An employee has been unfairly dismissed if Fair Work Australia (FWA) finds the following three factors to be true:

• they were dismissed
• the dismissal was harsh, unjust or unreasonable
• the dismissal was not a case of genuine redundancy.

WHEN IS A DISMISSAL UNFAIR?
To determine if a dismissal is harsh, unjust or unreasonable, Fair Work Australia will take into account a range of factors including:

• if there’s a valid reason for the dismissal relating to the employee’s conduct or capacity
• if the employee is notified of the reason and given an opportunity to respond
• if there’s any unreasonable refusal by the employer to allow the employee to have a support person present at any discussions relating to dismissal
• if the employee was warned about unsatisfactory performance (if this is a contributing reason) before the dismissal
• the impact of the size of the employer’s enterprise on the dismissal process, including the absence of dedicated human resource management specialists or expertise
• any other factors FWA considers relevant.

KEY STEPS IN THE UNFAIR DISMISSAL APPLICATION PROCESS
Where possible, Fair Work Australia (FWA) seeks to resolve unfair dismissal applications by agreement. The key steps in the unfair dismissal application process are:

1. First, the employee lodges the application.
2. FWA checks the application to ensure it is complete and valid.
3. The employer is then notified of the application.
4. FWA conciliates the application to try to have the parties resolve it amongst themselves.
5. FWA will determine an unresolved application.

AFTER THE UNFAIR DISMISSAL APPLICATION IS LODGED
Once the employee’s unfair dismissal application has been lodged with Fair Work Australia, the former employer should receive written notification of the application, information about the process Fair Work Australia will follow and an employer response form. The employee and the employer should also receive details of the time and date for the conciliation of the application.

At this stage, we strongly suggest you seek legal advice from CCIQLaw as to your position and develop a strategy to effectively manage your claim.

Phone our hotline on 1300 565 846.

WHAT IS CONCILIATION?
Conciliation is an informal, private and generally confidential process where a FWA conciliator assists employees and employers to resolve an unfair dismissal application by agreement. The conciliator is independent and does not take sides, but works to bring the parties to an agreed resolution. The style of each conciliator may vary but, in general, conciliation will include the following steps:

• the conciliator explains their role and the manner in which the conciliation is to be run
• each side briefly outlines their story including what happened, any relevant facts and what they want
• the conciliator may allow or ask questions
• the circumstances, and any issues arising, are discussed.

The conciliator may talk separately to the parties, then assists the parties to reach agreement by identifying common ground, suggesting possible options and sometimes by making recommendations and assisting the parties to draft an agreement in writing.

It is important that, prior to the conciliation, you review what you want to say at the conciliation about the unfair dismissal application and, if possible, send to FWA any documentary material you want considered at the conciliation. We strongly suggest legal advice be obtained to assist you with this process.
HEARINGS AND CONFERENCES
If the unfair dismissal application is not withdrawn or does not settle at or before theconciliation, the employer and the employee will each receive written notification from Fair Work Australia of any conferences or hearings to be held on the application.

The notification will include the time, date and location of any such conference or hearing. If you wish to adjourn the conference or hearing, you must apply for an adjournment in writing and provide full reasons for seeking the adjournment. Adjournment requests will only be granted on substantial grounds.

LEGAL SERVICES OFFERED BY CCIQLaw
Termination of employees is one of the most complex issues you’ll ever confront as an employer.

We advise employers on a wide range of industrial relations matters, including tactics and resolution strategies. Our experience enables advice to be delivered quickly and efficiently.

Our focus is on assisting employers to develop effective and adaptable industrial relations strategies to create a harmonious workplace and resolve disputes when they arise.

Our solicitors are highly experienced when it comes to dealing with conciliations (conferences) and arbitrations (hearings) facilitated by Fair Work Australia. Our solicitors are able to provide employers with easy to follow guidance and advice, as well as knowledgeable and experienced representation at both conferences and hearings.

If you receive a claim, it’s important you seek early legal advice. This will ensure you can develop a cohesive and considered approach at this difficult time.

