates registering for our exclusive automotive personnel database each month. Contact us if you would like to know more about any of our exceptional and experienced candidates.

NEW & USED SALES

- General Sales Manager seeking a forward thinking dealer where they can make a difference (#14178)
- Business Manager with sales experience seeking a new role and will relocate for the right position (#998)
- Sales Consultant seeking a role based on the Mid North Coast of NSW (#20276)
- Used Car Sales Consultant looking for variety based in Sydney (#20464)
- Sales Consultant here on a working holiday visa wants to stay and is looking for sponsorship (#20511)
- General Sales Manager seeking a new adventure based in Sydney (#20336)
- Toyota GSM looking for a move. Will consider all locations and maybe other brands (#1237)
- Parts experienced candidate would eventually like to obtain a position within Aftermarket (#16424)

PARTS

- Newcastle area based Parts Manager looking for a fair and forward thinking dealership (#1751)
- Parts Interpreter looking for a managerial role based in the Hunter region (#19883)
- Parts Interpreter with excellent stability is seeking a role in the Inverell / Moree region (#19937)
- Parts Manager looking for a change into a dealership environment based on the Mid North Coast (#20303)
- Sydney based Parts Manager with prestige experience is seeking a new opportunity (#20338)
- Senior Parts Interpreter based in Wagga is seeking a role as a Manager (#20450)

SERVICE

- Service Advisor in Sydney's West would like a new opportunity with prospect (#3819)
- This Holden Parts and Service Manager located in country NSW would consider a move (#1409)
- Ford Service Manager with a wealth of experience is looking for a role to make their own (#4553)
- Assistant Service Manager would consider a step back for the right career opportunity (#19911)
- Service Advisor with great stability looking for next career step based in Rural Southern NSW (#20437)
- Service Manager / Advisor is seeking a new role based on the Mid North Coast of NSW (#4676)
- Technician with European and motorcycle experience is looking for a new role based in Sydney (#18781)

ADMINISTRATION & MANAGEMENT

- Accountant would like a role with a dealership that embraces procedure and progress (#20508)
- Based in the Griffith area, this Administration Manager is seeking a new role (#20161)
- Administration Clerk with automotive experience is looking for a more mainstream dealership (#20407)
- Sydney based Dealer Principal would look at all opportunities locally (#20299)
- General Manager would like to progress to the next level and will relocate to do so (#11648)
- Administration / Registration Clerk seeking a role based in the Taree / Foster area of NSW (#20530)
- Mid North Coast Registration Clerk would like to branch out and tackle a Service Advisor role (#20525)

With nearly 7,500 automotive and heavy vehicle personnel on our confidential database, we'll find you the perfect candidate for your dealership.

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