

SMALL BUSINESS FAIR DISMISSAL CODE AND CHECKLIST


The *Fair Work Act 2009* (Cth) established a new framework of unfair dismissal laws. Whilst these changes enabled a broader range of employees to challenge a dismissal, they also established a set of rules for small businesses to follow when dismissing an employee, called the Small Business Fair Dismissal Code.

If a small business complies with the Code, an unfair dismissal claim made by an employee will be unsuccessful.

What is a “small business?”

Under the *Fair Work Act 2009*, a “small business” is defined as a business with **less than 15 employees** – as of 1 January 2011, this is based on a simple head count of all employees, regardless of their weekly hours of work. (Prior to 2011, the count was based on full time equivalent employees only).

This count must also include employees of any associated entities. The concept of ‘associated entities’ is explained further below.

 **Note:** a casual employee is not to be counted unless, at that time, he or she has been employed by the employer on a regular and systematic basis.

Associated entities

The *Fair Work Act 2009* defines an associated entity as per the definition in the *Corporations Act 2001* (Cth) – employers should seek legal or other professional advice on whether their business has associations with other entities, for example by virtue of shared directorships.

Application

- > The Small Business Fair Dismissal Code applies to small business employers – those with fewer than 15 employees.
- > An employee employed by a small business cannot make a claim for unfair dismissal if they are dismissed in the first 12 months of employment.
 - If an employee has been employed for longer than this period and the employer has adhered to the Code, the dismissal will be deemed to be fair.
- > If an employee is dismissed as part of a *genuine redundancy*, the dismissal will be deemed to be fair, provided that:
 - The employee’s job was no longer required to be performed by anyone because of changes in the operational requirements of the employer’s enterprise; and
 - The employer complied with any obligations in a modern award or enterprise agreement that applied to the employment to consult about the redundancy; and
 - It was not reasonable for the employee to be redeployed elsewhere within the enterprise or an associated entity

The Code and Checklist were last updated by the Fair Work Commission on 1 January 2011. This version has incorporated those changes.

The Small Business Fair Dismissal Code

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.

Small Business Fair Dismissal Code Checklist

The Checklist is a tool to help small business employers comply with the Small Business Fair Dismissal Code. **Completing the Checklist does not mean that the Code has been complied with**, nor is it a requirement of the Code that the Checklist be completed. However, completing the Checklist will help small business employers assess and record their reasons for dismissing an employee. It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim.

Employers should read the Code before completing the Checklist, ensuring they understand their procedural obligations under the Code. Meeting these obligations is an important factor in complying with the Code.

1. **How many employees are employed in the business? (A head count which includes full time, part time and regular and systematic casual employees as well as the dismissed employee and any other employee dismissed at the same time).**

- Under 15 employees (method of calculation set out in summary above)
- 15 employees or more

[If under 15 employees, the Small Business Fair Dismissal Code applies.]

2. **Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?**

- YES
- NO

[If no, the employee cannot make an unfair dismissal claim.]

3. **Did you dismiss the employee because you didn't require the person's job to be done by anyone because of changes in the operational requirements of the business?**

- YES
- NO

If yes,

- a) Did you comply with any requirements to consult about the redundancy in the modern award, enterprise agreement or other industrial instrument that applied to the employment?
 - YES
 - NO
- b) Did you consider if the employee could have been redeployed in your business or the business of an associated entity?
 - YES
 - NO

4. **Do any of the following statements apply?**

- | I dismissed the employee because I believed on reasonable grounds that: | YES | NO |
|--|--------------------------|--------------------------|
| a. The employee was stealing money or goods from the business. | <input type="checkbox"/> | <input type="checkbox"/> |
| b. The employee defrauded the business. | <input type="checkbox"/> | <input type="checkbox"/> |
| c. The employee threatened me or other employees, or clients, with violence or actually carried out violence in the workplace. | <input type="checkbox"/> | <input type="checkbox"/> |
| d. The employee committed a serious breach of occupational health and safety procedures | <input type="checkbox"/> | <input type="checkbox"/> |

5. Did you dismiss the employee for some other form of serious misconduct?

- YES
- NO

If yes, what was the reason?

If you answered YES to any question in parts 3, 4 or 5 you are not required to answer the following questions.

6. In any discussion with the employee where dismissal was possible, did the employee request to have a support person present, who was not a lawyer acting in a professional capacity?

- YES
- NO

7. If yes, did you agree to the request?

- YES
- NO

8. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

- YES
- NO

If yes:

- | | YES | NO |
|---|--------------------------|--------------------------|
| a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed? | <input type="checkbox"/> | <input type="checkbox"/> |
| b. Did you provide the employee with a reasonable amount of time to improve his or | <input type="checkbox"/> | <input type="checkbox"/> |

her performance or conduct? If yes, how much time was given?

Time given.....

- c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?
- d. Did the employee subsequently improve his or her performance or conduct?
- e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?
- f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved?

Please attach any supporting documentation.

9. Did you dismiss the employee for some other reason?

- YES
- NO

If yes, what was the reason?

10. Did the employee voluntarily resign or abandon his or her employment?

- YES
- NO

If yes, please provide details

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Signature _____

Date _____

Contacting the Victorian Chamber of Commerce and Industry

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Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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