

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

In early 2011, the Fair Work Ombudsman (FWO) in conjunction with Clubs Australia commenced a national education campaign on changes to the Registered and Licensed Clubs Award 2010.

The campaign has been funded by the Australian Government through the Fair Work Ombudsman's Shared Industry Assistance Projects (SIAP) Grant Program, which aims to better inform employers (particularly small to medium businesses) about changes to modern awards applicable to their industry sector. Following a competitive selection process, Clubs Australia was one of 15 successful organisations selected to deliver the education campaign in conjunction with the FWO.



Fair Work
OMBUDSMAN



Clubs Australia

The Fair Work Ombudsman is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws.

The information contained in this publication is:

- general in nature and may not deal with all aspects of the law that are relevant to your specific situation; and
- not legal advice.

Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered.

This information was published on 15 April 2011. The Fair Work Ombudsman does not accept legal liability arising from or connected to the accuracy, reliability, currency or completeness of this information.

Contents

Part 1	Annual Leave	3
Part 2	Personal Leave	9
Part 3	Parental Leave	17
Part 4	Unfair Dismissal	27
Part 5	Enterprise Agreements	41
Part 6	Redundancy Guide	49
Part 7	Pay Slip Records	63

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 1: ANNUAL LEAVE

Introduction

This part sets out the rules relating to annual leave provisions under the National Employment Standards (**NES**) contained within the *Fair Work Act 2009* (Cth) (**Act**). This part looks at:

- Background
- Entitlement to annual leave
- Accruing annual leave
- Taking annual leave
- Payment for annual leave
- When leave counts as service
- Cashing out annual leave
- Annual leave payments on termination.

Background

Before 1 January 2010, the annual leave entitlements of Club employees were governed by applicable Awards and the *Annual Holidays Act 1944* (NSW) (**Holidays Act**).

On 27 March 2006, the *Workplace Relations Act 1996* (Cth), as amended by the *Workplace Relations Amendment (**Workchoices**) Act 2005* (Cth), commenced operation and provisions of this Act replaced those of the Holidays Act for Clubs that are constitutional corporations.

On 1 July 2009, the majority of the Act commenced operation. The Act established the NES, which provide for 10 minimum standards that must be granted to employees on and from 1 January 2010. One of these standards is annual leave.

Entitlement to annual leave

For each year of service, employees (other than casual employees) are entitled to four weeks' paid annual leave.

An employee is entitled to an additional one week annual leave if they are deemed a shiftworker. The *Registered and Licensed Clubs Award 2010* (**Award**) defines a shiftworker as:

a seven day shiftworker who is regularly rostered to work on Sundays and public holidays, and includes a Club manager.

Contractors and casual employees are not entitled to paid annual leave.

Accruing annual leave

An employee's annual leave entitlement accrues progressively throughout each year of service according to the employee's ordinary hours of work. Annual leave accumulates from year to year.

Taking annual leave

Under the NES, an employee is entitled to take an amount of annual leave that has been credited to them. Where an employee has been employed for less than one year, they are still entitled to take annual leave so long as at least that period of leave has been credited to them.

An employer must authorise an employee's taking of annual leave. This authorisation must not be unreasonably withheld and may not be unreasonably withdrawn once given.

A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. Clause 30.4 of the Award provides that an employer may require an employee to take annual leave by giving at least four weeks' notice in the following circumstances:

- a) *as part of a close-down of its operations; or*
- b) *where more than eight weeks' leave is accrued.*

Payment for annual leave

An employee is entitled to be paid while on annual leave at their base rate of pay to which they were entitled at the commencement of the annual leave period.

'Base rate of pay' means a rate of pay that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other separately identifiable entitlements.

Certain days not considered part of paid annual leave

An employee on a period of paid annual leave is taken not to be on paid annual leave if a day or part-day that is a public holiday falls within the period of paid annual leave.

If the period during which an employee takes paid annual leave includes a period of any leave other than unpaid parental leave, the employee is taken not to be on paid annual leave for the period of that other absence.

Leave loading

Annual leave loading of 17.5% is payable in accordance with Clause 30.3 of the Award.

When is annual leave payment made?

The NES does not expressly state when annual leave payments are to be made. However, as the NES clearly refers to ‘paid’ leave, in normal circumstances payment should be made before, during or after the leave, in accordance with normal pay cycles. In addition, employers should consult the applicable modern award.

When leave counts as service

For the purposes of calculating entitlements to annual leave, the NES relies on the concept of ‘continuous service’.

Service is a period during which the employee is employed by the employer, but does not include any period that does not count as service (such as a period of unauthorised absence or any period of unpaid leave or unpaid authorised absence other than community service leave, or a period of stand-down under an enterprise agreement that applies to the employee or under the employee’s contract of employment). Note, however, that unpaid leave is not included in the calculation of nominal hours which forms the basis for the annual leave entitlement.

The following table summarises when leave or an absence will count towards an employee’s service.

Type of leave	Breaks continuity of service?	Counts as service?
Annual leave	No – see section 22(2) of the Act	Yes
Paid personal/carer’s leave and paid compassionate leave	No – see section 22(2) of the Act	Yes
Unpaid carer’s leave	No – see section 22(2) of the Act	No – except as expressly provided for by or under a term or condition of the employee’s employment
Parental leave	No – see section 22(2) of the Act	No – except as expressly provided for by or under a term or condition of the employee’s employment

Cashing out annual leave

Under the NES, annual leave may only be cashed out in accordance with the terms included in a modern award, enterprise agreement or by agreement between an employer and an award/agreement free employee.

If an award or agreement that applies to the employee does not include a cashing out provision for annual leave, cashing out of annual leave is not permitted.

The club Award does not allow cashing out of annual leave.

Where an enterprise agreement contains terms relating to cashing out annual leave, the following rules apply:

- Paid annual leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid annual leave being less than four weeks, and
- Each cashing out of a particular amount of paid annual leave must be by a separate arrangement in writing between the employer and the employee, and
- The employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

An employer cannot require an employee to forgo an entitlement to leave and must not unduly influence or pressure an employee to cash out their leave.

Annual leave payments on termination

When an employee resigns or is terminated, no matter what the reason, they are entitled to be paid out for any annual leave they have been credited and have not yet taken. The annual leave is to be paid at a rate that is no less than the employee's base rate of pay applicable to the employee on the date of their termination and is inclusive of the 17.5% annual leave loading.

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 2: PERSONAL LEAVE

Introduction

Personal leave is regulated by the National Employment Standards (**NES**) contained within the *Fair Work Act 2009* (Cth) (**Act**). The NES outlines the minimum requirements of both employers and employees in this area. This part looks at:

- Personal/carer's leave
- Unpaid carer's leave
- Compassionate leave
- Notice and documentation requirements
- Leave and service for entitlements
- Other points of note.

Personal/carer's leave

What is personal/carer's leave and what can it be used for?

Personal/carer's leave may be used for either:

- The personal illness or injury of the employee (sick leave), or
- Caring for a member of an employee's immediate family or household who requires the employee's care and support due to an illness or injury or because they are affected by an unexpected emergency (carer's leave).

The following are members of an employee's immediate family:

- A spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee
- A child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

A spouse includes:

- A former spouse
- A de facto spouse
- A former de facto spouse.

A child includes:

- An adopted child
- A stepchild
- An ex-nuptial child
- An adult child.

A de facto spouse of an employee means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis, whether they are of the same sex or different sexes.

Who is entitled to personal/carer's leave and what is the entitlement?

For each year of service with an employer, an employee is entitled to 10 days' paid personal/carer's leave. An employee's entitlement to personal/carer's leave accrues progressively throughout the course of the year according to the employee's ordinary hours of work.

There is no provision under the NES for paid personal leave for casual employees. However, casual employees are entitled to unpaid carer's leave and/or compassionate leave.

Accrual of personal/carer's leave

Personal/carer's leave is accrued by employees other than casual employees progressively throughout the course of the year depending on an employee's ordinary hours of work. This includes any probationary period.

Using personal/carer's leave

Unless there are circumstances beyond the control of the employee which prevent it, an employee is obliged to give their employer notice of their absence (or impending absence) as soon as reasonably practical (which may be at a time before or after the personal/carer's leave has started) to be entitled to use personal/carer's leave.

Using carer's leave

An employee may also use personal/carer's leave to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:

- A personal illness, or personal injury, affecting the member, or
- An unexpected emergency affecting the member.

The same notice provisions also apply to those employees wishing to take personal leave as carer's leave.

Where an employee has exhausted their paid carer's leave, the employee is entitled to take two days' unpaid carer's leave on each occasion when a member of the employee's immediate family or household requires care.

