

Unfair Dismissal

(21 Days to file a claim)

JobWatch
Employment Rights Legal Centre

What is Unfair Dismissal?

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 your job was **harsh, unjust** or **unreasonable**.

You have been **dismissed** if:

- your employment was 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 (see page 3 - '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 employed 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.

Note: *If your contract appears to be for a specific period but can be ended earlier by the giving of notice, then your contract may not be a genuine fixed term contract and you may be dismissed at your employer's initiative if your contract is not renewed. If this applies to you, you should obtain legal advice as soon as possible.*

A dismissal will **not** be an unfair dismissal if:

- your employer was a small business employer and the dismissal was consistent with the Small Business Fair Dismissal Code (see page 3 - 'Is your employer a small business employer'); or
- the dismissal was a case of **genuine redundancy** (see page 3 - 'Genuine redundancy').

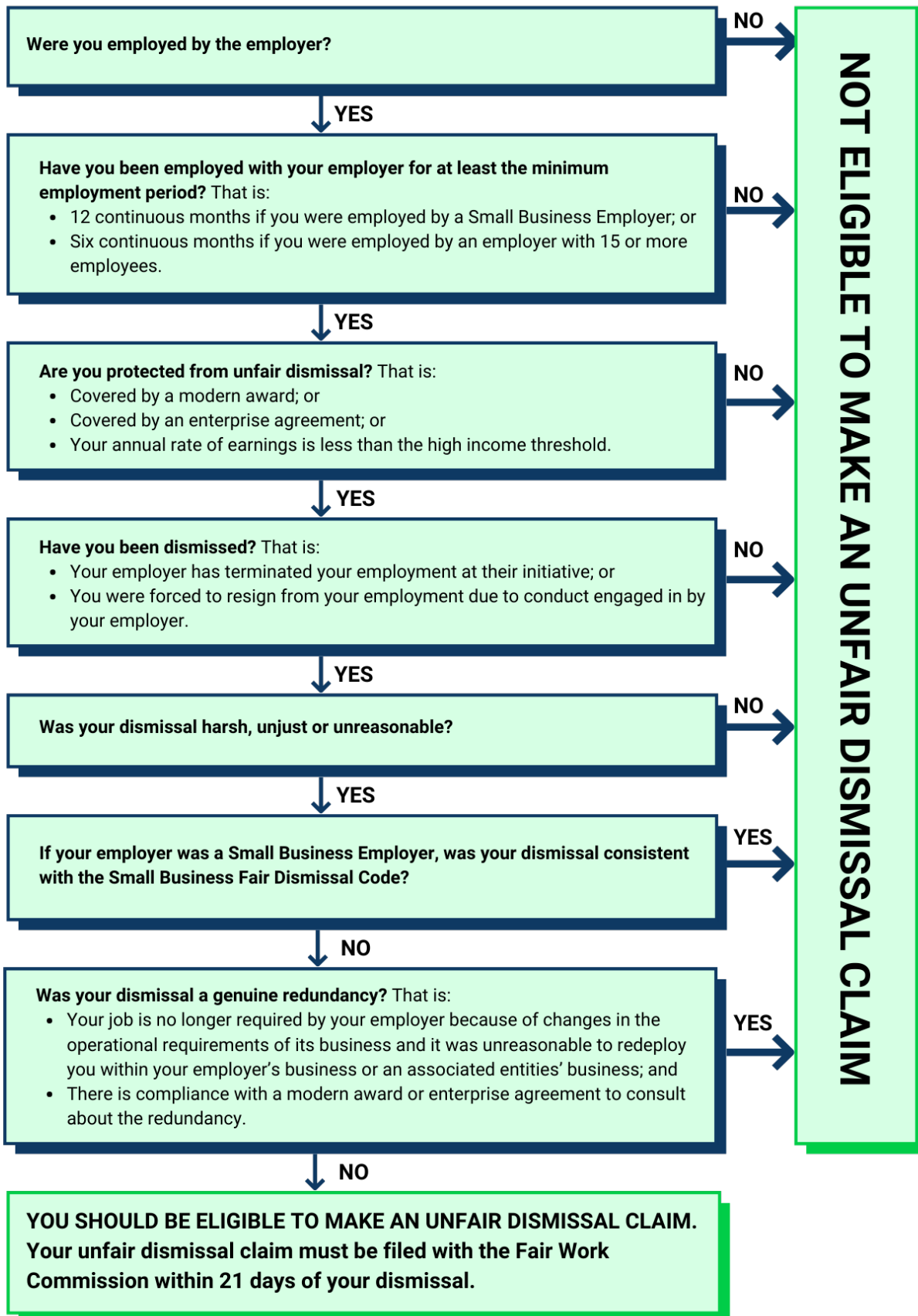
Note: You may also have a claim for pay instead of notice of termination of your employment – see JobWatch's 'Notice of Termination' Fact Sheet for further information.

