

## **DISMISSING AN EMPLOYEE UNDER THE FAIR WORK ACT 2009**

It is an unpleasant fact of life that, occasionally, an employee has to be dismissed. Except in the most extreme of cases (e.g. theft, serious assault, or similar) an employee, no matter how bad his or her conduct, will be entitled to either a period of notice or payment in lieu (or a combination of the two). The appropriate period of notice may be found in the employee's Contract, the relevant award or the National Employment Standards.

Even if notice is given, the employee can bring a claim through Fair Work Australia alleging that the dismissal was harsh **or** unjust **or** unreasonable. Note that these are alternatives – the dismissal does not have to be all three.

Broadly, FWA will consider whether or not dismissal is a reasonable and proportionate response in all the circumstances. "Harsh" can be taken to mean the dismissal will have a disproportionate effect on the individual (as in one recent case where it led to the revocation of the employee's work visa, and his subsequent removal from the country). "Unjust" tends to mean the following of due process and fairness. "Unreasonable" produces an element of proportionality – does the punishment fit the crime?

Even in the most extreme of circumstances an investigation should be carried out, and the employee given the opportunity to put his or her side of the story. There may be a reasonable explanation for what, at first glance, appears to be unacceptable or even criminal conduct.

An employee must have been employed continuously for a period of at least six months before the right to bring an application for unfair dismissal accrues. In the case of a small business, which is defined as one with fewer than fifteen employees by head count, the time period is one year. In certain circumstances, a casual employee has the right to claim unfair dismissal. This right accrues provided that the employee has worked for the employer for a continuous period of six months; it does not have to be for a continuous period of six months immediately prior to the dismissal.

We recommend that every employee should have a contract of employment, setting out notice periods and any relevant rules of conduct (for example not taking the office laptop home, where it could be misused). We are able to assist you in drafting these contracts, and in defending a claim for unfair dismissal if a former employee takes matters that far.

Please contact us on 07 3849 6263 or at [reception@oneillslawyers.com.au](mailto:reception@oneillslawyers.com.au) if we can be of any assistance.