

NEW DISMISSAL LAWS UNDER FAIR WORK AUSTRALIA

1 July 2009 marks the first day of operation of the *Fair Work Act 2009 (Act)*. The Act serves to replace the previous government's controversial WorkChoices legislation.

Employers must be aware that any dismissals occurring after 1 July 2009 will be subject to the Act. In particular, small businesses will be significantly impacted by the provisions of the Act in relation to dismissal by way of the Fair Dismissal Code (**Dismissal Code**).

The Act also introduces a new set of standards for collective bargaining, which will commence operation on 1 January 2010 and will deliver more powers to unions.

The Council of Small Business of Australia has issued a warning to small businesses to act with extreme caution when making any changes to their existing staffing arrangements, including hiring, firing, changing staff hours or rates of pay after 1 July 2009.

David Gregory, spokesman for the Chamber of Commerce and Industry stated that a lot of changes have been made with this new legislation and it is difficult for small businesses to keep up. These are new legal obligations which businesses will need to understand and comply with.

Less than 15 Employees

The Act changes the definition of a 'small business' from an employer with less than 100 employees to an employer with fewer than 15 full time equivalent employees (reducing further on 1 January 2011 to 15 total employee head count). The impact of this seemingly minor change is significant to small businesses as it serves to remove the 'small business exemption' to claims of unfair dismissal that the WorkChoices legislation previously provided for.

Dismissal Code

The Dismissal Code outlines a process for termination where the reason for dismissal involves capacity or conduct of the employee. An employee employed in a small business is prevented from making an unfair dismissal claim in their first 12 months of service. However, after 12 months of service, the termination of an employee must comply with the Dismissal Code in order to avoid an unfair dismissal claim.

The Dismissal Code provides that a "small business employer will be required to provide evidence of compliance" when an employee makes a claim for unfair dismissal. This clearly places the onus of establishing the legitimacy of a dismissal on the small business rather than on the employee who under the WorkChoices legislation would have been required to prove the illegitimacy of the dismissal.

In relation to summary dismissal, the Dismissal Code provides that 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 is defined to include theft, fraud, violence and serious breaches of occupational health and safety procedures.

In relation to other circumstances of dismissal, the small business employer must give the employee a reason why he or she is at risk of being dismissed (except in the case of summary dismissal). The reason must be a valid reason based on the employee's conduct or capacity to do the job. Opportunity must be provided to the employee in question as to respond and rectify the problem.

A small business employer will be required to provide evidence of compliance with the Dismissal Code (in the form of written warnings, witness statements or a notice of termination) if a claim for unfair dismissal is made.

Small Business Dismissal Checklist

For businesses that meet the definition provided for in the Act, the Dismissal Code allows employees to be dismissed so long as a warning (preferably written) has been issued to the employee despite which the employee has not improved and the employer adheres to a government issued 'Small Business Fair Dismissal Code Checklist' (**Checklist**).

An unfair dismissal claim cannot be brought by an employee who earns more than the threshold (which currently stands at \$108,840.00 p.a), is covered by a workplace agreement or an award or is dismissed because of a genuine redundancy.

More than 15 Employees

For businesses with more than 15 employees, Fair Work Australia determines a dismissal as being unfair where there is no valid reason for the dismissal, the employee is not given notice of proposed dismissal and opportunity to respond, the employee has been in service for more than 6 months or the performance or actions of the employee warrants the dismissal.

Summary

It is easy to see the importance of businesses to seek expert advice to ensure awareness and compliance with their rights and responsibilities under the new Fair Work legislation prior to taking any steps towards hiring or firing employees.

If you would like any further information on this topic, please contact Ilona Teremi, Managing Solicitor Director on 8239 6503 or ilona.teremi@kreissonlegal.com.au

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