

## Unfair Dismissal: Harsh, unjust or unreasonable

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*This article focuses only on unfair dismissal law and situations in which employees otherwise meet the criteria for an unfair dismissal remedy in the Fair Work Act 2009 (Cth). **Tammy Wong** highlights issues and scenarios to help you understand what may be considered Unfair Dismissal.*

An employee has been unfairly dismissed if the Fair Work Commission is satisfied of the following four criteria:

s.385

- 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.

This article concerns the second criteria – harsh, unjust or unreasonable.

Many employers do not realise that a valid reason for termination is not, in and of itself, sufficient to avoid the risk of an unfair dismissal claim. How the termination is carried out, whether the employee has had the opportunity to respond and improve to performance related issues, and the personal circumstances of the employee are all relevant factors.

This means that if the employer has a valid reason to terminate the employee but the dismissal was otherwise harsh or unjust, then the dismissal may be found to be unfair. It is important to note that if *any* of the three criteria in s385(b) are met then the dismissal may be deemed unfair.

### Case Study 1: Harsh, unjust OR unreasonable?

*Jason has been working for 10 years with XYZ Pty Ltd in a relatively unskilled capacity. He is 64 years old and lives alone. He has been performing poorly for the last year. The company has properly and fairly performance managed him but he has not improved. The company finally decided to dismiss him and sent him the termination notice by email while he was overseas on annual leave.*

Jason may be successful because while his dismissal was not unjust or unreasonable, his personal circumstances of being an older unskilled worker together with his dismissal whilst on annual leave may satisfy the criteria of “harshness”.

Section 387 of the Act sets out factors that the Fair Work Commission will consider when determining whether a dismissal is harsh, unjust or unreasonable. These include:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal; and
- any other matters that the FWC considers relevant

Most of the provisions in section 387 allude to the concept of procedural fairness and the importance of affording the employee an opportunity to respond to the allegations against her.

As case law has developed, the content of the final provision in section 387, “any other matters that the FWC considers relevant”, has become clearer.

The term “unjust” has generally been interpreted as relating to the truth of the reason for termination (ie, where an employee is dismissed for conduct that he or she did not commit) or the uneven application of the employer’s standards relating to termination (eg where an employee is dismissed for conduct that may be prima facie reasonable but which is generally otherwise acceptable to the employer).

The term “reasonable” has generally been interpreted as relating to the reasonableness of the investigation or performance management process, in addition to the reasonableness of the employer’s conclusions as to those processes (ie, whether it is objectively reasonable for the employer to draw the conclusions that support termination).

The content of the term “harsh”, however, has gradually been widened in its interpretation.

Although in the seminal High Court case of *Re Byrne, McHugh and Gummow JJ* emphasised that the Court’s interpretation of “harsh, unjust or unreasonable” was confined to the context of the applicable award (as opposed to in statute), the descriptor “harsh” has since been interpreted to include various consequences of termination upon an employee’s personal and economic situation; as well as the method and timing of dismissal or the proportionality of the penalty of dismissal given the misconduct alleged.

In *B, C and D v Australian Postal Corporation T/A Australia Post* [2013] FWCFB 6191, Vice President Lawler applied the principles in *Byrne* to conclude:

“[...] The adverse personal consequences of a dismissal tend to increase with age and duration of employment. For some employees, the loss of employment is not particularly damaging. A young, single employee with an in-demand trade or skill will likely find new employment very quickly. However, for an older employee without qualifications or a trade, dismissal can amount to a personal catastrophe and lead to long term unemployment, serious depression, loss of the family home, failed relationships and all of the myriad tribulations that flow from that for children.”

In ensuing cases, factors such as:

- age
- length of service

- qualifications and ability to find employment following termination
- dependents
- assets
- debts
- literacy levels

have all been variously considered by the Fair Work Commission in determining whether a dismissal is “harsh”.

It must be noted that the Courts and the Commission have been careful to confine their comments on a case-by-case basis and to emphasise the overarching principle of “a fair go all around” (taking every factor into account) such that there is no firm duty upon employers to thoroughly investigate the personal and economic consequences of termination upon their employees in order to determine if such action would be “harsh”.

However in view of the above, employers should take a strategic and holistic “long view” when making decisions regarding termination and seek advice where appropriate to reduce the costs and risks associated with unfair dismissal claims.