

## 2 Meaning of *small business employer*, for unfair dismissal purposes, prior to 1 January 2011<sup>1</sup>

(1) For the purposes of the application of Part 3-2 of the FW Act in relation to the dismissal of a person before 1 January 2011, a national system employer is a ***small business employer*** if, and only if, the employer's number of full-time equivalent employees, worked out under this item, is less than 15 at the earlier of the following times (the ***notice or dismissal time***):

- (a) the time when the person is given notice of the dismissal;
- (b) immediately before the dismissal.

(2) The employer's ***number of full-time equivalent employees*** at the notice or dismissal time is worked out as follows:

### *Method statement*

Step 1. For each person who was an employee of the employer at any time during the period of 4 weeks immediately preceding the day on which the notice or dismissal time occurs, work out the number of ordinary hours (including parts of hours) of the person as the employer's employee during the period.

Note: Subitem (3) sets out what are a person's ordinary hours.

Step 2. If, during the period, the person took leave to which subitem (4) applies, work out the number of hours of leave to which that subitem applies that the person took during the period.

Step 3. Add together all of the numbers of ordinary hours worked out under step 1, and subtract all of the number of hours of leave worked out under step 2.

Step 4. Divide by 152 the number worked out under step 3. The result is the employer's ***number of full-time equivalent employees*** at the notice or dismissal time.

Note: The number 152 is based on the maximum number of hours that a full-time employee would work in 4 weeks (being 38 hours per week) excluding reasonable additional hours.

(3) For the purposes of step 1 of the method statement in subitem (2), the ordinary hours of work of a person as the employer's employee are:

- (a) to the extent that a modern award, enterprise agreement or workplace determination applied to the person, and the person was not a casual employee—the ordinary hours of work specified or provided for in that award, agreement or determination; or
- (b) to the extent that a transitional instrument applied to the person, and the person was not a casual employee—the person's ordinary hours of work under item 33 of Schedule 3; or
- (c) to the extent that:
  - (i) a State industrial instrument applied to the person as a non-national system employee; and
  - (ii) the instrument specified, or provided for the determination of, the person's ordinary hours of work; and
  - (iii) the person was not a casual employee;the ordinary hours of work as specified in, or determined in accordance with, that instrument; or
- (d) to the extent that no such award, agreement, determination or instrument applied to the person, and the person was not a casual employee:
  - (i) if the person was a national system employee—the person's ordinary hours of work under section 20 of the FW Act; or

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<sup>1</sup> Schedule 12A—Unfair dismissal, item 2, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

(ii) if the person was a non-national system employee—what would have been the person's ordinary hours of work under that section if the person had been a national system employee; or

(e) to the extent that the person was a casual employee—the lesser of:

(i) 152 hours; and

(ii) the number of hours actually worked by the person.

(4) This subitem applies to leave, whether paid or unpaid, that the person took if:

(a) the person was entitled to the leave in connection with:

(i) the birth of a child of the person or the person's spouse or de facto partner; or

(ii) the placement of a child with the person for adoption; and

(b) the duration of the period of leave has been at least 4 weeks;

whether or not the person took any other kind of paid leave while taking that leave.

(5) For the purposes of this item, a national system employer and the employer's associated entities are taken to be one entity.

(6) This item has effect despite section 23 of the FW Act.