Disclaimer

This Fact Sheet 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 Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

Eligibility Chart

(See infosheet for definitions)



Harsh, unjust or unreasonable?

In determining whether a dismissal is harsh, unjust or unreasonable, the 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 at any discussions relating to dismissal;
- if the dismissal is related to unsatisfactory performance – whether you had been warned about that unsatisfactory performance;
- 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 the FWC considers relevant.

Is your employer a small business employer?

A small business employer is 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). This headcount should include:

- any employees of associated entities of your employer; and
- any regular and systematic casual employees.

Your dismissal will not be unfair if:

- Your employer was a small business employer; and
- The dismissal was consistent with the **Small Business Fair Dismissal Code**.

A dismissal may be consistent with the Small Business Fair Dismissal Code where the employer:

- dismissed you without notice or warning for serious misconduct (for example, theft, fraud or violence); or
- dismissed you 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.

Genuine redundancy

A genuine redundancy occurs when:

- your employer no longer requires your job 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 in a Modern Award or Enterprise Agreement that applied to your employment.

However, 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.

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 the FWC may not agree that you were forced to resign. See JobWatch's 'Constructive Dismissal' Fact Sheet for further information.

For a copy of the Small Business Fair Dismissal Code Checklist, contact:

Fair Work Commission

P: 1300 799 675

W: fwc.gov.au

Note: 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. 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.

Can you make a claim?

In order to make a claim, you would need to be protected from unfair dismissal. You are protected from unfair dismissal if:

- You are an employee who has completed a period of employment with your employer of at least the minimum employment period; and
- one or more of the following also apply:
 - a Modern Award covers you;
 - an Enterprise Agreement applies to you in relation to your employment; or
 - the sum of your annual rate of earnings and other such earnings, worked out in accordance with the regulations, is less than the current high income threshold.

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.
- If your employer is **a small business employer**, the minimum employment period is 12 months.

Period of employment

The period of employment with an employer is the period of continuous service which you had completed with the employer when you were given notice of the dismissal or immediately before the dismissal (whichever occurs first).

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 would only have 10 months of continuous service with your employer.

A period of service with an old employer will not count towards service with a new employer where:

- you transfer from one employer to another (for example, due to a sale of business); **and**
- 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.

Time limit – 21 days

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

The 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.

Note: The current high income threshold can be found on the FWC website: fwc.gov.au/high-income-threshold.

Note: 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.

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

Time limit – 21 days (cont.)

In deciding whether to grant an extension of time, the FWC will consider whether there were exceptional circumstances, taking into account 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?

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 the 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. The FWC may also order your employer to pay you remuneration that you lost because of the dismissal.

If the FWC orders compensation, the FWC must take into account the remuneration you would have received had you not been dismissed. Compensation will not be awarded for any shock, distress or humiliation associated with your dismissal. If the FWC finds that you engaged in misconduct which contributed to the dismissal, the FWC may reduce the compensation payable on the basis of this misconduct.

Maximum compensation that may be ordered is the lower of:

- half the amount of the high income threshold 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.

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 FWC. If you need assistance completing the application form, you may contact your union, a lawyer, or the FWC.

Filing your claim

Make sure you file your claim with the FWC before the **21 day** deadline, even if you have not yet received legal advice. You can do this online, by post or fax, email or phone, or by personally delivering it to the FWC.

A small filing fee is required to be paid with your claim. This fee may be refunded if you discontinue your application.

