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THE BUSINESS NEWSLETTER FROM AUSWILD & CO
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How to Safeguard Your Business Against an Unfair Dismissal Claim

Unfair dismissal remains the most common claim submitted to the Fair Work Commission (FWC) each year. Legally, a dismissal is unfair if an employee is terminated in a manner that is harsh, unjust, or unreasonable, is not a genuine redundancy, or violates the Small Business Fair Dismissal Code (if applicable).

To protect your business from costly legal exposure, relying solely on having a "good reason" for termination is not enough. Employers must implement a fair, transparent, and meticulously documented process.

An employee can only lodge an unfair dismissal claim if they meet specific statutory thresholds:

- **Minimum Employment Period (Large Business):** At least 6 months of service if the employer has 15 or more employees.
- **Minimum Employment Period (Small Business):** At least 1 year of service if the employer has fewer than 15 employees.
- **The 2027 High-Income Threshold:** An employee must earn less than \$190,100 per year (the active cap following the FWC indexation) to be eligible, unless they are covered by a modern award or an enterprise agreement.

So, what makes a dismissal unfair?

The FWC evaluates whether a termination is sound, defensible, and well-founded based on objective facts, rather than an employer's subjective opinion.

Valid Reasons for Dismissal	Unlikely to Constitute a Valid Reason
• Serious misconduct	• General personality clashes
• Repeated, unrectified poor performance	• Workplace gossip or hearsay
• Genuine operational redundancies	• A single, isolated foolish act

Before arriving at a final decision, you must notify the employee of the allegations against them and give them a genuine opportunity to respond.

- **Pre-Meeting Investigation:** Gather objective evidence—such as witness statements, performance logs, or relevant documents—before drafting any formal paperwork.

- **Drafting Specific Allegations:** Avoid vague or broad accusations.
 - *Conduct:* Do not simply write "threatening behaviour." State the exact date, time, action, and words used (e.g., pushing someone in the kitchen).
 - *Performance:* Do not broadly state that "KPIs were missed." Provide exact data and targets (e.g., failing to meet the target of 7 calls per day, backed by a CRM spreadsheet).

The Disciplinary Meeting and Right of Reply

Employees must be allowed to explain themselves in a formal meeting. Employers must genuinely consider this feedback and avoid pre-determining the outcome. Performance dips might be explained by medical or personal issues that require a structured performance plan instead of immediate termination. For ongoing performance issues, employees must be formally put on notice, given a reasonable chance to improve, and explicitly warned in writing that their employment is at risk if they fail to do so.

The Support Person Role

While you are not legally required to proactively offer a support person, you cannot unreasonably refuse an employee's request to have one present.

- **The Support Person's Role:** They are there to provide emotional support. They cannot act as an advocate or speak for the employee. If they step outside this boundary, they can be asked to leave.
- **Union Delegate Exceptions:** Modern awards and enterprise agreements often grant specific, broader representation rights to prescribed union delegates during disciplinary meetings.
- **Scheduling Flexibility:** Employers should allow reasonable, minor delays (such as a few days) to accommodate a support person's availability.

Proactive Strategies to Mitigate Risk

You cannot prevent an employee from lodging a claim, but you can significantly reduce the risk of that claim succeeding by avoiding common management blind spots –

- **Avoiding written communication:** Keeping concerns verbal rather than documented.
- **Neglecting reviews:** Failing to hold regular performance reviews.
- **Delaying difficult conversations:** Allowing unacceptable behaviour to pass without comment. This normalises the conduct, making it incredibly difficult to cite as a valid reason for dismissal later.
- **Blurring boundaries:** Treating employees like friends or family, or failing to treat staff consistently.

The Bottom Line

Many employers have strong structural grounds for dismissal but lose their cases at the FWC simply because they lack the evidence to support their decision. A clear, objective paper trail—built on clear policies, real-time warnings, and solid evidence—is what ultimately protects your business.