



Unfair Dismissal

What you need to know about the new unfair dismissal laws which apply to your business

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Overview

This White Paper will provide you with the essential information you need to know about the new rules relating to unfair dismissal which commenced operation on 1 July 2009. This is one of a series of White Papers available for download on the Fair Work for Small Business Portal. This Portal has been made possible by funding from the Commonwealth Government.

Need to know more?

If you need more background information before reading this paper, please return to the Portal where you can download a variety of seminars on the new Fair Work system.

fairworkforsmallbusiness.com.au



Introduction

The Commonwealth Government's new industrial relations legislation – called the Fair Work Act – began operating on 1 July 2009. This new law replaces the previous Government's Workplace Relations Act 1996, which was often referred to as WorkChoices. As a result of this new law coming into force, many of the rules which govern workplace relations in your business will have changed, including those concerning the unfair dismissal of employees. If you and your business are bound by the new legislation it is absolutely essential that you know what these new rules mean for you. Failing to comply with all of your legal obligations could result in you having to pay hefty fines.

This White Paper begins by providing some background information about the new Fair Work Act to help you determine if you are bound by this new law. You will then be introduced to the key terms you need to know so that you have a clear understanding of what an unfair dismissal is and how it is different from a 'genuine redundancy' and an 'unlawful termination'. You will then be guided through the rules which govern who is eligible to make an application for unfair dismissal and the process which will be followed to determine whether a dismissal was, in fact, unfair. Finally, you will be provided with an explanation of the different remedies – or outcomes – which can be imposed if you unfairly dismiss an employee.

The Fair Work Act

The Fair Work Act – and the new industrial relations system it creates – applies to all businesses which are 'national system employers'. You will be a national system employer if the business you operate is an incorporated entity, such as a 'Pty Ltd' which is actually trading, or your business is located in the ACT, NT or Victoria. If you are located in another state and you are unsure whether you are a national system employer, you should contact the Fair Work infoline on 13 13 94 for further advice and guidance. If you are not a 'national system employer' your work-related legal obligations will be found in state law and the Fair Work Ombudsman can point you in the right direction. If you are a 'national system employer' – and there's a very good chance you are – then you must now follow the new rules and obligations set out in the Fair Work Act, including those relating to unfair dismissal.



Key Terms You Should Know

As a small business owner or operator who is bound by the new Fair Work Act, it is absolutely essential that you understand what does, and does not, count as an unfair dismissal. Put simply, an unfair dismissal will occur when an employee has been dismissed – that is, fired – and the dismissal is ‘harsh, unjust or unreasonable’, and the dismissal was not a genuine redundancy. If the employee is dismissed from a ‘small business’, the dismissal will also be unfair if it was inconsistent with the ‘Small Business Fair Dismissal Code’.

Harsh, Unjust or Unreasonable

The terms ‘harsh’, ‘unjust’ and ‘unreasonable’ are not defined within the Act, but the Act does contain a list of factors which will indicate whether a dismissal falls into this category. These factors are as follows:

- Was there was a valid reason for the dismissal which relates to the employee’s ability to do the job or their behaviour?
- Was the employee advised of this reason?
- Was the employee given a chance to respond to the reason given?
- Was there an unreasonable refusal by the employer to allow the employee to have a support person present to assist him or her in any relevant discussions?
- If the employee was fired because of poor performance, was he or she warned that their performance was unsatisfactory?
- Does the size of the business impact on the procedure the employer is able to follow to dismiss an employee?
- Does the absence of a dedicated human resources specialist, or equivalent expertise, impact the types of procedures followed in dismissals?

Unfair dismissal claims must be lodged with the new industrial relations regulator, Fair Work Australia. It will be their job to consider all of these factors when assessing a claim and they may also consider any other factor they consider relevant. Fair Work Australia has replaced the Australian Industrial Relations Commission.

Remember the key elements of an unfair dismissal:

1. Employee dismissed
2. Dismissal is harsh, unjust or unreasonable
3. Not a genuine redundancy
4. Inconsistent with Small Business Fair Dismissal Code.



Genuine Redundancy and Unlawful Termination

A dismissal will not be unfair if it is a 'genuine' redundancy. A redundancy occurs when an employee is dismissed because the job he or she was doing is no longer required to be performed by anyone. For example, you may buy a machine which does the same job as one of your employees, which results in that employee no longer being required. However, a redundancy will only be 'genuine' if it was not possible to redeploy – or 'reassign' – the affected employee or it is unreasonable for the employer to redeploy him or her. If Fair Work Australia believes a redundancy is not genuine, it may find the employee was unfairly dismissed.

