Australian Government

Unfair Dismissal

Overview

This module contains information on the new unfair dismissal laws and covers off the following matters:

- Definitions surrounding unfair dismissal
- The Small Business Fair Dismissal Code
- Fair Work Australia Processes
- Remedies for unfair dismissal
- Rights and responsibilities for employees and employers under the *Fair Work Act 2009.*

This part of the *Fair Work Act 2009* establishes a framework for dealing with unfair dismissal that balances the needs of business (including small business) with the needs of employees. It establishes procedures for dealing with unfair dismissal claims and provides remedies if a dismissal is found to be unfair. All aspects of the unfair dismissal laws came into effect on 1 July 2009 and apply to all dismissals from that date.

Definitions

What is a dismissal?

A dismissal is where an employer terminates the employment of his or her employee.

Dismissal can also be at the employee's initiative, known as **Constructive Dismissal**. Constructive dismissal occurs where an employee has been forced to resign from employment because of conduct engaged in by the employer, such as harassment.

A person has **not** been dismissed if:

- they were employed under a contract of employment which operated for a specified period of time, for a specified task, or for the duration of a specified season, and employment was terminated at the end of the period, task or season
- a training arrangement applied to the employee, their employment was for a specified period of time or limited to the duration of the training arrangement and their employment was terminated at the end of the training arrangement
- the person was demoted without involving a significant reduction in pay or duties and they remained with the same employer (Section 386).

What is unfair dismissal?

A person has been **unfairly dismissed** when Fair Work Australia is satisfied that:

☑ the person has been dismissed;

☑ the dismissal was harsh, unjust or unreasonable;

☑ the dismissal was not a case of genuine redundancy; and

☑ the dismissal was not consistent with the Small Business Fair Dismissal Code (only where the employer is a small business employer) (Section 385).

What constitutes harsh, unjust or unreasonable?

Fair Work Australia will look at all the following factors when considering whether a dismissal was harsh, unjust or unreasonable:

☑ 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);

☑ whether the person was notified of that reason;

☑ whether the person was given any opportunity to respond to that reason;

☑ any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal;

☑ if the dismissal was related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal;

☑ whether the size of the employer's enterprise is likely to impact on the procedures followed in the dismissal;

☑ whether a lack of dedicated human resource management specialists or expertise in the employer's enterprise are likely to impact on the procedures followed in the dismissal; and

☑ any other matters that Fair Work Australia considers relevant (Section 387).

General Protections

There are prohibitions against dismissing someone on discriminatory grounds or for other reasons such as engaging in industrial activity or being temporarily absent from work because of illness or injury. This is not the same as unfair dismissal and is dealt with under the General Protections part of the *Fair Work Act 2009* (Part 3-1).

What is genuine redundancy?

Genuine redundancy is where an employee's job is no longer required to be performed by **anyone** because of changes in the **operational requirements** of the business.

Possible examples of changes in the **operational requirements** of an enterprise include:

- a machine is now available to do the job performed by the employee
- the employer's business is experiencing a downturn, for example, the employer only needs three people to do a particular task or duty instead of five
- the employer is restructuring their business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.

It is not a case of genuine redundancy if the person dismissed could have been redeployed in another position within the business or "associated entity" and it would have been reasonable in all the circumstances to redeploy them (Section 389).

In any selection process for determining which employee's are made redundant, the employer must ensure that the process is in accordance with any provision of any applicable modern award, enterprise agreement or transitional instrument and is not discriminatory.

General Protections

The provisions concerning genuine redundancy do not cover the process for selecting individual employees for redundancy. If the reason a person is selected for redundancy is unlawful under the General Protections provisions (for example, on the basis of race, sex or religion amongst others) then the person will be able to bring an action for an alleged contravention of the General Protections in Part 3-1 of the *Fair Work Act 2009*.

Who can make an unfair dismissal claim?

A person can make an unfair dismissal claim if they have:

- ☑ completed the **minimum employment period**; and
- ☑ are covered by a modern award (or award-based transitional instrument) or an enterprise agreement (or agreement-based transitional instrument) applies to the person.

In some situations, high earning employees will be excluded from unfair dismissal protections. All employees who are covered by an award (or award-based transitional instrument) or who have an enterprise agreement (or agreement-based transitional instrument) applying to their employment will have access to unfair dismissal remedies. However, if neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if the sum of their annual rate of earnings and any other amounts worked out in accordance with the regulations is less than the high income threshold (which from 1 July 2009 is $108,300, indexed annually).

What are the minimum employment periods?

Employees must have served a **minimum employment period** before they can make an unfair dismissal claim. The minimum employment periods are:

- one year for employees of a small businesses (from 1 July 2009 until 31 December 2010 a small business employer is a business with less than 15 full-time equivalent employees. From 1 January 2011, the method of calculation will change to less than 15 employees based on a head count of total employees rather than full-time equivalent employees)
- six months if the employer is not a small business (Section 383).

