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FACT SHEET

Termination Provisions

The *Fair Work Act 2009* (the 'Act') contains termination of employment provisions for employers subject to the federal workplace relations system.

A summary of the legislative provisions from the Act and other related legislation relating to termination of employment are below.

UNFAIR DISMISSAL APPLICATIONS

The concept of an Unfair Dismissal in the Act refers to the termination of employment where the termination is considered to be harsh, unjust or unreasonable.

An employee who believes that their employment was terminated unfairly can lodge an Unfair Dismissal application before the Fair Work Commission ('FWC'). Employees have 21 days after a dismissal takes effect to lodge an application.

Who Can Make a Claim?

Where an employer terminates an employee's employment after they have completed the *minimum employment period* they may be eligible to lodge an Unfair Dismissal application with the FWC. Please note the term 'minimum employment period' replaces the concept of the 'qualifying period'.

The minimum employment period for an employee:

- of a small employer (that is, less than 15 employees based on a headcount) is 12 months, and
- of a large employer (that is, with 15 or more employees based on a headcount) is 6 months.

NOTE: Section 23, paragraph 3 of the Act provides that:

"For the purpose of calculating the number of employees employed by the employer at a particular time, associated entities are taken to be one entity".

In addition to completing their *minimum employment period*, one or more of the following criteria must apply to the employee in order for them to be eligible to lodge an Unfair Dismissal:

- A modern award covered the employee; and/or
- An enterprise agreement applied to the employee in relation to their employment; and/or
- The employee's annual remuneration is less than the current high income threshold of \$142,000 (indexed annually – as at 1 July 2017)

Once an employee, including a casual employee who had been employed on a regular and systematic basis and who had a reasonable expectation of continuing employment with the employer, has served the *minimum employment period* and meets the above criteria, the employee, if terminated, may seek to lodge and progress an Unfair Dismissal claim.

UNFAIRLY DISMISSED

An employee will be regarded as being unfairly dismissed if the FWC is satisfied of the following:

1. the employee has been dismissed; and
2. the dismissal was harsh, unjust or unreasonable; and
3. the dismissal was not consistent with the Small Business Fair Dismissal Code; and
4. the dismissal was not a case of genuine redundancy.

Each element will be considered below in turn.

1. Dismissed

The first element that the FWC will take into account when an Unfair Dismissal is lodged is whether the employee has been dismissed.

Who has been Dismissed?

Section 386(1) of the Act provides that an employee has been dismissed if:

- The employee's employment was terminated on the employer's initiative; or
- The employee resigned their employment, but was forced to do so because of conduct, or a course of conduct, engaged in by their employer.

On the Employer's Initiative

'On the employer's initiative' has been interpreted through case law to mean that the actions of the employer – either directly or indirectly – results in the termination of the employee's employment. Had the employer not taken such action, the employee would have remained in employment.

Forced Resignation through Employer's Conduct

The FWC will regard an employee as being dismissed where an employer has engaged in conduct which causes the employee to resign. The employer may either expressly ask the employee to resign their employment, or through the employer's conduct leaves the employee feeling that that they have no other choice but to resign. This is commonly referred to as 'constructive dismissal'.

Common examples of constructive dismissal include:

- The employer may demand a resignation by the employee with a threat that if they don't comply they will be dismissed. In some instances an employer and employee may negotiate and agree upon the terms of the resignation. However, despite this the employee's only choice was to resign or be terminated therefore the cessation of the employment relationship was a result of the employer's decision to end the employee's employment. See *Turton v FMC Australasia Pty Ltd* [2011] FWA 8903.
- Converting a full-time employee to casual employment and hence reducing their ordinary hours of work without sound reason for doing so. The employer may be regarded as repudiating the contract of employment and the employee accepts the repudiation by refusing to accept the casual work unless they are reinstated to their previous full-time position. See *Field v Mount Gambier Community RSL* [2011] FWA 5930.
- A change in duties that results in a significant reduction in the employee's remuneration may be regarded as a demotion and therefore a repudiation of the employee's contract of employment. See *Campbell v Mayjay Hotels Pty Ltd t/a Marroubra Junction Hotel* [2012] FWA 163.

Who has not been Dismissed?

However, section 386(2) of the Act provides that an employee has not been dismissed, and therefore not eligible to lodge an Unfair Dismissal, if:

- The employee was employed under a contract of employment for a specific period of time, for a specified task or for the duration of a specified season and the employment was terminated at the end of the period, on the completion of the task, or at the end of the season; or
- The employee was employed under a training arrangement and the employment was terminated at the end of the training arrangements; or
- The employee was demoted in employment but the demotion did not involve a significant reduction in their remuneration or duties and they remained employed with the employer.

2. Harsh, Unjust or Unreasonable

Once the FWC has determined that the employee has been dismissed, consideration will be provided to whether the termination was harsh, unjust or unreasonable. The factors taken into account by the FWC when considering whether a dismissal was harsh, unjust or unreasonable are provided in the Act at section 387 and are listed below:

- Whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- Whether the person was notified of that reason; and
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- If the dismissal related to unsatisfactory performance by the person, whether the person had been warned about that unsatisfactory performance before the dismissal; and
- The degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- The degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- Any other matters that the FWC considers relevant.

3. The Small Business Fair Dismissal Code

Where the employer is a small business employer – as defined on page 1 – the FWC will consider whether the dismissal was consistent with the Small Business Fair Dismissal Code.

The Small Business Fair Dismissal Code is a Code to assist small employers who may not have the adequate resources or systems in place for dealing with termination procedures.

The Code consists of a checklist for small business employers to approach dismissal in a fair and reasonable manner. It is recommended that the checklist is completed at the time of the dismissal and kept on file so as to be able to rely on it in case of a future Unfair Dismissal claim.

