

Guide to Termination of Employment & Unfair Dismissal Rights of Employees under the Fair Work Act 2009



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This guide is for general information only. This guide is not legal advice and is not a substitute for legal advice which should take into account the specific circumstances of an employee and a termination situation. The information in this guide is correct, to the best of the knowledge of the author and publisher, as at January 2011.

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Introduction

Guide to Termination of Employment & Unfair Dismissal Rights of Employees under the Fair Work Act 2009

What this guide is about?

This guide provides information on the termination of employment and unfair dismissal rights under the *Fair Work Act 2009 (Cth)* (“**FWAct**”). This is not a guide to all potential rights and legal remedies applicable to the termination of employment.

Specifically this guide covers the following topics:¹

- The notice entitlements of employees in the *FWAct*.
- Employee resignations.
- Unfair dismissal rights and protections in the *FWAct*.

This guide does not provide information about the “*general protections*” provisions of the *FWAct* or the “*unlawful termination*” provisions of the *FWAct*.²

Who is this guide for?

This guide is for the information of employees.

This guide also contains more detailed information about the relevant law mainly in the end notes. These notes may be of assistance to employees who would like to know more about the law and for lawyers who may be assisting and advising employees.

Termination of Employment

What is a termination of employment?

In simple circumstances a termination of employment occurs where an employee's employment is brought to an end. This may occur because of the actions of the employee or the employer. The employee may resign or the employer may dismiss the employee, each event will result in a termination of employment.

Some examples of a termination of employment brought about by an employer include the following:

- Where an employer dismisses an employee on the basis of redundancy.³
- Where an employer dismisses an employee for poor performance in their job.
- Where an employer dismisses an employee for misconduct.
- Where an employer dismisses an employee for a breach of an employment contract or a breach of some other legal obligation of the employee.
- Where an employee is forced to resign their employment because of some action of the employer. For example, where the employer threatens dismissal if the employee will not resign.

The employer may or may not give notice in any of the above circumstances. This does not mean that notice is not required. In many of the above circumstances notice must be given in accordance with the *FWAct*. Notice obligations will be discussed further on in this guide.

Employment will also terminate in other circumstances. These circumstances may include:

- Where an employee is employed under a fixed term contract for a specified⁴ task or for a season and the fixed term contract, task or season comes to an end.
- Where employment is under a training contract and the training period is completed and there is no agreement to continue the employment after the training period is completed.
- If the employee dies.

Termination events are discussed in more detail with examples further on in this guide.

What is a dismissal?

The *FWAct* defines a dismissal by an employer as follows:

(1) "A person has been **dismissed** if:

- (a) *the person's employment with his or her employer has been*
- (b) *terminated on the employer's initiative; or*
- (c) *the person has resigned from his or her employment but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer."*

Strictly speaking, this definition only applies in unfair dismissal circumstances under the *FWAct*. However it provides a helpful short statement about how a dismissal may occur. Subsection 1(a) is straightforward. Subsection 1(b) serves to reinforce the idea that where an employee is pushed by the employer to resign the resignation is a termination of employment caused by the employer.⁵

The employer's obligations to give notice

In order for an employer to terminate an employee's employment the employer is in many cases required to give notice. Notice is the amount of time an employer is legally required to give to an employee between informing the employee of the termination and the last day of employment.

For example, if an employer is legally required to give an employee 4 weeks notice, then at least 4 weeks must pass between the date upon which notice is given and the last day of employment. The minimum notice required is set out in the applicable table in the *FWAct*.⁶ The table is set out on page 6 of this guide.

Notice may be given pursuant to a notice provision in the employee's contract of employment, award or enterprise agreement.⁷ The *FWAct* contains notice provisions which state the minimum notice that employers must give to employees where notice must be given.⁸ The notice provisions in the *FWAct* apply to all employees whose employment is covered by the *FWAct*.⁹ In NSW all private sector (non government) employees are covered by the *FWAct*.

Notice by the employer must be given to the employee in writing.¹⁰

Payment in lieu of notice

In most circumstances an employer is legally able to make a payment to the employee instead of giving actual notice.¹¹ Using the example above, if an employer is to give 4 weeks notice, the employer may terminate employment immediately. However, in such a case the employer must pay the employee 4 weeks wages or salary. This is referred to as a "*payment in lieu of notice*".

An employer may give an employee a combination of actual notice and a payment in lieu of notice. So using the example of 4 weeks notice, the employer may require the employee to work for 2 weeks and then conclude employment (after the 2 weeks) with a payment for a further 2 weeks in lieu of notice.

Termination without notice

Before considering specific notice entitlements, it is important to take note of the circumstances where the termination of employment by the employer may occur without the legal requirement to give notice. Some of these circumstances were identified in the earlier parts of this guide. The following is a more comprehensive statement and explanation of the circumstances where notice is not required under the *FWAct*:

- **Where an employee is employed for a specified time.**¹² For example, where an employee is employed under a 12 month contract and the 12 months pass without an agreement to extend the contract. The employment will end at the conclusion of 12 months without any act of termination by the employer or the employee.
- **Where an employee is employed for a specified task and the task is completed.**¹³ For example, where an employee is hired to work on a special project or a special event and the project or special event comes to an end.
- **Where an employee is employed for the duration of a season and the season comes an end.**¹⁴ Examples of this can be found in tourism and agricultural industries. A snow skiing instructor may be hired only for the winter and a fruit picker may be employed only for the season when the fruit is to be harvested. In each example employment will come to an end with the end of the season. Neither the employer nor the employee will terminate the employment.

- **An employer is not legally required to give notice under the *FWAct* where an employee's actions amount to serious misconduct.**¹⁵ In other words, the notice entitlements under the *FWAct* do not apply to serious misconduct situations. However, it will still be necessary for the employer to inform the employee of the termination of the employee's employment and the reason for the termination. There may be a dispute between the employer and employee about whether or not the conduct occurred or whether or not it was serious misconduct. The dispute may lead to an unfair dismissal claim or some other legal claim.
- **Where the employee is a casual employee.**¹⁶ True casual employment consists of a series of employment periods without an expectation of ongoing work. This is a difficult area of employment law because there is a fine line between permanent work and casual work.

For example, a shift worker who is contacted by the employer ahead of each roster period and is given a variety of shifts each time, or sometimes no shifts, will likely be a casual. It is not necessary to terminate the employment of this type of worker. The employer may simply choose not to offer any more shifts. A contrasting situation would be where a shift worker works the same shifts over a long period of time, where the work situation gives the employee a real expectation of regular shifts in the future and the period of this arrangement is open ended. It is unlikely that a worker in this situation is truly a casual employee.

- **Where an employee works under a training arrangement for a specified period and where it is agreed that employment will last for the length of the training period.**¹⁷ This will often apply to employees described as trainees. However it is important to note that this category of exclusion **does not apply to apprentices** because of the specific wording of the relevant provision of the *FWAct*. Accordingly, it is necessary to give notice to an employee who is an apprentice, despite the fact that the apprenticeship may be coming to an end.

