

Unfair Dismissal Fact Sheet

Unfair dismissal under the *Fair Work Act 2009* (Cth) ("Act")

The provisions relating to unfair dismissal described below took effect from 1 July 2009. The Act states that the object is to ensure that a "fair go all round" is afforded to both the employer and employee.

The eligibility requirements for bringing a claim and the categories of excluded employees have changed in a number of ways when compared with the previous WorkChoices legislation.

The following employees are excluded from making a claim of unfair dismissal to FWA:

- ▶ **high income employees:** an employee who is not covered by a modern award or enterprise agreement and whose annual rate of earnings exceeds the high income threshold being \$118 100 pa as at 1 July 2011;
- ▶ an **employee who has not completed the minimum period of employment.** This is six months where the employer is NOT a "small business employer" (see below) or 12 months where the employer is a "small business employer";
- ▶ **individual independent contractors;**
- ▶ an **employee employed for a fixed period of time, specified task or specified season** and the time, task or season ends;
- ▶ an **employee subject to a training agreement** and whose employment is limited to the duration of that agreement;
- ▶ an **employee dismissed in a case of genuine redundancy;**
- ▶ an **employee who has been demoted but without a significant reduction in remuneration or duties** and the employee remains in employment;
- ▶ a "small business employer" that has complied with the Small Business Fair Dismissal Code <http://www.fairwork.gov.au/Termination-of-employment/Documents/Small-Business-Fair-Dismissal-Code.pdf>

Small Business

An employee in a small business is precluded from bringing an unfair dismissal claim in the first 12 months of employment with the "small business employer". The Act defines "small business employer" as an employer employing fewer than 15 employees at the time of the dismissal. For the purposes of calculating the number of employees employed by the employer at the particular time:

- ▶ all employees employed by the employer at the time are to be counted;
- ▶ a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis;
- ▶ associated entities are to be taken as one entity; and
- ▶ the employee or any other employee who is being dismissed or terminated is also counted.

A dismissal in a small business is deemed fair if the employer follows the [Small Business Fair Dismissal Code](#).

Other Businesses

An employee in a business that is not considered a "small business employer" cannot bring a claim for unfair dismissal if he or she is dismissed within the first six months of employment.

Redundancy

Where a genuine redundancy is the reason for dismissal, the dismissal will not be unfair. A genuine redundancy occurs where the employer no longer requires the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise.

However employers need to be mindful of certain matters. Prior to making a decision to make a position redundant, the employer must consider redeployment within the enterprise or an associated entity. The employer must also follow any consultation provisions in the relevant award or agreement.

Time for bringing a claim

An unfair dismissal claim must be made within 14 days after the dismissal takes effect. However Fair Work Australia ("FWA") can exercise its discretion to extend the period in which an application can be made by taking into account factors such as the reason for the delay and prejudice to the employer.

FWA must subsequently convene a private conference between the dismissed employee and the employer. At the conference, FWA must take into account the wishes of both parties regarding the way in which it considers and informs itself on the claim. More formal hearings only occur if FWA considers it appropriate in the circumstances. For example, a hearing might be held in order to resolve disputed facts.

Relevant considerations

FWA is able to take into account a variety of matters in considering the merits of a claim, notably:

- ▶ whether there was a valid reason for the dismissal related to the person's capacity or conduct;
- ▶ whether the employee was notified of the reason;
- ▶ whether the employee was given an opportunity to respond;
- ▶ any unreasonable refusal by the employer to allow the employee to have a support person present at discussions relating to the dismissal;
- ▶ whether the employee had been warned about any unsatisfactory performance before the termination (if relevant);
- ▶ if the dismissal related to unsatisfactory performance – whether the person had been warned;
- ▶ 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 would be likely to impact on the procedures followed in effecting the dismissal; and
- ▶ any other relevant matters.

Remedies

With respect to unfair dismissal, FWA may order reinstatement or monetary compensation. The maximum that can be awarded is six months pay or half the amount of the high income threshold (as set out above), whichever is the lesser.

Generally, each party must bear their own costs in an unfair dismissal claim. Costs could be ordered if a person makes the application (or responded to an application) vexatiously, without reasonable cause, or the

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application or the response had no reasonable prospect of success. As a consequence of these changes, there is a potential for costs to be awarded against employers who defend claims which are without merit or any reasonable prospect of success.

We can assist you to make sure you do not breach your legal obligations. To find out more about the services that we offer please contact one of our workplace lawyers or workplace consultants on (02) 8030 8888.

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