When you apply discipline and dismissal methods and practices, you must ensure they’re fully compliant with Fair Work Australia legislative requirements.

At CCIQLaw, we’ll help to protect your business and assist you with all aspects of unfair dismissal claims in a timely and professional manner, working collaboratively with your business toward solutions that deliver the best outcomes.

Call and speak to one of our solicitors for advice on how we can tailor our services to suit your needs. Phone 1300 565 846.

SPECIAL ARRANGEMENTS FOR SMALL BUSINESS EMPLOYERS
There are special unfair dismissal arrangements that simplify the process for small business. These arrangements recognise small businesses usually:

• don’t have big human resource departments to help them
• can’t afford lost time
• can’t find other positions for employees.

Small business employers benefit from:
• an extension of the minimum employment period to 12 months instead of six months (employees can’t make an unfair dismissal claim in this 12-month period)
• a simple Fair Dismissal Code to help employers ensure dismissals are not unfair.

There’s also a helpful checklist that small business employers can follow to ensure the dismissal is not unfair, called the Small Business Fair Dismissal Code.

WHO IS A SMALL BUSINESS EMPLOYER?
A small business employer is now defined as someone who employs fewer than 15 full-time equivalent employees.

Since 1 January 2011, the method of calculation has changed and is based on a headcount of each employee, irrespective of the hours worked. The headcount includes casuals employed on a regular and systematic basis, employees of associated entities and the employee/s being dismissed.

WHAT’S THE DIFFERENCE BETWEEN UNFAIR DISMISSAL AND UNLAWFUL DISMISSAL?
An unlawful termination or general protections claim doesn’t look at whether a dismissal was harsh, unjust or unreasonable. Instead, it looks at whether the reason or one of the reasons for termination was unlawful.

An employee has 60 days from the date of termination to make an unlawful termination or general protections claim.

An employee who is unable to make an unfair dismissal claim may be able to take an unlawful dismissal claim or a general protections claim.

It’s also possible that an employee may have the option of choosing to take an unfair dismissal claim or an unlawful dismissal or general protections claim.

UNLAWFUL TERMINATION
Unlawful termination is where an employee’s employment is terminated for a discriminatory reason, or otherwise against the law. There are protections for employees who have been unlawfully terminated.
WHAT’S UNLAWFUL TERMINATION?
It’s illegal for an employer to dismiss an employee for a number of reasons. These reasons include a person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin. (Some exceptions apply; such as where it’s based on the inherent requirements of the job.)

Other reasons include:
- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities outside working hours or, with the employer’s consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees
- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint, or participating in proceedings against an employer.

WHAT IS ADVERSE ACTION?
The following are all examples of adverse action when taken because of any of the above attributes:
- dismissing an employee
- damaging an employee’s ability to do their job
- changing an employee’s job to their disadvantage
- treating one employee differently from other employees
- refusing to employ a potential employee
- not offering a potential employee all the terms and conditions normally in a job.

THE FOLLOWING EXAMPLE SHOWS AN ADVERSE ACTION:
Jane has recently applied for a promotion. She tells her manager that she is pregnant and will be taking parental leave under the National Employment Standards (NES) in five months’ time. Sarita is then unsuccessful in her application for promotion. Although highly qualified for the job, Sarita’s manager advises her that the reason she was not promoted is because she will only be able to do the job for a short period of time before going on parental leave. Denying Sarita the promotion because she is pregnant is prohibited under the Fair Work Act 2009.

Understanding unfair dismissals is essential knowledge for every employer. To find out more, phone CCIQLaw on 1300 565 846.

WHAT IS DISCRIMINATION?
Under the Fair Work Act 2009, an employer must not take ‘adverse action’ (as set out below) against any employee or prospective employee because of the following attributes:
- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- marital status
- family or carer’s responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin.

DISCRIMINATION AND ADVERSE ACTION
There are laws to protect employees and prospective employees from job-related discrimination. It is essential that employers are aware of this issue and provide a workplace that is discrimination-free.

Contact the CCIQ Law Hotline to speak to one of our industrial relations legal team for assistance regarding right of entry issues on 1300 565 846