Disciplinary Action and Termination of Employment Guide

2021 Edition

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About this Guide

All employers need to ensure that disciplinary action and, where necessary, termination of employment is lawful and fair.

This guide has been produced by Jobs Australia Ltd to assist members to develop and maintain a sound understanding of:

- the nature and extent of their legal obligations concerning termination of employment;
- how they can ensure that disciplinary procedures and employee dismissals are carried out lawfully and fairly;
- how to carry out disciplinary procedures;
- what happens when a dismissal is contested through courts and industrial tribunals; and,
- where to go to for assistance and advice.

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Preface to the 2021 Edition

This edition of the *Disciplinary Action and Termination of Employment Guide* provides a summary of the principles of good disciplinary processes, in the context of Australian industrial law as it stands under the *Fair Work Act* 2009 (Cth)

The Guide incorporates the elements of good process for termination of employment from earlier editions and updates to industrial legislation since 2019. The elements of a good process for termination of employment are consistent with earlier editions due to the principles of fair process and good management remain unchanged.

What continues to evolve are the technical aspects of how aggrieved employees can seek redress against perceived unfairness, and how employers can prevent and defend themselves against such claims under both state and federal legislation.

Apart from the ethical requirement that employers should treat employees fairly, good processes also send important signals to other staff. A poorly handled disciplinary process has the potential to be demoralising and disruptive to the rest of the organisation, regardless of whether the particular employee has access to legal action.

As always, the Workplace Relations Team at Jobs Australia welcomes any feedback about this Guide, and is always available to assist with any issue that might arise in managing employees.

The Workplace Relations Team
May 2021

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1 Overview of Laws Governing Termination of Employment

1.1 Two areas of law

The law governing termination of employment in the non-profit community sector is primarily based on two separate areas of the law:

1. Statutory requirements under Commonwealth and Western Australian State Industrial Relations legislation; and
2. The common law (law derived from precedents established by courts).

A. Statutory requirements

All employers in Australia have a legal obligation to ensure that any action taken by them in dismissing an employee is not "harsh, unjust or unreasonable" or unlawful. If an employee considers their dismissal is unfair or unlawful, the employee can make an application to the Fair Work Commission (or if in Western Australia) the relevant State Industrial Relations Commission (whichever is appropriate). Certain categories of employees may be excluded from unfair dismissal remedies.

NOTE: Where an employee is successful in an unfair or unlawful dismissal action, the employer may be forced to reinstate or re-employ the dismissed employee, and/or be ordered to pay monetary compensation to the dismissed employee.

To minimise possible claims, employers need to be aware of the statutory requirements concerning termination of employment.

B. Common law

Employers and employees enter into a common law contract of employment when a job is offered and accepted. Where an employer unilaterally terminates such a contract in a manner other than provided for in the contract itself, the employee can take a common law action in a Court for wrongful dismissal or breach of contract.

Such an action cannot ordinarily lead to reinstatement and usually only limited damages are available. Damages are typically limited to an equivalent of a reasonable notice period. Employees who are engaged on a fixed term contract may take such action to recover the balance of the contract.

These actions are costly to pursue and are not generally used by dismissed employees.

1.2 Which Industrial Relations System applies in Western Australia: Federal or State?

Due to Queensland, Tasmania, South Australia and New South Wales joining Victoria by referring their industrial relations powers to the Commonwealth, the commonwealth legislation (*Fair Work Act 2009)* now applies to **all** States (with the exception of Western Australia) in relation to termination of employment in the non-profit community sector.

However, Western Australia has chosen to retain its own State based system of industrial relations. This means that employers in Western Australia need to know whether the Federal or State system applies to them.

For non-profit community organisations in every state and territory including WA, if you are a constitutional trading corporation, then the commonwealth legislation (the *Fair Work Act 2009*) will apply in relation to termination of employment, (especially in relation to unfair dismissal).

If your organisation is **not** a constitutional trading corporation, in WA the State law will apply in relation to termination of employment (except in the case of unlawful termination where the relevant provisions under Fair Work Act apply to non-national system employers and employees in WA).

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Clearly in WA, it is important, to determine whether or not your organisation is a constitutional trading corporation. It is beyond the scope of this Guide to consider this issue in detail. However, further information is available from our publication *What is a Constitutional Corporation?* produced for Jobs Australia by Piper Alderman Lawyers.

Determining which system applies in Western Australia can be tricky, but crucial as different rules apply, so we encourage you to seek further legal advice if you are still unsure which system applies.

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2 "A Fair Go All Round"

2.1 The Fair Work Act 2009

A key feature of the *Fair Work Act* is the principle of a "fair go all round" in assessing the merits of an unfair dismissal claim. This places responsibility on employers to ensure fair process but also requires the Fair Work Commission (FWC) or the Federal Court to look at the totality of the circumstances of a dismissal to ensure that justice and fairness is provided to both the employer and the employee. In the consideration of justice and fairness with respect to termination of employment, the FWC or the Court must take into account:

- The circumstances surrounding the dismissal;
- The importance and right of the employer to manage the business;
- The nature and quality of the work performed by the employee; and,
- The potential impact on the employer's business if an order against the employer is to be made.

The law makes a distinction between terminations made on grounds which are **unfair** or on grounds which are **unlawful.**

- **Unfair terminations** are dismissals which are:
  - "harsh, unjust or unreasonable";
  - Not a case of genuine redundancy;
  - Inconsistent with the *Small Business Fair Dismissal Code* where it was carried out by a small business with fewer than 15 employees.
- **Unlawful terminations** are dismissals which are contrary to legal obligation, that is, the termination was based on a proscribed ground under the Act, such as discrimination based on prohibited grounds such as a person's race, colour, sex, religion or marital status (see Section 3.1 below).

2.2 Employees Exempted Under the Fair Work Act

A number of categories of employees are excluded from the operation of the unfair dismissal provisions of the *Fair Work Act 2009* (the Act) , although they may still be covered by the unlawful termination provisions (see section 3.1). Employees excluded from unfair dismissal provisions of the Act (section 386(2)) include:

- An employee who has not completed the Minimum Employment Period of:
  a) 6 months; or
  b) 12 months where the employer has fewer than 15 fulltime employees (not counting short term casuals).
- An employee engaged under
  a) a contract of employment for a specified period of time;
  b) a contract of employment for a specified task;
  c) unless a substantial purpose of employment under a fixed term contract was to avoid obligations under the unfair dismissal provisions of the Act;
- A casual employee engaged for a short period of less than twelve months on an irregular basis and who would not have had any reasonable expectation of continuing employment.
- A trainee whose employment under a traineeship agreement and the approved traineeship is for a specified period limited to the training arrangement;

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- Employees who are not employed under an award and whose total remuneration including benefits exceeds an amount set by the Regulations ($153,600 current to 30 June 2021) are also excluded.
- Employees who have been terminated due to genuine redundancy (see Section 7.5)

While the Act identifies certain categories of employees that are excluded from the Federal jurisdiction, organisations are strongly advised to contact Jobs Australia when faced with a situation involving such employees. Even where it seems clear that an employee is excluded, a claim may still be made and the employer may still be required to provide evidence to persuade FWC that the exclusion applies.

