

### Step 3.3 - Is the minimum employment period satisfied

#### Minimum employment period

##### The minimum employment period and the time:

- Small business employer – 1 year's continuous service at the particular time (ss.383 and 384, FW Act)
  - Less than 15 employees at the relevant time in the employer and its associated entities (s50A, including casuals employed on a regular and systematic basis (s.23, FW Act)
- Non-small business employer – 6 months' continuous service at the particular time (ss.383 and 384, FW Act)

Associated entities = businesses or other bodies that are connected to each other. For example, when 1 business owns or controls the other business for the purpose of a transfer of business. Section 50AAA of the Corporations Act provides a full definition.

- Need to take into account employees at all subsidiaries

#### 'particular time'

The earlier of (s 383 FWA):

- (i) the time when the person is given notice of the dismissal;
  - Time of dismissal that matters not the end of the notice period
  - If the notice period in their contract goes over the 6 months that does not matter
  - But if you said your dismissed annual leave sometime in the future than that is not effective notice for this provision, must say dismissing you and have 4 weeks notice (time of
- (ii) immediately before the dismissal; or
  - the notice of the dismissal must either specify a time when the termination is to take effect, or that time must be ascertainable (MFB v Duggan [2017] FWCFB 4878 at [42] – note that the dismissal may have occurred but not within the MEP unless this criteria was met during the MEP)

### Out of hours conduct

Generally, employers have no right to regulate or control an employee's out of hours conduct. Out of hours conduct will only have an impact to the extent it is a breach of an express or implied term of the contract of employment (particularly implied duty of fidelity and good faith) (Rose). The conduct must be of such gravity that it indicates repudiation of the employment contract by the employee (Rose)

Circumstances an employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited (Rose)

- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and the employee;
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

Thus, similar to **Rose**, there was no valid reason to terminate [employee] and [employee]'s dismissal is unfair although [other factors were satisfied - eg they were notified/given opportunity to respond etc]

## STEP 5 - REMEDIES

### 1. Reinstatement

- Reinstatement is rarely ordered, even though it is the primary remedy

### 2. Compensation (more typically remedy)

**Reinstatement order (almost all the time it is not considered appropriate)**

- An order for reinstatement means that the employer must:
  - - reappoint the person to the position in which they were employed immediately before the dismissal, or
  - - appoint the person to another position with terms and conditions no less favourable than those on which the person was employed immediately before the dismissal (ss.391(1) –(1A), FW Act)
- the FWC may also, where appropriate, make an order to maintain continuity of employment and the period of continuous service in addition to reinstatement (s.391(2), FW Act)
  - - **Continuity of employment** is where a person is considered to have remained as an employee during the period of time between the date of dismissal and the date of re- employment
- the FWC may also, where appropriate, make an order for lost remuneration in addition to reinstatement (s.391(3), FW Act)

Note the three reasons why reinstatement is unlikely

### **Compensation order is instead of reinstatement (s.392(1), FW Act)**

“The FWC must not order the payment of compensation to the person unless:

- (a) the FWC is satisfied that reinstatement of the person is inappropriate; and
- (b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case.” (s.390(3), FW Act)

**Compensation order** is instead of reinstatement **(s.392(1), FW Act)**

- FWC determines amount taking into account all the circumstances including:
  - - employer's viability
  - - length of service of the employee
  - - lost remuneration by the employee
  - - mitigation efforts of the employee
  - - misconduct by the employee contributing to the dismissal
  - - other matters the FWC considers appropriate **(s.392(2)-(3), FW Act)**
- No compensation for shock, distress, humiliation/analogous hurt **(s.392(4) FW Act)**
- Compensation cap of the lesser of **26 weeks' pay or half the high income threshold (s.392(5)-(6), FW Act)**