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# UNFAIR DISMISSAL AND THE FAIR WORK AUSTRALIA ACT 2009

## Introduction

With the election of the Labor Government in November 2007 the previous government's Work Choices legislation was substantially changed. The WorkChoices legislation was severely criticised by unions and other for depriving workers of fundamental rights, including the right to make an unfair dismissal claim. WorkChoices was supported by industry and employer groups, who claimed that its provisions accelerated economic growth.

From the 1<sup>st</sup> July 2009 small businesses will no longer be exempt from unfair dismissal laws. The new Fair Work laws will replace the WorkChoices law. No business, regardless of its size, will be exempt from the unfair dismissal provisions. The exemption that was previously in place for businesses with 100 employees or less is no more.

The industrial law in Australia has undergone significant changes over the past 10 years and this in itself makes it very hard for students, workers or employers to keep up with the law. This production will explain unfair dismissal in easily understood terms. It is important for everyone to clearly understand their rights.

## The Constitution

Some employees and employers are covered by Commonwealth or Federal legislation. Others are covered by state legislation.

## What is the difference between an unfair dismissal and an unlawful dismissal?

It's illegal for an employer to dismiss an employee for an unlawful reason. Such as:

- a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (some exceptions apply, such as where it's based on the inherent requirements of the job)
- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours
- non-membership of a trade union
- seeking office as, or acting as, a representative of employees

- being absent from work during maternity leave or other parental leave
- temporary absence from work to engage in a voluntary emergency management activity
- filing a complaint, or participating in proceedings against an employer.

An unlawful termination is never justified and an employee can seek compensation or some other order. An unfair dismissal may be allowed unless certain conditions are established; such as the necessary employment period.

If a person has been dismissed unlawfully they can apply to Fair Work Australia for help. An application must be made within **60 days** after the dismissal took effect, although Fair Work Australia may accept late applications.

### What then is an unfair dismissal?

A person has been unfairly dismissed if Fair Work Australia finds that:

- The employee was dismissed, and
- The dismissal was harsh, unjust or unreasonable, and
- The dismissal was not a case of genuine redundancy, and
- The dismissal was not consistent with the Small Business Fair Dismissal Code, where the employee was employed by a small business

A small business is defined as one that employs less than 15 full-time equivalent employees.

### Who can make an unfair dismissal application?

Before an employee can make an unfair dismissal claim they must surmount two obstacles.

Firstly they must be covered by the national workplace relations system.

In other words they must be:

- Employed by a constitutional corporation. This simply means employed by a company; a public company (ABC Limited) or a private company (ABC Pty Ltd)
- Employed in Victoria. Some time ago the Victorian Government handed all its industrial powers over to the Commonwealth. Victoria is the only state to do this. There is no dual system in Victoria, only the federal system.
- Employed in the Australian Capital Territory or the Northern Territory. These are both territories, not states, so the federal legislation applies. There is no dual system in the territories.
- Employed by the Commonwealth Government or a Commonwealth authority. As an example a Commonwealth authority could be the Australian Broadcasting Corporation, the Australian Wine and Brandy Corporation or the Australia Council.

- A waterside worker, maritime employee or flight crew officer in interstate or overseas trade or commerce

### Who is not covered by the unfair dismissal laws?

A person cannot take advantage of the unfair dismissal laws if:-

- They are contractors.
- They voluntarily resign and the resignation was not forced to do so by the conduct of the employer
- The person is employed under a contract for a specified period of time, or a specified task or the duration of a specified season
- They are trainees employed for a specific period and dismissed at the end of that arrangement
- An employee has been demoted where there is not significant reduction in their remuneration or duties and who remain employed by the same employer

So if a person falls within one of these categories, they cannot claim for unfair dismissal.

The next problem is the Act requires an employee, before he or she can claim for unfair dismissal, to have completed minimum employment periods.

There are 2 different periods:-

- Where the employer employs less than 15 full-time equivalent employees (this is defined as a small business) the employee will need to establish that they have worked for that employer for a period of 1 year or more. The Government decided that small businesses requiring more favourable treatment in regards to unfair dismissal laws
- Where the business employs 15 or more full-time equivalent employees the period of minimum employment is 6 months

Besides fulfilling a minimum period of employment qualification any person who earns more than \$108,300 per year must also establish one of the following:-

1. That the person is covered by an industrial award or
2. An enterprise agreement applies to that person

(The amount of \$108,300 is indexed annually)

An award is simply the current industrial award that applies to that person's employment. An example of an award is the Australian Public Service Award.