A dismissed employee has 21 days within which to lodge their application for relief for unfair dismissal. A claim of Adverse Action (where adverse action is alleged to have been taken for a prohibited reason such as discrimination) also must be lodged within 21 days of the dismissal.

2.3 WA system

Industrial legislation in WA provides the Western Australian Industrial Relations Commission with the power to hear applications and make orders with respect to alleged unfair dismissals. Employers that are not constitutional trading corporations may face unfair dismissal claims under WA state legislation in the WA Industrial Relations Commission.

As a consequence, in each case of termination of employment the employer needs to check as to whether the State or Federal system applies (see Section 1.2 of this Guide). Some examples of the differences to the Federal system are:

- Under the WA State system, a dismissed employee has 28 days within which to lodge their application for relief for unfair dismissal.
- Employees do not have rights of redress with respect to harsh, oppressive or unfair dismissal if an industrial instrument (an award or agreement) does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount of $172,000 (current to 30 June 2021)

The following details circumstances where particular groups of employees do not have rights of redress with respect to termination of employment in WA. Employers should not dismiss any of these categories of employees without first consulting with a Jobs Australia Workplace Relations Adviser.

- **employees governed by a workplace agreement** (unless the agreement specifically provides for unfair dismissal claims to be referred to the Commission, claims are brought in the Industrial Magistrate's Court);
- employees with access to an alternative right of appeal under another Act;
- (in most cases) employees governed by a federal award or agreement; and
- non-award employees who earn more than $172,000 (current to 30 June 2021).

2.4 HR management considerations

This Guide is primarily concerned with the industrial aspects of discipline and termination. But the HR management context is also relevant.

Our experience suggests that many terminations could be avoided if performance and conduct problems were addressed by the employer sooner rather than later. Much of the work of a manager involves providing regular informal feedback about performance. Feedback can be both positive and negative, but the objective is to address with minor issues before they become major. The disciplinary processes in this Guide should only be used for relatively serious matters, not minor problems that are more appropriately dealt with on an informal basis.

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3 Unlawful Termination & General Protections

3.1 Unlawful Termination Provisions Apply to all Employers

Before discussing unfair dismissal processes, which vary between federal and state systems, it is useful to consider the unlawful termination provisions of the *Fair Work Act* 2009 (the Act) The unlawful termination provisions deal with termination for defined prohibited reasons, separate to the general issue of unfair dismissal. It is important to note that;

1. All employers are covered by legislation prohibiting unlawful termination, regardless of whether the employer is in the federal system or the WA state system
2. Unlawful termination protection extends to all employees. This includes short term casuals and probationary employees.

Furthermore, there is a reverse onus of proof on the employer to be able to demonstrate that a termination was not for a prohibited reason. It is therefore prudent with all terminations to have evidence which demonstrates that the reason was a "valid" reason relating to conduct, capacity or operational requirements.

3.2 Prohibited Reasons for Dismissal

The *Fair Work Act 2009* prohibits dismissal, or other adverse action, on the following grounds:

a) temporary absence from work because of illness or injury;

b) union membership or participation in union activities outside working hours or, with the employer's consent, during working hours;

c) non-membership of a trade union;

d) seeking office as, or acting or having acted in the capacity of, a representative of employees;

e) the filing of a complaint, or participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (except in certain circumstances)

g) absence from work during maternity or other parental leave; and,

h) temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

Any dismissal which contravenes any of the above prohibited grounds constitutes "unlawful" termination of employment. While Fair Work Australia can conciliate applications alleging unlawful termination of employment, it does not have the power to make a judgement in relation to the claim. This power resides with the Federal Court or Federal Circuit Court. (See section 5.3)

An employee who wishes to make a claim of unlawful termination has **21 days** in which to do so. An individual also has **21 days** after a dismissal has taken affect (or longer as may be prescribed by the commission) to lodge an Adverse Action claim. However, they may not make such a claim at the same time as making an unfair dismissal claim.

An unlawful termination claim must be dealt with by the FWC in the first instance by holding a conference of the parties. If the matter is not resolved, the FWC my issue a certificate and it is at that stage that the employee may proceed to the Federal Court or Federal Circuit Court to determine the matter.

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Additional grounds for claims include:

a) failure to provide statutory notice of termination; and

b) failure to notify Centrelink, or to notify and consult with the relevant union, where there are 15 or more terminations due to redundancy.

In these situations, the FWC has the power to make a range of orders including reinstatement or financial compensation.

4 Unfair Dismissal

The discussion in this section refers specifically to the Federal system and proceedings conducted by the Fair Work Commission. However, the same principles apply in the WA State systems as well.

The process in the WA state system is broadly similar to the federal system. There may be differences in relation to details such as timelines for lodgement of documents, and classes of employees covered or excluded.

4.1 Fair Work Commissions Considerations

Only after determining that an employee is protected from unfair dismissal, and that the employee has been dismissed, can the Fair Work Commission determine whether the dismissal was unfair within the meaning of the Fair Work Act.

In doing so the Commission must consider whether the dismissal was harsh, unjust or unreasonable. This is also called determining the merits of the unfair dismissal claim.

There are 3 substantive elements of an unfair dismissal (apart from the fact of the dismissal itself) that the Commission must be satisfied of:

1. the dismissal must be harsh, unjust or unreasonable
2. the dismissal must not be consistent with the Small Business Fair Dismissal Code (where the Code applies), and
3. the dismissal must not be a case of genuine redundancy.

The power to grant a remedy cannot be exercised without the Commission being satisfied about these 3 matters

The FWC, in determining whether a dismissal was "harsh, unjust or unreasonable" must take into account:

- Whether there was a **valid reason** for the termination related to the capacity or conduct of the employee (including its effect on the safety or welfare of other employees);
- Whether the employee was **notified** of that reason;
- Whether the employee was given an **opportunity to respond** to any reason related to the capacity or conduct of the employee;
- Whether there was an unreasonable refusal by the employer to allow a support person to be present at discussions relating to the dismissal;
- Whether the employee had been **warned about the unsatisfactory performance** before the termination (if the termination related to **unsatisfactory performance** by the employee);
- The degree to which the size of the organisation would be likely to affect the procedures followed;

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- The degree to which the absence of human resource management specialists or expertise would be likely to affect the procedures followed; and,
- Any other matters the FWC considers relevant

4.2 Substantive and Procedural Fairness

Case law regarding the question of whether a dismissal was harsh, unjust or unreasonable indicates that employers should provide the dismissed employee with both substantive and procedural fairness.

a) **Substantive Fairness:** is concerned with whether or not the reason for the dismissal justifies the dismissal. That is, whether or not the employee's work performance or conduct was in itself enough to justify the dismissal.

b) **Procedural Fairness:** is concerned with the decision-making process followed or steps taken by an employer rather than the actual decision itself. This includes:

- whether an employer has followed their own procedures in dismissing an employee
- whether the employee had an opportunity to explain their side of whatever happened, or
- being able to seek advice or have a support person available at a meeting.

