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U3163125

**Workplace Law 2nd Assignment**

**Unfair Dismissal Advice**

**Legal Advice Regarding the Dismissal of Mr. Vovo and Mr. Sao**

Dear Mr. Carlo,

This letter provides an outline of the legal issues involved in your dismissal of the apprentices Mr. Vovo and Mr. Sao based on the unfair dismissal provisions outlined in Part 3-2 of the Fair Work Act of 2009 (Cwth) and case law involving the interpretation of those provisions (“Fair Work Act,” 2021). The key questions that are addressed:

* Do the unfair dismissal rules apply to a small business such as yours, or do you fall under the exemption?
* Are you liable for unfair dismissal, and what is your potential liability if Mr. Sao’s application is successful?
* Other issues of legal concern.

**Exemption for Small Businesses**

The Fair Work Act s. 23 defines a small business employer as meeting the following conditions as being a national system employer with fewer than 15 employees at that particular time of the employee’s dismissal or termination (“Fair Work Act,” 2021).

The Fair Work Act s. 14 defines the meaning of a national system employer as a body corporate incorporated in a Territory that employs others or a person who carries on an activity in a Territory that employs others. Based on the details provided about your business, you are a national system employer as defined by Section 14.

There is a question whether you qualify as a small business depending on how many employees were working at the dismissal time. You have four apprentices, six bakers, one administrative staff, and five seasonal workers (who are considered national system employees under the *casual* designation of the Fair Work Act), which means you meet the under 15-employee qualification for a small business employer only if you employed three or less seasonal workers at the time of dismissal. It is vital that you determine through your records how many employees were working at the time of dismissal to determine whether you were a small business employer at that time. Section 23(1) states an “at that time” qualification, meaning that you may or may not qualify depending on whether there were less than 15 employees working at the time of dismissal (“Fair Work Act,” 2021). However, even if you qualify as a small business, there is no exemption from unfair dismissal liability. The question will instead be whether the Fair Work Act or the Small Business Fair Dismissal Code apply.

Your apprentices count as employees. According to the Fair Work Ombudsman definition of an apprentice, “An apprentice *is an employee* who learns their trade or profession while working for an employer under a special training contract” (“Apprentice,” 2021). Moreover, the Unfair Dismissals Benchbook specifically exempts apprentices from the employer allowance to give oral notice of dismissal to employees working under training arrangements (“Unfair Dismissals Benchbook,” 2021). Additionally, the ruling in *Qantas Airways Limited v Fetz and others* ruled that apprenticeship contracts can be violated if the termination of employment occurs before the expiration of the contract (“Unfair Dismissals Benchbook,” 2021). That case also determined that an apprenticeship delivers “provision of valuable work for the employer” and thus cannot be meet the “specified task” exemption in the Fair Work Act (“Unfair Dismissals Benchbook,” 2021, p. 78).

**Liability for Unfair Dismissal**

Part 3-2 of the Fair Work Act addresses the conditions that protect employees from unfair dismissal. Section 383 requires a minimum employment period to be met, which for a small business would be one year and six months for an employer that is not a small business (“Fair Work Act,” 2021). An unfair dismissal is defined by Section 385(b) as “harsh, unjust, or unreasonable” (“Fair Work Act,” 2021). The criteria for these qualifiers are outlined in Section 387(a-h), and they include whether there was a valid reason based on the employee’s conduct, whether notification was provided, whether the employee was given a right to respond, and whether the person had been warned about their performance (“Fair Work Act,” 2021).

An unfair dismissal is defined by Section 385(c) if it “was not consistent with the Small Business Fair Dismissal Code” (“Fair Work Act,” 2021). Section 388(2)(a-b) of the Fair Work Act state that dismissal is consistent with the Small Business Fair Dismissal Code if the employer qualified as a small business *“*immediately before the time of the dismissal or at the time the person was given notice of the dismissal,” and the employer complied with the Small Business Fair Dismissal Code ((“Fair Work Act,” 2021).

