



Unjustified dismissals

Claims of unjustified dismissal cases figure prominently among employment relationship complaints.

Unjustified dismissals are a source of dread for employers as they are a minefield that can be hard to avoid.

Dismissals represent a breakdown in relationship between employer and employee, so it's not surprising in many cases a dismissed employee will want to claim the dismissal was unjustified.

Also, a successful claim can reap significant compensation so the frequency of unjustified dismissal cases is stress for many employers.

Wishing to avoid the cost and time of defending an unjustified dismissal claim, many employers opt to settle the matter out of court with a payment to the ex-employee, even where the dismissal was justified.

The number of unjustified dismissal cases has grown rapidly since 1991: in that year the Employment Contracts Act 1991 gave all employees access to the Act's personal grievance procedure making it possible for anyone to claim their dismissal unjustified. Before that, only unionised workers could make such a claim.

The Employment Contract Act has long been superseded, but unjustified dismissal provisions live on in the Employment Relations Act that replaced it.

Since then there has been an explosion in the number of unjustified dismissal cases and a growing amount of case law on the subject.

A recent case highlights the level of detail that now characterises this growth industry.

Last month the Employment Court in the *Xtreme Dining (Think Steel) v Dewar* case ruled that if an employee's contribution to an otherwise unjustified dismissal was so bad that defects in the dismissal procedure should be overlooked, no damages should be awarded. In such a case it was not good enough to award damages and then reduce them 100 percent - they should not be awarded in the first place.

In this case, as in many other unjustified dismissal cases, the concern was how the employer went about dismissing the employee, something many employers find hard to get right.

In dismissal cases, too often the focus is on 'employer procedure' rather than on 'employee fault' (why the employee was dismissed).

There has been a gradual change in the treatment of dismissal cases.

English common law once held that *how* someone was dismissed could not lead to damages for wrongful dismissal.

Now the Employment Relations Act has a whole section devoted to the how to go about dismissing employees. If the employer gets the procedure wrong, no matter how badly the employee behaved, most often the Employment Relations Authority or the Employment Court will rule the dismissal unjustified, awarding damages and compensation as a consequence.

In a key case in New Zealand - *Hennessey* in 1982 - the Court of Appeal found the dismissal unjustified because the employee was handed the dismissal notice before having a chance to explain his actions. Employers were concerned at this finding since the employee had already received a warning for the same kind of behaviour.

In a case last year, an employee accused of creating an 'environment of anger and intimidation', resulting other employees resigning, was awarded \$18,000 because the employer's investigation and consultation were considered deficient.

The personal grievance/unjustified dismissal process is not easy for employers. As a result, they are likely to be wary of taking on someone who might, in potential personal grievance terms, be considered high risk.

But those with a chequered work history need employment too. Without a statutory personal grievance/unjustified dismissal process, employment could be easier to find. Making the inclusion of personal grievance provisions in employment agreements voluntary could be a sensible way to go, rather than requiring them by law. For most employees that was once the case.

It has been said that in 1991, Parliament made a 'huge mistake' in deciding to impose personal grievance/unjustifiable dismissal provisions on everyone. Until then only union members could claim unjustified dismissal. All those on individual contracts managed perfectly well without them. They could again.

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