The *FWAct* contains an anti-avoidance provision to protect employees. The provision prevents employers from misusing the above categories to avoid notice obligations. The provision applies where the substantial reason for employment under the category was to avoid notice obligations.¹⁸ A good example of this may be "casual" employment. If an employer hires an employee to work regular part time hours but calls the employee a casual to avoid notice requirements, the anti-avoidance provision will operate. This will mean that the employer must still give termination notice under the *FWAct*.

Finally, there are a number of other categories of employment where the giving of notice is not required. In summary these include: daily hire employees in the building and construction industry; some daily hire and weekly hire employees in the meat industry.¹⁹

Notice entitlement amounts

Notice entitlements are calculated in accordance with Table 1 below, which is found in the *FWAct*.²⁰ The period of employment coincides with the entitlement and the stated entitlements are not cumulative.

Table 2

Period	Employee's period of continuous service with the employer at the end of the day the notice is given	Period*
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

***IMPORTANT** – Where an employee is over 45 years of age **and** has completed at least 2 years of continuous service, then the employee is to be given or paid 1 extra week of notice.

There are a number of matters to be aware of when using Table 1:

- When making a payment in lieu of notice, the employer must pay at least the amount that the employer would have been required to pay if the employee worked until the end of the notice period.²¹
- This calculation must be based on full pay and must also be based on the hours the employee would have worked.²²
- In many cases where the employee worked regular overtime or shifts then the payment in lieu of notice should also include the overtime or shift amounts the employee would have earned.
- The entitlements in Table 1 are located in the part of the *FWAct*, which sets out the *National Employment Standards*. On this basis the notice entitlements apply as a minimum standard to all employees covered by the *FWAct*.²³

An award, enterprise agreement or contract of employment may set out a greater notice entitlement. If this is the case then the employer must pay the greater amount. For example, an employee may have been employed for 2 years. The employee's notice entitlement will be 2 weeks notice if Table 1 is used. However, if the employee's contract states that the employer must give 4 weeks notice, then the employee's notice entitlement is 4 weeks.

At any time an employer and an employee may negotiate the employee's notice entitlement. The employer and employee may finally agree that a notice entitlement greater than Table 1 will be given.²⁴

An employee's obligations when resigning their employment

The *FWAct* does not specify the notice period that an employee must give to their employer to end their employment. However, the *FWAct* also makes clear that awards and enterprise agreements may specify an employee's termination notice obligation.²⁵

Many awards require an employee to give the same amount of notice as the employer must give under Table 1. ²⁶ However the employee is generally not required to provide the additional amount applicable where the employee is over 45 years of age.

Many awards now contain a provision which permits an employer to withhold from an employee an amount of money if the employee fails to abide by the employee's notice obligation. The employer may withhold money equivalent to the value of the notice not given.²⁷ For example if an employee was required to give 1 weeks notice but resigned and immediately left employment, the employer may deduct the value of 1 weeks wages from the employee's final payment of unpaid wages.

This deduction by the employer must be specifically allowed in an award or enterprise agreement. A clause in a contract allowing a deduction may not be enough to allow a legal deduction.

Other entitlements that could be relevant in circumstances of termination of employees

When an employee is terminated the employee may have other entitlements that must be paid in addition to notice.

The following is a summary of some other entitlements that should be paid on termination if they are relevant and are owed to the employee:

- Any redundancy pay entitlements if the employment is terminated by reason of redundancy.²⁸
- Any outstanding wages (including overtime and shift allowances) that are unpaid at the time of termination.
- Any accrued untaken annual leave.²⁹
- Annual leave loading (on the accrued untaken annual leave amounts). This amount is to be paid if the employee receives this loading under an applicable award, enterprise agreement or contract.
- Any accrued untaken long service leave.³⁰
- Any commission or bonus amounts that have been earned in periods up until the termination date.

Unfair Dismissal Rights

Since 1994, individual employees have been able to make some sort of unfair dismissal application to an industrial tribunal. Over the years these rights have undergone change.³¹ The old “*Work Choices*” laws significantly restricted employee unfair dismissal rights. New unfair dismissal laws were introduced under the *FWAct 2009*. The new *FWAct* laws cover and protect more employees than were covered under the *Work Choices* laws.³²

In broad summary the unfair dismissal laws in the *FWAct* have the following features:

- The laws broadly cover employees in Australia - **with the exception** of:
 - Public servants employed by State or Local Governments.³³
 - High income earners.
- The laws protect employees from unfair dismissal but only after the fact of the dismissal. It is not possible under the *FWAct* unfair dismissal laws to obtain an order preventing a potentially unfair dismissal from taking place.³⁴
- The laws describe the elements (or matters) that make up an unfair dismissal. The laws also set out some circumstances where employees may be excluded from making an unfair dismissal claim.
- The laws set out the remedies (legal outcomes) available to unfairly dismissed employees. There are only two – reinstatement and/or compensation.
- The laws give power to Fair Work Australia to deal with and decide unfair dismissal claims. Procedural steps are also set out in the laws.

Fair Work Australia (“FWA”)

FWA is the industrial tribunal established under the *FWAct* to deal with and decide on a wide range of matters that arise under the *FWAct*. Importantly, all unfair dismissal applications are made to FWA. FWA attempts to assist the employee and employer to resolve the matter in a process of conferences which includes “*conciliations*”. If the conciliation process fails, then FWA will eventually make a decision in favour of the employee or employer based on the merits of the claim.

FWA is not a court and its powers are limited. When FWA is determining an unfair dismissal claim it can only use the powers given to FWA by the *FWAct*.

FWA cannot:

- Order an employer to pay to an employee unpaid entitlements owed to the employee, such as unpaid wages or overtime, unpaid holidays or unpaid sick leave etc (except pay lost in a period before reinstatement).
- Make an order under the unfair dismissal laws preventing an employer from dismissing an employee. However FWA can make an order reinstating an employee to their former job.
- Impose a pecuniary penalty (fine) on an employer because of an unfair dismissal.
- Order changes to the terms and conditions of employment applicable to an employee and employer (except to protect terms and conditions when reinstating an employee).

Who is protected by the unfair dismissal laws?

Protection under the unfair dismissal laws in reality is a right to claim a legal remedy from FWA after an unfair dismissal.³⁵

An employee who satisfies the following requirements can make an unfair dismissal claim:

- The employee must have been employed for a “*continuous service*” period of at least 6 months.³⁶ In the case of a “*small business employer*”³⁷ the employee must have been employed for a “*continuous service*” period of at least 12 months. The “*small business employer*” definition and other related issues are discussed below.
- The Employee must be covered by:
 - A “*modern award*” **or**
 - An “*enterprise agreement*”, **or**
 - The employee must earn less than the “*high income threshold*”³⁸

Only one of these 3 criteria needs to apply to the employee. In reality many employees who earn less than the high-income threshold will be covered by a modern award. As at January 2011 the high income threshold was **\$113,800** in yearly income.³⁹

The continuous service requirements can create difficulties for casual employees. Generally a period of casual employment will not count as continuous service.⁴⁰

However, there is a very significant exception that will assist many employees whose employment is described by their employer as “*casual*”. The exception allows a period of service as a casual to count as continuous service if employment was on a regular and systematic basis and the employee had a reasonable expectation that employment in this way would continue.⁴¹ For example, where an employer hires an employee as a casual worker and the employee works the same shifts for 13 months, the employee will qualify to make an unfair dismissal claim if the employee can show that they had a reasonable expectation that their employment would continue in the same way. If the employer has at some earlier time indicated that the employee would continue working into the future this would strengthen the employee’s case that the period of casual employment should be counted.

