

*Your responses suggest that a claim for "unfair dismissal" may be available for you. You must apply to the Fair Work Commissioner for an "unfair dismissal" remedy within 21 days of your dismissal. However, the Fair Work Commissioner may grant you an extension in exceptional circumstances.*

### **387 Criteria for considering harshness etc.**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- (a) 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); and
- (b) whether the person was notified of that reason; and
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- (e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- (f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- (g) 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 followed in effecting the dismissal; and
- (h) any other matters that the FWC considers relevant.

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:

- 1. (a) the person sexually harasses another person; and
- 2. (b) the person does so in connection with the person's employment.

## **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 the Fair Work Commission, 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.

### **394 Application for unfair dismissal remedy**

- (1) A person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy.

Note 1: Division 4 sets out when the FWC may order a remedy for unfair dismissal.

Note 2: For application fees, see section 395.

Note 3: Part 6-1 may prevent an application being made under this Part in relation to a dismissal if an application or complaint has been made in relation to the dismissal other than under this Part.

- (2) The application must be made:
- (a) within 21 days after the dismissal took effect; or
  - (b) within such further period as the FWC allows under subsection (3).
- (3) The FWC may allow a further period for the application to be made by a person under subsection (1) if the FWC is satisfied that there are exceptional circumstances, taking into account:
- (a) the reason for the delay; and
  - (b) whether the person first became aware of the dismissal after it had taken effect; and
  - (c) any action taken by the person to dispute the dismissal; and
  - (d) prejudice to the employer (including prejudice caused by the delay); and
  - (e) the merits of the application; and
  - (f) fairness as between the person and other persons in a similar position.