



## UNFAIR DISMISSALS

### What employers are covered by the new Unfair Dismissal Laws?

The Unfair Dismissal provisions of the legislation apply to all federal system employers. This includes all constitutional corporations (ie. Pty Ltd's) in all States and Territories and all non-constitutional corporations (partnerships, sole traders) in all States and Territories but for WA.

### What employees are covered by the new Unfair Dismissal Laws?

In addition to needing to work for an employer covered by the legislation (described above) the new laws will apply to an employee:

- who has completed his/her 'minimum employment period'; and
  - is covered by an award; and/or
  - is covered under an enterprise agreement that applies to their employment; and/or
  - Whose annual earnings are less than the 'high income threshold' (currently \$113,800 – but will be indexed).

But will not apply to the following employees:

- an employee employed for a specified task, a specified period of time or a seasonal worker and is terminated at the end of that time, task or season
- an employee subject to a training agreement and whose employment is limited to the duration of that agreement
- an employee dismissed in the case of a genuine redundancy
- a casual employee not engaged on a regular and systematic basis with an expectation of ongoing employment

### What is the 'minimum employment period' an employee must have before being eligible to take a claim'?

#### Small employer

The minimum employment period is 12 months employment for an employee employed by a 'small employer'. A small employer is defined as one employing fewer than 15 employees.

#### 'Large' employers

The minimum employment period is six months for an employee employed by a large employer. A large employer is defined as one employing 15 employees or more.

## What 'threshold' matters must an employee satisfy before Fair Work Australia will consider a claim?

Fair Work Australia will consider the following matters before looking at the 'merits' of any claim:

- whether the application was lodged in time (it must be lodged within 14 days)
- whether the employee had completed the 'minimum employment period' (as described above)
- whether the dismissal was consistent with the Small Business Fair Dismissal Code (applies to small businesses only)
- Whether there was a 'genuine redundancy'.

## What is a genuine redundancy?

A 'genuine redundancy' is when the employee is terminated:

- because the employer no longer wants anyone to do the job because of changed operational requirements (restructure, downsizing etc.); and
- the employer has complied with award consultation requirements (consultation with affected employees and, where applicable, their union); and
- It was not reasonable in all the circumstances for the employer to redeploy the person within the employer's enterprise, or the enterprise of an associated entity of the employer.

Where all of the above criteria are satisfied – no unfair dismissal will be found to have occurred.

***Remember:** Review your applicable award or enterprise agreement and ensure you have complied with any consultation requirements BEFORE making any employee redundant or an unfair dismissal can be found to have occurred.*

The small business fair dismissal code is a code produced by Fair Work Australia in accordance with the requirements of the legislation. It applies to small employers (as described above) and states that where the small employer follows the code in terminating an employee, no finding of unfair dismissal shall occur. We advise employers to still consider issues such as valid reason carefully before implementing a termination under the code.

A copy of the code is also available as a fact sheet for you to download.

## What does Fair Work Australia consider to be an unfair dismissal?

A person will be unfairly dismissed if Fair Work Australia is satisfied that the employee:

- was dismissed at the initiative of the employer (which includes where an employee is forced to resign by the employer); and
- The dismissal was harsh, unjust or unreasonable

(Remember: the above cannot be found to have occurred where a genuine redundancy has occurred or the Small Business Fair Dismissal Code applied and was complied with.)

## What is considered in determining what is harsh, unjust or unreasonable?

In determining whether a termination was harsh, unjust or unreasonable, Fair Work Australia must have regard to:

- whether there was a valid reason for the termination related to the employee's capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the employee was notified of that reason; and
- whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and
- if the termination related to unsatisfactory performance by the employee - whether the employee had been warned about that unsatisfactory performance before the termination; and
- the degree to which the size of the employer's undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the undertaking, establishment or service would be likely to impact on the procedures followed in effecting the termination; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal; and
- any other matters it considers relevant

*It is these criteria which will be assessed where an employee satisfies the eligibility requirements to lodge an unfair dismissal complaint. Make sure your disciplinary policies, procedures and practices will stand up to examination against these criteria*

## What remedies might be awarded against the employer should they lose an unfair dismissal?

Reinstatement is the primary remedy. If Fair Work Australia decides it is not possible to reinstate an employee to their former position with the company which employed them, it may order the appointment of that employee to a position with a related entity of the employer; should one exist.

If satisfied reinstatement is not appropriate, Fair Work Australia may order compensation capped at the lesser of:

- One-half of the 'high income threshold' (\$54,150 indexed); and
- The employee's previous 6 months remuneration.

## What should employers do to protect their liability and avoid claims?

Employers should do the following:

- Revise and redraft all disciplinary policies, processes and practices for compliance with the altered requirements;
- Determine whether an employee is suitable for the position prior to the minimum employment period being reached;
- Obtain a copy of and follow the code if a small employer
- Review all employment documentation to ensure they are correct as, should a claim occur, all such documentation may be reviewed by Fair Work Australia including:

## IR FACT SHEET SERIES

- common law contracts/letters of offer
- your determination of the award applicable to the position
- your application of the award (particularly classification and rates)
- pay records
- relevant policies and procedures



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**If you have any questions regarding this fact sheet or would like assistance regarding IR/HR/OHS contact IR Assist for more information:**

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