

Fair Work | Fact Sheet



Unfair Dismissal

The information in this sheet concerns the unfair dismissal provisions in the Fair Work Act 2009 (Cth) (FW Act). It only concerns national system employers and Victorian employers.

The FW Act provisions will commence operation on 1 July 2009.

The key differences between unfair dismissal provisions in the Workplace Relations Act (WR Act) and those in the FW Act are:

- The qualifying period or “minimum employment period” is increased from 6 to 12 months for small business employer i.e. employer of less than 15 employees.
- For employers other than small business employers the qualifying period for casuals will be reduced from 12 to 6 months.
- Employees employed for a specified period, for a specified task or for a specified season, who are dismissed prior to the expiration of the period or season or the completion of the task will be able to access unfair dismissal laws.
- The WR Act exemptions for employers with 100 or less employees and for dismissals where reasons for dismissal includes a genuine operational reason are abolished.
- Under the FW Act, dismissal in a case of genuine redundancy will be exempt provided that employer complies with any obligation under a modern award or enterprise agreement to consult about redundancy.
- The genuine redundancy exemption is not available where it would be reasonable in all the circumstances to redeploy the employee within the employer’s business or a related business.
- Dismissal by a small business employer will be exempt if it complies with the Small Business Fair Dismissal Code in relation to the dismissal.

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Who can access the unfair dismissal scheme?

First requirement

- must be an employee of a national system or Victorian employer who has completed minimum employment period (MEP)
 - small business employer – MEP is 12 months
 - if dismissal is before 1 January 2011 a small business employer is an employer with less than 15 full time equivalent employees at the earlier of the time when the person is given notice of the dismissal and immediately before the dismissal
 - reverts to headcount on and after 1 January 2011(excluding casuals who are not employed on a regular and systematic basis)
 - in both cases count employees employed by associated entities
 - other employers – MEP is 6 months
- casual employee must have regular and systematic employment for MEP and reasonable expectation of continuing employment on that basis
- you must count pre- 1/7/09 service when determining whether an employee has served a MEP

The second requirement is that:

- a modern award, award, NAPSA, certified agreement, ITEA, AWA or enterprise agreement must cover or apply to the employee;

OR

- the person's annual rate of earnings must be less than the high income threshold (\$108,300 in 2009-10), pro rating this for part time or casual employees.
 - To calculate whether an employee's earnings exceed the high income threshold you must:
 - include the employee's wages, salary sacrifice benefits and other payments which are guaranteed or determined in advance; but
 - exclude compulsory superannuation contributions, commissions, incentive based payments, bonuses and overtime payments.
 - Fair Work Australia (FWA) may attribute value to certain non-monetary contractual benefits and require these to be added.

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When is a person dismissed for purposes of purposes of FW Act unfair dismissal provisions?

- An employee is dismissed for the purposes of FW Act unfair dismissal provisions when:
 - employment is terminated on the employer's initiative, or
 - the person is forced to resign because of the employer's conduct.
- It is not when:
 - employment terminates because a term which is the subject of a fixed term contract ends, or a task which is the subject of a specified task contract is completed, or the season which is the subject of a seasonal contract ends (unless the substantial purpose of these contracts was to avoid the unfair dismissal provisions);
 - employment terminates because traineeship ends;
 - the person is demoted without a significant reduction in remuneration or duties, and remains employed with employer.

When is dismissal harsh, unjust or unreasonable?

