

Fair Work Act for Small Business

The majority of The Fair Work Act 2009 (Cth) ("the Act") will come into operation on 1 July 2009. Provisions relating to the new National Employment Standards ("NES") and Modern Awards will operate from 1 January 2010. This fact finder looks at the principal parts of the Act that small businesses will need to be aware of.

Does the Act Apply?

The Act will apply to a business that employs more than 15 employees at any particular time (National System Small Business Employer). For the purpose of calculating the number of employees employed by the employer, all employees employed by the employer at the time are considered. Casual employees are not considered unless they have been employed by the employer on a regular and systematic basis.

As with the Work Choices legislation, associated entities are taken to be one entity. Accordingly, when determining the number of employees employed by an employer at a particular time, the employees employed by all associated entities are counted. An "Associated Entity" is an Associated Entity (the associate) of another entity (the principal) if:

- a. the principal controls the associate; or
- b. the associate controls the principal and the operations, resources or affairs of the principal are material to the associate; or
- c. the associate has a qualifying investment in the principal and the associate has significant influence over the principal and the interest is material to the associate; or
- d. the principal has a qualifying investment in the associate and the principal has significant influence over the associate and the interest is material to the principal; or
- e. an entity controls both the principal and the associate and the operations, resources or affairs of the principal and the associate are both material to the entity.

A qualifying investment in another entity is when the first entity has an asset that is an investment in the second entity, or has an asset that is the beneficial interest in an investment in the second entity and has control over that asset.

When Can an Employee Bring Unfair Dismissal Proceedings

The new unfair dismissal provisions will operate from 1 July 2009.

Like the Work Choices legislation, the Fair Work Act 2009 provides that an employee must complete a qualifying period of employment prior to being entitled to commence proceedings for unfair dismissal (described as the 'Minimum Employment Period').

The "less than 100 employees" defence to unfair dismissal proceedings which was previously available no longer applies. As long as an employee has completed a qualifying period, and he or she earns less than the prescribed High Income Threshold, he or she will be entitled to commence proceedings for unfair dismissal.

For small business employers (less than 15 employees) the qualifying period has been extended to 12 months. For other employers the qualifying period of employment remains 6 months.

The Small Business Fair Dismissal Code

The Act provides that an employee will have been unfairly dismissed if the dismissal was harsh, unjust or unreasonable, was not a case of genuine redundancy, and was not consistent with the Small Business Fair Dismissal Code.

A person's dismissal is consistent with the Small Business Fair Dismissal Code if, immediately before the time of the dismissal or the time at which the person was given notice (whichever happened first) the employer was a small business employer and the employer complied with the requirements of the Small Business Fair Dismissal Code in relation to the dismissal.

Where the employer proposes to summarily terminate an employee's employment, the Code requires that the employer believe on reasonable grounds that the employee's conduct is sufficiently serious. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedure. The Code also suggests that summary dismissal will be deemed fair if the conduct is of a type that could be or has been reported to the police.

In any other circumstances, the employer must give the employee reasons for dismissal. The reason needs to be validly based on the employee's conduct or capacity to do the job. The employee should receive oral or, preferably written warning that he or she is at risk of being dismissed. The employee should also have the opportunity to respond to the warning and be given a reasonable chance to rectify the problem. In order to rectify the problem, the employer may be required to provide additional training or guidance.

When discussing matters relating to possible dismissal, the employee should normally be allowed to have a support person present. However, it would not be the ordinary case for that person to be a lawyer acting in a professional capacity.

Prudent employers should maintain documentary evidence to show that the dismissal complied with the code. The Department of Employment, Education and Workplace Relations provides a Small Business Fair Dismissal Code Checklist which may be downloaded through the following link:

http://www.deewr.gov.au/WorkplaceRelations/NewWorkplaceRelations/Documents/WRfactsheet_09.pdf

Representation by a Lawyer in Unfair Dismissal Proceedings

As of 1 July 2009 a new body, Fair Work Australia, will replace the role of the AIRC in dealing with unfair and unlawful termination proceedings.

A person may only be represented by a lawyer or paid agent in proceedings brought before Fair Work Australia with the consent of Fair Work Australia. Fair Work Australia may grant permission for a person to be represented by a lawyer or paid agent if it would enable the matter to be dealt with efficiently, or it

would be unfair not to allow representation as the person is unable to represent themselves effectively, or it would be unfair not to allow representation taking into account the fairness between the parties involved.

Conclusion

The Fair Work Act has introduced a variety of changes to the Federal Workplace Relations system. Of these, a significant set apply specifically to small business employers. Employers who are small business employers within the meaning of the Act should review their current workplace policies and procedures to ensure compliance with the Small Business Fair Dismissal Code.

If you do not currently utilise policies and procedures, now is a good time to implement workplace policies in respect of unsatisfactory performance and disciplinary procedures. If you have any queries or require any advice in relation to the Fair Work Act please contact Tony Pattinson at Ferguson Cannon Lawyers.