

What are my employment rights?

Am I being treated fairly at work?

Where do I go for help?

# UNFAIR DISMISSAL – 21 Days

## DISCLAIMER

This infosheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This infosheet is designed for Victorian and national system employees in Tasmania and Queensland only. If you are not a Victorian employee or a Queensland or Tasmanian national system employee, you should obtain specialist legal advice about your case as soon as possible.

## Who can use this infosheet?

This infosheet is designed for **Victorian** and national system employees in **Tasmania** and **Queensland** only.

If you are a **Victorian** employee, you can use this infosheet unless you were employed in a sector that provides essential services of core government functions, including state infrastructure services such as electricity and gas, and your employer is not covered by a nationally registered collective agreement.

If you are a **Tasmanian** employee, you can use this infosheet unless you were a State public sector employee not covered by a nationally registered collective agreement.

If you are a **Queensland** employee, you can use this infosheet unless you were a State public sector or local government employee not covered by a nationally registered collective agreement.

## What is Unfair Dismissal? (see eligibility chart at end)

If you have been **dismissed** from your job and you believe it was **unfair**, you may have grounds to make an **unfair dismissal** claim at the **Fair Work Commission** (FWC). If eligible, you have **21 days** from the date your dismissal took effect to file your claim.

An unfair dismissal claim is a claim that your dismissal from employment was:

- **harsh, unjust or unreasonable**; and
- **not consistent with the Small Business Fair Dismissal Code** (if applicable); and
- **not a case of genuine redundancy**.

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Hours:- Mon – Fri 9am–5pm (Wednesday until 8:30pm).

### Constructive Dismissal

If you think you have no option but to resign from your employment because of your employer's conduct, you should obtain legal advice before doing so because this is a very technical area of law and FWC may not agree that you were forced to resign – see JobWatch's Constructive Dismissal infosheet for further information.

- your employment has been terminated at the initiative of your employer; or
- you resigned from your employment because you were forced to do so because of conduct, or a course of conduct engaged in by your employer (**constructive dismissal**); or
- you were employed under a contract of employment for a specified period or time, task or season and you were terminated prior to the end of the contract.

You have **not been dismissed** if:

- you were employed under a contract of employment for a specific period of time, task or season and your employment has terminated at the end of the period, season or completion of the task; or
- you were an employee to which a training arrangement applied and your employment was for a specified period of time because of a training agreement and your employment was terminated at the end of the training arrangement; or
- you were demoted in employment but the demotion does not involve a significant reduction in remuneration or duties and you are still employed by the employer who demoted you.

You may also have a claim for pay instead of notice of termination of your employment – see JobWatch's Notice of Termination infosheet for further information.

### Harsh, unjust or unreasonable?

In examining whether a dismissal is harsh, unjust or unreasonable, FWC must take into account the following:

- whether there was a valid reason for the dismissal relating to your capacity or conduct (including any effect on the safety and welfare of other employees);
- whether you were notified of that reason;
- whether you were given an opportunity to respond to any reason related to your capacity or conduct;
- any unreasonable refusal by your employer to allow you to have a support person present to assist at any discussions relating to dismissal;
- if the dismissal is related to unsatisfactory performance – whether you had been warned about that unsatisfactory performance before the dismissal;
- the degree to which the size of your employer's business would be likely to impact on the procedures followed in effecting the dismissal;
- the degree to which the absence of dedicated human resource management specialists or expertise in the business would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters FWC considers relevant.

## Is your employer a small business employer?

After 1 January 2011, a small business employer will be an employer who employs fewer than 15 employees, as calculated by a simple headcount, at the time of dismissal or at the time you were given notice of the dismissal (whichever happens first) including employees employed by associated entities of your employer (see page 4).

### SMALL BUSINESS FAIR DISMISSAL CODE

If you were employed by a **small business employer**, your dismissal will not be unfair if it was factually consistent with the **Small Business Fair Dismissal Code**.