Payment for personal/carer's leave

When utilising paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay, immediately before the leave commences, for the employee's ordinary hours of work in the period.

Base rate of pay means a rate of pay that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other separately identifiable entitlements.

Cashing out of personal/carer's leave

Paid personal/carer's leave must not be cashed out, except in accordance with cashing out terms included in a modern award or enterprise agreement.

A modern award or enterprise agreement may include terms providing for cashing out of paid personal/carer's leave by an employee.

The terms must require that:

- Paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement to paid personal/carer's leave being less than 15 days, and
- Each cashing out of a particular amount of paid personal/carer's leave must be by a separate agreement in writing between the employer and the employee, and
- The employee must be paid at least the full amount that would have been payable to the employee had the employee taken the leave that the employee has forgone.

The employer must not exert undue influence or undue pressure on an employee to agree to cash out the leave. There are no provisions under the Award which allows cashing out of personal leave. Accordingly, only clubs with enterprise agreements with cashing out of personal leave provisions could consider this.

Unpaid carer's leave

An employee is entitled to two days of unpaid carer's leave for each occasion (a 'permissible occasion') when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

- A personal illness, or personal injury, affecting the member, or
- An unexpected emergency affecting the member.

Taking unpaid carer's leave

An employee may take unpaid carer's leave for a particular permissible occasion if the leave is taken to provide care or support as referred to above.

An employee may take unpaid carer's leave for a particular permissible occasion as:

- A single continuous period of up to two days, or
- Any separate periods to which the employee and his or her employer agree.

An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

All employees, including casuals, are entitled to unpaid carer's leave.

Example:

Grace works at a Club as a casual bar attendant 2-3 days per week. She is scheduled to work an 8-hour shift on Saturday night. Before her shift is due to commence, Grace advises the Club that her mother has fallen and badly injured her hip, and as such she is unable to come into work for her shift or the next day's shift.

Under the NES, Grace is entitled to 2 days' unpaid carer's leave.

Compassionate leave

Entitlement to compassionate leave

An employee is entitled to two days of compassionate leave for each occasion when a member of the employee's immediate family or a member of the employee's household:

- Contracts or develops a personal illness, or
- Sustains a personal injury that poses a serious threat to the member's life, or
- Dies.

Taking compassionate leave

An employee may take compassionate leave for a particular permissible occasion if the leave is taken:

- To spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury, referred to above
- After the death of the member of the employee's immediate family or household.

An employee may take compassionate leave for a particular permissible occasion as:

- A single continuous two-day period, or
- Two separate periods of one day each, or
- Any separate periods to which the employee and his or her employer agree.

If the permissible occasion is the contraction or development of a personal illness, or the sustaining of a personal injury, the employee may take the compassionate leave for that occasion at any time while the illness or injury persists.

Example:

Oliver has had a bad year. In February, his sister died and he requested, and was granted, 2 days' paid compassionate leave by his employer. In September, Oliver's grandmother was seriously injured in a car accident and he sought an additional 5 days' paid compassionate leave.

Under the NES, Oliver is entitled to a single continuous 2-day period, or 2 separate periods of 1 day each. Therefore, the employer is permitted to reject Oliver's request for 5 days compassionate leave, but must grant Oliver 2 days compassionate leave either together or two separate periods of 1 day each.

The employer could grant Oliver 5 days paid compassionate leave at their discretion, but is not obliged to do so under the legislation.

Payment for compassionate leave

An employee, other than a casual employee, who takes a period of compassionate leave is entitled to payment at the employee's base rate of pay for the ordinary hours of work in the period.

Compassionate leave is a separate entitlement to personal leave and does not deduct from an employee's personal leave balance.

Notice and documentation requirements

The following notice and documentation is required to be provided by the employee to the employer as soon as reasonably practicable unless the employee cannot comply due to circumstances beyond the employee's control.

Leave	Notice	Documentation
Personal leave	Notice must be given to the employer that the employee is (or will be) absent because of a personal illness or injury	A medical certificate or, if not reasonably practicable, a statutory declaration*
Carer's leave	Notice must be given that the employee requires (or required) leave to provide care or support to a member of the immediate family or the household because of personal illness, injury or unexpected emergency	A medical certificate or, if not reasonably practicable or not related to illness or injury, a statutory declaration*
Compassionate leave	Notice must be given to the employer that the employee is (or will be) absent on compassionate leave	Evidence reasonably required by the employer that the employee requires compassionate leave

** This documentary evidence is only required if the employer requires the employee to provide it. The employer may wish to specify certain parameters, e.g. if employees are absent for 2 or more days on sick leave, a medical certificate from a registered medical practitioner is required.*

Leave and service for entitlements

The following table summarises when leave or an absence will count towards an employee's service.

Type of leave	Breaks continuity of service?	Counts as service?
Annual leave	No – see section 22(2) of the Act	Yes
Paid personal/carer's leave and paid compassionate leave	No – see section 22(2) of the Act	Yes
Unpaid carer's leave	No – see section 22(2) of the Act	No – except as expressly provided for by or under a term or condition of the employee's employment
Parental leave	No – see section 22(2) of Act	No – except as expressly provided for by or under a term or condition of the employee's employment

Other points of note

An employee is not entitled to be paid personal/carer's leave while they are receiving payments under workers compensation legislation.

An employee on personal leave is taken not to be on personal leave if a public holiday falls on that day.

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 3: PARENTAL LEAVE

Introduction

The National Employment Standards (**NES**) contained within the *Fair Work Act 2009* (Cth) (**Act**) regulate the area of parental leave. The NES outlines the minimum requirements of both employers and employees in this area. This summary looks at:

- Types of leave
- Eligibility for parental leave
- Entitlement to parental leave
- The period of leave
- Notice and evidence requirements
- Requirement to take parental leave
- Extension of parental leave
- Responsibility for care of a child
- Interaction with paid job
- Transfer to a safe job/job safe leave
- Replacement employees
- Workplace restructure and consultation, and
- Termination of employment.

Types of leave

There are two types of parental leave identified by the NES, birth-related leave and adoption-related leave. Previous labels 'maternity leave' and 'paternity leave' are not used in the NES. Each member of an employee couple is entitled to separate periods of 12 months' unpaid leave.

Eligibility for parental leave

Parental leave will apply to a permanent employee who may or may not be a member of an employee couple and who has, or will have, completed at least 12 months of continuous service with the employer at the date, or expected date, of birth or placement of the child.

Parental leave will also apply to a casual employee who has been employed on a regular and systematic basis for a period of at least 12 months and who has a reasonable expectation of ongoing regular and systematic employment.

What is an employee couple?

An employee couple is defined as two national system employees where each employee is the spouse or de facto partner of the other.

An employee's de facto partner means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (whether the employee and the person are of the same sex or different sexes) and also includes an employee's former de facto partner.

Entitlement to parental leave

An employee is entitled to 12 months of unpaid parental leave if:

The leave is associated with:

- The birth of a child of the employee, their spouse or de facto, or
- The placement of a child with the employee for adoption, and
- The employee will have a responsibility for care of the child.

Each member of an employee couple will be entitled to be absent from work on unpaid parental leave for separate periods of up to 12 months.

Birth-related leave

Birth-related leave can be either:

- Unpaid parental leave taken in association with the birth of a child, or
- Unpaid special maternity leave.

A female employee is entitled to unpaid special maternity leave if she is not fit for work because:

- She has a pregnancy-related illness, or
- She has been pregnant, and the pregnancy ends within 28 weeks of the expected date of birth otherwise than by the birth of a living child.

An employee who is taking unpaid special maternity leave must:

- Provide notice to the employer as soon as practicable, and
- Advise the employer of the expected period of leave, and
- If the employer requests, provide evidence the leave was taken because of one of the special maternity leave reasons. This evidence may include a medical certificate.

A female employee's entitlement to 12 months of unpaid parental leave is reduced by the amount of unpaid special maternity leave taken by the employee while she was pregnant.

Adoption-related leave

Adoption-related leave can be either:

- Unpaid parental leave taken in association with the placement of a child for adoption, or
- Unpaid pre-adoption leave.

An employee will be entitled to adoption-related leave if the child that is, or will be, placed with the employee for adoption:

- Will be under 16 as at the day, or expected day, of placement, and
- Will not have lived continuously with the employee for a period of six months or more as at the day, or expected day, of placement
- Is not a child of the employee, their spouse or de facto.

‘Day of placement’, in relation to adoption-related leave, means the earlier of:

- The day the employee first takes custody of the child, or
- The day the employee starts any travel that is reasonably necessary to take custody of the child.

