

# Unfair Dismissal Remedy

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Workplace Relations, Employment & Safety

**The Fair Work Act 2009 (Cth) (FW Act) provides protection for employees who have been unfairly dismissed. Eligible persons wishing to lodge an application for unfair dismissal must do so within 21 days of the dismissal coming into effect<sup>1</sup>.**

## Who can bring a claim?

A person can make a claim for an unfair dismissal remedy if he or she has completed the required *minimum employment period*<sup>2</sup> with the employer and one or more of the following apply:

- *the person is covered by an Award or agreement (including a transitional instrument);*
- *the person earns less than the high income threshold (currently \$129,300);*
- *an enterprise agreement applies*<sup>3</sup>.

Accordingly, a person who earns more than \$129,300 per annum at the present time<sup>4</sup> will not be protected by the FW Act from unfair dismissal and therefore cannot bring a claim for unfair dismissal remedy.

Casual employees are also ineligible to make a claim unless they have worked on a regular and systematic basis and have had a reasonable expectation of ongoing employment<sup>5</sup>.

## The minimum employment period

To be eligible to bring a claim, the person must have been employed for a minimum of 6 months or in the case of a *small business employer*, 12 months<sup>6</sup>.

## The need for a 'dismissal'

A person must also be able to demonstrate they have been dismissed from their employment before they can bring a claim. A dismissal occurs when the employment relationship is terminated by the employer or the employee was forced to resign due to the actions of the employer<sup>7</sup>. An employee is not dismissed if he or she voluntarily resigns.

## What constitutes 'harsh, unjust or unreasonable'?

Once a person has established that he or she is entitled to bring a claim for unfair dismissal remedy, the Fair Work Commission (FWC) will determine whether the dismissal was harsh, unjust or unreasonable. To succeed in the claim, the employee will need to establish the dismissal was harsh or unjust or unreasonable. There is no requirement for the employee to establish all three have occurred.



In determining whether the dismissal was harsh, unjust or unreasonable, the FWC must take into account:

- *whether there was a valid reason for the dismissal related to the applicant's capacity or conduct (including its effect on the safety and welfare of other employees);*
- *whether the applicant was notified of that reason and given an opportunity to respond;*
- *any unreasonable refusal by the employer to allow the applicant to have a support person present in discussions relating to dismissal;*
- *whether the applicant had received any prior warnings if the dismissal was due to unsatisfactory performance;*
- *the degree to which the size of the employer's business and/or the absence of a dedicated human resources management specialist would be likely to impact on the procedures followed in effecting the dismissal; and*
- *any other matters that the Fair Work Commission considers relevant.*<sup>8</sup>

Generally speaking, *other* matters include but are not limited to:

- *an employee's employment record;*
- *the effect of the dismissal on the employee and his or her personal circumstances;*
- *the employee's length of service with the employer; and*
- *the employee's failure to follow the employer's disciplinary policies and procedures.*

It is important to remember that in deciding whether a dismissal was harsh, unjust or unreasonable, the FWC will consider all matters in their totality. In other words, no one factor will ever be determinative of the outcome.

## Small Business Fair Dismissal Code

The Small Business Fair Dismissal Code prescribes the procedures for a *small business employer* to follow when dismissing an employee. While a *small business employer* is not compelled to follow the steps prescribed in the Code, compliance with the Code makes it far more likely that an unfair dismissal claim will not succeed.

A *Small Business Employer* is an employer that employs less than 15 employees at the time the termination occurs<sup>9</sup>.

To ensure you are able to defend an unfair dismissal claim, you should seek legal advice prior to taking action to terminate the employee.

*For further information regarding whether you are a Small Business Employer please see our Fact Sheet entitled Redundancy for Small Business Employers or contact Jodie Bradbrook on (08) 8227 2829.*

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### Endnotes

1. s394(2)(a) FW Act
2. s383 and 384
3. s382
4. indexed annually
5. s384(2)
6. s383
7. s386(1)
8. s387
9. s23

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*This Fact Sheet is provided for information purposes and does not constitute legal advice. If you require legal advice regarding your particular circumstances please contact Jodie Bradbrook.*