If immediately before the time of the dismissal or at the time you were given notice of the dismissal (whichever happened first), the employer was a **small business employer** and the employer complied with the **Small Business Fair Dismissal Code** in relation to the dismissal, your dismissal will be considered to be fair.

A fair dismissal can include a dismissal without notice or warning in cases of serious misconduct (for example, theft, fraud or violence) or dismissal for underperformance, provided that you were given a valid reason as to your capacity or conduct as well as a reasonable opportunity to rectify the problem.

For a copy of the Small Business Fair Dismissal Code Checklist, contact FWC. See 'Where to Get Help' page 8.

## Genuine redundancy

A genuine redundancy occurs when your employer no longer requires the job that you have been doing to be performed by anyone because of changes in the operational requirements of its business and your employer has complied with any obligation to consult about redundancy contained in a modern award or enterprise agreement that applied to the employment.

It is not a genuine redundancy if it would have been reasonable in all the circumstances for you to be redeployed within your employer's business or a business of an associated entity of your employer. See page 4 for explanation of an associated entity.

## Can you make a claim?

A person who is **protected from unfair dismissal** is entitled to make a claim.

A person is protected from unfair dismissal if the person is an employee who has completed a period of employment with their employer of at least the **minimum employment period** and one or more of the following also apply:

- a **modern award** covers the person;
- an **enterprise agreement** applies to the person in relation to the employment; or
- the sum of the person's annual rate of earnings and other such earnings, worked out in relation to the employee in accordance with the regulations, is **less than** the current high income threshold, being \$142,000.

A person who is protected from unfair dismissal is entitled to make a claim.

## Minimum employment period

The minimum employment period **differs** between **small business employers** and **other employers**.

If your employer is **not a small business employer**, the minimum employment period is 6 months, ending at the time when the employee was given notice of the dismissal or immediately before the dismissal (whichever occurs first). If your employer is a **small business employer**, the minimum employment period is one year ending at that time.

Minimum employment period is 12 months if your employer is a small business employer.

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## Period of employment

A period of employment with an employer is the period of continuous service which you have completed with the employer, as an employee.

For example, if you took 2 months of unpaid or unauthorised leave during your first year of employment with a small business employer then, after 12 months, you will only have 10 months of continuous service with your employer.

A period of employment as a **casual** employee does **not count** unless the employment was on a regular and systematic basis and there was a reasonable expectation of this continuing.

A period of service with an old employer will not count towards service with a new employer if you transfer from one employer to another (for example, due to a sale of business), if the new employer informed you in writing before you started with the new employer that the period of service with the old employer would not be recognised.

However, this does not apply where your old and new employers are **associated entities** (see below).

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### ASSOCIATED ENTITIES

An associated entity is defined by s50AAA of the Corporations Act 2001 and includes where your employer controls or is controlled by another company or individual. This is a very technical area of the law and each particular circumstance will be different but usually, where one or more of the directors of your employer are also directors of other companies, then those other companies will be **associated entities** of your employer.

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## Time limit – 21 days

A claim for unfair dismissal must be filed at FWC within **21 days** from when your dismissal took effect.

FWC may only grant an extension of time to file your unfair dismissal claim if there are exceptional circumstances. If you are already out of time, you could consider filing your claim as soon as possible and then obtaining advice about the likelihood of being granted an extension of time before your matter proceeds further.

**The 21 day time limit is a strict time limit. If you think you may have a claim, you should get advice as quickly as possible or file your claim and then get the relevant advice.**

In considering whether to grant an extension of time, FWC will consider the following:

- the reason for the delay;
- whether the person first became aware of the dismissal after it had taken effect;
- any action taken by the person to dispute the dismissal;
- prejudice to the employer (including prejudice caused by the delay);
- the merits of the application; and
- fairness as between the person and other persons in a similar position.