The Fair Work Act and the Small Business Fair Dismissal Code would allow termination without notice or warning if the employee engaged in serious misconduct (“Fair Work Act,” 2021; “Small Business Fair Dismissal Code,” 2021). Serious misconduct includes conduct that might harm the health and safety of other workers or customers (“Small Business Fair Dismissal Code,” 2021). Other types of conduct not explicitly cited in the Small Business Fair Dismissal Code can be considered as serious misconduct if employers provide adequate evidence to the Commission (“Small Business Fair Dismissal Code,” 2021). Serious misconduct for the Fair Work Act is defined by Fair Work Regulation 1.07 as “conduct that is willful or deliberate, and that is inconsistent with the continuation of the employment contract,” or that causes a risk to health and safety (“Unfair Dismissals Benchbook,” 2021).

The Code allows small businesses to terminate employees for reasons other than serious misconduct. Still, small businesses are required to provide the employee with a reason for the dismissal, which must be related to some other type of conduct or capacity to do their job (“Small Business Fair Dismissal Code,” 2021). The small business must provide a verbal or written warning to the employee, and the employee must be given a reasonable period to correct the problem (“Small Business Fair Dismissal Code,” 2021). Training or notification of any policies that were violated must be provided (“Small Business Fair Dismissal Code,” 2021).

Section 389 of the Fair Work Act also allows dismissal for genuine redundancy, which means that the operational requirements of the business no longer require the job to be performed, which does not appear to apply to this situation.

Section 382 of the Fair Work Act allows dismissal of employees earning the high-income threshold, which is adjusted annually on July 1 and was most recently $158,500 (“Unfair Dismissals Benchbook,” 2021).

**Potential Liability**

Mr. Sao and Mr. Vovo were employed longer than the minimum period whether or not you were a small business, and they qualify as employees. Thus, one issue is whether you are a small business or not, which would subject you to the Fair Work Act or the Small Business Fair Dismissal Code. Another potential exemption from liability is if Mr. Sao or Mr. Vovo earned the high-income threshold, which is unlikely, of course, given their complaints about receiving low pay and their apprentice positions.

The big question is whether the conduct of Mr. Sao and Mr. Vovo rise to the level of serious misconduct, which would justify the termination without notice. If not, your termination could be determined to be harsh. The health and safety provision might apply given the image of Mr. Vovo sneezing on food items, but the Commission might also interpret this as ambiguous since it could be staged. Failing to wear a hairnet is likely not to be considered a threat to health and safety.

A better argument could be made that the apprentices violated a policy or norm of social media use. However, there is no evidence that you provided them with any training or education about such a policy. You could argue that they violated a norm of acceptable conduct for posting negative content about the business on social media. However, the Commission might still rule that, even if this norm was violated, the conduct is not serious misconduct and could have been corrected with a warning and training (i.e., education about a policy of social media). In fact, the Fair Work Commission has upheld dismissals for social media posts. Still, those cases involved situations where the employees used physically threatening language, not merely criticized the business, their pay, and customers (“Social Media and Unfair Dismissal,” 2020).

Thus, you probably meet one or more of the criteria for harshness, including failing to provide a valid reason for dismissal, failure to provide notification of that reason for dismissal, and failure to provide an opportunity for the employee to respond or correct their behaviour. For example, you might have reinstated them in other stores to avoid customer conflicts and providing them with a warning and training about a social media policy.

The Fair Work Act s. 390 allows the Fair Work Commission to order the following remedies for which you might be liable for unfair dismissal, assuming the employee has made an application order under Section 394, which appear to be the case for Mr. Sao (“Fair Work Act,” 2021):

* Order reinstatement to the same position (Section 391(1)(a) or one no less favourable (Section 391(1)(b)) and with the restoration of lost pay (Section 391(3)) (“Fair Work Act,” 2021).
* Order payment of compensation if reinstatement is determined by the Commission to be inappropriate (Section 391(1)). The criteria for deciding the amount of compensation is outlined in Section 392(2)(a-g).
* A mitigating factor that you can pursue is that Section 392(3) allows the amount to be reduced if the misconduct of the employee contributed to the decision to dismiss (“Fair Work Act,” 2021).

There are numerous other factors surrounding reinstatement and compensation in Sections 391-393, including instalment opportunities for compensation, that should be reviewed to determine your potential liability if the Commission rules against you. As it stands, you are at considerable risk of reinstatement and compensation for lost pay, so reinstatement and compensation of lost pay might be warranted at this time, with possible reassignment to other stores.

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