

Unfair Dismissal and Best Practice

The new WorkChoices law dramatically curbs the rights of employees to contest unfair dismissals. It is a major change to the Australian industrial relations system that has enjoyed controversial press coverage since the introduction of the new laws.

The changes to the Workplace Relations Act under WorkChoices that affect unfair dismissal can be summarised as follows:

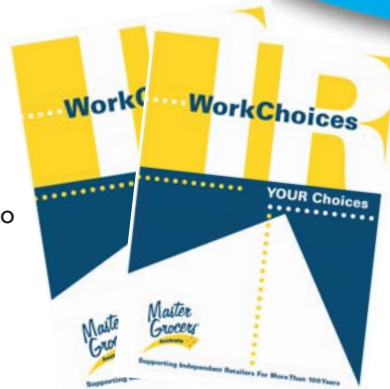
- Businesses that employ 100 or less employees are exempted from unfair dismissal
- Unfair dismissal claims cannot be made during the first six months of employment
- Employees who are made redundant cannot make an unfair dismissal claim

Employers must be careful how they make use of these laws. Provisions pertaining to unlawful dismissal remain part of the Workplace Relations Act and an employee can access other remedies such as discrimination or civil proceedings in a court of law.

Unfair dismissal will normally occur when an employer does not have a valid reason to dismiss an employee or where an employee is denied procedural fairness. The reason for the dismissal is normally related to the conduct or capacity of the employee. Unlawful dismissal arises where an employer dismisses an employee for a prohibited reason. Prohibited reasons include:

- Union membership or participation in union activities
- Refusal to enter into or vary or terminate an AWA
- Temporary absence from work due to illness
- Failure to provide notice or payment in lieu of notice
- Acting or wanting to act as an employee representative
- Race, sex, sexual preference, age, disability, marital status, family responsibility, pregnancy, political beliefs, nationality, social origin or religion
- Absence from work due to pregnancy
- Filing a complaint or participating in proceedings against an employer

Sometimes the lines between unfair and unlawful dismissal can be blurred. It can, for example, be argued that an employer had a valid reason to dismiss an employee but that the employee was entitled to appropriate notice. The federal government has also pledged up to \$4,000 in financial assistance to employees who need assistance to bring an unlawful dismissal claim.



Employees can also attempt to "dress up" an unfair dismissal as a discrimination case. Statistics from the Human Rights and Equal Opportunity Commission during 2004 -2005 indicate that 43 per cent of racial discrimination cases and 73 per cent of age discrimination cases concerned employment.

In the circumstances we recommend that employers follow best practice rules whether they are subject to unfair dismissal laws or not. "Best Practice" involves providing an employee with a reason for dismissal and to keep written records of such reasons. The reason furnished to the employee should be brief, to the point and avoid unnecessary detail. Elementary principles of procedural fairness should also be adhered to, for instance providing the employee with an opportunity to respond to allegations that can lead to dismissal. Dismissal should not surprise an employee. Poor performance for example should be preceded by warnings to improve performance. In following best practice rules an employer will limit the risks of an unlawful dismissal or discrimination claim. It will also assure remaining employees that their employer acts fairly and without caprice. This will contribute to employee morale and motivation.

Leon Blignaut
Industrial Relations Manager
Master Grocers Australia



BPAY Tax Invoice
BANK STATEMENT
REPORT MYOB
JV Accountability for your business
ABN: 24 108 584 498
P: (03) 5629 5196
E: admin@jvretailservices.com.au
JV Retail & Business Services
JV Business and Retail Services is a business designed by business people to assist other small businesses in the practical handling of their bookkeeping needs.
'With JV managing your books, you don't have to employ your own bookkeeper, not to mention train them'
www.jvretailservices.com.au