An employee is entitled to take up to two days of unpaid pre-adoption leave for the purpose of attending interviews or examinations required in order for approval to be provided for the adoption of the child.

An employee is not entitled to take unpaid pre-adoption leave if they have another form of leave that could be taken, and the employer directs them to take this leave.

Unpaid pre-adoption leave can be taken in a single continuous period of two days or any separate periods agreed to by the employer and employee.

An employee must provide notice to the employer of unpaid pre-adoption leave as soon as practicable, and must indicate the expected period of leave. Further, if required by the employer, evidence must be provided by the employee of this leave.

Return to work guarantee

An employee returning from parental leave is entitled to be employed in their pre-parental leave position, or, if that position no longer exists, then an available position the employee is qualified for and that is suited nearest in status and pay to the pre-parental leave position.

If the employee on parental leave began working reduced hours (e.g. part time) because of the pregnancy and prior to commencing parental leave, they are entitled to return to the position held immediately before starting to work on reduced hours.

Similarly, an employee who was transferred to a safe job because of the pregnancy before starting the period of parental leave is entitled to return to the position they held immediately before that transfer.

The period of leave

One employee taking parental leave

Generally, the parental leave provisions apply to:

- An employee who is not a member of an employee couple, or
- An employee who is a member of an employee couple, and the other member of the couple does not intend to take unpaid parental leave.

The employee must take the leave in a single continuous period.

Birth-related leave, other than for a pregnant employee, must start on the actual date the child is born. Birth-related leave for a pregnant employee may start at the earliest six weeks before the expected date of birth of the child, but no later than the actual date the child is born.

Adoption-related leave must start on the day of placement of the child.

The period of leave may start at anytime within the 12 months from the birth or placement of the child if:

- The employee has a spouse or de facto partner who is not an employee, and
- That person has a responsibility for the care of the child between the birth or placement of the child and the start date of the leave.

For an employee starting leave, other than from the date of birth or placement of the child, the employee must have completed 12 months' continuous service by the date they start the leave.

Both employees of an employee couple taking parental leave

This section applies to an employee couple where both employees intend to take unpaid parental leave.

The leave must be taken by each employee in a single continuous period.

Birth-related leave for the first employee of an employee couple, other than a pregnant employee, must start on the actual date the child is born. The other employee of the employee couple must then start their leave immediately after the end of the first employee's period of leave. Birth-related leave for a pregnant employee may start at the earliest six weeks before the expected date of birth of the child, but no later than the actual date the child is born.

Adoption-related leave for the first employee of an employee couple must start on the day of placement of the child. The other employee of the employee couple must then start their leave immediately after the end of the first employee's period of leave.

For an employee who starts a period of leave immediately after the end of their partner's period of leave, the employee must have completed 12 months' continuous service by the date they start the leave.

Concurrent leave for an employee couple can occur in compliance with the following:

- It must be for a period of three weeks or less, and
- It must start on the date of birth or placement of the child, except in the instance where the employer agrees for the concurrent leave to start earlier or finish later.

Notice and evidence requirements

The following notice provisions apply to an employee requesting unpaid parental leave. The employee must:

- Provide written notice to the employer at least 10 weeks before starting the leave, or as soon as practicable
- Specify the intended start and end dates of the leave in the written notice
- If the employer requests, provide evidence of the expected date of birth or day of placement of the child (this evidence may include a medical certificate), and
- At least four weeks prior to the intended start date of leave, confirm start and finish dates with the employer, or if any changes have been made to these dates.

Requirement to take parental leave

If a pregnant employee works during the six weeks prior to the expected birth, the employer can request the employee provide a medical certificate. This certificate must state whether the employee is fit to work in her present position and whether it is advisable for her to continue in her current position because of illnesses or risks arising out of the pregnancy, or hazards with the position.

If the medical certificate is not provided within seven days after the request, or if the certificate states that the employee is unfit for work, the employer may direct her to commence unpaid parental leave, provided she is not entitled to be transferred to a safe job, or paid no safe job leave.

Extension of parental leave

Extending leave within the original leave period

An employee may extend the period of unpaid parental leave beyond the originally requested leave period once, by giving their employer four weeks' notice before the end of the original leave period. The notice must indicate the new end date for the leave.

Only by agreement with the employer can the employee be given further extensions, beyond the initial extension, to the period of leave.

The employee is not entitled to extend the period of unpaid parental leave beyond the maximum available parental leave period of 12 months.

Extending leave beyond the original leave period

An employee may request their employer for an extension beyond their 12 month available parental leave period. This extension can be for a maximum period of 12 months immediately following their available parental leave period.

This request must be made in writing and given to the employer at least four weeks before the end of the available parental leave period.

The employer must provide a written response to the employee within 21 days stating whether the request has been granted or rejected. The employer can only refuse the request on reasonable business grounds, and the reasons for refusal must be provided in the written response.

When a member of an employee couple is requesting an extension to a period of unpaid parental leave:

- The request must state the amount of unpaid parental leave and special maternity leave the other member of the employee couple has, or will have, taken before the extension period starts
- The extension period cannot exceed 12 months, less any period of unpaid parental or special maternity leave the other member has, or will have, taken before the extension starts, and
- The amount of unpaid parental leave the other member is entitled to is reduced by the period of the extension.

The employee cannot extend their unpaid parental leave period beyond 24 months after the date of birth or placement of the child.

Example:

Rosa is a pregnant employee entitled to unpaid parental leave. She has taken two weeks of unpaid special maternity leave, on account of a pregnancy-related illness. Rosa intends to take four weeks' paid annual leave from the proposed start date of her period of unpaid parental leave.

Rosa also intends to apply to extend her unpaid parental leave entitlement, so she can care for the child up to the child's second birthday.

Rosa's spouse, Jim, is also entitled to unpaid parental leave, but only intends to take one week of concurrent leave around the time of the child's birth. Rosa and Jim are treated as an employee couple for purposes of this entitlement.

The maximum entitlement of any employee to unpaid parental leave is 12 months. (Rosa and Jim are entitled to a maximum of 12 months' unpaid parental leave each.)

Rosa's entitlement to unpaid parental leave is reduced by the amount of unpaid special maternity leave she has taken (i.e. two weeks).

Rosa may take any period of paid annual leave at the same time she is taking unpaid parental leave.

The maximum extension to a period of unpaid parental leave is 12 months, but this is reduced by the amount of unpaid parental leave and related entitlements that the other member of the employee couple may have taken. Extensions are only available to an employee if the employee takes their available initial parental leave period. (For Rosa, the available parental leave period would be the initial 12-month period of leave less the two weeks of unpaid special maternity leave.)

Rosa meets this requirement and is entitled to request (in writing and subject to certain notice requirements) a further period of leave of up to 12 months less one week (i.e. the amount of unpaid parental leave taken by Jim).

Rosa's employer may only refuse this request in writing on reasonable business grounds.

If Rosa's employer agrees to the extension, Jim's entitlement to unpaid parental leave would be effectively reduced by a corresponding amount. Because Rosa will be extending her period of unpaid parental leave by a further 12 months (less one week's leave taken by Jim), Jim could not take any further unpaid parental leave in relation to this child.

Reducing the period of parental leave

Provided the employer agrees, an employee who has started their unpaid parental leave may have that period reduced.

Responsibility for care of a child

An employer may give an employee written notice to return to work on a specified day if the employee ceases to have responsibility for the care of the child while on unpaid parental leave.

The specified day to return to work must be at least four weeks after the notice was given to the employee. In relation to birth-related leave for a female employee who has given birth, the specified day must not be earlier than six weeks after the child's date of birth.

The employee's entitlement to unpaid parental leave will end immediately before the specified day of their return to work.

Interaction with paid leave

An employee may take other forms of paid leave concurrently with unpaid parental leave, provided that the requirements for taking the other leave are complied with (e.g. annual leave is approved by the employer).

For example, if the employee has paid annual leave available, they may take some or all of that paid annual leave at the same time as the unpaid parental leave.

An employee is not entitled to take paid personal/carer's leave or compassionate leave while taking unpaid parental leave.

Transfer to a safe job/job safe leave

Employers are obligated to assess any requests for transfer to a safe job and the risks in the workplace for pregnant employees.

A pregnant employee who:

- Is entitled to unpaid parental leave, and
- Has already complied with parental leave notice requirements, and
- Gives her employer evidence, such as a medical certificate, that it is inadvisable for her to continue in her current position during a stated period (the risk period) because of illness, or risks arising out of the pregnancy, or hazards connected with the pregnancy,

is entitled to request change to their employment conditions.

