



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 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

- Toyota GSM looking for a move and will consider all locations (#1237)
- GSM / GM with car and truck experience looking for a suitable role and open to area (#2407)
- General Sales Manager with Subaru and Mercedes-Benz background is seeking a new role (#1451)
- General Sales Manager seeking a new opportunity in South East Melbourne (#20269)
- Senior Business Manager based in Melbourne looking for a dealership to progress (#20334)
- Assistant Sales Manager looking at taking the next step in their career (#20393)
- New Car Sales Manager with Toyota experience looking at making a move (#20394)

PARTS

- Computer savvy Parts Interpreter proficient with multiple DMS programs is open to relocation (#13596)
- Automotive experienced Parts and Service executive looking for an opportunity in management (#15180)
- Auto Parts Manager is keen to source a role after a contract in PNG (#1947)
- Mercedes-Benz Parts Manager is ready for something new and challenging (#13277)
- Parts Interpreter would like to gain more exposure to advance career. Good stability (#20173)
- Aftermarket and heavy vehicle Parts Interpreter would love to move into a dealership (#1317)
- Parts Interpreter seeking a role that is the right fit. Will consider all Melbourne based openings (#20460)

SERVICE

- Toyota Service Manager / Fixed Operations Manager will relocate for the right role (#2146)
- Pre Delivery Technician would like a move into a Service Advisor role to broaden his knowledge (#19132)
- Assistant Store Manager, technically trained, looking for a challenging & rewarding role (#20395)
- Workshop / Service Manager with prestige experience looking for a role based in Melbourne (#19007)
- Service Advisor looking at returning to the industry after a short break (#20408)
- Service Manager with prestige experience is seeking a role in a positive environment (#20517)
- Technician with customer experience is seeking a role off the tools based in Melbourne SE (#18689)

ADMINISTRATION & MANAGEMENT

- Financial Controller with a wealth of multi-franchise experience looking for a new challenge (#19556)
- Stock Controller with experience in pre delivery is seeking a new adventure (#13587)
- Accountant with vast experience is seeking a role based in Metro or South East area of VIC (#20310)
- Accounts Assistant with dealership experience based in the CBD is seeking a new role (#20318)
- DP / GM has been involved with a variety of brands, and will relocate for a great role (#4145)
- Financial Controller will move for the right position. Looking for a Group FC role or higher (#20380)
- Internationally experienced Financial Controller wants to move south from Darwin (#11664)

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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