



VISA ALERT

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Terminating 457 visa holders

:: TIPS

- Ensure procedural fairness - give appropriate notice
- Consider garden leave allowing time to research visa options to remain and other employment opportunities
- Facilitate a conference with an immigration specialist to assist the expat review their visa options to remain in Australia
- Be aware of your obligations as a sponsor
- Include clauses into contracts of employment with expatriates that will assist manage sponsorship obligations and avoid sanctions

Employers of 457 visas holders need to be cautious when considering termination

Sponsors need to be cautious when considering dismissal of 457 visa holders. Like their Australian counterparts, 457 visa holders have access to employment remedies under the *Fair Work Act*. Even where a sponsored employee's employment is terminated pursuant to the relevant employment agreement, the dismissal may still be held to be harsh, unjust or unreasonable. Under immigration law, when a sponsored employee's employment is terminated they have just 28 days to regularise their visa status or leave Australia.

If sponsors fail to comply with relevant workplace law, Fair Work Australia may order one of two sanctions: compensation or reinstatement orders. And, this could impact on the sponsor's continued ability to sponsor expatriates.

When determining whether a dismissal is harsh, unjust or unreasonable, Fair Work Australia takes into account, amongst other factors, whether:

- there was a **valid reason** for the dismissal
- the person was **notified** of the reason
- the person was **given an opportunity to respond** to any reason related to their capacity or conduct
- the person received a **warning about unsatisfactory performance** before the dismissal.

In *Webster v Mercury Colleges Pty Ltd*, Fair Work Australia held that termination of a sponsored teacher was unfair because of the serious financial consequences to the teacher and the social dislocation that was inevitable as a result his summary dismissal.

In *Richard Patemella v Electroboard Solutions Pty Ltd*, the tribunal held that the dismissal was harsh because the employee was not given any warning that his employment was at risk, limiting his opportunity to mitigate his job loss and, as a result, his ability to remain in Australia.

The *Fair Work Act* at section 394 requires employees in Australia including sponsored visa holders to lodge an unfair dismissal claim with Fair Work Australia within 14 days of their dismissal unless the tribunal is satisfied there are exceptional circumstances for the delay. In the recent decision of *Usman Ali v Industries Services Training Pty Ltd* it was held that the potentially severe impact on a 457 visa holder of losing his job constituted exceptional circumstances justifying a one day delay in lodging an unfair dismissal claim.

To hear Katie discuss this topic on radio please follow the link below:

<http://www.brr.com.au/event/90718?popup=true>

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