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## FAIR WORK ACT 2009 - FACT SHEET 3 Unfair Dismissal

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A prohibition against unfair dismissal of eligible employees has been a feature of Federal industrial/workplace relations legislation since 1993. Following the Work Choices reforms in 2006 to the key Federal workplace relations legislation, the *Workplace Relations Act 1996* (WRA), the eligibility criteria for unfair dismissal claims was significantly restricted.

The unfair dismissal provisions of the WRA were replaced by the unfair dismissal provisions of the *Fair Work Act 2009* (FWA) and took effect on **1 July 2009**.



### Who is eligible to make a claim?

A person will be eligible to make an unfair dismissal claim to Fair Work Australia *if* one or more of the following apply to her/him:

- a modern award covers the person;
- an enterprise agreement applies to the person in relation to the employment;
- the sum of the person's annual rate of earnings and such other amounts (if any) worked out in accordance with the *Fair Work Regulations 2009* are less than the high income threshold (currently \$108,300 and indexed each July).

Further, in order to be eligible to make an unfair dismissal claim, the person must have completed a qualifying (probationary period) which is 12 months in the case of a **small business employer** and six months for larger employers. This means that a small employer which dismisses an employee who has provided less than 12 months service is *not* at risk of an unfair dismissal claim.

### How are claims made?

Claims are made to Fair Work Australia ([www.fwa.gov.au](http://www.fwa.gov.au)) and must be made within **14 days of the dismissal**. That said, Fair Work Australia is open to consideration of extension of time applications.

Fair Work Australia serves the claim on the former employer of the person and that entity is then

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required to lodge an Employer's Response.

The matter is then set down for a conciliation conference, at which time the majority of matters are resolved between the parties. If the matter is not resolved at this stage, the Applicant has the option of asking that the matter proceed to hearing.

In order for either party to be legally represented, leave must be sought.

## When is a dismissal unfair?

A dismissal will be unfair if Fair Work Australia is satisfied that:

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

## Meaning of dismissal

Under the FWA a termination of employment (also known as a dismissal) is defined as "termination of employment at the initiative of the employer". The FWA also defines what is *not* a dismissal to include where a person is **demoted** and the demotion:

- does not involve a significant reduction in his/her remuneration or duties; and
- he/she remains employed by the employer who effected the demotion.

## Harsh, unjust or unreasonable

For companies with more than 15 employees, the matters which will be taken into consideration by Fair Work Australia when determining whether or not a dismissal was "harsh, unjust or unreasonable" are:

- 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 dismissal; and

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- 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 followed in effecting the dismissal; and
- the degree to which dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that Fair Work Australia considers relevant.

## ***Genuine redundancy***

A person's dismissal will be 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 the redundancy.

## ***Remedies***

In the event of a finding that a person has been unfairly dismissed, Fair Work Australia can order:

- reinstatement or re-employment (section 391(1));
- maintenance of continuity (section 391(2));
- lost pay (section 391(3)); and,
- compensation (section 392) - up to a maximum of 26 weeks pay.

The matters which Fair Work Australia must take into consideration when determining the appropriate remedy are:

- the effect of the order on the viability of the employer's enterprise; and
- the length of the person's service with the employer; and
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- the length of the person's service with the employer; and
- the remuneration that the person received, or would have been likely to receive, if the person had not been dismissed; and

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- the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- any other matter Fair Work Australia considers relevant.

The amount of compensation which may be awarded is **capped** at an amount equivalent to what the employee had been paid (total remuneration) in the 26 weeks immediately prior to the dismissal: *section 392(5)*.

Fair Work Australia is able to order that compensation be payable by **instalments**: *section 393*.

The FWA also includes a specific provision that:

- if Fair Work Australia is satisfied that **misconduct** by the person contributed to the employer's decision to dismiss him/her, Fair Work Australia must reduce the amount of compensation it would otherwise have ordered by "*an appropriate amount on account of the misconduct*": *section 392(3)*;
- the amount ordered by Fair Work Australia must not include a component by way of compensation for **shock, distress or humiliation** or other analogous hurt, caused to the person by the manner of the dismissal: *section 392(4)*.

## DO YOU HAVE ANY QUESTIONS OR WOULD LIKE TO KNOW MORE?

Getting the answers you need is as easy as giving us a call or sending us an email. We look forward to hearing from you.

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