Full-time equivalent test and the head count test

Full-time equivalent test (applies to dismissals that occur prior to 1 January 2011)

The number of full-time equivalent employees is to be calculated by adding up the ordinary hours of all employees in the four week period before dismissal or notice of dismissal (whichever is the earliest) and dividing those hours by 152 (being 4 x 38 hours). The ordinary hours of employees include periods of authorised leave (whether paid or unpaid) other than parental leave that has lasted for 4 weeks or more. One employee cannot count as more than one full-time equivalent. The legislation outlines the process for this calculation.

Head count test (applies to dismissals that occur on or after 1 January 2011)

The head count involves counting all employees employed by the employer at the time of dismissal or notice of dismissal (whichever is the earliest). Casual employees are not to be included in the count unless they have been employed by the employer on a regular and systematic basis.

In both tests, employees of associated entities are also counted.

How is a period of employment defined?

An employee's period of employment is based on the employee's **continuous service** with the employer.

Service as a **casual** employee can count towards the period of employment as long as it was on a regular and systematic basis and the employee had a reasonable expectation of continuing work on a regular and systematic basis (Section 384).

Any unauthorised absences and most periods of unpaid leave do not count as service; however these do not break an employee's continuity of service (Section 22).

Example of how continuity of service is calculated where there are periods of unpaid leave

John worked for 6 months as a full-time permanent employee. He then took leave without pay for 2 months and returned to work for a further 6 months. John's total period of continuous service is 12 months, which is the total period worked before and after the period of leave without pay.

How is the minimum employment period assessed?

Whether an employee has served the minimum employment period is assessed either when the person is given notice of dismissal, or when the dismissal actually takes effect, whichever happens first (Section 383).

What happens to the period of employment when the business is transferred to a new owner?

In a transfer of business, a new employer can choose not to recognise the employee's service under the old employer for the purposes of unfair dismissal provisions. However, they must inform the employee in writing before the new employment starts.

Associated (related) entities (Section 384).

This does not apply if the transfer of business was between associated entities. In this circumstance service with the first employer will always count towards service with the second employer for the purposes of unfair dismissal provisions.

What has changed?

Workplace Relations Act 1996	***Fair Work Act 2009***
Employees excluded from making an unfair dismissal claim if at the time of dismissal they were employed by a business with 100 or fewer employees.	No exclusions for unfair dismissal provisions based on business size. Employees have to serve minimum employment periods before they can make an unfair dismissal claim.

The qualifying period of employment to be served before an employee could make an unfair dismissal claim was six months, or a shorter or longer period determined in written agreement between the employer and employee before employment commenced.	An employee must have served a minimum employment period of twelve months if they are employed in a business with less than 15 employees, or six months in businesses with 15 of more employees before they can make an unfair dismissal claim.
An unfair dismissal claim could not be made if the dismissal was for genuine operational reasons or for reasons that included genuine operational reasons. Operational reasons were of an economic, technological, structural or similar nature relating to the employer's business.	Operational reasons are not a feature of the *Fair Work Act 2009*. However, a dismissal will not be unfair if Fair Work Australia is satisfied it was a genuine redundancy.

Key Points

- Fair Work Australia will determine whether a dismissal is unfair by determining whether the dismissal was harsh, unjust or unreasonable.
- A dismissal is not unfair where there is a genuine redundancy.
- An employee can make an unfair dismissal claim regardless of business size, as long as they have completed the minimum employment period and meet the other statutory requirements.
- The minimum employment period to be eligible to apply for an unfair dismissal case is 12 months for employees of a small business and six months for all other employees.
- Employees employed for a specified period or task are not protected by unfair dismissal laws if their employment is terminated at the completion of that period or task.

Small Business Fair Dismissal Code (Section 388)

The Small Business Fair Dismissal Code is **not a compulsory requirement**. However, if a person's dismissal is consistent with the Small Business Fair Dismissal Code then the dismissal will be considered fair (only relevant where the employer is a small business employer) (Section 396).

What is considered a small business?

From 1 July 2009 until 31 December 2010, the number of employees used to define a small business will be fewer than 15 full-time equivalent employees at the time of the dismissal or notice of dismissal (whichever is earlier).

From 1 January 2011, the number of employees used to define a small business will be based on a headcount of employees (regardless of whether they are full-time equivalent employees) at the time of the dismissal or notice of dismissal (whichever is earlier).

How does the Small Business Fair Dismissal Code work?

The Small Business Fair Dismissal Code describes the steps for a small business employer to follow when dismissing an employee. If the employee's dismissal is consistent with the Small Business Fair Dismissal Code, then the dismissal will be considered fair.

If a small business employer has not conformed to the Small Business Fair Dismissal Code, the unfair dismissal claim will be treated as any other unfair dismissal claim and may be found to be fair or unfair, depending on the circumstances.

The Small Business Fair Dismissal Code allows for a dismissal without notice or warning in cases of **serious misconduct** such as theft, fraud or violence.

For **underperformance**, the Small Business Fair Dismissal Code requires that the employee be given a valid reason why they are at risk of being dismissed and a reasonable opportunity to rectify the problem.

