

WHEN ARE FRANCHISEES PROTECTED AS A SMALL BUSINESS?

The Small Business Fair Dismissal Code (Code) provides protection against unfair dismissal for small business employers who follow the Code

A small business employer is someone who has fewer than 15 employees but often, franchisees of larger businesses are unsure how to calculate the number of employees for the purpose of qualifying as a small business employer.

This question was recently raised in a Fair Work Commission (FWC) hearing when a Ray White franchise made a jurisdictional objection to an ex-employee's application for an unfair dismissal remedy.

Small Business Employer

The Code includes a checklist to help small businesses assess and record their reasons for dismissing an employee.

One of the questions asks whether the employee has been employed in the business for 12 months or more and if the answer is no, the employee cannot make an unfair dismissal claim.

This is based on Section 382 of the Fair Work Act 2009 (Act) which states that a person is protected from unfair dismissal if the employee has completed the minimum employment period with their employer (and the person is covered by a modern award, enterprise agreement or earns less than the high income threshold).

This means that if a person has not completed the minimum employment period, they are not protected from unfair dismissal.

Section 383 of the Act defines the minimum employment period for a small business employer to be one year and defines a small business employer as an employer who employs fewer than 15 employees.

It states that for the purpose of calculating the number of employees at a particular time:

- (a) Subject to (b), all employees employed by the employer at that time are to be counted; and
- (b) A casual employee is not to be counted unless, at that time, they have been employed by the employer on a regular and systematic basis; and
- (c) Associated entities are taken to be one entity; and
- (d) In relation to a dismissal or termination, includes:
 - a. the employee being dismissed or whose employment is terminated; and
 - b. any other employee of the employer who is also being dismissed or whose employment is terminated.

Fair Work Commission Hearing

In a recent hearing, Ray White Ferny Hills (employer) submitted that it was a small business since it only employed four people and as such the employee in question did not qualify for unfair dismissal protection as he had not served the minimum employment period of 12 months.

In response, the employee argued that the employer was not a small business employer as it was an associated entity of Ray White Queensland (franchisor). The employee made submissions that the franchisor had significant control over how the employer conducted its business, including HR.

The employer produced evidence of the franchise agreement which confirmed that there was no relationship between the parties other than as independent contractors.

In this case, the Commissioner upheld the jurisdictional objection and dismissed the employee's application for unfair dismissal



because he was satisfied that the employer was a small business employer within the meaning of Section 23 of the Act.

Relevantly, the Commissioner stated:

The nature of the relationship from the material put before the Commission is that of a typical franchise agreement and not a relationship that falls within that of associated entities as described in any of sub sections (2), (3), (4), (5), (6) or (7) of Section 50AAA of the Corporations Act 2001.

Key Takeaways

- Small business employers have fewer than 15 employees;
- Employees of small business employers must complete a one-year minimum employment period in order to qualify for unfair dismissal protection;
- For the purpose of calculating the number of employees to determine whether a franchisee is a small business, the franchisee will only need to include the employees of their franchisor if their franchisor is an associated entity as defined under section 50AAA of the Corporations Act 2001 (Cth).

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