## What remedy do you want?

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Once you have established that you are eligible to make an unfair dismissal claim, you should think about what you are seeking to resolve your claim. You can seek reinstatement to your position and/or compensation.

If FWC orders reinstatement, you will be reappointed to the position you were in prior to your dismissal or to another position on terms and conditions that are no less favourable than previously. FWC may also order your employer to pay you remuneration that you lost because of the dismissal.

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If FWC orders compensation, you will be compensated in lieu of reinstatement.

Compensation will not be awarded for any shock, distress or humiliation associated with your dismissal and any misconduct by you that contributed to your dismissal will reduce the amount of compensation that may be ordered by FWC.

Maximum compensation that may be ordered is the lower of either half the amount of the high income threshold (\$142,000 for full-time employees) immediately before the dismissal or the total amount of income you received or were entitled to (whichever is the higher) during the 26 weeks prior to your dismissal.

**FWC will consider the option of reinstatement before it considers the option of compensation.**

## Making a Claim

### Application Form

The application form for unfair dismissal is called a Form F2 - Application for an unfair dismissal remedy. It is available from the Fair Work Commission.

#### Fair Work Commission

Level 4,  
11 Exhibition Street  
Melbourne 3000  
(GPO Box 1994)

Tel: 1300 799 675  
Fax: (03) 9655 0401  
Website: [www.fwc.gov.au](http://www.fwc.gov.au)

### Filing your claim

If you need assistance completing the application form, you may contact:

- your union (if you are a member);
- a solicitor; or
- FWC. You should be aware that FWC is not able to provide you with legal advice.

Make sure you file your claim within the 21 day deadline, even if you have not yet received legal advice.

You must file your claim with FWC. You can do this on-line, by post or fax or by personally delivering it to FWC.

### Fees

A \$70.60 filing fee is required to be paid with your claim.

This fee may be refunded if you discontinue your application at least 2 days before a conference, arbitration or hearing.

The filing fee may be waived by FWC if you can show that it would cause you “serious hardship”. To be eligible, you must file a fee waiver application form. This form is available from FWC or its website.

This form must be filed at the same time as (or soon after) you file your unfair dismissal claim.

**File your claim within the 21 day deadline.**

### What happens next?

Before FWC can consider the merits of your application, it must decide whether you are eligible to make a claim by considering the following matters:

- whether your claim was made within the time limit (21 days);
- whether you were protected from unfair dismissal;

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- whether your dismissal was factually consistent with the Small Business Fair Dismissal Code; and
- whether your dismissal was a case of genuine redundancy.

If the facts of your case are in dispute, FWC must conduct a conference or arbitration in relation to the matter. A conference is like a formal hearing but is generally conducted in private.

Nevertheless, FWC usually deals with unfair dismissal claims by firstly referring them to conciliation and then, if necessary, to a conference or arbitration.

## Conciliation

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FWC will convene a conciliation meeting between you and your former employer in the presence of a FWC conciliator over the telephone. The purpose of the conciliation is to bring you and your former employer together to try and resolve the matter without the need for a formal proceeding.

You can agree to settle your claim at any time, even before the conciliation. If your former employer makes you an offer to settle, it is always advisable to get independent advice so that you are satisfied that the offer is reasonable given the merits of your case.

## Do I need a Lawyer?

There is a limited role for lawyers at FWC.

If you are entitled to, or have leave of FWC to be represented by a lawyer, you should consider:

- how much your representative's fees will be;
- when they need to be paid; and
- to what stage are they prepared to take your claim.

Generally, you will have to pay your own legal costs regardless of the result of your case. Some Employment Law firms offer a "no-win-no-fee" arrangement which often means you don't have to pay all of your lawyer's fee if you are not successful with your claim.

Law firms participating in the Legal Referral Service run by the Law Institute of Victoria will provide you with an initial consultation of up to 30 minutes free of charge.

