Fair Dismissal

*Based on Fair Work Act 2009*

### Dismissal

In all cases (apart from summary dismissal), the 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 that he or she risks being dismissed if there is no improvement.

The employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem.

Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer’s job expectations.

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. (but not a lawyer)

**Always document your actions because;**

You may be required to provide 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.

### 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.

**Procedure**The Act makes no mention of an appropriate disciplinary procedure (such as three written warnings etc)

The fairness of a disciplinary procedure has been determined by precedent case law as applied by various industrial courts and tribunals.

The disciplinary procedure of the issuing of warnings etc, would appear adequate on the issue of 'procedural fairness' However, an employee must be given a reasonable chance to rectify the problem before a subsequent warning is issued — this may involve counselling the employee or providing additional training

In the normal course of events, failure to warn an employee that their conduct or behaviour may lead to dismissal would be considered a major omission by FWA.

### Special Rules for Small Business

The Fair Work Act has specific rules covering the dismissal of employees of small businesses. (Businesses with fewer than 15 employees in total) There is a Checklist tool to help small businesses comply with the Small Business Fair Dismissal Code. Completing the Checklist may help small business in case of a future unfair dismissal claim. [Click here](http://www.fairwork.gov.au/ArticleDocuments/715/Small-Business-Fair-Dismissal-Code-2011.pdf.aspx?Embed=Y) to download the checklist

### Who can make an unfair dismissal claim?

Not all employees are eligible to make an unfair dismissal claim. Employees excluded from accessing the unfair dismissal laws include:

* Employees who have not completed the qualifying period of employment of at least 6 months with the employer where the employer is not a small business, or 12 months where the employer is a small business
* Employees not covered by a Modern Award or agreement whose guaranteed annual earnings exceed the 'high income threshold' (currently $133,000 pa)
* Employees employed for a fixed term, specified task or season
* Employees dismissed in cases of redundancy
* Contractors.

Applications to claim unfair dismissal must be lodged with FWA within 14 days of the dismissal taking effect, although there is some discretion for FWA to extend the time in exceptional circumstances.

FWA has the power to order reinstatement, which is the primary remedy, or compensation where reinstatement is considered inappropriate. Compensation is capped at the lesser of 26 weeks pay or, as of **July 1 2016**, **$69,450. The c**ompensation cannot include any amount for shock, distress humiliation or other such hurt caused by the dismissal.