

# The Fair Work Act for Small Business Employers

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The Fair Work Act 2009 (Cth) (“the Act”) received Royal Assent on 8 April 2009. The majority of the Act will come into operation on 1 July 2009 (including the unfair and unlawful termination provisions). Provisions relating to the new National Employment Standards (“NES”) and Modern Awards will operate from 1 January 2010. Of the various new and revised conditions of employment provided for by the Act, of interest are those applying only to “Small Business Employers”. The following article will address the principal parts of the Act that small businesses will need to be aware of.

## 1. What is a Small Business Employer?

- 1.1. Section 23 of the Fair Work Act 2009 provides that a National System Small Business Employer at a particular time is an employer who employs fewer than 15 employees at that time.
- 1.2. For the purpose of calculating the number of employees employed by the employer, all employees employed by the employer at the time are considered (Section 23 (2)). Casual employees are not considered unless they have been employed by the employer on a regular and systematic basis.
- 1.3. Associated entities are taken to be one entity (Section 23 (3)). Accordingly, when determining the number of employees employed by an employer at a particular time, the employees employed by associated entities will also be counted.
- 1.4. An “Associated Entity” has the meaning given to it by Section 50AAA of the Corporations Act. Section 50AAA provides that an entity is an Associated Entity (the associate) of another entity (the principal) if:
  - a. the principal controls the associate; or
  - b. the associate controls the principal and the operations, resources or affairs of the principal are material to the associate; or
  - c. the associate has a qualifying investment in the principal and the associate has significant influence over the principal and the interest is material to the associate; or
  - d. the principal has a qualifying investment in the associate and the principal has significant influence over the associate and the interest is material to the principal; or
  - e. an entity controls both the principal and the associate and the operations, resources or affairs of the principal and the associate are both material to the entity.
- 1.5. An entity has a “Qualifying Investment” in another entity, if the first entity has an asset that is an investment in the second entity, or has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.
- 1.6. In relation to a dismissal, when determining the number of employees of the employer at a particular time, the employees that are to be counted include the employee who is being dismissed or whose employment was terminated and any other employee of the employer who is also being dismissed or whose employment was also terminated.

## **2. Exclusion from Obligation to Pay Redundancy Pay**

- 2.1. The obligation to pay Redundancy Pay is now a National Employment Standard (Section 119). Employers must comply with all NES from 1 January 2010.
- 2.2. Normally, a contravention of a Standard will expose the employer to the risk of civil proceedings in the Federal Court or Federal Magistrates Court (both jurisdictions have the authority to impose severe penalties on contravening employers).
- 2.3. However, Section 121 provides that Section 119 does not apply if, immediately prior to the termination of the employee's employment, or at the time that the employee was given notice (whichever is earlier) the employer was a small business employer.

## **3. Standing to Bring Unfair Dismissal Proceedings**

- 3.1. Similarly to the current requirements of the Workplace Relations Act, the Fair Work Act 2009 provides that an employee must complete a qualifying period of employment prior to being entitled to commence proceedings for unfair dismissal (described as the 'Minimum Employment Period').
- 3.2. The "less than 100 employees" defence to unfair dismissal proceedings which was available under the Workplace Relations Act, no longer applies. As long as an employee has completed a qualifying period, and he or she earns less than the prescribed High Income Threshold, he or she will be entitled to commence proceedings for unfair dismissal.
- 3.3. For small business employers the qualifying period has been extended to 12 months (Section 383). For other employers the qualifying period of employment remains 6 months.
- 3.4. The new unfair dismissal provisions will operate from 1 July 2009.

## **4. Dismissal – The Small Business Fair Dismissal Code**

- 4.1. Section 385 of the Fair Work Act provides that an employee will have been unfairly dismissed if the dismissal was harsh, unjust or unreasonable, was not a case of genuine redundancy, and was not consistent with the Small Business Fair Dismissal Code.
- 4.2. Under Section 388, a person's dismissal is consistent with the Small Business Fair Dismissal Code if, immediately before the time of the dismissal or the time at which the person was given notice (whichever happened first) the employer was a small business employer and the employer complied with the requirements of the Small Business Fair Dismissal Code in relation to the dismissal.
- 4.3. Compliance with the Code will be considered by Fair Work Australia ("FWA") prior to considering the merits of a person's application for relief in respect of unfair dismissal (Section 396).

## **5. Permission to be Represented by a Lawyer in Unfair Dismissal Proceedings**

- 5.1. As of 1 July 2009 a new body, Fair Work Australia, will replace the role of the AIRC in dealing with unfair and unlawful termination proceedings.

- 5.2. Pursuant to Section 596, a person may only be represented by a lawyer or paid agent in proceedings brought before Fair Work Australia with Fair Work Australia's permission.
- 5.3. Fair Work Australia may grant permission for a person to be represented by a lawyer or paid agent if it would enable the matter to be dealt with efficiently, or it would be unfair not to allow representation as the person is unable to represent himself, herself or itself effectively, or it would be unfair not to allow representation taking into account the fairness between the parties involved in the same matter (Section 596 (2)).
- 5.4. Some of the circumstances noted in the Act in which FWA will grant permission to a person to have representation, include where a small business with no special human resources staff is a party to the proceedings and the other party is represented by an officer or employee of an industrial association or another person with experience in workplace relations advocacy.

## **6. The Fair Dismissal Code for Small Business Employers**

- 6.1. The Fair Dismissal Code is not particularly onerous.
- 6.2. Where the employer proposes to summarily terminate an employee's employment, the Code requires that the employer believe on reasonable grounds that the employee's conduct is sufficiently serious. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedure. The Code also suggests that summary dismissal will be deemed fair if the conduct is of a type that could be or has been reported to the police.
- 6.3. In any other circumstances, the employer must give the employee reasons for dismissal. The reason needs to be validly based on the employee's conduct or capacity to do the job. The employee should receive oral or, preferably written warning that he or she is at risk of being dismissed. The employee should also have the opportunity to respond to the warning and be given a reasonable chance to rectify the problem. In order to rectify the problem, the employer may be required to provide additional training or guidance.
- 6.4. When discussing matters relating to possible dismissal, the employee should normally be allowed to have a support person present. However, it would not be the ordinary case for that person to be a lawyer acting in a professional capacity.
- 6.5. The employer should maintain sufficient documentation to show that the dismissal complied with the code.
- 6.6. The Department of Employment, Education and Workplace Relations provides a downloadable Small Business Fair Dismissal Code Checklist which may be completed by the employer and referred to in subsequent proceedings for relief, if they arise. The Checklist may be downloaded through the following link: [http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfa\\_ctsheet\\_09.pdf](http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfa_ctsheet_09.pdf)
- 7. **Concluding Comments: The Fair Work Act 2009; What Should Small Business Employers Do Next?**
  - 7.1. The Fair Work Act 2009 has introduced a variety of changes to the Federal Workplace Relations system. Of these, a significant set apply specifically to small business employers.

- 7.2. Accordingly, employers of small businesses should take time to determine whether they are a small business employer within the meaning of the Act.
- 7.3. Employers who are small business employers within the meaning of the Act should review their current workplace policies and procedures to ensure compliance with the Small Business Fair Dismissal Code.
- 7.4. In the absence of the employer operating under existing policies and procedures, now is a good time to consider implementing workplace policies in respect of unsatisfactory performance and disciplinary procedures and dispute settlement and grievance procedures.
- 7.5. Small business employers may also consider redrafting their existing employment contracts for new employees to remove any reference to entitlements to severance payments upon redundancy (Note. this should not occur if the removal of an entitlement would be contrary to a relevant Modern Award).

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