



UNFAIR DISMISSAL: Information Sheet

As a generalist Community Legal Centre, we assist dozens of clients each year with employment law matters which include applications for unfair dismissal. This Information Sheet is designed to address some of the more common questions and issues that arise when clients are considering making, or are involved in, an application for unfair dismissal.

What is Unfair Dismissal?

Unfair dismissal derives from the *Fair Work Act 2009* ("the Act") which provides the base level protections to employees across the country that cannot be contracted out.

The only exception to the unfair dismissal provisions under the Act is that it excludes State public sector and local government employees as they are not covered by the national system and remain under the state system. Remedies are available for those employees who believe they have been unfairly terminated, but the process is not the same as that provided for under the Act.

The Act defines 'unfair dismissal' as when a person has been:

- (a) Dismissed; and
- (b) The dismissal was harsh, unjust or unreasonable; and
- (c) The dismissal was not consistent with the Small Business Fair Dismissal Code; and
- (d) The dismissal was not a case of a genuine redundancy.

What is meant by "harsh, unjust or unreasonable"?

This is a question of fact and therefore it depends on the individual circumstances of the particular dismissal. The Act does however provide in section 387 some of the considerations the *Fair Work Commission* must take into account when considering 'harshness', which includes (amongst other considerations):

- (a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees);
- (b) whether the person was notified of that reason;
- (c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- (d) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal.

What if I have been dismissed for 'Serious Misconduct'?

If you were dismissed for 'serious misconduct', you may not have a strong claim for unfair dismissal and your employer does not have to provide you with a warning.

Serious misconduct is given its ordinary meaning, but r1.07 of the *Fair Work Regulations 2009* provides guidance as to what can constitute serious misconduct, which includes:

- (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- (b) conduct that causes serious and imminent risk to:
 - (i) the health or safety of a person; or
 - (ii) the reputation, viability or profitability of the employer's business.
- (c) Where an employee, in the course of the employee's employment, engages in:
 - (i) theft; or
 - (ii) fraud; or
 - (iii) assault; or
 - (iv) sexual harassment;
- (d) the employee is intoxicated at work; or
- (e) the employee refuses to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.

How can someone make an unfair dismissal application?

Unfair dismissal applications are made through the *Fair Work Commission*, whereby the form can be found on their website: <https://www.fwc.gov.au/content/rules-form/unfair-dismissal-application>

The application must be lodged within 21 days of the dismissal taking place, whereby the application can be filed by post, email, facsimile or in person at the *Fair Work Commission's* Office in your State or Territory.

There is an application fee payable upon lodging your application which at the time of publication is \$74.90. You should check the *Fair Work Commission* website to ascertain the current fee at the time of filing. If paying the fee will cause you serious hardship, you can apply for a fee waiver. The fee waiver should be lodged at the same time as your application.

What is the process once you have filed your application?

Once you have filed your application, a copy is sent to your employer. Your employer is then given an opportunity to respond to your application in writing which you will receive a copy of. This is your employer's opportunity to submit any jurisdictional challenges they may wish to make along with their response to the matters raised in your application.

The matter is then listed for a telephone conference. The telephone conference is a confidential and informal conference call hosted by the *Fair Work Commission* with you and your employer. This is referred to as the conciliation stage of the matter whereby parties have an opportunity to discuss each side's position with the assistance of a third party from the *Commission* to try and work out a mutually acceptable resolution to avoid the matter progressing further.

It is important that prior to the telephone conference you have carefully considered your position and issues raised by your employer in their response. You should also come prepared to discuss options to resolve the matter.

If an agreement is not reached during the conciliation, the matter will automatically proceed to a formal conference or hearing unless in the meantime the employee discontinues their application or a resolution is reached through an exchange of communications between the parties.

It is always advisable that you obtain independent legal advice before filing your application, but at a minimum, before your matter proceeds to the telephone conference.

Can anyone make an application for unfair dismissal under the Act if they believe they have been unfairly dismissed?

Yes, but subject to a few provisos, namely:

- (a) You must not be a State public sector or local government employee (as they are not covered by the national system);
- (b) If your employer is a small business (less than 15 employees) - You must have been employed for at least twelve months before your dismissal took effect;
- (c) If your employer is a large business (15 or more employees) - You must have been employed for at least 6 months before your dismissal took effect; and
- (d) You must be earning less than the 'high-income threshold', which at the time of publication is \$158,500.00. The exception to the high-income threshold is if the work you are performing for your employer is provided for in an enterprise agreement, in which case the high-income threshold does not apply (Please check the *Fair Work Commission* website to ascertain the current high-income threshold prior to filing your application).

