



UNFAIR DISMISSAL

The *Fair Work Act 2009* (Cth) (FW Act) increases the protection for employees who have been unfairly dismissed.

Who can make an unfair dismissal claim?

A person can make an unfair dismissal claim if they have:

- completed the minimum employment period; and
- are covered by a modern award (or award-based transitional instrument) or an enterprise agreement (or agreement-based transitional instrument) applies to the person.

In some situations, high earning employees will be excluded from unfair dismissal protections. All employees who are covered by an award (or award-based transitional instrument) or who have an enterprise agreement (or agreement-based transitional instrument) applying to their employment will have access to unfair dismissal remedies. However, if neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if the sum of their annual rate of earnings and any other amounts worked out in accordance with the regulations is less than the high income threshold (which from 1 July 2009 is \$108,300, indexed annually).

Casual employees are unable to make an unfair dismissal claim unless they were employed on a regular and systematic basis and they had a reasonable expectation of continuing employment on that basis.

What is the minimum employment period?

Employees must have served a minimum employment period before they can make an unfair dismissal claim. The minimum employment periods are:

- one year for employees of a small businesses (from 1 July 2009 until 31 December 2010 a small business employer is a business with less than 15 full-time equivalent employees. From 1 January 2011, the method of calculation will change to less than 15 employees based on a head count of total employees rather than full-time equivalent employees);
- six months if the employer is not a small business.

What is unfair dismissal?

A person has been unfairly dismissed when Fair Work Australia is satisfied that:

- the person has been dismissed;
- the dismissal was harsh, unjust or unreasonable;
- the dismissal was not a case of genuine redundancy; and
- where the employer is a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code.

An employee has been dismissed if the employee's employment was terminated by the employer or if the employee resigns because he or she was forced to do so by the conduct of the employer (known as constructive dismissal).

A person is not formally dismissed if:

- The person was employed for a specified period, a specified task or a specified season and the employee had their employment terminated at the end of that period, task or season.



- The person was employed for a specified period of time under a training arrangement (such as a traineeship or apprenticeship).
- The person was demoted without a significant reduction in pay or duties and they remained with the same employer.

What constitutes harsh, unjust or unreasonable?

Employers need to ensure that there is procedural fairness when dismissing an employee. When considering whether a dismissal was harsh, unjust or unreasonable Fair Work Australia will look at:

- (a) 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).
- (b) Whether the person was notified of that reason.
- (c) Whether the person was given any opportunity to respond to that reason.
- (d) 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.
- (e) If the dismissal was related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal.
- (f) The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in making the dismissal.
- (g) The degree to which the absence of dedicated human resource management specialists or expertise in the employer's enterprise would be likely to impact on the procedures followed in the dismissal.
- (h) Any other matters that Fair Work Australia considers relevant.

These factors are substantially the same as those applying under the previous workplace relations law other than (d) above. The FW Act does not define "support person"; it can be any person that the employee wants present. This doesn't mean that an employer is required to offer an employee the opportunity to have a person present. However, it is one factor that Fair Work Australia must consider when deciding whether a dismissal was unfair, taking into account the capacity of the employee to respond to allegations put to him or her without such a support person being present.

What is a genuine redundancy?

A redundancy is a genuine redundancy and not unfair dismissal if:

- (a) an employee's job is no longer required to be performed by anyone because of changes in the operational requirements of the business; and
- (b) the employer has complied with any requirement in a modern award or enterprise agreement to consult about the redundancy.

The term "operational requirements" is not defined in the FW Act and is distinct from the "operational reasons" that applied in the previous workplace relations legislation. Examples of changes in the operational requirements of an enterprise could include:

- A machine is now available to do the job performed by the employee.
- The employer's business is experiencing a downturn, for example the employer only needs three people to do a particular task or duty instead of five.
- The employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.



A redundancy is not considered to be a genuine redundancy if it was reasonable for the employer to redeploy the person in another position within the business or with an associated entity of the employer. An associated entity for the purposes of the FW Act has the same meaning as in the *Corporations Act 2001* (Cth). The FW Act does not provide guidance on whether redeployment should be at the same level as the position held by the employee made redundant. For larger employers, the requirement to consider positions in associated entities will mean that all available positions across the business group or with a joint venture partner will need to be taken into account when deciding what redeployment opportunities are available. Employers in the building and construction industry are encouraged to seek advice how on to apply the redundancy requirements in their business.

Small Business Fair Dismissal Code

The Small Business Fair Dismissal Code describes the steps for a small business employer to follow when dismissing an employee. An employer does not have to follow the Code, but if the dismissal is consistent with the Code, Fair Work Australia cannot find the person was unfairly dismissed. If the Code is not followed, the claim will be treated the same as any other unfair dismissal claim and may be found to be fair or unfair depending on the circumstances.

The Small Business Fair Dismissal Code allows for a dismissal without notice or warning in cases of serious misconduct such as theft, fraud or violence.

For underperformance, the Code requires that the employee be given a valid reason why they are at risk of being dismissed and a reasonable opportunity to rectify the problem.

The Code has a voluntary checklist that small business employers can complete at the time of dismissal and keep in case an unfair dismissal claim is made. It is not a requirement for the checklist to be completed. The checklist contains information such as if:

- The employee was stealing money or goods from the business
- The employee committed a serious breach of occupational health and safety procedures
- The employee was clearly warned (either verbally or in writing) that the employee was not doing the job properly and that they would have to improve his or her conduct or performance, or otherwise be dismissed.
- The employee was provided with any training or opportunity to develop their skills
- The employee voluntarily resigned or abandoned his or her employment.

A copy of the Small Business Fair Dismissal Code is available on the Fair Work Australia website at www.fwa.gov.au.

Procedures for unfair dismissal claims

An application for Fair Work Australia to consider an unfair dismissal claim must be made within 14 days of the date of dismissal unless there are exceptional circumstances.

If there are any disputed facts relating to the case, then Fair Work Australia must conduct a conference or hold a hearing. Fair Work Australia will take into account the wishes of the parties regarding how the matter is considered, but will only hold a hearing if it is the most effective and efficient way to resolve the matter. Conferences must be held in private.

Remedies for unfair dismissal

If Fair Work Australia finds that a person has been unfairly dismissed, the primary remedy is reinstatement of the employee, either to the same position or to a different position, provided that the terms and conditions of employment are not less favourable. In addition, Fair Work Australia may make



an order for the employer to pay the employee an amount for remuneration lost and to maintain continuity of service.

As an alternative to reinstatement Fair Work Australia can order the payment of compensation to the person. It must only do so if reinstatement is not appropriate. Fair Work Australia will take into account a range of factors in deciding the level of compensation, including the effect of the order on the viability of the employer's business, the length of the person's service with the employer and the amount of any remuneration earned by the person from other employment since the dismissal. The maximum compensation is 6 months pay.

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Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.