



Fact Sheet 10

A new dismissal system for small business

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

Under Work Choices, employees in businesses with up to 100 workers could be dismissed without any right to challenge the dismissal as being harsh, unjust or unreasonable. For other employees, the employer could dismiss an employee if it could demonstrate it was for 'operational reasons'.

A new fair dismissal system

The objective of the new unfair dismissal laws is to ensure there are protections for employees from being dismissed unfairly, whilst enabling employers to manage under-performing employees 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.

A simple checklist to aid employers

A simple checklist has been developed to help small business employers to comply 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.

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 2009 is \$108,300 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.

Other exclusions from unfair dismissal remedies include seasonal employment and specified-task employment at the end of which an employee's work is no longer required. The ending of employment that was for a fixed period or task is not considered to be a dismissal.

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, 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 new 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 the new system, 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, 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.

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 comes 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 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

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. However, it is not a requirement of the Fair Dismissal Code that the checklist be completed.

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 of a genuine redundancy?

Yes

No

If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered.

4. 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.

b. The employee defrauded the business.

c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.

d. The employee committed a serious breach of occupational health and safety procedures.

5. 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, you are not required to answer the following questions.

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

Yes

No

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.

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

Yes

No

If Yes, what was the reason?

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

Yes

No

If Yes, please provide details

DECLARATION

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

Signature

Date
