
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

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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



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