



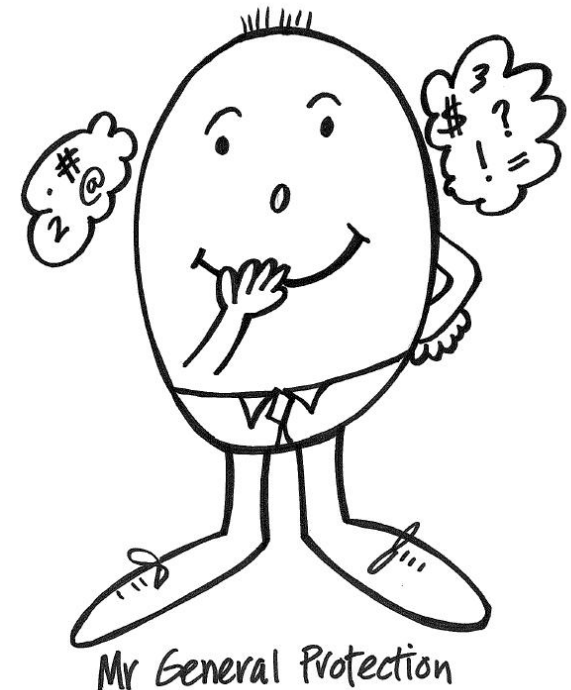
Australian Government

Fair Work Act 2009

General Protections
Unfair Dismissal

General Protections

An employer must not take adverse action against an employee because of their workplace rights, their industrial activities or for a discriminatory reason.



What is adverse action?

Adverse action by an employer against an employee includes:

- dismissal
- discrimination
- altering the position of an employee to their detriment

What is a workplace right?

A workplace right is an employee's:

- Employment entitlements;
- Roles or responsibilities (eg union delegate or OHS rep);
- Right to initiate or participate in processes or proceedings under workplace laws or instruments;
- Right to make complaint regarding employment;

Industrial Activities?

- A person's freedom to be or not be a member of a union;
- Freedom to participate or not participate in certain industrial activities;

What else is prohibited?

- Coercion or pressure
- Sham contracting

What is unfair dismissal?

A person has been unfairly dismissed when the dismissal:

- was **harsh, unjust or unreasonable**
- was not a case of **genuine redundancy**
- the dismissal was not consistent with the **Small Business Fair Dismissal Code**

Who is covered ?

- About 80% of employees in Australia are now protected from unfair dismissal.
- Small and large businesses are included.
- WorkChoices = only 44% of employees covered.
- **3 million more people are now protected.**

Qualifying period

All employees are protected from unfair dismissal, provided they have served a qualifying period.

- 12 months service for small business employees
- 6 months service for everyone else

Full time, part time and regular or systemic casual employees are all treated equally.

It is not lawful to have any clause in an Agreement that seeks to give unfair dismissal rights to people who have not served the minimum qualifying period.

Who isn't covered?

People who have not been 'dismissed'.

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

- They were employed under a contract for specified period of time or for a specified task
- the employment was for a specified period of time under a training arrangement
- the person was demoted without involving a significant reduction in pay or duties and they remained with the same employer

Employees earning over \$100k are not covered.

Harsh, unjust or unreasonable

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

- valid reason
- whether the person was notified of that reason
- whether the person was given any opportunity to respond
- Was a support person allowed?
- Warnings about unsatisfactory performance
- the size of the employer's enterprise
- a lack of dedicated human resource management specialists
- any other matters that Fair Work Australia considers relevant (Section 387).

General Protections

A worker cannot be dismissed 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 of the FW Act

Genuine Redundancy

When the employer no longer requires the work done by the employee to be performed by anyone, this is a genuine redundancy.

The employer can no longer avoid unfair dismissal by claiming 'operational reasons'.

What is a small business?

The definition of a 'small business' has changed from 100 employees to 15.

From 1 July 2009 until 31 December 2010 a small business is a business with less than 15 full time equivalent employees.

From 1 January 2011, this will change to a basic headcount of employees, including permanent fulltime and part-time employees as well as systemic casual staff

Small business fair dismissal code

If a small business employer can prove to FWA that it complied with the code, FWA cannot find the dismissal unfair.

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 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.

Transfer of business

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 employees service under the old employer for the purposes of unfair dismissal provisions.

They must inform the employee of this in writing before the new employment starts.

Making a Claim

Claims must be made to Fair Work Australia within 14 days.

FWA can allow a longer period for lodgement if there are exceptional circumstances.

FWA process for claims

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)
- whether the dismissal was a genuine redundancy

FWA process for claims

FWA will be able to assess claims **informally** in the first stage, including by phone interviews, papers and conferences at the workplace.

If there are contested facts, FWA may decide that a more formal hearing or conference is needed.

Most claims will not need to have a formal public hearing to get an outcome. FWA can make a binding decision from a conference.

Claims should be decided in a much shorter time frame due to these changes in claims and hearing process.

Outcomes

Re-instatement of the employee will be the preferred and usual outcome.

If re-instatement is not suitable, compensation may be ordered.

Compensation is capped at no more than 6 months worth of the employees earnings and can not include a component for stress, humiliation etc.