What are some common issues when determining eligibility to make an unfair dismissal application?

- **Not covered by the national dismissal laws** - as referred to above, the Act excludes State public sector and local government employees from relying on the unfair dismissal provisions under the Act.
- **Contractor or Self Employed** - Contractors and those who are self-employed cannot make an application for unfair dismissal. Whilst normally the distinction between a contractor and employee is obvious, this is not always the case. Sham contracting arrangements can attempt to

hold out an individual as a contractor when in reality, the nature of the relationship may suggest they are in fact an employee. Considerations include: the intention of the parties, is the individual able to delegate or subcontract work, who bears the financial responsibility or risk, who supplies the tools/equipment, hours of work, expectation of continuing work amongst various other factors.

- **Casual employees** – Casual employees are eligible to make application for unfair dismissal but only if they have been employed on a regular and systematic basis and had a reasonable expectation of ongoing employment with their employer.
- **You must have been dismissed** – You are not eligible to make application for unfair dismissal until you have been dismissed. If you have been forced to resign because of your boss's behaviour, that can sometimes count as a dismissal and is known as a 'forced resignation' or 'constructive dismissal'. In this circumstance the employee must be able to show that they had no real choice but to resign. The onus in proving this rests with the employee whereby the employee must prove that they did not resign voluntarily and that their employer forced their resignation.

What outcomes are available for someone who has been unfairly dismissed and goes through the process of lodging an unfair dismissal application?

There are three possible outcomes that the *Fair Work Commission* can order once they are satisfied that the employee has been unfairly dismissed. These are:

1. **Reinstatement to your position** – this will only be ordered if the *Commission* is satisfied that:
 - (a) The employee is capable of working for the employer again; and
 - (b) The employer/employee relationship is capable of working whereby it is not a situation where reinstatement will simply lead to the employer dismissing the employee again.

As a result, this option tends to be used sparingly and more often than not when dealing with a larger employer.

2. **Compensation up to a maximum of 26 weeks' pay** – will only be ordered if considered appropriate. It is not awarded for shock, humiliation, distress or hurt. It does however take into account matters such as: how long the employee worked for the employer, any genuine performance/behaviour issues or misconduct on the part of the employee, how long the employee would have continued to work for the employer but for the unfair dismissal, is the employee reemployed, how much are they now earning in their new job compared to their former one, if the employee remains unemployed have they received any job offers or been actively looking for work to mitigate their loss amongst other factors.
3. **No Order** – whilst unusual, depending on all the circumstances, the *Commission* can find that an employee has been unfairly dismissed but make no orders with respect to same.

Do you have to have a lawyer or can you run your application yourself?

No, you do not have to engage a lawyer to make your application or represent you, but you can if you wish.

This is an area of the law that is set up reasonably well for someone to represent themselves. With that said, like anything legal there is a real benefit to getting legal advice before making your application, because of the many technical matters that need to be carefully considered on a case-by-case basis. Furthermore, obtaining advice and/or legal assistance/representation early is often highly beneficial in order to:

- (a) Identify the grounds for your application;
- (b) Identify and ascertain the evidence that you ought to include in your application to put your best case forward; and
- (c) Obtain advice regarding a realistic outcome you ought to seek.

Keep in mind that employers often engage legal counsel to represent them, so you will likely be communicating with your former employer via their legal representative.

Where should you go if you think you have been unfairly dismissed from your job?

You have a number of options, which include the following:

- (a) **Access the *Fair Work Commission* website (www.fwc.gov.au)** - where you will find a large amount of useful information in written and video formats including the unfair dismissal application form itself.
- (b) **Contact your union (if you are a member of one)** - they can often provide you with both advice and representation should your matter have merit;
- (c) **Contact a private lawyer directly; and/or**
- (d) **You can make an appointment with our office** - we can provide you with free advice to ensure you firstly have a valid case for unfair dismissal and provide you with guidance with respect to your application. If you require legal representation, we can also provide you with our referral list of local lawyers that engage in this area of law.

If you have any queries, please make an appointment to speak with one of our lawyers free of charge.

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