

The Small Business Fair Dismissal Code was declared on 24 June 2009 pursuant to subsection 388(1) of the *Fair Work Act 2009*.

Commencement

The Small Business Fair Dismissal Code comes into operation on 1 July 2009.

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 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.

(Fair Work Act 2009)

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.

These are the remedies which may be available to you:
(Fair Work Act 2009)

Division 4—Remedies for unfair dismissal

390 When the FWC may order remedy for unfair dismissal

- (1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:
 - (a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and
 - (b) the person has been unfairly dismissed (see Division 3).
- (2) The FWC may make the order only if the person has made an application under section 394.
- (3) The FWC must not order the payment of compensation to the person unless:
 - (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
 - (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.

Note: Division 5 deals with procedural matters such as applications for remedies.

391 Remedy—reinstatement etc.

Reinstatement

- (1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:
 - (a) reappointing the person to the position in which the person was employed immediately before the dismissal; or
 - (b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:

- (a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and
- (b) that position, or an equivalent position, is a position with an associated entity of the employer;

the order under subsection (1) may be an order to the associated entity to:

- (c) appoint the person to the position in which the person was employed immediately before the dismissal; or
- (d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

- (2) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to maintain the following:
 - (a) the continuity of the person's employment;
 - (b) the period of the person's continuous service with the employer, or (if subsection (1A) applies) the associated entity.

Order to restore lost pay

- (3) If the FWC makes an order under subsection (1) and considers it appropriate to do so, the FWC may also make any order that the FWC considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.
- (4) In determining an amount for the purposes of an order under subsection (3), the FWC must take into account:
 - (a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and
 - (b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement.

392 Remedy—compensation

Compensation

- (1) An order for the payment of compensation to a person must be an order that the person's employer at the time of the dismissal pay compensation to the person in lieu of reinstatement.

Criteria for deciding amounts

- (2) In determining an amount for the purposes of an order under subsection (1), the FWC must take into account all the circumstances of the case including:
 - (a) the effect of the order on the viability of the employer's enterprise; and
 - (b) the length of the person's service with the employer; and

- (c) the remuneration that the person would have received, or would have been likely to receive, if the person had not been dismissed; and
- (d) the efforts of the person (if any) to mitigate the loss suffered by the person because of the dismissal; and
- (e) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for compensation; and
- (f) the amount of any income reasonably likely to be so earned by the person during the period between the making of the order for compensation and the actual compensation; and
- (g) any other matter that the FWC considers relevant.

Misconduct reduces amount

- (3) If the FWC is satisfied that misconduct of a person contributed to the employer's decision to dismiss the person, the FWC must reduce the amount it would otherwise order under subsection (1) by an appropriate amount on account of the misconduct.

Shock, distress etc. disregarded

- (4) The amount ordered by the FWC to be paid to a person under subsection (1) must not include a component by way of compensation for shock, distress or humiliation, or other analogous hurt, caused to the person by the manner of the person's dismissal.

Compensation cap

- (5) The amount ordered by the FWC to be paid to a person under subsection (1) must not exceed the lesser of:
 - (a) the amount worked out under subsection (6); and
 - (b) half the amount of the high income threshold immediately before the dismissal.
- (6) The amount is the total of the following amounts:
 - (a) the total amount of remuneration:
 - (i) received by the person; or
 - (ii) to which the person was entitled;
 (whichever is higher) for any period of employment with the employer during the 26 weeks immediately before the dismissal; and
 - (b) if the employee was on leave without pay or without full pay while so employed during any part of that period—the amount of remuneration taken to have been received by the employee for the period of leave in accordance with the regulations.

393 Monetary orders may be in instalments

To avoid doubt, an order by the FWC under subsection 391(3) or 392(1) may permit the employer concerned to pay the amount required in instalments specified in the order.

These are the relevant procedural matters:

(Fair Work Act 2009)

395 Application fees

- (1) An application to the FWC under this Division must be accompanied by any fee prescribed by the regulations.
- (2) The regulations may prescribe:
 - (a) a fee for making an application to the FWC under this Division; and
 - (b) a method for indexing the fee; and
 - (c) the circumstances in which all or part of the fee may be waived or refunded.