Procedural fairness continues to be an important factor that the Commission will take into consideration when deciding if a dismissal has been harsh, unjust or unreasonable. It requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to respond to it.

In cases of unsatisfactory performance, employers should institute a formal disciplinary process which clearly indicates the concerns the employer has about an individual employee's work performance, the manner in which concerns may be overcome and establishes a realistic time frame to address the particular performance issues.

In cases of misconduct, it is important that the employer informs the employee of the precise allegations of misconduct and gives the employee an opportunity to respond.

Failure to do this may result in a tribunal finding that the dismissal was "harsh, unjust or unreasonable".

4.3 Natural Justice

Most non-profit community organisations have a commitment to fair treatment and to abiding by the principles of natural justice. The considerations set out in section 4.1 reflect a natural justice approach that employers need to be able to demonstrate in order to defend an unfair dismissal claim. Such an approach not only provides a defence against claims, it is also consistent with the values of most non-profit community organisations.

The natural justice approach also makes good management sense as it reflects an evidence-based approach to decision making.

Therefore, having regard to the FWC considerations in section 4.1 and the principles of natural justice, in carrying out any form disciplinary action in relation to unsatisfactory work performance or misconduct, an employer should:

a) Clearly inform the employee of

i. the concerns, and of

ii. the process, and

iii. the potential consequences if the concerns are not satisfactorily addressed;

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b) Provide a genuine opportunity for the employee to respond and put their side of the story – this includes:

   i. Giving sufficient notice and information for the employee to be able to understand the issues and prepare themselves;

   ii. Allowing a support person or representative, such as a colleague or union representative, to be present (and there should be a witness for management as well); and

   iii. Where necessary, conducting a reasonable and fair investigation (for example, not taking complaints at face value without checking evidence, such as other witnesses and relevant documentation).

c) It is only after the process of giving the employee the opportunity to respond that a decision is made about the outcome. Possible outcomes include:

   i. No further action, if the employee has been able to satisfy the employer their concerns were unfounded or not as serious as thought;

   ii. An informal warning;

   iii. A written formal warning and the chance to address the employer's concerns; or,

   iv. If appropriate, dismissal. (See section 8 for more details about this process, Appendix D for a sample policy, and Appendices E and F for flow charts summarising the steps).

4.4 Small Business Fair Dismissal Code

For employers with fewer than 15 employees, it is a defence to be able to show compliance with the *Small Business Fair Dismissal Code*. This Code is reproduced in Appendix G.

The *Small Business Fair Dismissal Code* is consistent with the natural justice principles outlined above in Section 4.3. While this should provide some protection for small employers against being tripped up on "technicalities", advice should still be sought before dismissing an employee.

The code can be downloaded from the Fair Work Commission website.

5 Remedies for Unfair Dismissal or Unlawful Termination

5.1 Remedies under the Fair Work Act

In arbitrating a claim of harsh, unjust or unreasonable dismissal, the FWC can order:

- **Reinstatement** of the employee to their former position or to another position on terms no less favourable than the former position. In such instances, the Tribunal can also order that the employer maintains the continuity of employment of the dismissed employee and order **compensation** for wages lost because of the dismissal;
- **Compensation** where reinstatement is inappropriate, to a maximum of the remuneration the employee would have received in the 6 months prior to dismissal, or in the case of a non-award employee, a maximum of 76,800 (current to 30 June 2021) which is half of the high income threshold under the *Fair Work Act* or 6 months' pay whichever is lesser.

However, before making an order the relevant tribunal must have regard to all the circumstances of the case. The *Fair Work Act* summarises the relevant factors as including:

- The effect of the order on the viability of the employer's business;
- The employee's length of service;

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- The efforts of the employee to mitigate any loss and any amount they earned from other work since the dismissal; and,
- Any other matter that FWA considers relevant.

Furthermore, if the FWC is satisfied that the employee engaged in misconduct, any compensation must be reduced on account of that.

So, even where the employer is found to not have carried out a fair process that would fully meet the requirements set out in section 4.1, any compensation must be reduced if the employee is found to have actually engaged in misconduct.

The WA State IR Act has similar provisions, although some details may differ.

5.2 Process

Any Jobs Australia member who is faced with a claim for remedy for unfair dismissal should contact Jobs Australia for detailed advice before responding.

Briefly, both federal and state jurisdictions follow a process along the following lines:

- A dismissed employee must lodge their claim with the relevant tribunal within a prescribed timeframe (21 days for Fair Work Commission; 28 days in the WA State Commission);
- An informal conference will be scheduled within a few weeks. The purpose of this conference is for the tribunal to try to conciliate between the parties and reach an agreed settlement of the claim. Historically, roughly 90% of claims are settled at this stage.
- If not settled, the conciliator may issue a certificate which comments on the relative merits of each party's case.
- The applicant may then choose whether or not to have their claim arbitrated in a formal hearing. If the applicant is successful, they may either be reinstated, or awarded compensation to a maximum of six months' pay.

5.3 The Federal Court

For unfair dismissal in the federal system, the FWC conciliates and, where necessary, arbitrates a claim whether a dismissal has been harsh, unjust or unreasonable.

However for conciliation of an unlawful termination claim (that is, where a dismissal has been for a reason prohibited under the Act) the FWC does not resolve the case, it is the Federal Court rather than the FWC that will determine the claim. See section 3.1 above for further discussion of unlawful termination.

The Court can make various orders with respect to unlawful termination such as:

- Reinstatement of the employee;
- The employer to pay compensation to the maximum described for the Commission;
- The employer pay a penalty;
- Any other order that the Court thinks necessary to remedy the effect of an unlawful dismissal.

The Court also deals with contraventions of any orders of the Commission.

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6 Specific Issues relating to Termination

7.1 Provision of Notice

Every employee whose employment is terminated must be advised in writing of the termination. This notice must include the reasons for termination of employment. The law provides for minimum periods of notice to be given to employees dismissed for reasons other than misconduct which justifies summary or instant dismissal.

The *Fair Work Act 2009* sets out the following minimum periods of notice:

Employee's period of continuous service with the employer	Period of Notice
Not more than one year	At least one weeks' notice
Not more than one year but not more than three years	At least two weeks' notice
More than three years but not more than five years	At least three weeks' notice
More than five years	At least four weeks' notice
Employees over 45 years of age with two years continuous service with the employer	An additional week of notice to be given

The Fair Work Act provides a minimum standard for notice of termination in the federal system. Some awards and contracts may entitle employees to a greater period of notice. Where this is the case, the more generous provisions would prevail.