An enterprise agreement is an agreement made between an employer and employees, which is registered; it also sets out the terms and conditions of employment with that particular employer.

After establishing who can make an application, what is a harsh, unjust or unreasonable dismissal?

In considering whether a dismissal was harsh, unjust or unreasonable, Fair Work Australia must take into account the following:-

- 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), and
- Whether the person was notified of that reason, and
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person, and
- 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, and
- If the dismissal related to unsatisfactory performance by the person whether the person had been warned about that unsatisfactory performance before the dismissal, and
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures following in effecting the dismissal, and
- 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 following in effecting the dismissal, and
- Any other matters that Fair Work Australia considers relevant

Going back to the Act it says:

A person has been unfairly dismissed if Fair Work Australia finds that:

- The employee was dismissed, and
- The dismissal was harsh, unjust or unreasonable, and
- The dismissal was not a case of genuine redundancy, and
- The dismissal was not consistent with the Small Business Fair Dismissal Code, where the employee was employed by a small business

### What is a genuine redundancy?

A person's dismissal was a case of genuine redundancy if:

- The person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise, and
- The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about redundancy

A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

- The employer's enterprise
- The enterprise of an associated entity of the employer

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Under the previous Work Choices legislation employees in businesses with up to 100 employees could be dismissed for any reason without any right to challenge the dismissal as being harsh, unjust or unreasonable. Also if the employer could demonstrate that the dismissal was for 'operational reasons' there would be no right to challenge that decision.

A new system for small business has now been introduced. It will allow employers to dismiss employees who are under-performing and that dismissal will not be able to be challenged as long as the employer follows the provisions of the Code.

Until 1<sup>st</sup> January 2011 a small business is defined as a business with fewer than 15 full-time equivalents. After the 1<sup>st</sup> January 2001 a small business is a business with 15 employees, whether they are full-time, casual or part-time.

The Government recognizes that small businesses do not have human resource departments and are usually unable to redeploy workers to other areas or departments.

Remember an employee cannot claim for unfair dismissal unless that person has been employed for a minimum period of 12 months.

### Small Business Fair Dismissal Code

The Code operates from the 1<sup>st</sup> July 2009.

An employer may immediately dismiss an employee without notice or warning when the employer believes on reasonable grounds that that employee has engaged in violence, theft, fraud or serious breaches of occupational health and safety. In cases of violence, fraud or theft a report should be made to the police as this will corroborate the actions of the employer.

In all other cases the employer must give the employee a reason why he or she is at risk of being dismissed. It must be a valid reason based on the employee's conduct or capacity to do the job.

The Code says that the employee must be warned verbally or in writing that they risk being dismissed if there is no improvement. It is always preferable to warn an employee in writing. The document then can form a vital part of the evidence. Verbal warnings can be misunderstood or misinterpreted.

The employer must provide the employee with an opportunity to respond to the warning. He or she must also be given a reasonable chance to rectify the problem in the warning. This highlights the requirement to provide the employee with natural justice; a fair system. In a serious case instant dismissal may be appropriate in all others it is only fair that the problems are pointed out, a plan is put in place to rectify the problem and if that doesn't work then dismissal may be the only appropriate outcome.

If dismissal is a possibility, the employee can have a support person present. That person cannot be a lawyer.

If an employee makes an unfair dismissal claim, the small business employer will need to prove that they complied with the Code. There must be evidence of a warning, except in cases of summary dismissal. There may be witness statements, copies of warning letters, a letter of termination, CCTV footage, photographs etc.

Fair Work Australia has drawn up a checklist for dismissal by small business employers. All employers who dismiss an employee need to follow this checklist closely. Copy attached.

### Costs

A person involved in an unfair dismissal case before Fair Work Australia must pay their own costs.

### Remedy

An unfair dismissal claim must be lodged with Fair Work Australia within 14 days. Mediation will be tried first and if that fails then Fair Work Australia may decide the outcome of the case in either a conference

or by holding a formal hearing. At any hearing legal representation may be permitted, but only with Fair Work Australia's permission.

If it is decided that the dismissal was harsh, unjust or unreasonable then reinstatement will be ordered unless it is not in the interests of either of the parties. Where reinstatement is not feasible, compensation may be order ed. Compensation is capped at 6 months' pay.