



Working Women's Centre SA Inc.

Please note that this is general information & may not be relevant to your particular matter. This toolkit should not be taken as legal advice.

Unfair Dismissal

Have you been unfairly dismissed?

Important: You have 21 days from the date of dismissal to make an application.

This is a strict time frame. You should ensure that you make the application within 21 days (that is 21 calendar days). The first day of the 21 days, is the day after your dismissal.



THE WORKING WOMEN'S CENTRE SA INC

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Toolkit Part 1 - Have you been unfairly dismissed?

We are committed to providing advice that you can rely on however the information in this toolkit is general in nature.

If you're unsure about how it applies to your situation you can call your union. To find out more about unions, please visit www.actu.org.au

If you are not a union member, then call us on **08 8410 6499**.

How do I know if I was unfairly dismissed?

You have been unfairly dismissed if:

- 1.**You were dismissed.
- 2.**The dismissal was harsh, unjust or unreasonable.
- 3.**If you were employed by a small business, that the dismissal was not consistent with the Small Business Fair Dismissal Code.
- 4.**The dismissal was not a case of genuine redundancy.

1. The Dismissal

You will be considered to be dismissed, if your employment was terminated:

- **on the initiative of the employer;** or
- If you were forced to resign due to conduct by your employer. This is known as constructive dismissal.

You will not be dismissed if you were engaged by a contract of employment for a specific time period, or for a specific task or season.

For example, if you were employed on a 12 month contract and at the end of this 12 month contract, you are not offered a new contract, that decision will not constitute a dismissal.

Courtesy of the Fair Work Ombudsman.

2. Criteria for harshness

In deciding whether a dismissal was unfair, the Fair Work Commission (FWC) will consider specific criteria for the harshness of the dismissal. The FWC will take into account:

1. Whether there was a **valid reason** for dismissal.
2. Whether you were notified of that reason.
3. Whether you were given an opportunity to respond to any reason.
4. Whether you were offered or allowed a support person present in any discussions.
5. If the dismissal related to unsatisfactory performance, whether you had been warned about the performance before the dismissal.
6. How large is the business, and has the size of the business has an impact of them following appropriate procedures for dismissal.
7. Does the business have a dedicated human resource specialist.
8. Any other matters the FWC considers relevant.

Courtesy of the Fair Work Ombudsman.

3. Is the dismissal in consistent with the Small Business Fair Dismissal Code?

If you are employed by a small business, then your dismissal will be considered with respect to the Small Business Code.

Definition: A small business is defined as an employer, who employs less than 15 employees.

If you have been dismissed by a Small Business then the Fair Dismissal Code applies. The Code can be found here:

<https://www.fwc.gov.au/about-us/legislation-regulations/small-business-fair-dismissal-code>

Courtesy of the Fair Work Ombudsman.

4. Genuine Redundancy

You will not be eligible to lodge an unfair dismissal case if you were dismissed because of a genuine redundancy.

What is a redundancy?

Redundancy can happen when an employer either:

- doesn't need an employee's job to be done by anyone, or
- becomes insolvent or bankrupt.

Redundancy can happen when the business:

- introduces new technology (eg. the job can be done by a machine)
- slows down due to lower sales or production
- closes down
- relocates interstate or overseas
- restructures or reorganises because a merger or takeover happens.

Courtesy of the Fair Work Ombudsman.

Remember: A person is not made redundant, a POSITION or JOB is made redundant.

The test for a genuine redundancy is:

- The employer no longer requires the person's job to be performed because of operational requirements; and
- The employer has complied with any obligation to consult in a modern award or enterprise agreement; and
- There is no reasonable way to redeploy the employee within the business.

If your redundancy does not fit the above criteria, then it is likely you will have a case for unfair dismissal on the basis that the redundancy is not a genuine one.

Examples of Genuine Redundancy

Restructure – Reduction in the number of positions:

Julie is working as a medical receptionist in a busy doctor's surgery. Julie works with 4 other medical receptionists. Julie is the only medical receptionist to be made redundant. Julie's duties are distributed among the remaining medical receptionists. This is very likely to be a genuine redundancy.

Downturn in Business

Downturn in business Lee Lin, is a print journalist and works for a major newspaper in Adelaide, South Australia. Over the last few years, there has been a significant reduction in sales of print newspapers and the board has decided to cut the newspaper from 40 pages to 30 pages. As a result, Lee Lin and another journalist have been made redundant. This is very likely to be a genuine redundancy as Lee Lin's role is no longer required due to the downturn in business.

Examples of Non-Genuine Redundancy

Examples of situations when a worker may have been unfairly dismissed:

Reasonable redeployment & a lack of consultation.

Priya is working as a graphic designer for the state government. The state government decides to outsource all of its web content to a private graphic design company. Priya is told that her job no longer exists with the state government and her job has been made redundant. Priya was never consulted about this change. It is likely that this will not amount to a genuine redundancy and Priya could lodge an unfair dismissal application.

Sham Redundancies:

Sam has been working with an electrical company as an electrician for 9 months. At the Christmas party, Sam's boss tries to kiss them. Sam refuses the advance and leaves the party straight away. Sam was due to return to work after the holiday close down period but the next day, receives an email notifying them of a redundancy. Sam knew that the boss has work lined up for the next year and believes that the redundancy was due to incident at the Christmas party. If there has been no downturn in work and the reason for the dismissal was Sam rejected the boss's advances, the redundancy will not amount to a genuine redundancy and Sam will be eligible to lodge an unfair dismissal application. **If you experience sexual harassment in the workplace, contact us for further advice.*

Time period

You have **21 days** from the date of dismissal to make an application.