7.2 Summary Dismissal

Summary or instant dismissal effectively means dismissal "on the spot" and without the period of notice specified in the award or provided for under any applicable legislation.

Summary dismissal by an employer for serious and wilful misconduct is a common law right.

The *Fair Work Act 2009* in its Regulations defines and codifies the common law with respect to serious misconduct. REG 1.07 states that the following may be construed as serious misconduct:

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

Conduct that is deemed to be serious misconduct can occur when the employee, during the course of employment engages in one or more of the following:

- theft;
- fraud;
- assault;
- intoxication at work (to the extent that the employee is unfit for work); or
- refusing to carry out a lawful and reasonable instruction.

Effectively, the Act is stating that an employee's actions must be such that the employee has fundamentally breached an implied or express term of their contract of service with their employer. Judging whether a particular instance of misconduct constitutes serious and wilful misconduct is not always as straightforward as it sounds, and advice should be sought.

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As in other situations of termination of employment, if an employer is dealing with an employee where serious and wilful misconduct is alleged, the employee concerned is entitled to natural justice before a decision is made to summarily dismiss. The principles of natural justice are quite clear in the case of dismissals. Judgments have been made stating the principle that:

NOTE: An employee cannot lawfully be dismissed without first telling the employee what is alleged against them and hearing their defence or explanation.

While the employer may consider the actions of an employee to be such as to warrant instant dismissal, Jobs Australia advice should be sought before any decision to dismiss is made. Each case must be assessed on its particular merits.

7.3 Resignation and Constructive Dismissal

If an employee voluntarily chooses to resign, even though unhappy, the termination is at the initiative of the employee. In this situation, the employer cannot be held liable for an unfair dismissal as termination was not at their initiative. Employees who resign are excluded from unfair dismissal remedies.

However, if the "resignation" is actually at the initiative of the employer, a different situation may arise.

Employers cannot pressure an employee to resign or retire, or impose substantive changes in their existing position as a way of avoiding the disciplinary process. In such instances an employee may still bring a claim before an industrial tribunal. While the employee's departure from the organisation may appear to have been of their own volition, it may be determined that the termination was actually at the initiative of the employer (i.e. "**constructive dismissal**"). If so, the termination may be regarded as harsh, unjust or unfair.

It is not sufficient for an employee to merely claim that because they were unhappy with their job they were forced to resign.

Constructive dismissal claims are relatively uncommon. Each case is different and the outcome will depend on evidence about the process leading to termination. Where it can be shown that an employee has been constructively dismissed, it is likely to be held to be unfair as there will not have been a natural justice process.

7.4 Condoning Behaviour

Where an employer condones the employee's misconduct, then the right to summarily dismiss the employee will be treated as having been waived.

For example, if an employer seeks to dismiss an employee because they have breached a directive and the employer has previously condoned the same breaches by other employees or the same employee since the directive was issued, then the employer would be condoning the misconduct and would not be entitled to summarily dismiss in relation to the matter.

If, of course, new instructions were issued which stated that the employer would no longer condone future policy breaches and an employee continued to ignore the employer's directives, then the employer would be entitled to take action to dismiss the employee.

7.5 Redundancy

Redundancy may be a valid reason for termination of employment.

The *Fair Work Act* provides that where termination is due to "genuine redundancy" the employer will have a defence against an unfair dismissal claim.

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Genuine redundancy is defined as:

- The job is no longer required to be done by anyone because of changes in operational requirements;
- Any obligations to consult, under an award or enterprise agreement, have been complied with; and
- It was not reasonable to redeploy within the organisation or any associated entities. In effect there is a positive obligation to explore options.

Note: It is important to note that non-profit organisations have the same responsibilities as other organisations. The loss of funding does not preclude organisations from engaging in proper redundancy procedures, including the requirement to consult.

Our publication *Guide to Managing Redundancy* covers this issue in more detail.

7.6 Termination on Medical Grounds

Another valid reason for termination of employment may be where an employee is not capable of performing the inherent requirements of a job for medical reasons. Once again, it is important to follow an approach based on natural justice.

Furthermore, there are significant constraints on the employer's ability to terminate for reasons such as disability or short-term illness. Some of the constraints are summarised below.

Medical Issue	Constraints
Short term illness or injury	Employees are entitled to access paid leave. Unlawful to terminate due to illness or injury where the absence is less than three months in a twelve-month period, in addition to paid leave entitlements.
Work related injury	It is generally unlawful to terminate employment where the employee is in receipt of Workers Compensation, for periods of between 6 and 12 months. Advice should be sought.
Chronic illness, disability	Anti-discrimination and equal opportunity legislation in both state and federal jurisdictions generally impose an obligation on employers to make reasonable accommodation for disability.

Despite these constraints, in situations where an employee is genuinely unable to perform their role due to medical problems, it will eventually be possible to terminate employment. As a general rule, employers should be proactive in facilitating return to work and making reasonable accommodation for employees with medical problems such as illness or injury. However, there comes a point where, despite best efforts, it might not be practicable for the employee to perform their role as required.

The steps which should generally be followed include:

1. Ascertain whether there are specific constraints or timeframes that may affect the process, as outlined in the table above (get advice).
2. If the timeframe is appropriate, contact the employee and arrange for a medical assessment to determine whether or not the employee is able to perform the inherent requirements of their role, or could do so if reasonable accommodation were made in the workplace.

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3. The employee should be advised that there are concerns about their capacity to perform their role, and that if they are unable to perform their role you may need to consider if there are alternative roles available, or else termination of employment.
4. The medical practitioner should be asked whether the employee is fit for the specific requirements of the role. If they are not, the medical report should advise the likely timeframe within which their capacity might improve, whether there are any specific restrictions which might apply upon a return to work, whether modifications to the role might assist, or whether the employee might be fit for other duties.
5. It is only after obtaining objective medical evidence and providing the employee with an opportunity to respond to the findings that a decision should be made. Options could include a return to work, possibly with some temporary or permanent modifications to duties, transfer to more suitable duties, or termination of employment.

Managing employees with ongoing ill health or injury is subject to a range of industrial and anti-discrimination legislation. The issues can be quite complex and advice should be obtained.

7.7 Abandonment of Employment

When an employee absents themselves from the workplace without leave and with no intention of returning, they are considered to have abandoned their employment. In effect, they have resigned, by their actions even though there has not been a formal resignation.

However, in such cases it is important not to make assumptions. The employer still needs to check facts and give the employee the opportunity to make contact and explain their absence. Sometimes what appears to be abandonment can either be absence due to a serious illness or accident (the "hit by a bus" scenario), or just a misunderstanding.

The steps to be followed include:

1. Make reasonable attempts to contact the employee to ascertain if they are OK, and when they will return to work. If there is no response from phone or email, a letter should be sent by registered mail. Contact Jobs Australia for advice about drafting such a letter. The letter should raise the concern about their absence and advise that if there is no response within a reasonable timeframe (usually about a week), the employer will consider that they have abandoned their employment.
2. If there is no response or acceptable explanation, then the employer may consider sending a further letter confirming that they their employment has terminated due to abandonment by the employee.