Voluntary Checklist

A checklist to assist with complying with the Small Business Fair Dismissal Code has been developed for small business employers to complete at the time of dismissal and to keep in case an unfair dismissal claim is made. However, it is **not** a requirement for compliance with the Small Business Fair Dismissal Code that the checklist be completed.

How do employees make an Application for unfair dismissal?

A person who believes they have been unfairly dismissed can make an application to Fair Work Australia.

'Application for an Unfair Dismissal Remedy' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

What are the lodgement timeframes?

An application must be made within 14 days of the dismissal taking effect. However, Fair Work Australia has discretion to extend the timeframe for making an unfair dismissal application if there are exceptional circumstances, taking into account:

- ☑ the reason for the delay;
- ☑ whether the person first became aware of the dismissal after it had taken effect;
- ☑ any action taken by the person to dispute the dismissal;
- ☑ any possible disadvantage to the employer;
- ☑ the merits of the application; and
- ☑ fairness as between the person and other persons in a similar position (Section 394).

What fees can I expect to pay?

Unfair dismissal applicants are required to pay fees prescribed by regulation. The Regulations prescribe an application fee (which from 1 July 2009 will be $59.50), the method for indexing the fee and the circumstances in which all or part of the fee may be waived or refunded (Section 395).

What is the procedure through Fair Work Australia?

Fair Work Australia is required to decide certain matters before considering the merits of the application:

- ☑ whether the application was made within the 14 day time limit;
- ☑ whether the person is protected from unfair dismissal;

- ☑ whether the dismissal was consistent with the Small Business Fair Dismissal Code (only relevant where the employer is a small business employer); and
- ☑ whether the dismissal was a genuine redundancy (Section 396).

Fair Work Australia must hold a **conference or hearing** in relation to a matter that involves **contested facts**.

What is a Conference?

- Fair Work Australia conferences are the preferred option in an unfair dismissal claim.
- Fair Work Australia conferences are informal and must be conducted in private when considering an application.
- Fair Work Australia has the power to direct people to attend a conference at a time and place specified by Fair Work Australia, but must take into account the wishes of the parties, for instance where it holds the conference or the method of conducting it.
- Fair Work Australia must take into account any difference in the circumstances of the parties when considering and informing itself in relation to the application (Section 398).
- The responsibility for conducting a conference rests with a Fair Work Australia member, or a Fair Work Australia staff member under delegation (Section 592).

What is a Hearing?

- Fair Work Australia must only hold a hearing in relation to an unfair dismissal matter if it considers it appropriate after taking into account the views of the parties and where a hearing would be the most effective and efficient way to resolve the matter. Unfair dismissal hearings must be held in public, except where evidence is of a confidential nature.
- Fair Work Australia can hold a hearing in relation to only part of an unfair dismissal claim if it decides that an element of the claim is best dealt with in a formal hearing. For example Fair Work Australia might hold a hearing on an initial matter, such as whether the dismissal was a genuine redundancy, but then deal with the rest of the matter by way of a conference (Section 399).

<u>Representation</u>

Can I have someone representing me?

A person may be represented by a member, officer or employee (whether legally qualified or not) of an organisation, employer association or peak council representing the person.

Lawyer or paid agent

A person may be represented in a matter before Fair Work Australia by a lawyer or paid agent, but only with the permission of Fair Work Australia.

Fair Work Australia may grant permission for a person to be represented by a lawyer or agent only if:

- it would allow the matter to be dealt with more efficiently, having regard to the complexity of the matter
- the person to be represented is unable to represent himself, herself or itself effectively

- it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter (Section 596).

However, Fair Work Australia's permission is not required if the lawyer in question is representing the person in their capacity as an employee of an employer or company defending a claim.

Can I get the other party to pay my costs?

Generally, a person must pay their costs associated with hiring a lawyer or paid agent to represent them in a matter before Fair Work Australia.

Cost orders - Lawyers and Paid Agents

A person may make an application for costs against the other party's lawyer or paid agent within 14 days after a matter has been decided by Fair Work Australia. This means that a person believes that the other party's lawyer or paid agent should pay the costs they have incurred.

Fair Work Australia can make cost orders against lawyers and paid agents in two circumstances:

- where the lawyer or paid agent caused costs to be incurred by the other party to the matter because they encouraged a person to commence or continue a matter when it should have been reasonably apparent there was no reasonable prospect of success
- where they have caused costs to be incurred by the other party because of an unreasonable act or omission in conducting or continuing the matter.

Cost orders – a person

In addition, Fair Work Australia can make cost orders against **a person** in the following circumstances:

- if a person made or responded to an application, vexatiously or without reasonable cause
- if a person made or responded to an application and it should have been reasonably apparent to the person that their application or response to an application had no reasonable prospects of success (Section 611).

What happens when a cost order is not complied with?

Not complying with a cost order could result in the Federal Court or Federal Magistrates' Court imposing a civil (monetary) penalty.

