



9. A simple, fair dismissal system for small business

Under Work Choices, employees in businesses with up to 100 workers could be dismissed for any reason without any right to challenge the dismissal as being harsh, unjust or unfair. For other employees, the employer had only to demonstrate the dismissal was for 'operational reasons' and there would be no right of challenge or redress.

The removal of these rights resulted in clear hardship for many, and in real feelings of insecurity when workers realised they could be dismissed at any time for no reason.

A new fair dismissal system

As set out in Forward with Fairness before the last election, the Rudd Labor Government will establish new laws regarding unfair dismissal that are fair to small business owners and their employees.

The objective is to ensure good employees are protected from being dismissed unfairly, while enabling employers to manage under-performing employees with fairness and with confidence.

Special arrangements for small businesses

Within the overall unfair dismissal system, special arrangements will apply for small businesses with fewer than 15 employees.

These arrangements recognise the special circumstances of small business owners. They do not have human resource management departments, they cannot afford to lose time and they cannot readily redeploy employees into other positions or workplaces.

Compared with larger businesses, small business owners will benefit from:

1. A doubling of the qualifying period from six to 12 months, during which time employees cannot take a claim for unfair dismissal, and
2. A simple six-paragraph Fair Dismissal Code which, if followed by the small business owner, will ensure a dismissal is not unfair.

A Fair Dismissal Code for small businesses

The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence.

For under-performing employees, the Code simply requires the employer to give the employee a valid reason, based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem.

Multiple warnings are not required. It is desirable, but not necessary, for a warning to be in writing.

The Code sets out a process for dismissal which recognises that employees need a fair go. It contains basic principles that any reasonable person would regard as fair. If an employee is not performing satisfactorily it is only right that they should be warned and have the opportunity to improve their performance. At the same time, employers should have the right to immediately dismiss an employee whose conduct is seriously affecting the business, for example, stealing from the employer.

A simple checklist to aid employers

A simple checklist (attached) has been developed to help small business employers to comply with the Code.

What is 'unfair dismissal'?

Unfair dismissal is a dismissal that is harsh, unjust or unreasonable.

If an employee is made redundant, and the redundancy is genuine, the dismissal will not be unfair.

Exclusions from making an unfair dismissal claim

Only those casual employees who have been engaged on a regular and systematic basis and who have a reasonable expectation that their employment would continue, can make an unfair dismissal claim.

All employees must have completed the relevant minimum qualifying period (12 months employment in a small business and six months employment in a larger one) .

Other exclusions from unfair dismissal remedies include seasonal employment and specified-task employment at the end of which an employee's work is no longer required. The ending of employment that was for a fixed period or task is not considered to be a dismissal.

Simple, non-legalistic processes

Where a claim of unfair dismissal is made, a simple, streamlined process will apply for both small and larger businesses.

Unfair dismissal claims must normally be lodged with Fair Work Australia within seven days. Fair Work Australia will take a flexible approach in gathering information. It will be able to make initial inquiries and discuss the issues with employers and employees, including in informal conferences at mutually agreed locations, with a view to achieving a mediated resolution.

Where there are contested facts, Fair Work Australia will be able to decide the outcome in either a conference or by holding a formal hearing.

The new system will be non-legalistic, the aim being to keep lawyers and contingency fee agents out of the process as far as possible. Under the new system, legal representation will be permitted, but only with Fair Work Australia's permission.

Decisions will be able to be made in a conference setting. Fair Work Australia will act consistently with the principles of natural justice, including by ensuring that both parties get to have their say and are able to respond to allegations put against them.

Full public hearings will only occur where, after considering the views of the parties, Fair Work Australia decides this would be the most effective and efficient way to resolve the matter.

A remedy of reinstatement or capped compensation

Reinstatement will be the remedy unless it is not in the interests of either of the parties. Where reinstatement is not feasible, compensation may be ordered but a cap on compensation will apply. The maximum compensation will be six months' pay, but normally compensation will be well beneath the cap. Employers will no longer need to pay 'go away' money, since the process will be quick, simple and informal.



Australian Government

Small Business Fair Dismissal Code

Application

The Fair Dismissal Code applies to small business employers with fewer than 15 employees. Each full-time, part-time and regular and systematic casual employee (including those in any associated entity of the employer) will count as one employee..

Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.

Employees who have been dismissed because of a business downturn or their position is no longer needed cannot bring a claim for unfair dismissal. However, the redundancy needs to be genuine. Re-filling the position with a new employee is not a genuine redundancy.

The 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 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 either 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 may be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia. 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.

1. How many employees are employed in the business? (Include full time, part time and regular and systematic casual employees as well as the dismissed employee and any other employee dismissed at the same time).

Under 15 employees

15 employees or more

[If under 15 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?

Yes

No

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

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

Yes

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.	<input type="checkbox"/>	<input type="checkbox"/>
b. The employee defrauded the business.	<input type="checkbox"/>	<input type="checkbox"/>
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.	<input type="checkbox"/>	<input type="checkbox"/>
d. The employee committed a serious breach of occupational health and safety procedures.	<input type="checkbox"/>	<input type="checkbox"/>

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

Yes

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?

Yes

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?

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. Did you offer to provide the employee with any training or opportunity to develop his or her skills?

d. Did the employee subsequently improve his or her performance or conduct?

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?

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.

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

Yes

No

If Yes, what was the reason?

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

Yes

No

If Yes, please provide details

DECLARATION

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

Signature _____ Date _____