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FAIR DISMISSALS FOR SMALL BUSINESSES UNDER THE *FAIR WORK ACT 2009* (CTH)

The Federal Government has introduced a new fair dismissal system which took effect on 1 July 2009.

The reforms have particular implications for businesses with less than fifteen full-time equivalent employees ("small businesses"). Under WorkChoices, only employees in businesses with more than one hundred employees, who had been employed for over six months, were able to make an unfair dismissal claim (subject to the operation of a number of exemptions). The *Fair Work Act 2009* abolishes the one hundred employee threshold and instead provides that:

- small business employees must be employed for twelve months before they can bring an unfair dismissal claim; and
- employees of other businesses must be employed for six months before they can bring an unfair dismissal claim.

In this edition of Employment Alert, we review the implications of the new fair dismissal laws on small businesses.

The Definition of a Small Business

The *Fair Work Act 2009* defines a small business employer as a business with fewer than fifteen employees. Until 1 January 2011, this will be based on *full-time equivalent employees* which will be calculated by dividing the total number of ordinary weekly hours worked in the business (averaged over the four weeks preceding the dismissal) by 38. From 1 January 2011 a *simple headcount* method will be used to assess the number of employees employed by a business.

It is important to remember that when calculating the number of employees employed by an employer, employees employed by associated entities are also counted – this is similar to the related bodies corporate concept used in the WorkChoices legislation.

Small Business Fair Dismissal Code

Application

The Code sets out the fair dismissal requirements for a small business employer. If followed by an owner of a small business, the Code will ensure a dismissal is not unfair.

Summary Dismissal

Under the Code, an employee may only be summarily dismissed without notice or warning where the employer believes on reasonable grounds the worker's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. Under the Code, the report to the police of an allegation of theft, fraud or violence is sufficient, though not essential, for a dismissal to be deemed fair.

Other Dismissals

For underperforming employees, an employer needs to give the employee a valid reason why the employee is at risk of being dismissed based on the employee's conduct or capacity to carry out their job. The employer must give the worker a verbal, or preferably written, warning that the worker risks dismissal if there is no improvement. Multiple warnings are not required.

An employee must be provided with the opportunity to respond to the warning, and a reasonable chance to rectify the problem. According to the Code, rectifying the problem might involve the employer providing additional training, and ensuring the employee knows the employer's job expectations.

Procedural Matters

In any discussion where the employer raises the prospect of dismissal, the employee can have another person present to assist, but that person may not be a lawyer acting in a professional capacity.

If an employee brings an unfair dismissal claim, the employer will be required to produce evidence of procedural compliance with the Code, such as a completed checklist, copies of warnings, a statement of termination or signed witness statements

Exclusions

A number of categories of employees continue to be excluded from bringing unfair dismissal claims eg employees who earn over the high income threshold (currently \$108,300) unless they are award covered, employees on fixed term contracts, casual employees etc.

Process

An unfair dismissal claim must be made within 14 days of dismissal. It is intended that the process to be followed by Fair Work Australia will be user friendly, simple and streamlined. When dealing with a matter Fair Work Australia will conduct an information gathering exercise and may hold meetings with the parties in an endeavour to resolve the dispute. If the dispute remains unresolved, a hearing may be held. While reinstatement is the preferred remedy, where this is not in the interests of either of the parties, an order for compensation can be made up to a maximum of \$54,150.

Further information

A copy of the small business Fair Dismissal Code can be found at [A simple, fair dismissal system for small business.pdf](#)

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

Tim Adam
Principal
Tel: (03) 9843 2105
Email: tadam@mooreslegal.com.au

Peter Andrew
Consultant
Tel: (03) 9843 2108
Email: pandrew@mooreslegal.com.au

Frances Anderson
Senior Lawyer
Tel: (03) 9843 2122
Email: fanderson@mooreslegal.com.au

Leanne Tully
Senior Lawyer
Tel: (03) 9843 2127
Email: ltully@mooreslegal.com.au