Enforcing orders: Orders of Fair Work Australia can only be enforced through separate proceedings in the Federal Courts. In this instance, employers and employees should obtain independent legal advice on such matters.

Can I appeal a decision of Fair Work Australia?

Fair Work Australia cannot grant appeals from a decision made in an unfair dismissal case unless it is in the public interest to do so.

The Minister for Employment and Workplace Relations can apply to Fair Work Australia for a review of an unfair dismissal decision (other than those made by the full bench) if the Minister believes the decision is contrary to the public interest.

To the extent that an appeal is based on an error of fact, it will only be allowed where that error is a significant error of fact (Section 400).

Fair Work Australia has discretion to deal with appeals as it considers appropriate. Appeals will be conducted in a hearing unless Fair Work Australia decides that the appeal can be determined without oral submissions and the parties agree to the appeal being conducted without a hearing.

What has changed?

Workplace Relations Act 1996	***Fair Work Act 2009***
A person who had been dismissed had 21 days to make an unfair dismissal application.	A person who has been dismissed has 14 days to make an unfair dismissal application.
Australian Industrial Relations Commission would attempt to conciliate an unfair dismissal claim, if unsuccessful the case would then move to arbitration and a binding order would be made.	Fair Work Australia will hold a conference or a hearing in an unfair dismissal case that involves contested facts. Fair Work Australia conferences are informal and are the preferred option in an unfair dismissal claim, but Fair Work Australia can conduct a public hearing if they consider it would be the most effective and efficient way of dealing with the claim.
The AIRC could grant appeals in an unfair dismissal case, except for certain matters.	Fair Work Australia cannot grant appeals from a decision made in an unfair dismissal case unless it is in the public interest to do so. An appeal on a question of fact can only be made on the ground that the decision involved a significant error of fact.

<u>What sort of outcomes can Fair Work Australia consider?</u>

Reinstatement

Reinstatement will be Fair Work Australia's primary remedy for unfair dismissal. An order for reinstatement must be to reappoint the person to the position they had immediately before the dismissal or appoint them to another position that has terms and conditions no less favourable than the position they held previously. Fair Work Australia can make a reinstatement order applying to an associated entity of the person's previous employer where the person's position no longer exists with the original employer but that position, or an equivalent position, is available in an associated entity (Section 391(1A)).

What is an "associated entity"?

An associated entity is defined under section 50AAA of the *Corporations Act 2001.* It includes "related bodies corporate". In unfair dismissal matters, Fair Work Australia will have the power to order the reinstatement of an employee to an associated entity. This is a new feature under the Fair Work Act.

Fair Work Australia can make any other order that it considers appropriate to maintain the person's continuity of employment and the period of the person's continuous service with the employer.

Fair Work Australia can also make any other order it considers appropriate for an employer to pay an amount for remuneration lost or likely to have been lost because of the dismissal. This could include any money the person may have earned during the period since the dismissal. As these orders are only to compensate for lost remuneration, they cannot extend

to include any component by way of compensation for shock, distress or humiliation caused by the manner of the person's dismissal (Section 391).

Compensation

Fair Work Australia can make an order for payment in lieu of reinstatement if it is satisfied that reinstatement is inappropriate and that compensation is appropriate. Fair Work Australia must take into account all of the circumstances of the case in determining the amount of compensation, including:

- ☑ the effect of the order on the viability of the employer's business;
- ☑ the length of the person's service with the employer;
- ☑ the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed;
- ☑ the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal;
- ☑ the amount of any pay earned by the person between the dismissal and the order for compensation;
- ☑ the amount of any pay likely to be earned by the person between the dismissal and the order for compensation; and
- ☑ any other matter Fair Work Australia considers relevant.

Fair Work Australia can reduce the amount of compensation if it is satisfied that the person's misconduct contributed to the employer's decision to dismiss the person.

Any compensation ordered by Fair Work Australia will not include compensation for shock, distress or humiliation caused by the manner of the person's dismissal (Section 392).

What is the maximum amount that can be paid in compensation?

There is a cap on the compensation that can be ordered by Fair Work Australia for an unfair dismissal case. The compensation cap is the lesser of:

- half the amount of the high income threshold ($100,000 for full-time employees, indexed from 27 August 2007 and annually each year after that on 1 July)
- the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal.

The compensation cap will be the same for all employees, regardless of what workplace arrangement they are employed under (for example modern award or enterprise agreement).

Key Points

- Reinstatement will be Fair Work Australia's primary remedy for unfair dismissal.
- Fair Work Australia can make a compensation order in lieu of reinstatement.
- There is a cap on compensation. Compensation does not include compensation for shock, distress or humiliation caused by the manner of the person's dismissal.

Rights and Responsibilities under the *Fair Work Act 2009*

Employees

This section of the module caters specifically for employees. While some of the following information has been outlined earlier in the module, this information targets the information that will be most relevant for employees.

How do I make an application to Fair Work Australia for a remedy for unfair dismissal?