Some employees who transfer from an old employer to a new employer may not be able to count service with the old employer when making an unfair dismissal claim against the new employer.⁴² The law in this area is mostly relevant where an employee transfers to a new employer because of a business transaction, for example the sale of the business. In very general terms there will be no continuity of service where:

- The old employer and the new employer were not “*associated entities*” as defined in company law;⁴³ **and**
- The new employer informed the employee in writing before the new employment began that service with the old employer would not be recognised.

The transfer of employment provisions in the *FWAct* are complex.⁴⁴ Employees that are potentially affected by a “*transfer of employment*” should obtain legal advice.

The transfer provisions do not assist employees who simply resign and take up employment with a new employer in the way that employees usually move from one job to another.

What is an unfair dismissal?

Not any dismissal will be unfair despite the fact that a dismissal may have a negative effect on an employee. Also, even though an employee may satisfy the continuous service and other qualifications discussed above, there are still further legal criteria that must be met.

A dismissal will only be unfair under the *FWAct* if it falls within the definition in section 385 of the *FWAct* that states:

“A person has been **unfairly dismissed** if FWA is satisfied that:

- a) the person has been dismissed; and
- b) the dismissal was harsh, unjust or unreasonable; and

- c) *the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
- d) *the dismissal was not a case of genuine redundancy”.*

To fully understand this provision it is necessary to also understand the meaning of the terms used in section 385. The meaning of these terms is discussed below.

“Dismissed” - An employee must establish that they were dismissed. (Dismissal was discussed in general terms at the beginning of this guide.)

The *FWAct* uses the following words: *“terminated on the employer’s initiative”*.⁴⁵ The use of these words is wide enough to include almost all processes that an employer may begin that result in a dismissal.

The *FWAct* goes even further to make it clear that employees who were forced to resign because of the conduct of the employer have also been dismissed under the *FWAct*.⁴⁶ A typical example is where an employer says to an employee they will be dismissed if they do not resign. In these circumstances the employee will have been dismissed even though they may have formally resigned. There may be other circumstances in which an employee may be forced to resign by the employer.⁴⁷

An employee will not have been dismissed in any of the following situations:

- The person was employed for a specified period of time, for a specified task or for a specified season and employment ended with the conclusion of the period, task or season.⁴⁸ (These fixed term concepts were discussed earlier in this guide in relation to termination).
- The person was employed under a training arrangement of limited duration and the termination takes place at the end of the training arrangement.⁴⁹
- The person is demoted but the demotion does not involve a significant reduction in remuneration (wages/ salary) or duties.⁵⁰

The definition of dismissed contains an anti-avoidance provision.⁵¹ If the employer has employed the person under a fixed term, task specific or seasonal contract for the substantial reason of avoiding an employer’s obligations then the employee can still make an unfair dismissal claim.

Small Business Fair Dismissal Code – A *“small business employer”* can defeat an unfair dismissal claim if the employer is able to establish compliance with the *“Small Business Fair Dismissal Code”* (the **“Code”**).⁵²

An employer is a small business employer if less than 15 employees work in the business.⁵³ Some casual employees are counted as well as any employee whose employment is being terminated.⁵⁴

Under the *FWAct* the responsible Minister of the Federal Government has declared the Code and its content.⁵⁵ In brief the Code sets out:

- Circumstances that permit a summary dismissal for serious misconduct.
- Circumstances in which other dismissals may be made.
- Various procedures which the employer can follow.

If a small business employer can provide evidence of compliance with the Code the employer can argue that the dismissal was not unfair. It is important to note that an employer cannot defeat an unfair dismissal claim by just pointing to the existence and their knowledge of the Code. The employer must provide evidence that the employer has acted in compliance with (or consistent with) the Code in the actual dismissal.

The Fair Work Ombudsman has prepared a checklist that some employers may use in following the Code. However, mere use of the checklist does not always mean that compliance with the Code has occurred.⁵⁶ An employer’s argument that the Code has been followed does not prevent an employee from commencing an unfair dismissal claim. It will be up to the employer to establish that there has been compliance with the Code.

Genuine Redundancy – A dismissal will not be unfair in the case of a genuine redundancy⁵⁷.

A “*genuine redundancy*” should not occur because of an employee’s performance or conduct.

In the unfair dismissal provisions of the *FWAct* a genuine redundancy is defined in order to exempt redundancy situations from the application of the unfair dismissal laws in the *FWAct*.⁵⁸ In the applicable provision a genuine redundancy occurs if:

- “*the person’s employer no longer required the person’s job to be performed by anyone because of changes in the operational requirements of the employer’s enterprise; and*
- *the employer has complied with any obligation in a Modern Award or Enterprise Agreement that applied to the employment to consult about the redundancy.*”

In simple circumstances a genuine redundancy occurs where an employee’s job is abolished. This then results in the employee’s employment being terminated.

In more complex circumstances an employee’s job may be divided up and then transferred to various other employees. This situation may occur where the employer implements a restructure in the workplace. The result is that the employee, who no longer has any work to do, may have their employment terminated on the grounds of redundancy. In practical terms there are no limitations on the type of restructures that may result in redundancies.⁵⁹

Where an employer insists that unfair dismissal laws do not apply because the employee has been made redundant, then it stands to reason that the employer must pay redundancy pay to the employee as required under the *FWAct*, unless an exception applies.

(For further information see the Illawarra Legal Centre Inc’s *Guide to Redundancy Termination Entitlements*.)

Harsh, unjust or unreasonable – These terms or ideas are at the core of the unfair dismissal provisions of *FWAct*.

If the unfair dismissal claim is not resolved between the parties, FWA will determine the claim by considering whether or not the dismissal was “*harsh, unjust or unreasonable*”. It is interesting to note that the *FWAct* does not strictly require a consideration of fairness versus unfairness. However, it is an object of the unfair dismissal laws to provide a “*fair go all round*” for employees and employers and the word “*unfair*” is also used in the *FWAct*.⁶⁰

Although the phrase “*harsh, unjust or unreasonable*” is not defined, the *FWAct* does set out a number factors that FWA will take into account in determining whether a dismissal was “*harsh, unjust or unreasonable*”. These factors (criteria) are set out in the *FWAct* as follows:⁶¹

- (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 affecting 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 affecting the dismissal; and*
- (h) *any other matters that FWA considers relevant.*”

Section 387 requires that FWA consider each and every criterion. For this reason it is important that employees who are representing themselves and also lawyers be prepared to put forward arguments that address each criterion.