For an employee who provides reasonable evidence and requests a change to their employment conditions:

- The employer must, if there is an appropriate safe job available, transfer the employee to this job for the risk period, but no other change to the employee's conditions of employment shall occur, unless mutually agreed between the parties, or
- If there is no appropriate safe job available, the employee will be entitled to take paid no safe job leave (see below) for the risk period. Such leave does not reduce the employee's entitlement to unpaid parental leave.

If the pregnancy ends before the risk period ends, then the risk period ends when the pregnancy ends.

No safe job leave

An employee who takes paid no safe job leave for the risk period must be paid by the employer their base rate of pay for the employee's ordinary hours of work in the risk period.

If an employee is on paid no safe job leave during the six-week period prior to the expected date of birth of the child, the employer can ask for a medical certificate from the employee stating whether the employee is fit to work. The employer may require the employee to take unpaid parental leave:

- If the medical certificate is not provided within seven days, or
- Within seven days after the request, the employee provides a medical certificate stating they are not fit for work.

Replacement employees

An employer may temporarily replace an employee proceeding on parental leave. Before the employer engages an employee to do the work of the employee on parental leave, the employer must tell the primary replacement:

- That the engagement to do work is temporary, and
- Of the rights of the employee on parental leave to reduce or extend the period of their parental leave.

Workplace restructure and consultation

An employee on parental leave should be offered the same opportunities to redundancy or to apply for new positions as any other employee.

If the employer makes a decision that will have an effect on the status, pay or location of the employee's pre-parental leave position, the employer must take all reasonable steps to provide the employee with information and opportunity to discuss the effect of this decision.

Termination of employment

An employer must not terminate an employee because of the following:

- The employee or their spouse is pregnant or they have applied to adopt a child, or
- The employee has applied for, or is absent on, parental leave.

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 4: UNFAIR DISMISSAL

Introduction

The *Fair Work Act 2009* (Cth) (**Act**) aims to establish a framework for dealing with unfair dismissal that balances the needs of business (including small business) with the needs of employees. The Act establishes procedures for dealing with unfair dismissal claims and provides remedies if a dismissal is found to be unfair. The Act's unfair dismissal laws commenced from 1 July 2010.

This part contains information on the new unfair dismissal laws. It looks at:

- Definitions and procedures
- Small Business Fair Dismissal Code
- Fair Work Australia (**FWA**) processes.

Definitions and procedures

What is a dismissal?

Section 386 of the Act defines a person has been dismissed if:

- (a) *the person's employment with his or her employer has been terminated on the employer's initiative; or*
- (b) *the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.*

The first part ('a') is where an employer terminates the employment of the employee, while the second ('b') is more commonly known as 'constructive dismissal'. Constructive dismissal occurs where an employee has been forced to resign from employment because of conduct engaged in by the employer, such as harassment.

Section 386(2) of the Act outlines situations where a person has *not* been dismissed. These include:

- Where the person was employed under a contract of employment which operated for a specified period of time, for a specified task, or for the duration of a specified season, and employment was terminated at the end of the period, task or season
- Where a training arrangement applied to the employee, their employment was for a specified period of time or limited to the duration of the training arrangement and their employment was terminated at the end of the training arrangement, or
- Where the person was demoted without involving a significant reduction in pay or duties and they remained with the same employer.

What is unfair dismissal?

Section 385 of the Act defines that a person has been 'unfairly dismissed' when Fair Work Australia is satisfied that:

- (a) *the person has been dismissed; and*
- (b) *the dismissal was harsh, unjust or unreasonable; and*
- (c) *the dismissal was not consistent with the Small Business Fair Dismissal Code; and*
- (d) *the dismissal was not a case of genuine redundancy.*

What constitutes 'harsh, unjust or unreasonable'?

FWA will examine all the following factors when considering whether a dismissal was harsh, unjust or unreasonable. Section 387 of the Act states:

- (a) *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*
- (b) *whether the person was notified of that reason; and*
- (c) *whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and*
- (d) *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*
- (e) *if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and*
- (f) *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*
- (g) *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*
- (h) *any other matters that FWA considers relevant.*

General protections

There are prohibitions against dismissing someone on discriminatory grounds or for other reasons, such as engaging in industrial activity or being temporarily absent from work because of illness or injury. This is not the same as unfair dismissal and is dealt with under the General Protections part of the Act.

Who can make an unfair dismissal claim?

A person can make an unfair dismissal claim if they have completed the *minimum employment period* and they are covered by a modern award (or award-based transitional instrument), or an enterprise agreement (or agreement-based transitional instrument) applies to the person.

In some situations, high-income earning employees will be excluded from unfair dismissal protections. All employees who are covered by an award (or award-based transitional instrument) or who have an enterprise agreement (or agreement-based transitional instrument) applying to their employment will have access to unfair dismissal remedies.

However, if neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if the sum of their annual rate of earnings and any other amounts calculated in accordance with the regulations is less than the high income threshold (which from 1 July 2010 is \$113,800, indexed annually).

What are the minimum employment periods?

Employees must have served a *minimum employment period* before they can make an unfair dismissal claim. The minimum employment periods are:

- One year for employees of a small businesses (from 1 July 2009 until 31 December 2010 a small business employer is a business with less than 15 full-time equivalent employees; from 1 January 2011 the method of has changed to less than 15 employees based on a head count of total employees rather than full-time equivalent employees), or
- Six months if the employer is not a small business.

How is a period of employment defined?

An employee's period of employment is based on the employee's *continuous service* with the employer.

Service as a *casual* employee can count towards the period of employment as long as it was on a regular and systematic basis and the employee had a reasonable expectation of continuing work on a regular and systematic basis.

Section 22 of the Act notes that any unauthorised absences and most periods of unpaid leave do not count as service; however, these do not break an employee's continuity of service.

What happens to the period of employment when the business is transferred to a new owner?

In a transfer of business, a new employer can choose not to recognise the employee's service under the old employer for the purposes of unfair dismissal provisions. However, they must inform the employee in writing before the new employment starts.

This does not apply if the transfer of business was between associated entities. In this circumstance, service with the first employer will always count towards service with the second employer for the purposes of unfair dismissal provisions. It should be noted that transfer of business is a complex area and each case depends on its own facts and circumstances and accordingly, it is recommended the Clubs seek professional advice.

Small Business Fair Dismissal Code

The Small Business Fair Dismissal Code (**Code**) is *not a compulsory requirement*. However, if a person's dismissal is consistent with the Code, then the dismissal will be considered fair. Whether a dismissal is consistent with the Code will be considered by FWA if an unfair dismissal claim is lodged against the employer (only relevant where the employer is a small business employer).

What is considered a small business?

The number of employees used to define a small business is based on a headcount of employees, regardless of whether they are full-time equivalent employees, at the time of the dismissal or notice of dismissal, whichever is earlier.

How does the Small Business Fair Dismissal Code work?

The Code describes the steps for a small business employer to follow when dismissing an employee. If the employee's dismissal is consistent with the Code, then the dismissal will may be considered fair by FWA.

If a small business employer has not conformed to the Code, the unfair dismissal claim will be treated as any other unfair dismissal claim and may be found to be fair or unfair, depending on the circumstances.

The Code allows for a dismissal without notice or warning in cases of *serious misconduct* such as theft, fraud or violence.

For *underperformance*, the Code requires that the employee be given a valid reason why they are at risk of being dismissed and a reasonable opportunity to rectify the problem.

Voluntary checklist

A checklist to assist small business employers comply with the Code has been developed to complete at the time of dismissal and to keep in case an unfair dismissal claim is made. However, it is *not* a requirement for compliance with the Code that the checklist be completed.

(Annexure A: Small Business Fair Dismissal Code and Checklist)

Fair Work Australia processes**How do employees make an application for unfair dismissal?**

A person who believes they have been unfairly dismissed can make an application to FWA.

What are the lodgement timeframes?

An application must be made within 14 days of the dismissal taking effect. However, FWA has the discretion to extend the timeframe for making an unfair dismissal application if there are exceptional circumstances. Section 394 of the Act sets out these circumstances:

- (a) the reason for the delay; and
- (b) whether the person first became aware of the dismissal after it had taken effect; and
- (c) any action taken by the person to dispute the dismissal; and
- (d) prejudice to the employer (including prejudice caused by the delay); and

- (e) *the merits of the application; and*
- (f) *fairness as between the person and other persons in a similar position.*

What is the procedure for dealing with an unfair dismissal application?