A person who has been dismissed may make an unfair dismissal application to Fair Work Australia.

An employee must make an unfair dismissal application to Fair Work Australia within **14 days** of the dismissal taking effect. Fair Work Australia may extend this timeframe if it is satisfied that there are exceptional circumstances.

'Application for an Unfair Dismissal Remedy' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

Fair Work Australia will take the following into account when considering whether there are exceptional circumstances:

- ☑ the reason for the delay;
- ☑ whether the person first became aware of the dismissal after it had taken effect;
- ☑ any action taken by the person to dispute the dismissal;
- ☑ any possible disadvantage to the employer;
- ☑ the merits of the application; and
- ☑ fairness as between the person and other persons in a similar position (Section 394).

What fees can I expect to pay?

The Regulations set out the application fee and circumstances in which all or part of the fee may be waived or refunded (Section 395). From 1 July 2009 the fee for making an unfair dismissal application is $59.50. The fee will be indexed annually.

Can anyone make an unfair dismissal claim?

There are laws about which employees are entitled to make an unfair dismissal claim. Employees need to have completed the following minimum employment periods with their employer to be eligible to make an unfair dismissal claim:

- one year for employees of a small businesses (businesses with fewer than 15 employees); or
- six months for all other employees (Section 383).

A person is not considered to be dismissed, and therefore cannot make an unfair dismissal claim if:

- the person was employed under a contract of employment for a specified period of time, for a specified task, or the duration of a specified season and the employment has terminated at the end of the period, task or season

- a training agreement applied to the employee, their employment was for a specified period of time or limited to the duration of the training arrangement and employment was terminated at the end of the training agreement
- the person was demoted in employment but it did not involve a significant reduction in pay or duties and they remained with the same employer (Section 386).

In some situations, high earning employees will be excluded from unfair dismissal protections. All employees who are covered by a modern award (or an award-based transitional instrument) or who have an enterprise agreement (or agreement based transitional instrument) applying to their employment will have access to unfair dismissal remedies. However, if neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if their remuneration is less than the high income threshold set out in the Regulations (which from 1 July 2009 will be $108,300, indexed annually).

A person can make an unfair dismissal claim where they have been constructively dismissed. Constructive dismissal occurs where an employee has resigned from their employment but was forced to do so because of conduct engaged in by their employer (e.g. harassment).

What if I have been made redundant?

A dismissal due to **genuine redundancy** is not an unfair dismissal. A person's dismissal will be a case of genuine redundancy if his or her job was no longer required to be performed by anyone because of changes in the operational requirements of the employer's enterprise and the employer has complied with any obligations to consult in an applicable modern award, enterprise agreement or transitional instrument (Section 389).

Can I withdraw my unfair dismissal application?

Yes. A person who has made an unfair dismissal application can discontinue their application whether or not the matter has been settled. Procedural rules must be followed in this instance.

What if I believe I have been dismissed on discriminatory grounds?

There are prohibitions against dismissing someone on discriminatory grounds or for some other reasons such as engaging in industrial activity or being temporarily absent from work because of illness or injury. This is not the same as unfair dismissal and is dealt with under the **General Protections** part of the *Fair Work Act 2009* (Part 3-1).

Details on the **General Protection** section of the *Fair Work Act 2009* can be found in the module titled *Overview of the Fair Work Act 2009.* The *Fair Work Act 2009* does not allow an employee to make claim in regards to the General Protections area of the *Fair Work Act 2009* in conjunction with an unfair dismissal claim.

How will Fair Work Australia determine if my dismissal is unfair?

Fair Work Australia must decide certain initial matters before considering the merits of the application. These initial matters are whether:

☑ the application was made within 14 days of the dismissal taking effect or such further time as Fair Work Australia allowed;

☑ the person was protected from unfair dismissal;

☑ the dismissal was consistent with the Small Business Fair Dismissal Code (only relevant where the employer is a small business employer); and

☑ the dismissal was a case of genuine redundancy.

If Fair Work Australia does not dismiss the claim after considering these initial matters, it will go on to consider the merits of the case.

There are many factors Fair Work Australia will take into account when considering whether a dismissal was harsh, unjust or unreasonable:

☑ 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);

☑ whether the person was notified of that reason;

☑ whether the person was given any opportunity to respond to that reason;

☑ any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal (however, employers are not obliged to offer an employee the opportunity to have a support person present when they are considering dismissing them);

☑ if the dismissal was related to unsatisfactory performance by the person – whether the person had been warned about the unsatisfactory performance before the dismissal;

☑ whether the size of the employer's enterprise might impact on the procedures followed in process of the dismissal;

☑ whether a lack of dedicated human resource management specialists or expertise in the employer's enterprise would be likely to impact on the procedures followed in the dismissal; and

☑ any other matters that Fair Work Australia considers relevant (Section 387).

What happens after Fair Work Australia considers the application?

Fair Work Australia must conduct a conference or hearing if the matter involves factual disputes.