Where a Small Business employer can demonstrate an employee's termination was carried out in accordance with the Small Business Fair Dismissal Code, the dismissal is likely (but not guaranteed) to be considered fair and the other factors relating to Unfair Dismissal may not need to be considered.

Reliance on the Fair Dismissal Code when terminating an employee's employment is considered insufficient for larger employers who are more likely to have dedicated HR Departments or be a member of a professional association such as the QHA, and who are expected to have 'best practice' systems in place.

4. Genuine Redundancy

The FWC would not regard an employee as being unfairly dismissed in the instance of a genuine redundancy. In order for a redundancy to be regarded as genuine the following elements must be satisfied:

- The employer no longer requires the employee's job to be performed by anyone because of a change in the operational requirements of the employer's enterprise; and
- The employer has complied with the consultation requirements within the applicable industrial instrument; and
- The employer has considered how the employee can be redeployed within the employer's enterprise or an associated entity of the employer.

In the instance of a genuine redundancy the employee would be exempt from making an Unfair Dismissal claim.

Refer: QHA's Redundancy Fact Sheet

Remedies

Where the FWC makes a decision of Unfair Dismissal, reinstatement is the primary remedy.

Where reinstatement is not possible the FWC may order the payment of compensation to the former employee. The maximum compensation that may be awarded to an employee who has been unfairly dismissed is 26 weeks' pay. It should be noted that the compensation that may be awarded in the instance of an Unfair Dismissal does not include compensation for shock, distress, humiliation or hurt.

ADVERSE ACTION APPLICATIONS

Chapter 3, Part 3-1 of the Act provides General Protections for employees. These General Protections are designed to ensure fairness and representation. This includes:

- A right to freedom of association;
- Protection from workplace discrimination;
- Protection from sham contracting arrangements; and
- The ability to exercise, or to not exercise Workplace Rights.

One of the objects is to protect Workplace Rights and provide relief for persons who have been adversely affected as a result of contraventions of this part of the Act. The General Protections provisions provide a right to apply to the FWC if an employer or employee is the recipient of Adverse Action.

WORKPLACE RIGHTS AND ADVERSE ACTION

A person must not take Adverse Action against another person:

- a) *Because the other person:*
 - i. *has a Workplace Right; or*
 - ii. *has, or has not exercised a Workplace Right; or*
 - iii. *proposes or does not propose to exercise a Workplace Right; or*
- b) *to prevent the exercise of a Workplace Right by the other person.*

In a practical sense, the right to protection from Adverse Action prevents one person acting adversely against another because the second person has, or seeks to assert (or not assert) their Workplace Right.

In addition, a person must not take Adverse Action against another person (the second person) because a third person has exercised or proposes to exercise a Workplace Right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Section 341 of the Act provides that a person has a Workplace Right if the person:

- a) *Is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
- b) *Is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
- c) *Is able to make a complaint or inquiry to a person or body who has the capacity under a workplace law to seek compliance with that law or workplace instrument, or to anyone regarding their own employment.*

Adverse Action Defined

Reproduced below is the table at section 342 of the Act. Adverse Action includes threatening to take action and organising such action as outlined in the table (emphasis added to highlight dismissal related activities).

ADVERSE ACTION IS TAKEN BY:		IF:
1	an employer against an employee	the employer: (a) dismisses the employee ; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the principal) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the principal) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.

6	an independent contractor against a person who has entered into a contract for services with the independent contractor.	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

Remedies

If a person believes they have been dismissed and alleges that their dismissal was in breach of the General Protections provisions of the Act, they can apply to the FWC to deal with the dismissal. Such an application to the FWC is called a *General Protections Application Involving Dismissal*, which must be lodged within 21 days of the dismissal taking effect.

The parties can ask the Commission to arbitrate and therefore finally determine the matter. The Commission can only arbitrate where both parties agree and notify the Commission of their consent.

If the parties do not consent to the Commission arbitrating the dispute, an applicant can choose to progress their matter by making a separate application to the Federal Circuit Court or the Federal Court.

Employers are made aware that there is no cap for compensation when the matter proceeds to a hearing before the Federal Circuit Court.

Refer: QHA's General Protections Fact Sheet

UNLAWFUL TERMINATION

An Unlawful Termination occurs where an employee's employment has been terminated on the basis of one or more of a number of reasons as listed at section 772 of the *Fair Work Act 2009*. An employee who is not a National System Employee may take an Unlawful Termination Claim.

Section 723 of the Act states a person must not make an Unlawful Termination claim in relation to conduct if that person is entitled to make a General Protections court application in relation to that conduct. Therefore, Unlawful Termination claims are open to non-national system employees (as defined) only.

BREACH OF CONTRACT

An employee may pursue common law action for breach of contract where an employment term, which may be an implied or an express term in a contract, is breached by the employer. Implied terms apply to both verbal and written contracts.

DISCRIMINATION

Where an employee feels their employment was terminated for a discriminatory reason, they may seek to make a discrimination claim in line with state and federal anti-discrimination law, or under the General Protections provisions in the Act.

NOTE: an employee will not be able to make an application under the *Fair Work Act 2009* alleging termination based on discrimination if they have already commenced other termination proceedings under another Commonwealth or State law.

Refer: QHA's Unlawful Discrimination Fact Sheet

WRITTEN NOTICE OF THE DAY OF TERMINATION

The National Employment Standards require that, where termination of employment is at the initiative of the employer, the employer must give the employee written notice of the day of termination. Please note that the termination cannot be before the day the notice is given.

The notice may be given to an employee by:

- Delivering it personally; or
- Leaving it at the employee's last known address; or
- Sending it by pre-paid post to the employee's last known address.

Employers will need to keep this written notice requirement in mind, particularly as written notice cannot be given after the termination notice is given.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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