



NEWSLETTER

April 2018

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 notwithstanding 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

- Young accomplished Sales Manager with major franchise experience ready for a new role in Brisbane (#18553)
- Business Manager looking for a new role on the south side of Brisbane (#20306)
- Sales Manager looking to move to Brisbane from ACT with large dealership experience (#18757)
- Excellent Prestige Sales Manager looking for a role from Brisbane to the Gold Coast (#19986)
- Business Manager with very stable background looking for a volume role in Brisbane (#20532)
- Multiple Aftermarket Consultants considering their options on the Sunshine Coast (#5203)
- New Car Sales Manager with Toyota experience looking at making a move and will relocate (#20394)

PARTS

- Computer savvy Parts Interpreter proficient with multiple DMS programs is open to relocation (#13596)
- Well versed with multiple franchises, this Parts Manager is keen to secure a new challenge (#1319)
- Holden Parts and Service Manager located in NSW would consider a move to a Qld coastal area (#1409)
- Parts Interpreter with excellent CJD experience looking to step up (#20291)
- Warehouse / Inventory Controller looking for a new start in Brisbane following business slow down (#20312)
- 15 years of high-volume Toyota parts experience makes this candidate an expert with the brand (#20131)

SERVICE

- Toyota, Nissan and Holden Fixed Ops Manager wants to move to a family friendly area in Qld (#19666)
- Sydney based prestige Service Manager looking to move to Brisbane, knows European brands (#16192)
- Highly experienced Group Service Manager seeks a senior role in SE QLD (#16339)
- Luxury Service Advisor with great stability would like to step up in the Brisbane region (#16771)
- Long serving Service Manager looking for a new role after 20+ years with the same employer (#19077)
- CJD Service Manager is looking for a role in SEQ, boasts longevity and wants a long term opportunity (#60)
- Toyota Service Manager in a volume operation would like to talk about future options (#14861)
- Service Manager with more than 10 years' at one dealership is ready for a new challenge (#11713)

ADMINISTRATION & MANAGEMENT

- Finance Officer looking for a new role on the south side of Brisbane after 7 years with one employer (#20524)
- Accounts Administrator with good longevity looking for a new role on the north side of Brisbane (#10470)
- Admin candidate looking for a flexible role to accommodate young family. Excellent finance experience (#3756)
- Internationally experienced Financial Controller wants to move south from Darwin (#11664)
- Former Toyota GM with excellent tenure wants to consider their options in South East Queensland (#5983)
- Brisbane based Accountant would like to step up to a role with more responsibility (#12920)
- General Manager with car and truck experience looking for a suitable role and open to area (#2407)

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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