You should also note that an 'unlawful termination' is treated differently from an unfair dismissal. An unlawful termination occurs when an employee is dismissed for one of the specifically prohibited reasons set out in the Fair Work Act. These include dismissing an employee because of a personal characteristic such as their race or gender or because they choose to – or choose not to – join a trade union. You should review the complete list of prohibited grounds set out in the Act to ensure you understand your obligations in this regard.

Small Business Fair Dismissal Code

The Fair Work Act has introduced new rules specifically focussed on the dismissal of employees by small businesses. From 1 July 2009 until 31 December 2010, a 'small business' is any business which employs fewer than 15 full-time equivalent employees. You should note that this is not a simple headcount – a careful calculation must be performed which includes your casual, part-time and absent employees to determine whether your business meets the definition of a small business. If it does, you should use the Small Dismissal Fair Code every time you dismiss an employee. This Code contains a step-by-step checklist which, if carefully followed when dismissing an employee, will mean Fair Work Australia will consider the dismissal to have been 'fair'. This could save your business thousands of dollars. From 1 January 2011, the number of employees used to define a small business will be based on a head count of employees (regardless of whether they are full-time equivalent employees) at the time of dismissal or notice of dismissal (which ever is earlier).

A special Small Business Calculator Guide is available on the Fair Work for Small Business Portal. This calculator will help you determine whether yours is a 'small business'.



Who is eligible to lodge a claim?

The rules which determine who is eligible to lodge a claim for unfair dismissal changed on 1 July 2009. An employee may now lodge a claim if he or she:

- has completed the 'minimum employment period'
- is covered by an award or agreement
- earns less than the high income threshold, which is currently set at \$108 300 per year.

The 'minimum employment period varies depending on whether the employee was employed by a 'small business'. If they were, the period is set at 12 months of continuous service. In all other cases, the minimum employment period is 6 months continuous service.

The Unfair Dismissal Claim Process

An employee who feels they have been unfairly dismissed may lodge an application with Fair Work Australia within 14 days of the dismissal taking effect. Fair Work Australia has discretion to accept late applications in exceptional circumstances. Before considering the merits of the application, Fair Work Australia must check whether:

- the application was received within 14 days
- the applicant is eligible to make a claim
- the dismissal was consistent with the Small Business Fair Dismissal Code (where relevant)
- whether the dismissal was a genuine redundancy

The employer can also object to the application being considered by Fair Work Australia if:

- The dismissal was not unfair
- The application was lodged after the 14 day deadline
- The applicant is not eligible to lodge a claim, or
- The application has no real basis or the employee has a history of making false claims or there is no real chance of the claim being upheld by Fair Work Australia.



Conferences, Hearings and Representation

If Fair Work Australia decides to consider the merits of the application and the employer and employee disagree about the facts surrounding the dismissal, Fair Work Australia will hold either a conference or a hearing to hear from both sides. A Conference is the preferred option for Fair Work Australia as these are both private and informal. You may be represented at a conference or hearing by a person from an organisation, employer association or peak council to which you belong or which otherwise represents you or your business. However, you may not be represented by a lawyer or any other paid agent unless you have firstly obtained permission from Fair Work Australia.

Possible Outcomes

If Fair Work Australia finds that the dismissal was not unfair you will have no further case to answer in relation to the employee's application. However, if the dismissal is found to be unfair Fair Work Australia may order you to:

- Reinstatement the employee – that is, reemploy him or her. This is Fair Work Australia's preferred method of remedying unfair dismissals. You may also be required to backpay the employee for lost wages and other entitlements.
- Pay the employee compensation – but only to a certain limit and only if reinstatement is inappropriate. When deciding how much compensation to award, Fair Work Australia will look at a number of factors relevant to the applicant's employment. The maximum amount that the dismissed employee can receive in compensation is capped to the lesser of:
 1. Half the high income threshold – which would currently equal \$54 150, or
 2. The equivalent of 26 weeks' pay

It is absolutely essential that you maintain proper records of all your human resource-related activity, including conversations held with employees and proper time and wage records.



If the dismissal is found to be unfair you may have to:

1. Reinstatement the employee, or
2. Pay compensation
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Appeals and Costs

If you don't agree with Fair Work Australia's decision you may wish to lodge an appeal. However, an appeal relating to an unfair dismissal decision can only be granted where it is in the 'public interest'. In certain circumstances, Fair Work Australia may permit the successful party to recover the costs of the proceedings from the unsuccessful party. Strict rules apply to 'costs-orders' and you can obtain more information directly from Fair Work Australia.

Conclusion

Thank you for downloading the Fair Work For Small Business White Paper on Unfair Dismissals. We trust you have found this document helpful and we invite you to view the other White Papers in this series which are available for immediate download from the Portal.

The Council of Small Business of Australia, Workforce Guardian and Telstra Business present Fair Work for Small Business - an online, one-stop-shop for education and information for small businesses on the Fair Work Act.

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