Note: The FWC will consider the option of reinstatement before it considers the option of compensation.

Note: The current high income threshold can be found on the FWC website: fwc.gov.au/high-income-threshold.

Fair Work Commission
P: 1300 799 675
W: fwc.gov.au

Note: The filing fee may be waived by the FWC if you can show that it would cause you "serious hardship". To be eligible, you must file a fee waiver application form at the same time as (or soon after) you file your unfair dismissal claim.

What happens next?

The FWC usually deals with unfair dismissal claims by first referring them to conciliation.

If the matter does not resolve at conciliation, and you wish to pursue it further, the FWC can schedule the claim for arbitration hearing or determinative conference, to determine whether the dismissal was unfair.

Conciliation

In most cases, the FWC will convene a conciliation between you and your former employer, which would be conducted by 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 through negotiation, without the need for a formal proceeding.

You can attempt to negotiate a settlement of your claim at any time, including before the conciliation. If your former employer makes you an offer to settle, you should obtain independent legal advice so that you are satisfied that the offer is reasonable, given the merits of your case.

Do I need a lawyer or paid agent?

You are *not* obliged to retain a lawyer or paid agent. If you wish, you can retain a lawyer or paid agent and seek the permission of the FWC to be represented by that lawyer or paid agent. Before you retain a lawyer or paid agent you should consider:

- how much their 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 and advocates offer a “no-win-no-fee” arrangement which often means you don’t have to pay all of their fee if you are not successful with your claim.

Representing yourself?

It is important to be prepared for the conciliation. In preparing for the conciliation, it may be helpful to write down a brief chronology of the relevant events. Towards the beginning of the conciliation, the FWC conciliator may ask you to outline your claim briefly and state what remedy you are seeking.

You may summarise the key events in your employment. It is important to explain why you think the dismissal was unfair. Your former employer will also be given an opportunity to outline the key events from their point of view, putting their response to your claim. Discussion will then generally occur with a view to reaching a settlement if possible.

If a settlement is reached at conciliation

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.

Note: 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.

For more assistance with conciliation meetings, view JobWatch’s ‘Unfair Dismissal Self-Representation Kit’.

If a settlement is reached at conciliation (cont.)

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.

You can file a 'Notice of Discontinuance' form with the 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, you may:

- discontinue your application by filing a 'Notice of Discontinuance'; or
- ask the FWC to schedule the matter for an arbitration hearing or a determinative conference.

Arbitration hearing or determinative conference

If the claim doesn't resolve at conciliation, the FWC can schedule a claim for arbitration hearing or determinative conference, to determine whether the dismissal was unfair.

Representing yourself at a hearing is much more difficult than representing yourself at a conciliation, because you need to prove your claim with evidence.

In preparation for any arbitration or determinative conference, you and your employer would likely be required to file witness statements and submissions. You should ensure you comply with written directions issued by the FWC in relation to the filing of such material.

At the hearing itself, witnesses would be required to attend, to give evidence and to answer questions. Subsequently, the FWC would determine whether the dismissal was unfair, in light of the evidence and submissions.

Threshold questions

In some cases, the FWC may need to resolve a threshold dispute. That is, the FWC may have to resolve any dispute about:

- whether your claim was made within the time limit (**21 days**);
- whether you were protected from unfair dismissal;
- whether your dismissal was consistent with the Small Business Fair Dismissal Code; and/or
- whether your dismissal was a case of genuine redundancy.

If the FWC finds against you on such a threshold question, that will preclude the claim from proceeding further. Conversely, if the FWC finds in your favor regarding the threshold dispute/s, it may then proceed to determine whether the dismissal was unfair.

Note: 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.

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

Note: The FWC can schedule a determinative conference or hearing to determine threshold questions.

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 the 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.

Separation Certificates

Your former employer has a legal obligation to provide you with a Separation Certificate for Centrelink purposes. If it wishes, your employer can obtain a Separation Certificate form from Centrelink.

If your former employer refuses to provide you with a Separation Certificate, 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

JobWatch’s free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Centrelink	132 850
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria’s Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

Centrelink

P: 132 850

W: centrelink.gov.au

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.