This is a **strict time frame**. You should ensure that you make the application within 21 days (that is 21 calendar days). The first day of the 21 days, is the day after your dismissal.

There may be times where you are notified of your dismissal, but your final day of employment is not for some time (say 4 weeks later). In this case, the dismissal will take effect on your last day of employment.

Example

If an employee is given 4 weeks' notice that they will be dismissed, and they work through the 4 week period – then the date that the dismissal takes effect will generally be at the end of that 4 week notice period. HOWEVER, if an employee receives 4 weeks' pay in advance in lieu (instead) of working and is NOT required to work through the 4 week notice period – then the date that the dismissal takes effect will generally be the last day worked unless the employer specifies a different date of dismissal.

Example : Courtesy of the Fair Work Commission.

Can I lodge an Unfair Dismissal Application?

Length of service

The law provides that you need to have completed a minimum period of service to be eligible to make an unfair dismissal application.

- If your employer is a small business employer (less than 15 employees), then your minimum period of service is 12 months.
- If your employer is a large business (15 employees or more) then your minimum period of service is 6 months.

If you have not been employed for at least the minimum period, you will not be eligible to make an unfair dismissal application.

If you are still confused as to whether you are eligible to lodge an unfair dismissal, please take the Fair Work Ombudsman Quiz.

<https://www.fwc.gov.au/termination-of-employment/unfair-dismissal/eligibility>

Toolkit Part 2 - Making the Application

If after reviewing the information above, you think you have been unfairly dismissed then you will need to make an Application to the Fair Work Commission (FWC) **within 21 days from the date of the dismissal.**

You will need to complete a Form 2 – Application for Unfair Dismissal.

This can be found on the FWC website. At this link:

<https://www.fwc.gov.au/content/rules-form/unfair-dismissal-application>

This form will need to be emailed to the FWC. You can find directions in the Form 2 about how to lodge this application.

You can also complete the form using the online lodgment service using this link:

<https://www.fwc.gov.au/disputes-at-work/how-the-commission-works/lodge-application/online-lodgment-service>

Filing the Application

Once you have completed the Form 2 you should email it to the FWC. Details for the FWC can be found here:

<https://www.fwc.gov.au/disputes-at-work/how-the-commission-works/commission-offices/south-australia>

You should receive a confirmation email from the FWC saying they have received your Application. In a few days you should receive a listing advice from the FWC that will give you a time and date for a conciliation conference. It is likely this will be in 3-4 weeks time.

Fees

There is a filing fee of \$73.20 for an Unfair Dismissal application.

If you cannot afford to pay the fee, you will need to complete Form 80 – Application for Waiver of Filing Fee. That can be found on the FWC website. <https://www.fwc.gov.au/content/rules-form/waiver-application-fee>

Top 5 tips in completing your application form

- 1** At Part 2.1 you should include what outcome you want, we recommend compensation (the maximum is 26 weeks), a statement of service, and for the dismissal to be rescinded and you be allowed to resign.
- 2** At Part 3.1 insert brief reasons why you were dismissed. Please be aware that if you have a workers compensation matter, then resigning from your employment may prohibit you from receiving workers compensation. If you were given a letter of dismissal, refer to it here, and attach it to the application.
- 3** At Part 3.2 you need to explain here why the dismissal is unfair. Use the criteria for hardness outlined in Part 1 of this toolkit to help you with what you need to say. If you were made redundant, or your employer was a small business you need to address that here too.
- 4** At Part 3.2 it is best to use dot points or number your paragraphs. Be concise and try to avoid long, complicated paragraphs, with opinions and emotions.
- 5** Make sure you submit your application within 21 days from the date of your dismissal. This is very important.

Toolkit Part 3 - Conciliation conference

The Fair Work Commission (FWC) will hold a conciliation conference between you and the employer to help both of you come to an agreement. You can use the information below to help prepare for the conciliation conference.

On the date of the conciliation conference, a conciliator will call you from the FWC. The conciliator will be an impartial third party. The employer will be on the phone as well.

Overview of the Conciliation conference

- The conciliator will explain the process for how the conciliation will be run.
- You will then get a chance to make a statement. An opening statement is a summary of your unfair dismissal application. You may also choose to respond to the employers response in your opening statement. The purpose of your opening statement is to put forward your case, in a concise way, at the start of the conciliation conference. **Tip: prepare your opening statement before the conciliation conference so you can read it out, rather than having to think of what to say on the spot.**
- The employer will then be given an opportunity to make an opening statement.
- The conciliator may ask some questions of you and your employer.
- The conciliator will then break you into separate sessions. The conciliator will talk to you in a private session, and ask you to make a first offer. Prepare what your first offer will be before the conciliation. This can include compensation, statement of service, or resignation. **Tip: start higher than what you want to settle for, so you have room to negotiate.**
- The conciliator will then take the offer back to the other side.
- It is likely to go back and forward between both parties until an agreement is reached.
- If an agreement is reached, the conciliator will help to draft Terms of Settlement for both the parties to sign.
- If an agreement is not reached, then the matter will proceed to a hearing, in person, at the FWC.

Here is some information from the Fair Work Commission website about conciliation:

<https://www.fwc.gov.au/termination-employment/unfair-dismissal/about-conciliation>

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