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8 The Disciplinary Procedure

Almost every employer at one stage or another will need to deal with employees who are not performing well in their jobs or who have been involved in acts of misconduct related to their employment. A large proportion of our advice to employers relates to these issues.

To make it easier for employers to be fully aware of the implications involved in implementing disciplinary action, a detailed set of procedures is outlined below.

A sample policy on disciplinary procedures is provided at **Appendix D**.

Employers who avoid dealing with serious concerns when first identified often make it difficult to solve problems later. It is essential that employers **deal with problems early!** There is merit in early intervention to address emerging issues with employees. There is no benefit in avoiding taking any action until the relationship between employer and employee has broken down to such an extent that there appears to be no other option but to dismiss the employee.

When an employer fails to conduct dismissal in the proper manner, the risks are high. By following the appropriate disciplinary steps, an employer minimises the risk of a dismissal being challenged and increases the defensibility of any decision to terminate. Just as importantly, a good process maximises the chances of successfully resolving concerns with minimum disputation.

Appendices E and F provide flow charts which summarise the elements of a good process, consistent with the steps described in this section.

8.1 The Stepped Process -

a) Step 1: Preparation

Employers need to be well prepared before taking disciplinary action. A list should be made of all the concerns relating to an employee's work performance or conduct, set out in order of seriousness under different headings. It is also a good idea to list specific examples with a timeframe to illustrate how the employee has failed to meet standards of conduct or performance required by the employer.

It is important to check the employee's position description or duty statement and any written policy instructions, staff memos or other policies and procedures which staff are obliged to follow. Where possible, the list of concerns and specific examples should relate to the specific requirements outlined in such documents.

By dealing with the problems effectively, it may be possible to avoid messy disputes in the workplace and sometimes costly proceedings in industrial tribunals.

Note: Employers and Managers need to be patient in dealing with these issues. It is important to maintain a clear, professional, and objective perspective. Don't let anger or frustration influence your handling of the situation.

b) Step 2: Prior Notice to the Employee

Prior notice should be given to an employee when initiating formal disciplinary procedures. The notice should state that formal disciplinary procedures have been initiated because of serious concerns relating to work performance or conduct. The notice formally requires the employee to attend a meeting to respond to the concerns. It should state who is to conduct the interview and where and when it is to be held. The notice must also indicate the employee's right to invite a union representative.or appropriate support person to the meeting.

If any request is made for a solicitor to be present, please contact Jobs Australia for advice.

The interview should be held in a place where all participants can speak frankly without being overheard by others and where there will be no interruptions. Divert all calls and other possible interruptions. Furthermore, all those involved should be reminded that the process is confidential.

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The period of notice required is not specific, but an employee should normally be given sufficient time to make arrangements to prepare for the disciplinary interview meeting. One or two days' notice would normally be acceptable. However, it needs to be noted that some union officials will argue for more time on the grounds of inability to attend. If a union is unable to meet the employer's timeline, then consideration should be given to a reasonable extension so as to avoid further disputation. It is advisable to contact a Jobs Australia Industrial Relations Adviser to seek advice should such a situation arise.

It is advisable to include a summary of the employer's concerns in the formal notification of requirement to attend the interview. This provides a focus for the discussion and is a useful reminder of the full range of issues that the employee will respond to. There should be sufficient detail including timeframe for the employee to understand the key issues. For that reason, it is better to refer to a specific incident (eg, "…a client has complained that you swore at them on Monday…" is clearer than "…you appear to have engaged in unprofessional behaviour…").

It is also best to be as formal as possible throughout the process and to ensure that there is a clear record of all actions taken by the employer, in the event that there is a dispute such as an unfair dismissal claim.

For small employers with fewer than 15 employees, a clear paper trail that shows this process has been followed will assist in satisfying the requirements of the *Small Business Fair Dismissal Code* in the federal system (see Appendix G).

Appendix A outlines a draft letter that employers may wish to adapt to suit their individual circumstances.

It is advisable to personally explain to the employee that you have concerns and that a meeting is to be held to discuss the concerns in more detail. A letter should then be handed to the employee. This provides an opportunity to briefly emphasise that, although it is a formal process, the purpose is to give the employee an opportunity to put their side before any decision is made about an outcome. Many performance and conduct matters are easy to rectify so it helps to get the focus on the practical issues at hand and not let the employee become overwhelmed by the formalities. Giving notice in writing establishes a paper trail and also helps to ensure that there is no misunderstanding about what is happening.

c) Step 3: The Interview

Who Conducts the Interview?

The employer will decide who is to conduct the disciplinary interview. Usually, it is the Manager with another senior employee, or a representative from the Board or Management Committee, who conducts the interview on behalf of the employer. It is advisable to keep the number of management representatives to a minimum, preferably just two or three. If too many are present it may be intimidating to the employee and undermine the effectiveness and perceived fairness of the process.

A Successful Interview

A person other than the lead member of the employer's team should take notes of what is said by both parties during the meeting and have these notes typed up as soon as possible after the meeting. The greater the delay in recording the discussions, the less accurate such records tend to be. The notes do not need to be a verbatim record. They should clearly summarise the issues discussed, the key points made by each participant, and any outcomes or actions decided.

The main aims of the interview should be:

- To ensure that the employee is aware of all the concerns of the employer;
- To give the employee a reasonable opportunity to respond to any allegations made against them;

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- To let the employee know what standards of work performance or conduct the employer requires; and
- To plan how the employer's concerns will be responded to and satisfactorily addressed by the employee.

It is important that the person conducting the interview on behalf of the employer keeps control over the direction of the interview. The purpose of the meeting is to provide the employee with the opportunity to respond to the employer's concerns. Whoever conducts the interview must stick to the point, remain objective and use the headings and examples that have been prepared. At the same time, the employer's representative must listen carefully to what is being said by the employee or the union representative or other support person. The employer will need to carefully consider these responses before determining the next step in the process. .

Some representatives may seek to steer the discussions into 'other' areas but the focus should always be on seeking and receiving responses. It should also be remembered that 'no response' is of itself a response.

It may be necessary to adjourn the meeting to be able to investigate new issues raised by the employee in their defence. For example, if the employee claims there is a witness who can support an alternative explanation, the employer should interview that witness before making a decision about disciplinary action.

There are a range of possible outcomes. It is possible that the concerns turn out to be unfounded or a misunderstanding. In that case there would be no further action.

Alternatively, it may be found that some or all of the concerns are substantiated. In that case the outcome will usually be a warning, or may sometimes warrant termination of employment.

d) Step 4: The Warning Letter

Unless it is decided that the matter has been resolved because the employee has provided a satisfactory response, or the outcome of the process is dismissal, the employer should issue a formal written warning to the employee.