Private and informal Fair Work Australia conferences are the preferred option in an unfair dismissal claim. Fair Work Australia hearings will only be held if Fair Work Australia considers it will be the most effective and efficient way to deal with the matter, taking into account the views of the parties.

In an unfair dismissal case, reinstatement is the preferred remedy. An **order for reinstatement** must be to either:

- reappoint the person to the position they had immediately before the dismissal
- appoint them to another position that has terms and conditions no less favourable than the position they held previously.

Fair Work Australia can make a reinstatement order applying to an associated entity of the person's previous employer where the person's position or an equivalent position exists in the associated entity, but not with the person's employer (section 391).

What if reinstatement is not appropriate, can I seek compensation?

Fair Work Australia can make an **order for compensation** instead of reinstatement only where it is satisfied that reinstatement is inappropriate and compensation is appropriate. Fair Work Australia must take into account all circumstances of the case in determining the amount of compensation, including:

☑ the effect of the order on the viability of the employer's business;

☑ the length of the person's service with the employer;

☑ the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed;

- ☑ the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal;
- ☑ the amount of any pay earned by the person between the dismissal and the order for compensation;
- ☑ the amount of any pay likely to be earned by the person between the dismissal and the order for compensation; and
- ☑ any other matter Fair Work Australia considers relevant.

Fair Work Australia must reduce compensation if it is satisfied that the person's misconduct contributed to the employer's decision to dismiss the person.

Any compensation ordered by Fair Work Australia must not include a component for shock, distress or humiliation caused by the manner of the person's dismissal.

There is a cap on the compensation that can be ordered by Fair Work Australia for an unfair dismissal case. The compensation cap is the lesser or:

- half the amount of the high income threshold ($100,000 for full-time employees, indexed from 27 August 2007 and annually each year after that on 1 July)
- the amount of remuneration received by the person, or that they were entitled to receive (whichever is higher) in the 26 weeks before the dismissal.

Can I appeal a decision of Fair Work Australia?

Fair Work Australia cannot grant appeals from a decision made in an unfair dismissal case by Fair Work Australia unless it is in the public interest to do so.

To the extent that an appeal is based on an error of fact, it will only be allowed where that error is a significant error of fact (Section 400).

Fair Work Australia has the discretion to deal with matters as it considers appropriate, including deciding to hold a hearing or deciding a matter on the papers. Appeals will be conducted in a hearing unless Fair Work Australia decides that the appeal can be determined without oral submissions and the parties agree to the appeal being conducted without a hearing.

Can I have someone representing me?

A person may be represented by a member, officer or employee (whether legally qualified or not) of an organisation, employer association or peak council representing the person.

Lawyer or paid agent

A person may be represented by a lawyer or paid agent in a matter before Fair Work Australia only with Fair Work Australia's permission.

Fair Work Australia may only grant permission for a person to be represented by a lawyer or agent if:

- it would allow the matter to be dealt with more efficiently
- the person to be represented is unable to represent himself, herself or itself effectively
- it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter (Section 596).

However, Fair Work Australia's permission is not required if the lawyer in question is representing the person in their capacity as an employee of an employer or company defending a claim.

Can I seek the other party to pay my costs?

Generally, a person must pay their own costs associated with hiring a lawyer or paid agent to represent them in a matter before Fair Work Australia.

Cost orders - Lawyers and Paid Agents

A person may make an application for costs against the other party's lawyer or paid agent within 14 days after a matter has been decided by Fair Work Australia. This means that a person believes that the other party's lawyer or paid agent should pay the costs they have incurred.

Fair Work Australia can make cost orders against lawyers and paid agents in two sets of circumstances:

- if the lawyer or paid agent have caused costs to be incurred by the other because they encouraged a person to commence or continue a matter when it should have been reasonably apparent there was no reasonable prospect of success
- if they have caused costs to be incurred by the other party because of an unreasonable act or omission in conducting or continuing the matter.

Cost orders – a person

In addition, Fair Work Australia can make cost orders against **a person** in the following circumstances:

- where a person made or responded to an application, vexatiously or without reasonable cause
- where a person made or responded to an application and it should have been reasonably apparent that their application, or response to an application, had no reasonable prospects of success (Section 611).

What happens if a cost order is not complied with?

Not complying with a costs order could result in the Federal Court or Federal Magistrates' Court imposing a civil (monetary) penalty.

Enforcing orders:

Orders of Fair Work Australia can only be enforced through separate proceedings in the Federal Courts. In this instance, employers and employees can obtain independent legal advice on these matters.

Key Points

- An employee must make an unfair dismissal application to Fair Work Australia within 14 days of the dismissal taking effect.
- Employees have to serve minimum employment periods before making an unfair dismissal claim which are 12 months for employees of a small business and six months for all other employees.
- Fair Work Australia will determine whether a dismissal is unfair by determining whether the dismissal was harsh, unjust or unreasonable.
- An unfair dismissal claim can be dismissed in the case of "genuine redundancy". This can include the situation where the person's job is no longer required to be performed by anyone because of changes in the operational requirements of the employer's business.
- Under the *Fair Work Act 2009*, Fair Work Australia will hold a conference or a hearing in

an unfair dismissal case that involves contested facts.

