



Australia's Fair Work system

9. A simple, fair dismissal system for small business

A new, fair dismissal system has been introduced as part of the Fair Work system. New dismissal laws took effect on 1 July 2009.

Under Work Choices, employees in businesses with up to 100 workers could be dismissed for any reason without any right to challenge the dismissal as being harsh, unjust or unreasonable. For other employees, the employer had only to demonstrate the dismissal was for 'operational reasons' and there would be no right of challenge or redress.

The removal of these rights resulted in clear hardship for many, and in real feelings of insecurity when workers realised they could be dismissed at any time for no reason.

A new fair dismissal system

The Government has established new laws regarding unfair dismissal that are fair to small business owners and their employees.

The objective of these laws is to ensure good employees are protected from being dismissed unfairly, while enabling employers to manage under-performing employees with fairness and with confidence.

Special arrangements for small businesses

Within the overall unfair dismissal system, special arrangements apply for small businesses with fewer than 15 full-time equivalent employees until 1 January 2011. From 1 January 2011, the special arrangements will apply to small businesses with fewer than 15 employees based on a simple headcount (rather than using a full-time equivalent calculation).

These arrangements recognise the special circumstances of small business owners. They do not have human resource management departments, they cannot afford to lose time and they cannot readily redeploy employees into other positions or workplaces.

Compared with larger businesses, small business owners benefit from:

1. A doubling of the minimum employment period from six to 12 months, during which time employees cannot take a claim for unfair dismissal, and
2. A short and simple Fair Dismissal Code which, if followed by the small business owner, will ensure a dismissal is not unfair.

In addition, there is a specialist information and assistance unit established within the Office of the Fair Work Ombudsman to give small and medium sized employers assistance and advice if they are considering dismissal.

A Fair Dismissal Code for small businesses

The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence.

For under-performing employees, the Code simply requires the employer to give the employee a valid reason, based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem.

Multiple warnings are not required. It is desirable, but not necessary, for a warning to be in writing.

The Code sets out a process for dismissal which recognises that employees need a fair go. It contains basic principles that any reasonable person would regard as fair. If an employee is not performing satisfactorily it is only right that they should be warned and have the opportunity to improve their performance. At the same time, employers should have the right to immediately dismiss an employee whose conduct is seriously affecting the business, for example, stealing from the employer. Employers should pay careful attention to the procedural matters under the Code. Meeting these obligations is an important factor in complying with the Code.

A simple checklist to aid employers

A simple Small Business Fair Dismissal Code Checklist (the Checklist) has been developed to help small business employers to comply with the Code. It is a tool to help small business employers follow the Code's procedural elements when dismissing an employee and understand when the Code applies. It should be noted that completing the Checklist does not mean that the Code has been complied with, nor is it a requirement of the Code that the Checklist be completed. The Checklist should be read in conjunction with the Code.

What is 'unfair dismissal'?

Unfair dismissal is a dismissal that is harsh, unjust or unreasonable.

If an employee is made redundant and the redundancy is genuine, the dismissal will not be unfair. Under Commonwealth workplace relations law, a termination is a genuine redundancy if:

- the operational requirements of the business have changed and you no longer need the person's job to be done by anyone; and
- you have followed any requirements in an applicable modern award, enterprise agreement or other industrial instrument to consult (e.g. with employees and/or their representatives) about the redundancy.

It is not a genuine redundancy if it would have been reasonable in all the circumstances for the employee to be redeployed.

The requirements for determining whether a redundancy is genuine are set out in section 389 of the Fair Work Act.

When employment for a fixed period or to complete a particular task, or seasonal employment comes to an end, the end of that employment is not considered to be a dismissal.

Exclusions from making an unfair dismissal claim

Employees who have not met the minimum employment period (12 months employment in a small business and six months employment in a larger one) are not eligible to make a claim for unfair dismissal.

Employees whose remuneration is more than the high income threshold (unless a modern award or enterprise agreement covers or applies to their employment) are also excluded from making an unfair dismissal claim. The high income threshold from 1 July 2010 is \$113,800 and is indexed annually.

Casual employees employed on an irregular basis are also not eligible to make a claim for unfair dismissal. Only those casual employees who have been engaged on a regular and systematic basis and who have a reasonable expectation that their employment would continue, on that basis, can make an unfair dismissal claim.

Simple, non-legalistic processes

Where a claim of unfair dismissal is made, a simple, streamlined process applies for both small and larger businesses.

Unfair dismissal claims must normally be lodged with Fair Work Australia within 14 days. Fair Work Australia may take a flexible approach in gathering information. Fair Work Australia may make initial inquiries and discuss the

issues with employers and employees, including in informal conferences at mutually agreed locations or held over the telephone, with a view to achieving a mediated resolution.

