



June 2009

E-Update

Unfair dismissal provisions under the *Fair Work Act* and the new *Small Business Fair Dismissal Code*

With the more broadly applying unfair dismissal provisions of the *Fair Work Act* coming into effect as of 01 July 2009, smaller companies with less than 100 FTE (Full Time Equivalent) staff will need to be diligent in order to avoid successful challenges for unfair dismissal.

As of 01 July 2009, all employers with 15 FTEs or more must have disciplinary/performance management policies and procedures in place that provide for proper investigation of performance and behaviour issues and provide employees with a fair chance to achieve their agreed key performance/assessment criteria. Employers with fewer than 15 FTEs must comply with a newly introduced initiative, the *Small Business Fair Dismissal Code*.

For those employers with 15 FTEs or more, a person will be considered unfairly dismissed if the new court with jurisdiction, Fair Work Australia (FWA), is satisfied that the dismissal was harsh, unjust, or unreasonable. The criteria for determining whether unfair dismissal will remain the same as the current criteria, except there will be an additional requirement that FWA must take into account any unreasonable refusal by the employer to allow the employee to have a support person present in any discussions relating to dismissal.

For an employee to qualify for an unfair dismissal claim they must have been continuously employed by their employer for at least 6 months (or in the case of an employer with fewer than 15 FTEs, 12 months continuous service).

For companies with less than 15 FTEs, the *Fair Work Act* provides a new code of practice called the *Small Business Fair Dismissal Code*.

Under the Code, employers must answer the following questions to determine whether a dismissal is fair:

1. How many FTEs are employed in the business?

If under 15 FTEs, the *Small Business Fair Dismissal Code* applies.

2. Has the employee been employed as a full-time, part-time, or casual employee for 12 months or more?

If "no", the employee is excluded from making an unfair dismissal claim.

3. Was the employee dismissed due to a genuine redundancy and was redeployment considered?

If "yes", the employer must be able to explain the reason for the redundancy, such as economic downturn, introduction of new technology requiring less staff, improved efficiencies or another legitimate reason; and be able to address what redeployment options, if any were available, where considered.

4. Do any of the following statements apply?

The employee was dismissed because the employer believed on reasonable grounds that:

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- a) The employee was stealing money or goods from the employer/business,
- b) The employee defrauded the employer/ business,
- c) The employee threatened the employer, fellow employees, or clients with violence, or committed violence in the workplace, or
- d) The employee committed a serious breach of occupational health and safety procedures.

5. Did the employer dismiss the employee for any form of serious misconduct?

If "yes", what was the serious misconduct?

If the employer answers "yes" to any part of questions 3, 4, or 5, the employer is not required to answer the following questions:

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

If "yes":

- a) Did the employer properly 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 the employer 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 the employer offer to provide the employee with any training or opportunity to develop their skills?
- d) Did the employee subsequently improve their performance or conduct?
- e) Before dismissing the employee, did the employer tell the employee the reason for the dismissal and give them an opportunity to respond?
- f) Did the employer keep any records of warning(s) made to the employee or of discussions on how their conduct or performance could be improved?

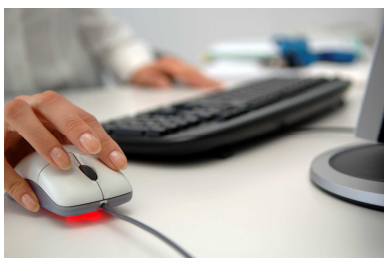
7. Did the employer dismiss the employee for any other reason?

If "yes", what was the reason?

8. Did the employee voluntarily resign or abandon their employment?

If "yes", the employer must be able to provide details/justification for this belief.

If you have any questions, or want more information about the unfair dismissal provisions under the *Fair Work Act* and the new *Small Business Fair Dismissal Codes*, please contact Workplace Law on 3226 9099 or 5597 8888.



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