

WORKERS' RIGHTS UNFAIR DISMISSAL



To decide if a dismissal has been harsh, unjust or unreasonable, it is important to look at whether there is a valid reason for the dismissal relating to your behaviour or ability to do the job and if you were notified of the reason and given an opportunity to respond.

What is an unfair dismissal?

Your employer should not dismiss you without good reason. Unfair dismissal is when you are sacked in a way that is considered to be harsh, unjust or unreasonable, such as being sacked without reason or warning, or for a reason that seems false or unfair, or the dismissal is not a case of genuine redundancy.

To decide if a dismissal has been harsh, unjust or unreasonable, it is important to look at whether there is a valid reason for the dismissal relating to your behaviour or ability to do the job and if you were notified of the reason and given an opportunity to respond.

It is not the case that an employee must be given three warnings before being dismissed. However, an employer must give an employee fair and reasonable warning and an opportunity to improve.

Termination Entitlements

If your employment is terminated, your employer must follow due process. You are entitled to:

- a valid reason for the dismissal;
- a fair and transparent process leading up to the dismissal;
- written notice of the date of termination (unless you are a casual);
- wages due at the time of dismissal;
- a separation certificate (if your employer refuses to provide one, contact Centrelink who can obtain one);
- request to have a support person present at discussions regarding the dismissal, which your employer should not unreasonably deny.

What is not unfair dismissal?

Unfair dismissal does not include a person employed under a contract or for a particular task if their employment was terminated at the end of the contract or completion of the task. Seasonal and casual workers are not eligible unless the casual work was regular and systematic and had a reasonable expectation that their employment would continue.

Businesses may dismiss staff if they need to make a genuine redundancy but employees should be consulted about a proposed redundancy and if possible, should be offered another job in the same or associated business.

Who can apply for unfair dismissal under the Fair Work Act?

Workers must be covered by the national workplace relations system (almost all employees other than state and local government employees) and have served at least 6 months before they can challenge a dismissal as unfair. If you work for a small business, then you have to have been employed for at least 12 months before you can claim for unfair dismissal. A small business is one that employs less than 15 people. As well, you have to be covered by an award or agreement or be earning less than \$118,100 a year (as at 1 July 2011).

How to apply?

Don't delay! If you think you may have a claim, you should:

- Get legal advice or assistance from your union (if you are a member) as soon as possible
- Lodge your claim, as Unfair dismissal claims must be lodged with Fair Work Australia (FWA) within 14 days of the dismissal.

A late application may be accepted in some circumstances. Any late application must include reasons as to why it would be unfair for FWA not to accept the application.

You should complete a Form F2 - Application for Unfair Dismissal Remedy, which is available from the FWA website (www.fwa.gov.au), or from the FWA office in Adelaide. Applications can be submitted to FWA a number of ways, including in person, by telephone, by facsimile, by post or online through electronic lodgement on the FWA website. It costs \$60.60* to lodge the application but this can be waived in cases of serious financial hardship. To apply for FWA to waive the fee, complete and attach the form Application - waiver of application fee to your application.

What happens next?

After the relevant documents have been lodged, FWA can make initial inquiries and discuss the issues with the employer and you. If your claim is accepted, your matter will first be listed for a telephone conference. When you apply, FWA will check the application to see if it's complete and valid. FWA will send a copy to your employer.

Usually, a conciliation conference by telephone is then arranged, to help both sides to resolve the matter by agreement. In general, unfair dismissal cases and discussions in conciliation conferences are confidential. During conciliation, both you and your employer have a chance to explain your version of events. It is important to be prepared for the conference.

At the Conciliation Conference, you can tell the conciliator why you think your dismissal was unfair, and hear what your employer has to say about it. The conciliator may recommend ways of settling the matter and say what could happen if it went to a formal hearing. Most applications are settled by agreement at the conciliation stage and do not need to go further. Unlike a hearing in court, you cannot be ordered to do something at the Conciliation Conference.

If a resolution can't be reached, a formal FWA hearing will be held. If FWA finds that the dismissal was unfair, your employer can be ordered to either:

- reinstate you (give you back your job), or
- compensate you for up to 26 weeks pay (up to a maximum amount of \$59,050*)

Unlawful Termination

Unlawful termination is when you are sacked based on discrimination of race, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. It also constitutes unlawful termination if you are sacked because of a temporary absence from work due to illness or injury, trade union membership or non-membership, participation in trade union activities outside working hours or, with the employer's consent, during working hours, being an employees' representative, taking parental, maternity or community leave, or for making a complaint or participating in proceedings against your employer.

If you think you have been unlawfully dismissed for any of the reasons listed above you can apply to FWA for help to deal with the dispute. You have 60 days within the date of the unlawful termination to make a general protections dismissal application to FWA. Although FWA may accept late applications in limited circumstances. You should complete Form F8 – Application for FWA to deal with a General Protections Dispute.



An employee who has made a claim or complaint under another law cannot also make an unlawful termination application. For example, if you have made a complaint about your dismissal to the Australian Human Rights Commission, you cannot also make an unlawful termination application alleging discrimination. Likewise, you cannot make a complaint to the Australian Human Rights Commission on the same grounds as the unlawful termination claim. You should seek advice if your claim relates to more than one area of law.

If you have experienced discrimination during the course of your employment, call the Fair Work Infoline on 13 13 94 to seek advice about lodging a complaint for adverse action with the Fair Work Ombudsman (FWO). Forms can be lodged at the FWO's office in Adelaide, online (www.fairwork.gov.au), by fax or by post.

*Please note these amounts are subject to change. You should check the amount prior to lodging your claim.

Where can I get more help?

Your union

SA Unions
Ph: (08) 8279 2222
www.saunions.org.au

Working Women's Centre

Ph: 1800 652 697
www.wwc.org.au

1st Floor, Station Arcade
52 Hindley Street
Adelaide, SA, 5000

Legal Services Commission

Ph: 1300 366 424
www.lsc.sa.gov.au

82-98 Wakefield Street
Adelaide SA 5000

Young Workers Legal Service

Ph: (08) 8279 2233
www.ywls.org.au

Fair Work Australia (FWA)

Ph: 1300 799 675
www.fwa.gov.au

Level 6, Riverside Centre,
Nth Terrace, Adelaide, 5000

Fair Work Ombudsman (FWO)

Ph: 13 13 94
www.fairwork.gov.au

Level 2, 148 Frome St.
Adelaide SA, 5000

Fair Work Ombudsman

Complaints Assessment Team
GPO Box 2567, Adelaide, SA, 5001

Telephone Interpreter Service

Ph: 13 14 50

Legal disclaimer: The Fair Work Ombudsman (FWO) is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws. The information contained in this publication within the FWO's jurisdiction as set out in the Fair Work Act 2009 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 10 June 2011. The FWO does not accept legal liability arising from or connected to the accuracy, reliability, currency or completeness of this information. This material has been funded by the Australian Government through a Fair Work Ombudsman initiative to produce educative materials on the Fair Work Act.