

ELC

Employment Law Centre of WA (Inc)

Working for WA Workers

jobwatch
Employment Rights Legal Centre



Choice of forum for termination of employment

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18 October 2011

Unfair Dismissal

- is a dismissal that is harsh, unjust or reasonable under the Fair Work Act 2009.
- A dismissal is unfair if there was not a valid reason for dismissal or the employer did not follow a fair process.
- For example:
 - Client was fired and not given a reason
 - Client was fired and not given a warning
 - Client was fired for conduct or performance that didn't warrant such a severe punishment.

Adverse Action

- is a general protections claim under the Fair Work Act
- involves an employer taking adverse action against an employee because of an employment right held by the employee or because of a personal characteristic of the employee For example:
 - Client had shifts removed for asking to take annual leave
 - Client passed over for promotion due to gender
 - Client fired for joining the union.

Factors to consider

- Eligibility (for unfair dismissal) – where disputable
 - Qualification period
 - The existence of a dismissal
 - Constructive dismissal
 - Demotions and other changes in duties
 - Income threshold

Factors to consider (cont'd)

- Strength of the claim
- Available remedies
- Forums (for hearing)
- Fees and costs

Factors to consider (cont'd)

- Limitation periods (and out of time options)
- Capacity and ability of the client
- Punitive options
- Onus of proof

Client characteristics

- Capacity to understand legal arguments
- Diligence
- Resourcefulness
- IT savvy
- Access to information
- Access to representation
- Support base
- Judgement
- English language proficiency
- Resilience
- Focus
- Available time

If both claims have good merit, we often consider unfair dismissal to be more appropriate for our client base because:

- The concept of unfair dismissal is easier to understand.
- An unfair dismissal claim is less procedural and there is no requirement to switch jurisdictions to proceed to a hearing.
- A general protections (adverse action) claim can incur more fees and incidental costs.

Case study 1

see handout

Case study 2

see handout