
10 Steps to a Fair Dismissal

A Plan to Avoid Dismissal Problems



Welcome and Introduction

Michael Smith

Integrated HR Solutions



Integrated HR Solutions

Housekeeping

- **Emergency Exits / Evacuation**
- **Smoking**
- **Toilets**
- **Break Times**

Disclaimer

This presentation is intended to provide general information only and does not constitute legal advice.

Whilst every effort has been taken in preparing this presentation, no responsibility is accepted by the author for the accuracy of the information contained therein, and all liability is expressly disclaimed for any damage which may arise from any person acting on any statement or information contained herein.

Session Outline

- **A definition of dismissal**
- **The legislative framework**
 - ✓ **Unfair Dismissal**
 - ✓ **Unlawful Termination**
 - ✓ **Redundancy**
- **Fair Dismissal Action Plan**

Dismissal - a Definition

- **Termination of employment is when an employee's contract of employment with an employer ends. This may occur because of redundancy, resignation or dismissal**
- **Dismissal is the termination or ending of an employment contract by an employer**

Reasons for Dismissal

There are many possible reasons for dismissal, including:

- **performance, capacity & conduct**
 - ✓ not meeting expected standards of performance
 - ✓ loss of ability to perform duties
 - ✓ serious & wilful misconduct
- **retrenchment of an employee**
- **employer opts not to renew an expired contract**
- **business goes into liquidation or is wound up**
- **employee claims employer has altered the employment contract in an important respect & effectively terminated the contract (constructive dismissal)**

Unfair Dismissal

A dismissal is unfair if:

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

Unfair Dismissal

- **Factors considered in determining whether a dismissal was “harsh, unjust or unreasonable”:**
 - ✓ if there is a “valid reason” for dismissal relating to conduct or capacity
 - ✓ if the employee is notified of the reason and given an opportunity to respond
 - ✓ any unreasonable refusal to allow a support person present at discussions relating to dismissal
 - ✓ if the dismissal is based on performance whether a warning was provided prior to dismissal
 - ✓ the impact of the size of the employer’s enterprise on the dismissal process including the absence of dedicated HR expertise
- **Reinstatement or compensation (lesser of 26 weeks or \$54150)**

Who Can Apply for Unfair Dismissal

To apply for Unfair Dismissal, employees must be:

- covered by the national workplace system
- eligible to apply
 - ✓ have completed minimum employment period of at least 6 months (or 12 months for a “small business” employer)
 - ✓ be covered by a modern award or pre-modern award instrument e.g. NAPSA
 - ✓ be covered by an enterprise agreement or agreement based transitional instrument
 - ✓ be earning less than \$113,800 p.a.

Who Cannot Apply

The following employees are not eligible to make an unfair dismissal application:

- **independent contractors**
- **employees who resign (& were not forced by employer's conduct)**
- **employees employed under a contract for a:**
 - ✓ **specified period of time**
 - ✓ **specified task**
 - ✓ **duration of a specified season**
- **employees under a training arrangement**
- **employees who have been demoted where the demotion did not involve significant reduction in remuneration or duties**

Small Business Employers

- **A small business employer is someone who employs fewer than 15 employees**
 - ✓ based on headcount
 - ✓ irrespective of hours worked
 - ✓ includes casuals employed (regular & systematic)
 - ✓ includes employees of associated entities
 - ✓ includes the employee being dismissed
- **Small business employers benefit from**
 - ✓ 12 month minimum employment period
 - ✓ Small Business Fair Dismissal Code

Unlawful Termination

It is unlawful to dismiss an employee for specified reasons (“general protections dismissal”) including:

- **discrimination (e.g. race, sex, pregnancy, age)**
- **temporary absence because of illness or injury**
- **trade union membership or non membership**
- **participation in trade union activities outside working hours (in working hours with employer’s consent)**
- **seeking office/acting as an employees’ representative**
- **absence during parental leave**
- **absence during voluntary emergency work**
- **filing a complaint against an employer**

Redundancy

- **National Employment Standards provide for minimum severance payments & notice provisions in event of redundancy**
- **Severance payments apply to all national system employers who employ 15 or more employees**
- **Includes award/agreement free employees from 1 January 2010**

Redundancy

A genuine redundancy will not be an unfair dismissal. Dismissal is a “genuine redundancy” if:

- the employer no longer needs the person’s job to be done by anyone because of changes in the operational requirements of the business**
- the employer followed any consultation requirements in a modern award, enterprise agreement or other applicable instrument**
- the employee cannot be reasonably deployed in the business or an associated entity**

Redundancy

Generally, under NES, redundancy pay is not payable to an employee who:

- **has less than 12 months continuous service**
- **works for a small business employer**
- **is employed for specified period of time, a specified task, or duration of a specified season**
- **is terminated for serious misconduct**
- **is a casual employee**
- **is subject to a training arrangement for a specified period of time**
- **is an apprentice**
- **is covered by an industry specific redundancy scheme in a modern award**

What Can We Do?

