



NEWSLETTER

May 2018

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Unfair dismissal and capacity or conduct

This is the final in our 3 part series on unfair dismissal, discussing the various triggers that may give rise to a sacked employee instigating a claim that their dismissal was harsh, unjust or unreasonable. Our newsletter in March gave an overview of what unfair dismissal is, what may be considered and the time constraints involved. April's newsletter discussed where performance issues may give rise to an unfair dismissal claim. This final segment will focus on issues regarding a person being terminated for their capacity or conduct, and how, under certain circumstances, they may be able to claim that they were unfairly dismissed.

Capacity is the employee's ability to execute the tasks and responsibilities of the position, as required by the employer. The concept of a person being capable to perform is a concept which in some positions may be permanent, or temporary. Even if they were temporary, they may be of a certain expected duration, which would make continued employment untenable. The Fair Work Act protects employees from being dismissed where their absence is temporary in nature and related to an illness or injury for a period up to 3 months. After three months, it becomes a question of whether or not the employee is likely to return to their duties in the short or medium term.

Where the conduct of an employee warrants dismissal, employers must make sure that they fully investigate the circumstances and be sure that the conduct did in fact occur. They must then consider, whether in light of similar actions of other staff and company policy, if the conduct warrants termination. In some instances, such as theft, it is quite apparent that continued employment is not a viable option in the circumstances. In other cases, an employee's conduct may breach company policy, but depending on all the circumstances, even if the conduct did in fact occur, termination may be seen as a step too far.

Serious misconduct such as theft, fraud, assault, intoxication at work, refusal to carry out lawful and reasonable instructions and conduct endangering the safety and welfare of other staff, are all activities that are *generally* seen as valid reasons for termination. If the conduct relied upon as a justification for termination occurred outside of work hours, that conduct must have a relevant connection to the employment relationship. Criminal offences alone do not warrant dismissal, unless they result in the employee being unable to attend their employment for a significant period. This would more so bring the employment contract to an end due to the contract being frustrated. Case examples where proven conduct was a valid reason for termination:

- Poor behaviour and attitude towards staff, customers and supervisors.
Kolodka v Virgin Australia Airlines Pty Ltd t/a Virgin Australia [2012] FWA 7828
- Employee making threatening comments about a colleague on Facebook.
O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys [2011] FWA 5311
- Covering up the theft of items by another employee.
Woodman v The Hoyts Corporation Pty Ltd PR906309
- Refusing to remove eyebrow ring in accordance with company dress code.
Woolworths Limited (t/as Safeway) v Brown PR963023
- Sending an offensive email in breach of company policy.
Anderson v Thiess Pty Ltd [2015] FWCFB 478
- Improper use of workplace information in breach of company policy.
Applicant v Australian Federal Police [2012] FWA 1352

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 new adventure based in Sydney (#20336)
- Business Manager with Sales experience seeking a new role and will relocate for the right role (#998)
- Assistant Sales Manager looking for a Sales Manager opportunity based on the Central Coast (#19364)
- Sales Manager based on the Central Coast looking for a role close to home (#20604)
- Salesperson with Holden experience is seeking a role preferably based on the Central Coast (#14217)
- Used Car Sales Consultant looking for variety based in Sydney (#20464)
- Sales Consultant here on a working holiday visa is looking for sponsorship (#20511)

PARTS

- Newcastle area based Parts Manager looking for a fair and forward thinking dealership (#1751)
- Parts Interpreter with over 25 years' auto experience is seeking a step into a managerial role (#12223)
- Parts Interpreter with excellent stability is seeking a role in the Inverell to Moree region (#19937)
- Parts Manager looking for a change into a dealership environment based on the Mid North Coast (#20303)
- Senior Parts Interpreter based in Wagga is seeking a role as a manager (#20450)

SERVICE

- Mid North Coast Registration Clerk would like to branch out and tackle a Service Advisor role (#20525)
- Parts Interpreter with excellent stability would like to move into a Service Advisor role (#20495)
- Technician based on the mid north coast is seeking a role preferably as a Service Advisor (#20537)
- Ford Service Manager with a wealth of experience is looking for a role to make their own (#4553)
- Holden Parts and Service Manager located in country NSW would consider a move (#1409)
- Stable Service Advisor would like an new role to expand their knowledge base (#20535)
- Service Advisor looking at returning to a role they love after a short break. Mid North Coast NSW (#20611)
- Service Manager/ Advisor is seeking a new role based on the Mid North Coast of NSW (#4676)
- Prestige Senior Service Advisor would like a new challenge with scope and opportunity (#16698)
- Qualified prestige Technician / Advisor would like a new challenge as a Service Advisor (#20546)

ADMINISTRATION & MANAGEMENT

- Accountant would like a Sydney based role with a dealership that embraces procedure (#20508)
- Experienced VW Stock Controller seeking a new direction and would like to move into sales (#15024)
- Based in the Griffith area, this Administration Manager is seeking a new role (#20161)
- Administration Clerk with automotive experience is looking for a more main stream dealership (#20407)
- Sydney based Dealer Principal would look at all opportunities based in Sydney (#20299)
- General Manager would like to progress to the next level and will relocate (#11648)
- Administration / Registration clerk seeking a role based in the Taree / Foster area of NSW (#20530)

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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