While verbal warnings can be considered, their major weakness is that no evidence is produced as to the substance or detail of the warning. Given that many dismissals are challenged, there is merit in making all warnings in writing. On the other hand, for a relatively minor problem where the employer is confident the employee is genuinely committed and able to ensure no repeat of the problem, a written warning may be counterproductive and an informal verbal warning may be sufficient. This will always be a matter of judgement depending on the specific circumstances.

A written warning should:

- Directly state that unless the employee's work performance and/or conduct improves to the standard required by the employer (following a reasonable review period), the employer will consider further disciplinary action including dismissal (if the matter is serious, there should be a direct reference to the prospect of dismissal);
- Stipulate the review period and review date; and,
- Outline the standards of employee work performance or conduct the employer requires to be reached and maintained.

The review period should be long enough for employees to be able to demonstrate that they have achieved and can maintain the standards set by the employer. A recommended length of time could be between 6 weeks and 3 months, but of course will depend on individual circumstances. It is best to consult with Jobs Australia about a suitable review period.

Employers are advised to have draft warning letters checked by Jobs Australia. **Appendix B** contains a draft warning letter that could be adapted for local use.

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In hearing an alleged unfair dismissal claim, the FWC will take particular note of whether or not a warning has been given. The FWC will consider the fairness of the employer in giving the employee adequate information about the nature of the employer's concerns as well as a reasonable opportunity to address those concerns. Failure to provide a proper warning and review period can cause serious problems for an employer if a dismissal is challenged by the union or by a dismissed employee.

e) Step 5: The Review Period

The ideal outcome of the review process is that the employee will achieve the standards required and go on to become an effective and valued member of the team. Most employees want to be good performers. Given this, it is important to try to take a positive approach to the review period and work together. The review should not be a matter of 'sink or swim'. Try to identify obstacles to good performance and then develop solutions. If both employer and employee want to make it work, there needs to be reasonable assistance provide to the employee in the form of coaching, mentoring or training as needed. For example:

- Role clarity – Does the employee understand where they fit in the organisation? Does there need to be a straightforward discussion about what is and is not expected in their role?
- Skills – Does the employee need to be sent on a short refresher or update course?
- Coaching – Does the supervisor or an experienced colleague have a role to play in setting aside some time to specifically guide the employee in an informal and non-threatening setting?
- Feedback – Is the employee able to get timely informal feedback during the review period, before they go too far off track?

This type of process is not always easy as the relationship is often strained by this point, but for reasons of fairness as well as being a practical approach to getting the desired outcome it makes sense to try to help the employee.

Ultimately, an assessment will need to be made as to whether or not the employee is meeting expectations. The employer needs to be reasonable in monitoring the performance and conduct of the employee during the review period. It can be unfair and unreasonably stressful to micro-manage an employee and a reasonable balance needs to be found.

However, the employer will need to accurately observe and record the employee's work performance or conduct during the review period. In particular, the employer should note whether the employee has or has not achieved and maintained the standards set.

It is advisable that a diary be maintained by the individual conducting the disciplinary procedures recording, in detail, instances when the employee has failed or succeeded in achieving the work performance and/or conduct standards set. This evidence would then be used in the review process at the end of the period.

Some employers worry that an employee will improve during the review period and drop their standards immediately afterward. This is one of the reasons that it is in the employer's interests not to shorten the review period too much. It is our experience that a poor performer will either address the issues within a reasonable period (thereby solving the employer's problem), or simply fail during the period. Some people are just not able to achieve the standards set by the employer.

When a decision needs to be made by the employer, the most appropriate action can be taken because there has been sufficient documentation of evidence and process.

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f) Step 6: Review - Possible Sanctions including Dismissal

Following the adoption of Step 5, a decision will need to be made about the outcome of the review process. The outcomes could include:

- No further action if performance has been satisfactory;
- A further warning depending on how much improvement there has been; or
- Dismissal, depending on the history of warnings and the level of seriousness of the problems.

Whether or not to dismiss the employee is a decision that should only be made at a senior level of the organisation (and, of course advice should be sought). In some cases, the Board or Management Committee makes the final decision. However, this power may be delegated to the Executive or to the Manager or another appropriate person or group. Make sure that any delegated power is clearly expressed through a minuted policy decision of the Committee or Board.

It is the employer who conducts the review - not the employee or their union representative or other support person. Further, it is the employer who needs to be satisfied that the employee's performance or conduct has improved to the point where dismissal is no longer warranted.

Warning or dismissal?

Dismissal can proceed if the review indicates that the employee has not satisfactorily addressed the employer's concerns, depending on the level of seriousness and the history of warnings.

NOTE: There is no set rule about the number of warnings required. Case law suggests that each situation needs to be viewed on its merits.

Generally, in cases of poor performance, the attitude of tribunals has been that employees should be given multiple opportunities to improve before being dismissed. However, in the case of small employers with fewer than 15 employees by headcount, the *Small Employer Fair Dismissal Code* makes it clear that just one warning is all that is required to defend an unfair dismissal claim in the federal system. Nevertheless, from the perspective of good management practice, it will often make good business and ethical sense to allow an employee who is trying and improving more than one opportunity.

In cases of misconduct, it may be reasonable to give fewer warnings since misconduct relates to deliberate actions or behaviour of the employee, whereas performance issues relate to skills and capacity that are more able to be addressed immediately by an employee.

The decision to dismiss

Termination of employment is the ultimate sanction available to the employer. It may result in taking away the livelihood of the employee and their family and should receive serious consideration and not be decided lightly. On the other hand, continuing employment when either performance or conduct is unacceptable despite warnings may be damaging to the organisation and unfair on colleagues and clients.

Once a decision has been made to dismiss an employee the employer should, as soon as is practicable, advise the employee of the decision. This advice should inform the employee of the reasons for the decision and should be provided in both written and verbal forms.

The *Fair Work Act 2009* sets out minimum periods of notice (see section 6.1). These are reflected in modern awards. Because awards are reviewed , it is important that employers check the relevant award(s) before taking any action in any particular case. Where a contract of employment or enterprise agreement provides more generous notice, then the contract or enterprise agreement will prevail. If there is any doubt, contact a Jobs Australia Industrial Relations Adviser for advice.

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If it is not appropriate that the employee works out the notice period, **the employer may pay the employee in lieu of the required notice**.

You may also be required to provide the employee with an **Employment Separation Certificate**. Employment Separation Certificates are available from Centrelink, and can be downloaded from their website.

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Appendix A: Draft Letter re Commencement of Disciplinary Action

(Your letterhead)

(*date*)
Name of employee
Address

Email address

Private and Confidential

Invitation to Disciplinary Meeting

Dear (name)

I write to advise you that serious concerns have been raised by management with regard to (your conduct or the standard of your work performance – choose which is appropriate) in your position of …….