The final criterion – “*any other matters*” is a general catch all, allowing FWA to consider matters that are not already specifically mentioned.⁶²

Remedies

The *FWAct* gives powers to FWA to make orders in favour of an employee where FWA decides that the employee’s dismissal was unfair. These orders are referred to in general terms as “*remedies*” as the orders are made to overcome or correct the unfair dismissal.

There are two remedies that may be ordered by FWA⁶³:

- Reinstatement, or
- Compensation.

Reinstatement – This usually involves an order that the employee is to resume work with the employer.⁶⁴

Reinstatement orders may involve:

- Reappointing the employee to the employee’s original position with the employer;⁶⁵
- Appointing the employee to another position with the employer;⁶⁶ or
- In some circumstances, appointing an employee to a position with an employer who is an “*associated entity*” of the original employer.⁶⁷ (This can be relevant when the original position has transferred to a new employer.)
- Ordering that the continuity of the employee’s service is maintained (not broken) by the dismissal.⁶⁸ This may be relevant to the calculation of employee entitlements in the future (amongst other things).

Where an employee is appointed to a position other than their original position, the appointment order will protect the employee’s minimum terms and conditions which applied before the dismissal. Using the words of the relevant *FWAct* provision: the appointment will be “*on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal*”.⁶⁹

The *FWAct* makes clear that reinstatement is the preferable or primary remedy and that compensation should only be ordered where reinstatement is not appropriate.⁷⁰ In reality reinstatement is a remedy that is not often ordered, especially not where the employer - employee relationship has broken down and cannot be repaired. In such a situation reinstatement would likely lead to further friction and other problems in the workplace.⁷¹

In the case of medium and small employers, a reinstatement order is rare. Generally, it is not realistic for medium and small business employees to expect reinstatement orders if successful in unfair dismissal claims.

Reinstatement orders are more common in cases involving the Commonwealth public service and large private sector employers, where reinstatement will result in no (or minimal) disruption.

Compensation – Orders for monetary compensation may be ordered by FWA if it is satisfied that:

- The dismissal was unfair; and
- Reinstatement is not appropriate; and
- The “*payment of compensation is appropriate in all the circumstances of the case*”.⁷²

The compensation order can only be made against the actual employer as at the time of the dismissal.⁷³

The compensation provisions of the *FWAct* allow FWA to make a compensation order up to an amount of 26 weeks pay.⁷⁴ This total amount is calculated on the basis of the remuneration the employee received (or was entitled to receive) in the 26 weeks period before the dismissal⁷⁵. An order for compensation cannot exceed an amount calculated in this way.

An order for 26 weeks compensation is vary rare and would only be ordered in extreme unfair dismissal cases. The vast majority of compensation orders are for much lesser amounts.

The *FWAct* sets out in section 392(2) the matters that FWA must take into account in determining compensation amounts.⁷⁶ They are as follows:

- (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 [reduce] 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 FWA considers relevant.”*

The final criteria – *“any other matters”* is a general catch all allowing FWA to consider matters that are not already specifically mentioned.⁷⁷

In a similar way to the unfair dismissal considerations, section 392 requires that FWA consider each and every matter. For this reason it is important that employees who are representing themselves and also lawyers be prepared to put forward arguments that address each of these matters.

There are a number of further matters relevant to compensation orders. In summary they are as follows:

- Where FWA orders reinstatement it may also order the employer to pay to the employee an amount to compensate the employee for earnings lost because of the dismissal.⁷⁸ (An example would be where FWA orders the employer to pay to the employee wages applicable to the period from dismissal to the date work recommences, in accordance with a reinstatement order).
- If FWA is of the view that misconduct contributed to the dismissal, it may still find the dismissal unfair and order compensation. In these circumstances FWA may reduce the amount of compensation it would have ordered because of the misconduct.⁷⁹
- FWA cannot include in a compensation order an amount that is compensation for *“shock, distress or humiliation or any other analogous hurt caused to the person by the manner of the person’s dismissal”*.⁸⁰
- FWA may order that the compensation amount is to be paid in instalments.⁸¹ This may be a suitable order in a case involving a small employer where the employer asks for an instalment order because of financial difficulty in paying a lump sum.

Procedures in unfair dismissal claims under the FWAct

This part of the guide summarises the procedures, processes and other requirements relevant to making an unfair dismissal claim. Many of these must be met for an employee to successfully make and progress an unfair dismissal claim.

The application

A dismissed employee who wants to make an unfair dismissal claim must make their claim by lodging an application with FWA using the specific form for unfair dismissal claims, which is form F2. The employee must provide various information and details in the form and briefly state (amongst other things):

- The reasons the employer gave for the dismissal; and
- Why the employee says the dismissal was unfair.

The application form can be lodged with FWA by post, fax, email or online at the FWA website. It is also possible to lodge an application by telephone. A telephone application may be necessary where the time limit (see below) is about to expire.

More information about lodgement of a claim is available at the FWA website: **www.fwa.gov.au**

The F2 form (Application for Unfair Dismissal Remedy) can be accessed from the FWA website using the following link: **www.fwa.gov.au/index.cfm?pagename=dismissalsclaim**

An application fee of \$60 (as at January 2011) must also be paid to FWA. The fee is refundable to the employee if the claim is discontinued as part of a settlement or because the employee decides not to continue with the claim. It is possible for FWA to waive the fee on the grounds of financial hardship. In such cases the employee should contact FWA about the fee waiver process and requirements.

In due course a form containing a response will be prepared by the employer which will be sent to the employee. The employee will also receive a “*notice of listing*” from FWA indicating the time and date of a conciliation conference. (Conciliation is discussed below).

Time limit

Section 394(2) of the *FWAct* requires that the application must be made “***within 14 days after the dismissal took effect***” (in other words – within 14 days after the last day of employment).

The date that the dismissal takes effect will not necessarily be the last day that work was performed, especially if the employee was on a period of leave. If an employee is given notice of termination then the dismissal will take effect when the notice period expires. If an employee is dismissed with immediate effect with a payment in lieu of notice, then the last day of employment will be the day on which the dismissal took immediate effect.

It is vitally important that employees who wish to make an application do so within the 14 day period. If an employee has any doubt about the date on which the dismissal took effect the employee should seek legal advice as soon as possible. Some options for obtaining urgent legal advice are set out at the end of this guide.

FWA offices will accept an application form that is late. However FWA may decline to allow the application to proceed and in effect dismiss the application because it was lodged after the 14-day time limit.

FWA has some limited scope to allow an application outside of 14 days.⁸² In dealing with late applications the *FWAct* requires FWA to be satisfied that there are exceptional circumstances. FWA will take into account the following.⁸³

- (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.”*

Despite the ability of FWA to allow applications that are late, recent decisions by FWA on this issue have shown that FWA is reluctant to allow applications lodged outside of the 14 days to proceed.⁸⁴ It seems that an employee may have to satisfy FWA that the application was late because of circumstances that were outside of the employee’s control.⁸⁵ This requirement can be very difficult to meet.