When FWA receives an application for unfair dismissal they will first check the application to see if it's complete. FWA will then notify the employer.

Usually a conciliation is then arranged to help both sides to resolve the matter by agreement.

If a resolution can't be reached, a conference or hearing will be held.

If FWA finds that the dismissal was unfair the employer can be ordered to either:

- reinstate the employee or
- compensate the employee for up to 26 weeks pay (up to a maximum amount of \$56,900).

Annexure A: Small Business Fair Dismissal Code and Checklist

Small Business Fair Dismissal Code

Commencement

The Small Business Fair Dismissal Code came into operation on 1 July 2009.

Application

The Fair Dismissal Code applies to small business employers with fewer than 15 employees (calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis). Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.

Employees who have been dismissed because of a business downturn or their position is no longer needed cannot bring a claim for unfair dismissal. However, the redundancy needs to be genuine. Re-filling the position with a new employee is not a genuine redundancy. The requirements for determining whether a dismissal was a genuine redundancy are contained in section 389 of the Act. The Small Business Fair Dismissal Code Checklist attached to this document can assist in determining whether a redundancy is a genuine redundancy.

Further information on the application of the Code, genuine redundancy and unfair dismissal is available at www.fairwork.gov.au or by contacting the Fair Work Infoline on 13 13 94.

The Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Small Business Fair Dismissal Code Checklist

The Checklist is a tool to help small business employers comply with the Small Business Fair Dismissal Code. Completing the Checklist does not mean that the Code has been complied with, nor is it a requirement of the Code that the Checklist be completed. However, completing the Checklist will help small business employers assess and record their reasons for dismissing an employee. It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim.

Employers should read the Code before completing the Checklist, ensuring they understand their procedural obligations under the Code. Meeting these obligations is an important factor in complying with the Code.

1. How many employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

- ☐ Under 15 employees
- ☐ 15 employees or more

[If under 15 employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?

- ☐ Yes
- ☐ No

[If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because you didn't require the person's job to be done by anyone because of changes in the operational requirements of the business?

- ☐ Yes
- ☐ No

If Yes	YES	NO
a. Did you comply with any requirements to consult about the redundancy in the modern award, enterprise agreement or other industrial instrument that applied to the employment?	<input type="checkbox"/>	<input type="checkbox"/>
b. Did you consider if the employee could have been redeployed in your business or the business of an associated entity?	<input type="checkbox"/>	<input type="checkbox"/>
4. Do any of the following statements apply?		
I dismissed the employee because I believed on reasonable grounds that:	YES	NO
a. The employee was stealing money or goods from the business.	<input type="checkbox"/>	<input type="checkbox"/>
b. The employee defrauded the business.	<input type="checkbox"/>	<input type="checkbox"/>
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.	<input type="checkbox"/>	<input type="checkbox"/>

- d. The employee committed a serious breach of occupational health and safety procedures.

☐☐

5. Did you dismiss the employee for some other form of serious misconduct?

☐ Yes

☐ No

If Yes, what was the reason?

If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. In any discussion with the employee where dismissal was possible, did the employee request to have a support person present, who was not a lawyer acting in a professional capacity?

☐ Yes

☐ No

7. If Yes, did you agree to that request?

☐ Yes

☐ No

8. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

☐ Yes

☐ No

If Yes	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	<input type="checkbox"/>	<input type="checkbox"/>
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?	<input type="checkbox"/>	<input type="checkbox"/>
c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	<input type="checkbox"/>	<input type="checkbox"/>
d. Did the employee subsequently improve his or her performance or conduct?	<input type="checkbox"/>	<input type="checkbox"/>
e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?	<input type="checkbox"/>	<input type="checkbox"/>
f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.	<input type="checkbox"/>	<input type="checkbox"/>
9. Did you dismiss the employee for some other reason?		

☐ Yes

☐ No

If Yes, what was the reason?

10. Did the employee voluntarily resign or abandon his or her employment?

☐ Yes

☐ No

If Yes, please provide details

Declaration

I declare that I believe every statement or response in this checklist to be true.

Signature

Date

Updated 1 January 2011

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 5: ENTERPRISE AGREEMENTS

Introduction

Enterprise Agreements (**EAs**) are made collectively between employees and employers about the terms and conditions of employment at the workplace level. Historically they have been known as ‘collective agreements’ and have represented the Government’s desire to place collective bargaining at the heart of workplace relations.

Under the *Fair Work Act 2009* (Cth) (**Act**), as of 1 January 2010 businesses will no longer be able to make individual workplace agreements with their employees. EAs will therefore become an increasingly important tool in negotiations about suitable terms and conditions of employment over and above those provided by awards.

This part looks at:

- Enterprise Agreement basics
- Bargaining
- The approval process
- Variation and termination of Enterprise Agreements
- Interaction between Enterprise Agreements and the NES
- Enterprise Agreement process checklist.

Enterprise Agreement basics

Who can make an EA?

An EA can be made between one or more employers and:

- Employees, and
- In the case of greenfields agreements, one or more relevant employee organisation(s).

Types of EAs

Single EAs are made between an employer, or two or more employers that are single-interest employers (e.g. amalgamated Clubs), and:

- Existing employees to be covered by the EA, or
- One or more relevant unions if the EA is in relation to a genuine new business or organisation that does not have any employees already in its employ (**greenfields agreement**).

Multi-EAs are made between two or more employers that are not all single-interest employers and:

- Existing employees to be covered by the EA, or
- One or more relevant unions if the EA is a greenfields agreement.

What can an EA include?

EAs may include anything that is deemed to be a 'permitted matter'. Permitted matters are:

- Matters pertaining to the relationship between an employer to be covered by the EA and its employees
- Matters pertaining to the relationship between the employer(s) and the employee organisation(s) to be covered by the EA
- Deductions from wages authorised by an employee to be covered by the EA, or
- How the agreement will operate.

Examples of permitted matters include:

- Rates of pay
- Employment conditions such as hours of work, meal breaks or overtime
- Consultative mechanisms
- Dispute resolution procedures, including terms that allow for union involvement in the process
- Deductions from wages for any purpose authorised by the employee, such as salary sacrifice or superannuation payments
- Terms relating to union training leave or providing for employees to have paid time off to attend union meetings.

What cannot be included within an EA?

An EA cannot include matters that are deemed to be unlawful. Unlawful matters include:

- A discriminatory term, based on an employee's race, colour, sex, sexual preference, age, disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin, except in circumstances permitted by law (e.g. if the discrimination relates to the inherent requirements of the job)
- An objectionable term that requires or permits a contravention of general protections of the Act, such as workplace rights or freedom of association
- A term that provides an employee coverage of unfair dismissal provisions, prior to completing the required qualifying period
- A term that modifies the application of unfair dismissal provisions to the detriment of an employee
- A term that provides for protected industrial action that is inconsistent with the Act
- Terms that contravene right of entry provisions under the Act.

Fair Work Australia (**FWA**) will review EAs for any unlawful or non-permitted matters. If FWA believes that any matters contained within the EA constitute unlawful content it must not approve the EA.

Bargaining

When does bargaining begin?

Bargaining for a proposed EA begins at the notification time. This is the time when the employer agrees to initiate or initiates bargaining, when a majority support determination starts operating or when a scope order comes into operation.

Bargaining representatives and representation rights

Each employee and the employer has the right to appoint a person or organisation of their choice to act on their behalf as a bargaining agent. The following can be appointed as bargaining representatives:

- An employer that would be covered by the EA
- A union for an employee who would be covered by the EA (unless the employee nominates another bargaining representative or specifically revokes representation by the union)
- A union that has applied for a low paid authorisation that relates to the EA
- Any person specified in writing as the bargaining representative by either an employer or employee who would be covered by the EA.

Notice of Employee Representational Rights

As soon as possible, and no later than 14 days, after the notification time, the employer is required to take all reasonable steps to notify all employees of their right to be represented by a bargaining representative.

Reasonable steps might include, but are not limited to, giving the notice to an employee personally, sending the notice by post, fax or email, or posting a notice on the staff notice board that is accessed by employees who would be covered by the EA. The notice is required to explain that:

- Each employee may appoint a bargaining agent to represent them through the EA process
- A union of which an employee is a member becomes a default bargaining representative unless the employee appoints another bargaining representative
- If an employee appoints a bargaining representative, a copy of the letter of appointment must be given to the employer.

Good faith bargaining

Each of the bargaining representatives is required to bargain in good faith. The requirements for bargaining in good faith are:

- Attending, and participating in, meetings at reasonable times
- Disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner

- Responding to proposals made by other bargaining representatives for the agreement in a timely manner
- Giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining, and
- Recognising and bargaining with the other bargaining representatives for the EA.

