



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.

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Vol.25 Issue 5

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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

- Business Manager ready to take a step up will consider all locations (#19914)
- Very stable Sales Manager located in Adelaide is looking for a new role in new or fleet (#17338)
- Sales Manager in Northern Regional VIC would like an opportunity to expand to a GSM (#1360)
- This Sales Consultant is seeking a new start with a fresh and progressive dealership (#20246)
- General Sales Manager seeking a new opportunity in South East Melbourne (#20269)
- Assistant Sales Manager looking at taking the next step in their Mazda career (#20393)
- Used Car Sales Consultant desires to move up into a Manager's position (#20569)

PARTS

- Adelaide based Parts Manager moved out of dealerships, but is keen to get back in anywhere (#2895)
- Prestige Parts Interpreter in Adelaide looking for a new role (#1298)
- Parts specialist has done Mitsubishi, Subaru, Honda, Kia, Great Wall, Nissan, Holden, Mazda (#4557)
- Aftermarket and heavy vehicle Parts Interpreter would love to move into a dealership (#1317)
- Parts Interpreter would like to gain more exposure to advance career. Good stability (#20173)
- Parts Interpreter in the South East suburbs of Melbourne would like a role near home (#20527)

SERVICE

- Service / Fixed Ops Manager returning from PNG and looking for options (#3097)
- Parts and Service Manager looking for a new role in Adelaide now (#18595)
- Service Manager with major brand experience looking in Adelaide for a Fixed Ops role (#11890)
- Parts Interpreter would like to spread their wings and become a Service Advisor (#20580)
- Service Manager with prestige experience is seeking a role in a positive environment (#20517)
- Qualified Technician would like the opportunity to get off the tools into a Service Advisor role (#20565)
- Assistant Service Manager would like a role as a Manager to progress in their career (#20575)
- Service Advisor looking for a role close to home around Epping VIC (#20610)

ADMINISTRATION & MANAGEMENT

- NZ based General Manager can move to Australia anytime, knows Toyota most recently (#4047)
- General Manager with vast experience looking to step into a Dealer Principal role (#771)
- This Mercedes-Benz Dealer Principal will move interstate for a new role, available immediately (#18180)
- DP / GM with solid experience is looking for a new role after moving from WA to VIC for family (#20594)
- Financial Controller will move for the right position. Looking for a Group FC role or higher (#20380)
- Administration Clerk looking for a role with scope and would look at learning something new (#20327)
- Stock Controller with experience in pre-delivery is seeking a new adventure (#13587)

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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