

Employment Law Fact Sheet

Unfair Dismissal Claims

Information regarding unfair dismissal claims under the *Fair Work Act 2009* (Cth).

Have I been dismissed?

Dismissal claims only apply to employees who have been dismissed from their employment. If you are considered an independent contractor or you have not been dismissed, you cannot bring a dismissal claim.

Dismissal is defined as:

- the termination of your employment at your employer's initiative; or
- you being forced to resign because of your employer's conduct (forced dismissal).

You will not have been dismissed if:

- a fixed-term contract has simply come to an end and you are not offered further work;
- you chose to resign from your employment; or
- you were demoted without a significant reduction in your pay and duties.

What dismissal claims are available?

There are two main dismissal claims available under the *Fair Work Act 2009* (Cth):

1. unfair dismissal; and
2. general protections (dismissal)

You can only bring one claim in relation to your dismissal. There are different requirements for each claim, so you should consider which claim is most applicable to your circumstances.

The rest of this information sheet focuses on unfair dismissal.

What is unfair dismissal?

Unfair dismissal looks at whether your dismissal was, in all the circumstances, harsh, unjust or unreasonable.

There are a number of circumstances where a dismissal will not be unfair, in particular:

- if your employer is a small business employer and the dismissal was consistent with the Small Business Fair Dismissal Code; or
- if the dismissal was a case of genuine redundancy.

Do I qualify for unfair dismissal?

Not all employees are protected from unfair dismissal.

There are three key criteria that you must meet in order to be protected from unfair dismissal:

1. you must be employed by a national system employer (this covers most employees in Victoria); and
2. you must meet the minimum employment period; and
3. you must be covered by a modern award or enterprise agreement or earn under the high income threshold (currently \$162,000 per year – adjusted annually on 1 July).

If you do not meet these criteria, you are not eligible to bring an unfair dismissal claim.

If you are unsure about your modern award coverage, you can find out more details on the Fair Work Ombudsman's website – www.fairwork.gov.au

What is the minimum employment period?

The minimum employment period depends on the size of your employer.

If your employer is a small business employer (less than 15 employees at the time of your dismissal), then the minimum employment period is 12 months.

If your employer is not a small business employer, then the minimum employment period is 6 months.

Calculating the number of employees

In determining the size of your employer, you count:

- all permanent employees of the employer and its associated entities; and
- any regular and systematic casual employees of the employer and its associated entities.

In counting employees, you also include yourself and anyone else dismissed at the same time as you.

In calculating the minimum employment period, periods of continuous service are counted. There are some periods of unpaid leave which do not count as continuous service.

Continuous service is determined differently for casual employees, who can only count periods where they were employed on a regular and systematic basis and with a continuing expectation of employment.

When is a dismissal harsh, unjust or unreasonable?

To determine whether a dismissal is harsh, unjust or unreasonable, you need to consider all of the circumstances including:

- whether your employer had a valid reason for your dismissal, such as a reason related to your capacity or conduct;
- did your employer afford you procedural fairness, including notifying you of the reason for dismissal, giving you an opportunity to respond to the reason and an opportunity to improve your performance;
- other factors regarding harshness, your longstanding service or personal circumstances.

How do I make a claim?

To make a claim, you need to file a Form F2 application with the Fair Work Commission. You can do this in a variety of ways, including online or by email.

The Form F2 is available via the Fair Work Commission's website at www.fwc.gov.au/form/apply-unfair-dismissal-form-f2

Filing deadlines

You must make your application for an unfair dismissal claim within 21 days of your dismissal taking effect, otherwise, it is unlikely to be considered. The 21-day time limit can only be extended in exceptional circumstances.

Filing fees

You must also pay a filing fee of \$77.80 unless you can demonstrate that paying the filing fee would cause you serious financial hardship. If you want to rely on this ground to seek a fee waiver, you must file the Fee Waiver Form at the same time as your application.

What happens after I file my claim?

Once you file your claim, it will be provided to your employer for their response.

Your claim will then either proceed to a conciliation or a hearing to deal with any jurisdictional objections made by your former employer.

Jurisdictional objections

Jurisdictional objections are preliminary objections made by your employer which say that the Fair Work Commission cannot hear your claim.

Types of objections that fall into this category include:

1. that you were not an employee or that you have named the right employer;
2. that you do not meet that minimum employment period; or
3. that you were not dismissed.

The Fair Work Commission may hear and decide these objections first, before letting your claim proceed.

Conciliation

If no jurisdictional objections are made, or if they do not succeed, then your matter will proceed to conciliation.

Conciliation is a voluntary dispute resolution process where the parties try to reach an agreed settlement of your claim.

This will usually be conducted by telephone by a Fair Work Commission staff conciliator. The conciliator will assist the parties to discuss the unfair dismissal claim and work towards a negotiated settlement. The negotiated settlement could include reinstatement, compensation, an apology or an agreement that you be able to resign from your employment.

If the claim does not resolve at conciliation, it will be listed for determination by the Fair Work Commission in either a hearing or conference.

What outcomes can I achieve at a hearing or conference?

If your matter is determined by the Fair Work Commission at a hearing or conference, there are very limited outcomes that the Fair Work Commission can order if you are successful.

The Fair Work Commission can order:

1. that you be reinstated into your position; or
2. that you be awarded compensation.

If the Fair Work Commission awards compensation, this is only for the loss of wages and is capped at 26 weeks' pay. Therefore, the Fair Work Commission cannot award damages for hurt or humiliation and cannot award more than 26 weeks' pay.

I have questions about my dismissal - what should I do next?

You should seek legal advice or information about your dismissal as soon as possible. There are strict time frames for filing dismissal applications.

More information about unfair dismissal is available from the Fair Work Commission at www.fairwork.gov.au.

Note: The information in this document is general information only and should not be relied on as legal advice. It is current as at 29 March 2023. If you need further assistance, please contact Deakin Law Clinic.



Law Clinic

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