However, good faith bargaining does not require a bargaining representative to make concessions during bargaining or reach agreement on the terms that are to be included in the EA.

Bargaining orders

Any of the bargaining representatives may apply to FWA for a bargaining order in regard to a proposed EA. An application may be made to FWA only if the representative:

- Has concerns that good faith bargaining requirements are not being met, or concerns that the process is not proceeding efficiently or fairly because there are multiple bargaining representatives
- Has given a written notice setting out their concerns to the other bargaining party or parties, or
- Has given the other party or parties reasonable time to respond, and considers that they have not responded appropriately to the representative's concerns.

Bargaining disputes

In the event of a dispute between bargaining representatives that cannot be resolved between the parties, an application may be made for FWA to provide assistance. FWA has several options in trying to bring the parties to agreement. It may refer them through to mediation or conciliation, where an unbiased observer assists the parties in their discussions or it may make a recommendation or express an opinion of how the parties should resolve the dispute.

However, FWA is not automatically authorised to arbitrate the dispute and may only do so if invited by all the bargaining representatives.

Any findings as a result of arbitration are binding on the parties.

The approval process

Pre-approval steps to be taken by employers

At least seven days prior to requesting employees to vote on an EA, the employer is required to take all reasonable steps to ensure all employees who are to be covered by the proposed EA have been given a copy of, or access to, the proposed EA, as well as any supporting documentation referenced within the EA.

The employer is also required to ensure that employees are given an explanation of the terms of the EA, and the effect of those terms, in an appropriate manner. For example, a Club with a diverse ethnic workforce would be required to make arrangements for explaining the EA in the native language of employees whose English skills are inadequate.

The voting process

At least seven days prior to the vote, the employer is required to notify the employees who are to be covered by the proposed EA of:

- The time and place at which the vote will occur, and
- The voting method that will be used. The employer may request employees to undertake a specific method of voting, such as a secret ballot or an electronic method.

An employer must not request employees to vote on an EA until at least 21 days after issuing the last notice of employee representational rights.

The vote is successful if it is passed by a majority of the employees who participate in the voting process and cast a valid vote.

Applying for approval

Before FWA will approve an agreement it must ensure it meets certain requirements and tests.

Requirements include:

- it's genuinely agreed to by the employees covered by it (for non-greenfields agreements)
- if a multi-enterprise agreement, each employer has genuinely agreed to it
- it passes the better off overall test from 1 January 2010 (for agreements made before 1 January 2010 it had to pass the no disadvantage test as it applied to enterprise agreements)
- it covers a group of employees that was fairly chosen
- it doesn't contain unlawful designated outworker terms
- it includes a dispute settlement procedure
- it includes a nominal expiry date of 4 years or less.

Variation and termination of Enterprise Agreements

The process to vary an EA is very similar to the process used to create one. The parties to an EA may jointly apply to vary the EA (**variation**).

Interaction between Enterprise Agreements and the NES

It is not permissible for a provision contained within an EA to exclude the NES, or any part of it. This means that an EA must not contain a clause which extends a lesser entitlement to employees than the NES. For example, an EA must not contain a clause which stipulates that employees are entitled to three weeks' paid annual leave per year, as this falls below the minimum standard of four weeks' (or five weeks for shiftworkers) paid annual leave per year.

However, certain provisions within the Act allow for an EA to cover various provisions that would otherwise be contrary to the NES. For example, the NES prohibits the cashing out of annual leave, unless the provision is contained within a modern award or EA. Therefore, an EA may allow employees to cash out a proportion of annual leave, whereas it would be prohibited otherwise.

Enterprise Agreement process checklist

1. Within 14 days of the Club agreeing to bargain, the employees must be notified of their right to be represented.
2. Each employee should give the Club written notification of their choice of bargaining representative.
3. At least seven days prior to a vote being held on the EA, the employees must be given a copy of the EA and any documentation referred to in the EA, and the Club must ensure the EA and its effect on employment conditions are fully understood by each employee.
4. Employees must endorse the EA by voting on it. The vote cannot occur until at least 21 days after the employees were informed of their representational rights.
5. The Club must notify employees of the time and place at which the vote will take place and the voting method that will be used.
6. The vote is successful if a majority of employees who cast a valid vote approve the EA.
7. If the EA is approved, it must be signed by both an employee and employer representative.
8. The signed EA and supporting documentation needs to be lodged within 14 days with FWA.

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 6: REDUNDANCY GUIDE

Introduction

The *Fair Work Act 2009* (Cth) (**Act**) has introduced new restrictions and requirements regarding redundancy.

The new legislation requires employers to undertake consultation and investigation of options. Failure to comply with these provisions will be capable of challenge through the unfair dismissal or unlawful dismissal provisions of the Act.

When is a redundancy genuine?

An important consideration is whether a redundancy is 'genuine' or not.

Genuine redundancy is where an employee's job is no longer required to be performed by anyone because of changes in the operational requirements of the business. Examples of changes in the operational requirements of an enterprise may include the following:

- A machine is now available to do the job performed by the employee.
- The employer's business is experiencing a downturn; for example, the employer only needs three people to do a particular task or duty instead of five.
- The employer is restructuring its business to improve efficiency and the tasks done by a particular employee are distributed between several other employees and therefore the person's job no longer exists.

The definition centres around the job becoming redundant, not the employee. There is no personal act or default by the employee which causes it. Termination is, therefore, not always the consequence.

It is *not* a case of genuine redundancy if the person dismissed could have been redeployed in another position in the business or an 'associated entity' and it would have been reasonable in all the circumstances to redeploy them (section 389 of the Act).

In any selection process for determining which employees are to be made redundant, the employer must ensure that the process is in accordance with any provision of any applicable modern award, enterprise agreement or transitional instrument and is not discriminatory.

A court may find that a redundancy is not valid if, for example, another person is to be engaged to perform the role of the employee who has been terminated on the grounds of redundancy.

Note that the provisions concerning genuine redundancy do not cover the process for selecting individual employees for redundancy. If the reason a person is selected for redundancy is unlawful under the General Protections in Part 3-1 of the Act (e.g. on the basis of race, sex or religion, among others) then the person may be able to bring an action for an alleged contravention of the General Protections.

Redundancy provisions

The redundancy provisions are contained in the Registered and Licensed Clubs Award (**Award**) and the National Employment Standards (**NES**). Note that the Award provisions currently mirror the NES. The Act also provides a legislative meaning of redundancy.

Redundancy provisions are contained in clause 14 of the Award and operate subject to the transitional provisions contained at clause 14.5. The transitional provisions apply where an employee was previously covered by a NAPSA or Div.2B state award that provided a redundancy entitlement in excess of that provided in the NES.

Essentially the redundancy provisions provide for a sliding scale of weeks of severance payments and notice periods depending on the length of service of each employee.

Redundancy payments do not apply to:

- An employee employed for a specified period of time, for a specified task, or for the duration of a specified season
- An employee whose employment is terminated because of serious misconduct
- A casual employee
- An employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement.

Small business exemption

All of the aforementioned provisions provide an exemption for employers with fewer than 15 employees. However, if consultation is found to be lacking in the process of a small business making redundancies, it may well be found, if challenged, that those redundancies may be considered to be unfair dismissals, regardless of the 'fewer than 15 employee' exemption.

There is a potential exception to this under Clause 14.5 of the Award which preserves more generous NAPSA entitlements that may impact on the small business exemption. A specific example is the SA Hotels Clubs Etc Award which will continue to have affect until 31 Dec 2014.

Consultation

Consultation remains the key to the redundancy process. The specific consultation process prescribed in the NAPSA and the Awards should be complied with.

Employees and their union representatives should be given every opportunity to address the employer on how to find alternatives and to mitigate the impact of any redundancy. Issues raised in the consultation process may include timing of the process, method of implementation, outplacement and job-seeking assistance, referrals to other employers, retraining assistance and financial planning. Any such suggestions should be explored, evaluated and considered by the employer.

Importantly, the Act now requires that employers consider the redeployment of employees who are facing redundancy. Section 389(2) of the Act states:

A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer.

It is therefore a legislative requirement for employers to look genuinely at the redeployment of employees before making them redundant.

This does not mean that the employer is obligated to redeploy or indeed accept the suggestions of the employees or their union; however, the employer should examine every option and be prepared to defend their decision if challenged by way of a dispute or an unfair dismissal case in a tribunal.

A guide to the redundancy process

The following step-by-step redundancy guide is designed to help Clubs through the redundancy process.