You can also contact JobWatch and ask about its "Unfair Dismissal Self-Representation Kit".

## Representing yourself?

It is important to be prepared for the conciliation. The FWC conciliator will ask you to outline your claim briefly and state what remedy you are seeking. Write down a brief chronology of the relevant events and summarise the key details of your employment. It is important to explain why you think the dismissal was unfair, taking into account the grounds of your claim.

Your former employer will also be given an opportunity to put forward their side of the case.

Discussion will then normally occur with a view to reaching a settlement if possible.

## If a settlement is reached

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If you have settled your claim, you may be asked to sign a document called a "Release Agreement", "Settlement Agreement", "Deed of Release", "Terms of Settlement" or something similar.

These are legal documents that usually state that:

- you and your former employer have agreed to settle your claim; and
- in return for reinstatement and/or compensation, you will not take any further action against your employer in the future over any and all matters arising out of the employment.

Releases often have complicated legal language in them and can be difficult to understand. If you have any doubts about signing one of these documents or if you think you may have other claims against your employer, you should obtain legal advice before you sign.

You should file a “Notice of Discontinuance” form with FWC once:

- you have settled for an amount of compensation and/or reinstatement; and
- you have received everything you have agreed to in the terms of settlement; and
- if this involves money, the funds have been cleared.

If you are eligible for a refund, a Notice of Discontinuance form must be lodged before your application fee refund can be processed.

## What if a settlement cannot be reached at conciliation?

If a settlement is not reached at conciliation, your options are to:

- not continue with your application by filing a Notice of Discontinuance; or
- wait for the relevant documents to be prepared, or directions to be given by FWC regarding a formal hearing.

Ensure you comply with all written directions by FWC.

Representing yourself at a formal hearing is much more difficult than representing yourself at a conciliation because you need to prove your claim with evidence from witnesses and/or documents.

**It is recommended that you obtain legal advice before representing yourself at a formal proceeding.**

## Costs

Generally, each party pays its own legal costs. However in some circumstances, FWC may, on application within 14 days of the matter being discontinued or determined, make an “*order for costs*” against one of the parties. This can only happen in certain circumstances, including if FWC is satisfied that:

- one of the parties made their claim vexatiously or without reasonable cause; or
- it should have been reasonably apparent that a claim had no reasonable prospect of success; or
- a party caused costs to be incurred by the other party because of their unreasonable act or omission in connection with the conduct or continuation of the matter.

If you are in doubt about the strength of your claim, you should obtain independent legal advice before or shortly after filing your unfair dismissal claim. As an applicant, you run the risk of incurring a liability for costs from the moment you make your claim.

## Separation Certificates

Being dismissed without being given a Separation Certificate is not, on its own, a ground for unfair dismissal. However, your former employer has a legal obligation to provide you with a Separation Certificate for Centrelink purposes.

If your former employer does not have a precedent form of a Separation Certificate, you can obtain one from Centrelink or on the internet at [www.centrelink.gov.au](http://www.centrelink.gov.au)

If your former employer refuses to provide you with a Separation Certificate within a few days of your dismissal, you may report this to Centrelink. Centrelink has the power to contact the employer and request them to provide you with the Certificate.

## Where to get help

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Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission Helpline	1300 799 675
Victorian Equal Opportunity & Human Rights Commission	1300 292 153
Anti-Discrimination Commission Queensland	1300 130 670
Equal Opportunity Tasmania	1300 130 670
Australian Human Rights Commission	1300 656 419
JobWatch <i>(Telephone interpreters available for non-English speakers.)</i>	Metro: 9662 1933 Rural: 1800 331 617 <a href="http://www.jobwatch.org.au">www.jobwatch.org.au</a>
ACTU Worker Information line (for referral to a union):	1300 362 223
Legal Referral Service (Law Institute of Victoria)	9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	6234 4133

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**ELIGIBILITY CHART (See “Who can use this infosheet?” on page 1).**