Conciliations, conferences and hearings

After the application is lodged, FWA will convene a conciliation conference that is quite similar to a mediation. The employee and the employer will participate in this conference with the assistance of a FWA Conciliator. At present these conciliations are conducted by telephone conference. At the commencement of the conciliation each party is given the opportunity to present their case. The Conciliator then encourages the parties to reach a settlement of the claim. A very significant number of unfair dismissal claims are settled this way.

The present format of conciliation conferences permits the involvement of lawyers and other industrial advocates at the conciliation to assist and represent the parties. However, employees and employers often represent themselves at the conciliation.

Further conferences may take place where an appointed Member of FWA will preside over the conference and give encouragement to the parties to reach a settlement. These further conferences with an FWA Member usually take place with the parties attending the conference in person at a nominated FWA venue. Again, if the parties are represented by a lawyer or other industrial advocates they may also attend the further conference.

If the parties are unable to reach a settlement then a Member of FWA will proceed to decide the claim. However, before considering the merits of the claim the FWA member must make a decision on the following matters (if it is necessary to decide these matters):⁸⁶

- whether the application was made within the 14 day period or should be allowed to proceed if the application was late;
- whether the person was protected from unfair dismissal – in other words, is the employee permitted by the *FWAct* to make an unfair dismissal claim;
- if the employee was dismissed by a *“small business employer”* – whether or not the dismissal was consistent with the applicable Code;
- whether the dismissal was a case of *“genuine redundancy”*.

If one or more of the above matters is decided in favour of the employer the claim will in effect be dismissed. Alternatively, if these matters are determined in the employee’s favour, the claim will proceed and an FWA Member will make a decision on the merits of the case (that is, whether or not the dismissal was unfair).

The FWA Member can make their decision in a conference or a hearing.⁸⁷ A conference will primarily be an informal process, in private, allowing the parties to informally present their case.

As a matter of procedure and fairness the FWA Member must take into account the difference in the circumstances of the parties when the Member considers the claim and informs him or herself of relevant matters. The FWA Member must also take into account the wishes of the parties as to how the FWA Member should go

about informing himself or herself of relevant matters. On this basis the FWA Member should make allowances for the fact that an employee (for various reasons) may not be as able to present their case as an employer with human resources managers who have knowledge and experience of employment matters in FWA.

A hearing is an alternative to a conference. The FWA Member may decide at any time to hold a hearing which will be a more formal process. The FWA Member may decide to hold a hearing in relation to some parts of the claim or the entire claim.

The FWA Member must take into account the views of the parties about whether or not a hearing should take place. The FWA Member must also take into account whether or not a hearing would be the most effective and efficient way of dealing with the claim.

The *FWAct* requires that a FWA Member conduct a conference **or** hold a hearing where there is a dispute between the parties about the facts of the case.⁸⁸

The strict rules, which often operate in courts do not apply to FWA in conferences and hearings. The *FWAct* makes it clear that:

- FWA may inform itself in relation to a fact or matter **in any manner** that FWA considers appropriate;⁸⁹ and
- FWA is not bound by the strict rules of evidence and procedure.⁹⁰

Having said this, FWA is required to follow the *FWAct* and the accompanying *Fair Work Regulations* and the *Fair Work Australia Rules*. It is also implied that FWA must be fair to all of the parties in the application of its procedures and processes. For example, in an unfair dismissal matter both the employee and the employer must be given a fair opportunity to present their case.

The role of lawyers and other industrial advocates

Arguably the procedures relating to unfair dismissal claims under the *FWAct* were designed so employees and employers can represent themselves. However lawyers, industrial advocates and union officials often represent parties in unfair dismissal claims. There are a variety of views about the involvement of lawyers and other representatives and the role they do or should play.

It is sometimes appropriate for employees to be represented where there is a significant difference between the employee's and the employer's capacity to present and argue their case. This is especially so where medium sized or large employers have experienced human resources and industrial relations staff who can present the employer's case with skill and confidence.

At a conference or hearing conducted by a FWA Member it is necessary for any lawyers or "*paid agents*" (usually industrial advocates) be granted permission to represent their client.⁹¹ There can be consequences involving orders that lawyers and paid agents pay a party's legal costs where the case they present has no reasonable prospects of success.⁹² There can also be a legal costs order where the unreasonable conduct by a lawyer or paid agent causes the other side to incur unnecessary legal costs.⁹³

The payment of legal costs will only be ordered on the application of the party who seeks the payment of their legal costs. The application must be made within 14 days of the determination or discontinuance of the claim.⁹⁴

Compliance

Refusal or failure of a party to obey an order made under the unfair dismissal laws may result in a pecuniary penalty (fine) being imposed on the party.⁹⁵ The Federal Court of Australia or the Federal Magistrates Court may impose the penalty.⁹⁶ Presently (as of January 2011) a maximum fine of \$6,600 may be imposed on an individual person and a maximum fine of \$33,000 may be imposed on a corporation.

Cost orders against the employee or the employer

The general rule in unfair dismissal claims is that each party must pay their own legal costs (if any).⁹⁷ This rule will apply in the great majority of unfair dismissal claims, whether or not the employee or the employer ultimately has a determination made for them or against them. Most threats by one party to another about eventual costs orders are not supported by the costs provisions of the *FWAct*. FWA is not a court where the losing party usually pays some part of the successful party's costs.⁹⁸

It is exceptional and rare for FWA to make a legal costs order in an unfair dismissal claim. The *FWAct* only permits a legal costs order against another party where:⁹⁹

- The claim or response to the claim was vexatious; or
- The claim was made without reasonable cause; or
- It should have been apparent that the claim or response had no reasonable prospects of success.

In other words, for costs orders to be made, the claim or response would have to be viewed as hopeless or a nuisance, with no reasonable argument or evidence that could be put forward in support of the party's case.

To avoid any risk of a legal costs order employees should at the outset consider if their claim has at least some evidence and reasonable arguments to support the claim.

If an application for a costs order is to be made against a party to the proceedings it must be within 14 days of the determination or discontinuance of the claim.¹⁰⁰

Appeals

There are limited appeal rights for unsuccessful parties in unfair dismissal matters.¹⁰¹ Permission from FWA to make the appeal must first be obtained before the actual appeal can proceed.¹⁰² FWA will not grant permission unless FWA considers that it is in the "*public interest*" to grant permission for the appeal to be made.¹⁰³

If a party is appealing on a question of fact the appeal can only be made on the ground that the original decision involved "*a significant error of fact*".¹⁰⁴

An appeal must be lodged within 21 days of the decision of FWA or within such further time that is allowed by FWA.¹⁰⁵

The appeal process can be complicated and must be made upon certain grounds.¹⁰⁶ Any employee considering an appeal should first obtain legal advice.