- Fair Work Australia conferences are informal and are the preferred option in an unfair dismissal claim.
- Reinstatement will be the preferred remedy for an unfair dismissal claim; however Fair Work Australia can make an order for compensation if reinstatement is inappropriate.
- Under the *Fair Work Act 2009*, Fair Work Australia cannot grant appeals from a decision made in an unfair dismissal case unless it is in the public interest to do so.

Rights and Responsibilities under the *Fair Work Act 2009*

Employers

This section of the module caters specifically for employers. While some of the following information has been outlined earlier in the module, this section highlights the information of most relevant to employers.

How employers might consider conducting a dismissal

There are procedures all employers can follow to reduce the likelihood that a dismissal would be found to be unfair. Some of these include:

- ☑ notifying employees of any problems relating to the person's capacity or conduct (including its effect on the safety and welfare of other employees);
- ☑ allowing the employee to respond to any perceived problem with their capacity or conduct;
- ☑ allowing an employee to have a support person present to assist at any discussions relating to the dismissal if requested;
- ☑ warning employees of any unsatisfactory performance and the possibility of dismissal before the dismissal. If this is done in writing it may be useful in defending an unfair dismissal claim;
- ☑ organising training to overcome any performance problems;
- ☑ ensuring that if they dismiss the employee that there is a valid reason for the dismissal related to the employee's capacity or conduct and notifying the employee of that valid reason; and
- ☑ complying with the Small Business Fair Dismissal Code if they employ less than 15 employees. To help with this, the employer can use the Small Business Fair Dismissal Code Checklist.

What is the process when Fair Work Australia considers applications for unfair dismissal?

When an unfair dismissal application is made, Fair Work Australia is required to consider specified initial matters before considering the merits of the case. These matters are whether:

- ☑ the application was made within 14 days of the dismissal taking effect or further time as Fair Work Australia allowed;
- ☑ the person was protected from unfair dismissal (e.g. they had served the relevant minimum employment period and had been "dismissed" within the meaning of the legislation);
- ☑ the dismissal was consistent with the Small Business Fair Dismissal Code (only relevant when the employer is a small business employer); and
- ☑ the dismissal was a case of genuine redundancy.

If Fair Work Australia does not dismiss the claim after considering the initial matters, then it will go on to consider the merits of the case.

There are certain criteria that Fair Work Australia must take into account when considering whether a dismissal was harsh, unjust or unreasonable. These are:

- ☑ whether there was a valid reason for the dismissal related to the person's capacity or conduct (including the effect on safety and welfare of other employees);
- ☑ whether the person was notified of that reason;
- ☑ whether the person was given any opportunity to respond to any reason related to the capacity or conduct of the person;
- ☑ any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal (however, employers are not obliged to offer an employee the opportunity to have a support person present when they are considering dismissing them);
- ☑ if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance by the person before the dismissal;
- ☑ the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures following effecting the dismissal; and
- ☑ any other matters that Fair Work Australia considers relevant (Section 387).

Fair Work Australia will weigh up all factors in coming to a decision about whether a dismissal was harsh, unjust or unreasonable. No factor alone will necessarily determine the case.

Can I object to an unfair dismissal application?

An employer can object to an unfair dismissal application on the basis:

- the applicant was not unfairly dismissed
- the application was lodged with FWA outside of the prescribed time limits
- the applicant is not covered by the unfair dismissal laws or is not eligible to make an application
- the application is frivolous, vexatious or has no reasonable prospects of success.

'Employer response to application for an unfair dismissal remedy' forms are available from www.fwa.gov.au or call Fair Work Australia on 1300 799 675

What happens after Fair Work Australia considers the application?

If there are contested facts surrounding an unfair dismissal claim, Fair Work Australia will hold conferences and/or hearings to determine the facts.

Private and informal Fair Work Australia conferences are the preferred option in an unfair dismissal claim. Fair Work Australia hearings will only be held if Fair Work Australia considers it appropriate to do so, taking into account the views of the parties and whether a hearing is the most effective and efficient way to deal with the matter. A specialist information and assistance unit will be established in the Office of the Fair Work Ombudsman to provide help to employers of small and medium sized enterprises on unfair dismissal matters.

Can I appeal a decision of Fair Work Australia?

Fair Work Australia cannot grant appeals from a decision made in an unfair dismissal case unless it is in the public interest to do so.

The Minister for Employment and Workplace Relations can apply to Fair Work Australia for a review of unfair dismissal decisions (other than those made by the full bench) if the Minister believes the decision is contrary to the public interest.

To the extent that an appeal is based on an error of fact, it will only be allowed where that error is a significant error of fact (Section 400).

Fair Work Australia would have the discretion to deal with appeals as it considers appropriate, including deciding whether to hold a hearing or decide a matter on the papers. Appeals will be conducted in a hearing unless Fair Work Australia decides that the appeal can be determined without oral submissions and the parties agree to the appeal being conducted without a hearing.