[if previous discussion otherwise delete]
I refer to the discussion we had [relevant date if not date of letter) where I advised you of the serious concerns held by management relating to your (conduct or work performance – choose which is applicable)

This letter confirms those concerns and makes arrangements for a meeting to provide you with the opportunity to discuss and respond to the concerns in more detail. You will be afforded the opportunity to explain and/or defend yourself in relation to any allegation made about your (conduct or work performance – choose which is appropriate)

Allegations

(list the areas of concern)

-
-
-
-
-

(The concerns should ideally be listed in point form with dates or timeline and should be broad, but to the point.)

You are directed to attend a formal disciplinary meeting to be held on *(nominate a date, time and venue and who will be present)*. You are invited to have a union representative or other appropriate support person present at the meeting.

If we are able to satisfactorily resolve the concerns there may not be any need for further action. However, if we are not able to satisfactorily resolve the concerns, the outcome of this meeting may be disciplinary action, which could include a warning or termination of employment.

Privacy

In order to protect the privacy of all concerned and to ensure the integrity of this process, you are directed not to discuss this matter with any other (name of employer) employee unless they are your chosen support

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person. This direction must be strictly adhered to and failure to do so will be considered as serious and wilful misconduct, which may lead to disciplinary action up to and including termination of employment.

[delete if no EAP available]
We understand that sometimes employees experience difficulties both at work and in their private lives, and that this process may be difficult for you, accordingly, I invite you to make contact with the (name of employer) employee assistance providers who provide our employees with confidential counselling. They can be contacted on (phone number).

If you have any queries please do not hesitate to contact me.

Yours sincerely,

……
Chairperson (or Manager)
(date)

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Appendix B: Draft Warning Letter

(*Your letterhead*)

(*date*)

Name of employee
Address

Email address

Private and Confidential

Dear (*name*)

I refer to my recent letter dated *(date)* in relation to concerns expressed about your (conduct in the workplace / or the reported standard of your work performance).

I take this opportunity to thank you for attending the disciplinary meeting on (relevant date) with myself (or name of manager) and (other management attendee) to discuss management concerns expressed about (your conduct / or the reported standard of your work performance). I note that (name of union representative or support person) attended the meeting as your support person / or you elected not to have a support person present).

Allegations

(List the allegations the same as the commencement letter)

At that meeting, you were provided with the opportunity to respond to the concerns raised and you were also afforded the opportunity to explain and/or defend yourself in relation to these concerns.

(Outline in one paragraph any response or reason that was provided and (for example) whether the conduct/performance was admitted and or substantiated by the investigation).

We now wish to formally advise you that the Management has fully considered your responses. We continue to hold serious concerns about your (performance / conduct – choose one as appropriate to such an extent that this letter constitutes a formal warning).

<u>Warning</u>

(work performance) (delete if conduct)
Unless you address the following concerns to the standards required by (*insert date*), disciplinary action may be continued, which may include termination of your employment.

Standards to be achieved:

-
-
-
-
-

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Your progress in meeting these standards will be monitored and a review of your work performance will be carried out by (*insert date*).

You are directed to carry out all work tasks diligently and to cooperate fully with management throughout the review period.

(conduct) (delete if performance)
You are advised that any repetition of the conduct outlined in this letter if substantiated following an investigation process may result in termination of your employment.

We remind you that this matter must remain confidential between all parties involved.

Yours sincerely,

……
Chairperson (or Manager)
(date)

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Appendix C: Draft Letter of Termination

(your letterhead)

Date

Employee name

Address

Email address

PRIVATE AND CONFIDENTIAL

Dear *(name)*

Termination of Employment

I refer to my recent letter dated *(date)* in relation to serious concerns raised about (your conduct in the workplace / or failure to comply with the required standards of performance – *choose which is relevant)* as identified in the letter of warning dated (*date*).

I take this opportunity to thank you for attending the meeting on *(date)* to respond to (the allegations of serious misconduct / unsatisfactory work performance) and to show cause why (name of employer) should not consider termination of your employment. I note that (name of support person) attended the meeting / you elected not to bring a support person to the meeting).

Allegation

Outline the original allegations from the Investigation meeting letter - that were put to the employee (with date and time)

In response to the allegations you stated (one paragraph /or longer if necessary – to outline the employees response to the show cause – including if anything was admitted).

Outcome of Investigation

I have reviewed your account of events presented at the meeting on *(date).* The investigation concluded that (you engaged in wilful and deliberate misconduct because of the findings that …… / your work performance remains unsatisfactory to the expected standard of a (name of position)

On balance, it was determined that your conduct represents a serious breach of the Code of Conduct (and any standards if applicable). Taking into consideration your responses as well as the serious nature of the allegation, we maintain the view that it is appropriate that your employment should be terminated.

Termination of Employment

Prior to finalising this decision, I am providing you with 7 days (date 7 days after date of letter) to contact us and provide a response to this proposal or any mitigating factors. You may respond to (name of manager / CEO as appropriate) by email (relevant email address) Should we not hear from you, the termination will be

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processed on (relevant date 8 days after of letter) and your last date of employment will be (7 days after date of letter). (Only include sentence about notice if management decide to pay notice – You will receive payment of xxx weeks in lieu of notice). You will be paid any outstanding leave entitlements.

We remind you that while this investigation is being conducted, this matter must remain confidential between all parties involved.

(delete if not applicable)
Employee Assistance
I encourage you to contact (name of EAP) on (phone number) for confidential counselling. This employee assistance program is available to you to seek support and advice as required during this difficult time.

If you have any queries please do not hesitate to contact me.

Yours sincerely,

…….
Chairperson (or Manager)
(*date*)

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Appendix D: Sample Policy on Disciplinary Procedures

1) Where the employer has concerns about the work performance or conduct of an employee, other than probationary or short-term casual employees, the following disciplinary procedure will apply.

2) The staff member shall be advised:

   a) of the alleged poor work performance or misconduct;

   b) that those concerns will be dealt with in accordance with these procedures;

   c) and that, if the concerns are not satisfactorily resolved, a possible outcome could be a disciplinary sanction such as a warning or termination of employment.

3) The staff member shall be provided with the opportunity to respond to any such allegations at a disciplinary meeting with the relevant manager(s). A staff member subject to disciplinary proceedings may be assisted or represented in any disciplinary meeting by a support person of the employee's choice from the workplace, such as a colleague, or by a union representative.

4) The staff member shall be treated at all times in accordance with the principles of natural justice. These principles include:

   a) the right to a fair hearing including adequate notice of what is alleged and a reasonable opportunity to respond to allegations, and

   b) the right to an unbiased process of judgement.

5) Nothing in this procedure shall restrict the employer's right to summarily dismiss an employee in circumstances that warrant summary dismissal, or to dismiss with notice for misconduct that is less serious but which nevertheless justifies dismissal.

6) If the concerns are not adequately addressed at the initial disciplinary meeting,

   a) In case of poor performance a warning may be issued or

   b) in the case of misconduct there may be a warning or employment may be terminated, depending on the level of seriousness of the misconduct and any mitigating factors.

