

Fact Sheet – Unfair Dismissal and Small Business

Am I running a Small Business?

From 1 January 2011, the definition of a small business is a business that employs less than 15 employees.

Prior to 1 January 2011, the definition was in relation to 15 full time equivalent employees.

Are my employees protected by the Unfair Dismissal laws?

An employee of a small business is protected from unfair dismissal IF:

- (a) the employee has completed a minimum of 1 year service for the small business employer AND
- (b) the employee is covered by a Modern Award or Enterprise Agreement or the employee does not earn above the high income threshold (\$113,800 per year, to 30 June 2011).

Casual employees may also be protected from unfair dismissal if the casual employee was employed on a regular and systematic basis and the employee had a reasonable expectation of continuing employment and the casual employee completed a minimum period of employment of 1 year.

How do the Unfair Dismissal laws apply to my Small Business?

If you employ less than 15 employees then the Small Business Fair Dismissal Code applies to your business.

If you dismiss an employee and that dismissal was not consistent with the Small Business Fair Dismissal Code then the dismissal may have been unfair.

A person's dismissal was consistent with the Small Business Fair Dismissal Code if:

- (a) immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happened first), the person's employer was a small business employer; and
- (b) the employer complied with the Small Business Fair Dismissal Code in relation to the dismissal.

If the dismissal was consistent with the Code, then the former employee has not been unfairly dismissed.

What does the Small Business Fair Dismissal Code say?

Summary dismissal – Serious Misconduct

It is fair 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 can not 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.

How do I Comply with the Small Business Fair Dismissal Code

1. Warnings

The Code requires that employees be given a clear warning that he/she risks being dismissed if there is no improvement in their performance or behaviour.

That warning must be clear and specific enough to allow the employee to know what the problem is so they can address it.

The warning should include a statement that failure to improve work performance/behaviour (as the case may be) would result in termination of employment.

It is a good idea to specify a deadline for improvement. The deadline must be reasonable in the circumstances to allow the employee the opportunity to rectify the problem.

It may be necessary for further training or supervision to assist the employee to rectify the problem depending upon the nature of the problem. For some small businesses however this may be too onerous but where possible, further training should be offered.

It is always better for warnings to be in writing rather than verbal however where a written warning is not appropriate (for example, for minor issues) detailed notes of the conversation should be taken. Ideally, those notes will also be signed by the employee acknowledging them as an accurate record of the conversation.

2. Opportunity to respond

The Code requires that employees be given the opportunity to respond to the proposition that their employment would be terminated.

Preparing letters of resignation/termination or drawing cheques for payment in lieu of notice in advance of a disciplinary meeting is indicative of the employer making a decision to terminate the employment before allowing the employee the opportunity to respond. These things should not happen.

Offering support, further training or providing clarification of the employer's requirements should be the focus of a disciplinary meeting.

3. Checklist

The checklist is not required by FWA or mandatory for employers but rather a guide regarding matters to be taken into account when small businesses do dismiss an employee. This is a good starting point when developing policies and procedures for performance management and dismissals generally.

More Information

If you have any queries or would like some advice on complying with the Small Business Fair Dismissal Code please call and make an appointment to see Heather McGeorge on 9389 3999 or email hmcgeorge@cbhlegal.com.au