396 Initial matters to be considered before merits

The FWC must decide the following matters relating to an application for an order under Division 4 before considering the merits of the application:

- (a) whether the application was made within the period required in subsection 394(2);
- (b) whether the person was protected from unfair dismissal;
- (c) whether the dismissal was consistent with the Small Business Fair Dismissal Code;
- (d) whether the dismissal was a case of genuine redundancy.

397 Matters involving contested facts

The FWC must conduct a conference or hold a hearing in relation to a matter arising under this Part if, and to the extent that, the matter involves facts the existence of which is in dispute.

398 Conferences

- (1) This section applies in relation to a matter arising under this Part if the FWC conducts a conference in relation to the matter.
- (2) Despite subsection 592(3), the FWC must conduct the conference in private.
- (3) The FWC must take into account any difference in the circumstances of the parties to the matter in:
 - (a) considering the application; and
 - (b) informing itself in relation to the application.
- (4) The FWC must take into account the wishes of the parties to the matter as to the way in which the FWC:
 - (a) considers the application; and
 - (b) informs itself in relation to the application.

399 Hearings

- (1) The FWC must not hold a hearing in relation to a matter arising under this Part unless the FWC considers it appropriate to do so, taking into account:
 - (a) the views of the parties to the matter; and
 - (b) whether a hearing would be the most effective and efficient way to resolve the matter.

- (2) If the FWC holds a hearing in relation to a matter arising under this Part, it may decide not to hold the hearing in relation to parts of the matter.
- (3) The FWC may decide at any time (including before, during or after conducting a conference in relation to a matter) to hold a hearing in relation to the matter.

399A Dismissing applications

- (1) The FWC may, subject to subsection (2), dismiss an application for an order under Division 4 if the FWC is satisfied that the applicant has unreasonably:
 - (a) failed to attend a conference conducted by the FWC, or a hearing held by the FWC, in relation to the application; or
 - (b) failed to comply with a direction or order of the FWC relating to the application; or
 - (c) failed to discontinue the application after a settlement agreement has been concluded.

Note 1: For another power of the FWC to dismiss applications for orders under Division 4, see section 587.

Note 2: The FWC may make an order for costs if the applicant's failure causes the other party to the matter to incur costs (see section 400A).

- (2) The FWC may exercise its power under subsection (1) on application by the employer.
- (3) This section does not limit when the FWC may dismiss an application.

400 Appeal rights

- (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
- (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

400A Costs orders against parties

- (1) The FWC may make an order for costs against a party to a matter arising under this Part (the *first party*) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.
- (2) The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.
- (3) This section does not limit the FWC's power to order costs under section 611.

401 Costs orders against lawyers and paid agents

- (1) This section applies if:
 - (a) an application for an unfair dismissal remedy has been made under section 394; and

- (b) a person who is a party to the matter has engaged a lawyer or paid agent (the **representative**) to represent the person in the matter; and
- (c) under section 596, the person is required to seek the FWC's permission to be represented by the representative.

(1A) The FWC may make an order for costs against the representative for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred because:

- (a) the representative encouraged the person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success in the matter; or
- (b) of an unreasonable act or omission of the representative in connection with the conduct or continuation of the matter.

(2) The FWC may make an order under this section only if the other party to the matter has applied for it in accordance with section 402.

(3) This section does not limit the FWC's power to order costs under section 611.

402 Applications for costs orders

An application for an order for costs under section 611 in relation to a matter arising under this Part, or for costs under section 400A or 401, must be made within 14 days after:

- (a) the FWC determines the matter; or
- (b) the matter is discontinued.

403 Schedule of costs

(1) A schedule of costs may be prescribed in relation to items of expenditure likely to be incurred in relation to matters that can be covered by an order:

- (a) under section 611 in relation to a matter arising under this Part; or
- (b) under section 400A or 401;

including expenses arising from the representation of a party by a person or organisation other than on a legal professional basis.

(2) If a schedule of costs is prescribed for the purposes of subsection (1), then, in awarding costs under section 611 in relation to a matter arising under this Part, or awarding costs under section 400A or 401, the FWC:

- (a) is not limited to the items of expenditure appearing in the schedule; but
- (b) if an item does appear in the schedule—must not award costs in relation to that item at a rate or of an amount that exceeds the rate or amount appearing in the schedule.

404 Security for costs

The procedural rules may provide for the furnishing of security for the payment of costs in relation to matters arising under this Part.