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INDUSTRIAL RELATIONS NEWSLETTER

NEWSLETTER — 4-03-12/1

- The number of unfair dismissal applications made to Fair Work Australia (FWA) between 1 July 2011 and 31 December 2011.

SOME QUESTIONS WE GET ASKED:

- When and why does a dismissal become unfair?
- What are the processes when the FWA receives an application for unfair dismissal?

Number of Dismissal Applications Before the Fair Work Australia Tribunal

The total number of applications filed for unfair dismissal under section 394 of the Fair Work Act for the period 1 July 2011 to 31 December 2011 was 6922 over the period of the six months.

It costs a disgruntled employee approximately $65.00 to file an unfair dismissal application with the Fair Work Australia Tribunal and an employer must anticipate that it will happen.

It is imperative for an employer to keep a documentary trail of all warnings and procedures as well as the evidence to back the decision for the dismissal such as copies of spoilt work or incorrectly completed work such as invoices etc.

All of the documentation is essential when it comes to the process of the evidence to be submitted in the "Employer's Reply" to the allegations prior to the conciliation conference and if not settled then to be placed as evidence prior to the hearing of the matter.

When Does a Dismissal Become Unfair?

When making a decision as to the merits of a case for unfair dismissal the Fair Work Australia Tribunal rigidly applies the following provisions of the Fair Work Act.

Section 385 states "What is an unfair dismissal

A person has been unfairly dismissed if FWA is satisfied that:

a) the person has been dismissed; and
b) the dismissal was harsh, unjust or unreasonable; and

c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
d) the dismissal was not a case of genuine redundancy."

Section 387 of the Act states;

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:

a) whether there was valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employee's): and
b) whether the person was notified of that reason; and
c) whether the person was given the opportunity to respond to any reason related to the capacity or conduct of the person; and
d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and
e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance prior to the dismissal; and
f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
g) the degree to which the absence of a dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
h) any other matters that the FWA considers relevant."

It follows that not only is the issue and evidence for the dismissal critical but so is the record of the procedure and the evidence of the procedure used is also critical.

What are the Processes When Fair Work Australia (FWA) Receives an Application for Unfair Dismissal?

1) When the FWA receives an application it sends a copy of the application and the grounds for the application to the employer.
2) The notification from the FWA advises of the date that a conciliation conference will be held with a conciliator from the Tribunal who attempts to settle the matter.
3) That conciliation conference is conducted over the telephone and can take up to 2 hours.
4) That conciliation conference is usually held and conducted approximately 14-21 days after the employer is sent the documentation from FWA.
5) The employer is required to file a defence to the application and any documentation associated with the matter including evidence of the processes used.
6) If the conciliator is unable to settle the matter it will then proceed to a hearing.

The fact is if the matter goes to a hearing it will cost the employer a significant amount of money to defend the application just in preparation such as witness statements and compilation of the evidence and submissions in support of the employer.

There is also the cost of others attending and appearing as witnesses and the time away from work while they are attending the hearing and these should not be treated lightly either.

In some instances and depending on the complexity of the issues a hearing can take several days.

The fact is it also costs the applicant employee to run their application and case.

It is a fact that it is a commercial decision that it is better for the employer to settle the matter for as little as possible and get on with the operations of the business of the employer.

The process of settlement and opportunity of settlement of the application for the employer turns on the evidentiary trail of documentation that they have and have submitted in their reply to the application.

The fact is the evidentiary trail is critical to the defence of the employer and we cannot emphasise that enough.

That evidentiary trail must be documented and our position is that it should commence from the beginning of the employment of the employee and if that is not available then the written or documented record of warnings or interviews and other documentation that the employer places into their defence will be critical to the settlement negotiations and critical to the hearing and its proceedings.

It is also a fact that we are often placed in the situation where we can advise the employer that their chances of losing the case are slim but that to defend the application will cost significant monies and it is more appropriate to settle the matter for a lesser amount and have a deed of release so that the applicant can never come back at the employer.

The reason for this is that the jurisdiction of Fair Work Australia is essentially a "no costs" jurisdiction and the parties must bear their own costs unless there are significant issues associated with the application.

Who Can I Contact for More Information and Assistance?

If you would like to discuss any concerns you may have in relation to issues of employment or any other employment related issues you may have, please contact:

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