Laws and Regulations

Employee dismissal in Australia is largely governed at the federal level by the *Fair Work Act 2009* (Cth). Under the Act, employees can either make a claim for unfair dismissal or rely on the general protections provisions. A successful unfair dismissal claim requires a finding from the Fair Work Commission that the dismissal was ‘harsh, unjust or unreasonable’.\(^1\) In contrast, the general protections provisions prohibit dismissal for specified reasons, including if an employee engages in certain actions or has a particular protected attribute.\(^2\) Other relevant regulations are found in equal opportunity legislation, the *Competition and Consumer Act 2010* (Cth), and common law claims for wrongful dismissal involving breach of contract.

When choosing what legal avenue to pursue, important factors to consider include whether the dismissed employee was employed by a small business (defined as having less than 15 employees) or a large business; whether they were employed in the national or state system; whether they were a permanent or casual employee; whether their dismissal was a genuine redundancy; whether their salary exceeded the high income threshold, and the length of their employment before being dismissed.

Is there an obligation for the employer to give reasons for the dismissal?

There is no common law obligation for an employer to give reasons for terminating an employment contract on notice.

However, if a worker is eligible for the unfair dismissal scheme under the Fair Work Act, section 387(b) of the Act states that the Fair Work Commission must take into account whether an employee was notified of the reason for their dismissal. This factor ‘must be treated as a matter of significance in the decision making process’.\(^3\)

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\(^1\) *Fair Work Act 2009* (Cth), s 385(b).
\(^2\) *Fair Work Act 2009* (Cth), ss 334 – 378.
\(^3\) *Crozier v Palazzo Corporation Pty Ltd (t/as Noble Park Storage and Transport)* (2000) 98 IR 137 at [27].
As a result, failing to provide reasons for termination would be detrimental, but not necessarily fatal, to an employer’s claim that the termination was lawful.\(^4\)

If the worker was unable to make an unfair dismissal claim, they may still be eligible to bring an action under the Part 3-1 general protection provisions of the Act. It would be advantageous to employers, attempting to prove that an employee dismissal was not caused by one of these prohibited reasons, if they provided correct reasons at the outset.

[3] If so, is there an obligation on the employer to specify the reasons for dismissal, so that the employee knows exactly why he lost his employment, or is it sufficient, for the employer, to give a general motive pattern like «incompetence»?

Section 387(a) of the Act states that another factor that must be taken into account for unfair dismissal claims is ‘whether there was a valid reason for the dismissal connected with the employee’s capacity or conduct.’ A valid reason has been described as one that is ‘sound, defensible or well founded’ and not ‘capricious, fanciful, spiteful or prejudiced’.\(^5\) Additionally, as outlined above, the more detailed reasons an employer provides, the harder it will be for an employee to argue they were treated in a ‘harsh, unjust or unreasonable’ manner, or that they were fired for a reason prohibited by law.

[4] If the employer doesn’t give the real reasons for the dismissal to the employee, can he still invoke them in court?

There is no legislative provision or common law rule that prevents employers from providing reasons for dismissal in court that differ from the reasons originally told to the employee. It is doubtful, however, that providing incorrect reasons for dismissal would count as notifying the employee of the reasons behind their termination. This would make it more difficult for an employer to dispute an unfair dismissal claim.

[5] What is the nature of judicial review on the ground of a dismissal:

- Is it a marginal control, ie that the court cannot substitute its opinion for that of the employer regarding the advisability of dismissal or is it an unlimited jurisdiction, which means that the judge may substitute its assessment for that of the employer and give the decision that should have been made?

\(^4\) See Explanatory Memorandum, Fair Work Bill 2009 (Cth), 1540.

The Tribunal is not limited to consider only the reasons given by the employer for the termination. The test applied is whether, on the evidence in the proceedings before the tribunal, it is shown that there was a valid reason for the dismissal. As a result, the Fair Work Commission has unlimited jurisdiction to give the decision that should have been made.

[6] **What are the consequences on the employer for not giving reasons or for giving inadequate reasons:**

- The nullity of the dismissal?
- An obligation to continue the contractual relationship (reinstatement)?
- Sanctions?
- Civil sanctions provided by the law?
- Financial sanctions (damages) for a wrongful dismissal?

The consequences would depend on the surrounding circumstances of the case and the chosen cause of action. Although not fatal on its own, not providing adequate reasons for an employee’s dismissal makes it more likely the employee will be successful in a legal claim against their former employer.

As stated above, not notifying employees of a valid reason for their dismissal would count against employers in a claim for unfair dismissal. Similarly, in a general protections claim, employers would find it easier to prove an employee’s dismissal was not for an unlawful reason if the employer can show they provided adequate reasons in a timely manner.

If proven, the two most common remedies of a successful employee dismissal claim are reinstatement and/or monetary compensation for lost remuneration. In some cases, financial penalties may also be imposed.

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7 *Steven Pietraszek v Transpacific Industries Pty Ltd T/A Transpacific Cleanaway* [2011] FWA 3698.