STEP-BY-STEP GUIDE TO IMPLEMENTING REDUNDANCIES

About this guide

- | | |
|-------------------|--|
| Step 1 | Identify whether redundancies are genuine |
| Step 2 | Identify all employees who will be affected by the redundancies |
| Step 3 | Notify each affected employee of the Club's provisional decision |
| Step 4 | Identify any possible alternatives to retrenchment for each employee |
| Step 5 | Determine redundancy benefits for employees |
| Step 6 | Conduct termination interviews with affected employees and union |
| Step 7 | Notify Centrelink |
| Annexure A | Notification letter to union |
| Annexure B | Letter to class of affected employees |
| Annexure C | Notification letter to employees being made redundant |

About this guide

This guide is not designed to create a strict set of rules or obligations on Clubs when implementing redundancies. Rather, it is devised in order to provide Club management with information and guidance on preferred procedures for implementing redundancies. Applying an appropriate redundancy selection process will minimise the likelihood of affected employees successfully challenging the termination of their employment.

The core of this guide is a suggested step-by-step procedure which managers should find useful when implementing redundancies within their Club. If the suggested procedure is followed it will reduce the chances of successful claims being made against the Club.

The procedure should be followed in all instances where employees who are eligible to bring unfair dismissal claims may be made redundant. It can also be used where the redundancies of other groups of employees are being considered, as it sets out procedures which seek to achieve best practice in circumstances of this kind.

We have assumed that the guide is only to be used in respect of employees that work for a Club.

Additional issues

When implementing redundancies, Clubs will have to address a number of other issues which this guide does not address in detail. These include determining:

- The correct period of notice of termination to give to employees
- Whether to make a payment in lieu of notice
- Whether the employee is entitled to any statutory entitlements on the termination of their services (e.g. consider annual leave and long service entitlements), and
- The correct amount of redundancy (or severance) pay for each employee.

General tips

It is vital that notes be kept at all stages during the redundancy process including notes of meetings with employees/union representative(s) and notes of internal meetings to discuss, for example, alternative positions which might be available for employees. These notes will be useful if an employee challenges the termination of their employment.

Step 1: Identify whether redundancies are genuine

Assess whether redundancy is genuine as per Section 389(1) of the Act:

A person's dismissal was a case of genuine redundancy if:

- (a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and*
- (b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.*

Step 2: Identify all employees within the class of employees who will be affected by the redundancies

Assess the numbers and identities of employees who are within the class of employees who occupy positions which will, as a consequence of the restructure, be affected.

(Annexure A: Notification letter to union and Annexure B: Letter to class of affected employees).

For example, if there are currently 10 bar attendants and the Club has determined that only eight will be needed following the restructure, then all 10 will be identified as part of the class of employees that will be affected by the impending redundancies.

Also consider:

If there are a number of job functions which are largely similar, and one position is to be made redundant, then the incumbents in all of the similar positions should be identified as part of the class and considered for redundancy.

Step 3: Notify each affected employee (and the union) of the Club's provisional decision to make them redundant

The Club should notify each affected employee in writing of its provisional decision to make them redundant. This letter should outline the redundancy selection criteria that were considered, and should ask the employee (and a union representative if the employee wishes) to attend a meeting with the Club to discuss the decision. The letter should also state that the employee will have access to an appeal process to higher management of the Club should the employee wish to contest the decision.

(Annexure C: Notification letter to employees being made redundant).

Ideally, an appeal process should be run independently of the original assessors. Any appeal to higher management should be made in writing by the employee, perhaps by way of a standardised appeal form. This form would ask the employee to identify any selection criteria for

which they believe they were scored or appraised unfairly, to record the score(s) they believe they should have been awarded or the reason why they believe they were unfairly appraised against that criteria, and to record any details of their conduct at work which would support their complaint.

Once higher management have reviewed the appeal form, a written reply should be forwarded to the employee. The reply should indicate that a review has been conducted and the result of that review. The reply should also contain a brief explanation of the reasons for the appeal decision.

Step 4: Identify any possible alternatives to retrenchment for each employee the Club proposes to make redundant

Identify in the section in which the employees are engaged to work and in the Club as a whole, whether there are alternative positions which employees whose positions are redundant may be able to fill.

Also consider:

This includes assessing opportunities for job-share arrangements and whether, with retraining, employees who might otherwise be redundant might be redeployed.

The Club must consider only viable and reasonable alternatives to redundancy; it need not consider alternatives which may result in it incurring extra expense (and in the process possibly defeating the object of the restructuring exercise).

Step 5: Determine redundancy benefits for employees

Before implementing the redundancies, the Club must be organised and have done the necessary administrative work.

The Club needs to calculate the amount of money to pay each employee who is to be made redundant. To do this the Club needs to consider:

- The relevant period of notice the employee is entitled to (minimum entitlement is set out in clause 13 of the Award, which refers to the NES and is dependent on the employee's period of continuous service with the Club)
- Whether the Club will offer the employee payment in lieu of notice
- The relevant severance pay the employee is entitled to receive (the minimum entitlement is set out in clause 14 of the Award and is dependent on the employee's period of continuous service with the Club), and
- The employee's statutory entitlements to long service leave and annual leave.

Also consider:

Redundancy provisions contained in clause 14 of the Award operate subject to the transitional provisions contained at clause 14.5. The transitional provisions apply where an employee was previously covered by a NAPSA or Div.2B state award that provided a redundancy entitlement in excess of that provided in the NES.

Severance pay is only applicable for Clubs that have 15 or more employees immediately before the termination of employment of employees in accordance with the redundancy process.

The Club may consider giving employees benefits which are in excess of the amounts they are entitled to under the Award. The Club may make the additional benefits conditional on the employee executing an appropriate release agreement in favour of the Club. This approach should be discussed with your registered club association.

Step 6: Conduct termination interviews with affected employees and union

The Club should conduct a termination interview with the employee and union representative if requested. During the meeting the Club should:

- Advise the employee that after considering their input the Club has determined that there are no viable alternatives to retrenching them
- Advise that this means that the Club has no choice other than to terminate the employee's employment
- Advise that the employee is entitled to certain redundancy benefits (if applicable) in accordance with the Award (outline details of these benefits)
- Advise that the employee will be paid out any annual leave and long service leave entitlements in accordance with relevant legislation
- If the Club has offered the employee additional benefits beyond those they are entitled to receive under the relevant Award in exchange for the provision of a release agreement, give the employee a copy of the release to take away from the meeting and give them reasonable time to consider and obtain advice on the release, and
- State that the above information has been outlined in a termination letter, and hand a copy of the letter to the employee. Confirm that the original termination letter will be sent to them by post.

Also consider:

The Club should have two representatives present at this meeting. One person should run the meeting and the other should observe and take a file note.

Working through a notice period, as opposed to being paid out in lieu, is a step that may minimise the impact of termination on the employee. They may find it easier to find another job while still employed by the Club.

Step 7: Notify Centrelink

The Club must give written notification to Centrelink of the decision to terminate employees. The following information should be included:

- The reasons for the proposed terminations (i.e. redundancy)
- The number and categories of employees likely to be affected, and
- The period over which the Club intends to carry out the terminations.

Also consider:

This step needs to be taken only in circumstances where 15 or more employees are in the employ of the Club immediately before the redundancies are implemented.

The notice must be sent to Centrelink as soon as possible after the Club has decided to make employees redundant, but before implementing the redundancy in its entirety.

Annexure A: Notification letter to union

SAMPLE ONLY

[Insert Club letterhead]

[Insert date]

[Insert name of union]

[Insert address]

Dear [insert title & surname]

On behalf of the board of directors and senior management of [insert name of Club], I would like to take this opportunity to inform you of the intent to commence a restructuring exercise. After considerable review, it has become necessary to commence an organisational restructure which will inevitably affect certain employees, including the possibility of redundancies.

The objective of the restructuring exercise is ultimately to:

Decrease wages expenditure

Improve operational efficiency

Appropriately resource certain divisions/departments, and, most importantly

Ensure the financial strength of the Club for the longer term.

The purpose of this letter is to notify you of the intent of the Club to commence what, in the interests of all stakeholders, will be an extremely arduous task that will undoubtedly benefit all those concerned by ensuring the Club's long-term survival. The board of directors and senior management will shortly forward you an official invitation to attend a meeting, to be held prior to the staff meeting, which will highlight the proposals to be notified to affected employees at a staff meeting to be scheduled very shortly.

We thank you for your cooperation in advance for what we envisage will be a difficult time for all.

