

Fair Work | Case Study

Unfair Dismissal - Case Study 3

Zachary is a casual retail worker in a suburban supermarket, Smith & Co. Smith & Co is a trading corporation in WA that employs 15 casuals. Zachary has worked regular shifts since 2008. On 6 July 2009 his bag is checked and he is found to have 3 cans of beer in his bag. The manager of Smith & Co makes a report to the Police and sacks him summarily.

As a trading corporation, Smith & Co is a national system employer and therefore subject to Part 3.1 of the *Fair Work Act 2009* (Cth) (FW Act), which contains the unfair dismissal provisions.

However, if Smith & Co employs no one other than the 15 casual employees, it will be exempt from unfair dismissal claims provided that it follows the Small Business Fair Dismissal Code (Code). Until 1 January 2011 a small business for the purposes of the Code will be those employing less than 15 full-time equivalent employees. After that time, a small business will be based on a simple count of all employees, and one employing less than 15 employees.

Under the Code, a small business may dismiss an employee for theft without providing them with notice. Further, a dismissal will be deemed to be fair under the Code if the theft is reported to the police.

Accordingly, provided that Smith & Co is a small business employer, even if Zachary has worked the 12 month MEP, he will not be able to bring an unfair dismissal claim because he was dismissed for theft and the theft was reported to the police, which automatically makes the dismissal fair under the Code.

However, Zachary may be able to bring an unfair dismissal claim if:

- Smith & Co have more than 15 full-time equivalent employees,
- he has worked regular shifts as a casual for over 12 months, thereby meeting the necessary MEP; and
- he earns less than \$108,300, which is the remuneration cap for bringing unfair dismissal claims.

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In that case, if Zachary brings an unfair dismissal claim, Smith & Co will need to demonstrate that they had reasonable grounds for terminating his employment for theft. This will involve being able to demonstrate that Smith & Co investigated the matter thoroughly, put the allegation clearly to Zachary for his response and took his response into account.



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