



## WORKPLACE RELATIONS FACT SHEET

### THE SMALL BUSINESS FAIR DISMISSAL CODE

A dismissal is considered to be 'unfair' if it has been found to be harsh, unjust or unreasonable. Your employees cannot bring an unfair dismissal application to the Fair Work Commission within the first 12 months of their employment.

Small businesses have a different set of standards within which the criteria is applied as they generally do not have access to the same resources as larger organisations. A 'small business' is any company with fewer than 15 employees who are employed on a regular and systematic basis. As a small business, you are protected against unfair dismissal claims if you have followed the Small Business Fair Dismissal Code. Specifically, an employer may dismiss an employee without notice or warning if the employer believes on reasonable grounds that the employee's conduct is sufficiently serious enough to justify an immediate dismissal. This is called a 'summary dismissal' and may include cases of serious breaches of theft, violence, fraud.

### NOTICE OF TERMINATION

When terminating an employee's employment, the employer must provide an employee with notice of the date of termination. Such notice cannot be retrospective and varies depending on the employee's length of service.

Under the *Restaurant Industry Award 2020*, the notice period requirements are set out below:

<b>Column 1</b> <b>Employee's period of continuous service with the employer at the end of the day the notice is given</b>	<b>Column 2</b> <b>Period of notice</b>
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

The period of notice is increased by 1 week if the employee is over 45 years old and has completed a two year period of continuous service at the end of the day the notice is given. There is no requirement for employers to provide casual employees with a notice period.

## **PUBLIC HOLIDAYS**

The days within which public holidays fall under are prescribed under the National Employment Standards and may vary according to each state and territory.

The *Restaurant Industry Award 2020* provides that an employer and employee can agree to substitute a public holiday, in full or part, for another full or part day. As such, that full or part substitute day will be recognised as the public holiday.

## **REDUNDANCY**

Redundancy occurs when an employer decides that the employee's job cannot be done by any other person, and retrenchment is not possible, or if the employer becomes insolvent or bankrupt. It is the job itself, not the employee, that becomes redundant.

Under the *Restaurant Industry Award 2020*, the employer must adhere to strict procedures to ensure that the position is, in fact, a 'genuine redundancy.' The employer must ensure that they have complied with their consultation obligations in order for the redundancy to be a 'genuine redundancy.' This includes providing affected employees with adequate notice, discussing the effects of the change with the employee, and inviting a response from the employee.

## **CASUAL CONVERSION**

At present, the Act does not contain a definition of a 'casual employee.' However, emerging case law characterises a 'regular casual employee' as a worker who 'in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee.' An employer is obliged to consider the employee's request for a conversion, and the employer must not unreasonably refuse the employee's request.

Some reasonable grounds for refusal include:

1. The employer is not a *regular* casual employee;
2. It is reasonably foreseeable that the employee's position will not exist within the next 12 months; and
3. It is expected that the employee's work hours will be significantly reduced within the next 12 months

## **SALARY ANNUALISATION**

An employer may arrange for full employees to enter into an annualised salary arrangement of at least 25% above their annual wage (calculated by their respective minimum wage under the Award multiplied by 52 weeks). Ordinarily, a salary arrangement would include any overtime and penalty rates. The employer has very strict obligations if they enter a salary. It is important that the employer:

1. Retain records of all start and finishing times;
2. Ensure that the record is signed weekly by the employee; and
3. Conduct a reconciliation at the end of each year by comparing the employee's ordinary wage under the award and the actual payments payment. In the event of an underpayment, the employer must pay the difference to the employee as soon as practicable.