Where there are contested facts, Fair Work Australia may decide the outcome in either a conference or by holding a formal hearing.

The Fair Work system is designed to be non-legalistic, the aim being to keep lawyers and contingency fee agents out of the process as far as possible. Under Fair Work, legal representation may be permitted, but only with Fair Work Australia's permission.

Decisions may be made in a conference setting. Fair Work Australia will act consistently with the principles of natural justice, including by ensuring that both parties get to have their say and are able to respond to allegations put against them.

Full public hearings will only occur where, after considering the views of the parties, Fair Work Australia decides this would be the most effective and efficient way to resolve the matter.

A remedy of reinstatement or capped compensation

Reinstatement will be the remedy unless it is not in the interests of either of the parties. Where reinstatement is not feasible, compensation may be ordered but a cap on compensation will apply. The maximum compensation will be six months' pay, but normally compensation will be well beneath the cap. Employers will no longer need to pay 'go away' money, since the process will be quick, simple and informal.

Fair Work Australia review

Fair Work Australia will conduct a thorough and transparent review of the first three years of operation of the new unfair dismissal arrangements in 2012 and will particularly take into account the experience of employers of small and medium sized businesses.

Small Business Fair Dismissal Code

Commencement

The Small Business Fair Dismissal Code came into operation on 1 July 2009.

Application

The Fair Dismissal Code applies to small business employers with fewer than 15 full time equivalent employees.

Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.

Employees who have been dismissed because of a business downturn or their position is no longer needed cannot bring a claim for unfair dismissal. However, the redundancy needs to be genuine. Re-filling the position with a new employee is not a genuine redundancy. The requirements for determining whether a dismissal was a genuine redundancy are contained in section 389 of the Fair Work Act. The Small Business Fair Dismissal Code Checklist attached to this document can assist in determining whether a redundancy is a genuine redundancy.

Further information on the application of the Code, genuine redundancy and unfair dismissal is available at www.fairwork.gov.au or by contacting the Fair Work Infoline on 13 13 94.

The Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Small Business Fair Dismissal Code Checklist

The Checklist is a tool to help small business employers comply with the Small Business Fair Dismissal Code. Completing the Checklist does not mean that the Code has been complied with, nor is it a requirement of the Code that the Checklist be completed. However, completing the Checklist will help small business employers assess and record their reasons for dismissing an employee. It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim.

Employers should read the Code before completing the Checklist, ensuring they understand their procedural obligations under the Code. Meeting these obligations is an important factor in complying with the Code.

1. How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

- Under 15 full-time equivalent employees
- 15 full-time equivalent employees or more

[If under 15 full-time equivalent employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full time, part-time or regular casual employee for 12 months or more?

- Yes
- No

[If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because it was a genuine redundancy? In other words, was the dismissal because you didn't require the person's job to be done by anyone because of changes in the operational requirements of your business?

- Yes
- No

| | | |
|--|--------------------------|--------------------------|
| 4. If Yes, | YES | NO |
| a. Did you comply with any requirements in a modern award, enterprise agreement or other industrial instrument that applied to the employment, to consult (eg with employees and/or their representatives) about the redundancy? | <input type="checkbox"/> | <input type="checkbox"/> |
| b. Did you consider if the employee could have been redeployed? | <input type="checkbox"/> | <input type="checkbox"/> |

5. Do any of the following statements apply?

| | | |
|--|--------------------------|--------------------------|
| I dismissed the employee because I believed on reasonable grounds that: | YES | NO |
| a. The employee was stealing money or goods from the business. | <input type="checkbox"/> | <input type="checkbox"/> |
| b. The employee defrauded the business. | <input type="checkbox"/> | <input type="checkbox"/> |
| c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.. | <input type="checkbox"/> | <input type="checkbox"/> |
| d. The employee committed a serious breach of occupational health and safety procedures. . | <input type="checkbox"/> | <input type="checkbox"/> |

6. Did you dismiss the employee for some other form of serious misconduct

Yes

No

If Yes, what was the reason?

If you answered Yes to any question in parts 3, 4 or 5 or 6 you are not required to answer the following questions.

7. In any discussion with the employee where dismissal was possible, did the employee request to have a support person present, who was not a lawyer acting in a professional capacity?

Yes

No

8. If Yes, did you agree to that request?

Yes

No

9. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

Yes

No

10. If Yes

YES

NO

a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?

b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?

c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?

d. Did the employee subsequently improve his or her performance or conduct?

e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?

f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.

11. Did you dismiss the employee for some other reason?

Yes

No

If Yes, what was the reason?

12. Did the employee voluntarily resign or abandon his or her employment?

Yes

No

If Yes, what was the reason?

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Signature _____ Date _____