Yours faithfully,

[Insert name]

[Insert title]

Annexure B: Letter to class of affected employees

SAMPLE ONLY

[Insert Club letterhead]

[Insert date]

[Insert name of employee]

[Insert address details]

Dear [insert title & surname]

On behalf of the board of directors and senior management of [insert name of Club], I would like to take this opportunity to inform you of the intent to commence a restructuring exercise. After considerable review, it has become necessary to commence an organisational restructure which will inevitably affect certain employees, including the possibility of redundancies.

The objective of the restructuring exercise is ultimately to:

Decrease wages expenditure

Improve operational efficiency

Appropriately resource certain divisions/departments, and, most importantly

Ensure the financial strength of the Club for the longer term.

The purpose of this letter is to notify you of the intent of the Club to commence what, in the interests of all stakeholders, will be an extremely arduous task that will undoubtedly benefit all concerned by ensuring the Club's long-term survival. The board of directors and senior management will shortly forward you an official invitation to attend a meeting, at which you may elect to have a union or representative of your choice in attendance. The staff meeting will highlight the proposals that will be introduced over time and how those proposals will impact on certain members of staff.

We thank you for your cooperation in advance of what we envisage will be a difficult time for all.

Yours faithfully,

[Insert name]

[Insert title]

Annexure C: Notification letter to employees being made redundant

SAMPLE ONLY

[Insert Club letterhead]

[Insert date]

[Insert name of employee]

[Insert address details]

Dear [insert name],

On behalf of the board of directors and senior management, it is with regret that I inform you that your position of employment has been made provisionally redundant.

The board of directors and senior management have assessed and evaluated the viability of the proposals that were put forward in the staff meeting held on [insert date] in the accompaniment of [insert names and/or titles]. However, the proposals have been determined as non-viable, with minimal benefit and/or gain to be achieved by the Club for the longer term.

The Club, in the interests of procedural fairness, has prepared a Redundancy Appeal Form that you may complete and return to senior management. The objective of this form is to lodge a final appeal on the decision made to make your position of employment redundant. This will give the board and senior management the opportunity to administer a final assessment regarding the provisional decision to make you redundant.

It is highly recommended that you complete this form and return it to [insert name] no later than [insert name]. Late forms will not be accepted unless a valid reason is provided. The Club thanks you for your continued cooperation during this important process.

Yours faithfully,

[Insert name]

[Insert title of employment]

Cc: [Insert name of union/representative]

[Insert name of representative from Club]

ClubsAustralia Workplace Relations Handbook

ACTS AND SUMMARIES

PART 7: PAY SLIP RECORDS

Introduction

Clubs must comply with the new recording keeping and pay slip requirements under the *Fair Work Act 2009* (Cth) (**Act**) and the *Fair Work Regulations 2009* (Cth) (**Regulations**). This summary of pay slips and recording keeping looks at:

- Who is covered?
- What are the requirements?
- Pay slips
- Contents of records (pay, overtime, averaging of hours, leave, superannuation)
- Individual flexibility arrangements
- Termination of employment
- Records – transfer of business
- Inspection and copying of records
- Information concerning records
- Accuracy concerning records.

Who is covered?

Not only employees covered by modern awards are affected by these requirements but also employees under an individual contract of employment, including a common law contract. As such, record keeping requirements are obligations that Clubs cannot avoid or contract out of.

What are the requirements?

General employment records

Clubs must record the following employment information in relation to employees:

- The employer's name
- The employee's name
- On and after 1 January 2010, the Australian Business Number (ABN), if any, of the employer
- The employee's status (e.g. full time, part time)
- Whether the employee's employment is permanent, temporary or casual, and
- The commencement date of their employment.

Form of records

Records must be kept in a legible form in English and in a form readily accessible by a workplace inspector.

How long do records need to be retained?

Records must be kept for seven years.

Pay slips

Pay slips must be issued to an employee within one day of the payment to which the pay slip relates. Pay slips must be in either electronic form or hard copy. They should detail the following information, as per the Regulations:

- The employer's name
- The employee's name
- The date on which payment to which the pay slip relates was made
- The period to which the pay slip relates
- If the employee is paid at an hourly rate of pay:
 - The ordinary hourly rate, and
 - The number of hours in that period for which the employee was employed at that rate, and
 - The amount of the payment made at that rate.
- If the employee is paid at an annual rate of pay, that rate as at the latest date to which the payment relates
- The gross amount of the payment
- The net amount of the payment
- Any amount paid that is an incentive-based payment, bonus, loading, allowance, penalty rate or other separately identifiable entitlement the employee has
- The details in respect of each amount deducted from the gross amount of the payment, including the name, or the name and number, of the fund or account into which the deduction was paid
- On and after 1 January 2010, the Australian Business Number (ABN), if any, of the employer, and
- If the employer is required to make superannuation contributions for the benefit of the employee:
 - The amount of each contribution made for the benefit of the employee during the period to which the pay slip relates; and
 - The name of any fund to which that contribution was made.

Contents of records

Pay

The employer must make and keep a record that specifies:

- The rate and remuneration paid to employee
- The gross and net amounts paid to employee, and
- Any deductions made from the gross amount paid to employee.

If the employee is a casual or flexible part-time employee who is guaranteed a rate of pay set by reference to a period of time worked, the record must set out the hours worked by the employee.

If the employee is entitled to be paid:

- An incentive-based payment, or
- A bonus, or
- A loading, or
- A penalty rate, or
- Another monetary allowance or separately identifiable entitlement,

then the record must set out details of the payment, bonus, loading, rate, allowance or entitlement.

Overtime

If a penalty rate or loading must be paid for overtime hours actually worked by an employee, a record must be kept that specifies:

- The number of overtime hours worked by the employee during each day, or
- When the employee started and ceased working overtime hours.

Averaging of hours

If the employer and employee agree in writing to an averaging of the employee's hours of work, a copy of that agreement is a kind of employee record that the employer must make and keep under section 535 of the Act.

Leave

The employee's leave record must contain a record of certain matters.

If the employee is entitled to leave, the record must set out:

- Any leave the employee takes, and
- The balance (if any) of the employee's entitlement to that leave from time to time.

If the employer and employee make an agreement to cash out an accrued amount of leave:

- A copy of the agreement must be kept, and
- The rate of payment for the amount of leave that was cashed out must be recorded, and
- The date when the payment was made must be recorded.

Superannuation

If the employer is required to make superannuation contributions for the benefit of the employee, the record relating to the employee must contain the following:

- The amount of the contributions made
- The period over which the contributions were made
- The dates on which the contributions were made
- The name of any fund to which the contributions were made
- The basis on which the employer became liable to make the contributions, including:
 - A record of any election made by the employee as to the fund to which contributions are to be made, and
 - The date of any relevant election.

Individual flexibility arrangements

If the employer and employee agree in writing on an individual flexibility arrangement, a record must be kept of that arrangement, along with a copy of any subsequent notice or agreement that terminates the individual flexibility arrangement.

Termination of employment

If the employee's employment is terminated, the record relating to the employee must contain the following:

- Whether the employment was terminated:
 - by consent, or
 - by notice, or
 - summarily, or
 - in some other manner (specify the manner)
- The name of the person who acted to terminate the employment.

Records – transfer of business

The participants in a transfer of business can be identified as:

- The old employer, and
- The new employer, and
- A transferring employee.

The old employer must transfer each employee record concerning a transferring employee that the old employer was required to keep. If the transferring employee becomes an employee of the new employer *after* the time the transfer of business took place, the new employer must ask the old employer to provide all employee records concerning the transferring employee.

The new employer who receives transferred employee records must keep those records, as if they had been made by the new employer at the time at which they were made by the old employer. The new employer is not required to make any records concerning the new employee's employment with the old employer.

Inspection and copying of records

The employer must make available a copy of an employee record for inspection and copying on request from an employee or former employee to whom the record relates. This copy must be made available in a legible form.

If the record is kept at the premises which the employee works, then it must be made available at the premises within three days of receiving the request, or a copy of the employee record must be posted within 14 days of receiving the request. If the record is not kept at the premises, then it must be made available as soon as practicable.

Information concerning records

An employer who has been asked to make a copy of an employee record available for inspection must tell the employee or former employee where the record is kept.

The employee or former employee may also interview the employer, or a representative of the employer, at any time during ordinary hours about a record that the employer has made or will make.

Accuracy concerning records

The employer must ensure that records kept are not false or misleading to the employer's knowledge, and that any errors are corrected immediately upon gaining knowledge of them.

Any errors corrected must contain a notation of the nature of the error corrected, and must not be altered in any other way unless prescribed by the Act or Regulations.