



NEWSLETTER

May 2018

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.

(07) 3359 4363

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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

- Sales Manager looking to move to Brisbane from ACT with large dealership experience (#18757)
- Looking to move from NSW, this BM is open to ALL areas and has worked with a range of lenders (#19808)
- Business Manager looking to make a move to an automotive dealership in Brisbane (#20392)
- North QLD based Sales Manager looking for a new role with volume (#13047)
- Sales Manager / GSM looking for a role in Gold Coast area following relocation (#10993)
- Assistant Sales Manager looking at taking the next step in his career (#20393)
- Business Manager with great longevity is looking for a new chair in Brisbane (#20485)
- Business Manager based in Brisbane South is hoping to find a dealership closer to home (#10207)

PARTS

- NZ based Toyota Parts Interpreter looking to move to QLD (#19877)
- Parts Manager with prestige experience ready for a new role in Brisbane (#701)
- Proven Parts Manager with excellent stability, can work prestige and/or high volume operations (#12277)
- Parts Interpreter with a service background looking on the Sunshine Coast (#20584)
- Fixed Ops Manager with strong parts background wants to move to Qld (#20592)

SERVICE

- Service Manager with luxury experience wants to relocate to Brisbane from WA (#16821)
- Toyota Service Manager in a volume operation would like to talk about future options (#14861)
- BMW Tech, currently a Service Manager in an allied industry and wants back in to automotive (#20554)
- Toyota qualified young Technician looking for a role in SE QLD (#20397)
- Prestige Technician with strong BMW experience ready for new role in Brisbane (#20601)
- Service Advisor knows Porsche, Rolls-Royce, Bentley, Mercedes-Benz, BMW, Volvo and Audi (#12044)
- Service Manager with well-rounded VW & BMW experience wants more responsibility (#11727)
- Service / Fixed Ops Manager with volume brand experience open to all areas (#20493)

ADMINISTRATION & MANAGEMENT

- Finance officer looking for a new challenge in Brisbane after 7 years with one employer (#20524)
- CPA Qualified Dealership Accountant is looking to move to the SEQ region from Canberra (#20574)
- Financial Controller has just moved to Brisbane and seeks a new position! (#16331)
- Well credentialed and experienced Financial Controller wishing to relocate south to Brisbane (#3071)
- Admin candidate looking for a flexible role to accommodate a young family. Excellent experience (#3756)
- Financial Controller with a wealth of multi franchise experience looking for a new challenge (#19556)
- Deal Processor / Registrations Clerk moving to Brisbane southside soon and wants to work (#202)

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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CHRIS FOWLER
Director

KELLY MCLEAN
Recruitment Consultant

MARA NOGAROTTO
Recruitment Consultant

GEOFF FOWLER
Associate

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T: 07 3359 4363 F: 1300 792 500 E: jobs@autorecruit.com.au W: www.autorecruit.com.au