FWA will determine whether dismissal is harsh, unjust or unreasonable having regard to all relevant factors, which will always include:

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

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Small Business Fair Dismissal Code

In the case of a small business employer, a dismissal is not harsh, unjust or unreasonable if it is consistent with the Small Business Fair Dismissal Code. The Small Business Fair Dismissal Code includes the following guidelines:

- An employer can dismiss an employee fairly without providing notice where 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. It is fair to dismiss without notice where an allegation of theft, fraud or violence has been reported to the police, although reporting it is not mandatory and the employer must have reasonable grounds for making the report.
- An employer can fairly dismiss an employee for unsatisfactory conduct or performance if the employee has been clearly warned (either verbally or in writing) that they are not doing the job properly and that they must improve their conduct or performance, or otherwise be dismissed. In addition, the employee must be given a reasonable amount of time to improve their performance or conduct and must also be offered training or an opportunity to develop their skills. Where the employee did not subsequently improve their performance or conduct the employer must tell them that it has grounds for the dismissal and explain the grounds. The employee must then have an opportunity to respond before the dismissal is effected.
- Any unreasonable refusal by the employer to allow the person to have a support person (not a lawyer acting in a professional capacity) present to assist any discussions relating to dismissal will be factor against an employer in determining whether a dismissal was unfair.
- A small business employer can prove compliance with the Small Business Fair Dismissal Code by providing FWA with a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Condensing the Code – a 3 step process for dismissing for unsatisfactory performance

- **Step one** – issue a clear warning that the employee is not performing his/her job properly and must improve to avoid dismissal;
- **Step two** – give the employee a reasonable time to improve and training and other support to develop skills;
- **Step three** – explain the grounds for dismissal and give the employee an opportunity to respond.



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Genuine redundancy

A dismissal is not unfair if it arises as a result of a genuine redundancy. A genuine redundancy arises where the position performed by the employee is no longer required because of changes in the operational requirements of the employer's enterprise.

It is not a genuine redundancy if:

- the employer has not complied with obligations to consult with the employee or their representative about the redundancy arising under a modern award, enterprise agreement, award, NAPSA, certified agreement, ITEA or AWA;
- it was reasonable to redeploy the person within the employer's business or the business of an associated entity.

What is the procedure for bringing a claim?

A claim must be submitted within 14 days of the dismissal taking effect, unless FWA allows an extension.

Claimants must pay a filing fee (\$59.50 in 2009-10).

FWA must consider whether the application was made in time, whether a person was protected from unfair dismissal, whether the dismissal was consistent with the Small Business Fair Dismissal Code and whether the dismissal was a genuine redundancy.

If matters of fact are contested, FWA must conduct a conference or a hearing, otherwise it can consider the wishes of the parties, costs and efficiency in deciding whether to hold a conference or hearing or neither.

FWA has a broad discretion as to how it wants to deal with a claim.

There is only a right of appeal from a decision made by FWA if it considers that this would be in the public interest. Appeal rights in relation to an error of fact may only be granted where the decision involved a significant error of fact.

Lawyers may not be present at unfair dismissal conferences or hearings unless FWA has granted permission for their presence.

Remedies

Reinstatement with or without back pay is still the primary remedy available. Compensation must not exceed the lesser of 6 months' pay or 50% x high income threshold (\$54,150 in 2009-2010).

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In awarding compensation FWA must take into account the viability of the employer's enterprise; the length of service; remuneration the person would have received; efforts to mitigate; amount of remuneration earned during the period after the dismissal; future loss of earnings; and any other matters considered relevant.

Compensation may be reduced if misconduct contributed to the dismissal. Compensation for shock, distress and humiliation must not be included in relation to the manner of the dismissal.

Preparing for FW Act dismissal provisions

- ascertain modern award coverage (this determines scope of unfair dismissal laws);
- review use of casual and fixed term employment (the FW Act provisions give these employees more unfair dismissal rights);
- understand obligations arising under industrial instruments to consult about redundancy (compliance with these is required to avoid retrenchments being challenged through unfair dismissal claims);
- prepare templates and policies for implementation of redundancies (these should ensure that you can prove compliance with consultation obligations and that redeployment is not reasonable);
- review performance management tools and policies (use the Small Business Fair Dismissal Code as a guide because it is likely to be absorbed more generally in FWA case law).



Find out more at:
www.fairworkaustralia.ahri.com.au