7) The management representative shall notify the employee of the reason for the decision and, where a warning is issued, detail the standards of performance and/or conduct expected.

   a) In the case of unsatisfactory performance the employer will also set a timeframe for a review of performance, and will consider reasonable measures to assist the employee to meet the required performance standards, such as mentoring or training as appropriate.

   b) The warning shall also state the consequences of not meeting the required standards of performance and/or conduct, such as further disciplinary action which could include termination of employment.

8) If the problem continues the matter will be discussed with the employee at a second disciplinary meeting.

   a) Unsatisfactory Performance - If the concerns are not resolved at the second meeting, in the case of unsatisfactory performance normally a second warning in writing will be given to the employee. Termination of employment for unsatisfactory performance at this stage may occur in cases where the unsatisfactory performance has particularly serious consequences, such as placing the viability of the employer at risk or posing a serious safety risk.

   b) Misconduct – If the allegations of a recurrence of misconduct are not satisfactorily resolved at the second meeting, a second written warning may be given to the employee, or employment may be terminated, depending on the level of seriousness of the misconduct and any mitigating factors.

9) If the problem continues the matter will be discussed with the employee at a further disciplinary meeting. If the concerns are not resolved, the outcome may be a further warning or termination of employment. Nothing in this procedure shall prevent the employer from conducting further disciplinary meetings where the particular circumstances require it.

Call Jobs Australia *BEFORE* you begin a disciplinary process or dismiss an employee.

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Appendix E: Unsatisfactory Work Performance

INVESTIGATION

- Before taking any action, contact Jobs Australia.
- Employer objectively identifies performance concerns.
- Prepare a letter summarising poor work performance with detailed examples.

PRIOR NOTICE OF MEETING

- Letter sent to employee stating that a disciplinary process is being initiated.
- Letter includes summary and examples of poor performance.
- Schedules a meeting time and place. Nominates who will carry out disciplinary interview.
- Invites employee to be accompanied by union or other personal representative.

MEETING

- Interview with the employee.
- Provide opportunity for employee to answer all allegations and to defend themselves.
- Take notes on responses to each defence or explanation.
- Concentrate on the issues listed in the notification letter.
- Don't be distracted.
- Representative can speak but does not run the meeting.

IF CONCERNS SATISFACTORILY ADDRESSED	IF CONCERNS NOT SATISFACTORILY ADDRESSED
• If you are satisfied that the employee has addressed your concerns, there is no need for further action. • Advise the employee there will be no further action.	• Issue written warning which directly advises dismissal is a possible consequence if performance is not improved to employer's standards. • Detail performance standards. • Establish review timetable

DURING REVIEW PERIOD

- Monitor the employee's work performance. Record appropriate information objectively and accurately.
- Provide reasonable assistance to help employee improve.
- Do not over-supervise.
- Leave room for the employee to show they can work at an acceptable performance level

REVIEW

- Arrange Review Meeting. (Allow union or other personal representative to attend in support)

CONCERNS SATISFACTORILY ADDRESSED	WARNING	DISMISSAL AFTER WARNINGS
• Advise employee disciplinary action ended. • Give positive feedback on their efforts. • Remind employee that performance needs to be maintained.	• If performance still unsatisfactory, but only one or two previous warnings, issue a further written warning. • Detail performance standards. • Establish review timetable. • Continue with the disciplinary procedure.	• Union or other personal representative to be allowed to accompany employee. • Detail finding of review. • Give employee (and union or other representative) an opportunity to respond. • Give notice or pay in lieu. • Pay employee all entitlements on last day. • Include reasons for dismissal in written notice.

Call Jobs Australia *BEFORE* you begin a disciplinary process or dismiss an employee.

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Appendix F: Dealing with Serious and Wilful Misconduct

INVESTIGATION

- Employer collects all material relevant to the allegation.
- Employer objectively reviews information obtained.
- BEFORE TAKING ANY ACTION CONTACT JOBS AUSTRALIA.

PRIOR NOTICE OF INTERVIEW

- Letter sent to employee stating that a disciplinary process is being initiated.
- Letter details the allegation of serious and wilful misconduct.
- Schedule a meeting time and place and nominate who will conduct the interview.
- Invite employee bring a union representative or other appropriate support person.

INTERVIEW

- Interview with the employee. Provide opportunity for employee to answer all allegations. Take detailed notes on responses to each defence or explanation.
- Concentrate on the issues listed in the notification letter. Don't be distracted and stay objective.
- Advise the employee that you wish to consider the employee's explanation.
- Thoroughly investigate any matter which was raised in the interview in defence of the allegation and about which you are not clear. Fairly, and objectively consider the explanation and information provided by the employee.

You should contact Jobs Australia at this stage to discuss whether it is appropriate to summarily dismiss the employee.

TERMINATION

- If the allegations of misconduct are proven to your satisfaction then the employee should be advised of employer's decision to terminate their employment for serious and wilful misconduct.
- Provide written notice of termination including the reason(s) for dismissal.
- Pay employee all accrued entitlements.
- No Notice period is paid in the case of a summary dismissal.
- Issue Certificate of Service and Separation Certificate.

If in doubt at any stage, contact Jobs Australia - we're here to help.
Remember: If you don't follow the above procedures you may be forced to reinstate an employee or pay compensation.

Call Jobs Australia *BEFORE* you begin a disciplinary process or dismiss an employee.

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Appendix G: Small Business Fair Dismissal Code

https://www.fairwork.gov.au/ArticleDocuments/715/Small-Business-Fair-Dismissal-Code-2011.pdf.aspx?Embed=Y

Small Business Fair Dismissal Code

Commencement

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

Application

The Fair Dismissal Code applies to small business employers with fewer than 15 employees (calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis). Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.

Employees who have been dismissed because of a business downturn or their position is no longer needed cannot bring a claim for unfair dismissal. However, the redundancy needs to be genuine. Re-filling the position with a new employee is not a genuine redundancy. The requirements for determining whether a dismissal was a genuine redundancy are contained in section 389 of the Fair Work Act. The Small Business Fair Dismissal Code Checklist attached to this document can assist in determining whether a redundancy is a genuine redundancy.

Further information on the application of the Code, genuine redundancy and unfair dismissal is available at www.fairwork.gov.au or by contacting the Fair Work Infoline on 13 13 94.

The 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.

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Call Jobs Australia *BEFORE* you begin a disciplinary process or dismiss an employee.

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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? (Include the dismissed employee and any other employee dismissed at the same time).

   ☐ Under 15 employees

   ☐ 15 employees or more

[If under 15 employees, the 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.]

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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	YES	NO
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?	☐	☐
b. Did you consider if the employee could have been redeployed in your business or the business of an associated entity?	☐	☐

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.	☐	☐
b. The employee defrauded the business.	☐	☐
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.	☐	☐
d. The employee committed a serious breach of occupational health and safety procedures.	☐	☐

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.

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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 that 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?	☐	☐
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was 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.	☐	☐

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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 _____

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