Further Help

- The Fair Work Info Line is able to provide employees with information about employee entitlements and other related matters: **13 13 94**. See also their website: **www.fairwork.gov.au**
- The Fair Work Ombudsman acts on complaints by employees about underpayment or non-payment of entitlements or the denial of other workplace rights: **www.fairwork.gov.au**. When complaining to the Fair Work Ombudsman it is advisable that employees complete and lodge the complaint form: **www.fairwork.gov.au/complaints/making-a-complaint/pages/lodging-your-complaint.aspx**
- Unions are able to assist and advise their member. More information about unions can be obtained from Unions Australia: **www.unionsaustralia.com.au**
- Law Access is able to give free advice over the telephone: **1300 888 529**
- The Law Access website also provides employment law related information: **www.lawaccess.nsw.gov.au**
- Community Legal Centres can provide some advice and assistance with employment law matters. Information about Community Legal Centres and the location of Community Legal Centres can be found at Community Legal Centres NSW website: **www.clcnsw.org.au**
- Legal Aid NSW can provide some advice in employment law matters. Information about Legal Aid and the location of Legal Aid offices can be found at the Legal Aid website: **www.legalaid.nsw.gov.au**

Endnotes

In these endnotes a reference to a Part (“**Pt**”), Division (“**Div**”) or section (“**s**”) is a reference to a Part, Division or section of the *Fair Work Act 2009 (Cth)* respectively, unless the reference states otherwise.

In these endnotes the following abbreviations are used:

AIRC - Australian Industrial Relations Commission

ALLR - Australian Labour Law Reporter (published by CCH)

AR - Arbitration Reports

FCA - Federal Court of Australia

FWA - Fair Work Australia

FWAct - *Fair Work Act 2009 (Cth)*

HCA - High Court of Australia

- 1 This guide deals only with the three areas of law set out in the introduction to this guide. This is not a guide to all rights and legal remedies potentially applicable to the termination of employment. For example, this is not a guide to contractual, common law rights or rights that may exist under legislation other than *FWAct*. Lawyers advising employees or former employees should consider advising (where relevant) on:
 - Contractual obligations and breach of contract;
 - The common law action based on wrongful dismissal and the common law concept of reasonable notice;
 - Redundancy (Illawarra Legal Centre Inc has separately published a *Guide to Redundancy Termination Entitlements*);
 - Worker’s compensation laws;
 - Provisions in awards and enterprise agreements relevant to the termination of employment;
 - Anti discrimination legislation; and
 - Legislation, regulations and other matters that may apply to the termination of public servants in NSW.

Macken’s Law of Employment is an excellent reference which covers some of these areas of employment law: Carolyn Sappideen, Paul O’Grady, Geoff Warburton, *Macken’s Law of Employment* (Lawbook Co. 6th ed, 2008)
- 2 In addition to unfair dismissal rights, the *FWAct* provides two other avenues for dismissed employees to pursue their rights depending on the manner and/or reason for the dismissal. Pt 3-1 contains the “*general protections*” provisions. Pt 3-1 legislates the concepts of “*workplace rights*” and “*adverse action*”. These concepts are relevant to a dismissal if an employee has inquired or raised a complaint in connection with a “*workplace right*” and the employer then responds by taking “*adverse action*” against the employee. The “*adverse action*” may take the form of a dismissal or threatened dismissal. The “*general protections*” provisions also provide protections against discrimination (s351) and protect industrial activities (amongst other things). A breach by the employer under Pt 3-1 may give an employee the right to bring a “*general protections*” application. If there has been a dismissal the application must be made to FWA within 60 days of the dismissal. FWA will conciliate the matter. If this is unsuccessful then the applicant must proceed in the Federal Court or the Federal Magistrates Court. Pt 6-4 contains the “*unlawful termination*” provisions. The employer must not terminate an employees’ employment on any of the prohibited discriminatory grounds set out in s772. An aggrieved employee can bring an “*unlawful termination*” application. The claim must be lodged within 60 days of the termination. FWA will conciliate the matter. If this is unsuccessful then the applicant must proceed in the Federal Court or the Federal Magistrates Court. An “*unlawful termination*” application must not be made where the employee is entitled to make a “*general protections*” court application (s723). Simultaneous actions arising from a dismissal are not allowed (Pt 6-1 Div 3). The onus of proof is reversed in “*general protections*” and “*unlawful termination*” proceedings.
- 3 Illawarra Legal Centre Inc has separately published a *Guide to Redundancy Termination Entitlements*.
- 4 s386
- 5 A resignation forced by the employer is referred to as a “*constructive dismissal*”. The case law on this point has been summarised to the extent that 4 broad circumstances have been identified where a constructive dismissal could have occurred: (1) forced resignation (2) fundamental variation of terms and conditions of employment without the agreement of the employee (3) significant breach of the employment contract by the employer (4) where the employee is “squeezed out” – ie. the employer makes the working conditions increasingly intolerable thereby forcing the employee to resign. For further information see ALLR paragraphs 47-178 to 47-188.
- 6 s117.

7 The new, and somewhat standardised, industrial awards under the *FWAct* are referred to as “*Modern Awards*”. The “*Modern Awards*” are the result of an extensive modernisation process undertaken by the former AIRC. More information on “*Modern Awards*”, their application to job/work specific categories and the terms and conditions they set out may be obtained from FWA and the FWA website: fwa.gov.au Also refer to Pt 2-3.

“*Enterprise Agreements*” are enforceable collective agreements covering the employment conditions of a group of employees and their employer. “*Enterprise Agreements*” can include single or multi-enterprise agreements and must meet a number of tests before they can be approved by FWA. “*Enterprise Agreements*” in effect sit on top of the relevant “*Modern Award*” and may provide for additional (above award) remuneration and more flexible enterprise specific work practices. Refer to Pt 2-4.

8 Pt 2-2 Div 11.

9 The coverage of the *FWAct* is now extensive throughout Australia, creating a national system of industrial relations and employment laws. As at 1 January 2010 NSW, South Australia, Tasmania, the ACT and the Northern Territory had referred their industrial relations powers to the Commonwealth. (Victoria had done so in 1996). There are some limitations to the referrals and some NSW laws with some relevance to employment continue to be in force. In NSW as a result of the referral, all non government sector employees in NSW are now covered by the *FWAct*. The referral does not affect NSW government employees, employees of NSW government agencies and employees of local government in NSW. State owned corporations are part of the referral and therefore employees of a state owned corporation are covered by the *FWAct*.

10 s117(1).

11 s117(2)(b).

12 s123(1)(a).

13 s123(1)(a).

14 s123(1)(a).

15 s123(1)(b). The *Fair Work Regulations* contain a definition of serious misconduct for the purposes of the *FWAct* in regulation 1.07.

“1.07 Meaning of *serious misconduct*”

(1) For the definition of *serious misconduct* in section 12 of the Act, serious misconduct has its ordinary meaning.

(2) For subregulation (1), conduct that is serious misconduct includes both of the following:

- (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- (b) conduct that causes serious and imminent risk to:
 - (i) the health or safety of a person; or
 - (ii) the reputation, viability or profitability of the employer’s business.

(3) For subregulation (1), conduct that is serious misconduct includes each of the following:

- (a) the employee, in the course of the employee’s employment, engaging in:
 - (i) theft; or
 - (ii) fraud; or
 - (iii) assault;
- (b) the employee being intoxicated at work;
- (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee’s contract of employment.