Having a clear plan may not completely remove dismissal problems but will avoid many unnecessary ones.

Here is our 10 step action plan for avoiding problems when dismissing employees

1. Pre-employment

Specify what you want & expect of all new hires:

- **Letter of Offer**
 - ✓ in writing
 - ✓ reference to industrial instrument
 - ✓ agreed notice period
- **Company Policies & Procedures**
 - ✓ in writing
 - ✓ clear & unambiguous
 - ✓ make available, communicate & instruct
 - ✓ ensure these include termination of employment & behavioural standards

2. Probation

Provide for a probationary period to allow for employer & employee to assess the relationship:

- typically 3 months (but can be longer)
- minimum employment period under Fair Work Act is 6 months
- in writing (letter of offer)
- actively monitor employee performance
- confirm in writing prior to end of probation

3. Keeping Records

- **Record information relevant to the employment relationship in a ‘staff notes’ journal or diary**
 - ✓ **daily notes of events, exchanges, promises, undertakings & questions that impact on employment relationship**
- **If this is too much work, at least take down brief notes whenever you have a private meeting with employees**

4. Training

Provide line managers & supervisors guidance & training:

- **who has authority to hire & fire**
- **company termination requirements & procedures**
- **disciplinary process**
- **supervisory & management skills**

5. Summary Dismissal

Avoid summary dismissals where possible (at minimum, take special care as summary dismissal may not be justified in some cases, even if a valid reason exists):

- **have a written procedure in place that requires another senior manager to become involved**
- **include union representatives where applicable**
- **carefully spell out the reason/s**
- **investigate the incident & hear all parties involved**
- **keep records of the meeting**

6. Make a Decision

When considering dismissal there are only 4 possibilities, so determine which is appropriate and act promptly:

- **summary dismissal is justified**
- **dismissal with notice is warranted**
- **dismissal is not appropriate, but written warning is**
- **no cause for dismissal**

7. Warning Letters

Positive counselling & guidance should be used to improve employee performance, but where this does not work, issue warning letters and follow up:

- **avoid verbal warnings (omissions/misunderstandings)**
- **follow company disciplinary process (typically, 2 warning letters plus a final warning letter)**
- **be specific**
- **proper monitoring of subsequent performance**
- **provide genuine assistance to employee to improve**

8. Procedural Fairness

Ensure the disciplinary process leading to termination is fair and transparent:

- **employee has opportunity to state their case**
- **sufficient time is provided to improve**
- **employee is offered support person to be present**
- **decision is made only after genuine consideration of all facts**

Small Business Fair Dismissal Code

Special unfair dismissal arrangements apply to small businesses:

- **minimum employment period 12 months (employees cannot make a claim in this period)**
- **simple Fair Dismissal Code to assist**
- **specialist service from Fair Work Ombudsman**

Small Business Fair Dismissal Code

Procedure still needs to be followed in dismissal:

- **a valid reason to be given**
- **warning/s to be provided (preferably written)**
- **provide employee opportunity to respond**
- **afford reasonable chance to rectify**
- **another person to assist (if dismissal a possibility)**
- **keep evidence (e.g. checklist, written warning/s)**

9. Termination Pay

Take care with termination pays, especially termination pays of a dismissed employee

- **check industrial instruments**
- **payment for work up to termination**
- **payment for annual leave & long service leave**
- **severance pay in some circumstances**
- **superannuation**
- **other contractual rights**

10. Seek Assistance

Before things go wrong, don't delay ...

collect the documents you have been keeping throughout employment and consult your advisor quickly

Summary

In this session we have discussed:

- **Unfair Dismissals**
- **Unlawful Terminations**
- **Redundancy**
- **10 Steps to Fair Dismissals**

THANK YOU

Integrated HR Solutions

0428 92 96 96

integratedhrsolutions.com.au



Integrated HR Solutions