Small Business

The Small Business Fair Dismissal Code process

After an unfair dismissal claim is made, Fair Work Australia is required to decide certain matters before it considers whether a dismissal was harsh, unjust or unreasonable. One of those matters is whether the dismissal was consistent with the Small Business Fair Dismissal Code (only relevant where the employer is a small business employer).

If the dismissal was consistent with the Small Business Fair Dismissal Code it will be considered fair (Section 396). In these circumstances, it is not necessary to proceed to determine the merits of an application.

If there are questions in relation to whether the dismissal was consistent with the Small Business Fair Dismissal Code, Fair Work Australia is required to gather further information by holding a conference or conducting a hearing.

The Australian Government has developed a Small Business Fair Dismissal Code checklist that small business employers can complete at the time of dismissal in case of a future unfair dismissal claim. However, it is not a requirement of the Fair Dismissal Code for Small Business that the checklist be completed.

The checklist covers off information such as whether:

- the employee was stealing money or goods from the business
- the employee committed a serious breach of occupational health and safety procedures
- the employee was clearly warned (either verbally or in writing) that the employee was not doing the job properly and that they would have to improve his or her conduct or performance, or otherwise be dismissed
- the employee was provided with any training or opportunity to develop his or her skills
- the employee voluntarily resigned or abandon his or her employment.

If Fair Work Australia finds the dismissal was not consistent with the Fair Dismissal Code for Small Business, the dismissal will be considered on its merits (Section 388).

The declaration contained at the bottom of the Fair Dismissal Code Checklist does not need to be solemnly witnessed as a statutory declaration would (i.e. by a police officer, etc). However, an employer may voluntarily complete their own separate statutory declaration or affidavit for later use in unfair dismissal proceedings. Employers should note that wilfully

making a false statement in a statutory declaration is an offence which may result in fines, imprisonment, or both.

Key Points

- There are certain steps that an employer can follow to minimise exposure to an unfair dismissal claim, such as notifying employees of any problems relating to their conduct and allowing them to respond.
- Under the *Fair Work Act 2009*, a person who has been dismissed has 14 days to make an unfair dismissal application.
- Under the *Fair Work Act 2009*, Fair Work Australia will hold a conference or a hearing in an unfair dismissal case that involves contested facts.
- Fair Work Australia conferences are informal and are the preferred option in an unfair dismissal claim. Fair Work Australia can conduct a public hearing if they consider it would be the most effective and efficient way of dealing with the claim.
- Reinstatement will be the preferred remedy for an unfair dismissal claim, however Fair Work Australia can make an order for compensation if reinstatement is inappropriate.
- The *Fair Work Act 2009* establishes the Small Business Fair Dismissal Code. If a small business employer complies with the Code, the dismissal will be considered fair.
- If there are contested facts in relation to whether the dismissal was consistent with the Small Business Fair Dismissal Code, Fair Work Australia will gather further information by holding a conference or hearing.
- The Small Business Fair Dismissal code is not a compulsory code.

For further information

Fair Work Act 2009, Explanatory Memorandum to the Fair Work Bill, and the Transitional and Consequential Bill:

http://www.workplace.gov.au/workplace/Publications/Legislation/FairWorkBill.htm

'Fact Sheets' on the new industrial relations system:

http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Pages/FactSheets.aspx

The Small Business Fair Dismissal Code

Summary Dismissal

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 considered 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 cannot 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.

Small Business Fair Dismissal Code Checklist

It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim. However, it is not a requirement of the Fair Dismissal Code that the checklist be completed.

How many full-time equivalent employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time.)

c Under 15 full-time equivalent employees

c 15 full-time equivalent employees or more

[If under 15 full-time equivalent employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?

c Yes

c No

[If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because of a genuine redundancy?

c Yes

c No

If Yes, explain the reason for the redundancy (for example, economic downturn, introduction of new technology therefore requiring less staff, or another such reason) and whether redeployment was considered.

____

____

____

4. Do any of the following statements apply?

I dismissed the employee because I believed on reasonable grounds that:	YES	NO
a. The employee was stealing money or goods from the business.	c	c
b. The employee defrauded the business.	c	c
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.	c	c

d. The employee committed a serious breach of occupational health and safety procedures.	c	c

5. Did you dismiss the employee for some other form of serious misconduct?

   c Yes

   c No

   If Yes, what was the reason?

   ____

   ____

   ____

   ____

   If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

   c Yes

   c No

If Yes	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	c	c
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?	c	c
c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	c	c
d. Did the employee subsequently improve his or her performance or conduct?	c	c

e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond? c c

f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation. c c

7. Did you dismiss the employee for some other reason?

c Yes

c No

If Yes, what was the reason?

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____

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____

8. Did the employee voluntarily resign or abandon his or her employment?

c Yes

c No

If Yes, please provide details

____

____

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____

____

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Signature Date
____