(4) Sub regulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

(5) For paragraph (3) (b), an employee is taken to be intoxicated if the employee’s faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee’s duties or with any duty that the employee may be called upon to perform.”

Subregulation 1.07(1) above makes clear that the ordinary meaning of serious misconduct is preserved and then supplemented and qualified by the remainder of the regulation. The types of conduct that may amount to serious misconduct are not curtailed by the regulation. Accordingly the case law remains relevant. In any event the focus on “*wilful or deliberate behaviour*” is consistent with the case law. The case law does make clear that incompetence is not serious misconduct justifying summary dismissal; *Re Jeffery Williams v Printers Trade Services* [1984] FCA 68. It should be noted that the unfair dismissal provisions of the *FWAct* do not contain the words “*serious misconduct*”. Therefore the above definition is not strictly applicable in unfair dismissal proceedings where an employer responds to the claim asserting that the employee has engaged in serious misconduct, however the definition may still have some relevance.

16 Casual employment is not generally defined for all purposes in the *FWAct*. Consequently it is necessary to refer to the case law on point. The Full Bench of the AIRC has described a class of employees who are true casuals where employment is characterised by “*informality uncertainty and irregularity*” and contrasted that with another class of employees who work a “*regular pattern of hours with an ongoing employment relationship*”. The AIRC concluded that the latter class of employees

were not truly casual (despite any “casual” title given to the employees); *Australian Municipal, Administrative, Clerical and Services Union v Auscript* [1998] 43 AILR; See also the decision of *Reed v Blue Line Cruises Limited* [1996] 73 IR 420. See also *Ozcan v Sydney South West Area Health* [2008] NSWIRComm 1078. See also the survey of case law in paragraphs 47 – 195 ALLR. Although many decided cases involve a consideration of whether or not an employee is “casual” for the purposes of unfair dismissal laws prior to the *FWAct*, the principles are still relevant to whether or not certain employees labelled as “casual” are covered by termination notice provisions in the *FWAct*. Despite there being no general definition of “casual” in the *FWAct*, s12 of the *FWAct* does provide a definition of a “long term casual”. However, this term and its usage is only relevant for the purposes of requesting flexible working arrangements (s65) and parental leave entitlements (s67).

17 s123(1)(d).

18 s123(2).

19 s123(3).

20 s117(3).

21 s117(2)(b).

22 s117(2)(b).

23 For a discussion of the coverage of the *FWAct* see note 9 above.

24 It is important in the circumstances of a negotiated agreement for the employee to ensure that the agreement to pay an additional notice amount is legally binding. The employee should at least seek a written agreement with the employer setting out the additional amount that will be paid. It is also preferable that employees seek some legal advice on the terms of the written agreement if possible. At the time of termination an employer may insist that an employee sign a deed of release in exchange for the agreement to pay an additional notice amount. Often the deed may be used to formalise an agreement where a dispute has occurred in connection with termination. The usual effect of the deed is that the employee gives up their right to sue the employer in exchange for the settlement money that will be paid. In this way a deed of release is a serious document in which the employee surrenders some legal rights. Some employers may seek release terms that go much further than simply releasing the employer from any further obligation to pay termination amounts. If possible employees should obtain legal advice prior to signing a deed of release. Employees should **not** agree in a deed to give up such rights as worker’s compensation and personal injury claim rights in exchange for notice, redundancy pay and leave amounts. Some employers attempt to have the departing employee agree in a deed not to take up employment with the former employer’s competitors. Employees should not agree to these type of terms only in exchange for notice entitlements. Basically, it is not advisable that employees give away any right under a deed on termination unless the right:

- is specifically connected with payments that will be made in accordance with the deed; **and**
- the specific payments are in excess of the minimum amounts that the employer is legally obliged to pay.

Furthermore, courts and employment tribunals have often said that an employee **should not** be required to sign a deed of release where the employee is merely receiving their legal termination entitlements. An example of an excess payment that may be made in exchange for a signed deed is a compensation payment, such as a compensation settlement for an unfair dismissal.

25 s118.

26 A good example of such a provision can be found in clause 13 of the *Clerks – Private Sector Award 2010*.

27 See note 26 above. Also note s326 *FWAct* which provides that certain award terms allowing a deduction may have no effect in some unreasonable circumstances.

28 In respect of *FWAct* redundancy entitlements see s119 and more generally Pt 2-2 Div 11. Illawarra Legal Centre Inc has separately published a *Guide to Redundancy Termination Entitlements*.

29 In respect of *FWAct* annual leave entitlements see Pt 2-2 Div 6.

30 In the *FWAct* see Pt 2-2 Div 9. Also employees should refer to long service leave entitlements that may be set out in an applicable award or enterprise agreement. Also for employees in NSW the *Long Service Leave Act 1955 (NSW)* may apply.

31 While this guide focuses on the statutory unfair dismissal provisions of the *FWAct*, the legislative use of terms such as “unfair”, “harsh”, “unjust”, “unreasonable” (and similar terms) have a significant history which predates the *FWAct*. Accordingly, the body of case law that has developed in connection with unfair dismissal rights under various statutory regimes is still relevant and helpful in understanding the provisions in the *FWAct*.

32 In respect of *FWAct* coverage see note 9 above.

33 In NSW, employees of State owned corporations are covered by the *FWAct* and therefore the unfair dismissal provisions of the *FWAct* apply.

34 Within the unfair dismissal provisions of the *FWAct* there are instances of the use of the words “protected” and “protection” from unfair dismissal. It is possible for the use of these words to create confusion about how employees are protected. In reality the protection provided by the provisions takes the form of a right to make a claim for unfair dismissal with the possibility of reinstatement or compensation. In this way the protection is available only after the fact of dismissal and FWA cannot make an order (in the nature of an injunction) preventing a dismissal which is (or potentially is) unfair.

- 35 See note 34 above.
- 36 s384. The term “*period of employment*” is used and defined in s384. The term “*continuous service*” is also used. s22 provides a definition of “*continuous service*”.
- 37 s23 provides a definition of “*small business employer*”.
- 38 s382 sets out these 3 alternate requirements.
- 39 The *Fair Work Regulations* contain further provisions on how to calculate the “*high income threshold*” in the case of employees who work on piece rates and employees who receive non monetary benefits as part of their remuneration. See clause 3.05 of the *Fair Work Regulations*.
- 40 For a general discussion of casual employment see note 16 above.
- 41 s384(2)(a).
- 42 s384(2)(b).
- 43 For the definition of “*associated entities*” see s12. See also s50AAA of the *Corporations Act 2001 (Cth)*.
- 44 See s22 in relation to “*transfer of employment*”, “*service*” and “*continuous service*”. Also see s311 in relation to “*transfer of business*” and “*transferring employee*” which may be relevant.
- 45 s386.
- 46 This will likely be a “*constructive dismissal*”. For a discussion of “*constructive dismissal*” see note 5 above.
- 47 See note 5 above.
- 48 s386(2)(a).
- 49 s386(2)(b). “*Training arrangement*” is defined in s12: “*means a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees*”. Unlike the notice provisions of the *FWAct*, there is no express mention of apprentices in the s12 definition or in s386(2)(b). This leads to the conclusion that apprentices will be excluded from bringing an unfair dismissal claim if their employment terminates at the end of the apprenticeship (ie. the end of the “*training arrangement*”).
- 50 s386(2)(c). Demotions can give rise to the difficult question of whether or not the changes “*involve a significant reduction ... in remuneration or duties*”. There is obviously much scope for a dispute between the employer and employee as to the extent of the changes and the application of s386(2)(c). Employees who are facing demotion or have been demoted should obtain legal advice on their situation as soon as possible.
- 51 s386(3).
- 52 s385(c) & s388.
- 53 For full explanation of the meaning of “*small business employer*” see s23.
- 54 Casual employees employed on a regular and systematic basis are counted s23(2).
- 55 The following is the *Small Business Fair Dismissal Code* declared by the Minister:

SMALL BUSINESS FAIR DISMISSAL CODE

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 Fair Work Australia, 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.

- 56 FWA in a 2010 decision has criticised the use of the checklist which was described as being of “*dubious value*”. FWA held that following the checklist did not ensure compliance with the Code; *Mr N v The Bakery* [2010] FWA 3096.
- 57 s389.
- 58 s389(1).
- 59 Prior to the *FWAct*, applicable legislation did not define the term “*redundancy*”. However, there is much case law prior to the *FWAct* which has considered “*redundancy*”. At the pinnacle of this case law is the *Redundancy Test Case* (2004) AIRC 287 PRO32004 which may be found at AIRC website: <http://www.e-airc.gov.au/redundancycase/>
- 60 The expression “*fair go all round*” was used by Sheldon J in *re Loty and Holloway v Australian Workers Union* [1971] AR (NSW) 95. The case is specifically noted under s381 in the *FWAct* in order to give guidance about the object and application of the unfair dismissal laws. The decision has long been quoted by commentators. Another notable case which articulated the general principles of fairness and the exercise of powers in relation to reinstatement under unfair dismissal laws is *Western Suburbs District Ambulance Committee v Tipping* (1957) AR (NSW) 273. The statement of principles in that case was endorsed by Walsh J of the High Court of Australia in *North West County Council v Dunn* [1971]126 CLR 247. For a comprehensive survey of case law and detailed commentary on the concepts of “*fairness, harsh, unjust, unreasonable*” see paragraphs 47-152 to 47-190 ALLR.
- 61 s387.
- 62 s387(h).
- 63 Pt 3-2 Div 4.
- 64 s391.
- 65 s391(1)(a).
- 66 s391(1)(b).
- 67 s391(1A). For definition of an “*associated entity*” see note 43 above.
- 68 s391(2).
- 69 s391(1) & s391(1A).
- 70 s390(3).
- 71 Paragraphs 47- 440 ALLR provides an extensive survey of case law on the question of reinstatement versus compensation as the preferable remedy in unfair dismissal cases.
- 72 s390(3).
- 73 s392(1).
- 74 s392(5).
- 75 s392(6). Section 392(6)(b) and clause 3.06 *Fair Work Regulations* deal with compensation for employees who were on leave without pay or on leave without full pay.
- 76 s392(2).
- 77 s392(2)(g).
- 78 s391(3) and s391(4).
- 79 s392(3).
- 80 s392(4).
- 81 s393.

82 s394(3). The Explanatory Memorandum to the FWAct is relevant here. The Explanatory Memorandum cites the decision in *Brodie-Hanns v MTV Publishing Ltd* (1995) 67 IR 298. The case sets out the principles relating to the exercise of discretion to allow an application to proceed which has been lodged outside of the required time limit. The '*Brodie-Hanns*' principals are as follows:

"(1) Special circumstances are not necessary but the [Tribunal] must be positively satisfied that the prescribed period should be extended. The prima facie position is that the time limit should be complied with unless there is an acceptable explanation for the delay which makes it equitable to extend. (2) Action taken by the Applicant to contest the termination, other than applying under the Act, will be relevant. It will show that the decision to terminate is actively contested. It may favour the granting of an extension of time. (3) Prejudice to the Respondent including prejudice caused by delay will go against the granting of an extension of time. (4) The mere absence of prejudice to the Respondent is an insufficient basis to grant an extension of time. (5) The merits of the substantive application may be taken into account in determining whether to grant an extension of time. (6) Consideration of fairness as between the Applicant and other persons in a like position are relevant to the exercise of the [Tribunal's] discretion."

83 The factors to be taken into account somewhat mirror the principles stated in *Brodie-Hanns v MTV Publishing Ltd* (see note 82 above).

84 In the following cases FWA did not allow an application filed after the time limit to proceed: *Wemyss v Mission Australia Employment Services* [2010] FWA 1798 (where the employee was suffering stress, anxiety insomnia and back pain); *SW v S Pty Ltd* [2010] FWA 3944 (where the employee thought a complaint to the Fair Work Ombudsman was the formal commencement of an unfair dismissal claim); *Prasad v Alcatel-Lucent Australia Ltd* [2010] FWA 7804 (where the employee delayed for 119 days after the time limit, during which period he sought reemployment with the employer, was initially unaware of the law and was reluctant to make an application while he sought a resolution through administrative means with the employer).

85 In the following cases FWA would allow an application filed after the time limit to proceed: *Johnson v Joy Manufacturing Co Pty limited t/as Joy Manufacturing* [2010] FWA 1394 (where the employee tried to file his claim through the FWA website but failed and then posted his application which was delayed in the mail); *Bastos v Caelli Constructions (VIC) Pty Ltd* [2010] FWA 3105 (where an application that was 8 months late was allowed because the employee spoke very little English and was therefore ignorant of his rights); *Setterfield v Syefile Pty Ltd* [2010] FWA 3351 (where the application was late because of the error of the employee's lawyer); *Jones v Holcim Australia Pty Ltd* [2010] FWA 3129 (where an application was 2 days late because of a delay by the employee's lawyer).

86 s396.

87 In relation to conferences generally, see s398. In relation to hearings generally, see s399.

88 s397.

89 s398(4) in regards to conferences. See also s590 relating the general powers of FWA to inform itself.

90 s591.

91 In respect of permission for representation by lawyers and paid agents see s596.

92 s401(1).

93 s401(1).

94 s402.

95 s405.

96 Pt 4-1.

97 s611.

98 FWA may order security for costs pursuant to s404 and Rule 16 of the *Fair Work Rules*. It is not expected that FWA will often make security for costs orders and FWA will not usually order security for costs before the conclusion of conciliation.

99 s611(2).

100 s402.

101 In relation to appealing an unfair dismissal claim see s400.

102 s604.

103 s400(1).

104 s400(2).

105 Regarding appeals procedures and the time limit see Rule 12.3 of the *Fair Work Australia Rules*.

106 Also note that the President of FWA may refer a question of law to the Full Court of the Federal Court. See s608.