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Understanding Unfair Dismissals under the Fair Work Act

An unfair dismissal can take many forms, including issues such as a disingenuous redundancy, a dismissal inconsistent with the Small Business Fair Dismissal Code (the Code), or a dismissal that is harsh, unjust or unreasonable. The *Fair Work Act 2009* (the Act), effective from 1 July 2009, sets out the parameters of an 'unfair dismissal'.

Qualifying period

All dismissed employees are excluded from making an unfair dismissal claim if they have not completed the applicable minimum employment period at the time of their termination. The Act prescribes the following minimum employment periods:

- 12 months' for employees of small businesses; and
- 6 months' for all other employees.

Small businesses

A small business, for the purposes of unfair dismissal, is defined by the

Act as a business with fewer than 15 employees. If small business employers wish to dismiss an employee, they should follow the procedures outlined in the Code and its associated checklist, to avoid or defend an unfair dismissal claim successfully.

Aspects of the Code

The Code recognises that summary dismissal (termination of an employee without notice or warning) may be warranted in issues of serious misconduct, such as theft, fraud, violence or serious breaches of occupational health and safety procedures.

In the case of an under-performing employee, the Code requires the employee be warned and given a reasonable opportunity to improve his or her performance. Where there is no improvement, the employer may dismiss the employee. However, if the employee makes a claim for unfair dismissal, the employer may need to provide evidence of compliance with the Code, such as a copy of the completed Code checklist or copies of any written warnings to the employee.



Relevant factors in determining whether a dismissal is unfair

In deciding whether a termination is harsh, unjust or unreasonable, Fair Work Australia (**FWA**) will consider several factors, including (but not limited to):

- whether there was a valid reason for the dismissal;
- whether the employee was notified of the risk of their employment being terminated (by either verbal or preferably a written warning);
- whether the employee was given an opportunity to respond and improve (for performance-related dismissals);
- the size of the employer's business (including whether it had a dedicated human resources function) and the degree to which that would impact on the procedures followed in the dismissal; and
- whether the employee was permitted to have a support person present to assist at any discussions over the dismissal.

Genuine redundancy

An employer may dismiss an employee for reasons of 'genuine redundancy' and such a dismissal will not be considered unfair. A genuine redundancy occurs when the employer no longer requires a particular person's job to be performed by anyone because of changes in the business' operational requirements. In these circumstances, the employer must also have complied with any consult obligations on the redundancy, in any relevant modern award or enterprise agreement.

An employer intending to claim a termination was as a result of 'genuine redundancy' must be able to prove that redeployment was not possible within the employer's business or businesses of any of its associated entities.

Procedural steps

Unfair dismissal claims must be lodged with FWA within 14 days of the termination taking effect (or such further period that FWA allows). Once an application for unfair dismissal has been lodged, FWA will investigate it. This will involve discussions with the employer and the employee to try to resolve the claim and may include a conference or hearing. Parties will only be entitled to be represented by a lawyer if FWA grants permission.

Remedies for unfair dismissals

The preferred remedy under the Act is reinstatement, however FWA may consider ordering payment of compensation in certain instances. Any compensation awarded will be capped.

If FWA orders reinstatement of a dismissed employee, the employer must return the employee to the position they were employed in immediately before the dismissal. Alternatively, for example where this is not possible, the employee must be appointed to another position on terms and conditions no less favourable than those on which they were employed previously.

In addition to reinstatement, FWA may also order the employer to pay the person an amount for wages lost as a result of the dismissal.

To avoid wasting time and money defending unfair dismissal claims, employers should seek professional advice before terminating any employees, to ensure they comply with the Act.

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