



15th November 2011

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Hi Jules!

## Unfair Dismissals

Workwise has seen a noticeable increase in our clients being taken for alleged unfair dismissal. The following information is pertinent to managing terminations appropriately in your workplace whether you are a Federal or State system employer.

### **What is unfair dismissal?**

An unfair dismissal occurs where an employee makes an unfair dismissal remedy application and 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 a business that employs less than 15 employees.

### **Who is eligible to make an application?**

An employee is eligible to make an application for unfair dismissal if they have completed the

minimum employment period of:

- one year - where the employer employs less than 15 employees (a small business employer)
- six months - where the employer employs 15 or more employees.

### **What is harsh, unjust or unreasonable?**

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

- 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),
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person,
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal,
- if the dismissal related to unsatisfactory performance by the person - whether the person had been warned about that unsatisfactory performance before the dismissal,
- 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 or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal,
- any other matters that Fair Work Australia considers relevant.

### **What is 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 employer to consult about the redundancy.

A person's dismissal is 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, or
- the enterprise of an associated entity of the employer.

The Small Business Fair Dismissal Code provides that:

***Summary Dismissal***

Is for an employer to dismiss an employee without notice or warning when the employer believes, on reasonable grounds, that the employee's conduct is sufficiently serious to justify immediate dismissal.

Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures.

For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the Police. Of course, the employer must have reasonable grounds for making the report.

***Other dismissal***

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

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

***Procedural matters***

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

**What are the remedies for unfair dismissal?**

If Fair Work Australia is satisfied an employee was unfairly dismissed then it may order the employee's reinstatement together with continuity of service and lost remuneration, or the payment of compensation to the employee if satisfied that reinstatement is inappropriate.

### **Who pays the costs?**

An employee and employer involved in an unfair dismissal case before Fair Work Australia must generally meet their own costs.

Fair Work Australia may order an employee or employer to bear some or all of the costs of the other party if the unfair dismissal application or response to it:

- was frivolous, vexatious or made without reasonable cause
- had no reasonable prospect of success.

In certain circumstances, Fair Work Australia may also make a costs order against a lawyer or paid agent representing a party in dismissal case.

Still Confused?? Call Workwise for further assistance and advice.

Kind Regards

**The Workwise Team**

### **Policy and Procedures**

***Does your business have a current set of customised Policy and Procedures which support your workplace??***

***Call us now for further information on how to obtain a current set of Foundation Policy and Procedures.***

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**Map Where you are at on our 'Best Practice Model'.**

**By now you should have received information about the first five stages of the model.**

#### **1. Time and Wages Compliance Audits**

Are you confident that your payroll practices are compliant and in line with the applicable Modern or State Awards??

#### **2. Employment Documentation**

Do you have a clearly written and compliant employment agreement which stipulates your employment arrangements and provides you with protections in relation to confidentiality and restraint of trade - to name but two areas.

#### **3. Policy and Procedures**

From a risk management perspective we encourage you to take a pro-active step and reassure yourself that there are no non compliant or discriminatory practices within your business.

#### **4. Job Description Forms**

A good JDF will illustrate clear performance and guidelines for that 'position' which should then eliminate issues within your workplace in regards to Performance and responsibility of any one of your employees within your business.

**5. Individual Performance Appraisals**

A Well crafted IPA provides clear direction to employees on what they are expected to achieve and how that will be achieved.



Have you forgotten to advise us of any changes - please let us know by emailing [clientliaison@workwiseby.com.au](mailto:clientliaison@workwiseby.com.au) so that we can update our records.

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## Seminars

### Bunbury

## Due to Popular Demand - 5th seminar

Topic : The Model 'Work Health & Safety Act' (WHS)

Where: Small Business Centre

177 Spencer Street Bunbury

When: Wednesday 30th November 2011- 6pm start

Please call The Small Business Centre on 9791 2666 for further details

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